SHOOT FIRST, ASK QUESTIONS LATER: AN EXAMINATION AND CRITIQUE OF SUSPENSION AND DEBARMENT PRACTICE UNDER THE FAR, INCLUDING A DISCUSSION OF THE MANDATORY DISCLOSURE RULE, THE IBM SUSPENSION, AND OTHER NOTEWORTHY DEVELOPMENTS

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I. Introduction ........................................................................................................... 548
II. Background ........................................................................................................ 552
   A. Introduction to Suspension and Debarment ........................................... 552
      1. Administrative Suspension and Debarment .................................. 553
      2. De Facto Debarment ..................................................................... 554
      3. Statutory Debarment .................................................................. 554
   B. The Evolution of the System ........................................................................ 555
      1. Early Statutes Dealing with Contractor Responsibility .......... 555
      2. Statutory Debarment Provisions Emerge .................................. 556
      3. FPR and ASPR Regulations Emerge ........................................ 557
      4. Administrative Conference of the United States ....................... 558
      5. Adoption of Uniform Government-wide Suspension and Debarment Regulations ................................................................. 560
      6. Establishment of the Interagency Committee on Debarment and Suspension ................................................................. 561
   C. Important Case Law Developments Shaping the Current System .............. 562
      1. Perkins v. Lukens Steel (1940) ................................................. 563
      2. Gonzales v. Freeman (1964) ................................................... 564
      3. Horne Brothers, Inc. v. Laird (1972) ....................................... 566

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I. INTRODUCTION

Suspension and debarment are tools employed by the Government to protect itself from nonresponsible government contractors. These tools play
an essential gatekeeper function and are designed to prevent dishonest and incompetent contractors from remaining inside the potentially lucrative government-contracting arena. Although necessary and effective tools, current practice, as proscribed under the Federal Acquisition Regulation (FAR), authorizes agencies to proceed on a “shoot first, ask questions later” basis. Given that there are thousands of suspension and debarment actions each year, the consequences of this practice can be far-reaching and harm not only government contractors but also the agencies that depend on these contractors and the suspension and debarment system as a whole.¹

The suspension and debarment system has several structural flaws that threaten to undermine its fairness, effectiveness, and integrity.² Tasked with the mission to eradicate undesirables from the government-contracting arena, suspension and debarment officials (SDOs) are authorized to exclude contractors from obtaining government contracts based upon prior conduct or alleged conduct that raises questions regarding the contractor’s responsibility. While SDOs may proceed by providing contractors with pre-exclusion notification and extending them an opportunity to be heard before such drastic measures are imposed, and while some SDOs do proceed in this fashion, either through a “request for information” or “show cause” letter, the FAR does not expressly recognize these alternative measures. Rather, the FAR allows, or perhaps encourages, given the lack of explicit alternatives, SDOs to exclude contractors from receiving new government contracts through the issuance of either a notice of suspension or a notice of proposed debarment without providing pre-exclusion notice and a pre-exclusion opportunity to be heard.³

When either approach is taken, contractors immediately lose the ability to compete for government contracts without any pre-exclusion notice. Furthermore, the agency’s decision is based upon an incomplete and one-sided record that does not reflect any consideration of the contractor’s perspective, including whether the contractor has taken corrective action or implemented remedial measures to prevent reoccurrence, assuming the underlying acts occurred in the first place. Additionally, these sanctions may be imposed without consulting other interested agencies. While the lack of information sharing and collaboration alone is problematic, when the decision to exclude is made


3. See FAR 9.406(c)(3) (authorizing agencies to issue a notice of proposal to debar); FAR 9.407.1(b) (authorizing agencies to suspend contractors without first providing a pre-exclusion opportunity to be heard).
without consulting other agencies, there is risk that one or more of those agencies may have no other choice but to waive the exclusion and continue working with the contractor.\textsuperscript{4} When one considers that these sanctions implicate a contractor’s constitutional due process liberty interests—the right to be free from the stigmatizing effects of exclusion, which immediately impact a contractor’s ability to do business\textsuperscript{5}—this “shoot first, ask questions later” mentality threatens the integrity and effectiveness of the system and inflicts unnecessary harm on contractors.

The system’s flaws are highlighted by its internal inconsistencies. Under the FAR, the Government is prohibited from debarring a contractor from federal contracting without first providing the contractor with notice and an opportunity to present its side of the story.\textsuperscript{6} These safeguards are afforded because debarment implicates a contractor’s due process liberty interests and, at inception, stigmatizes the contractor and acts immediately to deprive a contractor of the ability to seek business and generate revenue for a significant period of time. Losing the ability to compete for new contracts, for even a brief period of time, can be fatal to a contractor’s business. The contractor also must cope with the stigma associated with being debarred, which may brand the contractor as a delinquent or crook depending upon the allegations. Given these devastating consequences, it is not surprising that contractors are afforded some protection before debarment is imposed.

The very same immediate consequences befall a contractor who receives a notice of suspension or a notice of proposed debarment; yet, in those instances, the contractor is immediately excluded without prior notice and a pre-exclusion opportunity to be heard.\textsuperscript{7} The stark contrast in treatment stems from the belief that these measures result in a temporary form of debarment and the contractor will be given a chance to rebut the allegations shortly after being excluded. While the contractor is afforded such an opportunity after being excluded, it may be a meaningless opportunity in the current system, as the contractor may linger in a state of “temporary debarment”\textsuperscript{8} for months, if not longer, while the SDO renders a determination. This post-exclusion opportunity to be heard, therefore, does not serve to protect a contractor’s reputation or business interests. Thus, under the current system, notices

\textsuperscript{4} See FAR 9.407-1(d) (authorizing the agency head or designee to allow for continued business dealings with a suspended contractor).
\textsuperscript{5} See discussion of Old Dominion, infra Part II.C.5.
\textsuperscript{6} FAR 9.406-3(b)(1) (“These procedures shall afford the contractor … an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.”); FAR 9.406-3(c) (“A notice of proposed debarment shall be issued by the debarring official advising the contractor … [t]hat debarment is being considered ….”).
\textsuperscript{7} See IMCO, Inc. v. United States, 97 F.3d 1422, 1426 n.* (Fed. Cir. 1996) (“This distinction, however, is without significance. There is very little difference or practical effect between a suspension and a proposed debarment.”).
\textsuperscript{8} The term “temporary debarment” or “temporarily debar” is used by the author to refer to the immediate exclusion associated with receiving a notice of suspension or notice of proposed debarment.
of suspension or proposed debarment may have the same practical effect as debarment.

A contractor withering away without the ability to compete does not value the artificial legal distinction between debarment and temporary debarment when the practical effects are identical. This is especially so for small to medium-sized businesses focusing solely on government business that may lack the financial means to remain viable during the period of exclusion. Given the current environment in which temporary debarment is practiced, it has the potential to be as devastating as debarment and can be applied much more liberally.

The lack of pre-exclusion notification undermines the notion that the suspension and debarment system is carried out with “fundamental fairness” and casts doubt on its effectiveness and integrity. The practice subjects contractors to a devastating sanction from a reputational and economic standpoint without giving them even a brief pre-exclusion opportunity to demonstrate their responsibility. The lack of pre-exclusion notification deprives the Government of the opportunity to make a well-informed decision based upon a developed record that contains the views of the contractor. In some instances, the decisions to exclude even ignore the compelling needs of other agencies, leaving them with no choice but to waive the exclusion and continue working with the contractor, a result that may portray the Government as internally inconsistent. Ultimately, because the decision to temporarily debar may appear to be based on an incomplete and one-sided record with which other agencies may disagree, the integrity of the suspension and debarment system is in jeopardy.

The current system is the byproduct of a number of reform measures and decisions originating from Congress, agencies, and the judiciary. Many of the changes to suspension and debarment procedures were designed to protect contractors’ due process rights, while simultaneously balancing the Government’s need to swiftly eradicate nonresponsible contractors from the procurement system. Just as suspension and debarment procedures have been altered repeatedly to address deficiencies revealed over time, it is now time for further refinements. The dilemma, however, is in finding the appropriate balance between protecting the Government and preserving the due process liberty interests of contractors. While supporters of the current system believe it reflects the right balance, the premise of this Article is that the suspension and debarment system is better served when contractors are given pre-exclusion notice and a pre-exclusion opportunity, however brief, to be heard. While there may be cases that make a strong argument in favor of

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9. FAR 9.406-3 and 9.407-3 provide that agencies shall establish procedures governing the debarment and suspension decision-making process that are as informal as is practicable, “consistent with principles of fundamental fairness.”

10. See discussion infra Part II.B–C (discussing the evolution of the system).

11. Id.
the “shoot first, ask questions later” practice, such as the recent suspension of the IBM Corporation, more often than not, the Government has other less drastic options at its disposal.

To make the case for change to the suspension and debarment system, this Article will first introduce the concepts of suspension and debarment and the stated purpose underlying these tools. After identifying these fundamentals, the evolution of the suspension and debarment system will be explored, including statutory, regulatory, and case law developments. This historical analysis demonstrates that many of the refinements to the system were implemented to protect the due process rights of contractors, thereby providing fairness and instilling integrity. Against this backdrop, current suspension and debarment procedures will be examined and some noteworthy developments will be discussed, including the recent promulgation of the mandatory disclosure rule, proposals to reform the system, and the recent suspension of the IBM Corporation. After setting the stage, the major obstacles to having a fairer and more effective suspension and debarment system will be identified and analyzed, including the lack of pre-exclusion notification, the absence of regulations requiring agencies to participate in the lead agency process, and the damaging effects of suspension and debarment waivers. Finally, specific refinements to suspension and debarment procedures will be proposed.

II. BACKGROUND

A. Introduction to Suspension and Debarment

For those unfamiliar with the concepts of suspension and debarment, these tools enable the Government to exclude contractors from receiving new contracts where the Government believes the contractor is not responsible and presents a threat to the Government’s interests.\(^\text{12}\) The primary difference between suspension and debarment is the length of exclusion, which is highlighted by the terms given to these devices. Blacklisting refers to debarment, whereas graylisting has been used to describe suspension.\(^\text{13}\)

Exclusion from federal contracting arises in three ways, including administrative suspension and debarment, statutory debarment, and de facto debarment. This Article focuses on the administrative regulations set forth in the FAR, which form the critical foundation for individual agency supplementary regulations such as the Defense Federal Acquisition Regulations (DFARS). While the manner in which agencies initiate administrative suspension and debarment is the primary focus of this Article, each of these concepts will be explored.

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\(^{12}\) FAR 9.402. Notably, and not the subject of this article, suspension and debarment also are applied to nonprocurement transactions. See 2 C.F.R. pt. 180 (2008).

1. Administrative Suspension and Debarment

Subpart 9.4 of the FAR contains the regulations governing the manner in which agencies may carry out administrative suspension and debarment. Suspension is a temporary, interim measure taken while the Government investigates the matter and assesses the contractor’s present responsibility.\(^{14}\) Suspension may only be “imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government’s interest.”\(^{15}\) Suspension shall not last longer than twelve months unless an assistant attorney general requests an extension, in which case it may be extended for an additional six months but in no event longer than eighteen months unless legal proceedings have been initiated.\(^{16}\)

Debarment generally is not to exceed three years but can be extended in order to protect the Government’s interests.\(^{17}\) Debarment is the final measure taken once the Government determines that the contractor is not responsible and should not be a source for goods or services. When the cause for debarment is “not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence.”\(^{18}\) Notably, agencies also may use a notice of proposed debarment to initiate immediate exclusion while they investigate a cause for debarment.\(^{19}\) Where the notice of proposed debarment is based upon a criminal conviction or civil judgment, or where no genuine dispute over material facts exists, the SDO must render a decision within thirty days of receipt of the contractor’s response.\(^{20}\) Notably, however, the provision allows the period to be extended for “good cause.”\(^{21}\) Where material facts are in dispute, there is no requirement that the SDO render a decision within a set period of time and, thus, conceivably the contractor can remain excluded indefinitely, or at least for the maximum length of a debarment.\(^{22}\)

While suspension, notice of proposed debarment, and debarment produce different long-term effects, to the target of either, the immediate effect is identical—loss of the ability to compete for contracts. Despite the similar devastating impact that these devices have on a contractor’s business, the process associated with each is starkly different. Debarment cannot be imposed until the contractor is given the opportunity to be heard and a variety of remedial and mitigating factors are considered.\(^{23}\) Suspension, a sanction that can last

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17. FAR 9.406-4(a)(1), (b).
19. See FAR 9.406-3(c) (stating that the notice shall advise the contractor “[o]f the effect of the issuance of the notice of proposed debarment”); see also FAR 9.405(a) (contractors proposed for debarment are excluded from receiving contracts).
20. FAR 9.406-3(d).
21. Id.
22. See id.
23. FAR 9.406-3(b)(1) (“These procedures shall afford the contractor … an opportunity to submit, in person, in writing, or through a representative, information and argument in
as long as eighteen months, may be imposed without any prior notice or opportunity to be heard and may be based solely upon “adequate evidence” of a cause for suspension where the SDO determines that “immediate action is necessary to protect the Government’s interest.” Similarly, a notice of proposed debarment, which results in immediate exclusion, may be imposed simply where a cause for debarment exists without prior notice or opportunity to be heard and ostensibly may last indefinitely or at least as long as debarment.

2. De Facto Debarment

The concept of de facto debarment refers to the repeated denial of contract awards based upon agency findings of contractor nonresponsibility. In these instances, the contractor is not officially suspended or debarred as a result of the Contracting Officer’s decision. Nonetheless, where the contractor is repeatedly denied contracts based upon responsibility concerns, the practical effect is identical to debarment and, hence, the label de facto debarment.

As will be discussed infra Part II.C.5., in Old Dominion Dairy Products v. Secretary of Defense, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) discussed de facto debarment. The court determined that due process requires that prior to being denied a contract award, the contractor be “notified of the specific charges concerning the contractor’s lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit.” Given this requirement, agencies can no longer simply refuse to contract with a contractor that is otherwise in line for award. Due process requires that contractors be afforded procedural safeguards. The concept of de facto debarment and the issue of whether, in practice, agencies comply with these requirements provide fertile ground for an entirely independent article. Nonetheless, this Article will explore the rationale underlying the distinction created by the court between the procedures utilized for administrative suspension and de facto debarment.

3. Statutory Debarment

Statutory debarment refers to congressional enactments that provide bases for debarring contractors. These enactments largely exist in two forms: those
that mandate the debarment of contractors for certain conduct and those that identify certain conduct as a cause for possible debarment. Statutory debarment provisions first appeared in 1933 within the provisions of the Buy American Act. These statutory provisions were necessary at a time when there was no regulatory basis to suspend or debar contractors for certain conduct. With the promulgation of administrative suspension and debarment procedures, which vest within the experienced SDO the discretion to suspend or debar for conduct indicating a lack of responsibility, it is debatable whether there continues to be a need for statutory debarment provisions. Nonetheless, Congress enacts such provisions perhaps for policy reasons and to address perceived issues that it feels the agencies have not adequately considered.

B. The Evolution of the System

An examination of the evolution of the suspension and debarment system demonstrates that the current system is the byproduct of countless reform measures, many of which were designed to make the system fairer to those who choose voluntarily to work with the Government, namely government contractors.

1. Early Statutes Dealing with Contractor Responsibility

The concept of contractor responsibility, which underlies the suspension and debarment system, dates back to an 1884 Army appropriations statute, which stated that the “award in every case shall be made to the lowest responsible bidder for the best and most suitable article ....” Early on, however, government agencies were not permitted to exclude a low bidder based upon responsibility concerns. In 1921, the General Accounting Office, now the Government Accountability Office (GAO), rejected the Army’s decision to make an award to a bidder whose bid was “nearly 63 per cent higher” than the low bidder based upon the latter’s perceived “incompetency,” holding that such concerns are “too general and could have been protected against by bond.”

