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Suspension & Debarment Explored: *Crafting Resolutions to Address Agency Responsibility Concerns*

Presented by:

Todd Canni, Partner

Kevin Massoudi, Associate

November 17, 2020

Overview of S&D Under FAR Subpart 9.4

- Suspension and debarment (S&D) are tools used by government to protect the government from the risks associated with doing business with “non-responsible” contractors
- Non-responsible essentially means that there is information before the government that reflects negatively on the contractor’s integrity, ethics, or competency in performing government contracts
- S&D act to render a contractor ineligible from receiving new contracts
- Exclusion is accomplished by sending the contractor a notice of suspension or proposed debarment and posting their name on a public website (SAM)

Overview of S&D Under FAR Subpart 9.4 *(cont.)*

- 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
- The FAR sets forth 10 factors to assess present responsibility

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*
 - An indictment = adequate evidence

Suspension

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

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
- Any individual associated w/ a contractor can be suspended or debarred including:
 - Contractor employees;
 - Owners or officers of a contractor;
 - Consultants or representatives of a contractor
- We estimate over 50% of cases involve individuals

Who Can Be Suspended or Debarred? *(cont.)*

- 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

- FAR 9.4 identifies many specific causes for S&D, including:
 - Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property, Fraud or criminal offense in connection with obtaining, attempting to obtain, or performing a contract, willful violations of contract terms, history of a failure to perform or of unsatisfactory performance, lack of business integrity. . .

Causes for Suspension & Debarment *(cont.)*

- 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)

Sources of Suspension & Debarment Cases

- Investigators
- Auditors
- Contracting personnel
- Prosecutors
- Whistleblowers (competitors, contractor employees)

Sources of Suspension & Debarment Cases

(cont.)

- 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, 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 be awarded subcontracts in excess of \$35K (FAR 9.405-2) (***Caution: cannot break-up awards to circumvent dollar threshold***)

Effects of Suspension & Debarment *(cont.)*

- May not conduct business w/ government as rep or agent of other contractors
- Listed on System for Award Management, which is available to the public
- Exclusion under FAR, results in exclusion under non-procurement rule & vice versa

Collateral Consequences of S&D

- 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

Collateral Consequences of S&D *(cont.)*

- Reduction in size of the business and/or delay/cancellation of future expansion plans
- Reduction in employees
- Loss of employees to competitors and/or layoffs
- Bankruptcy
- For individuals, loss of employment

Practice and Procedure

- Suspensions are initiated through a notice of suspension
- Debarments are initiated through a notice of proposed debarment
- Both result in immediate exclusion

Practice and Procedure *(cont.)*

- 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, provided to contractor upon request
 - Contractor is not entitled to discovery

What to do Upon Receipt of a Notice

- 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 *(cont.)*

- 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 *(cont.)*

- 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 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, 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

Considerations When Appearing for A Meeting *(cont.)*

- 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 for A Meeting *(cont.)*

- 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

FAR Suspension & Debarment Factors

Standards of Conduct /
Internal Control Systems

Voluntary Disclosure

Internal Investigation
Conducted & Shared

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*

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 depending upon circumstances
 - If “no” – debarment is possible
(the term depends on the circumstances)

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

Administrative Agreements *(cont.)*

- Elements generally include –
 - 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 a report to SDO

Hypo. 1 – *Alleged Misconduct by Owner/CEO*

- ABC Corp. is a build-to-print manufacturer for the DoD
- ABC Corp. received a notice from a DoD SDO after prime contractor submitted a disclosure alleging misconduct by the CEO and owner of ABC Corp.
- Actions of owner/officer imputed to company under imputation and affiliation principles because he allegedly performed such acts on behalf of company and was in control of the company

Hypo. 1 – Alleged Misconduct by Owner/ CEO *(cont.)*

- **Response & Outcome:**

- Negotiated 3-year AA with the Government:

- Owner resigned his position as CEO and transitioned to a non-leadership position
- Owner accepted a voluntary exclusion from government contracting and agreed not to be involved in company's government contracting business
- Owner participated in intensive ethics & compliance training

Hypo. 1 – Alleged Misconduct by Owner/ CEO *(cont.)*

- Negotiated 3-year AA with the Government:
 - ABC Corp. instituted values-based ethics & compliance program
 - Quarterly ECO reports to monitor and government on E&C program
 - ABC Corp. implemented internal controls and corrective actions to prevent similar events from reoccurring
 - ABC Corp. appointed new, majority-independent Board and puts control of company in hands of Board
 - The Board appointed a new CEO to lead company on day-to-day basis
 - Subject to independent monitoring

Hypo. 1 – *Alleged Misconduct by Owner/CEO* (cont.)

