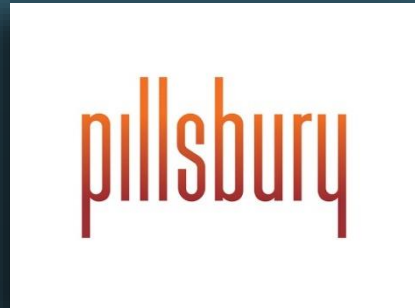


Developments in Suspension & Debarment and Ethics and Compliance Practices Impacting the Supply Chain

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Agenda

- How the Suspension & Debarment System Works
- SDO Considerations in Assessing Present Responsibility
- ISDC Report: SDOs Have Been Active
- Illustrative High-Profile Suspension & Debarment Cases
- Best Practices for Government Contractors in Ethics & Compliance to Avoid Debarment

I. How the Suspension & Debarment System Works

Overview of S&D Under FAR Subpart 9.4

- Suspension and debarment (S&D) are tools used to protect the government from the risks associated with doing business with “non-responsible” contractors
- Non-responsible essentially means the government believes the party is unethical, dishonest, and/or incapable of complying with contract requirements, applicable laws, and/or regulation
- S&D act to exclude a contractor from competing for or receiving new contracts
- Excluded individuals cannot serve as an agent or representative of a contractor
- Exclusion is accomplished by sending the contractor a notice of exclusion and posting their name on a public website (SAM)

Overview of S&D Under FAR Subpart 9.4

- S&D, by one agency, has government-wide effect
- S&D are not supposed to be used to punish contractors for past misconduct; that's the role of the criminal justice system
- “Present responsibility” is the focus of a S&D proceeding
- Despite prior misconduct, is the contractor presently responsible?
- Focus is on honesty, integrity, competence, among other factors
- Note: Presentation does not address suspension and debarment regulations in the non-procurement context under 2 CFR 180.

Suspension vs. Debarment

- Suspension
 - Facts still being developed through an investigation or legal proceedings
 - No conviction or civil judgment exists
 - Adequate evidence = probable cause
 - *Very low standard; gives SDOs much discretion*

Suspension

- Used where “immediate action” is necessary to protect Government’s interests
- Generally, may last 12 months before legal proceedings must be instituted
- Where the Department of Justice requests, suspensions may continue for 18 months
- Once legal proceedings are initiated, suspension may stay in place until the proceedings conclude

Debarment

- Investigation or legal proceeding has concluded resulting in conviction or civil judgment
- In the absence of a conviction or civil judgment, agency may proceed on a fact-based debarment, whereby a preponderance of evidence of improper conduct is required
 - Evidence that leads to conclusion that the fact is more probably true than not
- The FAR provides that generally 3 year term imposed, but SDOs have discretion to depart upwardly or downwardly from that number

Who Can Be Suspended or Debarred?

- Contractors of all sizes can be suspended or debarred, including small, medium, large, and publicly-traded companies
- Individuals can be suspended or debarred including, but not limited to:
 - Contractor employees;
 - Owners or officers of a contractor;
 - Consultants or representatives of a contractor
- Most suspension and debarment actions include individuals in addition to companies
- We estimate over 50% of cases involve individuals

Who Can Be Suspended or Debarred?

- FAR 9.403 - “Contractor” means any individual or other legal entity that—
 - (1) Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract ... or a subcontract under a Government contract; or
 - (2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor

Causes for Suspension & Debarment

- Improper conduct reflecting negatively on a contractor's business integrity or responsibility
 - Fraud or criminal offense in connection with obtaining, attempting to obtain, or performing a contract
 - Antitrust violations relating to submission of offers
 - Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property

Causes for Suspension & Debarment

- ***Unethical conduct indicating a lack of business integrity or business honesty***
- Willful violations of contract terms
- History of a failure to perform or of unsatisfactory performance
- Failure by a principal to disclose credible evidence of fraud, conflicts of interest, bribery, gratuity, violations of civil False Claims Act, or significant overpayments

