

## CONSTRUCTION

# THE RISE OF THE CORPORATE DEATH PENALTY: UNDERSTANDING SUSPENSIONS AND DEBARMENTS

Over the past decade, the number of convicted criminals sentenced each year to the death penalty has rapidly declined.<sup>1</sup> Yet, while fewer criminals are being sentenced to capital punishment, the number of federal government contractors sentenced to what is commonly known as the “corporate death penalty” has skyrocketed.

According to a September 2012 report issued by the Interagency Suspension and Debarment Committee (ISDC), federal agencies<sup>2</sup> took 5,838 suspension or debarment actions in fiscal year 2011,<sup>3</sup> up from 2,668 in fiscal year 2009.<sup>4</sup> Since there is no indication that contractors are behaving any worse than they were a few years ago, it raises the question: What is causing this dramatic rise in the number of suspensions and debarments?

The dramatic uptick in suspensions and debarments should not only be a concern to bad contractors, but also to good contractors. Under the new rules and regime, it appears that the days of free passes and second chances may be going away.

## ORIGINS AND CAUSES FOR SUSPENSION AND DEBARMENT

Suspensions and debarments are exclusions of individuals and entities from federal contracting. The U.S. Comptroller General first recognized the right of government agencies to debar or suspend contractors from bidding on federal contracts in 1928.<sup>5</sup> In that watershed opinion, the comptroller general recognized as “a general rule, there is no authority for the debarment of bidders,” but there might be circumstances when “the interests of the United States” justified debarment of a contractor from bidding on federal contracts.<sup>6</sup>

1. Death Penalty Information Center, The Death Penalty in 2011: The Year End Report (Dec. 2011), available at [www.deathpenaltyinfo.org/documents/2011\\_\\_Year\\_\\_End.pdf](http://www.deathpenaltyinfo.org/documents/2011__Year__End.pdf).

2. For purposes of simplicity, federal agencies and departments are referred to collectively as “agencies” in this article.

3. ISDC, FY11 Report on Federal Agency Suspension and Debarment Activities (Sept. 18, 2012) [hereinafter “ISDC FY11”], available at [www.epa.gov/isdc/pdf/isdc\\_section\\_873\\_fy\\_2011\\_report\\_to\\_congress\\_lieberman.pdf](http://www.epa.gov/isdc/pdf/isdc_section_873_fy_2011_report_to_congress_lieberman.pdf).

4. ISDC, FY09 and FY10 Report on Federal Agency Suspension and Debarment Activities (June 15, 2011) [hereinafter “ISDC FY09/10”], available at [www.epa.gov/isdc/pdf/isdc\\_section\\_873\\_report.pdf](http://www.epa.gov/isdc/pdf/isdc_section_873_report.pdf).

5. Comptroller Gen. McCarl to the Sec’y of the Treasury, 7 Comp. Gen. 547 (1928).

6. *Ibid.*



There are three types of suspension and debarment actions that can be taken by a federal agency to exclude an entity from federal contracting:

- Suspension — a temporary disqualification of a contractor from government contracting
- Proposed debarment — occurs when an agency debarring official issues a notice of proposed debarment, and lasts until the debarring official makes the decision on whether or not to debar for a specified period
- Debarment — an exclusion of a contractor from government contracting for a specified period after debarment procedures have been followed

Depending on the contractor and circumstances, a contractor can go through one or all of these stages.<sup>7</sup>

Suspension and debarment actions can be authorized by statute or regulation. While statutory-based suspension and debarment is usually mandatory and intended as a punishment, administrative suspension and debarment is discretionary and may not be imposed for the purpose of punishment. Authority for administrative suspensions and debarments is found in FAR Part 9.4 (procurement-based), 2 C.F.R. Part 180 (nonprocurement-based), and individual agency regulations.

Today, most suspensions and debarments result from a contractor's commission of criminal or civil fraud, poor contract performance, or other serious misconduct that indicates that the contractor is not presently responsible.<sup>8</sup> The FAR enumerates a number of causes for which a contractor may be suspended or debarred, including:

- Fraud relating to obtaining, performing, or attempting to obtain a public contract or subcontract
- Violation of antitrust statutes relating to submission of offers
- Embezzlement
- Theft
- Forgery
- Bribery
- Falsification or destruction of records
- Federal tax delinquency<sup>9</sup>

However, even if there is sufficient proof of such misconduct, none of these administrative causes result in automatic suspension or debarment. Instead, an agency's suspension and debarment official (SDO) has the discretion to decide whether it is in the government's best interests to suspend or debar the contractor. Importantly, the "serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment."<sup>10</sup> More specifically, "It serves a remedial purpose of protecting the federal government from the business risk of dealing with an individual who lacks 'business integrity or business honesty.'"<sup>11</sup>

## PROCEDURES FOR SUSPENSION AND DEBARMENT

The debarment and suspension procedures vary from agency to agency. If the SDO believes there is sufficient evidence of contractor misconduct to justify action, then it will either issue a notice of suspension or a notice of proposed debarment to the contractor.<sup>12</sup> The contractor (also referred to as the "respondent" in such proceedings) then has 30 days from receipt of the notice to submit a written response with facts and argument contesting the basis for suspension or debarment.<sup>13</sup>

7. See U.S. Gov't Accountability Office (GAO), GAO-12-932, Suspension and Debarment: DOD has Active Referral Processes, but Action Needed to Promote Transparency 4-5 (2012).

