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SHEDDING **LIGHT** ON SUSPENSIONS AND DEBARMENTS

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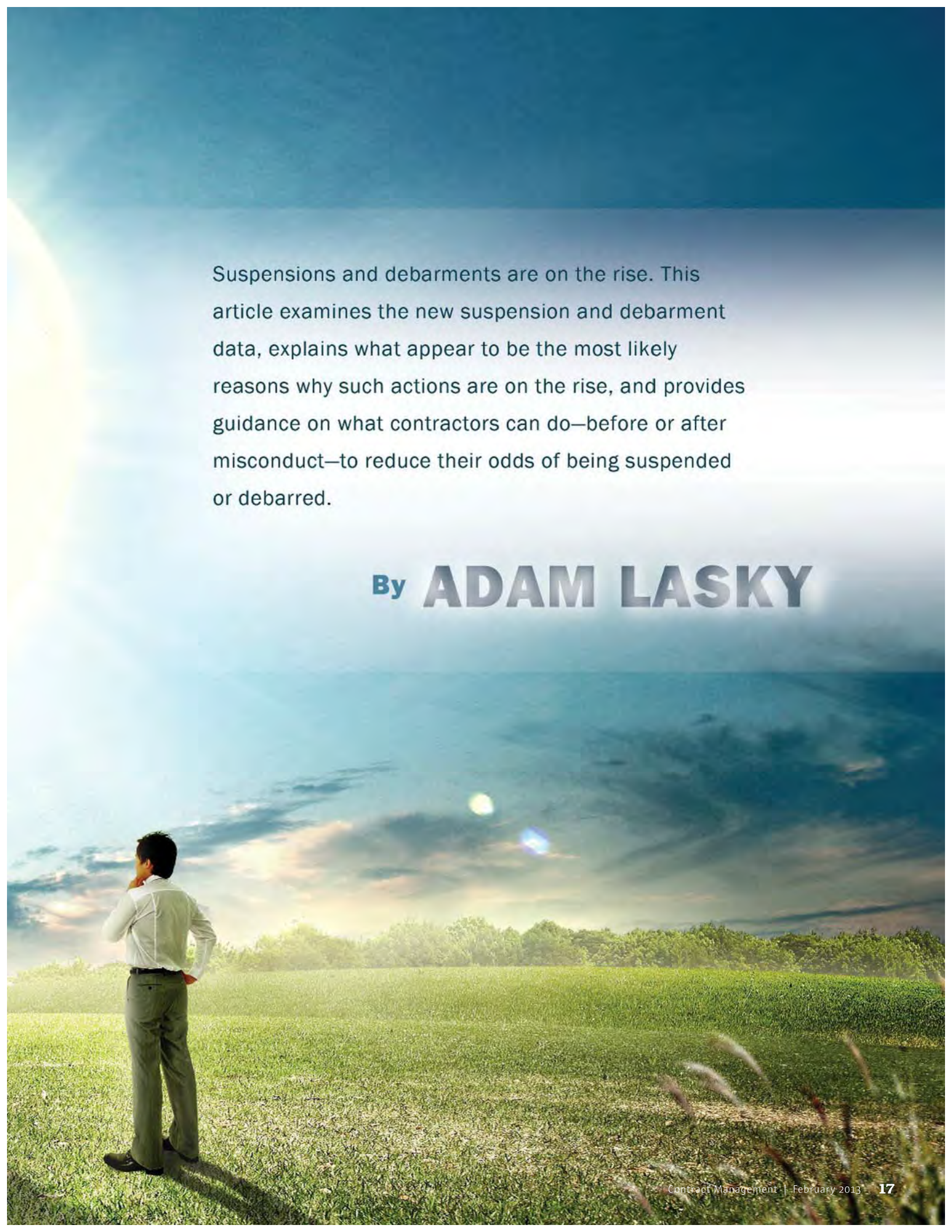
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A large, glowing lightbulb is the central focus of the image. It is positioned on the right side, with its base resting on a green grassy field. The lightbulb is illuminated from within, casting a bright glow that fills the upper right portion of the frame. The background consists of a clear blue sky with some light clouds and a distant horizon line. The overall composition is clean and professional, with a focus on the lightbulb as a symbol of ideas and clarity.