Seven short years later, however, the GAO shifted its position and upheld the General Supply Committee’s refusal to accept or consider Impervious Paint and Varnish Co.’s proposal. GAO found that “[w]hile a bond will, in most cases, safeguard the Government against monetary loss, there may be cases where the supplies or services are of such character as to require other safeguards, such as experience, technical knowledge, etc., necessary to insure complete performance.” GAO then set forth the first procedural requirements governing debarment, stating that debarment will be upheld if

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31. 1 Comp. Gen. 304, 305 (Dec. 7, 1921).
the length of time of such debarment is definitely stated and not unreasonable, and the reasons for the debarment, with a statement of the specific instances of the bidder’s dereliction, are made of record and a copy thereof furnished the bidder and this office. Such should be the procedure with respect to the debarment of bidders hereafter.\textsuperscript{33}

Debarment was in its infancy at this time, and, as a result, the procedures were simplistic and did not consider whether a contractor's constitutional due process rights were affected. Specifically, the Government was not required to provide predebarment notice and extend the contractor an opportunity to rebut the allegations pertaining to its perceived “dereliction.”\textsuperscript{34}

2. Statutory Debarment Provisions Emerge

Following these early GAO decisions, Congress began enacting legislation establishing causes for debarment. The first of these was the Buy American Act, enacted in 1933, which provided that “only” articles, materials, and supplies mined or produced in the United States “shall be acquired for public use.”\textsuperscript{35} Where an agency determines that a contractor has failed to comply with this requirement, “no other contract . . . shall be awarded to such contractor . . . .”\textsuperscript{36} Not long thereafter, Congress enacted additional statutory debarment provisions in the labor context, including the Davis-Bacon Act of 1931 through a 1935 amendment,\textsuperscript{37} and the Walsh-Healey Public Contracts Act of 1936.\textsuperscript{38} Ultimately, in an effort to provide uniformity in application and enforcement of these labor statutes, the secretary of labor was authorized to issue regulations providing for a three-year debarment period for any contractor found to be in aggravated or willful violation.\textsuperscript{39} Notably, these statutes

\textsuperscript{33.} Id. at 547–48.
\textsuperscript{34.} See id.
\textsuperscript{36.} Id. § 3(b). Notably, statutory debarment only applied to contractors failing to comply with the clause in the context of construction contracts—not supply contracts. See Gantt & Panzer, supra note 13, at 178.
\textsuperscript{37.} Act of August 30, 1935, ch. 825, § 3(a), 49 Stat. 1011. This Act requires payment of certain wages. Id.
\textsuperscript{39.} The Reorganization Act of 1949 authorized the president, subject to congressional approval, to transfer any or all of an agency's functions to other agencies. Reorganization Act of 1949, ch. 226, 63 Stat. 203. President Truman eventually submitted a plan to Congress requiring the secretary of labor to issue regulations to ensure consistent application and enforcement of certain labor provisions. Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 3176 (May 24,
did not address debarment procedures, as the focus was solely on eradicating perceived wrongdoers from the system.

3. FPR and ASPR Regulations Emerge

In the 1950s two major regulations emerged authorizing and setting forth debarment procedures. The Federal Procurement Regulation (FPR), promulgated by the General Services Administration (GSA), set forth debarment procedures for civilian agencies.\(^{40}\) Similarly, the Department of Defense (DoD) promulgated the Armed Services Procurement Regulation (ASPR), which set forth such procedures for military agencies.\(^{41}\) Both the FPR and ASPR treated debarment in like manner. The provisions identified the following causes for debarment: (1) the conviction or judgment for an offense related to obtaining or performing a government contract or for antitrust violations; (2) clear and convincing evidence of a serious violation of a contractual provision; and (3) debarment by another agency.\(^{42}\) Both required that debarment be for a reasonable, definitely stated period of time\(^{43}\) and further required notification to the contractor of the reason for debarment and the period of debarment. Importantly, neither required that the contractor be provided predebarment notice and an opportunity to be heard.\(^{44}\)

Unlike the FPR, however, the ASPR authorized the suspension of contractors and did so in an unfair manner.\(^{45}\) The ASPR stated that “[a] suspended Contractor will not be informed of the prohibitions effected against him.”\(^{46}\) One critic described the process as follows: “[b]y summary administrative action . . ., which is taken without notice or hearing or opportunity either to know or to contest whatever evidence may motivate the action, a company is abruptly deprived of opportunities to bid, to be paid, or even to know what the trouble is.”\(^{47}\) Under the ASPR system, the suspended contractor, unaware of its suspension, would continue to submit bids in an attempt to compete

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40. ASPR 1-605 (1976). The ASPR was promulgated as a result of the Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 21 (1948), amended by Act of Oct. 30, 1951, Pub. L. No. 82-245, 65 Stat. 700. Ultimately, the Defense Acquisition Regulation (DAR) replaced the DAR, and then the DFARS replaced the DAR.

41. 18 Fed. Reg. 5031, 5032 (Aug. 22, 1953) (to be codified at ASPR 400.604-1); 24 Fed. Reg. 1933, 1944 (Mar. 17, 1959) (to be codified at FPR 1-1.605(a)).

42. 18 Fed. Reg. 5031, 5032 (Aug. 22, 1953) (to be codified at ASPR 400.604-2); 24 Fed. Reg. 1933, 1944 (Mar. 17, 1959) (to be codified at FPR 1-1.605(b)(5)).

43. 19 Fed. Reg. 7639, 7639 (Nov. 27, 1954) (to be codified at ASPR 400.604-3); 24 Fed. Reg. 1933, 1944–45 (to be codified at FPR 1-1.605(b)(6)).

44. Gantt & Panzer, supra note 13, at 200 (citing ASPR 1-605.4).

45. Id.

for contracts, incurring unnecessary expense and wasting time, but never receiving any contracts or being informed of the reason for the denial of award.  

Recognizing that the system inflicted unnecessary harm on suspended contractors, Congress held hearings to discuss these procedures. One critic commented that the system seemed out of place in a democratic system of governance, finding it “almost inconceivable that such a condition exists in an agency of the Government which is supposed to have a democratic form of Government.” Ultimately, in an effort to instill fairness, integrity, and transparency into the process, the ASPR’s suspension procedures were revised in July of 1956, and the amended regulation recognized that suspension is a “drastic action” and must be “based upon adequate evidence rather than mere accusation,” in apparent recognition of the manner in which DoD had been imposing suspension under existing regulations. Under the revised regulations, the Government was required to notify the suspended contractor within ten days of the effective date of the suspension. While this addition improved the suspension procedures, “lest a suspended contractor become too optimistic after reading the ASPR, such contractor should be cautioned that the average suspension amounts to about two years.” Notably, under current regulations, contractors still do not receive presuspension notice and suspension may last up to eighteen months.

4. Administrative Conference of the United States

Several years later, in a 1963 report, the Administrative Conference of the United States (ACUS) set forth nine recommendations concerning the suspension and debarment system, which were originally made by the Conference Committee on Adjudication of Claims after a comprehensive examination of the system. The Committee found four “major problems” with the de-
Suspension and debarment system, including (1) “the absence of safeguards to insure procedural fairness”; (2) “the inadequacy of the rules concerning the grounds and the scope of debarment”; (3) “the length and disparity of debarment periods”; and (4) “the combination of prosecutive and judicial functions in decision-making regarding debarment.” The Committee’s recommendations focused on making improvements to these general areas.

At the outset, the Committee recognized the primary concern addressed by this Article, specifically, that the system seemed to be lacking in the areas of procedural fairness. “Procurement regulations do not provide for advance notice, and in some case prohibit opportunity to know the reasons, or the evidence for the suspension.” The report further recognized, “[b]usiness firms suspected of fraud or other criminal conduct . . . are subject to ‘suspension’ from further government contracts pending investigation and appropriate action by the Department of Justice, a time period that frequently exceeds 3 years.”

Of particular relevance is the Committee’s recommendation, numbered 29–2, dealing with suspension. “A major problem in contractor debarment is the procedural unfairness of suspension of contractors from government business as practiced openly [sic] or secretly by contracting agencies.” Suspension is normally carried out through “summary procedures that do not include any prior notice or statement of reasons for the action taken, or opportunity to learn what those reasons are or to show that the alleged grounds are untrue, and continue in the average case for two or three years.” The Committee likened the suspension practices to the days of the wild, wild west in Wild Bill Hickok’s Abilene, Kansas, as recalled by President Eisenhower, where, as long as you confronted your adversary face-to-face, “you could get away with almost anything, as long as the bullet was in the front.”

The Committee made several recommendations regarding suspension practice. First, the Committee stated, with some exceptions, “the practice of summary suspensions of individuals and firms . . . without notice and opportunity for a trial-type hearing should be discontinued.” Second, despite recognizing the significant harm and unfairness associated with the lack of presuspension notification and perhaps without consideration of the other less drastic measures at the Government’s disposal, the Committee sanctioned the use of

chairman of the Subcommittee on Administration Practice and Procedure, requested that the ACUS Report be printed. Id. at III.

57. Id. at 276.
58. Id. at 267–69, 289–90.
59. Id.
60. Id. (emphasis added).
61. Id. (emphasis added).
62. Id. at 286.
63. Id. (emphasis added).
64. Id. at 288 n.55 (discussing the town code of Abilene, Kansas, under the leadership of Wild Bill Hickok, as city marshal).
65. Id. at 269 (emphasis added).
summary suspensions in instances of criminal convictions, civil judgments, or probable cause that the contractor has committed fraud or has engaged in other conduct showing a substantial lack of present responsibility. Finally, the Committee recommended limiting all suspensions to a “reasonable time,” which in most cases would not exceed one year.

The Committee’s central recommendation was that contractors should receive “notice of proposed debarment” and an “opportunity … to have a trial-type hearing before an impartial agency board or hearing examiner in the event there are disputed questions of fact relevant to the debarment issue.” Overall, the Committee’s observations were spot on and its recommendations ultimately led to improvements in the fairness and transparency of the system. Although the Committee recognized the problems associated with the lack of presuspension notification, the laws have yet to be changed to implement this concern. While the Committee seemed to favor presuspension notification, ultimately, the Committee did not draw a line in the sand and impose presuspension notification. Statements in its report suggest that this was the result of compromise in an attempt to balance competing interests, namely:

[g]overnment’s operational interest in excluding the dishonest and the willful or chronic contract violators from its programs by means that do not impede ongoing contracting or impair law enforcement, and the competing public interest in assuring that the debarment power is exercised in a fair and open manner because of the severe, often fatal consequences of this government sanction.

The Committee’s recommendations, nonetheless, lend credence to the point central to this Article—the lack of pre-exclusion notification is fundamentally unfair and undermines the integrity and transparency of the system. Just as this practice was unfair in the 1960s, it is equally objectionable today, if not more so given the judicial findings since the 1960s, wherein the courts have recognized that a contractor’s due process liberty interests are at stake, as discussed infra Part II.C.

5. Adoption of Uniform Government-wide Suspension and Debarment Regulations

Beginning in the 1970s and continuing into the 1980s, the suspension and debarment system began taking steps toward Government-wide uniformity of practice and procedure. After various committees and task forces were

66. Id. at 267; see also id. at 290 (“Recommendation 29-2 authorizes temporary suspension pending debarment ….”).
67. Id. at 289–90.
68. Id. at 267 (emphasis added).
69. Id. at 273–74.
70. In 1969 Congress established the Commission on Government Procurement (COGP) in order to assess the “economy, efficiency, and effectiveness” of the procurement process. Act of
formed to assess the system, the Senate Subcommittee on the Oversight of Government Management ultimately issued a report that largely criticized the lack of communication, coordination, and uniformity among the various agencies in their suspension and debarment procedures.\textsuperscript{71} As a result of the subcommittee’s criticisms, the Office of Federal Procurement Policy (OFPP) issued a policy letter setting forth guidelines for a Government-wide suspension and debarment system.\textsuperscript{72} While the substantive guidelines were incorporated into the Defense Acquisition Regulation (DAR) and the FPR, which shortly thereafter were recodified into FAR Subpart 9.4, the regulations were not revised to require agencies to coordinate their actions and decisions before imposing suspension or debarment.\textsuperscript{73}

6. Establishment of the Interagency Committee on Debarment and Suspension

A few years later, President Ronald Wilson Reagan issued Executive Order 12549, dated February 18, 1986, which was issued “to curb fraud, waste, and abuse in Federal programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs . . . .”\textsuperscript{74} Notably, the executive order established the Interagency Suspension and Debarment Committee (ISDC), which, in addition to monitoring implementation of the executive order, “facilitates lead agency coordination, serves as a forum to discuss current suspension and debarment related issues, and assists in developing unified Federal policy.”\textsuperscript{75} Moreover, “[w]hen requested by OMB, the Committee serves as a


\textsuperscript{72} Office of Management and Budget, Government-wide Debarment, Suspension, and Ineligibility Policy Letter, 47 Fed. Reg. 28,854 (July 1, 1982).

\textsuperscript{73} FAR 9.402(c).

\textsuperscript{74} Exec. Order No. 12549, 51 Fed. Reg. 6,370 (Feb. 18, 1986).

\textsuperscript{75} Interagency Suspension and Debarment Committee, http://www.epa.gov/isdc (last visited Mar. 8, 2009).
regulatory drafting body for revisions to the government-wide nonprocurement suspension and debarment common rule.”76 Recently, as part of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA), Congress empowered the ISDC to take on a greater role in the lead agency process by

resolv[ing] issues regarding which of the Federal agencies is the lead agency having responsibility to initiate suspension or debarment proceedings;... coordinat[ing] actions among interested agencies with respect to such action;... [and] encourag[ing] and assist[ing] Federal agencies in entering into cooperative efforts to pool resources and achieve operational efficiencies in the Governmentwide suspension and debarment system.77

Despite these significant efforts to improve coordination and information sharing among agencies, the FAR still does not require agencies to participate in the lead agency process or to follow any specific procedures before suspending or debarring contractors. Rather, the FAR merely encourages agencies to establish procedures for coordinating their suspension and debarment actions and provides that agencies should consider designating a lead agency when more than one agency has an interest.78 Additionally, the existing procedures governing such coordination and the selection of a lead agency are informal and not publicly available.79

C. Important Case Law Developments Shaping the Current System

Judicial decisions over the last forty-five years played a major role in shaping the draconian suspension and debarment system of the past into the fairer, more procedurally conscious system it is today. These important refinements are due largely to several instrumental cases wherein the courts, presented with questionable agency conduct, recognized that while there may not be a right to contract with the Government, there are constitutional due process rights at stake when the Government excludes a contractor. After making this significant determination, subsequent decisions then focused largely on ascertaining what due process requires.

76. Id.
78. FAR 9.402(c) (“When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.”).
79. See Interagency Suspension and Debarment Committee, http://www.epa.gov/isdc (last visited Mar. 8, 2009) (discussing the ISDC). To the author’s knowledge, upon learning of a cause for suspension or debarment, the agency SDO contacts the ISDC vice chair and provides notification of the action it intends to take. The vice chair then sends an e-mail to all agency SDOs to ascertain whether any other agencies are interested in participating in the process. Presumably, where more than one agency has an interest, the chair of the ISDC selects the lead agency.
1. *Perkins v. Lukens Steel* (1940)

**Government contracting is a privilege, not a right.**

In *Perkins v. Lukens Steel Co.*, a 1940 Supreme Court decision, the Court did not have suspension and debarment procedures before it, but rather considered whether contractors had standing to challenge the secretary of labor’s wage determinations under the Public Contracts Act. The Act required suppliers of goods to the Government to agree to pay employees engaged in producing goods wages that were not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the supplies ... are to be manufactured or furnished under said contract.81

In finding that “prospective bidders for contracts derive no enforceable rights against the agent [Secretary] for an erroneous interpretation of the principal’s [Congress's] authorization,” the Court held that the contractors lacked standing to challenge the secretary’s wage determination.82 Before reaching this conclusion, the Court made a general statement that subsequently caused some to question whether contractors were entitled to any procedural protections before losing the ability to contract with the Government: “Like private individuals and businesses, the Government enjoys the *unrestricted power* to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.”83

Years later, GAO relied upon the privilege-right dichotomy underlying the *Perkins* decision to send a protester packing despite finding procedural deficiencies. In 1956, the Ideal Uniform Cap Company challenged its debarment by the Navy, which was based upon its contract default and its refusal to produce business records subpoenaed by a Senate subcommittee relying upon the Fifth Amendment.84 Despite recognizing that the Navy failed to comply with ASPR 1-604.3, which required notice of “all instances of derelictions serving as a basis for the debarment action” and “reasonable opportunity to present information for consideration,” GAO held that “the deficiency in the procedural requirements could readily be cured by a new notice ...”85 In closing, GAO stated, “contracting with the Government is a privilege, not a legal right.”86

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80. 310 U.S. 113, 127 (1940).
81. *Id.* at 116–17.
82. *Id.* at 129.
83. *Id.* at 127 (emphasis added).
85. *Id.* at *4.
86. *Id.* at *5 (emphasis added).
2. *Gonzales v. Freeman* (1964)

“Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.”