8. See Steven A. Shaw, Deputy General Counsel (Contractor Responsibility), U.S. Air Force, Suspension and Debarment in a Nutshell (2011), available at [www.safgc.hq.af.mil/shared/media/document/AFD-110314-018.pdf](http://www.safgc.hq.af.mil/shared/media/document/AFD-110314-018.pdf).

9. FAR 9.406-2, 9.407-2; see also GAO-12-932, supra note 7, at 5. For a more detailed discussion on the causes for suspension and debarment, see Kate M. Manuel, Cong. Research Serv., Report No. R40826, Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments (Jan. 6, 2012), available at [www.safgc.hq.af.mil/shared/media/document/AFD-120315-091.pdf](http://www.safgc.hq.af.mil/shared/media/document/AFD-120315-091.pdf).

10. FAR 9.402(b).

11. See *Burke v. U.S. E.P.A.*, 127 F. Supp. 2d 235, 238-239 (D.D.C. 2001) (quoting 40 C.F.R. § 32.305(a)(4)).

12. In some cases, the SDO will first send a show-cause letter to the contractor. A show-cause letter offers the contractor a brief period to respond and convince the SDO that administrative action is not warranted. Unlike a notice of suspension or proposed debarment, a show-cause letter does not suspend the contractor during the pendency of the investigation. See David Robbins, et al., *Path of an Investigation: How a Major Contractor's Ethics Office and Air Force Procurement Fraud and Suspension/Debarment Apparatus Deal with Allegations of Potential Fraud and Unethical Conduct*, 40 Pub. Cont. L.J. 595, 611 (2011).

13. FAR 9.407-3(c)(5); FAR 9.406-3(c)(4).

## IMPLICATIONS OF SUSPENSION AND DEBARMENT

The implications of suspension or debarment should not be taken lightly. It has long been said that suspension or debarment is the equivalent of the “death penalty” for a contractor.<sup>14</sup> Absent a “compelling reason” justification an awarding agency,<sup>15</sup> a suspended or debarred contractor is prohibited from bidding on any federal government contracts, nor may it perform any federal subcontracts valued in excess of \$30,000.<sup>16</sup> These same restrictions may also be applied to entities and individuals affiliated with the suspended/debarred contractor.<sup>17</sup> With regard to the contractor’s existing federal contracts, no new orders, work or options can be exercised, and the government even has discretion to terminate these existing contracts.<sup>18</sup>

In addition to the immediate consequences, long-term and collateral consequences also result from suspension or debarment. A contractor may lose its security clearance or specialty license, making it impossible to return to work even after the debarment/suspension period ends. Additionally, a contractor with a federal suspension or debarment on its record will be put at a significant disadvantage when competing for many local and state contracts, and may in some jurisdictions face reciprocal suspension/debarment.<sup>19</sup> The reality is most contractors are unable to recover from a debarment or long-term suspension. Even a brief suspension can cripple a contractor’s business.<sup>20</sup>

## WHY ARE SUSPENSIONS AND DEBARMENTS ON THE RISE?

A September 2012 report issued by the ISDC showed a more than two-fold increase in the number of suspension and debarment actions taken over the past two fiscal years.<sup>21</sup> While there is no doubt that suspensions and debarments are on the rise, the actual increase may not be as dramatic as the statistics in the ISDC reports would suggest.

The shortcoming of the ISDC report is that it counts the number of suspensions and debarments in terms of “actions” instead of “cases.” A suspension or debarment “action” occurs each time any entity or individual is suspended, proposed for debarment, or debarred. The first problem is that while some contractors who end up being debarred for misconduct are first suspended and/or proposed for debarment for that same misconduct, some are not. In addition, when an agency commences a suspension or debarment “case” against a contractor, it will often prosecute multiple individuals and entities affiliated with that contractor as part of the same “case.” However, there is little uniformity in the number of affiliates prosecuted from one “case” to the next. Thus, while one suspension or debarment “case” might account for just a single “action,” another “case” might account for 27 “actions” (e.g., if nine affiliated entities/individuals are prosecuted for the same misconduct as part of a single “case,” and all nine are suspended, proposed for debarment, and then debarred, this one “case” would amount to 27 “actions”).<sup>22</sup> Because there is little uniformity in the number of “actions” taken per “case,” comparing the number of suspension and debarment “actions” taken from one year to the next is not a particularly reliable way to measure the true increase suspensions and debarments.<sup>23</sup>

Because the ISDC statistics are reported in terms of “actions,” and not “cases,” the statistics should be taken with a grain of salt. Although the ISDC data clearly show that suspension and debarment activity is on the rise, it is unlikely that suspension and debarment cases have actually doubled over the past two fiscal years.

There are a number of explanations for why suspensions and debarments are on the rise across the majority of federal agencies. The following are some of the primary reasons for the increase.

14. See Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practices Under the FAR, Including A Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 Pub. Cont. L.J. 547, 579 (2009).

