DEPARTMENT OF THE AIR FORCE
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SUSPENSION AND DEBARMENT IN A NUTSHELL

INTRODUCTION

General overview - Suspension and debarment protect the government from doing business with contractors that are not "responsible." Each Executive Branch department and agency has delegated to a "suspending" and "debarring" official (S & D official) the authority to suspend and debar non-responsible contractors. Suspension or debarment has the immediate effect of making the contractor ineligible for new contracts or for federal assistance programs with all Executive Branch departments and agencies. That ineligibility is effectuated when the S & D official causes the contractor's name to be placed on the "GSA list," maintained on the Internet. Contracting officers are required to review the GSA list prior to the award of new contracts.

Regulations - The suspension and debarment regulations are found in the Federal Acquisition Regulation (FAR), Subpart 9.4. - "Debarment, Suspension, and Ineligibility." 48 CFR, Chapter 1, Part 9.

Suspension - The government may suspend a contractor based upon "adequate evidence" that it has engaged in certain misconduct as stated in FAR 9.407-2. The suspension continues, with certain limitations, pending the completion of any investigation or legal proceeding. An indictment constitutes "adequate evidence" as a matter of law. FAR 9.407- 2(b). As a general principle, "adequate evidence" is analogous to probable cause.

Debarment - A S & D official may debar a contractor if the contractor is convicted of a crime in connection with obtaining, attempting to obtain or performing a public contract. A S & D official may also debar a contractor if there is a civil judgment for fraud against the contractor in connection with obtaining, attempting to obtain, or performing a public contract. However, a conviction or civil judgment is not a necessary prerequisite to debarment. The government can debar a contractor for any misconduct if it is so serious as to affect the contractor's present responsibility. FAR 9.406-2(c). The debarment is for a specific period of time: "generally" no more than three years. FAR 9.406-4(a)(1).

ACTIONABLE MISCONDUCT

Most suspensions and debarments are based on the commission of a crime or civil fraud, poor contract performance, or other serious misconduct showing that the contractor is not responsible.

Suspension

The government can suspend a contractor if the government has adequate evidence that the contractor engaged in the following conduct, as described in FAR 9.407-2(a):

- Commission of fraud or any crime in connection with obtaining, attempting to obtain or performing a public contract;
- Violating a federal or state antitrust law;
- Committing embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax evasion or receiving stolen property;
- Violating the Drug Free Workplace Act of 1988;
- Intentionally affixing the "Made in America" inscription to products that were not made in America;

- Committing an unfair trade practice; or
- Committing any other act showing a lack of business integrity or honesty that affects the contractor's responsibility.

An indictment constitutes adequate evidence, FAR 9.407-2(b). However, an indictment is not a prerequisite, and the government can suspend a contractor even though there is no indictment.

Debarment based on conviction or civil judgment

The government can debar a contractor if the contractor has been convicted of, or adjudged civilly liable for the following misconduct, as described in FAR 9.406-2(a):

- Commission of fraud or any crime in connection with obtaining, attempting to obtain or performing a public contract;
- Violating a federal or state antitrust law;
- Committing embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax evasion or receiving stolen property;
- Intentionally affixing the "Made in America" inscription to products that were not made in America; or
- Committing any other offense showing a lack of business integrity or honesty that affects the contractor's responsibility.

Fact-based suspension or debarment where there is no indictment, conviction or civil judgment

The government can also suspend or debar a contractor even though the contractor has not been indicted, convicted or adjudged civilly liable for the acts described above. For example, FAR 9.407-2(c) and FAR 9.406-2(c) permit the government to suspend or debar a contractor for any cause of a serious or compelling nature affecting the contractor's present responsibility. Similarly, FAR 9.406-2(b)(1)(i) permits the government to debar a contractor for failure to perform in accordance with the terms of a contract.

If there is a preponderance of evidence that the contractor has done any of the following, then the government can debar the contractor, even though there is no conviction or civil judgment:

- Willful failure to perform in accordance with the terms of a contract;
- A history of unsatisfactory performance of one or more contracts;
- Violating the Drug Free Workplace Act of 1988;
- Intentionally affixing the "Made in America" inscription to products that were not made in America;
- Committing an unfair trade practice; or
- A determination by the Attorney General that the contractor is not complying with the Immigration and Nationality Act.

Because the government can debar for a history of unsatisfactory performance of one or more contracts, this means that in appropriate circumstances, action can be taken against a contractor for a pattern of negligent performance on a single public contract. There is no need to show fraud or even reckless conduct.