In *Gonzales v. Freeman*, appellant Thos. P. Gonzalez Corporation (Gonzalez) stood tall in the daunting shadow of *Perkins v. Lukens Steel*, which many believed suggested that contractors could not challenge their exclusion from contracting with the Government because the ability to contract with the Government was a privilege, not a right. Gonzalez sought a declaratory judgment in the U.S. District Court for the District of Columbia challenging the Commodity Credit Corporation’s (CCC) debarment decision. In January of 1960, Gonzalez, which had been doing business with the CCC for a number of years, learned via telegram that it was “suspended from participating in any programs of the Commodity Credit Corporation pending completion of an investigation regarding misuse of [official inspection] certificates issued by the Commodity Credit Corporation” regarding beans exported to Brazil. After Gonzalez lingered in a state of suspension for nearly two and a half years while awaiting the CCC’s final determination, on May 24, 1962, after considering Gonzalez’s statement in opposition, the CCC informed Gonzalez that it “ha[d] been debarred … for a period of five years effective as of January 13, 1960 …”

After the district court upheld the agency’s conduct, Gonzalez appealed to the D.C. Circuit challenging the propriety of the CCC’s debarment procedures. Chief Justice Warren Burger, then a judge for the D.C. Circuit, first set the stage by recognizing that *Perkins* held that “no citizen has a ‘right,’ in the sense of a legal right, to do business with the government.” Judge Burger then indicated that the “use of such terms as ‘right’ or ‘privilege’ tends to confuse the issue presented by debarment action. Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave consequences.” While acknowledging that one may not have a “‘right’ to government contracts,” Judge Burger stated, “that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts.” After paying homage to *Perkins* but then signaling that the

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88. Id. at 573.
89. Id. at 572 n.2.
90. Id. at 572 n.3.
91. Id. at 574 (citing Perkins v. Lukens Steel Co., 310 U.S. 113 (1940)).
92. Id.
93. Id. (emphasis added).
Supreme Court’s ruling should be narrowly interpreted, the court decided each of the issues on appeal. Each of these rulings was instrumental to the foundation currently underlying the present-day suspension and debarment system:

- **Issue 1**: “Does debarment of a government contractor from eligibility for purchase of surplus commodities give rise to a justiciable controversy if it is alleged that debarment was imposed without due process?”
  
  **Holding**: Yes. “An allegation of facts which reveal an absence of legal authority or basic fairness in the method of imposing debarment presents a justiciable controversy in our view. The injury to appellants alleged in their complaint gives them standing to challenge the debarment processes by which such injury was imposed.”

- **Issue 2**: “Did Congress provide for judicial review of the debarment process conducted by Commodity Credit?”
  
  **Holding**: Yes. “We read section 10(b) of the Administrative Procedure Act . . . as providing that whenever judicial review is not ‘specified by statute’ or is inadequate ‘any applicable form of legal action’ . . . may be brought ‘in any court of competent jurisdiction.’ . . . [A]lthough this is not agency action for which Congress has specifically provided judicial review, debarment here is ‘final agency action for which there is no other adequate remedy in any court’ . . . under Section 10(c).”

- **Issue 3**: “May debarment of a government contractor be imposed without express statutory authority?”
  
  **Holding**: Yes. “[S]uch a power is inherent and necessarily incidental to the effective administration of the statutory scheme.”

- **Issue 4**: “If Commodity Credit has legal authority to debar, can appellants be debarred:
  
  “(a) in the absence of regulations establishing standards and procedures, and
  
  “(b) in the absence of written notice of charges, evidentiary hearings and findings on charges of misconduct?”
  
  **Holding**: No. “Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence

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94. *Id.*
95. *Id.* at 573–74.
96. *Id.* at 574–75 (citing Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 370–71 (1961)).
97. *Id.* at 574.
98. *Id.* at 576 (quoting 5 U.S.C. § 1009(b), (c) (1958); 60 Stat. 243 (1946)).
99. *Id.* at 574.
100. *Id.* at 577.
101. *Id.* at 574.
and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.”

Despite not expressly recognizing that due process considerations were in play, the court found that “basic fairness” requires that there be procedures requiring notice to the contractor and opportunity to be heard. The D.C. Circuit predicated its instrumental holding on the harm or “grave economic consequences” associated with debarment. The court recognized that depending upon a variety of factors, including the “size and prominence of the contractor … [and] the ratio of his government business to non-government business,” debarment may cause a “sudden contraction of bank credit, adverse impact on market price of shares of listed stock, if any, and critical uneasiness of creditors generally, to say nothing of ‘loss of face’ in the business community.”

While the court largely focused on the impact of debarment, it seemed to recognize that the same harm could be suffered as a result of a “suspension” if the period of suspension was not “reasonable.” The D.C. Circuit’s opinion in Gonzalez was monumental and acted as a springboard for subsequent challenges, which led to additional refinements, including changes to suspension procedures.

3. Horne Brothers, Inc. v. Laird (1972)

Any suspension “beyond a thirty day period is more fairly likened to a preliminary injunction after notice, maintainable only on the showing of adequate evidence that is not self-determined.”

Nearly a decade after its decision in Gonzalez, in 1972, the D.C. Circuit issued a key holding in Horne Brothers, Inc. v. Laird, which resulted in a significant change in suspension procedures. Horne Brothers, Inc. (Horne Brothers) challenged the Navy’s suspension decision arguing that the Navy violated law by refusing to award it a naval vessel repair contract. Relying upon Gonzalez in part, the court found that “an action that ‘suspends’ a contractor and contemplates that he may dangle in suspension for a period of one year or more, is such as to require the Government to insure fundamental fairness to the contractor whose economic life may depend on his ability to bid on government contracts.” Because the Navy rejected Horne Brothers’ bid only three weeks after its suspension, the court did not find any error.

102. Id. at 578.
103. Id.
104. Id. at 574.
105. Id. (emphasis added).
106. See id. at 579 (“Conceivably a summary debarment, in the nature of a temporary suspension, might be warranted for a reasonable period pending investigation . . . .”).
108. Id.
109. Id. at 1269.
110. Id. at 1271.
in the agency’s conduct, finding that the Government should be afforded a reasonable period of time before being required to give the contractor an opportunity to be heard.\footnote{111. Id. at 1272.}

Importantly, the court held that any suspension “\textit{beyond a thirty day period is more fairly likened to a preliminary injunction after notice, maintainable only on the showing of adequate evidence that is not self-determined}.”\footnote{112. Id. (emphasis added).} In an effort to define the type of evidence needed, the court indicated that the evidence need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. This is less than must be shown at the trial, but it must be more than uncorroborated suspicion or accusation.\footnote{113. Id. at 1271.}

The court recognized that by the time of its opinion, “[t]he suspension of Horne has lasted for over 5 months,” which caused “numerous additional” bids to have been rejected because of Horne Brothers’ suspended status.\footnote{114. Id. at 1273 n.10.} The court seemed to find this unacceptable given that Horne Brothers had not yet been given an “opportunity to be heard.”\footnote{115. Id.} After so finding, the court suggested to the lower court that it had the power to “fashion” appropriate relief.\footnote{116. Id.}

\textit{Horne Brothers} was instrumental in changing existing suspension procedures. The regulations require the Government to have “adequate evidence” of a cause for suspension before suspending a contractor, and further require that the Government notify the contractor of the suspension immediately upon imposition and afford contractors the opportunity to submit a written response within thirty days of being suspended.\footnote{117. FAR 9.407-1(b)(1).} The \textit{Horne Brothers} decision, nonetheless, overlooked or discounted the immediate harm experienced by the contractor as a result of suspension—loss of the ability to compete for awards while the investigation proceeds—apparently under the belief that any harm to the contractor is outweighed by the Government’s potential exposure to non-responsible contractors. This belief, however, appears questionable given that the court did not discuss the agency’s basis or need for the suspension.


\textit{In assessing administrative action, the dictates of due process require the balancing of three factors, which consider the relevant private and government interests.}

\textit{Mathews v. Eldridge}\footnote{118. 424 U.S. 319 (1976).} establishes the framework for analyzing whether the Government’s administrative procedures comport with due process. The
particular facts before the Supreme Court did not concern suspension or debarment practices, but rather the procedures associated with the termination of Social Security benefits, which the Court recognized are due process property interests. Nonetheless, the Court devised a general balancing test to be applied to all government actions adversely affecting due process rights, including life, liberty, and property interests.\footnote{119. \textit{Id.} at 334.}

The Court made clear that a due process inquiry must be conducted on the basis of the particular procedures in question as applied to the interests at stake.\footnote{120. \textit{Id.}} “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”\footnote{121. \textit{Id.} (internal citation omitted).} The Court identified the competing interests that must be balanced stating, “resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected.”\footnote{122. \textit{Id.} (internal citation omitted).} Specifically, the “dictates of due process generally require[] consideration of three distinct factors” including

- “the private interest that will be affected by the official action”,\footnote{123. \textit{Id.} at 335.}
- “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”;\footnote{124. \textit{Id.}} and
- “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”\footnote{125. \textit{Id.}}

Before the Court was the question of whether an oral evidentiary hearing was required prior to the termination of disability benefits.\footnote{126. \textit{Id.} at 323.} The Court stated that the general rule is “that something less than an evidentiary hearing is sufficient prior to adverse administrative action.”\footnote{127. \textit{Id.} at 343.} In determining that the procedures applied were sufficient and an oral hearing was not required, the Court focused on the fairness of existing procedures, the likely value of a hearing, and the added costs associated with such a hearing.\footnote{128. \textit{Id.} at 343, 347.} Importantly, in reaching this conclusion, the Court recognized the benefit recipient had been given \textit{pretermination notice} of the agency’s tentative assessment along with a copy of the assessment, a summary of relevant evidence, and an opportunity to submit rebuttal evidence or argument—all \textit{prior} to the cutoff of any benefits.\footnote{129. \textit{Id.} at 346.}
Mathews v. Eldridge does not identify what due process requires prior to the imposition of suspension or debarment. Nonetheless, the Supreme Court provided lower courts with a flexible formula for assessing administrative conduct. Thus, in the wake of Mathews v. Eldridge, courts recognize that in assessing suspension or debarment procedures, it is necessary to balance the private contractor’s liberty interests in protecting its reputation and ability to compete for new contracts versus the Government’s interest in being able to eradicate nonresponsible contractors from the system. While Mathews v. Eldridge was a pivotal decision for assessing agency conduct generally, subsequent decisions fleshed out what is specifically required in the suspension and debarment context.


In the context of de facto debarment, due process requires that the contractor be “notified of the specific charges concerning the contractor’s lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit” before being denied a contract award.130

Four years later, in a landmark decision, the D.C. Circuit in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*,131 expanded upon the “fairness” concerns expressed in *Gonzalez* and *Horne Brothers* by applying Mathews v. Eldridge in the suspension and debarment context. The court found that a contractor’s due process liberty interests are implicated when, based upon “integrity” concerns, the Government deems the contractor unfit for contract awards.132 The appellant defined the liberty interest as “a right to be free from stigmatizing governmental defamation having an immediate and tangible effect on its ability to do business.”133 As to the impact of the stigmatization, the court stated that “it is precisely the ‘accompanying loss of government employment’ and the ‘foreclosure from other employment opportunity’ which is the injury resulting from the Government defamation complained of in this case.”134 After recognizing that “the very economic life of the contractor may be in jeopardy,” the court identified the due process required, stating that the contractor should be “notified of the specific charges concerning the contractor’s lack of integrity so as to afford the contractor the opportunity to respond to and

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131. *Id.*
132. *Id.* at 961, 963, 966.
133. *Id.* at 961.
134. *Id.* at 966; see also Nathanael Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora’s Box*, 29 PUB. CONT. L.J. 637, 675–76 (2000) (discussing the Old Dominion ruling); Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?* 44 CATH. U. L. REV. 363, 395 (1995) (recognizing that the Old Dominion court “concluded that the combined stigma to the contractor and the accompanying loss of government work satisfied the Paul stigma-plus test”).
attempt to persuade the contracting officer, in whatever time is available, that the allegations are without merit” before being denied a contract award.\textsuperscript{135}

Unlike the prior cases, which involved administrative suspension or debarment, \textit{Old Dominion} involved \textit{de facto} debarment, as discussed \textit{supra} Part II.A.2. Specifically, the Contracting Officer, in assessing Old Dominion’s responsibility prior to making award, determined that Old Dominion “lacked integrity”\textsuperscript{136} and did not award it the contract based upon an “audit report which raised the possibility that Old Dominion had violated the terms of an existing contract and overcharged the Government.”\textsuperscript{137} Importantly, the Government never informed Old Dominion of the allegations against it or that contracts were denied on that basis despite that a number of conversations took place between the Government and Old Dominion prior to the determination and between the time when the determination was made and when the contracts were lost.\textsuperscript{138} The court did, however, find that “the determination that Old Dominion lacked integrity had already been communicated through Government channels and undoubtedly would have been recommunicated every time ODDPI bid on a subsequent contract.”\textsuperscript{139}

In rejecting the Government’s argument that corporations do not have due process liberty interests, the court stated that “a corporation may contract and may engage in the common occupations of life, and should be afforded no lesser protection under the Constitution than an individual to engage in such pursuits.”\textsuperscript{140} In finding that Old Dominion had such rights and the ability to challenge the procedures by which it was barred from government business, the court relied upon the reasoning in \textit{Gonzalez} and found that while a contractor may not have a “right” to a government contract, it has a right to challenge arbitrary government action that deprives it of the ability to compete for government business.\textsuperscript{141} \textit{Old Dominion} was instrumental in recognizing the important rights at stake when the Government is investigating whether a contractor should have the ability to compete for contracts. The court’s reasoning seems to rest at least in part on the policy rationale that when considering the interests of both parties, the economic harm inflicted upon Old Dominion when it was deemed to lack integrity outweighed the inconvenience associated with having to notify the contractor prior to taking action and awaiting a response.\textsuperscript{142}

\textsuperscript{135} \textit{Old Dominion}, 631 F.2d at 968 (emphasis added).
\textsuperscript{136} \textit{Id.} at 963.
\textsuperscript{137} \textit{Id.} at 960.
\textsuperscript{138} \textit{Id.} at 966.
\textsuperscript{139} \textit{Id.} at 966 n.24.
\textsuperscript{140} \textit{Id.} at 962.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.} at 969 (“On March 21, a determination was made that Old Dominion lacked integrity. On that same day, that determination and accompanying reasons were wired to the contracting officer on Yokohama. \textit{There is no reason why that same report could not have been wired to Old Dominion; the effort required to do so would have been minimal.”} (emphasis added).
Notably, in an effort to address its concern with the fact that the Government’s informal action—the denial of contract awards—could have “continued indefinitely with absolutely no recourse for the contractor,” the court created a distinction between “formal Government action” and informal action.\textsuperscript{143} Regarding the informal action in the case, the court stated, “[t]he injury complained of in this case is the loss of contracts before Old Dominion was ever suspended, \textit{not} the loss of contracts after suspension but before suspension procedures were able to be implemented.”\textsuperscript{144} While there is a distinction between the two procedures, the practical result of both \textit{de facto} debarment and suspension is identical: loss of the ability to receive new contracts. Although suspension procedures were not before the court, had the court believed existing suspension procedures adequately protected contractors’ due process rights, it could have followed the approach used in the suspension context and simply required notification to the contractor shortly after being denied a contract award based upon responsibility concerns. Rather, and although speculative, it may have created a distinction between suspension and \textit{de facto} debarment simply because it believed that being deprived of contract awards is a devastating economic penalty that should not occur until the contractor is given the opportunity to be heard. Overall, given the similar effect associated with \textit{de facto} debarment and exclusion through suspension or the issuance of a notice of proposed debarment, the reasoning in \textit{Old Dominion} supports the notion of providing pre-exclusion notice and opportunity to be heard.


