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A Long Overdue Update: Suspension And Debarment Under The FAR Today

*By Kara M. Sacilotto**

For years, there have been two primary mechanisms for the Federal Government to exclude individuals and contractors from doing business with it: the suspension and debarment rules under the Federal Acquisition Regulation (FAR),[1] which apply to procurement contracts, and the Nonprocurement Common Rule (NCR),[2] which apply to nonprocurement transactions, such as grants, cooperative agreements, and assistance agreements.[3] Pursuant to Executive Order No. 12689,[4] the two systems are reciprocal, meaning that if an entity is excluded under one set of rules, it is excluded under the other.[5]

Because the two systems are reciprocal, Government contracts practitioners have for years advocated for either merging the two rules or, at a minimum, aligning their provisions.[6] On January 3, 2025, the FAR Council published a final rule partially accomplishing the latter: it better aligned the FAR with the NCR, and it updated the FAR to bring it closer into alignment with current suspension and debarment practices.[7] This BRIEFING PAPER will discuss the administrative remedy of suspension and debarment under the updated FAR rules,[8] highlight similarities and differences between the FAR and the NCR, and provide guidelines when facing a situation that could lead to suspension or debarment.

Background And Purpose

The Federal Government has a policy of only doing business with responsible contractors.[9] This is expressed in two primary ways. First, before any contract, task order, or other award can be made, the contracting officer must affirmatively determine that the *prospective* contractor is responsible pursuant to FAR Subpart 9.1. This is accomplished by reviewing the standards in FAR 9.104-1 and any special standards in the solicitation pursuant to FAR 9.104-2. One such responsibility standard in FAR

**Kara M. Sacilotto is a partner in the government contracts practice at Wiley Rein LLP. She is former Chair of the American Bar Association Public Contract Law Section (ABA PCL Section), a Vice Chair of the Debarment and Suspension Committee of the ABA PCL Section, and Chair of the Suspension and Debarment Committee of the Government Contracts Section of the Federal Bar Association.*

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9.104-1 is whether the contractor has a "satisfactory record of integrity and business ethics."[10] Second, the FAR's suspension and debarment provisions in Subpart 9.4 support the general policy of doing business with responsible contractors only by assessing whether a contractor remains *presently* responsible, after award and during contract performance or generally, regardless of any pending awards.

Both the FAR and the NCR are clear that suspension and debarment are "serious" remedies that should be imposed "only in the public interest for the Government's protection and not for purposes of punishment."[11] As noted above, the two systems are reciprocal, and both provide that any one agency can take action that precludes a contractor or individual from entering into contracts or nonprocurement transactions with every other federal agency. In other words, suspension and debarment is also Government-wide. The scope and breadth of an exclusion from Government contracting is one of the reasons that imposition of these remedies has been called a "death knell" for a contractor.[12]

Types Of Exclusions Under The FAR And The NCR

The FAR and the NCR have similar types of exclusions with one enduring and notable exception.

Suspension, Debarment, And "Voluntary Exclusion"

Both the FAR and the NCR allow for "suspension," which is a temporary exclusion usually because of an ongoing investigation or legal proceeding or an immediate need to protect the Government's interests.[13] Under both sets of rules, an entity or individual can be suspended immediately from federal contracting or participation in nonprocurement transactions by issuance of a notice of suspension, with the exclusion taking effect even if the entity has not had an opportunity to respond.[14] Similarly, both the FAR and the NCR allow for "debarment," which is an exclusion for a set time period, usually three years, after the entity or individual has had an opportunity to be heard.[15] With the January 2025 update to the FAR,[16] the FAR now includes the remedy of "voluntary exclusion," whereby an entity or individual agrees to be excluded from contracting or nonprocurement transactions for an agreed-upon period.[17] This new FAR remedy has existed in the NCR[18] and is discussed later in this PAPER.

The Conundrum Of "Proposed Debarment"

An enduring difference between the FAR and the NCR is the remedy of "proposed debarment." Despite "most respondents" to the FAR Council's proposed rule arguing that proposed debarment under the FAR should be non-exclusionary, as it is under the NCR, the FAR Council declined to adopt that change and alignment of the two systems.[19] Thus, an entity or individual that receives a notice of proposed debarment under the FAR is immediately excluded from federal contracting, similar to being suspended. The FAR Council reasoned that the policy differences between contracts and nonprocurement actions justify the different treatment.[20] In the proposed rule, the FAR Council described these policy reasons as follows: (1) "the necessity to continue to protect the Government's interests and taxpayer's money by minimizing business risk where procurements are involved"; (2) "[b]oth [remedies] have been in the FAR as recognized tools for decades, with different standards

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for use"; (3) "contracts are more likely than nonprocurement transactions, such as Federal financial assistance, to require immediate exclusion when something goes wrong"; (4) "[p]articipants in nonprocurement transactions—while subject to the terms and conditions of a Federal award—are typically required to meet overall program goals and objectives, rather than perform to an exact contractual requirement"; (5) "Federal financial assistance typically is for public purposes of support or economic stimulation, rather than for the direct benefit of the U.S. Government"; and (6) "[t]he importance of protecting the Government's interests is reflected in recurring Appropriations Act language since 2012 . . . which states that funds may not be used to enter into a contract with any corporation that was convicted of a felony criminal violation under Federal law within the preceding 24 months, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that further action is not necessary to protect the interests of the Government."[21] Moreover, the FAR Council did not believe that exclusionary proposed debarment is overused, particularly with the addition of "prenotice letters" in the FAR as a non-exclusionary mechanism for investigating a contractor's present responsibility.[22]

Whether these policy reasons justify different treatment is debatable. Nonetheless, the difference remains in the January 2025 update.