Causes for Suspension & Debarment

- Catch-all ***“Any other cause of so serious or compelling a nature....”***
- **SDOs have much discretion in deciding what conduct gives rise to a cause for suspension or debarment**
- Conduct need not be related to government contracting (i.e., mortgage fraud, passing bad checks)

*****Judgments / Convictions are unnecessary**

Sources of Suspension & Debarment Cases

- Investigators
- Auditors
- Contracting personnel
- Prosecutors
- Whistleblowers (competitors, contractor employees)
- Public records: civil judgments, indictments, plea agreements, deferred prosecution agreements, settlement agreements, and convictions
- News stories (proactively address issues w/ SDO)
- Contractor disclosures (voluntary and mandatory)

Effects of Suspension & Debarment

- Ineligibility for **new** contracts and subcontracts, including task orders
- **May continue existing contracts and subcontracts**
- **But**, as for existing contracts/subcontracts, may not exercise options or issue modifications that add work or extend duration
- May not perform subcontracts in excess of \$35K (FAR 9.405-2)
(Caution: cannot break-up awards to circumvent dollar threshold)
- May not conduct business w/ government as a representative or agent of other contractors
- Listed on System for Award Management (long term record on archives)
- Exclusion under FAR, results in exclusion under non-procurement rule & vice versa

Parallel Proceedings Are Becoming More Common

- These days, it's not uncommon to receive a notice of proposed debarment/suspension while you are under investigation or civil FCA case is pending
- Parallel proceedings include concurrent criminal actions, civil actions, contractual remedies, and other administrative sanctions
- When government representatives discover evidence of misconduct, contractors should expect the government to pursue all appropriate remedies, in many cases, concurrently
- Creates challenges for responding – *e.g.*, transparency & candor v. defensive response; government stakeholders will share information

Collateral Consequences of Suspension & Debarment

- Potential debarment on State/Local level
- Potential termination of ongoing contracts (government & commercial)
- Reputational damage and loss of goodwill
- Loss of revenue
- Potential loss of security clearances
- Contraction of credit and/or denial of loans

Practice and Procedure

- Suspensions are initiated through a notice of suspension
- Debarment actions are initiated through a notice of proposed debarment
- Both result in immediate exclusion
- Suspensions / Proposed Debarments
 - Contractors given 30 days to respond
 - Contractors generally make a written submission responding to the allegation
 - May request a meeting to make oral presentation in support of written submission
 - Decisions based on Administrative Record, which is provided to contractor upon request
 - Contractor is not entitled to discovery

Practice and Procedure

- Show Cause Letters
 - Do not result in ineligibility
 - A tool used to learn the contractor's position
 - Used where responsibility concerns exist, but for one reason or another, government does not believe exclusion is appropriate (i.e., dated conduct or insufficient evidence)
 - Can lead to exclusion ultimately, however

Practice and Procedure

- Requests for Information (RFI)
 - Do not result in ineligibility
 - Information gathering tool
 - Ex. RFIs may be sent to a contractor that has made a disclosure to gain more info about the circumstances or the individual that engaged in misconduct

What to do Upon Receipt of a Notice of Suspension, Proposed Debarment, Show Cause Letter, or RFI

- Retain experienced debarment counsel
- Request, obtain, and review the administrative record before responding to the allegations
- Work with the SDO's counsel to establish a due date for the submission to enable you to have sufficient time to prepare a submission (extensions typically granted)
- In multi-party actions, lots of other considerations come into play

What to do Upon Receipt of a Notice of Suspension, Proposed Debarment, Show Cause Letter, or RFI

- Conduct fact development prior to responding so as to be able to respond/dispute allegations using objective evidence
- Ensure the complete accuracy of your submission; inaccuracies can undermine your position and/or lead to additional causes for debarment
 - SDOs often do not accept unsupported statements as true; expect that each statement will be questioned and/or verified
 - If the SDO loses trust in your word, the outcome is unlikely to be favorable

What to do Upon Receipt of a Notice of Suspension, Proposed Debarment, Show Cause Letter, or RFI

- Consider using a Declaration under penalty of perjury where appropriate to bolster the credibility of your submission
- Take steps to demonstrate present responsibility where appropriate
- Where you acknowledge doing something wrong, the SDO will expect that you have taken concrete steps to prevent reoccurrence
- This may include training tailored to the situation (ethics, specific compliance training, or leadership training, etc.)

