

STATEMENT BY
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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
“HOW CONVICTS AND CON ARTISTS
RECEIVE NEW FEDERAL CONTRACTS”

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Chairman Towns, Ranking Member Issa, distinguished members of the Committee, thank you for the opportunity to appear today to discuss the effectiveness of the Excluded Parties List System (“EPLS”) and of the federal suspension and debarment process. I am a partner with the law firm of McKenna Long & Aldridge LLP, where I have practiced federal procurement law for more than thirty years, specializing in ethics and compliance issues, and in particular suspension and debarment. I also have served for the past three years as the Co-Chair of the Debarment and Suspension Committee of the American Bar Association Public Contract Law Section. In that capacity, I have worked closely with the government community, including agency suspension and debarment officials and Department of Justice attorneys, to review, analyze and comment upon legislative and regulatory developments related to suspension and debarment. In fact, in a collaborative effort involving Committee members from both the government and private sectors, our Committee developed and published a set of draft recommendations to improve the suspension and debarment process that are further discussed below.¹

BACKGROUND

The federal government may only purchase goods or services from, and award contracts to, “responsible contractors.”² Suspension and debarment are discretionary actions available to the government to protect it from entering into business relationships with persons that are dishonest, unethical or otherwise not “presently responsible.” A company or person that is suspended or debarred generally is ineligible to compete for or receive federal contracts, grants or assistance throughout the federal executive branch. The effect upon a company that does a significant volume of government contracting, including state and local contracting, and upon that company’s employees, can be devastating.³

Different regulatory schemes govern suspension and debarment, depending upon the nature of the underlying business relationship. The rules applicable to suspension and debarment from federal procurement transactions, *i.e.*, federal contracts, are set forth in the Federal Acquisition Regulation (“FAR”).⁴ Non-procurement transactions, such as grants, loan guarantees, loans, insurance or

¹ The draft recommendations are available at <http://meetings.abanet.org/webupload/commupload/PC403500/newsletterpubs/ABAREPORT.PDF>.

² 48 C.F.R. § 9.103.

³ Many state and local government regulatory schemes provide that suspension or debarment by the federal government is grounds for debarment from local contracting.

⁴ 48 C.F.R. § 9.4.

federal assistance, are governed by the so-called Common Rule.⁵ While these rules are similar, they differ in certain respects. As the subject of this hearing is federal contracting, my statement will focus on the FAR rules.⁶

The FAR sets forth the grounds for suspension and debarment and provides agency suspension and debarment officials (“SDOs”) with great latitude. The grounds include, among other things: conviction or civil judgment for commission of a fraud in connection with obtaining or performing a public contract; anti-trust violations; commission of offenses involving theft, falsification of documents, bribery or false statements; a history of failure satisfactorily to perform contracts, or “any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.”⁷

A debarment is imposed upon the completion of legal proceedings for a fixed period, generally not to exceed three years. The SDO is given discretion to extend that period under certain circumstances, or to reduce the period if the SDO deems appropriate.⁸ A suspension is a temporary measure that the government may employ to protect its business interests pending the completion of an investigation or legal proceedings, if the SDO finds “adequate evidence” of grounds for suspension or debarment and also determines “that immediate action is necessary to protect the Government’s interest.”⁹

DISCRETIONARY DEBARMENT AND SUSPENSION ARE AN EFFECTIVE TOOL TO PROTECT THE GOVERNMENT’S BUSINESS INTERESTS

Significantly, suspension or debarment are not to be used as punishment. The criminal and civil justice systems are designed to seek compensation for the harm to the government caused by contractor wrongdoing and to punish those responsible. The FAR expressly provides that these serious sanctions be imposed

⁵ 2 C.F.R. § 180.

⁶ Certain federal statutes mandate ineligibility for those convicted of violation of certain provisions of that statute. *See, e.g.,* the Clean Water Act. My testimony does not address such statutory debarments.

⁷ 48 C.F.R. § 9.406-2.

⁸ 48 C.F.R. § 9.406-4.

