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## DEBARMENT AND SUSPENSION

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### ABSTRACT

The Government's attitude toward contractor debarment and suspension can be compared to the sleeping giant - if you provoke him enough he'll wake up. For years the Government took relatively few debarment or suspension actions, comfortable in the belief that routine audits would catch mistakes, mischarges or improper claims. Criminal violations were suspected in only extreme cases. This attitude is changing. Contract specialists, cost/price analysts, auditors, quality/reliability specialists, and program personnel are all more alert to contract irregularities. Increased awareness of the three sisters--fraud, waste and abuse--together with a significant increase in Agency Inspector General investigations, has brought to light an increasing number of cases involving criminal activity on the part of both contractor and Government personnel. This paper serves as a primer on the basic principles of debarment and suspension of contractors and discusses a few interesting cases.

### BACKGROUND

Generally, all debarments can be classified into one of two large categories--statutory debarments or administrative debarments. This separation is based principally upon the nature of the questioned activity by the contractor. Statutory debarments are the province of certain Federal agencies which are given

responsibility, by statute, for the operation of particular federal programs, especially compliance programs. Examples would be environmental programs operated by the Environmental Protection Agency or labor programs run by the Department of Labor. These agencies are responsible for monitoring their respective programs and have statutory authority to enforce compliance. Only those agencies empowered by statute can bring enforcement proceedings against violators. Among the "tools" in their "enforcement bag" is the use (or threat of use) of debarment and suspension procedures. Agencies not empowered by statute cannot take enforcement actions based upon violations of those specific statutes. To illustrate, NASA cannot fine or debar a contractor solely for violating environmental laws. Nor can NASA debar or suspend a contractor for violations of labor regulations, as where a contractor fails to pay the minimum wages contained in a contract. If NASA, or any other agency for that matter, learns of such violations, the proper procedure is for NASA to refer the case to the agency empowered to deal with the violation.

The second category, administrative debarments, is frequently referred to as "nonresponsibility" debarments. These debarments are not the exclusive province of any particular agency for particular violations. Rather, these debarments are based on

any issue raising a question of a contractor's or individual's present responsibility. This paper discusses the administrative debarments. We'll examine some of the causes for debarment later in this paper.

In 1975, the Department of Defense (the three services and the old Defense Supply Agency) initiated a total of 19 debarment/suspension actions. In 1980, these same organizations initiated 48 actions. In 1985, the entire Executive Branch of the Government initiated more than 850 actions. What happened to cause such an increase? Basically, two events contributed to the increase. First, on October 12, 1978, the President signed into law the Inspector General Act of 1978 (P.L. 95-452) which provided for the establishment of an Office of Inspector General (OIG) in those civilian executive agencies which did not already have an OIG. It also provided for an OIG at the level of the Office of the Secretary of Defense. The Act provided the impetus for large increases in the staffing of the various OIG's and spurred an increase in their investigative activity. Secondly, the Congress, through extensive hearings precipitated by news of "horror cases," has brought other pressures to bear on agencies to be on the lookout for "fraud, waste and abuse."

From the outset, it must be understood that debarment or suspension action is taken for the purpose of the Government's protection and not as punishment of the contractor or individual. It allows the Government to place a barrier between itself and a contractor or individual who has harmed or is believed to have harmed the Government.

#### CAUSES

The causes for taking debarment or suspension action are set out at Federal Acquisition Regulation, Part 9.4. They are:

- ° fraud or other criminal offenses in obtaining, attempting to obtain or performing a contract;
- ° violation of federal or state antitrust laws relating to the submission of bids or offers, such as bid rigging;
- ° embezzlement, theft, forgery, bribery, falsification, receiving stolen property, false claims/statements, and other offenses indicating a lack of business integrity which affect present responsibility;
- ° violation of the terms of a contract so serious as to justify debarment/suspension, e.g.,
  - ° willful failure to perform a contract
  - ° a history of unsatisfactory performance; and
- ° any other offense of so serious or compelling a nature as to warrant debarment/suspension.

