

COALITION FOR GOVERNMENT PROCUREMENT

Winter Seminar 2003

Contracting in a Time of Corporate Scrutiny

*Suspension and Debarment: How Federal and Non-Federal
Contract Actions Can Impact Your Government Business*



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BACKGROUND

- Government wants to do business with “responsible contractors” (FAR 9.1; 9.402(a))
 - Includes a satisfactory record of integrity and business ethics
- “Present Responsibility”: Certain actions or events can raise questions about a contractor’s business honesty and integrity and lead the government to examine whether the contractor is “presently responsible” and should be excluded from doing business with the government
- Finding that a contractor is not “presently responsible” can result in exclusion from doing business with government (FAR Subpart 9.4)
 - Suspension
 - Debarment

BASES FOR SUSPENSION AND DEBARMENT

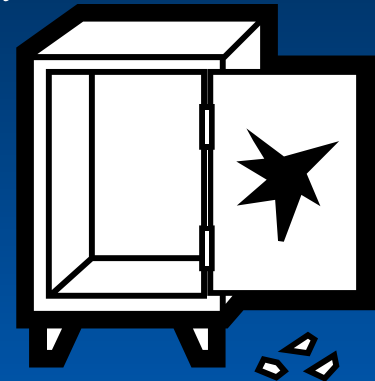
- Include, but are not limited to, matters related directly to Government contracts



Examples of Bases for Debarment – FAR 9.406

Conviction or civil judgment for:

- *Fraud or other criminal offense in connection with a government contract*
- Antitrust violations
- Embezzlement, theft, bribery, *falsification or destruction of records, false statements*, tax evasion, or stolen property
- Improperly affixing Made in America label
- Commission of “*any other offense indicating a lack of business integrity or business honesty* that seriously and directly affects the present responsibility of a Government contractor or subcontractor”



Other bases for debarment include:

- Willful failure to perform government contract
- “*Any other course of so serious or compelling nature* that it affects the present responsibility of a Government contractor”
 - *See Enron*

Examples of Bases for Suspension – FAR 9.407-2

Causes for Suspension:

- Generally track those for debarment
- “Adequate evidence” rather than conviction or civil judgment with respect to various offenses
 - Indictment is adequate evidence (*see Arthur Andersen*)



EXAMPLES OF CAUSES FOR SUSPENSION/DEBARMENT

- “Contract-Related”
 - Allegations of fraud (false claims/false statements) in connection with, e.g., contract pricing, contract billing, or product quality/testing
- “Non-Contract”
 - Environmental “crimes”



EFFECTS OF SUSPENSION OR DEBARMENT

- Ineligible for award of new prime contracts and, as a practical matter, subcontracts
- Current contracts
 - Generally continue in effect but cannot be renewed or extended
 - *Proposed FAR rule would prohibit issuance of additional delivery orders under IDIQ or FSS contracts or exercise of options*
 - » DOD already prohibits such orders (DFARS 209.405-1)
- GSA List of Parties Excluded from Federal Procurement and Non-Procurement Programs
- Collateral consequences
 - Non-procurement transactions
 - State and local government procurement
 - Export licenses
 - Security clearances
- Certifications (FAR 52.209.5)

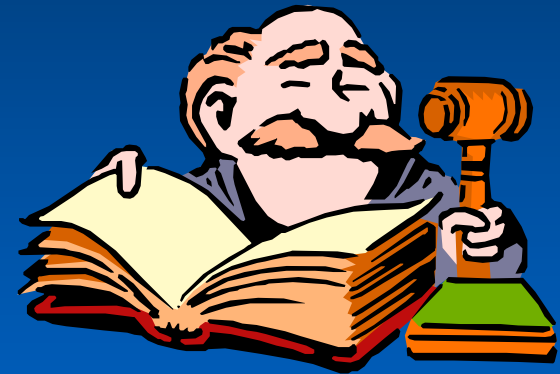
SCOPE AND DURATION OF SUSPENSION OR DEBARMENT

- Government-wide
- Company-wide
 - Risk of extension to affiliates
- Suspension: “Temporary” - often pending completion of a parallel proceeding
- Debarment: Three years
- Individuals as well as companies can be suspended or debarred



ADMINISTRATION AND PRACTICE

- “Debarring Official”
- Referrals
 - Contracting agency; IG or other law enforcement authorities
- Disclosures by contractor
- Lead Agency
- Procedures (FAR 9.406; 9.407)
- Judicial review of suspension/debarment decisions:
Arbitrary and capricious/ failure to consider mitigating factors.



AVOIDING SUSPENSION AND DEBARMENT

- Conduct business in compliance with law and ethical standards
 - Code of Business Conduct
- The “Ten Mitigating Factors” (FAR 9.406-1)
 - Effective standards of conduct and internal controls
 - Timely disclosure of cause(s) to government
 - Contractor investigation of cause(s)
 - Cooperation in government investigation
 - Paid all criminal, civil or administrative liability and made restitution
 - Appropriate disciplinary action against responsible individuals
 - Remedial measures
 - New or revised internal review and control procures and ethics training
 - Adequate time
 - Management recognition and acknowledgment of causes and commitment to prevent reoccurrence

ADMINISTRATIVE SETTLEMENT AGREEMENTS

- Code of Business Conduct
- Ethics Training
- Designated Ethics Official
- Other Substantive Terms as Appropriate
 - Internal Controls and/or Remedial Measures
 - Hotline/Helpline
 - Internal Audits
 - Policies and Procedures
 - Specialized or subject matter training
- Quarterly Reporting to Debarring Official

