When You’ve Taken a Body Blow – What Suspension and Debarment Officials Look For

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The Roadmap

- Background Nuts & Bolts
- Office structure, reporting chains, common causes
- Expectations for contractor engagement with SDOs
- Show-cause notices & other SDO tools
- Referral sources and fact-based suspension/debarment vs indictment/conviction-based suspension/debarment
- Approaches and goals for administrative agreements
- Guidance on Best Practices
Nuts & Bolts: Why Does Suspension & Debarment Matter?

- **Contractual Death Penalty**
  - No new Ks, subcontracts, or orders
- **Default is it applies to whole company (all divisions)**
  - Affiliates can also be excluded w/ due process
- **Often involve parallel proceedings**
  - Civil or criminal investigations, third-party actions
- **Can be extremely expensive to address via AA**
  - Heightened ethics and compliance programs & oversight
  - Extensive costs will be unallowable
- **Reputational stigma**
Nuts and Bolts: Basics of S&D

- FAR Subpart 9.1 requires Gov’t to contract with responsible contractors with satisfactory record of integrity and business ethics
  • Focuses on making award to responsible contractor
- FAR Subpart 9.4 addresses S&D
  • Focuses on present responsibility during course of performance
- Suspension or Proposed Debarment: Disqualifies contractor from government contracting temporarily
- Debarment: Disqualifies contractor from government contracting for specified period
- Both are discretionary, not mandatory, and are not to be used for purposes of punishment
- Right to compete for government contracts can be extinguished for reasons unrelated to performance of them
Nuts and Bolts: Causes for Suspension (FAR 9.407-2) & Debarment (9.406-2)

- Suspension based on indictment or “adequate evidence” of certain designated offenses
- Debarment based on conviction/judgment or “preponderant evidence” of certain offenses:
  - Illustrative disqualifying offenses include:
    - Fraud in connection with obtaining or performing public contract/subcontract
    - Violation of federal/state antitrust laws relating to submission of offers
    - Embezzlement, theft, forgery, bribery, falsification/destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property
    - Violation of Drug Free Workplace rules and intentional/untruthful Made in America labeling
    - Unfair trade practices and delinquent taxes over $3K
    - Knowing failure by principal of contractor to comply with mandatory disclosure obligations
    - “Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility” of a contractor
- SDO can also suspend a contractor “for any other cause of so serious and compelling a nature” that it affects contractor’s present responsibility
Nuts and Bolts: Suspension & Debarment Procedures

- Contractor has opportunity to provide within 30 days (in writing, in person) information and argument opposing proposed debarment or suspension
  - “Show cause” letters and/or early contact with SDO more frequent
  - Get AR; fact-finding is rare based on genuine dispute of material facts
- Unless based on conviction or civil judgment, where contractor submission shows genuine dispute of material facts, hearing is provided
  - For suspension not based on indictment, and DOJ permits, same applies
- Once a cause for suspension or debarment is established, contractor must demonstrate that it is presently responsible (focus on “mitigating factors”)
- SDO decisions afforded significant deference by courts, and effect of S&D so severe that contractor must make best case to SDO
- If SDO is “on the fence” about K’or responsibility, AA may provide assurances necessary to avoid suspension/debarment
Nuts & Bolts: Suspension & Debarment

Mitigating Factors

- Effective stnds of conduct and internal control systems at time of misconduct or since the misconduct
- K’or raise the issue w/ USG in timely manner
- K’or investigate and share results of investigation w/ SDO
- K’or cooperation w/ USG during investigation or court action
- K’or agreed to pay all criminal, civil, admin liability
- K’or take disciplinary actions against wrongdoers
- K’or agreed to implement remedial measures
- New/revised review & control procedures and ethics training
- Adequate time to eliminate circumstances that led to debarment
- Management recognize seriousness and implement preventive measures
Nuts & Bolts: Effect and Impact

- Apply Government-wide (not just with initiating agency)
- Listed as excluded on System for Award Management (www.sam.gov) (formerly the Excluded Parties List System (EPLS), which was one of Gov’t databases consolidated on SAM)
  - Agency to provide notice to GSA to place on SAM exclusions within 3 working days after action becomes effective and within 5 working days of change/rescission
- Suspension and proposed debarment automatic upon listing
- Must be reflected in certifications per FAR 52.209-5
- Misconduct of EE can be imputed to contractor if it occurred in performance of EE’s duties or with K’or knowledge/acquiescence
- Contractor misconduct imputed to individual who knew/had reason to know of misconduct—so individuals can be suspended/debarred
Nuts and Bolts: Administrative Agreements