- *But the story does not end there. . .*
- Less than one year after AA is executed, government alleges that owner has violated restrictions on his role and affords company to resolve the concerns
- In response:
 - Owner accepted responsibility for some of the findings

Hypo. 1 – *Alleged Misconduct by Owner/CEO* (cont.)

- In response:
 - To resolve Government concerns, relinquished his ownership interest in the company, transferring his shares to a family member
 - Owner completely resigns from company and agrees to have no involvement
 - Voluntary exclusion from government contracting continues for owner
 - Devised a set of controls governing the relationship between the family member shareholder and the company to limit their influence and address government's concerns

Hypo. 2 – *Alleged Misconduct by Family Member – Employee*

- XYZ, Inc. is a small business who maintains certain equipment at government facilities
- XYZ, Inc. received a notice of proposed debarment that alleged:
 - XYZ did perform monthly services it was contractually obligated to perform despite invoicing the government for these services
- Actions of family member-employee imputed to company

Hypo. 2 – *Alleged Misconduct by Family Member – Employee (cont.)*

- **Response & Outcome:**

- Negotiated a 1-year AA with the Government, as part of which:
 - Employee accepted responsibility for her role and while company tried to maintain family members employment, she was ultimately terminated to resolve government's concerns.
 - The employee proposed and the government agreed to a “voluntary exclusion” from government contracting for one year

Hypo. 2 – *Alleged Misconduct by Family Member – Employee (cont.)*

- **Response & Outcome:** *(cont.)*
 - Negotiated a 1-year AA with the Government, as part of which:
 - XYZ would establish and maintain E&C Program
 - Quarterly reports to monitor and government on E&C program
 - Subject to independent monitoring

Hypo. 3 – *Alleged Misconduct by Contractor Employee*

- John Doe was working for a major prime contractor in charge of overseeing certain programs
- Government alleged that he had a personal conflict of interest given he had an interest in a subcontractor his employer was doing business with

Hypo. 3 – *Alleged Misconduct by Contractor Employee* (cont.)

- **Response & Outcome:**

- Negotiated a 1-year AA under which:

- Individual agreed not to engage in certain agent and representative activities but carved out certain activities Doe could do
- Agreed to submit certifications on periodic basis confirming his compliance with the agreement
- Agreed to report to independent monitor on a monthly basis
 - Monitor would report to government on monthly basis on Doe's compliance

Hypo. 4 – *Alleged Misconduct of Owner/Officer*

- Owner of 123, Inc. was indicted on allegations of small business fraud
- Owner resigned position at company at time indictment was issued and transferred all his shares in company to spouse
- However, this was a family business
 - Family members still involved

Hypo. 4 – *Alleged Misconduct of Owner/Officer* (cont.)

- Years after indictment of former owner and company received notice of suspension
 - Notice was based on indictment and allegations therein
 - Alleged actions of former owner imputed to 123, Inc. under imputation and affiliation

Hypo. 4 – *Alleged Misconduct of Owner/Officer (cont.)*

- **Response & Outcome:**

- Negotiated AA under which:

- Installed majority outside, independent Board
 - Put control of company in hands of Board
- Removed ability of spouse (majority-owner) to control management/daily operations of company
- Revamped and bolstered E&C program
- Severed all ties with small business involved in alleged misconduct
- Precluded former owner from being able to have any interest or employment with company during period of his exclusion from government contracting

CLE Code: 2020-138

The DOL's Quickest Path To Debar – Navigating Service Contract Act Compliance

Presented by:

Aaron Raddock
Partner & National Co-Leader, Government Contracts

November 17, 2020



Agenda

- Service Contract Act (“SCA”) Overview
- Common Pitfalls and Penalties of Non-Compliance
- Current Enforcement Environment
- Best Practices for Compliance
- Questions