15. Individual agencies may still contract with a suspended or debarred contractor if they have documented in writing that a compelling reason to do so exists. See FAR 9.405(a), 9.406-1(c), and 9.407-1(d).

16. FAR 9.405; FAR 52.209-6(b). An exception to this rule exists for “commercially available off-the-shelf” items. See FAR 52.209-6(b)-(d).

17. FAR 9.406-1(b) (“Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities. The debarring official may extend the debarment decision to include any affiliates of the contractor if they are...[s] pecifically named; and...[g]iven written notice of the proposed debarment and an opportunity to respond (see 9.406-3(c)).”); FAR 9.407-1(c) (similar provision for suspensions).

18. FAR 9.405-1(a)-(b). See, e.g., *Commercial Drapery Contractors, Inc. v. U.S.*, 133 F.3d 1, 5-6 (D.C. Cir. 1998) (upon suspension of contractor, agency official properly canceled existing contract after conferring with other contracting officials and with counsel).

19. By way of example, a contractor with a recent federal suspension or debarment on its record would have difficulty winning, or be prohibited from bidding on, certain contracts with the following state and local agencies as a result of those jurisdictions’ prequalification surveys or responsibility questionnaires: California Department of Transportation, New York State Department of Transportation, City of Seattle, City of Los Angeles, City of San Diego, Tennessee Department of Transportation, Washington State Department of Transportation, South Carolina Department of Transportation, Vermont Agency of Transportation, Virginia Department of Transportation, and West Virginia Department of Transportation.

20. For example, in 2010 a contractor was suspended by a federal agency amidst allegations the contractor had improperly received government contracts intended for small businesses. Just eighteen days later, the suspension was lifted, but in the wake of the suspension the contractor lost nearly a quarter of its workforce, and experienced a 30.9 percent decline in revenue. See Allison C. Lerner, Inspector General, National Science Foundation, *Suspension & Debarment Overview 10* (June 23, 2011), available at [www.nsf.gov/oig/brussels2011/15lerner.pdf](http://www.nsf.gov/oig/brussels2011/15lerner.pdf).

21. Compare ISDC FY11, *supra* note 3, with ISDC FY09/10, *supra* note 4.

22. In re Golden West Imaging, et. al, AFD No. 111004-017 (April 18, 2011), available at [www.safgc.hq.af.mil/shared/media/document/AFD-111004-017.pdf](http://www.safgc.hq.af.mil/shared/media/document/AFD-111004-017.pdf).

23. A recent GAO study of Department of Defense suspension and debarment activity indicates that each suspension or debarment case accounts for an average of four suspension or debarment actions. See GAO-12-932, *supra* note 7, at 3.

## ENHANCED SUSPENSION AND DEBARMENT PROGRAMS AND POLICIES

The data indicates that the primary reason for the increase in suspensions and debarments is that, over the past few years, a number of federal agencies have significantly enhanced their suspension and debarment programs and policies through increased staffing, procedures, training, monitoring, and oversight. The impact of these improvements is best seen by comparing the agencies that have recently reported dramatic increases in the number of suspension and debarment actions, with those agencies reporting only marginal increases.

Of the federal agencies reporting the greatest increases in suspension and debarment actions, most have only just in the past few years developed detailed and effective suspension and debarment programs and policies. For example, one of the agencies reporting the largest increase in suspension and debarment actions is the Department of Transportation (DOT), going from 15 actions in fiscal year 2009 to 185 in fiscal year 2011 (a 1,133 percent increase).<sup>24</sup> A 2009-2010 audit by DOT's inspector general showed that DOT's suspension and debarment programs were limited by delays in department decisions and reporting, as well as deficiencies in its policies, procedures, and internal controls.<sup>25</sup> Since that audit, DOT has revamped its suspension and debarment policies and procedures to increase oversight and compliance, and has provided new training to its staff.<sup>26</sup>

Another agency that has seen a dramatic increase in suspension and debarment actions is the U.S. Agency for International Development (USAID). Like DOT, a 2009 audit of USAID showed that its suspension and debarment programs and policies were insufficient.<sup>27</sup> In response, USAID revised its suspension and debarment programs and policies, and has signed additional staff to work on suspension and debarment issues.<sup>28</sup> As a result, USAID went from 15 suspension and debarment actions in fiscal year 2009 to 63 actions in fiscal year 2011 (a 320 percent increase).<sup>29</sup>

By contrast, many of the agencies that have long had detailed and effective suspension and debarment programs and policies in place reported only marginal increases in their number of suspension and debarment actions over this same period of time. For example, unlike most of the other federal agencies, the Defense Logistics Agency (DLA), U.S. Navy, and General Services Administration (GSA) have long had dedicated suspension and debarment programs in place with full-time staff, detailed policies and procedures, and practices that encourage an active referral process.<sup>30</sup> These agencies have been amongst the highest in number of suspension and debarment actions taken over the past decade.<sup>31</sup> Yet, while the number of suspension and debarment actions more than doubled governmentwide between fiscal years 2009 and 2011, the total number of suspension or debarment actions taken by DLA, the U.S. Navy, and GSA increased by less than 20 percent.<sup>32</sup> This data reflects a strong correlation between the enhancement of suspension and debarment programs and policies and the increase in the number of suspension and debarment actions.<sup>33</sup>