Causes For Suspension, Proposed Debarment, And Debarment

The January 2025 update did not modify the grounds for suspension, proposed debarment, or debarment. Under FAR 9.407-2, a suspending and debarring official (SDO) may suspend a contractor based on "adequate evidence" of:

(1) Commission of fraud in connection with obtaining, attempting to obtain, or performing a public contract or subcontract;

(2) Violation of federal or state antitrust laws relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property;

(4) Violation of Drug-Free Workplace rules;

(5) Intentionally affixing a "Made in America" label to a product that is not domestic;

(6) Unfair trade practices as defined in FAR 9.403;

(7) Delinquent federal taxes exceeding $10,000;

(8) Knowing failure by a principal to comply with mandatory disclosure obligations;[23]

(9) Determination of a false certification under FAR 52.209-13, "Violation of Arms Control Treaties or Agreements—Certification"; and

(10) 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 or subcontractor.[24]

An indictment for any of these offenses constitutes "adequate evidence" to suspend an individual or entity.[25] Additionally, an SDO may suspend a contractor based on adequate evidence "for any other cause of so serious and compelling a nature" that it affects the contractor's present responsibility.[26]

The causes for proposed debarment or debarment under FAR 9.406-2 are similar to the causes for suspension but require either (1) a conviction or civil judgment of a violation (commission of fraud in connection with a federal contract or subcontract; state or federal antitrust violations; commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property; intentionally affixing a "Made in America" label to a product that is not; and "[c]ommission 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")[27] *or* (2) a "preponderance of the evidence" of a violation (violation of Drug Free Workplace laws; affixing a "Made in America" label to a product that is not; unfair trade practices defined in FAR 9.403; delinquent federal taxes over $10,000; failure by a principal to make a disclosure of credible evidence of a violation of the civil False Claims Act and

certain criminal violations; and a false certification under FAR 52.209-13, "Violation of Arms Control Treaties or Agreements—Certification").[28] This latter "preponderance of the evidence" category adds additional causes for proposed debarment or debarment not included in the grounds for suspension. Specifically, a contractor can be proposed for debarment or debarred based on a preponderance of the evidence of (a) willful failure to perform in accordance with the terms of one or more contracts; (b) a history of failure to perform or unsatisfactory performance on one or more contracts;[29] and (c) failure to comply with certain immigration requirements.[30] As with the causes for suspension, a contractor can be proposed for debarment or debarred for "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."[31]

Perhaps a little noticed but likely impactful expansion of the FAR are definitions for what constitutes a "civil judgment" and a "conviction." The terms have always been defined in the NCR.[32] Now, the FAR defines a "civil judgment" to mean "the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts or a final determination of liability under the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801–3812)."[33] This final reference should be to the newly renamed and revamped Administrative False Claims Act (AFCA).[34] A "conviction" is defined as:

> (1) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or
>
> (2) Any other resolution that is the functional equivalent of a judgment establishing a criminal offense by a court of competent jurisdiction, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.[35]

Thus, practitioners should note that certain dispositions of civil, administrative, and criminal matters, including findings under the AFCA, certain "settlements," or deferred prosecution agreements, depending on their terms, could create a collateral "cause" for suspension or debarment. As always, but perhaps even more so now, it behooves counsel handling the alleged violations to coordinate with Government contracts counsel on the potential collateral consequences of any resolution.

The January 2025 update helpfully emphasizes that regardless of the existence of cause for exclusion, an SDO has wide discretion to determine whether exclusion is in the Government's best interests. For example, FAR 9.407-1(b)(1) expands upon the considerations an SDO weighs to determine if suspension is necessary and whether evidence is "adequate:"

> In deciding whether immediate action is necessary to protect the Government's interest, the [SDO] has wide discretion. The [SDO] may infer the necessity for immediate action to protect the Government's interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government. In assessing the adequacy of the evidence, agencies should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence. An indictment or other official findings by Federal, State, or local bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.[36]

Updated Procedures And Process

FAR 9.406-3 and FAR 9.407-3 outline the procedures for debarment and suspension, respectively. The January 2025 updates emphasize that agencies should use a decisionmaking process that is "as informal as is practicable, consistent with principles of fundamental fairness."[37]

"Pre-Notice Letters" Formally Recognized

For years, the Interagency Suspension and Debarment Committee[38] has shared with SDOs the ability to use other types of "notices" to obtain information from contractors about their present responsibility without initiating an exclusion.[39] These non-exclusionary type notices could be requests for information, "show cause" notices, or simply letters to a contractor expressing concerns regarding alleged misconduct. Over time, SDOs have increasingly used these informal tools, and now the FAR formally recognizes them as "[p]re-notice letters,"

defined as "a written correspondence issued to a contractor in a suspension or debarment matter, which does not immediately result in an exclusion or ineligibility."[40] FAR 9.403 emphasizes that these letters are discretionary and are "not a mandatory first step in the suspension or debarment process."[41]