⁹ 48 C.F.R. § 9.407-1. Due to the consequences a suspension can have upon a contractor and its employees, it is critical that an SDO establish both the adequate evidence and immediate need elements before suspending. There have been a number of instances where contractors have incurred significant damage due to suspensions stemming from erroneous allegations or improper suspensions.

only when necessary to protect the government “and not for purposes of punishment.”¹⁰

In fact, the existence of a cause for debarment or suspension does not require that the contractor be debarred or suspended. Rather, the issue is one of “present responsibility.” The FAR identifies ten factors that an SDO should consider when determining whether a contractor is presently responsible to perform current and future government contracts. These include:

- Whether the contractor had effective standards of conduct and controls in place;
- Whether the contractor self-disclosed the activity to the government;
- Whether the contractor has investigated the conduct and shared its findings;
- Whether the contractor cooperated fully with the government’s investigation;
- Whether the contractor has agreed to pay all liability and made restitution for the conduct;
- Whether the contractor has taken appropriate disciplinary action;
- Whether the contractor has agreed to implement remedial measures;
- Whether the contractor has agreed to implement revised controls and ethics programs;
- Whether adequate time has elapsed to eliminate the causes for the improper conduct; and
- Whether management recognizes the seriousness of the misconduct and had implemented preventative programs.¹¹

These factors task the SDOs with assessing contractor corrective and remedial measures and compliance programs in light of the wrongful conduct to determine whether they are sufficient to protect the government from similar wrongful conduct in the future. The SDOs’ authority to exercise their business judgment whether to debar or suspend a contractor provides the government with a

¹⁰ 48 C.F.R. § 9.402.

¹¹ 48 C.F.R. § 9.406-1.

great deal of leverage. An SDO can play a significant role in reforming a contractor's ethics and compliance culture. As a condition for avoiding or retracting a debarment or suspension, the SDO can require the contractor to enter into an administrative compliance agreement that, among other things, influences the contractor's disciplinary actions, requires implementation of specific processes, procedures or controls, requires periodic reporting to the agency and may impose outside oversight of the contractor's ethics and compliance program.

This process has a number of significant benefits. It prevents innocent employees from losing their jobs as a result of a debarment stemming from the conduct of a misguided few. No matter how sophisticated and comprehensive a contractor's compliance program, there inevitably are employees who for personal reasons, a flawed perception of business goals, or a plain lack of understanding will circumvent or violate company policies and federal requirements.

Working with contractors to establish present responsibility, rather than mandating debarment, also enables the government to preserve the nation's industrial base and to enhance competition. The government thereby both preserves its sources and increases the likelihood it can obtain the lower pricing likely to result from more competitive purchasing.

EFFECT OF LISTING ON THE EPLS

Future Contracts and Work

A contractor that is suspended, proposed for debarment¹², or debarred under the FAR is listed on the EPLS and is ineligible for the award of future federal contracts and work. That restriction extends to:

- Issuing new orders under indefinite quantity contracts;
- Placing orders under Federal Supply Schedule contracts, blanket purchase agreements or basic ordering agreements; and
- Adding new work, exercising options or otherwise extending the duration of existing contracts.¹³

¹² Under the FAR, a contractor that is proposed for debarment is ineligible upon issuance of the notice. This is one of the key differences with the Common Rule. Under that Rule, a contractor or grantee that receives a notice of proposed debarment is not ineligible until a determination of debarment is made. In the interim, if there is an immediate need to protect the government's interest, the agency can suspend the entity.

¹³ 48 C.F.R. § 9.405.

A suspended, debarred or proposed for debarment contractor also may not be awarded first tier subcontracts in excess of \$30,000 under a federal prime contract.

The listing on the EPLS is effective throughout the federal Executive Branch. If one agency suspends, proposes for debarment, or debars a contractor, no other agency may award that contractor work.¹⁴ The suspension or debarment extends to all divisions of the contractor, unless otherwise limited.

The SDO has the discretion to extend the suspension or debarment to affiliated entities. An affiliated entity includes a company that controls or is controlled by the contractor or is under common control, as evidenced by interlocking management or ownership, or shared use of equipment, facilities and employees. An affiliate also includes a business entity organized after the suspension, proposed debarment or debarment that has the same or similar management, ownership or principal employees as the contractor.¹⁵ Therefore, a contractor should not be able to evade a suspension or debarment by creating a new business entity to contract with the government.

Compelling Circumstances Exceptions to Suspension or Debarment

The FAR recognizes that there may be circumstances where it is in the government's best interests to award work to a debarred or suspended contractor. It provides the agency with the discretion to do so if the appropriate procedures are followed. In order to award a contract or other work to an entity on the EPLS, the agency head must find that there are "compelling circumstances" justifying the award of the work. The determination should be in writing and set forth the basis for the determination.¹⁶ Similarly, a prime contractor can make a compelling circumstances exception to award a first tier subcontract to a suspended or debarred contractor.