24. Compare ISDC FY11, *supra* note 3, with ISDC FY09/10, *supra* note 4.

25. See Office of Inspector General, U.S. Dept. of Transp., PT-2011-010, DOT's FY 2011 Top Management Challenges 38 (Nov. 15, 2010), available at [www.oig.dot.gov/sites/dot/files/TMC%20for%20FY%202011%20-%20508.pdf](http://www.oig.dot.gov/sites/dot/files/TMC%20for%20FY%202011%20-%20508.pdf); Office of Inspector General, U.S. Dept. of Transp., ZA-2010-034, DOT's Suspension and Debarment Program Does Not Safeguard Against Awards to Improper Parties (Jan. 7, 2010), available at [www.oig.dot.gov/sites/dot/files/Suspension\\_and\\_Debarment\\_1.7.10\\_0.pdf](http://www.oig.dot.gov/sites/dot/files/Suspension_and_Debarment_1.7.10_0.pdf).

26. See ISDC FY11, *supra* note 3, at 16; DOT, PT-2011-010, *supra* note 28, at 38.

27. See Office of Inspector General, USAID, 9-000-10-001-P, Audit of USAID's Process for Suspension and Debarment (Oct. 1, 2009), available at <http://oig.usaid.gov/sites/default/files/audit-reports/9-000-10-001-p.pdf>; Tim Cox, Assistant Inspector General for Audit, USAID, The USAID Suspension & Debarment Experience 6 (CIGIE Suspension & Debarment Conference, Oct. 14, 2011), available at [www.nsf.gov/oig/SD2011/16.pdf](http://www.nsf.gov/oig/SD2011/16.pdf).

28. See Cox, *supra* note 30, at 6-10.

29. Compare ISDC FY11, *supra* note 3, with ISDC FY09/10, *supra* note 4; see also Cox, *supra* note 30, at 8.

30. See U.S. Gov't Accountability Office, GAO-11-739, Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved 12-17 (2011); see also ISDC FY11, *supra* note 2; ISDC FY09/10, *supra* note 4.

31. *Ibid.*

32. Compare ISDC FY11, *supra* note 3, with ISDC FY09/10, *supra* note 4 (in fact, the number of actions taken by GSA decreased during that period).

33. See GAO-11-739, *supra* note 33 (concluding that the agencies with the most suspension or debarment actions also had the most comprehensive suspension and debarment programs and policies).



## INCREASED OVERSIGHT AND SCRUTINY FROM THE LEGISLATIVE AND EXECUTIVE BRANCH

Of course, the expansion of suspension and debarment programs and policies did not come about out of thin air. The initial catalyst for the expansion of these programs appears to have been a number of investigations and audits performed by ISDC, the Government Accountability Office, and various inspectors general over the past few years.<sup>34</sup> Their reports were highly critical of many agencies' suspension and debarment programs. The revelations in these reports led to increased scrutiny and oversight from Congress and the White House.<sup>35</sup>

Over the past few years, Congress has held a number of hearings regarding federal suspension and debarment, and several pieces of legislation have been introduced that would make suspension and debarment mandatory under certain circumstances. One such bill that has been enacted is the Consolidated Appropriations Act of 2012.<sup>36</sup> Under that law, a contractor with a recent federal felony conviction or a delinquent tax liability is effectively suspended from federal contracting until the awarding agency has considered whether an actual suspension or debarment is appropriate.<sup>37</sup>

More recently, Rep. Darrell Issa, R-Calif., chairman of the House Oversight Committee, released a draft bill entitled the Stop Unworthy Spending Act (also referred to as the "SUSPEND Act"), which would radically change federal suspension and debarment practice and procedure.<sup>38</sup> The SUSPEND Act would consolidate the suspension and debarment offices of over 41 civilian agencies into a single office within the General Services Administration called the Board of Civilian Suspension and Debarment ("BCSD").<sup>39</sup> Noncivilian agencies, such as the Department of Defense, would also be able to opt into the consolidated BCSD suspension and debarment program.<sup>40</sup>

## THE MANDATORY DISCLOSURE RULE

Another reason for the increase in suspension and debarment actions is the advent of the "mandatory disclosure rule." Since 2008, all federal government contractors have been required to report to the agency any "credible evidence" of fraud and significant overpayments in connection with federal government contracts.<sup>41</sup> It is not hard to see why the mandatory disclosure rule has led to an increased number of suspension and debarment actions — it requires contractors to disclose information to the agency that could get the contractor debarred, and if they do not disclose the information the agency can use nondisclosure itself as a basis for debarment.

