



Comments on the Wartime Contracting Commission's Recommendations on

Suspension and Debarment



By:

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In February 2011, the Commission on Wartime Contracting in Iraq and Afghanistan issued its second interim report to Congress entitled “At what risk? Correcting over-reliance on contractors in contingency operations,”² which, in part, found that agencies are not suspending and debaring companies or individuals as frequently as is necessary and that several changes to the government-wide suspension and debarment (S&D) system are necessary to increase activity. Subsequent news articles on the report only intensified the commission’s criticisms. The *Federal Times*’ story entitled, “Wartime Panel: Get Tougher on Bad Contractors,” concluded, “Federal agencies are too lenient in dealing with companies

accused of ripping off the government...,” and “agencies routinely let companies off the hook when they are accused—and even convicted—of wrongdoing.”³ These stories naturally leave the public with a negative impression of the overall S&D system.

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¹The views expressed herein are the authors’ views and do not necessarily reflect the views of the Department of the Air Force or the U.S. Government.

²To read the commission’s second interim report, see http://www.wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf.

³To read the *Federal Times* story see <http://www.federaltimes.com/article/20110306/ACQUISITION03/103060306/1018/DEPARTMENTS>

We take pride in our S&D work and recognize the importance of protecting the government from the risks of doing business with non-responsible contractors.⁴ We analyze each case on its own and devise an appropriate and thoughtful solution that is in the best interests of the Air Force and government as a whole. For these reasons, we believe the commission's findings are overly broad and misleading as they relate to the government-wide S&D system and particularly the Air Force. While the commission's findings may be accurate with regard to particular agencies, especially those with less mature S&D programs, the commission's report did not distinguish among agency programs and its recommendations, in large part, would have government-wide effect. This article offers our perspective on the S&D system, addressing some of the commission's findings and setting the record straight.

The Commission's Criticisms are Limited to Contingency Environments & Particular Agencies

As a threshold matter, the commission's charter is limited to assessing S&D activity in contingency environments in Iraq and Afghanistan—not the government-wide system. Within this segment of the overall S&D community, the commission's findings are further limited to the particular agencies it observed who have not been named. These critical facts place the commission's report in context.

The Commission's Findings & Recommendations

The commission concluded that agencies do not suspend and debar as often as they should and identified several reasons for such inaction:

- Agencies prefer to enter into administrative agreements;
- Procedural complexities discourage S&D, such as the perceived requirement to hold a hearing prior to excluding a contractor through a notice of suspension or notice of proposed debarment; and
- The Department of Justice (DOJ) enters into deferred prosecution agreements and non-prosecution agreements with contractors to resolve criminal and/or civil matters and promises a favorable result with regard to agency S&D action.

Unlike the criminal justice system, S&D do *not* exist to punish.

To address these issues, the commission recommended several changes including:

- Where an agency Suspension Debarment Official (SDO) declines to take action against a contractor referred for consideration, the SDO should be required to document its decision, obtain the approval of the head of the agency and post the declination decision in the government-wide past performance database;
- Suspensions should be mandatory and automatic for government-contract-related indictments;
- Agencies working in contingency environments should be exempted from the requirement to hold a pre-exclusion hearing prior to issuing a notice of suspension or proposed debarment; and
- DOJ should be prohibited from making promises to contractors regarding S&D.

Before addressing the commission's findings and recommendations, we want to ensure readers understand the core principles underlying agency decision-making in the S&D context.

The SDO Focuses on the Contractor's Present Responsibility

The commission effectively viewed the S&D system through the prism of the criminal justice system and questioned why so many bad actors were not punished through debarment. Unlike the criminal justice system, S&D do not exist to punish. Rather, such tools exist to protect the government from the risks associated with doing business with non-responsible contractors. SDOs, through S&D, enable agency acquisition programs to follow the overarching policy that agencies only contract with responsible contractors. Naturally, where a contractor is determined to be presently responsible despite past misconduct, it presents no threat to the government's interests, making debarment inappropriate.

Federal Acquisition Regulation (FAR) Subpart 9.4, which governs agency SDO decision-making, provides that the existence of a cause for debarment does not require debarment. Rather, the SDO shall consider the existence of any remedial measures taken by the contractor since the improper conduct occurred and the presence of any factors that mitigate against the seriousness of the past conduct. Specifically, FAR Subpart 9.4 identifies 10 remedial measures and mitigating factors the SDO is required to consider, which largely focus on how the contractor has acted since the improper conduct.

⁴ To visit SAF/GCR's website, see <http://www.safgc.hq.af.mil/organizations/gcr/index.asp>.

By focusing on a contractor's past improper conduct and the question of why the agency did not debar the contractor, the commission converted the S&D system into an administrative penal system and did not appear to consider whether the agency found the contractor to be presently responsible. Unfortunately, this vantage point influenced the commission's observations and recommendations.