Other serious cause -- the catch-all provision

The government can suspend or debar a contractor based on "any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor." FAR 9.406-2(c) ; FAR 9.407-2(c).

This provision provides wide latitude to the Air Force to determine whether a contractor's conduct requires suspension or debarment, and could even include conduct that is neither criminal nor related to a public contract. A history of unsatisfactory performance on private contracts, for example, could indicate a lack of present responsibility requiring debarment under this "other causes" provision.

SCOPE OF DEBARMENT

Contractor Defined

A suspension or debarment action may be taken against any "contractor," which is defined as including any individual or entity that (a) "submits offers for or is awarded" Government contracts or subcontracts, or (b) "reasonably may be expected" to do so, and (c) agents of contractors. FAR 9.403. Debarment actions need not, therefore, be limited to persons having contracts with the Air Force, or even with the government.

The Air Force has often suspended or debarred persons and entities who were likely to seek Air Force contracts, by reason of their past interest in such contracts. The Air Force has also debarred Air Force members and employees who, under the circumstances, likely would seek government contracts in the near future.

Where justified by the evidence, the government can suspend or debar attorneys, accountants and consultants as "agents" of contractors.

Vicarious Liability

The government can suspend or debar not only contractors, but also those affiliated with and employed by contractors.

Affiliates Following a determination that a contractor has engaged in actionable misconduct, an "affiliate" of that contractor may also be debarred, if the affiliate is given notice and an opportunity to respond. FAR 9.406-1(b).

Power to control Generally, persons and entities are affiliates of each other if either has the power to control the other, or a third party has the power to control both. FAR 9.403. For example, if the government debars the Widget Division of Superior Aircraft Parts Corporation, then, after giving proper notice, the government could also debar the whole company, Superior Aircraft Parts Corporation, and all of its other divisions. The initial debarment of the Widget Division would automatically include the Widget Division's subdivisions and organizational units. The debarment could be extended further to include officers and any persons or entities holding sufficient ownership interest so as to control Superior Aircraft Parts Corporation.

Imputed misconduct The government can suspend or debar a person or entity even if the person or entity has not directly committed any misconduct or is not an affiliate of the wrongdoer, based on the imputation to them of the actionable misconduct of others. FAR 9.406-5. Considering again the Widget Division example, if Joe Jones, a Widget Division inspector, was caught signing false test certifications for widgets to be shipped to the Air Force, then Jones' misconduct may be "imputed" to the Widget Division because he was acting within the scope of his employment. On the other hand, any misconduct by Jones which was designed to personally benefit Jones, and not the Widget Division, could not be imputed to the Widget Division unless it was done with the "knowledge, approval, or acquiescence" of the management of the Widget Division. See FAR 9.406-5(a).

Reason to know of misconduct The Widget Division debarment could be extended further to include anyone "associated with" the Widget Division, that "participated in, knew of, or had reason to know of" the Division's misconduct. FAR 9.406-5(b) Thus, John Brown, the Widget Division's Vice President of Operations, could arguably be debarred, for example, upon a finding that Brown was responsible for directing the Widget Division's shipment of

10,000 widgets a day to the Air Force, and that he knew that Jones was the Division's only inspector. Such could support a finding that Brown "had reason to know of" the Division's false testing certifications.

Practical Considerations

Contracts in process The general rule is that absent a contrary determination by the ordering activity, debarment has no effect on the continued performance of contracts or subcontracts in existence at the time of the debarment. FAR 9.405-1. However, under DFARS 209.405-1, unless an agency head makes a compelling need determination, DoD entities may not place orders exceeding guaranteed minimums under indefinite quantity contracts, nor may they place orders against Federal Supply Schedule contracts.

Compelling reason exception - Further, the Air Force may enter into new contracts with contractors, even after they are debarred or suspended, if a determination is made that there is a "compelling reason" to do so. FAR 9.405(a). If, for example, the property or service is available only from the contractor in question or if the urgency of the requirement dictates use of the contractor in question, then there would be a compelling reason. See THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT, P. 56, n.222 (3rd ed. 2002). In the Widget Division hypothetical, the Air Force would be able to obtain widgets from the Widget Division, even after its debarment, if, for example, widgets are important to the Air Force mission, and there are no other sources reasonably available.

Narrowly tailored debarment - The Air Force's business interests may also be protected by fashioning a debarment narrowly, as it generally does, to address only the entities and persons engaged in and/or responsible for the misconduct. Using the widget hypothetical described above, if false widget testing occurred at only one of the Widget Division's production facilities, the debarment could be fashioned so as to name only that facility. The Air Force could continue to enter into new contracts for widgets produced at other Widget Division facilities. Such an approach would protect the Air Force from the dishonesty endemic to one of the contractor's facilities, while at the same time ensuring the Air Force's ability to obtain critical parts from the contractor's other facilities.