34. See, e.g., ISDC FY11, supra note 3; ISDC FY09/10, supra note 4; DOT, PT-2011-010, supra note 28; GAO-11-739, supra note 33; DOT, ZA-2010-034, supra note 28; Office of Inspector General, DHS, OIG 10-50, DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors (2010), available at [www.oig.dhs.gov/assets/Mgmt/OIG\\_10-50\\_Feb10.pdf](http://www.oig.dhs.gov/assets/Mgmt/OIG_10-50_Feb10.pdf); Office of Inspector General, DOD, D-2011-083, Additional Actions Can Further Improve the DOD Suspension and Debarment Process (2011), available at [www.dodig.mil/audit/reports/fy11/11-083.pdf](http://www.dodig.mil/audit/reports/fy11/11-083.pdf); Office of Inspector General, DOJ, Audit Rep. 12-25, Audit of Statutory Suspension and Debarment Activities Within the Department of Justice (2012), available at [www.justice.gov/oig/reports/2012/a1225.pdf](http://www.justice.gov/oig/reports/2012/a1225.pdf); Office of Inspector General, U.S. Department of Education, ED-OIG/113L0001, U.S. Department of Education's Nonprocurement Suspension and Debarment Process (June 22, 2012), available at [www2.ed.gov/about/offices/list/oig/aireports/i13i0001.pdf](http://www2.ed.gov/about/offices/list/oig/aireports/i13i0001.pdf); see also Commission on Wartime Contracting in Iraq and Afghanistan, Final Report to Congress, Transforming Wartime Contracting: Controlling Costs, Reducing Risks 155-60 (Aug. 2011), available at [www.wartimecontracting.gov/docs/CWC\\_FinalReport-lowres.pdf](http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf).

35. For instance, in November 2011, the White House (Office of Management and Budget) issued a memorandum requiring federal agencies to take specific action to remedy the deficiencies identified in GAO's August 2011 report, requiring each agency to appoint a senior accountable official to assess the agency's suspension and debarment program, including the adequacy of available training, resources, and staffing; ensure that the agency maintains effective internal controls and tracking capabilities; and ensure that the agency participates regularly on the ISDC. See Jacob J. Lew, Director, Office of Management and Budget, Executive Office of the President, M-12-02, Memorandum to the Heads of Executive Departments and Agencies (Nov. 15, 2011), available at [www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf](http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf).

36. Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011).

37. *Ibid.* Congress has since extended the applicable provisions of this law through the end of fiscal year 2013. See Consolidated and Further Continuing Appropriations Act of 2013, Pub. L. No. 113-6, 127 Stat. 198 (2013). Other legislation passed by Congress in 2012 affecting suspension and debarment include the following bills: National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1682(a), Jan. 2, 2013, 126 Stat. 1632, 2086 (2013) (amending 15 U.S.C. § 645(d)(2)(C) to make a contractor's misrepresentation of its status as a small business an independent basis for suspension or debarment); Honoring America's Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 706, 126 Stat. 1165, 1206 (2012) (amending 38 U.S.C. § 8127(g) to extend mandatory debarment period to minimum of five years for a contractor that willfully misrepresents its status as a VOSB or SDVOSB).

38. The Stop Unworthy Spending Act or SUSPEND Act, Feb. 5, 2013 Discussion Draft, 113th Cong. (1st Sess. 2013), available at [http://oversight.house.gov/wp-content/uploads/2013/02/Draft\\_SUSPEND\\_Act\\_2-5.pdf](http://oversight.house.gov/wp-content/uploads/2013/02/Draft_SUSPEND_Act_2-5.pdf). See also Press Release, H. Comm. Gov't Oversight, Issa: Stop Giving Taxpayer Dollars to Tax Cheats, Criminals, and Fraudsters (Feb. 7, 2013), <http://oversight.house.gov/release/issa-stop-giving-taxpayer-dollars-to-tax-cheats-criminals-and-fraudsters>.

39. See SUSPEND Act, supra note 41, § 6401.

40. See SUSPEND Act, supra note 41, § 6401(f).

41. FAR 3.1003, 9.406-2(b)(1)(iv), 9.407-2(a)(8), and 52.203-13.

## PREEMPTIVE STEPS CONTRACTORS CAN TAKE TO REDUCE THE RISK OF SUSPENSION AND DEBARMENT

The best way for a contractor to avoid suspension or debarment is to implement policies and practices aimed at preventing misconduct from occurring. The most important and effective step that a contractor can take is to develop a “values-based” ethics program, which includes review and control procedures and training, and which establishes an ethical culture in the organization and encourages employees to “do the right thing.” It is critical that the commitment to the ethics program be company-wide; in particular, senior management must exhibit a real commitment to the program. In addition, a company should have a designated ethics officer who can facilitate training, answer questions, advise on ethics and compliance, and investigate complaints.<sup>42</sup> While implementing such a program does not guarantee the contractor immunity from suspension or debarment, it will undoubtedly reduce the risks. In addition, should misconduct occur, the fact that the contractor already has these measures in place will greatly reduce the chances that the contractor will ultimately be debarred.<sup>43</sup>

## HOW TO AVOID SUSPENSION AND DEBARMENT AFTER THE MISCONDUCT HAS OCCURRED

Because the purpose of suspension and debarment under FAR Part 9.4 is to protect the government from doing business with nonresponsible contractors, rather than to punish contractors for past misconduct,<sup>44</sup> a contractor faced with a potential suspension or debarment is often in a position to avoid suspension or debarment even after the underlying misconduct has occurred. In fact, there are a number of actions that the contractor can take once it learns of the misconduct that still have the potential to reduce the chances of suspension or debarment (e.g., self-reporting, internal investigation, remedial measures, disciplinary actions, etc.).<sup>45</sup> But, if the contractor does not act immediately upon learning of the potential misconduct, it may miss its opportunity to establish a number of the key factors that would mitigate against debarment.<sup>46</sup>

Because the appropriate strategy can vary dramatically on a case-by-case basis, and it will be to the contractor’s benefit to bring in outside counsel at this initial stage to help evaluate its options and, if necessary, implement a mitigation strategy. The benefit of bringing in outside counsel at this early stage is that outside counsel is generally in a much better position to assess the circumstances and potential misconduct from a neutral point of view, and should have a better sense of what the SDO will look for in evaluating the case. Chances are bringing in outside counsel at this early stage will save the contractor money and reduce the likelihood of suspension or debarment.