Service Contract Act Overview

SCA Overview

- McNamara-O’Hara Service Contract Act of 1965 (“SCA”)
 - 41 U.S.C. 351 et seq.
 - 29 C.F.R. Part 4
 - Federal Acquisition Regulation (FAR) subpart 22.10, FAR clause 52.222-41
- Last in the line of federal statutes protecting wages and working conditions for federal contractor employees
 - 1931: Davis-Bacon Act (Construction workers)
 - 1936: Walsh-Healey Public Contracts Act (Manufacturing workers)
- Protects service workers from the consequences of low bidding by specifying required minimum wages and fringe benefits
- Administered by the Department of Labor’s (“DOL”) Wage & Hour Division (“WHD”)

“Principal Purpose” Test

- SCA applies to a contractor and subcontractors federal services contracts in excess of \$2,500 for services performed in the “United States”
 - “United States” defined at FAR 22.1001
 - District of Columbia contracts also covered
 - Presume coverage for indefinite-quantity contracts
- BUT ONLY if the “principal purpose” of the contract is to furnish services to the government using “service employees.” FAR 22.1003-1 Administered by the Department of Labor’s (“DOL”) Wage & Hour Division (“WHD”)
- No precise rules for “principal purpose” determination – broadly interpreted but does not cover “incidental” service work on construction and supply contracts

SCA Requirements

Wage Determination (WD)

Sets the minimum wages and fringe benefits for job classifications for a specific geographical region. ALL four must be met:

Minimum
hourly **Wage**
for the job
position

Minimum
hourly **Health &
Welfare (H&W)**
Benefit

Minimum
annual
Vacation
Benefit

Minimum
Holiday Benefit

- Wages and H&W are stipulated as hourly rates
- Vacation and Holiday require minimum weeks and days, respectively as set forth in the WD
- H&W payment requirements vary between odd and even-numbered WDs
- SCA also requires the contractor to post DOL notice WH 1313 and applicable wage determinations in a prominent area at the work site

Sample SCA WD

WD 15-4281 (Rev.-9) was first posted on www.wdol.gov on 01/16/2018

REGISTER OF WAGE DETERMINATIONS UNDER THE SERVICE CONTRACT ACT By direction of the Secretary of Labor	U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION WAGE AND HOUR DIVISION WASHINGTON D.C. 20210
Daniel W. Simms Director	Division of Wage Determinations
	Wage Determination No.: 2015-4281 Revision No.: 9 Date Of Revision: 01/10/2018

Note: Under Executive Order (EO) 13658, an hourly minimum wage of \$10.35 for calendar year 2018 applies to all contracts subject to the Service Contract Act for which the contract is awarded (and any solicitation was issued) on or after January 1, 2015. If this contract is covered by the EO, the contractor must pay all workers in any classification listed on this wage determination at least \$10.35 per hour (or the applicable wage rate listed on this wage determination, if it is higher) for all hours spent performing on the contract in calendar year 2018. The EO minimum wage rate will be adjusted annually. Additional information on contractor requirements and worker protections under the EO is available at www.dol.gov/whd/govcontracts

States: District of Columbia, Maryland, Virginia

Area: District of Columbia Statewide
 Maryland Counties of Calvert, Charles, Prince George's
 Virginia Counties of Alexandria, Arlington, Fairfax, Falls Church, Fauquier, Loudoun, Manassas, Manassas Park, Prince William, Stafford

Fringe Benefits Required Follow the Occupational Listing

OCCUPATION CODE - TITLE	FOOTNOTE	RATE
01000 - Administrative Support And Clerical Occupations		
01011 - Accounting Clerk I		18.06
01012 - Accounting Clerk II		20.28
01013 - Accounting Clerk III		22.68
01020 - Administrative Assistant		31.98
01035 - Court Reporter		21.84
01041 - Customer Service Representative I		14.94
01042 - Customer Service Representative II		16.81
01043 - Customer Service Representative III		18.33
01051 - Data Entry Operator I		14.88
01052 - Data Entry Operator II		16.23