Debarment limited to specific products - Finally, a debarment can be fashioned to name the commodity that was the subject of the misconduct, rather than the contractor that committed the misconduct. FAR 9.406-1(b). Thus, in our hypothetical, if the Air Force had a continuing need to purchase gyroscopes manufactured by the Widget Division, but could find alternate sources for widgets, the debarment could be limited to widgets. Again, such an approach--narrowly limiting the debarment to the source of the misconduct--would protect the Air Force from potential future dishonesty, while at the same time insuring the Air Force's ability to obtain needed parts.

PROCEDURE

Referral to SAF/GCR - Once evidence is obtained supporting a reasonable belief that a contractor may have committed actionable misconduct, the evidence is referred to the Secretary of the Air Force, Deputy General Counsel for Contractor Responsibility (SAF/GCR), in the manner set forth in the Defense Federal Acquisition Regulation Supplement (DFARS). DFARS 209.406-3. The information listed in the DFARS is important to our analysis of the allegations, but is not required in all cases. Furthermore, the formal DFARS referral need not be the first contact with SAF/GCR. Reporting persons are encouraged to contact SAF/GCR at the earliest opportunity, as are contractors seeking to avoid debarment. Contact Richard Pelletier, Assistant Deputy, at: (704) 588-0049, DSN 425-0049, fax (703) 588-1045, DSN fax 425-1045, email Richard.Pelletier@pentagon.af.mil.

Analysis of the evidence The most useful information in the referral is the analysis of the evidence. A referral that says "Joe Jones falsely certified that he had tested widgets" is far less useful, for example, than one that describes the evidence supporting that conclusion. The former, which merely states the violation, requires follow-up research and results in delay. A well-prepared description of the evidence often enables SAF/GCR to take immediate action. It is also helpful to have the referring person's email address so that we may quickly obtain additional information. If a fraud remedies plan has been prepared, it should be included in the information sent to SAF/GCR.

Notice to contractor Once it has been determined that there is evidence of misconduct that requires action, SAF/GCR sends a letter to the contractor. The letter notifies the contractor that it is suspended or proposed for debarment, sets forth the effects of the suspension or debarment, and advises the contractor of its rights. The

contractor's name is then posted onto the General Services Administration's web site, signifying the person's immediate ineligibility for new contracts.

Contractor's response - Responses are usually received from the contractor or its attorney within the 30 day period required by the FAR. Before making a submission in opposition to the suspension/debarment, the contractor usually will request and receive a copy of the administrative record. The administrative record contains the information relied upon in reaching the decision to suspend or propose debarment. Privileged communications and other information not relied on are not included within the administrative record and are not provided to the contractor. The referring party should advise SAF/GCR at the time of the referral of any information that the person believes should not be provided to the contractor, and, therefore, should not be shown to the suspending/debarring official or considered in the suspension or debarment decision.

There is no right to discovery beyond the right to a copy of the administrative record on which the suspension or debarment is based.

The contractor typically provides a written submission in opposition to the suspension or proposed debarment, in which the contractor either disputes the facts of the misconduct as stated in the notice or concedes the facts. Where the facts are not contested, the contractor will usually set forth information, which, it contends, establishes its present responsibility in spite of the misconduct.

Disputed Facts

Meeting with contractor - If a contractor disputes the facts asserted in the debarment or suspension notice, the contractor typically will set forth his version of the facts in a written submission. The contractor may also request a meeting with the S & D official, which generally is granted. The judge advocate, contracting officer and/or investigator familiar with the proposed action are welcome to attend these meetings, and are encouraged to provide information in response to the contractor's submission.

Closure of record - After the administrative record is closed, a determination is made as to whether the facts initially alleged in the notice of suspension or notice of proposed debarment continue to meet the relevant standard, in light of the information provided by the contractor. If the facts no longer provide "adequate evidence" for a suspension, or no longer establish a basis for debarment by a "preponderance of the evidence," the suspension or proposed debarment is terminated. FAR 9.407-2(a) ; FAR 9.406-2(b)(1).

