



Advising Construction Contractors on New Obligations with Respect to Suspended and Debarred Entities:

ABA Public Contract Law Section Webinar

June 28, 2012

Speakers

- David Sims, Department of Interior, Chair Interagency Suspension and Debarment Committee (ISDC)
- Duc Nguyen, NASA, Vice Chair ISDC
- Michael Harkins, Federal Highway Administration, Office of General Counsel
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Overview

- Governmentwide Suspension and Debarment
 - Basic Overview
 - Procurement vs. NonProcurement
 - ISDC
 - Role
 - Recent Developments in Suspension and Debarment
 - Practice and Procedure
 - Suspension vs. Debarment
 - Fact-based
- Case Study
 - Dept. of Transportation
 - Federal Highway Administration
 - Federal Transit Administration
 - Checking EPLS/ SAM
 - Discovery during or after performance
- Discussion

Authority to Suspend and Debar

- Administrative remedy – decision about significant business risk of a person or organization as a potential contractor or participant -
- Inherent authority of the Government as a consumer of goods and services

Purpose

- Protect the integrity of Federal procurement and non-procurement program activities
- The remedy is also consistent with and supports a basic objective of the Recovery Act which is prevention, as well as detection, of poor performance, fraud, waste, and abuse

Two Rules

- Two separate government-wide debarment rules
- For procurement: 48 CFR 9.4
- For nonprocurement (Discretionary Assistance Loans and Benefit Programs): OMB Guidelines at 2 CFR Part 180
- Each agency adopts Part 180 separately

Who Can Be Debarred or Suspended

- Business and organizational entities and affiliates
- Individuals
- Conduct may be imputed:
 1. individuals to entity;
 2. entity to individual;
 3. between entities



Effect of Action

- Reciprocal effect of action under rules P.L. 103-355, Section 2455 and E.O. 12689
- Prospective effect – new awards only
- Awarding officials separately decide proper action on existing awards



Effect of Action

- Cannot be agent, representative, or principal, including key employee for award performance purposes
- Names entered into web-based Excluded Parties List System:<http://www.epls.gov>.



BASIC COMPONENTS

- Suspension:
 1. Is cause present; and
 2. immediate necessity to suspend/continue suspension until completion of investigation, legal proceedings, debarment action
- Debarment:
 1. Is cause present; and
 2. Presence/absence of mitigating factors and/or effective remedial measures

The Interagency Suspension and Debarment Committee

- An interagency body, comprised of Executive Branch organizations
- All 24 agencies covered by the Chief Financial Officers Act (CFO Act) are standing members of the ISDC. In addition, eighteen independent agencies and government corporations participate on the ISDC.

ISDC – Role

- Provides support for governmentwide suspension and debarment programs
- Promote lead agency coordination and resolve related issues under FAR 9.402(d) and Part 180
- Recommend to OMB enhancements to the government-wide system
- Annual report to Congress on government-wide debarment and suspension activity.

ISDC – Role

Key ISDC efforts in FY 12 include:

- Assisting agencies to implement the OMB Memorandum of 11/15/11 directing the development of active debarment programs
- Assisting OMB in the development of guidance for implementation of the FY12 Appropriation Act debarment provisions

FY12 Appropriations Act Debarment Provisions

- DIVISION H—MILITARY CONSTRUCTION AND VETERANS AFFAIRS
 - SEC. 514. None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, or to make a grant to, any corporation that was convicted of a felony criminal violation under any Federal or State law within the preceding 24 months, where the awarding agency is aware of the conviction, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.
- DIVISION B—ENERGY AND WATER
 - ...that was convicted (or had an officer or agent of such corporation acting on behalf of the corporation convicted) of a felony criminal violation under any Federal law...
- Other Divisions contain variations on the underlined text.

FY12 Appropriations Act Debarment Provisions

- DIVISION A. DEPARTMENT OF DEFENSE
 - SEC. 8124. None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that any unpaid Federal tax liability that has been assessed for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.
 - Other Divisions contain variations on the underlined text.