SHEDDING LIGHT **ON SUSPENSIONS AND DEBARMENTS:**

**Why the “Corporate Death Penalty”
is on the Rise, and How Contractors
Can Avoid Being Suspended
or Debarred**



Suspensions and debarments are on the rise. This article examines the new suspension and debarment data, explains what appear to be the most likely reasons why such actions are on the rise, and provides guidance on what contractors can do—before or after misconduct—to reduce their odds of being suspended or debarred.

By **ADAM LASKY**



Over the past decade, the number of convicted criminals sentenced each year to the death penalty has rapidly declined.¹ 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 agencies² took 5,838 suspension or debarment actions in fiscal year 2011,³ up from 2,668 in fiscal year 2009.⁴ Since there is no indication that contractors are behaving any worse than they were a few years ago, it begs the question: What is causing this dramatic rise in the number of suspensions and debarments?

This 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 of Suspension and Debarment

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 no-

tice of proposed debarment, and lasts until the debarring official makes the decision on whether or not to debar for a specified period; and

- 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.⁵ However:

Debarment cannot be used to punish an individual; rather, 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.”⁶

The U.S. comptroller general first recognized the right of government agencies to debar or suspend contractors from bidding on federal contracts in 1928.⁷ 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.⁸

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.⁹ The *Federal Acquisition Regulation (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.¹⁰

However, even if there is sufficient proof of such misconduct, none of these 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.

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.¹¹ 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.¹²

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.¹³ Absent a "compelling reason" justification from an awarding agency,¹⁴ 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 \$30,000.¹⁵ These same restrictions may also be applied to entities and individuals affiliated with the suspended/debarred contractor.¹⁶ 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.¹⁷

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. 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.¹⁸

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.¹⁹ 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").²⁰ 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 in suspensions and debarments.²¹

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 shows 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.

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

The BP Suspension: Are the Days of Immunity Over for the Largest Contractors?

For many years, the largest federal government contractors have been essentially immune from suspension and debarment.¹ However, recent developments indicate that the era of large contractors being too big to suspend or debar could be coming to an end. In 2012, two of the top 100 largest federal contractors were suspended from federal contracting.² Most notably, on November 28, 2012, the U.S. Environmental Protection Agency (EPA) indefinitely suspended BP (and its subsidiaries and affiliates) due to BP's "lack of business integrity" as demonstrated by "the company's conduct with regard to the [2010] Deepwater Horizon blowout, explosion, oil spill, and response...."³ After just a month, the BP suspension was already the longest company-wide suspension of a top 100 contractor in recent history.⁴ But is the BP suspension a sign that large contractors are no longer immune from suspension and debarment? Although technically the EPA controls the duration of BP suspension, the course of action taken by the Defense Logistics Agency (DLA) will best reflect whether or not the era of immunity has come to an end. DLA, which is the world's largest fuel buyer and procures the bulk of the Pentagon's fuel, is BP's largest customer, and, in turn, BP is DLA's largest fuel supplier.⁵ The majority of BP's over \$2 billion in existing DLA fuel supply contracts will expire before the end of the current fiscal year.⁶ Should these contracts expire before the EPA has lifted BP's suspension, DLA will have to decide whether or not to issue a "compelling reasons" determination allowing BP to bid on new fuel supply contracts. So far, DLA has given mixed signals on what it might do. Although DLA has stated that it does not intend to issue any waivers to award new contracts to BP, it has already issued a "compelling reasons" determination to permit military fuel purchases from BP at commercial airports (there were \$6.2 million in such purchases during the last fiscal year, representing less than one percent of BP's fuel sales to DLA).⁷