Fact-finding - In actions based on an indictment, conviction or civil judgment, disputes of the underlying facts raised by the contractor in its submissions will not raise a genuine dispute of material fact, because such judicial actions provide sufficient bases for suspensions and debarments, as a matter of law. FAR 9.406-3(d). However, in a "fact-based" action, if the S & D official decides the contractor has raised a genuine dispute of material fact as to each basis for a suspension or proposed debarment, then the S & D official may conduct, or refer the matter to another official to conduct, a fact-finding proceeding and to make findings of fact. FAR 9.406-3(d). The S & D official will then reach a decision based upon the findings of fact. FAR 9.406-3(d)(2)(ii); 9.407-3(d)(2)(ii).

Duration of suspension/debarment - If it is determined that an action is required to protect the government's business interests, the S & D official will suspend or debar the contractor. A suspension is for a temporary period, pending the completion of legal proceedings (including appeals) or the government's investigation of the allegations. FAR 9.407-4(a). The suspension may not exceed one year, unless (i) the contractor has been indicted, or (ii) the Department of Justice requests an extension for an additional 6 month period so as to enable the completion of the investigation. FAR 9.407-4(b). A debarment is for a definite period, "generally" not to exceed 3 years. FAR 9.406-4 (a). The Air Force has debarred contractors for much shorter periods than 3 years, based upon a showing of mitigating circumstances and for periods in excess of 10 years based upon findings of egregious or repeated misconduct.

Present Responsibility Determination

Contractor's focus on present responsibility - Rather than contest the facts alleged in the notice of suspension or proposed debarment, many contractors choose to focus their submissions on their present responsibility. Such an

approach, based upon changed circumstances, can be effective, particularly where several years have elapsed between the date of the actionable misconduct and the initiation of the suspension/debarment action. This is so because, as previously discussed, the issue in a suspension/debarment action is not whether the alleged misconduct actually occurred but, rather, whether based upon that misconduct, and other factors, the contractor is or is not presently responsible. FAR 9.402(a); See Caiola v. Carroll, 851 F.2d 395, 398-99 (D.C. Cir. 1988); See THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT 56 n.222 (Richard J. Bednar, et al. eds., 3rd ed. 2002). It is the contractor's burden to demonstrate present responsibility.

Misconduct is threshold issue - A contractor faced with an allegation of actionable misconduct must clearly and unequivocally admit or deny the occurrence of that misconduct. If the contractor believes that it did not commit the misconduct, then the contractor is entitled to a determination of the facts, and if the contractor is correct, then the Air Force will terminate the suspension or debarment action. However, in the case of misconduct, the misconduct and how the contractor subsequently dealt with it are material to the present responsibility determination. SAF/GCR does not entertain present responsibility arguments until the threshold issue of the alleged misconduct is resolved.

Full disclosure required - SAF/GCR will insist on a full and complete disclosure of the circumstances underlying the misconduct, including in most cases copies of reports of internal investigations and the identification of all persons involved in the wrongdoing. The report of internal investigation should be the one drafted for management, regardless of privilege. A sanitized copy prepared for the government will be less persuasive. While privileged information cannot be compelled, it certainly can be provided voluntarily. Responsible contractors typically provide such information upon request.

Contractor's presentation - If the contractor admits the alleged misconduct, or if it has been otherwise established, the contractor may present evidence demonstrating it acted responsibly in dealing with the violation and took other action to insure such violations would not reoccur. The S & D official may decline to debar a contractor even where the misconduct is clear upon consideration of, among other things, the several mitigating factors set forth in FAR 9.406-1(a).

Important factors - The FAR's mitigating factors, FAR 9.406-1(a), are examples of circumstances that credit the contractor for efforts to prevent misconduct, for responding in a positive manner after learning of the misconduct, and for open, transparent dealing with the government. The most significant question is whether senior management genuinely recognizes the seriousness of the misconduct. Other factors include:

i. whether an internal investigation was conducted to determine the scope of the misconduct and whether the report was provided to the government;

ii. whether appropriate discipline was taken against the offending persons;

iii. whether remedial measures were taken to avoid future misconduct; and

iv. whether a standards of conduct program existed at the time of the misconduct.

An effective business standards program must involve all aspects of the contractor's business including its procurement department. For example, in weighing competitive bids does the contractor have a program that rewards a potential supplier for having an ethics program? If the contractor is unconcerned with the ethics of its suppliers, the sincerity with which it claims to be concerned about its own ethics must be questioned.

Full cooperation - The responsible contractor will have taken not only the appropriate steps internally after learning of the misconduct, but will have fully cooperated with the government in resolving the contractor's liability. Several FAR mitigating factors are illustrative. Did management bring the misconduct to the attention of the government? Have the results of the internal investigation been provided to the government? If warranted by the evidence, has the contractor accepted responsibility by pleading guilty? Has the contractor paid all fines and penalties? Positive answers to these questions are merely indicia of present responsibility. Their presence or absence is not determinative. FAR 9.406-1(a).