When an agency first learns of any of these violations, it must decide whether it will move directly to debarment or first invoke the suspension procedures. If the causes are serious enough and there has been a criminal conviction or civil judgment leaving no question of fact, an agency may proceed directly to debarment. However, where there is merely an indictment and questions of fact have not been finally resolved, an agency must invoke the suspension procedures. Further, where there is no conviction but the appropriate agency official believes there is adequate evidence to suspect illegal activity, suspension procedures may be invoked.

## EFFECT

Prior to the issuance of Office of Federal Procurement Policy Letter 82-1, when an agency debarred or suspended a contractor, that contractor was precluded from doing business only with that particular agency. The contractor was free to do business with other agencies unless the other agencies made their own independent conclusion that debarment/suspension was necessary to protect their interests. With the issuance of the policy letter, the General Services Administration (GSA) was given the responsibility of maintaining and publishing the Consolidated List of Debarred, Suspended, and Ineligible Contractors. After making a determination to debar or suspend a contractor, an agency must so inform the GSA so that the contractor's or individual's name may be placed on the Consolidated List. Once placed on the list, the debarment or suspension is effective throughout the entire Executive Branch of the Government and no Executive Branch agency can do business with that contractor or individual. The period of debarment is generally from one to three years.

Prior to the final determination to debar, the agency must give the contractor notice that it is being proposed for debarment. A contractor proposed for debarment is not placed on the Consolidated List and may do business with any agency except the agency proposing debarment. A contractor under suspension is placed on the Consolidated List immediately and is immediately curtailed from doing business with the Government.

An agency head or his delegee may authorize awards of contracts with debarred/suspended contractors on a case-by-case basis when compelling circumstances warrant such awards.

With regard to subcontractors, the Government contracting officer cannot give his/her consent-to-place a subcontract with a debarred or suspended firm. If the subcontract is below the threshold for requiring contracting officer's consent, the prime contractor may deal with a debarred or suspended subcontractor. However, it has been this author's experience and observation that, generally, prime contractors observe the Consolidated List and do not knowingly deal with debarred or suspended contractors unless the item or service offered by that contractor is proprietary or so unique that it cannot be obtained from another source.

Contracts already entered into before the contractor is debarred/suspended may remain in effect without special authorization. However, where a contractor, or any of its employees, is convicted of a crime in an attempt to obtain, or in the performance of a contract, the agency head may declare the contract void. (18 U.S.C. 218.)

## PROCEDURES/DUE PROCESS HEARINGS

The most frequent cause for debarment, and the easiest to effect from a procedural point of view, is debarment based on a conviction for one of the violations mentioned earlier. A notice of proposed debarment must be issued to the proposed debarree which clearly sets forth the reasons why the Government is taking the action. The notice must inform the proposed debarree that he has 30 days to submit information and argument in opposition to the debarment including the submission of information which raises a genuine dispute over material facts. The information and argument against debarment may be in the form of mitigating circumstances or hardship considerations which the agency should review before deciding whether or not debarment is necessary to protect itself. Where

there is a conviction there is little chance for any dispute over material facts. Consequently, it is highly unlikely that a hearing would be necessary.

A proposed debarment not based on a conviction also requires that the same notice be given. However, since there has been no conviction, the facts are more likely to come into dispute thereby increasing the likelihood of the necessity for a hearing. The Government decides whether or not any material facts are in dispute.

A suspension based upon adequate evidence to suspect fraud or other violations also requires the same notice. However, under a suspension, a hearing is required within 30 days of the suspension merely upon the suspensee's request.

The hearings here are administrative in nature and may be held before an Administrative Law Judge, a member of an Agency's Board of Contract Appeals, or a separate board or panel duly convened for such purpose. The proposed debarment/suspensee is given the opportunity to present its version of the facts, submit documentary evidence, present witnesses on its own behalf, challenge the Government's evidence and cross examine the Government's witnesses.

There is one situation where a hearing may be postponed or not held at all. If the Department of Justice is conducting a Grand Jury investigation, it may order an agency to forego the hearing in order not to compromise its investigation.

The requirement for fairness and an opportunity to be heard is founded in the Constitution. Neither liberty nor property can be taken away without due process of law. In 1964, in Gonzales v. Freeman, 334 F2d

findings of an investigation where there had been no conviction could not take place "without fair and uniform treatment." In that case, the Government learned that Mr. Gonzales had obtained a Government food inspection certificate under false pretenses. The Agency refused to do business with his company. No notice of the reasons was given to him and no opportunity to respond was provided. The court held that he had been debarred without any opportunity to challenge the Government's decision.