After receiving a notice of suspension or notice of proposed debarment, the contractor will need to determine what type of response is most likely to avoid or limit the suspension or debarment. There are essentially two distinct paths that a contractor can take to contest a proposed debarment or suspension. The first option is to contest the facts alleged in the notice. The contractor will not be debarred if it can show that there is no underlying factual basis for debarment. However, a frontal assault on the facts is risky — if the contractor is unable to successfully dispute the facts, it will be more difficult for it to later establish the key mitigating factors (discussed later) that, if established, could avoid punishment even if the underlying misconduct did occur.<sup>47</sup>

Since the existence of a cause for debarment does not necessarily require the contractor to be debarred, the contractor’s second option is to focus on showing that it is “presently responsible” by establishing the mitigating factors set forth in the FAR. Before making the debarment decision, the SDO must consider the seriousness of the contractor’s acts or omissions, together with any remedial measures or mitigating factors taken by the contractor. The agency “must ascertain whether any mitigating factors or remedial measures show that the business risk of dealing with the individual has been eliminated to the extent that debarment is unnecessary.”<sup>48</sup>

42. See Steven A. Shaw, Government Tools to Encourage Ethical Conduct of their Contractors 5-6 (2009), available at [www.safgc.hq.af.mil/shared/media/document/AFD-110314-025.pdf](http://www.safgc.hq.af.mil/shared/media/document/AFD-110314-025.pdf).

43. A compliance-only program is no longer considered sufficient, and in fact may be used as evidence against the contractor in a debarment proceeding. *Id.*

44. FAR 9.402(b).

45. See FAR 9.406-1(a)(1)–(10).

46. *Ibid.*

47. In addition, this first option is particularly difficult to pursue if the contractor is facing debarment on the basis of a conviction or civil judgment, or suspension on the basis of an indictment. See FAR 9.406-2(b)(2), 9.407-2(b)(2). Under those circumstances, the contractor cannot raise a genuine issue of material fact by disputing the facts underlying the indictment, conviction or judgment. See FAR 9.406-2(d), 9.407-2(d).

48. *Burke v. U.S. E.P.A.*, 127 F. Supp. 2d 235, 240 (D.D.C., 2001).

FAR 9.406-1(a) sets forth several relevant mitigating factors the agency should consider.<sup>49</sup> The contractor has the burden of demonstrating — to the satisfaction of the SDO — that sufficient mitigating factors make debarment unnecessary (i.e., that it is “presently responsible”).<sup>50</sup> These mitigating factors include the following:

## EFFECTIVE STANDARDS AND CONTROLS IN PLACE<sup>51</sup>

The first mitigating factor is whether the contractor had effective standards of conduct and internal control systems in place at the time of the misconduct or had adopted such procedures prior to any government investigation of the misconduct. This factor centers on the values-based ethics program previously discussed.

## SELF-DISCLOSURE AND DEGREE OF COOPERATION<sup>52</sup>

Another mitigating factor is the extent to which a contractor timely self-discloses the misconduct to the agency, and thereafter voluntarily cooperates with investigative authorities. A contractor’s “voluntary cooperation may be so substantial that such cooperation seriously mitigates the need for debarment or seriously reduces the period of debarment necessary to protect the government.”<sup>53</sup> Further, “[c]ooperation can take a number of forms, including bringing the activity cited as the cause for debarment to the appropriate government agency in a timely manner and providing the results of the respondent’s internal investigation to the government.”<sup>54</sup>

Where the contractor has conducted an internal investigation, the agency will insist on full disclosure of the circumstances underlying the misconduct, including complete copies of the contractor’s internal investigation reports, regardless of privilege.<sup>55</sup> While the agency may consider this as evidence that the contractor is “presently responsible,” a contractor’s disclosure of only a “sanitized copy” of an investigative report will be given less weight.<sup>56</sup>

If the contractor only self-reports its misconduct after learning that the agency is conducting an inquiry into the incident, then this will have little effect toward mitigating against debarment.<sup>57</sup> In addition, conduct that is to be expected in an enforcement proceeding (such as producing requested information and attending hearings) is insufficient to establish voluntary cooperation and present responsibility<sup>58</sup> — nor will a guilty plea in exchange for leniency in sentencing.<sup>59</sup>

## PAYMENT OF ALL JUDICIAL AND ADMINISTRATIVE FINES, SANCTIONS, AND RELATED MONETARY OBLIGATIONS<sup>60</sup>

Another mitigating factor exists if the “contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the government, and has made or agreed to make full restitution.”<sup>61</sup> The SDO “may consider information showing that a respondent has fulfilled or promptly made arrangements to fulfill judicial and administrative sanctions, including any restitution.”<sup>62</sup> However, an SDO may give little weight to payment of a court-imposed sanction,<sup>63</sup> or if payment is made by a third party.<sup>64</sup>

49. The SDO may consider other factors if appropriate in light of the circumstances of each case. See FAR 9.406-1.

50. *Burke*, 127 F. Supp. 2d at 240; see also *Joseph Construction Company, Inc. v. Veterans Administration*, 595 F. Supp. 448, 451 (N.D. Ill. 1984); *In re Lake Doctors, Inc., et al.*, EPA Cases Nos. 93-0133-00, -01, 1995 WL 1212896, at \*7 (Aug. 14, 1995).