Note: Executive Order (EO) 13706, Establishing Paid Sick Leave for Federal Contractors, applies to all contracts subject to the Service Contract Act for which the contract is awarded (and any solicitation was issued) on or after January 1, 2017. If this contract is covered by the EO, the contractor must provide employees with 1 hour of paid sick leave for every 30 hours they work, up to 56 hours of paid sick leave each year. Employees must be permitted to use paid sick leave for their own illness, injury or other health-related needs, including preventive care; to assist a family member (or person who is like family to the employee) who is ill, injured, or has other health-related needs, including preventive care; or for reasons resulting from, or to assist a family member (or person who is like family to the employee) who is the victim of, domestic violence, sexual assault, or stalking. Additional information on contractor requirements and worker protections under the EO is available at www.dol.gov/whd/govcontracts.

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: \$4.41 per hour or \$176.40 per week or \$764.40 per month

HEALTH & WELFARE EO 13706: \$4.13 per hour, or \$165.20 per week, or \$715.87 per month*

*This rate is to be used only when compensating employees for performance on an SCA-covered contract also covered by EO 13706, Establishing Paid Sick Leave for Federal Contractors. A contractor may not receive credit toward its SCA obligations for any paid sick leave provided pursuant to EO 13706.

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor, 3 weeks after 5 years, and 4 weeks after 15 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year: New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4.174)

Common Pitfalls and Penalties of Non-Compliance

SCA Compliance Challenges

Common Pitfalls:

- Failure to determine SCA applicability
- Failure to recognize other applicable Labor Laws (e.g., Federal Min. Wage, Paid Sick Leave, DBA)
- Missing WDs and WD updates
- Misunderstanding of employee coverage
- Incorrect Labor Category Classification
- Common processes for Commercial and SCA work
- Identifying bona-fide benefits
- Vacation carryforwards
- Non-hourly wages
- Self-funded Insurance plans
- Holidays for irregular schedules

Consequences of Non-Compliance

Non-Compliance can result in severe consequences, some of which include:

- Back Payments
- Civil Penalties
- Contract Withholds
- Payment of Government's re-procurement costs
- Contract Termination
- Personal Liability for Corporate Officers
- Suspension and/or Debarment
- False Claims Liability

Current Enforcement Environment

Current Enforcement Environment

Recent Developments

- On September 25, 2020, the DOL has released its proposed rule on how to classify workers as either employees or independent contractors under the Fair Labor Standards Act by adopting the “economic reality” test. The comment period will be closed on 10/26/2020. There are two “core” factors the DOL has identified in making the determination of the classification:
 - The nature and degree of the worker’s control over the work
 - The worker’s opportunity for profit or loss based on initiative or investment
- On August 31, 2020, the DOL issued a notice to increase the federal contractor minimum wage to \$10.95 per hour and the minimum hourly cash wage for tipped workers performing on or in connection with covered contracts to \$7.65 per hour
 - Rule to be effective January 1, 2021

Current Enforcement Environment *(cont'd)*

- On June 24, 2020, the DOL announced that the Wage and Hour Division will no longer pursue pre-litigation liquidated damages as its default policy from employers in addition to any back wages found due in its administratively resolved investigation in response to Executive Order 13924, requiring the Department to continue removing certain regulatory and enforcement barriers to economic prosperity in regard to the economic effects of COVID-19
 - https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_2.pdf

Recent Developments

- The U.S. Department of Labor has released its annual memorandum regarding the rate for Service Contract Act (SCA) Health and Welfare Fringe Benefits for all government contract bids or other service contracts, effective June 29, 2020