FY12 Appropriations Act Debarment Provisions

- Agency implementation efforts – additional representation & certification requirements
- OMB's Implementation Guidance Pending

Strong Congressional Interest in the Remedy

- “Suspension and debarment can be an effective tool for federal agencies to ensure contractor performance. Unfortunately...the suspension and debarment tools often go unused, quietly rusting away in the procurement tool box.”
 - Edolphus Towns, former chair, House Oversight and Government Reform Committee
- Current Bills with Suspension-Debarment Provisions
 - 2013 NDAA House (Small Business cert.)
 - 2013 NDAA SASC Report (Automatic referrals DoD)
 - 2013 Contingency Contracting Reform Act (Automatic referrals DoD, DoS, USAID)
- Recent Laws
 - 2012 Omnibus and Minibus Appropriations Acts
 - 2012 NDAA Sec. 818 Counterfeit Parts
 - 2010 Small Business Jobs Act

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Suspension

- SUSPENSION is a TEMPORARY status that makes a person or business ineligible to participate in Federal programs or projects for subcontracts or prime contracts worth \$25,000 or more. Suspension is imposed pending completion of an investigation or legal proceeding.
- SUSPENSION is GOVERNMENT-WIDE AND RECIPROCAL: suspension by any Federal agency makes respondent ineligible for programs and projects of all agencies and applies to both procurement and nonprocurement transactions.
- SUSPENSION is EFFECTIVE IMMEDIATELY, but individual or company must receive notice and opportunity to contest the action.

Suspension

- **TO IMPOSE A SUSPENSION:** SDO must have adequate evidence (probable cause) to determine that a cause for debarment exists:
 - Causes for debarment are listed in 2 CFR 180.800 and include:
 - conviction or civil judgment for fraud in obtaining or performing a government contract;
 - antitrust violations;
 - the commission of embezzlement, theft, forgery, bribery, false statements, tax evasion, or similar offenses;
 - the commission of any other offense indicating a lack of business integrity or honesty that seriously and directly affects present responsibility.
- Under the regulations, an indictment is adequate evidence AND
- SDO must determine that immediate action is necessary to protect the public interest.

Debarment

- **DEBARMENT IS IMPOSED FOR A FIXED TERM** (usually 3 years) as the final determination that a person/business is not presently responsible. SDO can make term shorter or longer, depending on seriousness of misconduct.
- **TO IMPOSE DEBARMENT, SDO MUST FIND:** a cause for debarment (as set out in 2 CFR 180.800) exists- established by a preponderance of the evidence, shown through either
 - conviction or civil judgment ; OR
 - a preponderance of other evidence, defined as "information that leads to the conclusion that the fact at issue is more probably true than not".
- **RESPONDENT MUST HAVE NOTICE AND OPPORTUNITY TO CONTEST PROPOSED DEBARMENT BEFORE SDO MAKES FINAL DETERMINATION**
 - SDO must consider seriousness of conduct and aggravating and mitigating factors (listed at 2 CFR 180.860) in making final determination

Debarment

- **SUSPENSION AND DEBARMENT ARE DISCRETIONARY REMEDIES**
 - SDO not required to debar contractor solely because a cause for debarment exists, and may, based on balance of aggravating and mitigating facts at 2 CFR 180.860:
 - Debar for less than three years;
 - Decline to act and terminate the proceedings based on mitigating factors; OR
 - Settle a debarment or suspension action at any time if settlement is in the best interest of the Government.

Factual Basis

- **FEDERAL AGENCIES MAY INITIATE SUSPENSION-DEBARMENT PROCEEDINGS** when they learn of information that warrants action:
 - Criminal or civil proceedings (Usually, indictment, conviction, or civil judgment information):
 - Initiation of action is not limited to learning of indictments and similar matters
 - Information from any reliable source can support action:
 - OIG referrals;
 - US Attorney investigations;
 - State investigations or proceedings; or
 - Civil or criminal actions or settlements in federal or state courts.