Eight years later, in 1972, a contractor was accused by the Navy of giving gratuities to Navy officials in exchange for preferences in the award and administering of a contract. Horne Brothers, Inc. v. Laird, 463 Fd2 1268. The Navy gave the company notice that it was under suspension, then did nothing for a year and a half. The company communicated continuously with the Navy and attempted to obtain an opportunity to be heard. Finally, the company went to court which held that leaving a firm in suspension for so long a period without an opportunity to be heard violated basic due process rights. The court further ruled that such a hearing must be provided within 30 days of the suspension. Hence, the 30 day rule of today.

In a more recent case affirming these principles, Old Dominion Dairy v. DOD, 631 F2d 953, (1980), the District Court for the District of Columbia held that a notice merely advising a company that it was under suspension without giving a clear statement of the reasons was not "sufficiently specific to enable the company to marshal evidence in its own behalf."

## SETTLEMENT AGREEMENTS

As was mentioned earlier, the debarment/suspension process is available so that the Government can protect itself by placing a barrier between itself and a contractor who harmed the Government or is reasonably suspected of doing so. The process serves a second function which is to provide time for the contractor to clean its house and rid itself of the problems which caused the questioned violations. Occasionally, the Government may be willing to enter into a settlement agreement where it appears that the contractor has uncovered the underlying causes and has begun or is ready to immediately begin a program of restoring its business integrity. In exchange for not being debarred, the contractor should follow a plan for restoration of itself. A typical agreement will contain most or all of the following points:

- ° culpable individuals will plead guilty to appropriate charges;
- ° the company will fire or reassign culpable individuals in order to remove them from the Government work;
- ° the company will agree to reimburse the Government for damages and will enter into a financial agreement outlining terms, conditions, payback time schedules, etc.;
- ° the company will institute a management awareness program so upper-level managers will be better equipped to monitor and control the activities of its subordinates;
- ° the company will establish an employee training and awareness program to teach the lower-level managers and workers what is expected of them under a Government contract;
- ° establish an internal hot-line so employees can report questionable activities to upper-management or directly to the Government without fear of reprisal;

- ° when deemed necessary, install an outside auditor to monitor the contractor's overall contract compliance and its adherence to the terms of the settlement agreement;
- ° if the improper activity took place at the top levels of the company, remove the individual(s) and place in their stead a trustee to run the company for a period of time. The culpable owners will place their stock in trust so that they could not vote their stock. Further, they will not serve on the Board of Directors or as a Chief Executive Officer, and, depending on the circumstances, might be ordered not to work for the company in any capacity.

NASA has had two experiences with the trustee concept, once with great success and once with moderate success. The first instance was with a printing contractor at one of NASA's field centers which had submitted false claims. The two owners pled guilty to criminal charges and agreed to remove themselves from the operations of the company, place their stock in trust, and permit the company to be run for a period of time by a trustee. This worked out well and the company got itself back on its feet, and is still in business. The second incident involved a subcontractor responsible for fabricating certain structural parts for the shuttle. The owner of the company pled guilty to false claims and agreed to reimburse NASA for damages. The owner was debarred for three years but the company was not debarred. The owner placed his stock in trust, agreed not to serve on the Board of Directors or as an officer of the company, and agreed to the placement of a trustee to run the company. Because of certain unique technical knowledge possessed by the owner, NASA agreed that the owner could enter into a consulting agreement with the company in order

to be available for high-level technical decisions. As it turned out, after a period of time, NASA learned that the owner used the consulting agreement to push his way back into the daily operation of the company. It was later learned that the Air Force was investigating him for failure to follow quality and reliability requirements in refurbishment work the company was doing on jet engine parts. The Air Force suspended the company. Other legal proceedings and investigations are underway.