Current Enforcement Environment *(cont'd)*

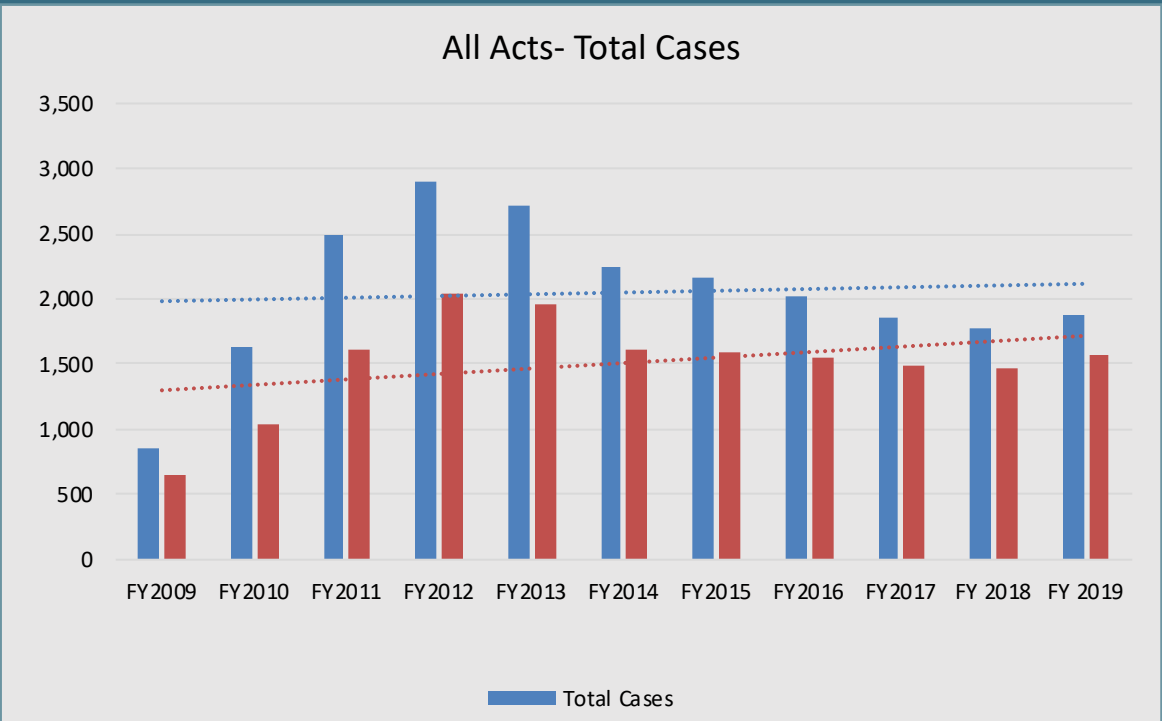
Recent Developments *(cont'd)*

- The rate of \$4.54 per hour (retained from 2019 rate) is required for employees performing on contracts not covered by Executive Order 13706
- The new rate of \$4.22 per hour (retained from 2019 rate) is required for employees performing on contracts covered by Executive Order 13706