Considerations When Appearing Before the SDO for A Meeting

- Prior to the meeting, attempt to understand the remaining concerns held by the SDO after reading your submission, if any
- Ensure the right company personnel attend the meeting; normally the SDO wants to meet the president, the board, ECO, and/or the employees involved in alleged conduct.
 - Always ask the SDO's office whether they would like certain individuals to be present at the meeting
- SDOs often expect the contractor to lead the agenda so come to the meeting with an agenda but be prepared for the SDO to take control during the meeting
- Prepare for the in-person meeting and anticipate the questions the SDO and staff may ask

Considerations When Appearing Before the SDO for A Meeting

- Maintain composure at the meeting; avoid displaying anger or frustration
- Be prepared to be examined by the SDOs office; it's par for the course
- Express that you take the allegations seriously and understand why the allegations cause concern
- Answer the questions asked clearly and completely
- Core objective – demonstrate that you can be trusted, are ethical and honest, and that debarment is unnecessary to protect government

Burdens of Proof

- Government must find that sufficient evidence exists to support the action
 - Adequate evidence = suspension
 - Preponderance of evidence = proposed debarment, debarment
- Once established, burden shifts to contractor to either raise a genuine dispute of material fact or where the allegations are undisputed, to demonstrate present responsibility

Fact-Finding Proceeding

- Where you deny the allegation and create a “genuine dispute of material fact,” the SDO may hold a fact-finding hearing
 - Fact-finding hearing
 - Testimony under oath
 - SDO or designee makes findings of fact
- Respondents are not entitled to discovery
 - Limited to administrative record which may be supplemented by either party
- Agency or contractor may present witnesses
- Such proceedings are very unusual

II. SDO Considerations in Assessing Present Responsibility

SDO Decision-Making & Potential Outcomes

- Does a cause for suspension/debarment exist? - If “yes,” then:
 - Has contractor demonstrated its present responsibility?
 - If “yes” – termination is appropriate
 - If “almost” but . . . – termination and/or administrative agreement
 - May be a candidate for administrative agreement depending upon the circumstances
 - If “no” – debarment is possible (the term depends on the circumstances)

FAR Suspension & Debarment Factors

- Standards of Conduct / Internal Control Systems
- Voluntary Disclosure
- Internal Investigation
- Full Cooperation
- Paid Costs/Restitution
- Disciplined Employee
- Implemented Remedial Measures
- Ethics and Compliance Policy and Training
- Adequate Amount of Time Has Passed Since Event
- Management Recognition of Problem

**Not all of these will apply in every case*

Administrative Agreements

- Typically, three years, but may be longer
- Administrative agreements may also provide for early termination upon satisfying certain conditions
- Elements generally include –
 - Development or enhancement of Ethics and Compliance Program, other policies and practices, and internal controls
 - Leadership engagement in Ethics and Compliance Program
 - Regular reporting obligations and other oversight efforts
 - Other specific corrective measures given the issues involved
 - Retention of an Independent Monitor who likely will visit company facilities several times a year and prepare reports to SDO

III. ISDC Report: SDOs Have Been Active

Interagency Suspension and Debarment Committee (ISDC) Section 873 Report

- Most recent report covers FY 2017
- Reports shows 2017 was an active year for suspensions & debarment cases
- Actions in 2017 totaled 3,642 (suspensions, debarments, proposed debarments)
- S&D activity has almost doubled since 2009, which saw a total of 1,836 total actions
- In FY 2017, there were 604 suspensions, 1616 proposed debarments, and 1422 debarments
 - In FY 2017, 9 agencies reported increase in suspensions, and another 9 agencies reported increase in debarments compared to 2016