Factual Basis

- Other evidence:
 - When there is reason to believe the government's interests in doing business only with presently responsible persons or businesses must be protected prior to an indictment, conviction or civil judgment OR regardless of an indictment, conviction or civil judgment, **agency can bring a "fact-based" case based on its development of the facts through an investigation or other evidence.**
 - For example, action can be based on:
 - Report of investigation;
 - Audits;
 - Affidavit for a search warrant; and
 - Information from a State that contractor has failed to perform.

Resources

- Executive Order 12549, *Debarment and Suspension* (1986) .
- Executive Order 12689, *Debarment and Suspension* (1989)
- 2 CFR Part 180, *OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)*
- 2 CFR Part 1200, *Department of Transportation Regulations Implementing OMB Guidelines on Debarment and Suspension (Nonprocurement)*
- DOT Order 4200.5E (2010)

Contractor Input

- How can contractors show present responsibility?
 - Investigate problems quickly and fix internally
 - Provide and document training on Federal-aid requirements and ethics
 - Cooperate with authorities in investigations and prosecutions
 - Remove problem officers/employees from positions of power before conviction and/or suspension/proposal to debar

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Case Study: Building a Bus Station

- Del Ray Transit Authority (DRTA) is building a transit station funded 10% by FHWA and 10% by FTA grants
- DRTA hires Acme Contractor to build the bus station
- Acme hires Blacktop Services to lay asphalt
- Blacktop was debarred in July '11 for 12 months
- From Aug '11 – Feb '12 Blacktop worked flawlessly
- Yesterday your Project Manager told you she heard about Blacktop's debarment from another prime
- You are scheduled to deliver the project in Oct '12

What questions should you be asking?

- How could we have caught this sooner?
- Were we obliged to consult EPLS when we hired Blacktop?
 - Did we consult EPLS when we hired Blacktop?
- What is the risk to the project from Blacktop's work?
- What are our obligations to report this event?
 - DRTA, FHWA, FTA, others?
- Can we continue to use Blacktop on this project?
- Can we use Blacktop for our new DoJ Headquarters job?
- Others?

Where do you begin?

- Procurement or NonProcurement?
 - 2 CFR § 180 “The Common Rule”
 - 2 CFR § 1200 DoT Regs
 - FHWA and FTA Guidance
 - Contract
 - DRTA Guidance
 - Company Policies

What does the Common Rule require? Due diligence.

- A “participant”, at any tier, may satisfy its due diligence obligation regarding participants at the next lower tier by any of three methods:
 - (a) checking the EPLS; or
 - (b) collecting a certification; or
 - (c) adding a clause or condition to the covered transaction.
- The participant chooses, absent agency direction.
- Participants must flow the requirement down to any “covered transaction” - any subordinate transaction with any participant that is expected to exceed \$25,000.
- “Participants” include any entity that is expected to participate in a related transaction over \$25,000 in value.

Agency-specific suspension and debarment regs

CHAPTER VI--DEPARTMENT OF STATE

<u>601</u>	<u>601.10 to</u> <u>601.1010</u>	NONPROCUREMENT DEBARMENT AND SUSPENSION
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CHAPTER VII--AGENCY FOR INTERNATIONAL DEVELOPMENT

<u>780</u>	<u>780.10 to</u> <u>780.1010</u>	NONPROCUREMENT DEBARMENT AND SUSPENSION
<u>782</u>	<u>782.10 to</u> <u>782.605</u>	REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

CHAPTER VIII--DEPARTMENT OF VETERANS AFFAIRS

<u>801</u>	<u>801.10 to</u> <u>801.1113</u>	NONPROCUREMENT DEBARMENT AND SUSPENSION
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CHAPTER IX--DEPARTMENT OF ENERGY

<u>901</u>	<u>901.10 to</u> <u>901.1010</u>	NONPROCUREMENT DEBARMENT AND SUSPENSION
<u>902</u>	<u>902.10 to</u> <u>902.645</u>	REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

What do DoT's regs require?

Due diligence.

- DoT regulations specify that contractors must incorporate a term or condition in lower tier agreements that advises the subcontractor of its obligation to comply with the Common Rule.
- Nothing more, nothing less.

What does FHWA guidance require? Due diligence.

