

# **UNDERSTANDING SUSPENSION AND DEBARMENT**



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## PRESENTED BY

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## **OVERVIEW**

- ❖ **Current climate**
- ❖ **Why does the Government suspend or debar a contractor?**
- ❖ **What does it mean to be suspended or debarred?**
- ❖ **What process does the Government follow to suspend or debar a contractor?**
- ❖ **Tips for avoiding and navigating the suspension and debarment process**
- ❖ **Questions**



## **CURRENT CLIMATE**

- ❖ Transparency
- ❖ Mandatory self-reporting
- ❖ Increased audits and investigations
- ❖ Highly competitive environment
- ❖ Protests, protests, and more protests
- ❖ New “presumed loss” rule
- ❖ Suspension and debarment activity is up significantly in recent years



## **SBA'S PRESUMED LOSS RULE**

- ❖ Effective August 27, 2013
- ❖ Implements “presumption of loss” provisions of the Small Business Jobs Act of 2010
- ❖ Jobs Act established a presumption of loss to the Government from a size or status misrepresentation equal to the total amount expended on a contract obtained by misrepresentation
- ❖ Designed to prevent and deter fraud and misrepresentation in small business procurements
- ❖ Expected to boost prosecutions by increasing the dollar value of size/status misrepresentation cases



## PRESUMED LOSS RULE ELEMENTS

- ❖ **Presumption of loss**
  - There is a presumption of loss to the Government based on the total amount expended on a contract, subcontract, etc., whenever it is established that a firm willfully sought and received the award by misrepresentation of size or status
- ❖ **Deemed certifications**
- ❖ **Signature requirement**
- ❖ **Limitation of liability**
- ❖ **Annual recertification**
- ❖ **Applicability to subcontractors**
- ❖ **Penalties**
  - Suspension and debarment + civil and criminal penalties



## HOW THE PRESUMED LOSS RULE WORKS

- ❖ “Broadly inclusive” of set-asides, reserves, partial set-asides, price evaluation preferences, source selection factors, and any other mechanism not specifically addressed in the FAR
- ❖ Proposed to be an irrefutable presumption, but the final rule makes it rebuttable
  - Rebuttable presumption allows firms to demonstrate mitigating circumstances to avoid liability
  - Trier of fact (i.e., judge or jury), not the SBA, will decide if the presumption is rebutted on a case-by-case basis in civil and criminal proceedings
- ❖ Prime contractors may be liable for misrepresentation by their subcontractor



## WHAT TRIGGERS A SUSPENSION OR DEBARMENT INQUIRY?

- ❖ IG investigation
- ❖ Contract audit
- ❖ Criminal investigation
- ❖ Contracting personnel
- ❖ Complaint from competitor/whistleblower
- ❖ Public records or disclosures
- ❖ Adverse protest ruling





## WHY DOES THE GOVERNMENT SUSPEND OR DEBAR A CONTRACTOR?

- ❖ FAR 9.402: “Agencies shall impose debarment or suspension to protect the Government’s interest and only for the causes and in accordance with the procedures set forth in this subpart.”
- ❖ Based on serious misconduct, the Government determines it needs to be protected from a contractor that is not “presently responsible” to do business with the Government
  - Actions by employees who actively engage with the Government can trigger a suspension or debarment of the contractor and its principals



## WHY: PRACTICAL CONSIDERATIONS

- ❖ Suspension and debarment should be imposed only to protect the public's interest, not as a punishment
  - But, suspension and debarment *is* a punishment
- ❖ Seriousness is in the eye of the beholder
  - Once you are in the Government's crosshairs, it is serious
- ❖ Political and other forces may work against you
- ❖ Agency suspension and debarment official (SDO) may have unrealistic expectations of perfection and may not listen to reason
- ❖ Often easier for agencies to go after small businesses
  - Too big to debar?