1. See Rena Steinzor and Anne Havemann, "Too Big to Obey: Why BP Should Be Debarred," *William & Mary Environmental Law & Policy Review* (2011): 111–113; Drury D. Stevenson and Nicholas J. Wagoner, "FCPA Sanctions: Too Big to Debar?" *Fordham Law Review* (2011): 809–810; Project on Government Oversight, "Federal Contractor Misconduct Database," available at www.contractormisconduct.org/index.cfm; and Project on Government Oversight, "Federal Contractor Misconduct: Failures of the Suspension and Debarment System" (May 10, 2002), available at <http://pogoarchive.pub30.convio.net/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html>.
2. See Administrative Agreement between Booz Allen Hamilton, Inc., and U.S. Air Force (April 13, 2012) (Booz Allen's San Antonio office was suspended from federal contracting for 10 weeks), available at www.safgc.hq.af.mil/shared/media/document/AFD-120416-004.pdf; and BP PLC, et al., EPA Cases No. 12-0295-00, et al., Notice of Suspension (November 28, 2012), available at www.corporatecrimereporter.com/wp-content/uploads/2012/11/bpdebar.pdf.
3. Press Release, EPA, "BP Temporarily Suspended from New Contracts with the Federal Government" (November 28, 2012), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/2AAF1C1DC80C969885257ABF006DAFB0>. See also BP PLC, et al., *ibid*.
4. See "Federal Contractor Misconduct Database," note 2.
5. See BP, "BP in America: Fueling the U.S. Military" (December 26, 2012), available at www.bp.com/assets/bp_internet/globalbp/STAGING/global_assets/downloads/B/BP_Fueling_the_US_Military.pdf; and Danielle Ivory, "BP Wins Most Pentagon Fuel Awards in Year After Gulf Explosion," *Bloomberg* (February 23, 2012), available at www.bloomberg.com/news/2012-02-24/bp-wins-most-pentagon-fuel-awards-in-year-after-gulf-of-mexico-explosion.html.
6. Danielle Ivory, "BP Has More Than \$2 Billion in Defense Awards Set to Expire," *Bloomberg* (November 30, 2012), available at www.businessweek.com/news/2012-11-30/bp-has-more-than-2-billion-in-defense-contracts-set-to-expire.
7. Danielle Ivory, "BP's U.S. Suspension Allows Airport-Fuel Exception for Pentagon," *Bloomberg* (December 14, 2012), available at www.bloomberg.com/news/2012-12-14/bp-s-u-s-suspension-allows-airport-fuel-exception-for-pentagon.html.

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).²² 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.²³ 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.²⁴

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.²⁵ In response, USAID revised its suspension and debarment programs and policies and assigned additional staff to work on suspension and debarment issues.²⁶ 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).²⁷

By contrast, many of those 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 Ad-

ministration (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.²⁸ These agencies have been amongst the highest in number of suspension and debarment actions taken over the past decade.²⁹ 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.³⁰ 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.³¹

Increased Oversight and Scrutiny from the Legislative and Executive Branch

Of course, the expansion of suspension and debarment programs and policies did

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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.³² 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.³³

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 2012.³⁴ Under that law (applicable to fiscal year 2012 procurements), 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.³⁵

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.³⁶ 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.

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 companywide; 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.³⁷ 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.³⁸

How to Avoid Suspension and Debarment After the Misconduct has Occurred

Because the purpose of suspension and debarment is to protect the government from doing business with nonresponsible contractors, rather than to punish contractors for past misconduct,³⁹ 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.).⁴⁰ 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.⁴¹

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.⁴²

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."⁴³

FAR 9.406-1(a) sets forth several relevant mitigating factors the agency should consider.⁴⁴ 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”).⁴⁵ These mitigating factors include the following.