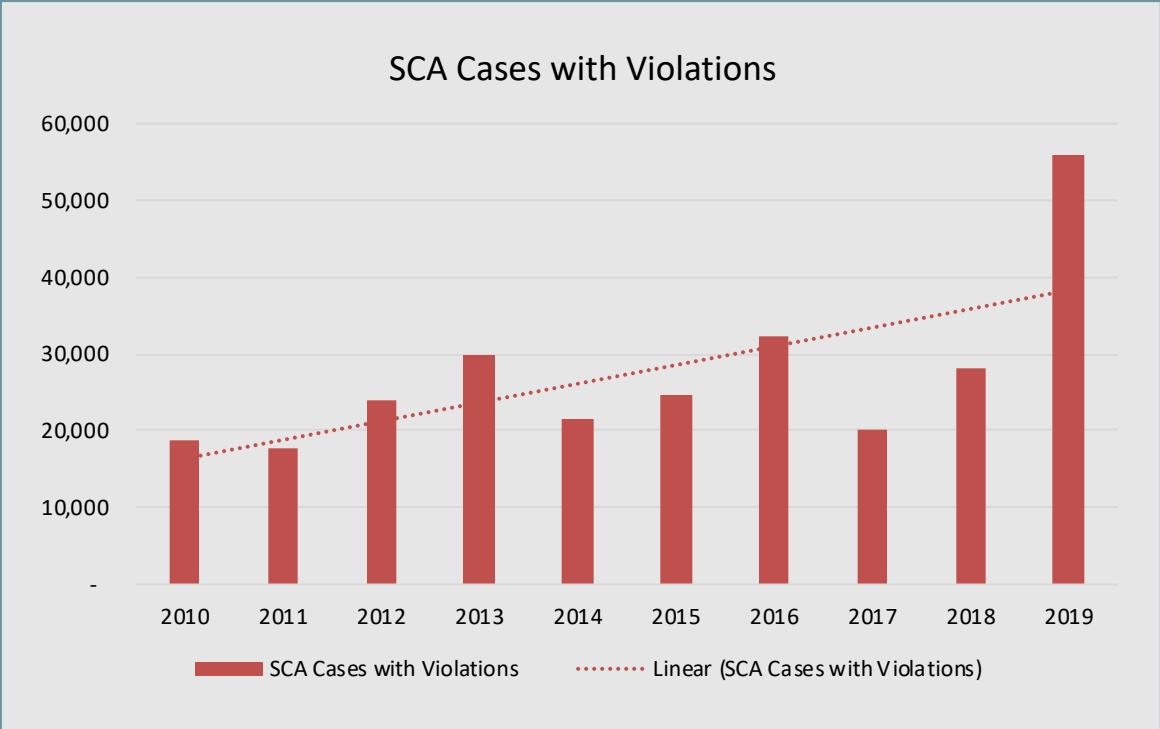
FY 2019 SCA Audit Statistics

Act	Investigations	Assessed Back Wages	Employees Affected	Debarments
SCA	680	\$64,861,303	34,201	23

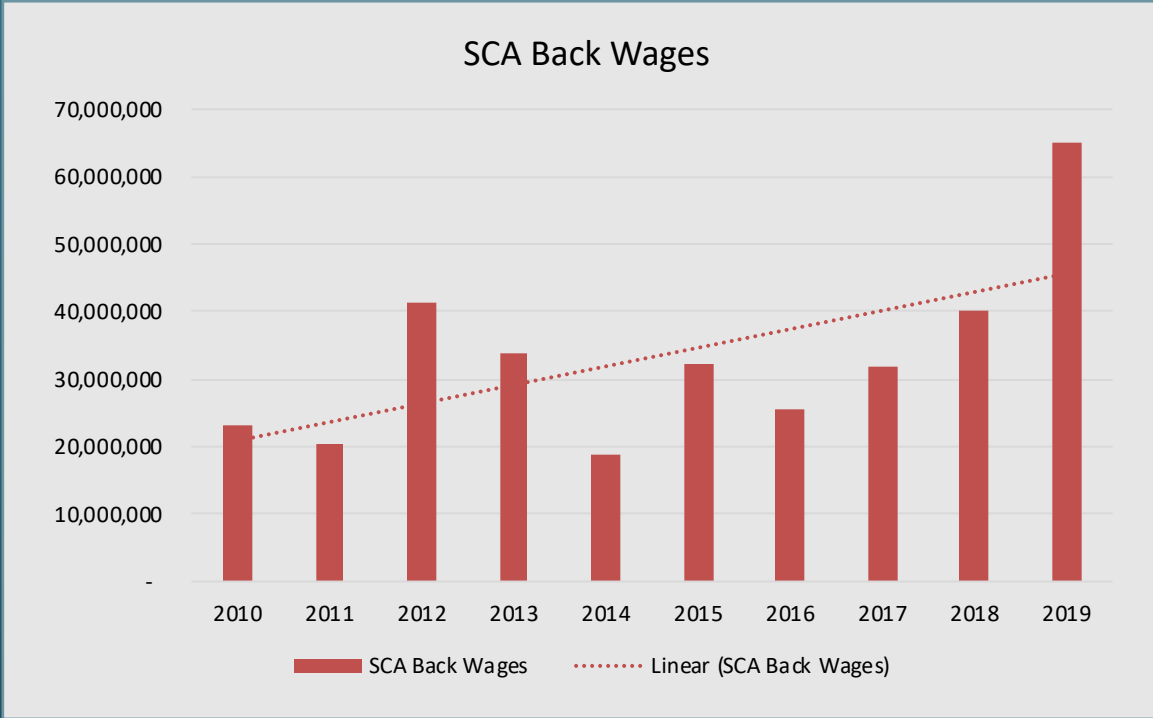
Government Contract Cases (FY 2010 to FY 2019)



SCA Violations (FY 2010 to FY 2019)