ISDC Section 873 Report

- Most active agencies: Army, Navy, EPA, Air Force, Homeland Security
- Agencies reported entering into 64 administrative agreements in FY 2017
 - EPA, HUD, SBA, and Dept. of Transportation were highest users of admin agreements
- Contractors continued proactive engagement with SDOs (53 reported)
- Agencies increased use of pre-notice engagements (RFI, SCL, other communications) (193 reported)

ISDC Section 873 Report

Suspension & Debarment activity at select departments/agencies:

Agency/Department	Total Actions (Suspensions + Proposed Debarments)	Administrative Agreements
<u>Defense (Total)</u>	<u>773</u>	<u>10</u>
Air Force	132	3
Army	315	3
Defense Logistics Agency	100	3
Navy	226	1
Environmental Protection Agency	203	15
General Services Administration	100	0
Homeland Security	128	1

ISDC Section 873 Report

- Most Common Causes for Debarment in FY 2017:
 - Time mischarging
 - Falsifying documents (*i.e.*, test reports)
 - False statements / certifications (*i.e.*, 52.209-5)
 - Kickbacks, Bribery, Improper Gifts
 - Antitrust Violations (*i.e.*, activities to restrain competition)
 - Environmental Violations of Law
 - Davis Bacon Act Wage Violations
 - Product Substitution & Counterfeit Parts

IV. Illustrative High-Profile Suspension & Debarment Cases

“Fat Leonard” Case Study

- Leonard Glenn Francis, a defense contractor nicknamed “Fat Leonard,” was the owner of Glenn Defense Marine Asia.
- Pleaded guilty to defrauding the Navy of \$35 million.
- Additionally, over a dozen Navy officers have pleaded guilty in connection with this scandal.
- For years, this Singapore-based businessman showered Navy officers with gifts, gourmet dinners, companionship, and cash bribes.
- Navy officers shared with Mr. Francis classified material about U.S. warship and submarine movements, confidential contracting information, and files about active law enforcement investigations into Mr. Francis’ company.

Booz Allen Hamilton (BAH) Case Study

- In April 2011, BAH hired retired a Air Force Lt. Col. as a senior associate responsible for business development in military and civilian health markets.
 - Lt. Col. had previously served as the deputy chief of the IT Division in the Air Force Medical Support Agency surgeon general's office. In that role, Lt. Col. was privy to non-public information, which included information about source-selection, bids & proposals.
- Lt. Col. brought an external hard-drive, containing sensitive information, with him on his first day of work at BAH.
- In an email to colleagues, Lt. Col. shared pricing information about an IT services contract that BAH was competing on.
- That information allegedly provided the company “with an unfair competitive advantage.”
- Lt. Col.'s supervisors “failed to report this improper disclosure,” and Lt. Col. continued to be involved in efforts to compete for the follow-on contract.
- BAH's San Antonio office was proposed for debarment until a company-wide administrative agreement was reached avoiding debarment.
- Lt. Col. was debarred

Darleen Druyun Case Study

- She was the top civilian procurement official for the Air Force and worked on contract negotiations.
- In the early 2000s, the Air Force announced awards to Boeing for several major projects, including a \$20 billion leasing agreement for 100 airborne tankers, a \$4 billion upgrading of the C-130 aircraft, and a \$412 million payment on a C-17 contract.
- In 2003, after contract negotiations had ended, she accepted an executive position at Boeing.
- A year later, she pleaded guilty to awarding the contracts to Boeing in exchange for jobs at Boeing for herself, her daughter, and her son-in-law.
- She served a 9-month prison sentence and paid a significant fine.
- The awards to Boeing were canceled.
- Boeing agreed to pay a \$615 million fine.
- Boeing's CFO was sentenced to 4 months in prison.