Effective Standards and Controls in Place⁴⁶

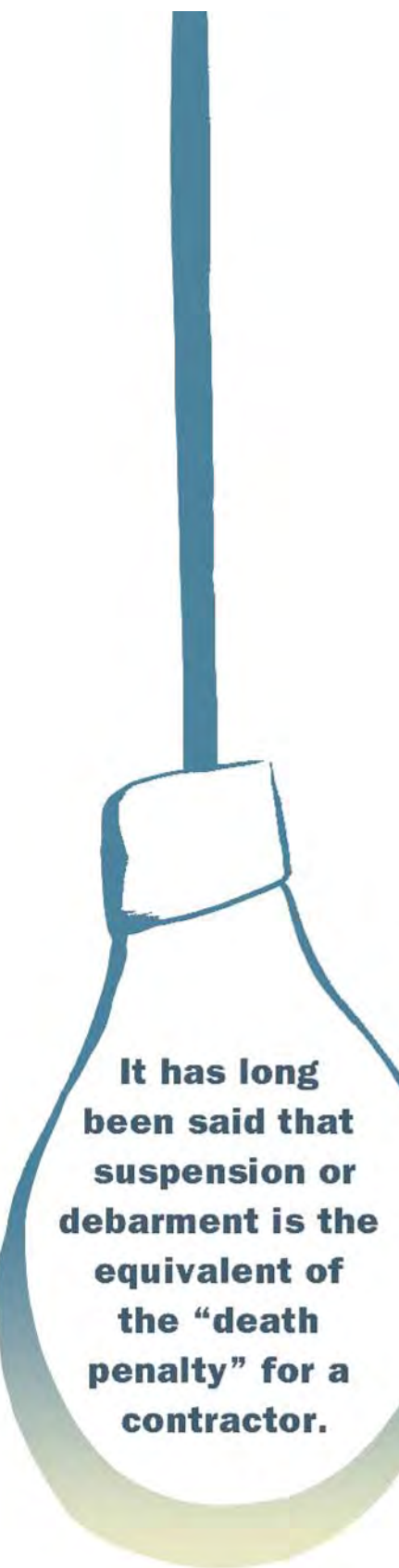
The first mitigating factor is whether the contractor had effective standards of conduct and internal control systems in place at the time of the misconduct or had adopted such procedures prior to any government investigation of the misconduct. This factor centers on the values-based ethics program previously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

Self-Disclosure and Degree of Cooperation⁴⁷

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.”⁴⁸ 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.”⁴⁹

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.⁵⁰ 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.⁵¹

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.⁵² 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 responsibility⁵³—nor will a guilty plea in exchange for leniency in sentencing.⁵⁴

Payment of All Judicial and Administrative Fines, Sanctions, and Related Monetary Obligations⁵⁵

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.”⁵⁶ The SDO “may consider information showing that a respondent has fulfilled or promptly made arrangements to fulfill judicial and administrative sanctions, including any restitution.”⁵⁷ However, an SDO may give little weight to payment of a court-imposed sanction⁵⁸ or if payment is made by a third party.⁵⁹

Appropriate Disciplinary Action⁶⁰

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.⁶¹ 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.⁶²

Implementation of Effective Remedial Measures and Time Elapsed Since the Offense⁶³

A contractor’s implementation of remedial measures taken after the misconduct is also a relevant mitigation factor.⁶⁴ 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.⁶⁵



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Acknowledgment of Responsibility and Recognition of the Seriousness of the Misconduct⁶⁶

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.⁶⁷ 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.⁶⁸ A contractor's acknowledgment of responsibility for the misconduct is given "significant" mitigating weight against debarment.⁶⁹ On the flip side, a contractor's failure to accept responsibility for misconduct is considered an "aggravating factor."⁷⁰

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.⁷¹

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.⁷² 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."⁷³ 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."⁷⁴