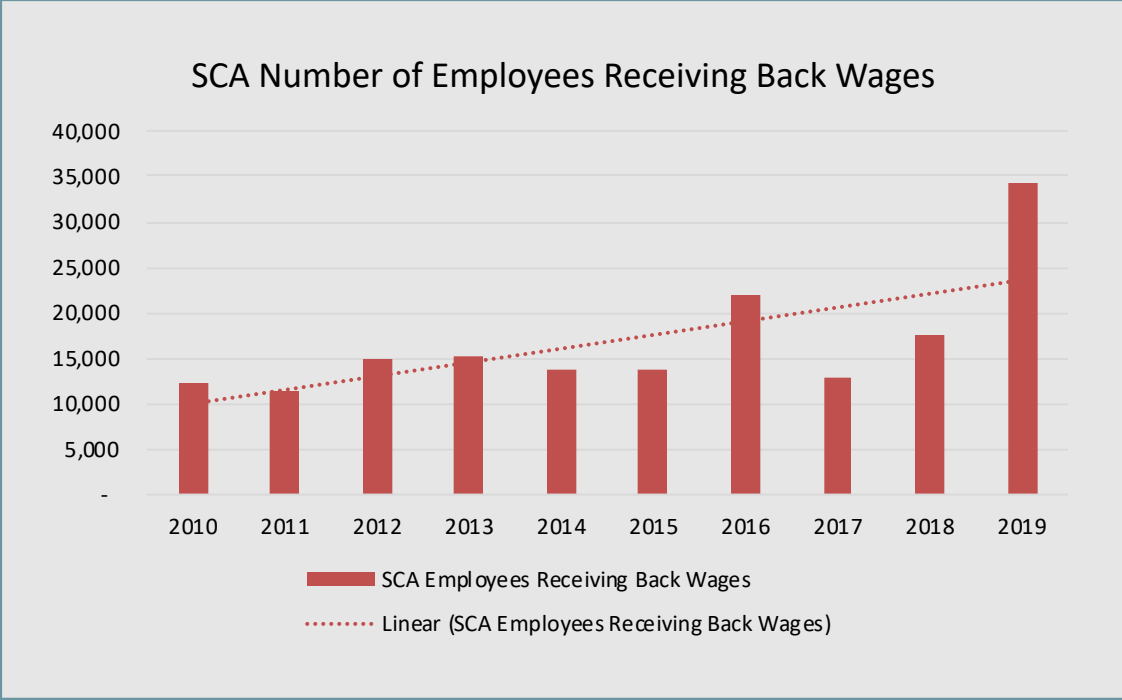


SCA Back Wages (FY 2010 to FY 2019)



SCA # of Employees Receiving Back Wages

(FY 2010 to FY 2019)



Best Practices for Compliance

Compliance: Best Practices

- Include the right people
 - At a minimum, contracts, finance, legal, human resources, project management, and accounting
- Train key personnel
 - Need to understand the key areas of risk
- Implement internal controls
 - Policies and procedures, forms, templates, and automated system controls
- Clearly communicate job responsibilities
 - Employees should understand how they have been classified and the work that does/does not entail
- Keep excellent records
 - Lack of documentation can result in the assumption of noncompliance
- Ensure your subcontractors are in compliance and understand the requirements

Compliance: Best Practices *(cont'd)*

- Understand the price adjustment process
 - Avoid taking actions that may limit the ability to obtain an adequate adjustment (i.e., paying wages in excess of the WD)
- Minimize complexities
 - Employees performing in more than one labor classification, or SCA and non-SCA jobs
- Perform self-assessments
 - Find and correct potential non-compliance before the Government does
- Resolve compliance issues with employees quickly to build a trust relationship
 - Employees covered by the SCA are often knowledgeable about the requirements

Disclaimer

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- Participants should contact appropriate legal counsel with specific questions to receive legal advice.
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Questions?



Todd J. Canni | Partner

Pillsbury Winthrop Shaw Pittman LLP

todd.canni@pillsburylaw.com

Tel: 213.488.7213

Cell: 202.384.6223



Kevin R. Massoudi | Associate

Pillsbury Winthrop Shaw Pittman LLP

kevin.massoudi@pillsburylaw.com

Tel: 213.488.7243



**Aaron Raddock | Partner & National
Co-Leader, Government Contracts
BDO**

araddock@bdo.com

Office: 703.336.1693



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