## CAUSES OF SUSPENSION AND DEBARMENT

- ❖ Conviction of, or civil judgment for, fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract
- ❖ Antitrust violation related to submission of an offer
- ❖ Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property
- ❖ Willful failure to perform in accordance with the terms of a contract or history of unsatisfactory performance
- ❖ Unpaid taxes
- ❖ Lack of business integrity



## MORE CAUSES

- ❖ **Knowing failure of a principal to timely disclose credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations; violation of the civil False Claims Act; or significant overpayment on a contract**
  - Incident may occur in connection with award, performance, or closeout of a contract or subcontract
  - Applies up to three years after final payment on any Government contract
- ❖ **Improperly obtaining a competitor's proprietary data to obtain an unfair advantage in a procurement**
- ❖ **Improperly obtaining source selection sensitive information from the Government or former Government employee**



## CAUSES RELATED TO SMALL BUSINESS STATUS

- ❖ Size and status misrepresentations
  - In proposals, SAM.gov, or anywhere else you represent your size or status in connection with federal procurements, grants, etc.
  - Applies to subcontracts, and prime contractor may be liable
- ❖ False statements in SBA applications and proceedings
- ❖ Failure to comply with the limitations on subcontracting
- ❖ Suspension or debarment of an entity can extend to affiliates



## MITIGATING FACTORS

- ❖ Cause does not necessarily require suspension or debarment
  - In deciding to suspend or debar, the Government should weigh the seriousness of the misconduct and any remedial measures or mitigating factors
- ❖ Factors to be considered:
  - Effective standards of conduct and internal control systems in place at the time of the activity at issue or prior to Government investigation
  - Full and open investigation by the contractor
  - Cooperation with the Government
  - Appropriate disciplinary actions
  - Recognition of the seriousness of the misconduct and commitment to avoiding recurrence



# WHAT DOES IT MEAN TO BE SUSPENDED OR DEBARRED?

- ❖ A suspended or debarred contractor cannot:
  - Propose on or win new contracts
  - Have options exercised, or otherwise receive an extension to current contracts or orders
  - Receive orders under FSS schedules, BPAs, BOAs, or IDIQ contracts (except to meet the minimum on an IDIQ)
- ❖ But, contractor may perform existing contracts until the end of the current contract period
- ❖ Suspension may be up to 12 months
  - Additional 6 months is possible if an Assistant Attorney General requests an extension
- ❖ Debarment may be up to 3 years
  - Or longer if necessary to protect Government's interest



## SCOPE OF SUSPENSION/DEBARMENT

- ❖ Effective Government-wide
  - Listed on SAM.gov (formerly EPLS)
  - Unless a particular agency head or designee states compelling reasons justifying business dealings
- ❖ Applies to all divisions or organizational elements of the contractor
- ❖ Federal suspension or debarment may also apply to state-level contracts
  - States and local governments monitor the Federal list and some states impose state debarment automatically on any contractors listed on the Federal list
- ❖ May also apply to commercial contracts – check terms





# IMPACT ON SUBCONTRACTS AND NOTIFICATION REQUIREMENTS

- ❖ **Subcontracts**
  - Government requires the insertion of FAR 52.209-6 into every contract over \$30K
  - FAR 52.209-6 prohibits subcontracts over \$30K with suspended or debarred contractors unless COTS or unless there is a compelling reason to do so
- ❖ **Triggers notification requirements**
  - Obligation to update certifications on proposals for ongoing procurements
  - Security clearances – obligation to report any “adverse information” and any information that changes previously submitted representations for cleared personnel or key management



## INDIVIDUALS AND AFFILIATES

- ❖ **Individuals may be suspended or debarred**
  - Likely for principals of suspended or debarred contractor
    - Principals includes officers, directors, owners, partners, and persons having primary management or supervisory responsibilities
  - Suspended or debarred individuals cannot work for a contractor as an agent, representative, or principal (including key employees)
  - Could affect commercial credit and employment applications
- ❖ **Affiliates may be suspended or debarred**
  - Affiliate is defined based on control (similar to SBA):
    - One company has the power to control the other; or
    - Third party has the power to control them both



# WHAT PROCESS DOES THE GOVERNMENT FOLLOW TO SUSPEND OR DEBAR A CONTRACTOR?

## ❖ Debarment

- Contractors may submit information to oppose a debarment before debarment occurs
- Debarment determination is ultimately made based on the preponderance of the evidence, including information from the contractor

## ❖ Suspension

- Contractors generally do not have an opportunity to oppose a suspension until after the suspension is imposed
  - “Shoot first, ask questions later”
- Suspension decision is made based on adequate evidence, typically without input from the contractor



## GENERAL PROCESS

- ❖ Begins with a written notice
  - Contractor typically receives a notice of suspension and proposed debarment, a notice of proposed suspension, or a notice to show cause
  - The notice should list what is being considered, the reasons for it, and the effect of any sanction being considered or imposed
- ❖ Contractor usually has 30 days to respond
- ❖ Initial burden is on the Government, then the burden shifts to the contractor
- ❖ In cases not involving a conviction, indictment, or civil judgment, the contractor generally has the right to appear with counsel, submit evidence, present witnesses, and confront any person the agency presents
- ❖ Fact-finding proceedings are rare and generally only occur where there is a genuine dispute over material facts