Summary of Best Practices

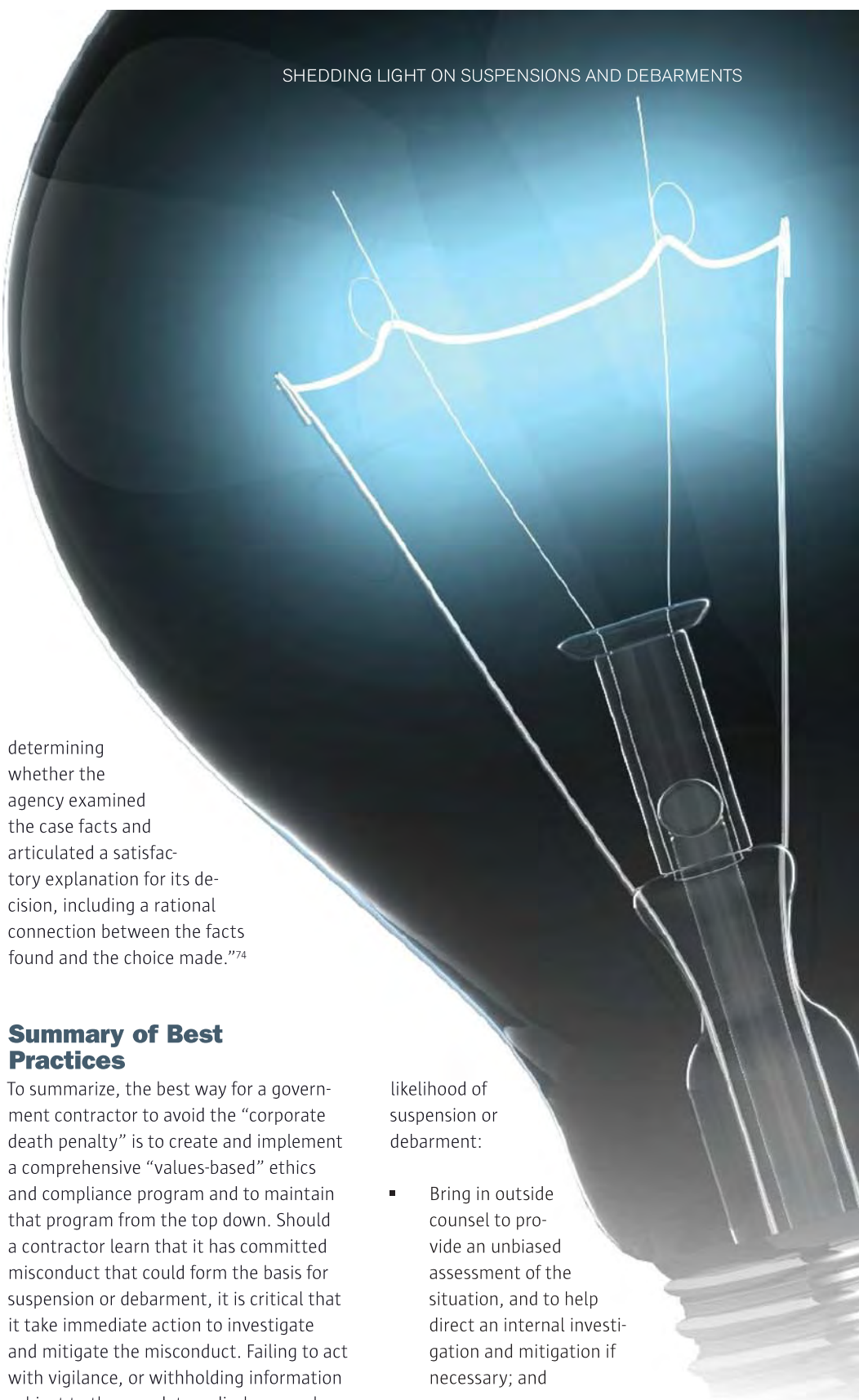
To summarize, the best way for a government contractor to avoid the "corporate death penalty" is to create and implement a comprehensive "values-based" ethics and compliance program and to maintain that program from the top down. Should a contractor learn that it has committed misconduct that could form 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 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. **CM**