Suspension Process

Suspension is initiated by the SDO providing a notice to the contractor that includes the fact that a suspension has been imposed, the causes relied upon under FAR 9.407-2, the effect of the suspension, the possibility of additional proceedings, and the contractor's rights to contest the action.[42] This notice serves as formal communication of the agency's concerns and initiates the response period. Helpfully for both agencies and practitioners, the methods of providing notice have been updated to reflect the modern reality of email (in addition to U.S. Mail and certified mail). Contractors should note that the email address default will be to the contact on the contractor's System for Award Management (SAM) registration.[43]

Upon receiving this notice, contractors have the opportunity to submit information and arguments opposing the suspension, typically within 30 days. The FAR has been updated to identify specific information that respondents must provide—general denials are not sufficient: (1) argument in opposition to the action; (2) any specific facts that contradict the notice as well as the aggravating or mitigating factors in FAR 9.406-1(a); (3) all existing, proposed, or prior exclusions based on similar facts taken by state, local, or federal agencies, including any administrative agreements with those agencies; (4) all criminal or civil proceedings not included in the notice that are related to the causes in the notice; and (5) all of the contractor's affiliates.[44] This last informational requirement is notable. A contractor must identify its affiliates so that the SDO can determine if those affiliates should also be excluded, a topic discussed below.[45] The FAR also warns "[t]hat if the contractor fails to disclose the information in [FAR 9.407-3(c)(7)] or provides false information, the agency taking action may seek further criminal, civil, or administrative action against the contractor[.]"[46] Thus, although it has always been important to be truthful and transparent with an SDO, the FAR puts a fine point on it. To ensure that contractors can respond fulsomely, counsel should be sure to request the agency's administrative record supporting the suspension notice.[47]

In actions that are not based on an indictment,[48] if the contractor's submission in opposition raises a genuine dispute over material facts, the Department of Justice (DOJ), U.S. Attorney's office, State attorney general, or other affected state or local official can preclude a fact-finding proceeding if that proceeding would prejudice an ongoing investigation or contemplated legal proceedings involving the same facts as the suspension. If no such determination is made, the contractor should be allowed the opportunity to appear with counsel, submit documents, present witnesses, and confront witnesses against it.[49] The FAR allows the SDO to refer the fact-finding to another official and allows the SDO to reject any facts found only if they are arbitrary and capricious or clearly erroneous.[50] As a practical matter, it is uncommon for agencies to hold fact-finding proceedings. Many agencies do not have administrative law judges or others to conduct fact-findings. Also, the FAR encourages informality with respect to proceedings. Accordingly, most suspension (and debarment) matters are addressed through the contractor's written submission, meetings between the SDO and his or her staff and the contractor, and exchanges of information.

If the action is based on an indictment, or if there is no genuine dispute over material facts, the SDO makes a decision based on the administrative record and the contractor's submission.[51] If there is a fact-finding proceeding, the SDO makes a decision based on the facts found, the contractor's submission, and any other information in the administrative record.[52]

Proposed Debarment Process

The debarment process under FAR 9.406-3 follows similar investigative and referral protocols as suspension, but with more permanent implications. Before implementing proposed debarment or debarment, the contracting agency must provide the contractor with written notice of the proposed debarment. This notice includes the basis for the action, causes relied upon, potential effect of debarment, and information about how to contest the proposed action. Upon receiving this notice, contractors have the opportunity to submit information and argument in opposition to the proposed debarment, typically within

30 days of receipt.[53] Similar to the procedures in a suspension, FAR 9.406-3 has been revised to require the respondent's submission to identify arguments in opposition to the action, any specific facts that contradict the notice as well as the aggravating or mitigating factors in FAR 9.406-1(a), all existing, proposed, or prior exclusions based on similar facts taken by state, local, or federal agencies, including any administrative agreements with those agencies, all criminal or civil proceedings not included in the notice that are related to the causes in the notice, and all of the contractor's affiliates.[54] As with suspension, a failure to disclose this information could lead to further enforcement actions,[55] and it is incumbent upon the contractor to request the administrative record.[56]

For matters involving disputed facts, the agency may conduct additional proceedings that allow the contractor to present evidence, cross-examine witnesses, and defend against the allegations.[57] As noted above, this is unlikely; the more common scenario is meetings and information exchanges. The SDO official must make a decision based on all the facts in the administrative record, including the contractor's submission and any fact-finding.[58] For matters with no disputed facts, the decision is based on the administrative record and the contractor's submission in opposition.[59]

Expanded Mitigating And Aggravating Factors

A major update to the FAR was to revise and expand the 10 mitigating factors in FAR 9.406-1 that an SDO should consider in assessing present responsibility to 17 mitigating *and* "aggravating" factors. The additional factors are those imported from the NCR.[60] The seven new factors added are:

> (11) Whether the contractor (including an individual) has a pattern or prior history of wrongdoing, the frequency of incidents and/or duration of the wrongdoing, and the actual or potential harm or impact that results, or may result, from the wrongdoing.
>
> (12) Whether and to what extent the contractor (including an individual) planned, initiated, or carried out the wrongdoing, and the kind of positions within the contractor's organization held by the individual involved in the wrongdoing.
>
> (13) Whether the wrongdoing was pervasive within the contractor's organization.
>
> (14) Whether the individual or the contractor's principals tolerated the offense.
>
> (15) Whether the contractor (including an individual) is or has been excluded or disqualified by an agency of the Federal Government or has not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this subpart.
>
> (16) Whether the contractor (including an individual) has entered into an administrative agreement with a Federal agency or a similar agreement with a State or local government that is not Governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this subpart.
>
> (17) Whether there are any other factors to consider for the contractor (including an individual) appropriate to the circumstances of a particular case.[61]

It bears repeating that the fact that there is "cause" for exclusion does not mean that a contractor should be excluded. An analysis of FAR 9.406-1's 17 factors, and whether the contractor's conduct is "aggravating" or "mitigating" under any one of them should be considered in the assessment of present responsibility. The seven additional factors add important nuance and flexibility to the determination by adding considerations about the impact and pervasiveness of the misconduct, the contractor's role in the misconduct, and a "catch all" for any other factors that may affect the contractor's responsibility. In responding to a notice of suspension or proposed debarment, contractors should try to demonstrate that it meets as many "mitigating" factors as possible in a manner that is responsive to the SDO's concerns. There are now seven additional tools in that toolbox.

Mitigating And Aggravating Factors For Individuals

Reviewing the added factors listed above, one may notice references to "individuals." Although not hidden from the definition or the exclusions listed on SAM, it sometimes comes as a surprise to people that individuals are included within the definition of a "contractor" in FAR 9.403 and that people can be individually suspended or debarred. Practitioners, as well as parties commenting on the proposed FAR rule, have advocated for either revision of the former mitigating factors in FAR 9.406-1 or development of a separate set of factors for individuals,

since the prior mitigating factors were geared toward corporate entities and the majority of exclusions appear to involve individual people.[62] Moreover, it is not uncommon for individuals to face potential exclusion without assistance of counsel.[63] The FAR Council recognized that "clarifying" the mitigating and aggravating factors would increase transparency and accordingly modified FAR 9.406-1(a) to indicate that they are applicable to individuals and, in some cases, added how.[64] For example, FAR 9.406-1(a)(8), which addresses whether the contractor has agreed to or instituted new or revised internal controls or training, now has two parts: one for entities, and one for individuals which asks "whether the individual has attended relevant remediation training."[65] FAR 9.406-1(a)(10) asks whether the contractor's "management" recognizes the seriousness of the misconduct that gave rise to the SDO's concerns and also "[f]or an individual, whether the individual recognizes, accepts, and understands the seriousness of the misconduct giving rise to the cause for debarment and has adopted practices to prevent recurrence."[66] Accordingly, the FAR now has more guidance for both corporate entities and individuals facing potential exclusion on how to advocate for their present responsibility.

Period, Effect, And Impact Of Suspension, Proposed Debarment, Or Debarment

Suspensions are intended to be temporary while investigations or legal proceedings are ongoing.[67] If no legal proceedings are initiated, the suspension ends after 12 months unless a prosecuting official requests an extension, in which case it can be extended for six months.[68] The FAR now requires the SDO to notify the DOJ or other prosecuting agency of the suspension's upcoming lapse at least 30 days before its expiration.[69] A suspension cannot last longer than 18 months unless legal proceedings have been brought.[70] If debarment is imposed, the period typically corresponds to the seriousness of the causes but generally should not exceed three years.[71]

Both suspension and debarment apply across the entire Federal Government, not just with the initiating agency. This Government-wide effect is a critical aspect of the system, ensuring that excluded contractors cannot simply shift their business to other agencies. Exclusions under the FAR are also applicable to nonprocurement transactions under the NCR, and vice versa. This reciprocal effect, codified in FAR 9.401 and 2 C.F.R. §§ 180.140 and 180.145, means that contractors excluded under either system are excluded from both procurement and nonprocurement activities across the Federal Government.

Excluded contractors are listed on the excluded parties list on SAM, which is the Government central repository of excluded parties. Agencies must provide notice to the General Services Administration to place an exclusion on SAM within three working days after the action becomes effective and within five working days of any change or rescission.[72]

The Government is not required to terminate existing contracts with excluded contractors, but it may choose to do so.[73] The objective of an exclusion is to freeze the status quo and protect the Government's interests going forward. Accordingly, with respect to excluded contractors, FAR 9.405 and FAR 9.405-1(a)(2) prohibit:

(1) Entering into new contracts or renewing existing contracts.

(2) Placing orders exceeding the guaranteed minimum under indefinite quantity contracts.

(3) Placing orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements.

(4) Adding new work, exercising options, or extending the duration of current contracts or orders.

Under FAR 9.405(e), bids from excluded contractors are logged but rejected, and proposals may not be evaluated, included in the competitive range, or considered for award. Even if a suspension or debarment is lifted during a competition, the contracting officer has discretion regarding whether to consider the offer.[74] Contractors debarred, suspended, proposed for debarment, or voluntarily excluded, are also excluded from conducting business with the Government as agents or representatives of other contractors and cannot act as sureties.[75]

There are exceptions: the head of the agency can make a written determination that there is a "compelling reason" for a particular contract action.[76] But such excep-

tions are relatively rare. Thus, the combined effect of these restrictions can have severe financial consequences for contractors, essentially cutting off their Government revenue stream except for existing work.