“\textit{D}ue process in this case required notice sufficiently specific to enable appellants to marshal evidence in their behalf so as to make the subsequent opportunity for an administrative hearing a meaningful one.”\textsuperscript{145}

In \textit{Transco Security, Inc. of Ohio v. Freeman}, Transco filed suit seeking to set aside GSA’s decision to suspend it from contracting based upon alleged billing irregularities and misrepresentations and to enjoin GSA from making a contract award to another contractor despite Transco’s being the low bidder.\textsuperscript{146} Transco asserted that GSA violated its due process rights by denying it a hearing and by providing deficient notices.\textsuperscript{147}

Before the court were regulations adopted following the \textit{Horne Brothers} decision.\textsuperscript{148} In assessing the adequacy of the regulations, which allowed agencies to deny hearing requests where the hearing “would ‘adversely affect possible civil or criminal prosecution,’” the court balanced the Government’s

\begin{footnotes}
\item[143.] Id. at 966 (emphasis omitted).
\item[144.] Id. at 967 (emphasis added).
\item[145.] Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 324 (6th Cir. 1981).
\item[146.] Id. at 319–20.
\item[147.] Id. at 320.
\item[148.] Id. at 321 (citing Horne Bros. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972)).
\end{footnotes}
interest and the private interest,\textsuperscript{149} as required by \textit{Mathews v. Eldridge}.\textsuperscript{150} The Government’s interests included the right to procure services and to protect the integrity of a possible criminal prosecution, whereas Transco’s interests included the “liberty interest not to be denied the opportunity to bid on, and be awarded government contracts while under the cloud of a charge of fraud.”\textsuperscript{151}

In contrasting the \textit{Horne Brothers} situation, wherein the contractor was not given an opportunity to rebut the Government’s evidence, the court recognized that the newly minted regulations addressed the previous problems identified in \textit{Horne Brothers} and provided the contractor with notice and an opportunity to address the evidence.\textsuperscript{152} “Thus under the current regulations, suspended contractors will not ‘dangle in suspension for a period of one year or more’ before being given an opportunity to rebut charges.”\textsuperscript{153} The court recognized, however, that while this opportunity will likely cure errors in most circumstances, it is only “meaningful if the notice is sufficiently specific to permit the contractor to collect and present relevant evidence refuting the charges contained therein.”\textsuperscript{154}

Turning to the “adequacy of the notice provided,” the court found that the notice was inadequate.\textsuperscript{155} “The general notice . . . did not permit adequate preparation for participation in a meaningful way in any forthcoming hearing or equivalent proceeding.”\textsuperscript{156} Specifically, the court recognized that the notice provided indicated that Transco was suspended for “billing irregularities,” among other allegations, yet the notice did not specify the contracts allegedly affected by, or the approximate date of, the “misbillings.”\textsuperscript{157} The court stated that, given what the Government provided, “it would be at best onerous and at worst virtually impossible to effectively gather and present relevant information refuting this general charge.”\textsuperscript{158} Ultimately, the court recognized the Government’s right to protect the “secrecy of its ongoing criminal investigation by not disclosing its evidence at this stage of the proceeding” but held that “due process in this case required notice sufficiently specific to enable appellants to marshal evidence in their behalf so as to make the subsequent opportunity for an administrative hearing a meaningful one.”\textsuperscript{159}

\begin{thebibliography}{9}
\item 149. \textit{Id}. at 321–22 (quoting 41 C.F.R. § 1.1-605-4(e) (1975)).
\item 150. 424 U.S. 319 (1976).
\item 151. Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 322 (6th Cir. 1981).
\item 152. \textit{Id}.
\item 153. \textit{Id}.
\item 154. \textit{Id}. at 322–23.
\item 155. \textit{Id}. at 323.
\item 156. \textit{Id}.
\item 157. \textit{Id}.
\item 158. \textit{Id}.
\item 159. \textit{Id}. at 324.
\end{thebibliography}

Due process requires a sufficiently detailed notice of suspension, which enables the contractor to get its "ducks in a row," the provision of sufficient evidence to inform the contractor of allegations, and adequate proceedings.

In ATL, Inc. v. United States, the Court of Appeals for the Federal Circuit applied the aforementioned groundbreaking rulings in evaluating the Navy’s suspension. ATL largely focused on what “due process” requires and identified precisely what the Government must provide in terms of a notice of suspension, the sufficiency of the evidence provided to the contractor, and the adequacy of the proceeding afforded. The Navy suspended ATL Inc. (ATL) based upon allegations that it knowingly submitted false certifications relating to compliance with the wage requirements under the Davis-Bacon Act, and for accepting payment for work never performed, among other allegations that were eventually dropped. The court stated that

in suspension cases it is recognized that, although a citizen has no right to a Government contract, and a bidder has no constitutionally protected property interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty. Accordingly, the minimum requirements of due process come into play.

In undertaking the Mathews v. Eldridge three-part “due process balancing analysis,” the court first considered the sufficiency of the Navy’s notice and, relying upon Transco, stated that “[t]he notice must be ‘sufficiently specific to permit the suspended contractor to collect and present relevant evidence refuting the charges contained therein.’” Where the agency denies the contractor an adversary hearing and provides merely for submission of information in opposition, a more “specific notice” is needed. The court further stated that where, as here, the Navy has “strung along” the contractor, “such specificity in notice is similarly critical, so that the contractor may rapidly prepare a thorough rebuttal.” Despite this seemingly high notice burden, the court held that the “notice does pass constitutional muster in this first step of the suspension process,” finding that it identified the contract at issue, “the type and location of work,” the names of the ATL employees allegedly involved, and the names of the allegedly underpaid workers. The

161. Id. at 682–87.
162. Id.
163. Id. at 681, 683.
164. Id. at 683 (third and fourth emphases added).
165. Id. at 684 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
166. Id. at 683 (citation omitted).
167. Id.
168. Id.
169. Id.
court found that “ATL could begin immediately to marshal a rebuttal” based upon the notice.\footnote{170}

As to the sufficiency of the evidence provided to ATL, the court found that “process was lacking.”\footnote{171} After recognizing that “the Government’s interest in protecting an ongoing criminal investigation is great,” the court indicated that

this cannot extend to obdurate uncooperativeness where the suspended contractor’s interest likewise is great. \textit{The Navy must not allow a busy U.S. attorney to dictate the terms of a civil investigation}. Instead, these agencies must work to “carve out” as much evidence as is reasonable for release to the contractor.\footnote{172}

While the court recognized that at least part of the information desired by ATL should have been in its very own possession and seemed to believe that the information sought was not necessarily critical to ATL’s rebuttal, the court appeared concerned with the Navy’s apparent willingness to take direction from the U.S. attorney’s office and its unnecessarily “secretive attitude”\footnote{173} in that the “Navy flatly denied ATL additional information or even access to basic documents . . . .”\footnote{174}

Indeed, with the wisdom of hindsight, we see that the Navy might have avoided this entire litigation process had it been up front with ATL from an early date . . . [or] pushed the U.S. attorney for maximum reasonable disclosure of documents and information, and included this in its suspension notice—or at least provided it shortly thereafter.\footnote{175}

The court ultimately held that “where the Navy is taking a flat-out position denying fact-finding,” the suspended contractor is due, at a minimum, a “prompt give-and-take, step-by-step cooperative process.”\footnote{176}

As to the adequacy of the proceedings that the agency must provide, the court reversed the lower court’s finding that ATL should be provided “an opportunity to confront its accusers and cross-examine witnesses,” stating that “[a] full blown trial-type hearing is not necessarily the process due a temporarily suspended contractor with a protected liberty interest, where the Government’s interest in protecting an ongoing criminal investigation is considerable.”\footnote{177} In affirming the lower court’s decision to stay the contract awards and to grant ATL a new hearing on the suspension charges, the court

\footnotesize{170. \textit{Id.} at 684.\footnote{171. \textit{Id.} at 685.\footnote{172. \textit{Id.} (emphasis added).\footnote{173. \textit{Id.}\footnote{174. \textit{Id.} at 684 (emphasis added).\footnote{175. \textit{Id.} at 686 n.41.\footnote{176. \textit{Id.} at 685. The court did suggest the type of information needed, referring to \textit{Electro-Methods, Inc. v. United States}, 728 F.2d 1471 (Fed. Cir. 1984), stating, “[i]n that case, the board’s full suspension recommendation, signed and dated by three named Air Force officials, was attached to the original suspension notice.” \textit{ATL, Inc. v. United States}, 736 F.2d 677, 687 (Fed. Cir. 1984).\footnote{177. \textit{ATL}, 736 F.2d at 686 (citing ATL, Inc. v. United States, 4 Cl. Ct. 374, 285 (1984)).}}})))}}}
recognized that these procedural safeguards “cannot, of course, compensate for deferred revenues and lost business activity” that ATL had sustained after having been suspended for nearly twelve months. While the court’s findings in ATL were less groundbreaking than other cases before it, the court succinctly spelled out what due process affords a suspended contractor and indicated that the typical concerns associated with a pending criminal investigation do not trump a contractor’s due process rights.


“An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.”

Yet, again, in Cleveland Board of Education v. Loudermill, the Supreme Court, building upon prior decisions, including Mathews v. Eldridge, further defined what due process requires before an individual is deprived of life, liberty, or a property interest. Before the Court was the question of whether a school security guard had a right to a hearing before being dismissed from his employment. Under the existing procedures, the guard was entitled to a post-dismissal hearing and back wages in the event he prevailed. The Court recognized the competing interests at stake: “the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of erroneous termination.”

The Court’s analysis of each of these interests is worthy of close examination as they are sufficiently analogous to suspension and debarment cases. “First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.”

“Second, some opportunity for the employee to present his side of the case is recurringly [sic] of obvious value in reaching an accurate decision.” After recognizing these important interests, the Court stated, “[t]he governmental interest in immediate termination does not outweigh these interests [because] … affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.”

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178. Id. at 687.
182. Id. at 536.
183. Id. at 536 n.1.
184. Id. at 542–43.
185. Id. at 543.
186. Id.
187. Id. (emphasis added).
Ultimately, the Court held that dismissal without a prior hearing was a denial of due process, stating that “[t]he essential requirements of due process … are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.”\textsuperscript{188} The Court explained the purpose of this basic requirement, stating that “the predetermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.”\textsuperscript{189}

While focusing on Loudermill’s claim of a deprivation of his property interest,\textsuperscript{190} importantly, the Court seemed to recognize that a predetermination hearing is required before any “deprivation of life, liberty, or property” interests,\textsuperscript{191} but it indicated that while such a hearing is “necessary, [it] need not be elaborate…. [T]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of subsequent proceedings.”\textsuperscript{192} While \textit{Cleveland Board of Education} involved the dismissal (\textit{i.e.}, exclusion) of a security guard, not a government contractor, and the analysis employed by the school and focus of its review were distinct from that employed by an SDO during a responsibility determination, the Supreme Court’s broad ruling at least raises some questions regarding the constitutionality of exclusion without notification, whether through the issuance of a notice of suspension or proposed debarment.\textsuperscript{193}

\begin{itemize}
\item \textsuperscript{188} Id. at 546 (emphasis added).
\item \textsuperscript{189} Id. at 545–46.
\item \textsuperscript{190} Id. at 538 n.3.
\item \textsuperscript{191} Id. at 542 (citing Boddie v. Connecticut, 401 U.S. 371, 378 (1971)).
\item \textsuperscript{192} Id. at 545.
\item \textsuperscript{193} While the Supreme Court has not yet considered this issue, at least one district court has found that the current practice comports with due process. See \textit{Mainelli v. United States}, 611 F. Supp. 606, 614 (D.C.R.I. 1985) (considering “whether due process required a pre-suspension hearing here” and stating, “it has been consistently held that due process is satisfied so long as a contractor who is \textit{formally suspended}, … has a meaningful rebuttal opportunity—whether it be an oral hearing or otherwise—after the suspension”). Relying upon \textit{Horne Brothers} and cases that followed, the court stated that “[b]ecause prior decisional law has balanced the competing interests and held that a post-suspension hearing within thirty days is sufficient, and because that principle has been incorporated into the suspension regulations challenged here I cannot find probable success in plaintiffs’ procedural due process claim.” Id. Given that the court seemed to rely exclusively upon decisions preceding the \textit{Cleveland Board of Education} ruling, and did not conduct any analysis of its own, the finding is not particularly persuasive. See \textit{also Rutigliano Paper Stock, Inc. v. U.S. Gen. Servs. Admin.}, 967 F. Supp. 757, 765 (E.D.N.Y. 1997) (while not involving a challenge to the use of suspension without prior notification, the court recognized that “[i]n the government contracting context several courts have considered the strength of this liberty interest and have held that its curtailment does not require a hearing prior to the suspension” (citing \textit{Mainelli}, 611 F. Supp. at 614)). But see \textit{Reeve Aleutian Airways, Inc. v. United States}, 982 F.2d 594 (D.C. Cir. 1993), involving a contractor’s challenge to the notice and hearing provided after a suspension without prior notification, and recognizing that “CARB’s suspension of Reeve, which (at least formally) did not affect Reeve’s ability to obtain government work outside of the DOD and which ceased as soon as corrective actions were taken, \textit{did not amount to as severe a deprivation...}

“FAR requires that administrative hearings comport with due process notions of ‘fundamental fairness,’”194 which requires “notice and an opportunity for [a] hearing appropriate to the nature of the case,”195 and “the FAR’s due process requirements have been deemed satisfied when the contractor has been provided all of the information relied on by the suspending official.”196

In *Lion Raisins, Inc. v. United States*, the plaintiff, a family-owned and operated grower and seller of raisins, alleged that the U.S. Department of Agriculture (USDA) violated the FAR by suspending it, arguing that its alleged conduct did not affect its present responsibility to perform government contracts, and that the USDA violated the FAR and due process in conducting a hearing.197 The USDA suspended the plaintiff for one year after conducting an investigation and concluding that the plaintiff falsified USDA certificates, finding that these falsifications constituted “a lack of business integrity or business honesty that seriously and directly affect[ed] the present responsibility.”198

In assessing the USDA’s suspension decision, the court found that even if the alleged conduct evidenced a cause for suspension, the USDA abused its discretion because it was aware of the information underlying its suspension decision for years and had since awarded plaintiff five contracts, finding each time that “plaintiff’s business practices met the standards for present responsibility.”199 The court noted, “the suspension appears to be in the nature of punishment because the USDA does not deny that, although it believed plaintiff to be responsible between May 1999 and December 2001, it suspended plaintiff solely for conduct of which the USDA was apprised fully in May 1999.”200 As the suspension decision merely relied upon the original alleged act and offered no additional information as to why suspension was “immediately necessary to protect government interests,” it “was arbitrary and capricious.”201

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195. *Id.* (citing Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981)).

196. *Id.* at 250.

197. *Id.* at 247.

198. *Id.* at 241.

199. *Id.* at 247.

200. *Id.* at 249.

201. *Id.* at 247–48. The court also quoted *Sloan v. Dep’t of Housing and Urban Dev.*, 231 F.3d 10, 17 (D.C. Cir. 2000) (“There must be a real need for immediate action to protect the public interest in order to justify a suspension.”).
The plaintiff also alleged that the hearing failed to comport with due process, relying on FAR 9.407-3(b)(2), which applies where the suspension is not based on an indictment and there exists a genuine dispute over material facts as a result of the contractor’s submission, and affords contractors the opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents. The plaintiff argued that (1) it was not afforded discovery prior to the hearing; (2) it was not afforded the opportunity to cross-examine the USDA’s witnesses; (3) Dr. Clayton, the suspending official, was also the hearing official; and (4) Dr. Clayton refused to address the issue of whether plaintiff presented an immediate threat to the public and/or overlooked substantial changes made by plaintiff in its operations since 1998.

The court recognized that “[t]he FAR requires that administrative hearings comport with due process notions of ‘fundamental fairness,’ ” which require “notice and an opportunity for [a] hearing appropriate to the nature of the case,” and “[t]he FAR’s due process requirements have been deemed satisfied when the contractor has been provided all of the information relied on by the suspending official.” The court concluded that the hearing comported with due process, stating that FAR 9.407-3(b)(2) was not applicable “because plaintiff had not established the requisite issue of material fact.”

The aforementioned judicial decisions assisted tremendously in bringing about the evolution of the suspension and debarment system from its early draconian ways to its present position, closer to fundamental fairness. Nonetheless, it is unclear whether current regulations governing suspension and the use of notices of proposed debarment comport with due process, given Loudermill. Putting aside what due process technically requires, which is a determination that is subjective and based in part upon the views of the presiding court, an examination of the current system will show that refinements are necessary to make the system fairer and to enhance the system’s integrity and effectiveness.

III. SUSPENSION AND DEBARMENT UNDER THE FAR

A. Suspension and Debarment Policy

Suspension and debarment are powerful weapons at the Government’s disposal. Upon imposition, suspension and debarment eradicate wrongdoers

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202. Id. at 250 (quoting FAR 9.407-3(b)(2)).
203. Id. at 249. As to plaintiff’s allegation that it was improper for Dr. Clayton to serve as both hearing official and suspending official, the court dodged the issue, stating that “plaintiff makes no specific argument demonstrating that Dr. Clayton’s dual role violated the FAR or was otherwise inappropriate.” Id. at 250.
204. Id. at 249.
205. Id.
206. Id. (citing Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981)).
207. Id. at 250.
208. Id.
or suspected wrongdoers from the government procurement system, thereby serving to protect the Government from any risks that would have been presented by entering into new contracts with that contractor. Because of the devastating consequences, suspension and debarment instill fear in contractors and, thus, likely have a deterrent effect. Despite the negative and sometimes fatal effects of suspension and debarment, which some have likened to the “death penalty,”209 the stated purpose underlying these devices is not to punish but rather to protect the Government from the potential consequences of contracting with nonresponsible contractors.210 Just like financial institutions may elect not to make loans to applicants with poor credit histories, the Government similarly does not want to deal with contractors that have demonstrated an inability to act honestly or lawfully or to satisfy their contractual obligations.