ABOUT THE AUTHOR

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ENDNOTES

1. Death Penalty Information Center, "The Death Penalty in 2011: The Year End Report" (December 2011), available at 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" (September 18, 2012) [hereinafter "ISDC FY11"], available at 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.
5. See U.S. Government Accountability Office (GAO), GAO-12-932, "Suspension and Debarment: DOD Has Active Referral Processes, but Action Needed to Promote Transparency" (2012): 4-5.
6. *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)).
7. *Comptroller Gen. McCarl to the Sec'y of the Treasury*, 7 Comp. Gen. 547 (1928).
8. *Ibid.*
9. See Steven A. Shaw, deputy general counsel, Office of the Air Force General Counsel, "Suspension and Debarment in a Nutshell" (2011), available at www.safgc.hq.af.mil/shared/media/document/AFD-110314-018.pdf.
10. FAR 9.406-2, 9.407-2; see also GAO-12-932, note 5, at 5. For a more detailed discussion on the causes for suspension and debarment, see Kate M. Manuel, Congressional Research Service Report No. R40826, "Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments" (January 6, 2012), available at www.safgc.hq.af.mil/shared/media/document/AFD-120315-091.pdf.
11. 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," *Public Contracting Law Journal* (Spring 2011): 611.)
12. FAR 9.407-3(c)(5); FAR 9.406-3(c)(4).
13. 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," *Public Contracting Law Journal* (2009): 579.
14. 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).)
15. 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)).
16. 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).
17. 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 the contractor, the agency official properly canceled the existing contract after conferring with other contracting officials and with counsel).
18. 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 18 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" (June 23, 2011): 10, available at www.nsf.gov/oig/brussels2011/15lerner.pdf.)
19. Compare ISDC FY11, note 3, with ISDC FY09/10, note 4.
20. *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.
21. 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, note 5, at 3.)
22. Compare ISDC FY11, note 3, with ISDC FY09/10, note 4.
23. See Office of Inspector General, DOT, PT-2011-010, "DOT's FY 2011 Top Management Challenges" (November 15, 2010): 38, available at www.oig.dot.gov/sites/dot/files/TMC%20for%20FY%202011%20-%2020508.pdf; and Office of Inspector General, DOT, ZA-2010-034, "DOT's Suspension and Debarment Program Does Not Safeguard Against Awards to Improper Parties" (January 7, 2010), available at www.oig.dot.gov/sites/dot/files/Suspension_and_Debarment_1.7.10_0.pdf.
24. See ISDC FY11, note 3, at 16; DOT, PT-2011-010, *ibid.*, at 38.
25. See Office of Inspector General, USAID, 9-000-10-001-P, "Audit of USAID's Process for Suspension and Debarment" (October 1, 2009), available at <http://oig.usaid.gov/sites/default/files/audit-reports/9-000-10-001-p.pdf>; and Tim Cox, assistant inspector general for audit, Office of Inspector General, USAID, "The USAID Suspension & Debarment Experience" (CIGIE Suspension & Debarment Conference, October 14, 2011): 6, available at www.nsf.gov/oig/SD2011/16.pdf.
26. See Cox, *ibid.*, at 6-10.
27. Compare ISDC FY11, note 3, with ISDC FY09/10, note 4; see also Cox, *op. cit.*, at 8.
28. See GAO-11-739, "Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved" (2011): 12-17; see also ISDC FY11, note 2; and ISDC FY09/10, note 3.
29. *Ibid.*
30. Compare ISDC FY11, note 3, with ISDC FY09/10, note 4 (in fact, the number of actions taken by GSA decreased during that period).
31. See GAO-11-739, note 28 (concluding that the agencies with the most suspension or debarment actions also had the most comprehensive suspension and debarment programs and policies).
32. See, e.g., ISDC FY11, note 3; ISDC FY09/10, note 4; DOT, PT-2011-010, note 23; GAO-11-739, note 28; DOT, ZA-2010-034, note 23; 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**; 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; 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; Office of Inspector General, U.S. Department of Education, ED-OIG/13L0001, "U.S. Department of Education's Nonprocurement Suspension and Debarment Process" (June 22, 2012), available at www2.ed.gov/about/offices/list/oig/aireports/i13l0001.pdf; and Commission on Wartime Contracting in Iraq and Afghanistan, Final Report to Congress, "Transforming War-time Contracting: Controlling Costs, Reducing Risks" (August 2011):155-160, available at www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf.