New Voluntary Exclusion Under The FAR

As discussed above, the January 2025 revisions added a new type of exclusion from the NCR: "voluntary exclusion." This new exclusion, which has always existed under the NCR,[77] is defined in FAR 9.403 as "a contractor's written agreement to be excluded for a period under the terms of a settlement between the contractor and the SDO of one or more agencies. A voluntary exclusion must have Governmentwide effect."[78] A voluntary exclusion includes many of the same elements as a suspension or debarment: the entity or individual is listed on the excluded parties list on SAM,[79] the exclusion applies across the entire Government, and it is reciprocal. Still, some entities or individuals may choose to negotiate a voluntary exclusion to demonstrate their acceptance of responsibility and, ideally, reach agreement on a shorter exclusion.

Lifting Exclusions

The FAR allows SDOs to reduce the term of a debarment, lift it early, or change its scope, upon a contractor's request based upon newly discovered material evidence that affects the contractor's present responsibility, reversal of the conviction or civil judgment upon which the debarment was based, a "[b]ona fide change in ownership or management," elimination of other causes for which the debarment was imposed, or for any other reasons the SDO may deem appropriate.[80] A common ground for lifting an exclusion is that the organization has been sold to a responsible contractor. Even then, it is possible that the agency will want an administrative agreement, discussed below, with the acquiring entity.

Subcontracting Implications

The implications of exclusion extend beyond prime contracts. FAR 9.405-2 prohibits contracting officers from consenting to subcontracts with excluded entities unless there is a compelling exception.[81] Additionally, FAR 52.209-6 requires prime contractors to ensure that their subcontractors are not excluded and prohibits prime contractors from entering into subcontracts exceeding $35,000 (except for commercially available off-the-shelf items) with excluded entities.[82] Similar to the compelling reasons exception for doing work with an excluded prime contractor, a prime contractor can subcontract with an excluded entity but the hoops are such that it is highly unlikely than any prime contractor would willingly go through them: the prime must provide notice to the contracting officer of its intent to subcontract with an excluded contractor, the compelling reason for doing so, and the systems or procedures the prime contractor has put in place to "fully protect[] the Government's interests."[83]

Vertical And Horizontal Imputation

By default, suspension or debarment extends to all divisions or organizational elements of a contractor unless the SDO explicitly limits it to specific divisions. This broad organizational coverage reflects the Government's view that responsibility issues often permeate an entire organization.

Imputation From Employees To Organizations And Organizations To Individuals

The misconduct of an employee can be imputed to the contractor entity if it occurred in the performance of the employee's duties or with the contractor's knowledge or acquiescence. This standard, found in FAR 9.406-5 and 9.407-5, means that organizations can be held responsible for their employees' misconduct provided the employee was acting within the scope of their employment or with the organization's awareness.

Conversely, a contractor entity's misconduct can be imputed to individuals who participated in, knew of, or had reason to know of the misconduct. This two-way imputation creates significant risk for individuals in management positions who may be personally excluded based on their organization's misconduct.[84] The NCR applies imputation in a similar way.[85]

Affiliates

FAR 9.406-1(c) and 9.407-1(c) permit exclusion to extend to affiliates if they are specifically named and given written notice and an opportunity to respond. Companies are considered affiliates if one controls or has

the power to control the other, or if a third party controls or has the power to control both.

The case of *Agility Defense & Government Services v. U.S. Department of Defense* established that affiliates can be suspended or debarred solely on the basis of their affiliate status, even without misconduct by the affiliate itself.[86] According to the court, FAR 9.407-1(c) "clearly states that an agency can suspend an affiliate based solely on its status as an affiliate of an indicted government contractor" and "the parallel provision governing debarment [FAR 9.406-1(b)] likewise permits an affiliate to be debarred solely based on its status as an affiliate. Together, these provisions make clear that the suspension and debarment of an affiliate derive solely from its status as an affiliate; no showing of wrongdoing by the affiliate is required for suspension or debarment."[87] Rejecting the argument that an affiliate should be treated separately and independently for suspension and debarment purposes since they are for purposes of obtaining a Government contract, the court succinctly held: "The whole text of the regulation provides that an affiliate can be suspended based solely on its affiliate status so long as the agency establishes that it is an affiliate, gives notice of the suspension, and provides an opportunity to respond to the suspension. The present responsibility of an affiliate is irrelevant."[88]

Judicial Review: Forum And Standard Of Review

Suspension and debarment decisions are generally reviewable in U.S. District Court, not the U.S. Court of Federal Claims.[89] District court actions are decided under the Administrative Procedure Act (APA)[90] standard of review, which assesses whether the exclusion decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[91] Because the impact of an exclusion can be devastating to a business that relies heavily on Government contracts, judicial review is often a last resort. Making your best case to the SDO in response to a pre-notice or notice is the best way to prevent exclusion, and, if the SDO has remaining concerns that can be addressed by the contractor while allowing it continue doing business, an administrative agreement is often the end result.