51. FAR 9.406-1(a)(1).

52. FAR 9.406-1(a)(2)-(4).

53. *In re Gary Boblitt*, EPA Case No. 94-0033-04, 1998 WL 1182109, at \*3 (March 24, 1998); see also *In re Caschem, Inc.*, EPA Case No. 96-0027-00, 1998 WL 1182106, at \*7 (May 12, 1998); *In re Kelley Technical Coatings, Inc.*, EPA Case No. 96-0090-00, 1997 WL 1248804, at \*6 (Aug. 28, 1997) (“Similarly, in a proper case, a respondent’s voluntary cooperation after an investigation commences may be so extraordinary that, in conjunction with other information in the record, the government’s trust in the respondent may be restored and a determination of present responsibility warranted.”); see, e.g., *In re Robert Schlosser*, EPA Case No. 91-0134-00 (Dec. 2, 1992) (respondent placed his own safety at risk by wearing a “body wire” to assist the government to obtain evidence against his employer).

54. *In re Cimarron Aircraft Corp.*, EPA Case No. 93-0162-00, 1995 WL 1212901, at \*9 (June 7, 1995).

55. See *Shaw*, *supra* note 11, at 6.

56. *Ibid.*

57. See *In re John R. Fields*, EPA Case No. 93-0289-00, 1995 WL 1212892, at \*7 (Nov. 13, 1995).

58. See *In re Kelley Technical Coatings, Inc.*, *supra* note 56, at \*6.

59. See *In re Caschem, Inc.*, *supra* note 56, at \*6.

60. FAR 9.406-1(a)(5).

61. *Ibid.*

62. *In re Robert Edward Caron*, EPA Case No. 93-0013-00, 1999 WL 1327400, at \*9 (Jan. 28, 1994).

63. See *In re Michael Gruttadauria*, EPA Case No. 98-0148-00, 1999 WL 1863624, at \*4 (July 30, 1994) (“For purposes of this debarment inquiry, Mr. Gruttadauria appears to have fulfilled the court imposed sanctions. Fulfillment of the court’s sentence is mandatory. This action sheds little if any light on the current state of Mr. Gruttadauria’s business ethics. Without more, the fact Mr. Gruttadauria fulfilled the court imposed sanctions carries limited mitigation weight. It does not provide persuasive support for a conclusion that debarment is unnecessary.”).

64. See *In re Stuart B. Cooper*, EPA Case No. 96-0027-01, 1998 WL 1182105, at \*7 (June 25, 1998) (the mitigating effect of the payment is minimized, if not eliminated, if a third party directly or indirectly pays the fine on the contractor’s behalf).

## APPROPRIATE DISCIPLINARY ACTION<sup>65</sup>

Evidence that a company has taken appropriate disciplinary action against the individuals responsible for the misconduct is another factor considered by the SDO in determining whether a period of debarment is necessary. The contractor is likely to receive credit on this factor if it suspends or terminates the responsible employee, but is unlikely to receive credit if the employee simply resigns.<sup>66</sup> The sooner the employee is terminated following the misconduct, the more it mitigates against debarment, particularly if the employee is terminated or suspended prior to the agency giving notice of a proposed debarment.<sup>67</sup>

## IMPLEMENTATION OF EFFECTIVE REMEDIAL MEASURES AND TIME ELAPSED SINCE THE OFFENSE<sup>68</sup>

A contractor's implementation of remedial measures taken after the misconduct is also a relevant mitigation factor.<sup>69</sup> A contractor may demonstrate by evidence of remedial measures that it is "presently responsible." The more time that has elapsed since the misconduct, and the longer the remedial measure has been in place, the more it will mitigate against debarment.<sup>70</sup>

## ACKNOWLEDGMENT OF RESPONSIBILITY AND RECOGNITION OF THE SERIOUSNESS OF THE MISCONDUCT<sup>71</sup>

The most important mitigating factor is whether the contractor's senior management acknowledges responsibility for, and genuinely recognizes the seriousness of, the misconduct at issue.<sup>72</sup> For this factor to weigh in the contractor's favor, it is important that the contractor's senior management take steps that reflect a sincere comprehension of the serious nature of the past misconduct, as well as acceptance of responsibility for the past misconduct.<sup>73</sup> A contractor's acknowledgment of responsibility for the misconduct is given "significant" mitigating weight against debarment.<sup>74</sup> On the flip side, a contractor's failure to accept responsibility for misconduct is considered an "aggravating factor."<sup>75</sup>