33. 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" (November 15, 2011), available at www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf.)
 34. *Pub. L.* 112-74, 125 Stat. 786 (2011).
 35. *Ibid.* Similar language has been included in the appropriations bills being considered for fiscal year 2013. (See, e.g., H.R. 5856, 112th Cong. 8108-8109 (2012); H.R. 6091, 112th Cong. 425-426 (2012); and H.R. 5972, 112th Cong. 416-417 (2012).)
 36. FAR 3.1003, 9.406-2(b)(1)(iv), 9.407-2(a)(8), and 52.203-13.
 37. See Steven A. Shaw, deputy general counsel, Office of the Air Force General Counsel, "Government Tools to Encourage Ethical Conduct of their Contractors" (2009): 5-6, available at www.safgc.hq.af.mil/shared/media/document/AFD-110314-025.pdf.
 38. A compliance-only program is no longer considered sufficient, and in fact may be used as evidence against the contractor in a debarment proceeding. (*Ibid.*)
 39. FAR 9.402(b).
 40. See FAR 9.406-1(a)(1)-(10).
 41. *Ibid.*
 42. 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) and 9.407-2(d).)
 43. *Burke v. U.S. E.P.A.*, 127 F. Supp. 2d 235, 240 (D.D.C., 2001).
 44. The SDO may consider other factors if appropriate in light of the circumstances of each case. (See FAR 9.406-1.)
 45. *Burke*, *op. cit.*; see also *Joseph Construction Company, Inc. v. Veterans Administration*, 595 F. Supp. 448, 451 (N.D. Ill. 1984); and *In re Lake Doctors, Inc.*, *et al.*, EPA Cases Nos. 93-0133-00, -01, 1995 WL 1212896, at 7 (August 14, 1995).
 46. FAR 9.406-1(a)(1).
 47. FAR 9.406-1(a)(2)-(4).
 48. *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); and *In re Kelley Technical Coatings, Inc.*, EPA Case No. 96-0090-00, 1997 WL 1248804, at 6 (August 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 (December 2, 1992) (respondent placed his own safety at risk by wearing a "body wire" to assist the government to obtain evidence against his employer)).
 49. *In re Cimarron Aircraft Corp.*, EPA Case No. 93-0162-00, 1995 WL 1212901, at 9 (June 7, 1995).
 50. See Shaw, note 9, at 6.
 51. *Ibid.*
 52. See *In re John R. Fields*, EPA Case No. 93-0289-00, 1995 WL 1212892, at 7 (November 13, 1995).
 53. See *In re Kelley Technical Coatings, Inc.*, note 48.
 54. See *In re Caschem, Inc.*, note 48.
 55. FAR 9.406-1(a)(5).
 56. *Ibid.*
 57. *In re Robert Edward Caron*, EPA Case No. 93-0013-00, 1999 WL 1327400, at 9 (January 28, 1994).
 58. 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.")
 59. 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).
 60. FAR 9.406-1(a)(6).
 61. See *In re Caschem, Inc.*, note 48.
 62. See *In re Golden West Imaging, et. al.*, note 20; *In re Caschem, Inc.*, note 48; and *In re Ulysses Cruises, Inc.*, EPA Cases Nos. 98-0021-00, -02, 1999 WL 1863625, at 8 (April 26, 1999).
 63. FAR 9.406-1(a)(7)-(9).
 64. FAR 9.406-1(a)(7); see also *In re John R. Fields*, note 52.
 65. See *In re Cimarron Aircraft Corp.*, note 49.
 66. FAR 9.406-1(a)(10).
 67. See Shaw, note 9, at 6.
 68. See *In re Kelley Technical Coatings, Inc.*, note 48 (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).
 69. See *In re Caschem, Inc.*, note 48 ("CASCHEM's acknowledgement of responsibility...is given significant weight in reaching a recommendation that a period of debarment is not warranted."); *In re Ulysses Cruises, Inc.*, note 62 ("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 acknowledgement of corporate responsibility and commitment to appropriate standards of business conduct.... Respondent's demonstrated remedial measures... is given significant weight in reaching a recommendation that a period of debarment is not warranted."); and *In re Kelley Technical Coatings, Inc.*, note 48 ("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. Williams' acknowledgement of responsibility is of mitigative value in the determination that a period of debarment is not warranted for KTC.").
 70. See *In re Lake Doctors, Inc.*, *et al.*, note 45.
 71. See Shaw, note 9, at 7; see also Manuel, note 10, at 10.
 72. 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").
 73. *Burke*, 127 F. Supp. 2d, at 238.
 74. *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. Department of the Interior, "Case Law Compendium: Debarment and Suspension" (November 16, 2012), available at www.nsf.gov/oig/caselawcompendium.pdf.