Administrative Agreements

Administrative agreements have been a longstanding tool for resolving suspension and debarment matters. Curiously, however, the FAR was virtually silent regarding them. No more. The January 2025 update now defines them in FAR 9.403.[92] In a nutshell, an administrative agreement allows the SDO to lift a suspension or debarment, or forgo suspension or debarment, in exchange for the contractor agreeing to abide by the terms of the agreement. The FAR does not dictate the terms of an administrative agreement, and that is a good thing. Administrative agreements are not "one size fits all" and should be tailored to the nature of the misconduct and the contractor's business, including its size and the maturity of its compliance program. For one contractor, the administrative agreement may hinge on changes to corporate management and control. For another, it may include remedial measures such as enhanced training. All administrative agreements are required to be posted publicly on SAM. Currently, one can find them, but it is a circuitous searching process.

Despite the need for tailoring, many administrative agreements share common features, and many agencies have standard agreement forms or templates that, at a minimum, serve as a starting point for negotiations. Common features of an administrative agreement are acknowledgment that there is cause for suspension or debarment; governance and ethics program improvements, including enhanced policies, practices, and training; creation of or recognition of an existing Chief Compliance Officer; commitment to continued cooperation with the Government and agency access to records and employees; provisions addressing business transfers or acquisitions; acknowledgement that the agreement is based on the contractor's representations and an ability to undo the agreement and take administrative action if those representations prove false or the agreement is violated; a release of the Government (but not the contractor); and preservation of the right to pursue administrative action if the agreement is violated or a new cause for suspension or debarment arises. Some agreements also include employee and supplier/subcontractor notification requirements.

Many agencies require an independent third-party monitor, paid by the contractor, to oversee the agreement

by ensuring that the contractor implements the remedial measures included in the agreement and to report back to the agency on those efforts and any lapses. Monitors also recommend improvements to contractor internal controls, and their work is not considered covered by an attorney-client privilege with the contractor. Larger contractors with established ethics and compliance programs may be able to negotiate forgoing an independent monitor and instead report to or meet with the SDO office periodically on progress. Typically, administrative agreements last three years, but this too is negotiable.

Guidelines

These *Guidelines* are intended to assist you in understanding the FAR's updated suspension and debarment rules. They are not, however, intended as or to act as a substitute for legal advice and professional representation in any specific situation.

1. The FAR's updated rules have important changes to definitions, the mitigating and aggravating factors, and the process for suspension and debarment matters. Many of these changes are drawn from the NCR; some changes reflect current suspension and debarment practices. Contractors and practitioners should familiarize themselves with these revisions. For those handling related criminal or civil matters, it is crucial to understand the FAR's updated rules and definitions to minimize or avoid the collateral consequence of suspension or debarment.

2. An ounce of prevention is worth a pound of cure. The most effective approach to suspension and debarment is prevention through robust ethics and compliance programs. Contractors should design compliance programs appropriate to their size, risk profile, and industry, drawing guidance from resources such as the DOJ Criminal Division's Evaluation of Corporate Compliance Programs and the DOJ Antitrust Division's Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations.

3. Bad news does not get better with age. Proactive outreach to an SDO when an incident has arisen, as opposed to waiting for the SDO to knock, demonstrates present responsibility, that the contractor understands the seriousness of the situation, and the transparency of a good business partner. In short, proactive engagement can stave off an immediate exclusion.

4. When facing potential suspension or debarment, contractors should engage experienced outside counsel with specific suspension and debarment expertise. Experienced counsel will assess the issues independently and avoid treating the process as adversarial litigation—SDOs are not opposing counsel but administrative officials determining present responsibility.

5. Contractors should focus on demonstrating present responsibility through the updated aggravating and mitigating factors in FAR 9.406-1 rather than exclusively challenging the underlying facts. SDOs rely on referrals; they generally do not conduct investigations themselves. As a result, there is usually "smoke" if not a "fire" that has led them to consider exclusion. Depending on the facts, arguing about whether those concerns are real may not be in your best interests.

6. An SDO will expect a responsible contractor to know that a problem has occurred and self-identify the necessary remedial measures to prevent a recurrence. An SDO will not (and should not have to) tell a contractor how to fix the problem.

7. Time is unlikely to be on your side. Getting to a fact-finding or judicial review usually is not the end game given the business impact of an exclusion. Acting quickly to demonstrate present responsibility, self-identifying remedial measures, and negotiating an administrative agreement, even if it requires a third-party monitor, may be in your best interests.

8. Recognize that the agency may have a form administrative agreement that has proven the test of time. Wholesale renegotiation may not be possible so focus on the possible within that framework.

ENDNOTES:

[1]The FAR is codified in Title 48 of the Code of Federal Regulations. The suspension and debarment rules are in FAR Subpart 9.4.

[2]The NCR, 2 C.F.R. Part 180, was issued by the Office of Management and Budget (OMB) to provide a common set of suspension and debarment rules for nonprocurement actions, identified in 2 C.F.R. § 180.970, in response to Executive Order No. 12549 (Feb. 18, 1986), Debarment and Suspension, 51 Fed. Reg. 6370 (Feb. 21, 1986). Individual agencies then adopt the NCR, with any agency-specific modifications, as part of their

own rules.