The suspension and debarment regulations exist in FAR Subpart 9.4, and agencies are authorized to issue agency-specific supplemental procedures.211 The FAR instructs agencies to solicit offers, award contracts, and consent to subcontracts with “responsible contractors only.”212 Because of the “serious nature” of suspension and debarment, these tools only are to be imposed when in the “public interest for the Government’s protection.”213 The courts have recognized the important role played by suspension and debarment.

The security of the United States, and thus the general public, depends upon the quality and reliability of the items supplied by these contractors.... Debarment reduces the risk of harm to the system by eliminating the source of the risk, that is, the unethical or incompetent contractor.214 Therefore, by removing nonresponsible contractors from the system, these tools act to protect not only the agency carrying out the act but also all those agencies that may have had the misfortune of entering into a contract with the nonresponsible contractor but for its removal.215

B. Causes for Suspension and Debarment

While the suspension and debarment regulations contain separate sections identifying “causes” for debarment and suspension, in large part, the “causes” for both are very similar. Both contain several specific causes and also contain

210. FAR 9.402(b).
211. FAR 9.406-3(a), 9.407-3(a).
212. FAR 9.402(a).
213. FAR 9.402(b).
214. Caiola v. Carroll, 851 F.2d 395, 398–99 (D.C. Cir. 1988) (emphasis added) (recognizing, however, that “[t]he federal acquisition regulations system operates on the assumption that all individuals with whom the government does business are persons of integrity who abide by the terms of their government contracts”).
215. See id.
blanket provisions, which, in essence, authorize the Government to suspend or debar contractors for incompetence or dishonesty. The blanket provisions provide that contractors may be suspended or debarred for committing any offense indicating “a lack of business integrity or business honesty” or “any other cause of so serious or compelling a nature” that affects the contractor’s present responsibility.  

While the specific causes for suspension and debarment are similar, the important difference between the two is that suspension deals with suspected actions or inactions whereas debarment pertains largely to actions or inactions that have resulted in a conviction or civil judgment. Both FAR 9.406-2 and 9.407-2 set forth a list of “causes” that includes:

1. Commission of fraud or a criminal offense in connection with—
   (i) Obtaining;
   (ii) Attempting to obtain; or
   (iii) Performing a public contract or subcontract.
2. Violation of Federal or State antitrust statutes relating to the submission of offers;
3. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;
5. Intentionally affixing a label bearing a “Made in America” inscription (or any inscription having the same meaning) to a product sold in or shipped to the United States or its outlying areas, when the product was not made in the United States or its outlying areas . . .;
6. Commission of an unfair trade practice . . .; [and]
7. Delinquent Federal taxes in an amount that exceeds $3,000.  

The debarment provisions include a few additional causes. Contractors may be debarred for violating terms of a government contract or subcontract that are so serious as to justify debarment, including willful failure to perform in accordance with contract terms, a history of failure to perform, or a history of unsatisfactory contract performance. Further, contractors may be debarred for failure to comply with the Immigration and Nationality Act employment provisions. Where the proposed debarment is not based upon a conviction or civil judgment, the cause for debarment must be established by a preponderance of the evidence. Although these “causes” appear expressly in the debarment provision unlike the suspension provision, arguably, these violations are subsumed within the broad blanket provisions contained in both provisions. The key difference between the suspension and debarment provisions is that debarment, with limited exceptions, is typically

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217. FAR 9.407-2(a); see also FAR 9.406-2.
219. Id.
220. FAR 9.406-3(d)(3).
only taken where a conviction or civil judgment exists, demonstrating that
the contractor committed the underlying acts, whereas suspension may be
imposed based upon suspected actions and inactions so long as “adequate
evidence” exists.

C. The Mandatory Disclosure Rule: A New Cause
for Suspension and Debarment

Recently, the FAR Council amended the FAR to “amplify the requirements
for a contractor code of business ethics and conduct, an internal control sys-
tem, and disclosure to the Government of certain violations of criminal law,
violations of the civil False Claims Act, or significant overpayments.” As it
relates to this Article, the new rule requires contractors to “timely disclose”
to the Government “credible evidence” of such violations or overpayments
or face suspension and debarment from government business. Thus, the
new rules create an additional ground for both suspension and debarment. It
provides:

[K]nowing failure by a principal, until 3 years after final payment on any Government
contract awarded to the contractor, to timely disclose to the Government, in con-
nection with the award, performance, or closeout of the contract or a subcontract
thereunder, credible evidence of—

A. Violation of Federal criminal law involving fraud, conflict of interest, bri-
bery, or gratuity violations found in Title 18 of the United States Code;
B. Violation of the civil False Claims Act [31 U.S.C. §§ 3729–3733]; or
C. Significant overpayment(s) on the contract, other than overpayments re-
sulting from contract financing payments as defined in FAR 32.001, Defi-
nitions.

While the effects of this rule provide fertile ground for an entirely inde-
pendent article, in short, it is likely to result in an increase in the number of
suspension and debarment actions initiated in the coming years either for
failure to disclose credible evidence or for the conduct underlying the disclo-
sure. Given that the Government is now requiring contractors to self-report,
basic fairness weighs in favor of not skewering contractors with immediate
exclusion based upon the conduct underlying their disclosure. While time
may show that most agencies will not proceed in this manner, even an occa-
sional suspension following a disclosure is cause for concern. In any event, if
contractors believe they are likely to be excluded for disclosing such conduct,
some contractors may not see any benefit in complying with the rule given the
consequences, which will undermine the effectiveness of the rule. In order for

Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program
and Disclosure Requirements, 73 Fed. Reg. 67,064 (Nov. 12, 2008) (amending FAR 52.203-13,
Contractor Code of Business Ethics and Conduct, and FAR 9.4, relating to suspension and
debarment).
223. Id.
the system to function properly, upon receiving a contractor disclosure that raises responsibility concerns, agencies should give contractors the opportunity to fully investigate the underlying conduct and make a present responsibility presentation before the agency considers suspension or debarment.

D. Practice and Procedure

While the causes for suspension and debarment are largely the same and produce immediate effects that feel identical to the excluded party, the procedures associated with each are starkly different.

1. Debarment

The SDO has the responsibility and discretion to determine whether debarment is in the Government’s interest and may debar a contractor for any of the recognized causes where doing so is in the public interest. Notably, the SDO cannot debar a contractor prior to providing notice and opportunity to be heard even where the cause for debarment is a conviction or civil judgment. The existence of a cause for debarment does not require that the contractor be debarred. Because the SDO is assessing present responsibility, the mere existence of a prior illegal or irresponsible act is not dispositive. Rather, the regulations provide that the SDO “should” consider the “seriousness” of the contractor’s acts or omissions and any remedial measures or mitigating factors. In fact, the regulations identify examples of remedial measures and mitigating factors that the SDO should consider, including

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.
(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.
(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.
(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any inves-

224. Notably, the rule does not define the term “credible evidence.”
226. FAR 9.406-3(b)(1) (“These procedures shall afford the contractor … an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.”); FAR 9.406-3(c) (“A notice of proposed debarment shall be issued by the debarring official advising the contractor … [t]hat debarment is being considered ….”).
227. Id.
228. See id.
229. Id. (emphasis added).
tive or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor’s organization that led to the cause for debarment.

(10) Whether the contractor’s management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence. \footnote{230}

These factors embrace the reality that while the contractor, or one of its employees, may have committed an act that at first blush appears to undermine the contractor’s responsibility, circumstances may indicate that despite the act the contractor is presently responsible. While the regulations provide that the SDO should consider these mitigating factors and remedial measures, the existence or nonexistence of any mitigating factors or remedial measures is not determinative of a contractor’s present responsibility. \footnote{231} Nonetheless, where a cause for debarment exists, the burden rests with the contractor to demonstrate its present responsibility and that debarment is unnecessary. \footnote{232}

Where the SDO determines a cause for debarment exists and is inclined to debar, the SDO cannot immediately debar the contractor but is permitted to proceed with a notice of proposed debarment. \footnote{233} The notice must inform the contractor that it has thirty days to submit an opposition. \footnote{234} The notice must also inform the contractor, among other things, that mere notice of proposed debarment acts to exclude the contractor from competing or receiving new contracts until the SDO renders a final decision. \footnote{235} While a notice of proposed debarment results in exclusion, the drafters of the regulations attempted to limit the impact of such exclusion on a contractor by imposing some time restrictions in certain circumstances. Where the cause for debarment is based upon a conviction or civil judgment or there is no genuine dispute over material facts, the regulations require the SDO to render a decision within thirty days of receipt of the contractor’s response to the notice of proposed debarment. \footnote{236} The regulations authorize the SDO to extend this period for “good cause,”

\footnote{230. FAR 9.406-1(a)(1)–(10).}
\footnote{231. FAR 9.406-1(a).}
\footnote{232. Id.}
\footnote{233. FAR 9.406-3(c) (discussing the use of a notice of proposed debarment).}
\footnote{234. FAR 9.406-3(c)(4).}
\footnote{235. FAR 9.405(b), 9.406-3(c).}
\footnote{236. FAR 9.406-3(d).}
however, and do not set forth a maximum time period.\textsuperscript{237} Where disputed facts are involved, the regulations do not require the SDO to act within a certain period of time.\textsuperscript{238} Ultimately, if the SDO decides to debar the contractor after receiving its opposition, notice of the debarment must be provided.\textsuperscript{239}

2. Suspension

Suspension is an interim measure to be imposed “pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government’s interest.”\textsuperscript{240} A contractor may be suspended based upon “adequate evidence” of a cause for suspension.\textsuperscript{241} In assessing the evidence, agencies are directed to consider “how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.”\textsuperscript{242} The existence of a cause for suspension does not require suspension. Rather, the suspending official should consider the “seriousness” of the acts or omissions and may, but, unlike debarment, is not required to, consider remedial measures or mitigating factors such as those discussed above.\textsuperscript{243} The SDO must provide the contractor with “[n]otice of suspension” immediately after being suspended, which must apprise the contractor, among other things, that it has thirty days to submit an opposition.\textsuperscript{244} Importantly, the regulations do not require the SDO to make a decision within a set period of time but do limit the overall length of a suspension to eighteen months.\textsuperscript{245}

The suspension procedures present a stark contrast from debarment procedures in terms of fairness. The SDO can suspend a contractor without providing pre-exclusion notice and a pre-exclusion opportunity to be heard based upon “adequate evidence” where the SDO believes “immediate action

\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} FAR 9.406-3(e). If the debarring official decides to impose debarment, the SDO must provide prompt notice, which refers to the notice of proposed debarment; specify the reasons for debarment; state the period of debarment; and advise that the debarment is effective throughout the executive branch of the Government unless the head of an agency or a designee makes the statement called for by FAR 9.406-1(c). Id.
\textsuperscript{240} FAR 9.407-1(b)(1).
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{243} FAR 9.407-1(b)(2).
\textsuperscript{244} FAR 9.407-3(c). The contents of the notice must state the basis for the suspension; that suspension is temporary pending the completion of an investigation or legal proceedings; the specific cause relied upon; the effect of the suspension; and that additional proceedings to determine disputed material facts will be conducted unless the action is based on an indictment or a determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced. Id.
\textsuperscript{245} See FAR 9.407-3(d)(4) (“Prompt written notice of the suspending official’s decision shall be sent to the contractor and any affiliates involved, by certified mail, return receipt requested.”).
is necessary to protect the Government’s interest.” Additionally, the SDO may suspend a contractor without considering mitigating factors or remedial measures. When one considers that debarment is in most cases based upon more compelling evidence—conviction or civil judgment—as opposed to allegations of wrongdoing, it is, at the very least, questionable why suspension may be imposed without any initial pre-exclusion protection for the contractor.

While the debarment provisions offer significantly more protection to contractors, notices of proposed debarment may be used in similar fashion to notices of suspension based solely upon the existence of a cause for debarment. Moreover, notices of proposed debarment are not subject to strict timing requirements, as SDOs may be able to extend the thirty-day period for virtually any reason given the subjectively broad “good cause” standard, thereby potentially rendering this timing requirement meaningless. Additionally, where the notice of proposed debarment is not based upon a conviction or civil judgment, the SDO is not explicitly required to render a decision within any timeframe, thereby potentially placing the contractor in a state of uncertainty for months or longer. Therefore, given that the regulations do not establish a maximum time limit, the Government can use a notice of proposed debarment to exclude a contractor indefinitely or at least as long as the period set forth for debarment. In fact, in practice, in an effort to avoid violating the timing requirements in the suspension context, it is not unheard of for agencies to follow up a suspension notice with a notice of proposed debarment in an effort to extend the period of exclusion while they continue to investigate the matter. Therefore, while contractors in receipt of a notice of proposed debarment technically are extended more protection than suspended contractors in some instances, it is unclear whether there is much of a difference in practice. In fact, because of the lack of a clear time limitation on the length of exclusion associated with a notice of proposed debarment, such notices could conceivably pose a greater risk to contractors.

E. Consequences of Suspension and Debarment

1. Direct Consequences

The immediate effects of being suspended, being debarred, and receiving a notice of proposed debarment are the same—the contractor is “excluded” from competing for and receiving new contract awards, consenting to

247. FAR 9.406-3(c)(3).
248. FAR 9.406-3(d).
250. FAR 9.405(a) (“Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action (see 9.405-1(b), 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(e)).”).
subcontracts,\textsuperscript{251} and participating in nonprocurement transactions.\textsuperscript{252} Unless the agency head directs otherwise, however, contractors may continue to perform under previously awarded contracts.\textsuperscript{253} A contractor’s exclusion is effective Government-wide, unless the agency head or a designee waives the sanction and states in writing the “compelling reasons justifying continued business dealings between that agency and the contractor.”\textsuperscript{254} Moreover, to ensure that all agencies are aware of the contractor’s exclusion, the contractor is listed on the Excluded Parties List Service, which Contracting Officers are required to review prior to any contract award.\textsuperscript{255}

2. Collateral Consequences

Exclusion from federal contracting, alone, is sufficiently devastating and may, by itself, put the contractor out of business.\textsuperscript{256} Nonetheless, and putting aside the tremendous expenditure of time, energy, and defense costs, there are many collateral consequences, which can dramatically amplify the direct effects of exclusion. While the impact of the collateral consequences will depend largely on the size of the contractor’s business, the diversity of clientele serviced, financial resources, and the size of the business,\textsuperscript{257} some of the collateral consequences may include

- Termination of ongoing contracts;\textsuperscript{258}
- Reputational damage and loss of goodwill;\textsuperscript{259}
- Loss of revenue;\textsuperscript{260}
- Contraction of credit;\textsuperscript{261}

\textsuperscript{251}FAR 9.405(a).
\textsuperscript{252}FAR 9.401 (“Any debarment, suspension or other Government-wide exclusion initiated under the Nonprocurement Common Rule implementing Executive Order 12549 on or after August 25, 1995, shall be recognized by and effective for Executive Branch agencies as a debarment or suspension under this subpart. Similarly, any debarment, suspension, proposed debarment or other Government-wide exclusion initiated on or after August 25, 1995, under this subpart shall also be recognized by and effective for those agencies and participants as an exclusion under the Nonprocurement Common Rule.”).
\textsuperscript{253}FAR 9.405-1.
\textsuperscript{254}FAR 9.407-1(d).
\textsuperscript{256}See, e.g., Christopher R. Yukins, Suspension and Debarment: Re-Examining the Process, 13 Pub. Procurement L. Rev. 255, 256 (2004) (“As a practical matter the shock and infamy of suspension or debarment can quickly drive government contractors (especially small contractors) out of business.”).
\textsuperscript{257}Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) (recognizing that the effects of suspension and debarment will vary “depending upon multiple factors”).
\textsuperscript{258}FAR 9.405-1.
\textsuperscript{259}Reeve Aleutian Airways, Inc. v. United States, 982 F.2d 594, 598 (D.C. Cir. 1993) (“Branding an airline unsafe creates a lasting blemish on a company’s reputation, roughly the equivalent to Hawthorne’s scarlet letter pinned across the heart of Hester Prynne.”); Gonzalez, 334 F.2d at 574.
\textsuperscript{260}Reeve, 982 F.2d at 598.
\textsuperscript{261}Gonzalez, 334 F.2d at 574.
Suspension and Debarment Practice Under the FAR

- Denial of loans;
- Reducing the size of the business;
- Delaying or canceling business goals and objectives;
- Reducing employee salaries and/or benefits;
- Laying off employees;
- Loss of employees to competitors;
- Denial of commercial contracts;
- Denial of state and local contracts, and
- Bankruptcy.

Because the consequences are significant and possibly irreparable depending upon the length of the exclusion and the underlying allegations, it is critical that the system require agencies to proceed cautiously in imposing such sanctions.