## ADMINISTRATIVE AGREEMENTS

As an alternative to suspension or debarment, the agency may be willing to enter into an administrative agreement with the contractor. The administrative agreement will identify the misconduct that formed the basis for the action, state the remedial measures taken by the contractor to show present responsibility, and require audits and periodic reporting to verify compliance. Administrative agreements generally require the contractor to meet certain agency-imposed requirements to avoid suspension or debarment and remain eligible for new contracts.<sup>76</sup>

65. FAR 9.406-1(a)(6).

66. See *In re Caschem, Inc.*, supra note 56, at \*7.

67. See *In re Golden West Imaging, et. al.*, supra note 25, at 5-6; *In re Caschem, Inc.*, supra note 56, at \*7; *In re Ulysses Cruises, Inc.*, EPA Cases Nos. 98-0021-00, -02, 1999 WL 1863625, at \*8 (April 26, 1999).

68. FAR 9.406-1(a)(7)-(9).

69. FAR 9.406-1(a)(7); see also *In re John R. Fields*, supra note 60, at \*12.

70. See *In re Cimarron Aircraft Corp.*, supra note 57, \*9.

71. FAR 9.406-1(a)(10).

72. See *Shaw*, supra note 11, at 6.

73. See *In re Kelley Technical Coatings, Inc.*, supra note 56, at \*7 (this mitigating factor was established when senior management took steps to remediate the misconduct, acknowledged that as the ultimate supervisor it was responsible for the misconduct, and took steps to train its employees to avoid a reoccurrence of the misconduct).

74. See *In re Caschem, Inc.*, supra note 56, at \*9 ("CASCHEM's acknowledgment of responsibility, as demonstrated through the remedial measures discussed in the following section, is given significant weight in reaching a recommendation that a period of debarment is not warranted."); *In re Ulysses Cruises, Inc.*, supra note 70, at \*9 ("The transfer of vessel staffing and operation to a specialist company with effective policies and procedures, and the absence of new violation citations directly demonstrate acknowledgment of corporate responsibility and commitment to appropriate standards of business conduct. .... Respondent's demonstrated remedial measures discussed in the following section, is given significant weight in reaching a recommendation that a period of debarment is not warranted."); *In re Kelley Technical Coatings, Inc.*, supra note 46, at \*7 ("Mr. Williams' [KTC's president and CEO] presentation reflected a sincere comprehension of the serious nature of the past misconduct as well as acceptance of responsibility for the environmental noncompliance of KTC. Mr. William's acknowledgement of responsibility is of mitigative value in the determination that a period of debarment is not warranted for KTC.").

75. See *In re Lake Doctors, Inc., et al.*, supra note 47, at \*11.

76. See *Shaw*, supra note 11, at 7; see also *Manuel*, supra note 10, at 10.



## LIMITED JUDICIAL REVIEW OF SUSPENSIONS AND DEBARMENTS

If suspended or debarred by an agency, the contractor can challenge the agency's decision by bringing an action in federal district court under the Administrative Procedure Act.<sup>77</sup> However, the standard applied on review is highly deferential to the agency. The court will not set aside the debarment or suspension unless the agency's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>78</sup> In evaluating a debarment under this standard, "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."<sup>79</sup>

## SUMMARY OF BEST PRACTICES

To summarize, the best way for a government contractor to avoid the "corporate death penalty" is to create and implement a comprehensive "values-based" ethics and compliance program, and to maintain that program from the top down. Should a contractor learn that it has committed misconduct that could form the basis for suspension or debarment, it is critical that it take immediate action to investigate and mitigate the misconduct. Failing to act with vigilance, or withholding information subject to the mandatory disclosure rule, will significantly increase the contractor's chances of being suspended or debarred.

If the contractor learns of misconduct that might put it at risk of suspension or debarment, there are two simple steps it can immediately take to significantly reduce the likelihood of suspension or debarment:

- Bring in outside counsel to provide an unbiased assessment of the situation, and to help direct an internal investigation and mitigation if necessary; and
- Make sure that the contractor's senior management is heavily involved and at the forefront of all mitigation and remedial efforts.

Although dealing with misconduct may be unpleasant, sometimes you have to do something unpleasant to avoid something even worse. And in the world of government contracts, there is nothing worse than being debarred.

## ABOUT THE AUTHOR

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77. See *Burke v. U.S. E.P.A.*, 127 F. Supp. 2d 235, 238 (D.D.C. 2001); see also *Agility Def. & Gov't Services, Inc. v. U.S. Dept. of Def.*, CV-11-S-4111-NE, 2012 WL 2480484, at \*6 (N.D. Ala., June 26, 2012) ("debarment or suspension of an affiliate, not itself accused of wrongdoing, presents a justiciable controversy").

78. *Burke*, 127 F. Supp. 2d at 238.

79. *Ibid.* (internal quotations omitted). For a compendium of case law concerning judicial review of debarment and suspension decisions, see David M. Sims, Esq., Debarment Program Manager, U.S. Dept. of the Interior, Case Law Compendium: Debarment and Suspension (Nov. 16, 2012), available at [www.nsf.gov/oig/caselawcompendium.pdf](http://www.nsf.gov/oig/caselawcompendium.pdf).

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