[3]There are statutes that impose forms of exclusion on those who violate them. Examples (non-exclusive) include criminal violations of the Clean Air Act, 42 U.S.C.A. § 7606, and the Clean Water Act, 33 U.S.C.A. § 1368; misrepresentation of status as a veteran-owned or service-disabled veteran-owned small business under 38 U.S.C.A. § 8127(g); and violations of certain labor laws such as the Davis-Bacon Act, 40 U.S.C.A. § 3144(b), the Walsh-Healey Act, 41 U.S.C.A. § 6504(b), and the Service Contract Act, 41 U.S.C.A. § 6706(b). Exclusions under these statutes are outside the scope of this Briefing Paper.

[4]Executive Order No. 12689 (Aug. 16, 1989), Debarment and Suspension, 54 Fed. Reg. 34131 (Aug. 18, 1989).

[5]See FAR 9.401; 2 C.F.R. §§ 180.140, 180.145.

[6]See, e.g., K. Sacilotto, "One Is the Loneliest Number: A Case for Changing Suspension and Debarment Regulations To Better Address Potential Exclusion of Individuals," 47 Pub. Cont. L.J. 479, 506 (2018); R. Meunier & T. Nelson, "Is It Time for A Single Federal Suspension and Debarment Rule?," 46 Pub. Cont. L.J. 553 (2017).

[7]90 Fed. Reg. 507 (Jan. 3, 2025). The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration are charged with direction and coordination of federal procurement policy and regulatory policy under the Office of Federal Procurement Policy Act, 41 U.S.C.A. Chapter 13. The FAR Council is made up of officials from these agencies and are assisted by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in promulgating and managing the FAR. For ease of reference, this Briefing Paper refers to these entities collectively as the FAR Council.

[8]Note that FAR Subpart 9.4, "Debarment, Suspension, and Ineligibility," has received a light touch in the "Revolutionary FAR Overhaul" process initiated by Executive Order 14275, "Restoring Common Sense to Federal Procurement" (Apr. 15, 2025), 90 Fed. Reg. 16447 (Apr. 18, 2025). The changes to the suspension and debarment rules in FAR Subpart 9.4 were minimal and not substantive. See https://www.acquisition.gov/far-overhaul/far-part-deviation-guide/far-overhaul-part-9. For ongoing analysis of the overhaul process and each of the revised FAR Parts as they are posted to the Government's FAR Overhaul website, see "Decoding the FAR Overhaul," Wiley, https://www.wiley.law/decoding-the-far-overhaul; see also K. Sacilotto, "The Revolutionary FAR Overhaul Initiative: Breaking Down Executive Order 14275 And Its Implementation," 25-7 Briefing Papers 1 (June 2025).

[9]FAR 9.103(a); FAR 9.402(a).

[10]FAR 9.104-1(d).

[11]FAR 9.402(b); see also 2 C.F.R. § 180.125(c).

[12]Mainelli v. United States, 611 F. Supp. 606, 610 (D.R.I. 1985).

[13]FAR 9.407-1(b)(1); 2 C.F.R. § 180.1015.

[14]See FAR 9.407; 2 C.F.R. §§ 180.700–180.760.

[15]See FAR 9.406; 2 C.F.R. §§ 180.800–180.885.

[16]90 Fed. Reg. 507 (Jan. 3, 2025).

[17]FAR 9.403.

[18]2 C.F.R. § 180.1020.

[19]90 Fed. Reg. 507 (Jan. 3, 2025).

[20]90 Fed. Reg. at 508.

[21]89 Fed. Reg. 1043, 1044 (Jan. 9, 2024).

[22]90 Fed. Reg. 507, 508.

[23]See FAR 9.406-2(b)(1)(vi); FAR 9.407-2(a)(8); and FAR 52.203-13.

[24]FAR 9.407-2(a).

[25]FAR 9.407-2(b).

[26]FAR 9.407-2(c).

[27]See FAR 9.406-2(a) for causes of debarment that are based on a conviction.

[28]FAR 9.406-2(b)(1).

[29]FAR 9.406-2(b)(1)(i).

[30]FAR 9.406-2(b)(2).

[31]FAR 9.406-2(c).

[32]See 2 C.F.R. § 180.915 (civil judgment); 2 C.F.R. § 180.920 (conviction).

[33]See FAR 9.403.

[34]The Program Fraud Civil Remedies Act was renamed the Administrative False Claims Act in the National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, § 5203. The updated statute, among other things, increases the ceiling for claims that can be handled administratively from $150,000 to $1 million, allows agencies to recoup the costs of investigating AFCA matters, and expands the categories of officials that can hear AFCA cases. See 31 U.S.C.A. §§ 3801–3812.

[35]See FAR 9.403.

[36]FAR 9.407-1(b)(1); see also FAR 9.406-1(a) for the factors an SDO should consider before a proposed debarment or debarment.

[37]FAR 9.406-3(b)(1); FAR 9.407-3(b)(1).

[38]See Interagency Suspension and Debarment Committee, https://www.acquisition.gov/isdc-home (last visited Mar. 30, 2025). Section 4 of Executive Order 12549 (Feb. 18, 1986) on Debarment and Suspension directed establishing the ISDC. 51 Fed. Reg. 6370 (Feb. 21, 1986). The ISDC facilitates lead agency coordination, serves as a forum to discuss suspension and debarment related issues, and assists in developing unified

federal suspension and debarment policy. When requested by the OMB, the ISDC serves as a regulatory drafting body for revisions to the NCR. The ISDC describes its "vision" as "promot[ing] transparency and best practices across its community to address business and integrity risks within the framework of the Federal suspension and debarment remedy." https://www.acquisition.gov/isdc-home (last visited Mar. 30, 2025).