F. Judicial Review of Suspension and Debarment Decisions

Given the lengthy exploration of case law developments over the last forty-five years, it should come as no surprise that a contractor can seek to have a court review an agency’s suspension or debarment determination. A contractor may challenge a suspension or debarment decision relying upon the Constitution based upon a denial of due process or under the Administrative Procedures Act (APA) based upon a clear error in agency decision making.265

Due process challenges are assessed under the Mathews v. Eldridge balancing test to determine whether the agency’s conduct comported with the minimum requirements of due process.266 Such cases are most commonly brought in the federal district courts, but the U.S. Court of Federal Claims possesses jurisdiction over cases where the contractor challenges a suspension or debarment in the context of a pre-award bid protest.267

Challenges under the APA are brought in the federal district courts. These courts evaluate the entire administrative record to ascertain whether the decision was based upon a consideration of relevant factors and whether the agency

262. Id.
263. Some commercial entities refuse to do business with suspended or debarred contractors.
264. Some state and local jurisdictions provide federal suspension or debarment as a cause for state or local suspension or debarment.
266. See discussion supra Part II.C (discussing Mathews v. Eldridge, 424 U.S. 319 (1976)).
267. See ATL, Inc. v. United States, 736 F.2d 677, 682 (Fed. Cir. 1984) (“While generally the Government is correct that a contractor would attack a suspension in district court, on the facts of this particular case the Government’s contention does not obtain. When ATL first filed its complaint with the Claims Court on July 6, 1983, it had no idea that OIC chief Captain Dallam had recommended to his superiors that ATL be suspended. From ATL’s point of view, it knew only that the Navy was unduly delaying the awards of four contracts upon which ATL bad already bid and was in fact low bidder in each case. As the trial court has pointed out, once jurisdiction properly attaches, the long-standing rule in the federal courts is that it cannot be ousted by subsequent events.”).
made a clear error in judgment.268 The court is not permitted to substitute its judgment for the agency’s judgment.269 Rather, the court’s analysis is limited to determining “whether the agency examined the case facts and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the choice made.”270

IV. NOTEWORTHY DEVELOPMENTS

A. Government-Initiated Reform Measures

Of particular relevance to this Article are two government-initiated measures to reform the system. Both of these measures add considerable credence to the proposals set forth in this Article.


I am concerned that contractors may not be aware that they are being considered for suspension. The FAR currently allows contractors an opportunity to present information in opposition to the suspension, either in writing or in person, prior to or within 30 days of the suspension. It does not, however, require pre-suspension notification to contractors. When appropriate prior to the suspension, I want companies to be informed that we have extremely serious concerns with their conduct, that their suspension is imminent and that they may contact the suspension official, or his designee, if they have any information to offer on their behalf. This is not a change to existing policy or an extension of the contractors’ rights, but merely an enhanced opportunity for DoD to consider all available information before making a decision which will affect a company’s future business dealings with the government.271

Former Under Secretary of Defense Donald Yockey’s 1992 policy statement clearly expresses his concern with the “shoot first, question later” mentality embodied in suspension procedures. Although he did not explicitly say so, Under Secretary Yockey seemed to believe that the lack of presuspension notification was unfair to contractors and detrimental to the Government. The undersecretary recognized that presuspension notification would have a positive result for agencies by allowing them to make a more informed decision based upon a fulsome record, which contained the views of the contractor. Despite the undersecretary’s guidance, because no requirement for...

268. See, e.g., Burke, 127 F. Supp. 2d at 237.
270. Burke, 127 F. Supp. 2d at 238 (“[T]he court may not substitute its judgment for that of the agency officials. Rather, the court’s inquiry is limited to determining whether the agency examined the case facts and articulated a satisfactory explanation for its decision, including a ‘rational connection between the facts found and the choice made.’” (quoting Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).
271. See Memorandum for Sec’ys of the Military Dep’ts et al., from Under Sec’y of Def. (Sept. 28, 1992) (emphasis added) (on file with author).
presuspension notification exists, DoD and other agencies remain authorized to suspend contractors without prior notification where they believe “immediate action is necessary to protect the Government’s interest.” While the FAR continues to authorize agencies to suspend contractors without prior notification, notably, some agencies appear to have adopted Under Secretary Yockey’s guidance and now use requests for information and show cause letters, which do not result in a contractor’s exclusion.

2. GSA’s Proposed Use of “Show Cause Notice”

Several years later, on June 28, 2004, GSA issued a proposed rule to amend the General Services Acquisition Regulation (GSAR) “to add an additional procedure to the decision-making process for the debarment and suspension of parties.” Specifically, GSA issued a proposed rule that “would provide parties who are being considered for suspension or debarment with a Show Cause Notice.” GSA contemplated that the “Show Cause Notice would be sent before issuance of a Notice of Suspension or a Notice of Proposed Debarment except in those cases where the government would be harmed by waiting any period of time to suspend or propose the debarment of the contractor.” Under the proposed rule, the parties would be given the opportunity to respond within thirty days, which is the same response period currently provided to contractors after being suspended.

In proposing the use of a Show Cause Notice, GSA recognized that under current law, there is no requirement to notify a contractor that it is being considered for suspension or debarment. GSA indicated that the lack of notice results in most contractors’ finding out that they are being considered upon receipt of either the suspension or the proposed debarment by mail or fax. Notably, however, GSA acknowledged that in recent cases, contractors had discovered that GSA was considering them for suspension or debarment through leaks to the press, which enabled them “to come in and talk to the GSA Suspension/Debarment Official ….”

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273. Notably, since Under Secretary Yockey’s memorandum, private associations and well-respected academics have called for the changes to the FAR to incorporate a presuspension notification requirement. Nash & Cibinic, Suspension of Contractors, supra note 209, at 46 (advocating in favor of presuspension notification); see 35 Gov’t Contractor ¶ 3, 5 (Jan. 6, 1993) (noting that the National Security Industrial Association (NSIA) advocated in favor of presuspension notification).
275. Id.
276. Id.
277. Id.
278. Id.
279. Id.
280. Id.
open and transparent “proactive approach,” GSA stated that it “encourages any of its private sector partners to come in and discuss with the Suspension/Debarment Official instances they have discovered where their responsibility may be placed in question and what steps they have taken to remedy the situation.”

GSA did not expressly identify the policy rationale underlying its proposed rule. From GSA’s statements, two facts are clear. First, it is evident that GSA has had positive experiences working with contractors before the issuance of a notice of suspension or proposed debarment. Second, based upon that experience, GSA determined that typically the system works more effectively where contractors are given the opportunity to address the Government’s concerns before the Government takes drastic action. GSA seemed to focus on the procedural benefits associated with an open and transparent system—a more developed record leads to more informed decision making, as a result of the Government having the opportunity to meet and speak to contractors before taking action.

Ultimately, GSA did not issue a final rule implementing this proposal. While it is not entirely clear why GSA did not issue a final rule, the publicly available record indicates that GSA did receive some criticism. In fact, the SDO at the Environmental Protection Agency (EPA) addressed the proposed rule on behalf of the EPA by stating: “I believe it is imprudent for any agency to surrender its option to employ any tool in its arsenal as a matter of rule or policy except as the individual facts in a given case may warrant in the best interest of the Government.” The SDO further stated: “I question whether any individual agency proposing to implement such a requirement within its own system is a violation of at least the spirit of flexibility and empowerment intended by OFPP or OFFM when the Government-wide systems were implemented.” Additionally, the SDO stated, “I admire GSA’s desire to inject ‘fairness’ among the various respondents who may face debarment actions,” referring to the perceived inequities between small and large contractors, but adding that he “question[s] whether the proposed rule, or any rule change in this regard, can or should achieve that goal.” The SDO concluded by stating, “I strongly encourage GSA to re-think the wisdom of finalizing the proposed rule at this time.” While it is not surprising that government agencies would be opposed to action that removes some of their op-

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281. Id.
284. Id.
285. Id.
286. Id. at 4.
erating flexibility and discretion, the comments received further indicate that while agencies may have the authority to issue agency-specific regulations imposing pre-exclusion notification, such a significant issue may be more appropriate to address government-wide through revisions to the FAR.287

In any event, because GSA’s proposed rule created an exception for instances “where the government would be harmed by waiting,” it is unclear whether the proposed rule would have resulted in any practical difference given that under existing rules, agencies are only supposed to suspend where “immediate action is necessary to protect the Government’s interest.”288 While protecting the Government from immediate harm is a legitimate basis, as will be discussed, the immediate and definite reputational and economic harm sustained by contractors outweighs the mere possibility of harm to the Government, especially when one considers that there are other mechanisms by which the Government can eradicate nonresponsible contractors from the system after contract award.

B. The IBM Suspension: A Recent Example of the Government’s Use of Suspension Without Notification

While the aforementioned Government-initiated efforts demonstrate that there is support within the Government for pre-exclusion notification, some agencies continue to suspend contractors without prior notification given that such action is authorized under the FAR. Although most suspensions take place without media attention and last months if not longer and, thus, represent more common examples of the use of suspension without prior notification, an examination of the recent suspension of the IBM Corporation by the EPA provides an interesting high-profile case study. Not only does it serve as an example of the Government’s use of suspension without notification, but it also demonstrates how pending criminal investigations, as discussed in ATL,289 may negatively impact a contractor’s due process rights. Moreover, the IBM suspension demonstrates that if a contractor such as IBM, the sixteenth top-grossing information-technology government contractor for 2008 with sales totaling $1.6 billion,290 can lose the ability to compete for new contracts without any prior notice and a pre-exclusion opportunity to be heard, just about any contractor can suffer the same fate, especially small and medium-sized contractors. For those contractors that lack the resources, influence, and leverage to bring the Government to the negotiating table quickly after

287. See id. ("The issue of effect of proposed debarment under the FAR vs the NCR, and the use of show cause letters are very important issues that should be resolved by the FAR Council and the ISDC in consultation with the OMB.").
289. See discussion supra Part II.C.7.
suspension is imposed, the notion of a short, eight-day suspension as experienced by IBM is unlikely. 291

1. IBM Suspended Without Notification

In late March 2008, EPA’s SDO 292 was presented with allegations that IBM improperly obtained sensitive source selection and contractor bid or proposal information from an EPA employee sometime during a two-year period surrounding an EPA procurement for the Financial System Modernization Project (FSMP). 293 Based upon this allegation and information suggesting that the EPA was in the process of making a multimillion-dollar award to IBM or its competitor, CGI Federal, Inc., for the FSMP, on March 27, 2008, the SDO suspended IBM without prior notice, concluding that “immediate action” was “necessary to protect the Government’s interests” and to preclude IBM from potentially obtaining the “fruits” of its alleged illegal behavior. 294 The Notice of Suspension, issued on March 27, 2008, stated, in relevant part:

The information provided to me by SDD [Suspension Debarment Division] indicates that between October 2006 and January 2008 IBM employees, in connection with their duties for and on behalf of IBM, knowingly obtained from an EPA employee protected contractor bid or proposal information and source selection information regarding the pending procurement, other than as provided by law. The information SDD provided also indicates that the IBM employees were aware that an EPA employee was providing protected information without authorization, and that the protected information the EPA employee provided was not publicly available at the time IBM’s employees obtained the information . . . .

In addition, the SDD information provides evidence that the IBM officials were aware of the nature of the protected information and used it in the competition for award of the contract in the pending procurement. 295

291. See Letter from Robert Meunier, supra note 283, at 3 (stating, “[l]arger companies with greater resources will always enjoy an ultimate advantage over small companies in effectively resolving an agency’s debarment concerns”); see also Steven L. Schooner, The Paper Tiger Stirs: Rethinking Suspension and Debarment, 13 PUB. PROCUREMENT L. REV. 211, 215 (2004) (“From the perspective of the contractor community, the Government’s suspension and debarment powers are not applied fairly. Conventional wisdom is that these tools are used heavily against small firms and individuals who, confronted with demanding, rule-obsessed government customer, frequently find themselves in over their heads. Conversely, large, important, or merely useful firms appear immune to the suspension and debarment remedy.”).

292. At the time of the IBM suspension, the SDO was Robert Meunier. Mr. Meunier has since retired after thirty-two years of government service and is now co-founder, chief executive officer, and general counsel of Debarment Solutions Institute. See Debarment Solutions Institute, http://www.masotes.com/ (last visited Mar. 9, 2009). The author expresses gratitude to Mr. Meunier for agreeing to telephone interviews on October 16, 2008, and January 29, 2009, to discuss the IBM suspension subject to certain restrictions given the ongoing criminal investigation.

293. See U.S. EPA, Notice of Suspension, EPA Case No. 08-0113-00, Mar. 27, 2008, at 1–2. The author obtained the Notice of Suspension through a Freedom of Information Act request.

294. See FAR 9.407-1(b)(1); see also IBM Suspended for Eight Days, All Hell Breaks Loose, 22 CORP. CRIME REP. 16, Apr. 21, 2008, available at http://www.corporatecrimeporter.com/suspension42108.htm [hereinafter IBM Suspended] (quoting Mr. Meunier as stating, “[i]f I were not to have suspended IBM, the fruits of the misconduct would have gone directly to the contractor on whose behalf the misconduct occurred”).

295. Notice of Suspension, EPA Case No. 08-0113-00, at 2 (emphasis added).
2. The Suspension Shocked the Government Contracting Community

Because of the lack of prior notice, IBM’s suspension caught IBM, other government agencies, and industry off guard. As a result, many questions and concerns surfaced. Agencies that depended upon IBM naturally grappled with how the suspension would impact their everyday business and pondered whether there were other contractors who could satisfy their needs. If no suitable replacement existed, agencies wondered whether they would need to waive IBM’s suspension—a decision that may undermine the integrity of the suspension and debarment system.296 Resellers of IBM’s products inquired as to whether the suspension would preclude them from reselling IBM’s products to the Government.297 Other government contractors who had teamed up with IBM or planned to work as a subcontractor on a pending competition likely wondered what effect, if any, the suspension would have on them and proposals they had submitted to the Government but that the Government had not yet acted on through contract awards. Many individuals expressed shock that such action was taken based solely upon allegations of wrongdoing because it is uncommon for the Government to suspend a contractor of IBM’s stature without prior notice.298 Others criticized the SDO’s decision, likening it to coming down with a “sledge hammer.”299 Overall, in the days following the suspension, there appears to have been uncertainty among government agencies and contractors alike regarding the effects of the suspension.

296. See Government Subpoenas Result in Suspension for IBM, Project on Gov’t Oversight, Apr. 1, 2008, http://www.pogo.org/pogo-files/alerts/contract-oversight/co-fcm-20080401.html (“POGO applauds the EPA’s decision to hold IBM accountable and hopes that the government doesn’t waive or lift the suspension when the next federal business opportunity presents itself. That’s the wrong message to send to contractors and the public.”); see also Elise Castelli, EPA Defends Action Against IBM, Fed. Times, Apr. 15, 2008, http://www.federaltimes.com/index.php?S=3479888 (“There has been so much consolidation among government contractors that there are so few now doing so much more business . . . . It’s a difficult challenge for the government to stop doing business with someone doing billions of dollars in business with the government.”).

297. See Jill R. Aitoro, GSA Now Says Resellers Not Affected by IBM Suspension, Nextgov.com, Apr. 3, 2008, http://www.nextgov.com/nextgov/ng_20080403_8722.php (“The General Services Administration released a statement retracting prior assertions that the IBM suspension from new federal contracts stemming from an action taken by the Environmental Protection Agency would extend to the sales of IBM products by resellers.”).

298. See IBM Suspended, supra note 294. Craig King, a partner who practices in this area, noted, “[w]ith a big company, it is rare to actually start with a suspension. There are informal processes, where a letter is sent. Some agencies call it a show cause letter. Some agencies call it a shock and alarm letter. But it is a letter that goes out and says—we have come to understand certain things. And they seem to give rise to a concern about whether you should be suspended or debarred. This is an opportunity to explain yourself.” Id.

299. See, e.g., id. (“[O]thers in the white collar bar say there should have been some kind of notification to IBM before the government came down with the sledge hammer of suspension.”); see also Jeff Horwitz, IBM Bid Suspension Rattles Contractors, Legal Times, Apr. 14, 2008, available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1208515559849 (“The lingering feeling among contractors is that the EPA’s abrupt move knee-capped any chance IBM had to offer up a defense.”). Alan Chvotkin, senior vice president and counsel of the Professional Services
3. IBM’s Suspension Lasted Eight Days

Many of these questions and concerns went unresolved, as IBM’s suspension was lifted eight days after imposition. While the typical suspension lasts longer and can extend as long as eighteen months in certain circumstances, the Government presumably was willing to work with IBM to reach an expedient resolution of the matter because of IBM’s vast resources, stature in the government contracting community, and the leverage it possesses due to the Government’s need for IBM’s products and services. Within days after imposing the suspension, which in and of itself is unusual, IBM’s counsel met with the SDO and, not long thereafter, the parties entered into an Interim Administrative Agreement (Interim Agreement) whereby the Government agreed to lift IBM’s suspension and, in exchange, IBM addressed the Government’s most immediate cause for concern and surrendered its pursuit of the FSMP contract and further acknowledged that if the allegations are proved to be true, the integrity of the acquisition was “adversely affected.” IBM also agreed to refund to the EPA the attorney fees and costs GAO awarded to it during its protest of EPA’s original award to CGI.
Additionally, as to addressing the underlying allegations, IBM agreed to examine its compliance program, implement necessary improvements, provide reports to the Government as to the progress of its investigation and any new information suggesting that such conduct has taken place with regard to other procurements, and cooperate with the ongoing criminal investigation concerning the allegations. After making these significant concessions, IBM’s suspension was lifted and it was again free to compete for government contracts.