S & D official's discretion - If the S & D official determines that actionable misconduct did occur and the contractor

failed to meet its burden of demonstrating its present responsibility, the contractor likely will be debarred or suspended. If, on the other hand, the contractor proves it is presently responsible, then the S & D official can decide debarment is not necessary to protect the government's interests, and either terminate the action or require the contractor to enter into an administrative agreement, in lieu of debarment. DFARS 209.406-1(a)(i).

Administrative Agreements

Administrative agreements, signed by the Air Force and the contractor, generally last for three years, identify the misconduct that formed the basis for the action, incorporate the remedial measures taken by the contractor which led to the present responsibility conclusion, and require audits and periodic reporting to verify compliance.

Typical agreement - The typical agreement contains a provision requiring the contractor to engage an outside consultant (approved in advance by the Air Force) to perform two reviews of the contractor's business standards program--one near the beginning and the other near the end of the period of the agreement. The results of the reviews are required to be provided by the consultant directly to the Air Force. The contractor is also required to provide the Air Force with copies of all internal audit reports that relate to the contractor's ethics program or compliance with the administrative agreement.

Reporting requirement - Finally, the contractor is required to submit periodic reports to the Air Force in which extensive information is provided about the operation of the contractor's business, including details about its newly implemented, or revised business standards program. Such reports include, among many other things, summaries of calls to the contractor's "Hotline," and the measures taken by management in response to such calls, descriptions of all ethics and compliance training conducted in compliance with the agreement, and a number of required certifications by the contractor's Board of Directors. The contractor is also required to report all known fraud related litigation and investigations, as well as all known "misconduct," regardless of whether it is the subject of litigation or investigation. The contractor acknowledges in the agreement that any violation of the agreement evidences lack of responsibility, and may form a separate basis for debarment.

COORDINATION OF REMEDIES

General approach - Any discussion of suspension and debarment as an affirmative administrative remedy invites the question of what impact, if any, such actions could have upon the Air Force's other remedies. All remedies of significant fraud cases are closely monitored and coordinated by the Acquisition Fraud Counsel and by SAF/GCR, which overseas the Air Force's fraud remedies program. It is the policy of the Fraud Remedies Program to coordinate all administrative, criminal, civil and contractual remedies of such cases simultaneously, as appropriate.

There is no formula by which one remedy should precede the others. As a general rule, Acquisition Fraud Counsel should consider suspension and debarment from the outset of a fraud case and should develop a file that will support such remedies. In many cases, an early suspension or proposed debarment will encourage resolution of the criminal or civil case. Therefore, whenever justified by the evidence, it is the Air Force's policy to pursue suspension and debarment as early as possible -- provided that doing so will not be detrimental to ongoing litigation or investigations.

It is not the policy of the Air Force (or of the Department of Justice) to propose global settlements of criminal, civil and administrative remedies. In criminal or civil litigation, if a defendant wants to discuss debarment, the Acquisition Fraud Counsel should refer the defendant to SAF/GCR. Debarment is not a bargaining chip in criminal or civil litigation, and debarment should not be mentioned in plea agreements or civil settlement agreements.

Department of Justice's policy - The Department of Justice, as a matter of policy, also encourages simultaneous criminal, civil and administrative proceedings, and recognizes how each can benefit from the other. See Memorandum of the Attorney General, Coordination of Parallel Criminal, Civil, and Administrative Proceedings (July 28, 1997). In most cases, early suspension and debarment consideration enhances, rather than inhibits, parallel criminal and civil proceedings. Furthering criminal and civil cases is, of course, not the purpose of suspension and debarment, which are imposed only to protect the government's business interests, and not for the purpose of punishment. FAR 9.402(b). The natural collateral consequences of such actions need not be ignored, however.

Coordination - While it is almost always in the Air Force's interest to pursue its civil, criminal and administrative

remedies concurrently, we coordinate potential debarment actions closely with the Department of Justice to avoid interference in the unusual case. We would not want to prematurely disclose the government's interest where the Department of Justice is directing an undercover or electronic surveillance operation, for example. Similarly, the Department of Justice is sensitive to the debarment remedy. It refuses, as a matter of policy, to include in civil and criminal settlement agreements, any provision purporting to resolve the contractor's debarment liability. Thus, early debarment referrals both protect the government's business interests, and assist it in obtaining civil and criminal remedies.

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