- While Common Rule and DoT do not mandate EPLS, does FHWA?
- First tier participants must include the clause titled “Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions” *without modification* in all lower tier covered transactions and solicitations exceeding \$25,000.
- A participant “may, but is not required to” consult EPLS.
- A participant’s “knowledge and information...is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.”

What does FHWA guidance require? Update cert.

- The primary participant must provide immediate written notice to the contracting agency “if any time[sic] [it] learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.”
- The primary participant’s certification relates only to its own responsibility and that of its principals.
- A participant at a lower tier must provide notice to the primary participant, “if at any time [it] learns that its certification was erroneous by reason of changed circumstances.”
- Nothing requires the primary participant to pass on that notification to the contracting agency.

What does FTA guidance require? Due diligence.

- While Common Rule and DoT do not mandate EPLS, does FTA?
- “FTA strongly recommends that the *recipient* check” EPLS, and its *Best Practices Procurement Manual* notes that *recipients* “may but are not required to” consult EPLS.
- *But see* FTA Ethics website
 - “Each FTA recipient agrees to review [EPLS] before entering into any third party subagreement, lease, third party contract, or other arrangement; additionally, each recipient must assure FTA that its subrecipients, lessees, third party contractors, and other participants at any tier will do the same.”
- *See also* FY 11 Certs. and Assurances for FTA Grants and Coop. Agmts.
 - “Applicant (Primary Participant)” and its principals (including first tier subrecipients) “assure that each lower tier participant involved in the Project is not presently debarred, suspended, proposed for debarment, [etc.]”

What does FTA guidance require? Update cert.

- Applicant must certify that “if later, it or its principals, including any of its first tier subrecipients, become aware of any information contradicting” its earlier certifications, “it will promptly provide any necessary information to FTA.”
- Contractors are not applicants or subrecipients.
- No required certification is implicated by the discovery of Blacktop’s debarment.

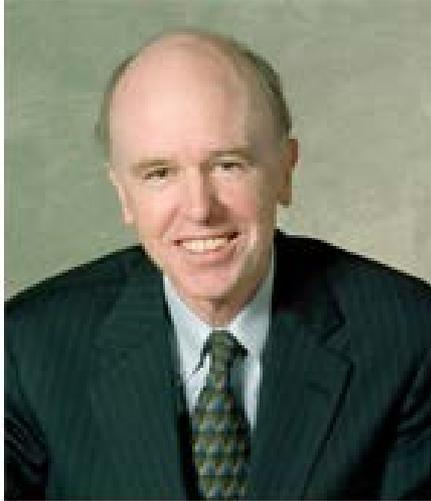
Other considerations

- Do DRTA regulations or our contract require more?
- What do our company policies require?
- What has the company's course of conduct been?
- What is the risk to Acme, DRTA, the USG or other contractors?

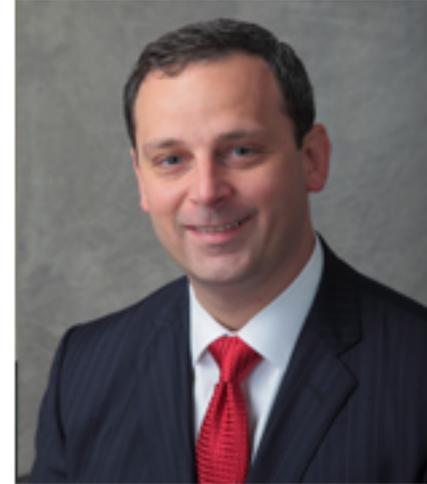
What does FAR require?

- FAR 52.209-6 Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment.
 - Shall enter no contract in excess of \$30,000 with a suspended or debarred entity
 - Shall require each proposed subcontractor to disclose in writing whether the company or its principals is or is not debarred, suspended or proposed for debarment *at the time of award*
- Flow down FAR 52.209-6 to all but COTS (which are exempted)
 - For commercial item contracts flow down to first tier subcontractors
 - For non-commercial contracts flow down to all tiers
- No explicit requirement to check EPLS or update certifications

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