The IBM suspension serves as a recent high-profile example of suspension without prior notification and offers a glimpse of the potentially devastating effects of suspension. Had this been a small or medium-sized contractor with no unique offerings and limited resources, it is unclear whether the Government would have been as willing to resolve the matter expeditiously. More likely than not, such a resolution would have taken months, if not longer, to reach. The Government likely would have proceeded much more tentatively and requested that the contractor conduct a full investigation and submit a comprehensive, written response. After reviewing and analyzing the contractor’s response, the Government may respond to the contractor with a request for additional information. Ultimately, assuming the Government is amenable to a resolution in lieu of suspension or debarment, the Government may then invite the contractor in to discuss the issues and to make a present responsibility presentation. Even after the presentation, the Government may take several additional weeks, if not longer, to make a final decision. Unlike the IBM Interim Agreement, wherein the Government accepted IBM’s assurances that it would continue its investigation, report such findings, and implement necessary remedial measures and corrective action, the Government typically requires the contractor to have completed its investigation and implemented remedial measures and corrective action prior to lifting the suspension. For these reasons, in considering whether suspension without prior notification is acceptable, one should recognize that the IBM suspension is atypical. Most suspensions last far longer and result in significant reputational and economic damage to the contractor.

The contention underlying this Article is that, in balancing the potential harm to the Government as a result of the prospect of additional business dealings with an allegedly nonresponsible contractor and the certain reputational and economic harm to the contractor as a result of exclusion, the due process liberty interests of the contractor should prevail. In most cases, however, the Government need not make that difficult decision because the risk of harm to the Government can be addressed in other less drastic ways. Where the

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303. *Interim Agreement*, EPA Case No. 08-0113-00, at 2–4.
304. Notably, unlike most Administrative Agreements, the Government reserved the right to reinstate the suspension should new information come to light. See id. at 4.
305. *See* Reeve Aleutian Airways, Inc. v. United States, 982 F.2d 594, 598 (D.C. Cir. 1993) (recognizing that suspension may result in damage to one's reputation and business).
Government has less drastic alternatives at its disposal, fundamental fairness weighs in favor of proceeding by notifying the contractor of the allegations and giving the contractor a brief opportunity to address the Government’s concerns. Even in the case of the IBM suspension, which involved an ongoing criminal investigation into procurement integrity violations and a pending multimillion-dollar contract award, other less drastic and damaging alternative measures may have existed.

4. Circumstances Underlying IBM’s Suspension

The SDO suspended IBM without notification because he believed, based upon the information provided to him, that the “selection of the successful offeror and award of the multi-million dollar contract was imminent” and “immediate action” was necessary to “protect the Government’s interest,” thereby satisfying the standard as required under FAR 9.407-1. While notification to the agency Contracting Officer or head of the contracting agency (HCA) of the general procurement integrity allegation likely would have resulted in the stay of the contract award pending the conclusion of the investigation, thereby addressing the Government’s immediate concerns of sustaining harm, apparently, government investigators imposed a nondisclosure restriction on the SDO, precluding him from sharing certain information with the contracting officials. Apparently, investigators were concerned that one or more of the officials may have been involved in the procurement integrity violations and would alert the IBM employees of the Government’s investigation, which might lead to the destruction of incriminating evidence, thereby compromising the Government’s criminal investigation. Given these circumstances, the SDO concluded that suspension without prior notification was appropriate under FAR 9.407-1.

5. Alternatives to Suspension Without Pre-exclusion Notification

The IBM suspension appears to comply fully with current regulations. Nonetheless, based upon the information currently available, it appears that the SDO may have been able to address his concern regarding the impending contract award through measures less drastic than suspension, while still complying with the nondisclosure restriction. Specifically, as the nondisclosure restriction permitted the SDO to issue IBM a notice of suspension containing a detailed description of the underlying allegations after investigators obtained evidence, presumably, he also could have provided that same level of information, or less, in a presuspension notice, which would have given IBM the opportunity to address his concerns prior to the imposition of suspension.

306. Interim Agreement, EPA Case No. 08-0113-00, at 1 (emphasis added).
307. See supra note 292 (discussing interviews with Mr. Meunier).
308. Notably, the SDO could have legally provided less information in the show cause letter or request for information because the notice requirements established in case law only apply after the contractor is suspended.
In the event the investigators’ seizure of evidence at IBM’s facility, alone, did not cue the contracting agency to IBM’s responsibility concerns, thereby resulting in a stay of the contract award while the investigation continued, the SDO could have forwarded a copy of the presuspension notification to the HCA upon issuing it to IBM.\textsuperscript{309} At that point, the SDO would have made his concerns known, and it would be within the HCA’s discretion to stay award pending the conclusion of the investigation. While all the circumstances impacting the SDO’s decision making are not available, more likely than not, these measures would have adequately addressed the Government’s concerns without interfering with the ongoing criminal investigation.

Nonetheless, even if the SDO’s central concern materialized and the agency awarded the contract to IBM before learning of the alleged violations, the Government possesses other tools to prevent nonresponsible contractors from continuing to perform under existing contracts. Specifically, assuming the SDO suspended IBM after receiving its response to the presuspension notification, FAR 9.405-1 authorizes the HCA to terminate existing contracts where a contractor has been suspended or debarred.\textsuperscript{310} Additionally, from a contract administration standpoint, the Government possesses the contractual right to terminate a contractor, either through a termination for default where the circumstances permit or through a termination for the convenience of the Government, where it is in the “Government’s interest.”\textsuperscript{311} While the SDO was not permitted to disclose information that would impact the ongoing criminal investigation, the mere disclosure to the contracting agency of the general procurement integrity allegation that appeared in the notice of suspension likely would have been sufficient to justify the agency’s termination of the contract and would not have jeopardized the investigation given that such information was already disclosed to IBM. While the Government is likely to incur administrative costs as a result of the termination and reprocurement, when the competing interests of the Government and the contractor are balanced, the certain reputational harm sustained by the suspended contractor and the resulting economic impact outweigh the harm to the Government associated with incurring administrative costs.

The IBM suspension involved unique and compelling circumstances making the SDO’s decision challenging. The IBM suspension involved a pending criminal investigation, which required a tactful approach in notifying

\textsuperscript{309}. As Mr. Meunier was permitted to share the allegations with IBM once investigators seized the evidence, presumably, the nondisclosure restriction would not prohibit him from sharing the information with the contracting agency.

\textsuperscript{310}. FAR 9.405-1(a) (“Notwithstanding the debarment, suspension, or proposed debarment of a contractor, agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by agency contracting and technical personnel and by counsel to ensure the propriety of the proposed action.”).

\textsuperscript{311}. FAR 52.249-2(a); \textit{see also} FAR 52.249-8.
IBM of the Government’s concerns without jeopardizing the ongoing criminal investigation. Additionally, the imminent award of a multimillion-dollar contract only intensified the concerns of potential harm to the Government that generally are associated with allowing an allegedly nonresponsible contractor to continue to remain eligible for contract awards. While the SDO’s decision complied with the suspension regulations, based upon the available information, suspension does not appear to have been the only tool at the Government’s disposal. Nonetheless, where a present responsibility inquiry intersects with an ongoing criminal investigation, which necessitates restrictions on the disclosure of information to contracting officials, it may be prudent to revise the suspension and debarment regulations to authorize SDOs to stay contract awards pending the conclusion of the ongoing criminal investigation. While the tools currently at the disposal of the Government appear to provide alternative solutions that are less drastic than suspension, in the event the full record underlying the IBM suspension indicates that such tools were not available, this suggestion may present a viable alternative for those unique cases where suspension without notification is the only option.

When one considers the certain harm, possibly irreparable, to be inflicted upon contractors as a result of suspension, fundamental fairness weighs in favor of requiring the Government to take less drastic measures to protect itself from potential harm. Additionally, suspension without prior notice has the potential, as evidenced by the IBM suspension, of causing uncertainty among industry and other government agencies alike as to how they will function without the suspended contractor. By providing the contractor with an opportunity to express its views, the Government enables itself to make a decision based upon a well-developed record. In addition, the Government also can effectively use the brief period of time extended to the contractor to coordinate and share information with other interested agencies and to select the lead agency—something that did not occur in the IBM suspension due to concerns that such information sharing would have created a threat to the criminal investigation. Moreover, in the event the SDO determines that suspension is necessary, the brief period of time will enable other interested agencies to make plans for how they will proceed once the contractor is excluded. Each of the advantages associated with presuspension notification will be explored further infra Part V.

312. Even under the intense pressures existing at the time of the events in question, the SDO’s decision making was thoughtful and complies with the suspension regulations. Assuming the current suspension practice continues, which authorizes suspension without prior notification, the expeditious and open-minded approach taken by the SDO should serve as a model, in many respects, for how suspensions should be carried out once imposed. Specifically, the suspension was imposed to address the perceived imminence of the pending contract award to IBM, and once that concern was removed through the Interim Agreement, the SDO lifted the suspension.

313. See supra note 77 and surrounding text (discussing the Interagency Suspension and Debarment Committee).
C. Draft Report on the Study of Federal Debarment and Suspension Processes

In the spring of 2008, just a few weeks before the IBM suspension, the Committee on Debarment and Suspension of the American Bar Association’s Section of Public Contract Law issued a Working Draft Report on the Study of Federal Debarment and Suspension Processes (the Report). The purpose of the Report was to memorialize the Committee’s ongoing assessment of the “effectiveness of current debarment and suspension processes and provide recommendations to improve them.” The Report reflects an assessment that the system is “generally effective” in protecting the Government’s interests, holding wrongdoers accountable, and enabling businesses to continue after implementing appropriate remedial measures. Nonetheless, the Committee concluded that there was significant room for improvement and offered ten recommendations, summarized here:

Recommendation #1: Adopt a more comprehensive process by which all interested agencies have an opportunity to express their interests and include a process for the selection of a lead agency. Provide that the decision not to debar/suspend is to be given government-wide effect.

Recommendation #2: Adopt provisions that acknowledge the use of administrative compliance agreements, adopt general terms and conditions for such agreements while preserving SDO discretion and flexibility, make such agreements publicly available, provide that such agreements are binding on all agencies, and provide that the existence of an agreement represents a finding of present responsibility.

Recommendation #3: Define “presently responsible” as “a contractor possesses the requisite level of business honesty and integrity to participate in federal procurement and non-procurement programs.” Define a “finding of present responsibility” as “a finding by a debarring or suspending official that an individual or entity, whether through a determination or on the basis of obligations assumed under an administrative compliance agreement in lieu of suspension or debarment, possesses the requisite level of business honesty and integrity to participate in federal procurement and non-procurement programs.” Provide that a finding by a debarring/suspending official that a contractor is presently responsible shall be binding upon Contracting Officers and grants officials.

Recommendation #4: Provide a process for using show cause letters and contractor-initiated prenotice presentation of information and argument.

Recommendation #5: Adopt for procurement programs, as is already the case for nonprocurement programs, that a notice of proposed debarment does not result in exclusion.

314. The author is a member of the Committee.
316. Id. at 2.
Recommendation #6: Provide that SDOs may not require contractors to prove “present responsibility” and seek reinstatement upon expiration of the debarment period.

Recommendation #7: Combine the separate debarment and suspension regulations for procurement and nonprocurement programs.

Recommendation #8: The Committee does not recommend any changes to the existing causes for debarment and suspension.

Recommendation #9: The Committee does not recommend any changes to the provisions relating to imputation and affiliation.

Recommendation #10: The Committee recommends that Congress consider the advantages of the current debarment and suspension system before enacting statutes that provide for mandatory debarment.317

The Committee’s Report reflects an insightful analysis of the current system and a pragmatic approach for improving practice. Notably, a few of the recommendations relate to or support the proposed reform measures underlying this Article, including recommendations one, four, and five. The Committee’s focus largely was on promoting the formal regulatory adoption of many of the informal procedures employed by the agencies that operate in the suspension and debarment environment.

V. OBSTACLES TO A FAIRER, MORE EFFECTIVE SYSTEM

While contractors do not have a constitutional right to contract with the Government, it is well settled that a contractor’s due process rights are implicated when the Government deems a contractor ineligible to compete for or obtain contract awards.318 Suspension and debarment act immediately to affect adversely a contractor’s liberty interests, which concern its reputation in the community and the resulting impact to its ability to compete for and obtain new business.319 In light of these consequences, courts have held that contractors are due some process; the question, however, is just how much. While the premise of this Article is that in balancing the competing interests, the due process interests of the contractor must prevail, this is undoubtedly a complex and challenging dilemma.320

317. Id. at 2–5.

318. See discussion supra Part III.C.

319. Evers v. Astrue, 536 F.3d 651, 659 (7th Cir. 2008) (“The Due Process Clause protects against deprivation, without notice and hearing, of one’s liberty interest in his good name, reputation, honor, and integrity.” (citing Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)); Reeve Aleutian Airways, Inc. v. United States, 982 F.2d 594, 598 (D.C. Cir. 1993) (“Reeve has a liberty interest in avoiding damage to its reputation and business caused by a stigmatizing suspension.”).)

320. Nash & Cibinic, Suspension of Contractors, supra note 209, at 45 (advocating in favor of presuspension notification but recognizing that the issue presents a dilemma). Compare Ralph
The FAR authorizes the Government to strip a contractor of the opportunity to compete for new business without a moment's notice through the use of notices of suspension or proposed debarment. 321 Immediately, the government contracting community, at the very least, views the contractor as dishonest or incompetent, depending upon the allegations. In fact, courts have recognized the devastating consequences: “branding an airline unsafe creates a lasting blemish on a company's reputation, roughly the equivalent to Hawthorne’s scarlet letter pinned across the heart of Hester Prynne.” 322 Putting aside death or imprisonment, which many have likened suspension and debarment to, 323 these are two of the most devastating sanctions that can be imposed on a business. This is particularly disturbing in light of the fact that it is unclear whether the current practice authorized by the FAR complies with the Constitution—specifically, the Fifth Amendment. While this may be debated, the Loudermill decision, at the very least, casts some doubt on the current practice of excluding a contractor without any prior notice and opportunity to rebut the allegations. 324 Unless the issue reaches the Supreme Court, a cloud, however small, will remain over the current practice.

In the event of a challenge to an agency's use of the current procedures, courts, in assessing whether an agency's action comports with the Constitution, analyze the Government's actions through a rubric that balances the private contractor's interests with the Government's interests in taking such action. 325 In considering the private interest, courts consider “the risk of an erroneous deprivation of such interest” through the employed procedures and “the probable value of additional or substitute procedural safeguards ....” 326 As to the Government’s interest, courts consider the function involved and the fiscal and administrative burdens associated with additional or substitute procedures. 327

The current balancing test appropriately recognizes the competing government and private interests at stake and attempts to measure the value of additional procedures against the increased costs of implementing them.

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321. See FAR 9.406(c)(3) (authorizing agencies to issue a notice of proposal to debar); FAR 9.407.1(b) (authorizing agencies to suspend contractors without first providing a pre-exclusion opportunity to be heard).
322. Reeve, 982 F.2d at 598.
323. See, e.g., Nash & Cibinic, Suspension of Contractors, supra note 209, at 44.
324. See discussion supra Part II.C.8 (discussing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).
325. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
326. Id.
327. Id.
Although functional, a more direct and precise balancing test is offered, which may result in a more effective analysis. Specifically, courts could balance the need for “effective governance” with the “preservation of a fundamentally fair system.” When employed to assess the adequacy of suspension and debarment procedures, courts would balance the Government’s need to eradicate nonresponsible contractors from the system with protecting the contractor’s due process liberty interests—specifically, its reputation and ability to compete for and obtain contract awards. Courts also should assess whether the procedures preserve the integrity of the system.

While it is unclear whether current procedures violate due process, under either the current or proposed rubric, it is evident that the current system favors the Government’s need to eradicate swiftly perceived wrongdoers at the expense of ensuring a fundamentally fair system that preserves the system’s integrity and its overall effectiveness. The IBM suspension presented a number of unusual circumstances, which made the use of presuspension notification challenging, though seemingly possible. The following hypothetical, in the author’s opinion, presents a more common suspension case.