[39]See, e.g., Fiscal Year (FY) 2023 Interagency Suspension and Debarment Committee (ISDC) Section 873 Report to Congress, available at https://www.acquisition.gov/sites/default/files/page_file_uploads/FY23%20Report%20by%20the%20Interagency%20Suspension%20and%20Debarment%20Committee%20on%20Federal%20Agency%20Suspension%20and%20Debarment%20Activities.pdf (last visited Mar. 30, 2025) (discussing and defining agency pre-notice letters).

[40]See FAR 9.403.

[41]FAR 9.403; see FAR 9.406-3(h); FAR 9.407-3(g).

[42]FAR 9.407-3(c).

[43]See FAR 9.406-3(c)(1); see also FAR 9.407-3(c) (referencing the procedures in FAR 9.406-3(c)(1) and (2)).

[44]See FAR 9.407-3(c)(7).

[45]See FAR 9.407-1(c).

[46]See FAR 9.407-3(c)(8).

[47]See FAR 9.407-3(d)(1), (2).

[48]Recall that an indictment for any offense under FAR 9.407-2(a) is "adequate evidence" of cause for suspension pursuant to FAR 9.407-2(b).

[49]FAR 9.407-3(b)(2).

[50]FAR 9.407-3(d)(2)(ii).

[51]FAR 9.407-3(d)(1).

[52]FAR 9.407-3(d)(2).

[53]FAR 9.406-3(c)(3).

[54]See FAR 9.406-3(c)(3)(viii).

[55]FAR 9.406-3(c)(3)(ix).

[56]See FAR 9.406-3(d)(1), (2).

[57]See FAR 9.406-3(b)(2).

[58]See FAR 9.406-3(d)(2).

[59]See FAR 9.406-3(d)(1).

[60]See 2 C.F.R. § 180.860.

[61]FAR 9.406-1(a)(11)–(17).

[62]See 90 Fed. Reg. 507, 509–510 (Jan. 3, 2025). See generally K. Sacilotto, "One Is the Loneliest Number: A Case for Changing Suspension and Debarment Regulations To Better Address Potential Exclusion of Individuals," 47 Pub. Cont. L.J. 479, 506 (2018).

[63]See 90 Fed. Reg. at 509–510.

[64]90 Fed. Reg. at 510.

[65]FAR 9.406-1(a)(8)(ii).

[66]FAR 9.406-1(a)(10)(ii).

[67]FAR 9.407-4(a).

[68]FAR 9.407-4(b).

[69]FAR 9.407-4(c).

[70]FAR 9.407-4(b).

[71]FAR 9.406-4(a)(1). There are longer or shorter periods for debarment for violations of the Drug Free Workplace restrictions, certain immigration law requirements, and false certifications under FAR 52.209-13. See FAR 9.406-4(a)(1)(i)–(iii).

[72]FAR 9.404.

[73]FAR 9.405-1(a).

[74]FAR 9.405(e)(3).

[75]FAR 9.405(a), (d).

[76]FAR 9.405(a).

[77]See 2 C.F.R. § 180.1020.

[78]See also FAR 9.406-3(g); FAR 9.407-3(f)

[79]FAR 9.404(b) & (c).

[80]FAR 9.406-4(c).

[81]FAR 9.405-2(a).

[82]FAR 52.209-6(b), (c); see FAR 9.405-2(b) ($35,000 threshold).

[83]See FAR 52.209-6(d).

[84]See, e.g., Int'l Exports v. Mattis, 265 F. Supp. 3d 35 (D.D.C. 2017) (misconduct of owner resulting in fraud conviction imputed to corporation, wife, and brother of owner based on their affiliation with corporation, and subsequently established corporation based on its affiliation with debarred individuals and corporation).

[85]Under the NCR, misconduct of an individual can be imputed to an organization or another individual, misconduct of organization can be imputed to an individual, and misconduct of one organization can be imputed to another. 2 C.F.R. § 180.630.

[86]Agility Def. & Gov't Servs. v. U.S. Dep't of Def., 739 F.3d 586 (11th Cir. 2013).

[87]739 F.3d at 590.

[88]739 F.3d at 590.

[89]See IMCO v. United States, 97 F.3d 1422, 1425 (Fed. Cir. 1996) ("The Tucker Act does not give the [Court of Federal Claims] jurisdiction to review the propriety of an agency's decision to debar a contractor, however; such a challenge must be brought in district court under the Administrative Procedure Act.").

[90]5 U.S.C.A. §§ 701–706.

[91]See 5 U.S.C.A. § 706(2)(A); see also Kisser v. Cisneros,14 F.3d 615, 618 (D.C. Cir. 1994) ("Our review of [an agency]'s debarment decision is . . . governed by

the traditional 'arbitrary and capricious' standard set forth in the APA.").

[92]FAR 9.403 ("Administrative agreement means an agreement between an agency suspending and debarring official and the contractor used to resolve a suspension or debarment proceeding, or a potential suspension or debarment proceeding.").

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BRIEFING PAPERS