- Vary among agencies and from settlement to settlement
- Document remedial measures taken to prevent recurrence of incident that lead to suspension or debarment
- Give Gov’t assurances and protection to allow lifting suspension/proposed debarment/debarment
- Typical elements:
  - Address issues covered by mitigating factors
  - Often up to three years in duration
  - Heightened ethics and compliance programs and provide updates
  - Exclude certain individuals from agency or USG programs
  - Immediate placement on SAM in event of breach
  - Payment for investigation costs, oversight, restitution
Nuts and Bolts: Increased Legislative and Executive Focus on Suspension/Debarment

- **Legislative Hearings**
  - House Oversight and Government Reform (June 2013)

- **GAO Reports:** GAO Report No. 11-739 (Aug. 2011)

- **Legislation**
  - FY14 NDAA, Pub. L. No. 113-66, Section 813
  - FY13 NDAA, Pub. L. No. 112-239, Secs. 861, 1682-83
  - Consolidated and Further Appropriations Act of 2013, Pub. L. No. 113-6
  - Stop Unworthy Spending Act (SUSPEND Act) (H.R. 3345)
  - Afghanistan Suspension and Debarment Reform Act (H.R. 2912)

- **Interagency Suspension and Debarment Committee Activities**
  - Mar. 5, 2014: ISDC issued report to Congress on FY12-13 S&D programs
  - Five year trend: “The reported activity levels for FY 2012 and FY 2013 indicate a growing number of agencies with active suspension and debarment programs and a significantly increased number of suspension and debarment actions when compared to activity in FY 2009 . . . .”
Office structure, reporting chains, and common causes for suspension/debarment

- How is your office staffed?
- Where does it fit organizationally in terms of reporting?
- What organizations does your office regularly work with and in what capacities (CIS, IG, DCAA, AUSA)?
- What are common causes for suspension/debarment your office sees, and are they changing or static?
Expectations for Contractor Engagement with SDOs & Compliance Programs

- Best practices for interaction your office has with major contracting partners?
- If K’or becomes aware of an issue that could affect responsibility that has not been raised by your office, what interaction do you expect them to have with you?
- What do you look for in contractor compliance program when assessing present responsibility?
- Best practices of ethics/compliance programs?
- How do you deal with challenges contractors face with “rogue employees” and remote business locations?
Show Cause Notices, Hearings and Other Tools in the SDO Toolbox

- What are circumstances under which you issue show-cause notices?
- What are you looking for in a show-cause response? Tips?
- “Requests for Information”—What are they and when are they used?
- Meetings with contractors whose responsibility you are examining but who have not been suspended or proposed for debarment? What do you want to see?
  - Substantively
  - Corporate representative
- Do’s and Don’ts of meeting with SDOs?
Fact-based Suspension/Debarment vs Indictment/Conviction-based Suspension/Debarment

- Approach where contractor has not been indicted or convicted, but concern based on K performance or integrity (fact-based suspension or debarment)?
- Approach where contractor has been indicted or convicted, given suspension/debarment not mandatory?
- Approach for reviewing mandatory disclosures? What do you look for—and who looks for it in first instance—from a responsibility perspective?
- Government releases of K’or proprietary information?
- Main source of referrals?
Administrative Agreements: Approaches and Goals

- When do you use it in lieu of a suspension/debarment?
- If contractor is suspended/debarred, what are indicia that contractor may be ready for AA?
- What is the goal you seek to achieve with an AA?
- What are the key 3 or 4 clauses you require for an AA?
Best Practices To Avoiding S&D

- Institute a “values-based” ethics program (“core values” that govern business rather than rules) combined with robust training (including *in-person*) based on real-life scenarios
- Senior management commitment to values-based ethical culture
- Senior leader in charge of ethics/compliance program, with direct reporting to CEO and necessary resources
- Internal/external reviews of corporate business practices, procedures, policies and internal compliance controls
- Policies and practices that encourage employees to report suspected misconduct and include robust non-retaliation policy
- Policies and practices to identify and investigate serious issues
- Timely, fulsome and transparent disclosure to Gov’t of possible violations (and disclosure to the *right* Gov’t entity given nature of incident)
- Processes to ensure that teammates adhere to similar ethical standards
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