SDO Discretion to Enter into Administrative Agreements is Critical to Motivating Positive Behavior within Organizations

The commission views administrative agreements (AAs) skeptically and appears to believe that agencies use AAs to avoid taking debarment action.

"[A]gencies sometimes do not pursue suspensions or debarment in a contingency environment, preferring instead to enter into administrative agreements with the problematic contractor," the report said. "When agencies fail to take action to bar contractors from participation in the federal marketplace despite chronic misconduct, criminal behavior, or repeated poor performance, taxpayer dollars can be wasted and mission objectives compromised—*while the contractor is left with no incentive to improve.*" (Emphasis added).

AAs are widely used throughout the government and are expressly recognized by the Department of Defense FAR Supplement (DFARS) 209.406-1. At all times, SDOs are required to act in the government's interests and thus, whenever an SDO takes action, including entering into an AA, they have determined that doing so is in the government's interests. This applies equally both inside and outside of contingency environments.

Fundamentally, the commission appears to question the value of AAs for at least two reasons. First, the commission assumes that the alternative is always debarment and that debarment is more effective in protecting the government. The commission does not realize that in some instances, but for the availability of an AA, an SDO would terminate the action. This may be because insufficient evidence exists to sustain the debarment despite legitimate concerns or because the SDO believes that the contractor has demonstrated its present responsibility making debarment unnecessary but the SDO and contractor both believe that entering into an AA will give the organization structure and facilitate

and motivate desired improvements to the organization's ethics and compliance systems, improvements that provide significant value to the government.

Second, and perhaps more problematic, the commission assumes that once the contractor enters into an AA, it "has no incentive to improve." This belief reflects a misunderstanding of how an AA operates and seems to suggest that the commission is confusing an AA with a standard settlement agreement which is often used to resolve litigation. AAs are used by SDOs because they motivate positive behavior within an organization.

The agreement serves as the "carrot," by providing the contractor with an incentive to avoid debarment by improving its ethical culture, compliance and business processes, and the "stick," by identifying consequences for failure to do so, including debarment. Violation of the agreement, alone, generally provides a separate and independent cause for debarment. Additionally, to further protect the government's interests during the term of the agreement, such AAs include certain controls to ensure compliance, such as quarterly reporting and, where appropriate, the use of an independent monitor to provide an independent verification tool for the SDO. In most cases, the AA is effective in improving

the contractor, thereby providing the government with another responsible source for its needs.

While we understand the commission's perception that debarment is an effective tool, SDOs have a number of tools at their disposal and one is not necessarily better than the other. The particular factual circumstances dictate which tool should be used. One important benefit AAs offer over debarment is that where an SDO debar a contractor, at the end of that pre-determined debarment period, which the FAR indicates should generally not exceed three years, the contractor is free to contract with the government without limitations. This is problematic because no assessment of the contractor's present responsibility has been done and most contractors do not normally spend money improving their government-contracts related ethics and compliance structures when their government revenue streams are cut off. By contrast, at the end of the term of an AA, most contractors have implemented a host of ethics and compliance improvements. This is but one example of why, in appropriate cases, the use of AAs can be a more effective way of protecting the government's long-term interests.

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There is No Requirement to Hold a Hearing Before Excluding a Contractor through a Notice of Suspension or Notice of Proposed Debarment

The commission also found that agency officials are not using S&D as frequently as needed because of procedural complexities, specifically because of perceived difficulties associated with conducting a pre-exclusion hearing in fact-based cases, which requires the agency to locate and present witnesses. The commission recommended that agencies operating in contingency environments be exempted from this requirement and allow initial decisions to exclude through a notice of suspension or proposed debarment to be made based upon a documentary record alone.

The commission misunderstands when the fact-finding hearing is required. FAR Subpart 9.4 does not require that a hearing be held prior to excluding a contractor through a notice of suspension or proposed debarment. Rather, agency SDOs may base those initial actions on a documentary record, referred to as the “administrative record,” and shared with the contractor upon request. Therefore, the changes recommended by the commission are unnecessary.

A fact-finding hearing is required in limited instances after the contractor is excluded where it makes a submission challenging its exclusion and raises a genuine dispute over facts material to the action. This post-exclusion requirement is designed to protect a contractor’s constitutional due process liberty interests. However, the potential for a post-exclusion hearing would not impact the initial decision to exclude because the need to hold a hearing would only become clear after the SDO receives and reviews the contractor’s submission.