#### COMPLIANCE PROGRAMS

There are certain actions a company can take when it discovers, before the Government does, that certain illegal contract activity has taken place within its organization. The primary procedure is voluntary disclosure. This is encouraged by the Government. The Department of Justice is in favor of such a program, although it is not an amnesty program. The degree of cooperation by the company is considered by the Government in deciding whether or not to undertake prosecution or debarment/suspension action. Cooperation would consist of providing access to records and accounting data, the availability of site inspections and the availability and degree of cooperation of all personnel through out all levels of the company.

Once improper activity is discovered by the company, the company should immediately put into motion corrective procedures. A reasonable compliance program should include at least the following:

- ° the contractor will develop a corporate philosophy and code of conduct for employees;
- ° prepare or update written policies and procedures so employees know what's expected of them;

- ° improve the internal oversight function;
- ° improve and increase training in target areas;
- ° improve the internal audit function and compliance reviews; and
- ° establish a hotline.

#### RECENT LEGISLATION

Congress has recently passed several new laws which make it easier for the Government to pursue administrative remedies and increases the penalties for fraud.

#### FALSE CLAIMS AMENDMENTS ACT

The initial False Claims Act was passed during the Civil War. The amendments increase the penalties that can be imposed. The penalty for civil fraud is raised from \$2,000 to between \$5,000 to \$10,000, plus 3 times damages (in lieu of double damages) sustained by the Government. The Government's recovery may be limited to double damages if the violator fully cooperated with the Government in the investigation and provided all information concerning the violation within 30 days, and no other civil action or criminal prosecution is pending.

The "qui-tam" provision (private suits) allows an individual with evidence of fraud to sue the violator on behalf of themselves and the Government. If successful, the individual may keep a share of the recovery. If the Government joins with the individual in a suit against a violator, the law provides that the Government will control the prosecution and make the decisions over witnesses, testimony, cross-examination of witnesses, and the overall progress of the case.

The Act makes it easier to prove fraud in a civil action. Where the old burden of proof standard was "clear and convincing evidence," the

new standard requires establishing the facts by a "preponderance of the evidence." No proof of specific intent to defraud the Government is required.

#### ANTI-KICKBACK ENFORCEMENT ACT

The amendments to the Anti-Kickback Act make it more effective in preventing subcontractor kickbacks in Government contracts. The amendments extend liability to anyone who knowingly pays or receives a kickback. The Act subjects not only the subcontractor and the kickback recipient to liability but also the prime contractor, independent sales representatives or anyone else involved in the kickback scheme. Further, it encompasses fixed-price contracts as well as cost-reimbursement contract. The Government is allowed to recover against the contractor whose employees or subcontractors are involved in the scheme, even if the contractor had no knowledge of it. This was intended by Congress to be an incentive for contractors to be more alert regarding their own internal operations. The Act applies to attempted kickbacks as well as completed kickbacks.

#### PROGRAM FRAUD CIVIL REMEDIES ACT

This Act provides Federal agencies with an administrative remedy against false claims and false statements. In fraud cases not exceeding \$150,000, where the Department of Justice has declined prosecution, a Federal agency may impose a fine not to exceed \$5,000.

The investigative findings must be independently reviewed by an agency official to determine whether there is adequate evidence to believe that a false claim or statement was submitted. If so, the matter must first be referred to the Department of Justice which must approve

further proceedings by the agency. If the Department of Justice has no objection, the agency will conduct an administrative hearing to determine if a preponderance of the evidence establishes liability and, if so, what penalty should be imposed.

A party found liable may appeal to the agency head and, if unsuccessful, appeal to the U.S. District Court.

The private bar expects challenges to this provision of the law on the grounds that the Constitution requires that a determination of fraud can be made only in a judicial proceeding.

#### SUMMARY

The change in the Government contracting environment in recent years should be sufficient incentive for contractors to monitor their operations more closely in order to assure themselves that violations of law or contract terms sufficient to invoke debarment/suspension are not present. The use of a settlement agreement to bring about corrections in a contractor's operation in exchange for no debarment is at the Government's option and should not be relied upon as a safety net to continue to be lax in monitoring one's operations. The Government is serious about identifying fraud and recovering damages. The Congress has made the job a little easier. It's time for contractors to protect themselves by examining their operations and enhancing their monitoring procedures in order to assure themselves that no fraudulent activity is taking place in their organization.