Impenetrable Corporation (Impenetrable) is a large defense contractor that manufactures aircraft parts for the Department of Defense. Impenetrable has a stellar past-performance record. Currently, it is supplying parts to the U.S. Army and Navy and is competing to supply similar parts to the Air Force. On January 10, 2008, and without any prior notice, the Navy SDO, without notifying other agencies and soliciting input or participating in the lead agency process, suspended Impenetrable based upon a former Impenetrable employee’s allegations that Impenetrable has not been testing its parts. The notice of suspension provided, “within thirty calendar days, you or your representative may submit information and/or argument in opposition to your suspension.”

Impenetrable recognized the immediate destructive effects suspension would have on its business and, thus, promptly investigated the allegations and submitted a response stating that, while there were some testing oversight failures years ago, the system has been corrected and compliance procedures have been established to prevent reoccurrence. Stripped of the ability to compete for new contracts and with its prior contracts coming to a conclusion, Impenetrable, in an effort to prevent bankruptcy while awaiting the SDO’s decision, began cutting costs by laying off employees. Fortunately for Impenetrable and its remaining employees, after three months, the Air Force, in dire need of its parts to support the war fighter abroad, waived the suspension decision and awarded Impenetrable a multimillion-dollar contract. During this time, news of the suspension was publicized by several watch dog groups who questioned Impenetrable’s responsibility and the integrity of the suspension and debarment system in light of the waiver. The impact of the suspension, coupled with negative commentary, resulted in the contraction of Impenetrable’s bank credit. On the verge of going under, in October 2008, nearly ten months after being suspended, the SDO lifted Impenetrable’s sus-
pension, finding Impenetrable presently responsible given the remedial measures taken.328

This hypothetical demonstrates that while the system is functional in that it protects the Government, it has several deep fractures that undermine its integrity and effectiveness, and the notion that it is fundamentally fair. First, the Government can exclude a contractor from competing for and receiving new contract awards through either a notice of suspension or notice of proposed debarment without providing the contractor with prior notice of the Government’s concerns and a brief opportunity to address those concerns.329 Second, an agency considering whether to suspend or issue a notice of proposed debarment is not required to notify other potentially interested agencies and collaborate before taking such action despite that the decision is given government-wide effect.330 Third, the system allows agencies to waive the exclusion where compelling reasons exist.331 Each of these issues will be discussed in turn.

A. Lack of Pre-exclusion Notification and Opportunity to Be Heard

Where a cause for suspension exists, SDOs are permitted to suspend a contractor immediately.332 Similarly, where a cause for debarment exists, SDOs are permitted to issue a notice of proposed debarment, which acts to exclude the contractor immediately.333 The only meaningful distinction is that in the debarment context, if the cause is based upon a conviction or civil judgment or no material facts are genuinely in dispute, the SDO is required to render a decision within thirty days after receipt of the contractor’s response.334 Because the thirty-day requirement can be extended indefinitely for “good cause,” in practice, it may not offer the contractor much protection. Therefore, through the use of suspension or notice of proposed debarment, a contractor’s ability to compete for new work can be ended without even a moment’s prior notice.

To many contractors, exclusion, whether through suspension or notice of proposed debarment, is the equivalent of the corporate death penalty.335 Even

328. Notably, the suspension could have lasted months longer and then been followed by exclusion through the issuance of a notice of proposed debarment, which, in practice, could last as long as the term of a debarment, if not indefinitely.
329. See FAR 9.406(c)(3) (authorizing agencies to issue a notice of proposal to debar); FAR 9.407.1(b) (authorizing agencies to suspend contractors without first providing a pre-exclusion opportunity to be heard).
330. See FAR 9.402(c) (encouraging agencies to coordinate and designate a lead agency but not mandating it). Notably, the SDO in the IBM suspension did not notify other potentially interested agencies before suspending IBM.
331. FAR 9.407-1(d).
332. FAR 9.406(c)(3) (authorizing agencies to issue a notice of proposal to debar).
333. FAR 9.407-1(b) (authorizing agencies to suspend contractors without first providing a pre-exclusion opportunity to be heard).
334. IMCO, Inc. v. United States, 97 F.3d 1422, 1426 n.* (Fed. Cir. 1996).
335. See Nash & Cibinic, Suspension of Contractors, supra note 209.
where the SDO ultimately finds the contractor “presently responsible” at the conclusion of the investigation, or is willing to enter into an administrative agreement, as in the IBM example, and allow the contractor to continue its business, it may be too little, too late if the contractor went out of business, its reputation was destroyed, or it lost its key personnel during the period of uncertainty, to name just a few potential consequences. Because exclusion through suspension or notice of proposed debarment can be just as devastating as being debarred for some contractors, additional procedural protections are needed.

The rationale for imposing immediate exclusion upon learning of a cause for suspension or debarment is to remove any possibility that the Government may suffer harm. Undoubtedly, protecting the Government from dishonest or incompetent contractors is an important and necessary objective. The Government should possess the right to protect itself, and suspension and debarment are appropriate tools.

While protecting the Government from nonresponsible contractors is certainly a legitimate cause, the notion that pre-exclusion notification often will result in harm to the Government, while an appealing objective, is largely an illusion. Granting the contractor a brief period in which to respond to the serious allegations directed at it more often than not is unlikely to expose the Government to a new award, let alone any harm. Even in instances such as those presented by the IBM case study where the SDO believes that the contractor may be awarded a contract during the brief period between receipt of pre-exclusion notice and the Government’s decision, the reality of continued business dealings with a suspended or debarred contractor is already built into and accepted by the current system, as suspended and debarred contractors are permitted to continue performing previously awarded contracts. Putting aside the fact that the current system contemplates continued business dealings with a contractor deemed nonresponsible, most, if not all, contractors who learn of government concerns regarding their responsibility are going to implement corrective action expediently to address those concerns. Therefore, pre-exclusion notification should be perceived as a tool that presents an opportunity for the Government to preserve an existing business partner.

Importantly, where an agency does not desire to continue working with the suspended or debarred contractor, the Government possesses the unilateral right to terminate an ongoing contract, thereby preventing harm. The Government may terminate a contractor for default or for its convenience. Thus, while it is possible that the contractor could receive a new contract during the brief pre-exclusion response period, the Government possesses the contractual right to terminate. Moreover, where the Government learns

336. See FAR 9.405-1(a).
337. See FAR 9.405-1 (discussing the Government’s option to terminate); see also FAR 52.249-2, 52.249-8.
of information causing it to have safety concerns regarding a contractor currently performing a contract, as in the hypothetical discussed above regarding Impenetrable, rather than suspend the contractor, the agency may issue a Stop Work Order while it investigates the matter further. Accordingly, there is little additional risk to the Government in providing pre-exclusion notification, as the Government already has tools at its disposal to eradicate nonresponsible contractors. While there are undoubtedly administrative costs associated with these actions, when one balances such additional costs and the mere possibility of harm to the Government where the contractor is given a brief period for a response against the certain reputational and resulting economic harm sustained by excluded contractors, notions of fundamental fairness, if not due process, tip the scale in favor of proceeding with pre-exclusion notification. The scale falls abruptly in favor of pre-exclusion notification when one considers other factors such as the integrity and effectiveness of the system, both of which are undermined by current practice.

B. Lack of Coordination and Collaboration

While the FAR requires agencies to consider designating a lead agency where more than one agency has an interest, the lead agency process is not mandatory. Nor is the agency undertaking such action required to collaborate with other agencies and coordinate actions. This is particularly disconcerting when one considers that the decision to exclude is given government-wide effect. Upon learning of a cause for suspension or debarment, the interested agency SDO may simply suspend the contractor or issue a notice of proposed debarment. While the ISDC has established a process enabling agencies to notify other interested agencies before taking action, given that agencies are not required to follow the ISDC process, agencies may take action without consulting other agencies. In fact, the EPA SDO suspended IBM without first collaborating with other agencies or participating in the lead agency process given concerns that so doing would interfere with the Government’s criminal investigation. Moreover, even assuming agencies consistently notify one another and coordinate all suspension and debarment actions, the procedures governing the lead agency process are not annunciated in the FAR, nor are they published and publicly available. Notably, however, given section 873(a) (4) of the NDAA, which authorizes the ISDC to “recommend to the Office of Management and Budget changes to the Government suspension and debarment system and its rules,” this may soon change. It remains to be seen

338. FAR 42.1303, 52.242-15.
339. FAR 9.401.
340. FAR 9.402(c) (“When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision.”).
341. See supra note 292 (discussing interviews with Mr. Meunier).
342. See supra note 77 (discussing the NDAA).
whether the ISDC will recommend the promulgation of formalized procedures to lend credence and formality to the lead agency process, including the promulgation of flexible criteria to be used in selecting the lead agency.

The lack of existing regulations setting forth procedures for information sharing and coordination early on in the process is detrimental to the Government and to contractors alike. It may result in the inefficient use of government resources, as multiple agencies could conceivably be in the process of considering whether to suspend or debar a contractor and yet each could render an independent decision without knowledge of the other agencies’ investigation. Additionally, each agency may reach different determinations. While a suspension or debarment is given government-wide effect, notably, a decision not to suspend or debar has no effect on other agencies. Moreover, the lack of coordination also leaves open the possibility that decisions will be made based upon incomplete or inaccurate information or possibly without consideration of other agencies’ interests in the contractor. Furthermore, the system is unfair to contractors who may be forced to defend themselves against multiple inquiries regarding their responsibility. As the IBM case study demonstrates, the lack of presuspension consultation and coordination also could result in uncertainty in the government contracting community in the days following a contractor’s exclusion. This lack of organization and consistency in application undermines the fairness, effectiveness, and integrity of the system.

C. Waiver

The system permits agencies to waive a contractor’s suspension or debarment, where the designated official “states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.” The rationale behind this exception is that while the contractor may be unfit to do business generally, there may be instances where the Government’s need is so great that the Government will assume the risk associated with dealing with such a nonresponsible contractor. Although debatable from a policy standpoint, if this waiver exception did not exist, agencies might find themselves in a precarious position where they might be unable to procure critical items including military weapons, parts, and equipment. This exception enables agencies to continue their mission, even if that requires continued business dealings with a contractor deemed nonresponsible.

From a practical standpoint, this waiver exception makes sense where the Government needs the goods or services and no one else can provide them. Putting aside the practical need for such operating flexibility, this practice undermines the integrity of the system, which is founded upon the policy that agencies should only do business with “responsible contractors.”

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344. FAR 9.402(a).
waivers contradict the premise underlying the system and send a confusing message to the public.\textsuperscript{345} In fact, critics have stated, “[f]or the federal government to continue to do business with a private company that has a documented record of defrauding the government and abusing tax payer money is unconscionable.”\textsuperscript{346} Moreover, because waivers may only be used where compelling circumstances exist, primarily instances where no other contractor can provide the services or supplies needed, waiver practice tends to favor large, well-established contractors, thereby leading to disparate treatment among small and large contractors.\textsuperscript{347}

In addition, waivers create an impression of inconsistency within the Government, due to one or more agencies ignoring the bar by working with an excluded contractor. It also may suggest that if the Government really needs a contractor, it will overlook instances of dishonesty or delinquency. Furthermore, such a practice sends a negative message to taxpayers, who expect that the Government will use their funds wisely. Overall, these negative connotations raise legitimate concerns regarding the propriety of waivers.

While one could make a persuasive argument that waiver practice should be ended, the potency of this argument would dissipate as soon DoD has a critical need for military items to support the war fighter—perhaps, a procurement that may save the lives of troops abroad. Nonetheless, there may be a solution that allows agencies to continue their dealings where a compelling justification exists, while preserving the integrity of the system, as will be discussed below.

VI. PROPOSED REVISIONS TO THE FAR

While the current system is functional, a few refinements would ensure “fundamental fairness” to contractors, instill integrity, and enhance the system’s effectiveness. Each proposed amendment to FAR 9.4 will be discussed in turn.

Pre-exclusion notification: The FAR should be revised to prohibit agencies from excluding contractors without pre-exclusion notification and an opportunity to be heard. Upon learning of a cause for suspension or debarment, the SDO shall promptly notify the contractor of the basis for concern in sufficient detail and permit a brief response period. In the debarment context,
agencies may continue to use a notice of proposed debarment, which would not result in the contractor’s exclusion. In the suspension context, the notice could be effectuated through the use of a request for information or show cause letter, which are approaches currently used by some agencies. In terms of the time permitted for a response, the period should be set at thirty days as set forth under the current rules, but where the agency reasonably believes that immediate action may be necessary to protect the Government’s interests, the response period could be shortened to fifteen days. Where an agency elects to utilize the fifteen-day shortened response time, however, the FAR should require the agency to render a prompt determination in order to justify its reduction of the standard period allotted to contractors.

**Collaboration and coordination:** Depending upon the urgency of the matter, either before or after notifying the contractor of the cause for concern, the agency SDO initiating such action shall notify all civilian and military agencies. The internal notice should identify the name of the contractor and provide a sufficient description of the cause for concern. The notice also should request that any interested agencies contact the issuing SDO without delay. Upon hearing that other agencies are interested, the SDO should convene a meeting with the other agency SDOs and a lead agency should be selected based upon objective criteria. The lead agency should collaborate with the other interested agencies and share information. After receipt of the contractor’s response, the lead agency shall promptly determine whether suspension or debarment is necessary to protect the Government’s interest.

**Elimination of Waiver Option:** The lead agency SDO also should be required to consider, based upon discussions with other interested agencies, whether any agency is likely to waive the suspension or debarment if imposed. Where the lead agency determines that suspension or debarment is “necessary” but learns that waiver would occur, the lead agency should not immediately exclude the contractor. Rather, the lead agency should offer the contractor the opportunity to enter into an administrative agreement, whereby the contractor agrees to implement relevant compliance measures to prevent reoccurrence of the cause for suspension or debarment and refrain from competing for new awards with the exception of agencies that have demonstrated “compelling reasons” to continue their business relationship. This approach recognizes the practical necessity of allowing agencies to continue their business dealings with the contractor but does so in a manner that does

348. Notably, notices of proposed debarment did not originally result in exclusion. See Letter from Robert Meunier, supra note 283, at 1–2 (discussing the history underlying the use of notices of proposed debarment). Moreover, as recognized in the Working Draft Report of the Committee on Debarment and Suspension of the American Bar Association’s Section of Public Contract Law, in the nonprocurement system, a notice of proposed debarment does not result in exclusion. See ABA Section of Pub. Contract Law, supra note 315, at 1 (recommendation five). There is no logical reason to create a distinction between the procurement world and the nonprocurement world given that the Government suffers the same general risk of harm in dealing with a potentially nonresponsible contractor in either context.
not undermine the system but rather works within it to accomplish this goal. Moreover, because the contractor will be required to implement compliance measures per the terms of the administrative agreement, this approach may ultimately result in a more responsible contractor.349

The implementation of these proposals will go a long way in improving the system. Contractors will be given the opportunity to present their side of the case and to demonstrate why governmental action is unnecessary. In addition to protecting contractors from erroneous or unnecessary exclusion, the use of pre-exclusion notification, when coupled with agency collaboration and information sharing, will lead to more effective decision making.

VII. CONCLUSION

While the system will not collapse if it continues in its present form, the proposed reform measures will instill much needed fairness and integrity into the process and ultimately lead to a more effective system. The system has undergone numerous refinements over the years. Many of these changes were implemented to protect contractors’ due process rights. Once again, such action is needed. When one considers the devastating reputational and economic harm a contractor is likely to sustain as a result of being excluded, a brief notice period is not unreasonable. Such a requirement will improve the overall operation of the system, as the investigating SDO will have the opportunity to make a decision based upon a more developed record. Additionally, the integrity of the system will be preserved, as it gives contractors an opportunity to address the concerns before action is taken and demonstrates that the ultimate decision is based upon a complete record. Where the SDO ultimately determines that the contractor is not responsible, the SDO retains the right to suspend or debar the contractor. While the proposed measures of reform will aid greatly in making the system fairer and more procedurally conscious, they do not go too far, as ultimately it is critical that the Government retain the ability to swiftly eradicate nonresponsible contractors from the system. Now at a time when contractors are required to disclose violations of law under FAR 52.203-13, disclosures that alone may result in suspension or debarment, basic fairness weighs in favor of providing contractors with notice and an opportunity to be heard prior to being excluded.

349. While it is difficult to imagine a contractor refusing to work with the lead agency to agree on corrective action or remedial measures, in the event that occurred, and another agency had compelling reasons justifying continued business dealings with the contractor, that agency should, at the very least, ensure that the contractor has taken measures to address the circumstances leading to the cause for exclusion.