V. Best Practices for Government Contractors in Ethics & Compliance to Avoid Debarment

Best Practices in Ethics & Compliance

- Values-based ethics programs to inculcate an ethical culture
- Leadership engagement and “tone at the top”
- Compliance policies tailored to risk profile
- Policies and procedures for responding to and investigating reports of misconduct
- Policies and procedures for assessing events for possible disclosure and handling disclosures; knowing when to engage with the lead agency SDO

Values-Based Ethics Programs

- Core values are inculcated into the company's culture (i.e., Integrity, Trust, Fairness, and Respect)
- Values guide employees' decision-making
- Such programs encourage employees to adopt a new way of approaching their work and issues they encounter
- Even where the act may be legal, does it comport with our values?
- Encourage employees to think before they act and to always “do the right thing”
- Common test used to distinguish ethics from compliance; if you want to know if something is ethical, ask your mother/father; if you want to know if something is legal, ask your attorney

Considerations for a Values-Based Ethics Programs

- Select values that are tailored to your business and risks
- Define values in a way that makes sense to employees
- Ensure values are marketed and visible within company
- Ensure leadership engagement in values promotion
- Use cascading training where each supervisor periodically meets with his/her team to discuss ethical issues
- Appoint and utilize ethics officers to serve as a POC
- Recognize and reward employees who promote values
- Tie performance evaluations to core values
- Use questionnaires/surveys to periodically assess culture

Considerations for a Tailored Compliance Program

- Identify your risk profile taking into account your industry, location(s), operations, and activities of the company
- Focus on high risk areas
- Periodically re-assess risk profile and update program to reflect developments
- Consider linking compliance requirements to your values (i.e., procurement integrity relates to honesty, fairness, competition)
- Audit periodically to identify gaps / areas for improvement

Considerations for a Tailored Compliance Program

- Make your written policies accessible to employees
- Supplement written policies with training (live training particularly for high risk areas)
- Screen employees, particularly principals, before hiring
- Conduct periodic audits, particularly in high risk areas
- Regularly remind employees of available reporting channels, including supervisors, ethics officer, or hotline
- Train those who may receive reports on what to do
- Train employees following events using as a lesson learned
- Document employee training and annual certifications

Considerations for Internal Investigations

- Maintain policies and procedures for responding to reports of misconduct
- Ensure all stakeholders are trained on what to do
- Ensure that consideration is given to preserving attorney-client privilege and work product protections
- Ensure a document hold is put in place
- Ensure investigations are conducted promptly
- Consider developing an investigative plan identifying the steps to be taken and issues to be investigated
- Ensure investigators are experienced and capable

Considerations for Internal Investigations

- Where attorneys are used, inform employees that attorneys represent the company and that the company holds the privilege
- Ensure personnel interviewed are aware of the company's potential reporting obligations where certain evidence is discovered (*i.e.*, MDR, Anti-Kickback Act)
- Ensure someone is responsible for reviewing and evaluating the investigative findings and for determining how to proceed following the investigation, including whether the company has disclosure obligations, is corrective action needed, disciplinary action, etc.

Considerations for Disclosure Policies

- Maintain a policy establishing procedures for responding to events giving rise to potential disclosure obligations
- Assign responsibility to an individual or team of individuals to determine whether the company has a reporting obligation
- Disclosures should be complete and accurate
- Vague or incomplete disclosures could trigger further review and may dissipate the benefits of making the disclosure

Considerations for Disclosure Policies

- Be aware that disclosures are often shared with the appropriate agency SDO, so the disclosure should also address the likely present responsibility concerns (including the present responsibility of individuals identified)
- Many S&D actions are taken against individuals identified in disclosures
- Even where no mandatory disclosure obligation exists, assess whether it would be beneficial to make a voluntary disclosure and whether to engage with the SDO
- When making a voluntary disclosure, treat it as formally and seriously as a mandatory disclosure and with the same considerations in mind

Considerations for Disclosure Policies

- Typical considerations to have in mind when preparing a disclosure:
 - What happened
 - When did it happen
 - Why it happened (i.e., root cause)
 - Who was involved
 - How it was discovered (if delay in reporting, why delay)
 - Whether internal policies/training were violated by action
 - Whether disciplinary action taken and, if not, why
 - Whether corrective action taken
 - ***Why it is unlikely to reoccur

Questions?

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