## AGENCY-SPECIFIC PROCESSES

- ❖ Most federal agencies have their own process for referral, investigation, and suspension/debarment decisions
  - There are important differences between how cases are run between agencies, so it is important to know your agency
  - Inexperienced agencies are more likely to bring cases based on old circumstances and not understand that they should focus on the contractor's present responsibility
- ❖ Agencies with the most suspension and debarment cases are DoD (DLA, Navy, Army, Air Force), GSA, and EPA
  - These agencies have a dedicated suspension and debarment program with full-time staff, detailed policies and procedures, and practices that encourage an active referral process



## APPEAL PROCESS

- ❖ A suspension or debarment is reviewable in federal district court under the Administrative Procedures Act
- ❖ Scope of review is deferential to the agency
  - A court will not overturn the agency unless the suspension/debarment decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law”
- ❖ Scope of review for obtaining injunctive relief pending the district court’s decision is the same standard applied to any other preliminary injunction/TRO request, which is stringent
- ❖ Contractor generally must exhaust all administrative remedies before bringing court action



# TIPS FOR AVOIDING SUSPENSION AND DEBARMENT

- ❖ **Develop and maintain strong internal controls**
  - Policy and procedures for size and status representations
  - Designate a corporate compliance officer
  - Clear oversight and reporting procedures
  - Employee training
  - Perform regular internal compliance reviews
- ❖ **Fine tune your teaming and subcontracting procedures**
  - Perform risk analysis for your projects and partners
  - Require written representations of size/status from your subcontractors, confirm in SAM.gov, and require subcontractor to indemnify
  - Protect company and procurement sensitive information



## MORE AVOIDANCE TIPS

- ❖ Tailor your compliance efforts to your most likely risks
- ❖ If it seems too good to be true, it probably is
  - Be wary of “inside” information
  - Question where and how your employee or partner obtained sensitive information
  - When in doubt, disclose
- ❖ Maintain good lines of communications with contracting personnel and within contracting agencies





## TIPS FOR NAVIGATING THE SUSPENSION/DEBARMENT PROCESS

- ❖ When you first receive a notice, focus on preparation and information gathering
- ❖ Key initial steps:
  - Get experienced counsel
  - Ask for the administrative record that was the basis for the notice
  - Conduct internal investigation to determine what happened
  - Contact the SDO
    - Get adequate time to respond
    - Arrange for a face-to-face meeting



## GET OUT IN FRONT OF THE PROCESS

- ❖ Be proactive!
  - As soon as possible, voluntarily take meaningful actions to remediate the harm and show present responsibility
  - Set up a meeting with agency officials to discuss the steps you have already taken and what else you are prepared to do
  - Actions should be significant, not window dressing
- ❖ Appropriate steps may include:
  - Revising/implementing stronger internal controls with an eye towards preventing any future reoccurrence
  - Improve internal investigation, reporting and disclosure system
  - Disciplinary actions against personnel involved
  - Increase training for personnel, both tailored and general training



## MEETING WITH THE AGENCY

- ❖ Never hurts to ask for a meeting, but it may hurt not to
  - Push for a meeting as quickly as you can get one
  - Agency may not be willing to meet with you before you make a written response
  - Important to show the agency that the company and its principals take the matter very seriously
- ❖ Be prepared!
  - Ask the SDO beforehand if there are any people the contractor should bring or issues to discuss
  - Practice what to say (and not say)
  - Use the mitigating factors in the FAR as a roadmap for what to do and how to show the agency you are presently responsible



## ADMINISTRATIVE AGREEMENTS

- ❖ What is an administrative agreement?
  - A way to settle with the agency to lift suspension or avoid debarment
  - Potential for win-win with agencies getting result they can tout, and contractors avoiding harshest penalties
  - Terms often impose additional controls and reporting on the contractor, such as independent monitors, regular reporting to the agency, increased training, etc.
- ❖ Agencies often reach administrative agreements when the contractor is presently responsible or close to presently responsible
- ❖ Recommended to have plan in place for the meeting
  - Proposed agreement terms and steps
  - Discuss potential difficulties beforehand



# Questions?

Thank you for joining us today.

If you would like to speak with Jon or Alex about suspension and debarment issues, please contact them at:

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