Second, while a hearing is time consuming, its burden can be minimized. FAR Subpart 9.4 does not impose a specific time requirement for when the hearing must occur, so agencies must act reasonably and the nature of the given circumstances dictate what is reasonable. Additionally, agencies are not required to provide discovery beyond what is already in the administrative record that the SDO possessed at the outset when the initial decision to exclude was made. Finally, when a hearing is held, the contractor is entitled to submit documentary evidence, present its own witnesses and confront any person the agency presents. There is no requirement, however, that agencies locate and

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present witnesses. Thus, if the agency cannot locate witnesses or does not believe it is necessary to present witnesses to sustain the action, it is not required to do so.

DOJ Cannot Make Promises Regarding S&D Action Without Agency Approval

The commission found that DOJ has entered into deferred prosecution and non-prosecution agreements with contractors wherein DOJ promises a favorable result with regard to agency S&D action, such as that the contractor’s admissions will not be used against them in a debarment action, the agency will enter into an AA, or that

debarment will not occur. We are not aware of a single instance where DOJ has made such promises to contractors and doing so would violate existing DOJ policy. To the extent this practice is occurring, the problem lies within DOJ and should be addressed through training.

Even if such a promise is made by DOJ, we do not believe such agreements would be binding on the agency SDO and, thus, would not preclude an agency from taking debarment action that is appropriate and in the government’s interests. Such a decision is solely within the province of an SDO.

Requiring Written Declination Decisions and Agency Head Approval Will Encroach on the Discretion and Independence of SDOs and Consume Limited Resources

The commission recommends that SDOs be required to provide a written rationale when they decline to take action against a contractor referred for consideration. The commission’s recommendation appears to be based on the unsupported notion that SDOs are not taking action where appropriate. Unless this is substantiated, there does not appear to be a basis for such a proposal.

In any event, such a requirement should not be adopted because it would result in a host of adverse consequences. First, requiring the SDO to justify, in writing, a declination to take action and then to obtain the approval of the agency head has the risk of impacting the SDO’s independence and discretion, critical elements of the role of the SDO. Since the SDOs role is to evaluate present responsibility and not to punish contractors, it is a unique role and one that should be free from outside influence.

Second, while SDO offices frequently decline a matter through written correspondence, requiring, as a matter of practice, a written formal declination in every case would be an administrative burden on most agency S&D programs, which already have limited resources to carry out their existing missions of protecting the government. Thus, if imposed, a byproduct would naturally be that less S&D actions would be taken, a result directly at odds with the commission's stated goals.

By removing SDO discretion, the system would lose the opportunity to influence and motivate positive corporate behavior. If exclusion is automatic, the contractor has no incentive to improve by setting up ethics and compliance programs that mitigate the risk of employee violations.

Third, the commission recommends posting the declination documentation in the government-wide past performance database. We believe posting such documentation will result in inundating contracting officers with information that could slow down the pace of awards and potentially increase bid protests, serious concerns in the contingency contracting environment. Additionally, such a practice will inevitably result in *de facto* debarment determinations where a contractor is effectively denied awards based on responsibility concerns but without being afforded the opportunity to address the concerns before the agency SDO.

Automatic Suspensions for Contract-related Indictments Are Unnecessary and Bad Policy

In practice, it is our experience that most contract-related indictments involving recent improper conduct already result in suspension, and the commission has not offered evidence to suggest otherwise. Thus, on this basis alone, we do not believe mandatory suspensions are necessary.

Automatic exclusions transform the debarment tool into a punishment device because such action is solely based on allegations of past improper conduct and not any consideration of present responsibility. If the fundamental question underlying a S&D inquiry is present responsibility, it cannot be made without consideration of the particular contractor or the circumstances underlying the indictment. For example, if the indictment is for conduct that occurred 10 years ago, is such conduct in all cases truly reflective of the contractor's present responsibility? Similarly, if a single rogue employee engaged in misconduct in a company of 10,000 individuals, should the entire company always be suspended?

Additionally, there will be situations where a contractor has undertaken extensive remedial measures since the improper conduct, measures that will prevent the misconduct from re-occurring. In such cases, the SDO may decide that no action is needed or that an AA can ensure accountability through agency oversight for a reasonable period. By removing SDO discretion, the system would lose the opportunity to influence and motivate positive corporate behavior. If exclusion is automatic, the contractor has no incentive to improve by setting up ethics and compliance programs that mitigate the risk of employee violations.

We do not believe the one-size fits all approach offered by automatic exclusion is consistent with FAR Subpart 9.4, which requires that each contractor's present responsibility be assessed. Ultimately, the SDO needs the discretion to structure a resolution that is in the best interests of the government, which may require no action, an AA, suspension, or debarment.

Overall, we value the interest of the commission in S&D and appreciate its efforts to try to improve government operations. All systems can be improved and the S&D system is no exception. Before any action is taken with regard to the recommendations contained in the commission's second interim report or its final report, which had not been released at the time of publication of this article, we hope the commission will revisit its findings. ■