Several circumstances could justify such a determination. If there were no other source to satisfy the government's requirements, a compelling circumstances exception may be warranted. Alternatively, there may not be another source that could timely perform the required work; the need to avoid delay and the associated program impact could justify a compelling circumstances exception. However, in

¹⁴ The EPLS includes entities that have been declared ineligible for particular programs under certain statues or regulations. In some cases the ineligibility is not reciprocal, *i.e.*, it is limited to the particular program and does not extend to other programs or agencies.

¹⁵ 48 C.F.R. § 9.403.

¹⁶ 48 C.F.R. § 9.405.

either event, the determination should be in writing and the explanation of the compelling circumstances documented.

If an agency deems it appropriate to award work to a suspended or debarred contractor, it can contact the listing agency to determine the basis for that listing. If appropriate, the agency can then impose special conditions on the contractor or take other precautions to protect against the type of conduct that gave rise to the debarment or suspension.

Continuation of Current Contracts

Termination of an existing contract could have both programmatic and cost consequences for the government. The government may not have an alternative source capable of providing the particular product or service, or of providing it within the time frame the government requires. Additional time and effort would be required to conduct a new procurement, and perhaps also for the existing contractor to wind down its efforts and for the new contractor to mobilize.

Further, in many instances the conduct underlying the debarment or suspension may be unrelated to the terminated contract, and any termination legally would be one for “convenience” and not for default. Under a termination for convenience, the government is obligated to pay the contractor the contract price for all completed goods or services, the costs incurred by the contractor plus a reasonable profit on the terminated portion of the contract, and the costs it incurs to wind down the contract.¹⁷ In the event of a termination for convenience, the government would be responsible for all of these costs in addition to the cost of any reprocurement.

The FAR recognizes this likelihood and provides agencies the discretion to continue existing contracts when the contractor is suspended or debarred, subject to the limitations on adding new work described above. In fact, there is a presumption that such contracts will be continued unless determined otherwise by the agency head, and no decision to terminate may be made until after a review by agency contracting and technical personnel and by counsel to ensure the propriety of the action.¹⁸ Factors the agency should consider are its ability to reprocure the goods or services, the impact of a termination on the agency’s mission, how far along the contractor is in performance, whether the termination would be for default or convenience, and the potential cost impact of a termination.

¹⁷ 48 C.F.R. § 49.2.

¹⁸ 48 C.F.R. § 9.405-1.

Federal Supply Schedule (FSS) contracts present a somewhat different situation. Such contracts typically are awarded for a five year term. While new orders cannot be placed under an FSS contract held by a listed contractor absent a compelling circumstances determination, there is no need to terminate the contract. In all likelihood, the term of a suspension or debarment would expire or the contractor would enter into an administrative compliance agreement before the contract expires. There is no reason then to require the contractor to submit a new contract proposal, and the government to incur the effort and cost of evaluating and negotiating a new contract. The government's interests can be adequately protected if government acquisition personnel check the EPLS before issuing new orders under a schedule contract, as they are required to do before making any contract award.

THE EPLS AND AWARDS TO LISTED CONTRACTORS

The EPLS is an on-line compilation of all entities and persons suspended, debarred or otherwise ineligible for participation in federal programs. It identifies the listing agency, the basis for the listing, the duration of the listing, the scope of the person or entity's ineligibility and all other persons or entities that are listed arising out of the same transaction. The EPLS also contains an archive feature that lists all persons and entities that previously had been listed. It is available to the general public as well as to the government, and can be found at www.epls.gov.

Federal contracting officers are required to review the EPLS both after receiving bids, proposals or quotations from contractors and again before issuing any contract awards to determine if the contractor is listed.¹⁹ The EPLS today is simple to use. It allows one to enter a name or combination of letters and, like a "Google" search, will identify all listings containing that name or combination of letters. One need not know the exact name of an individual or entity, for example the first name of a person or whether an entity is a "Co." or "Company," to identify a listed party.²⁰

During my thirty years of practice, I am unaware of any situations in which a suspended or debarred contractor I represented was not listed on the EPLS, and of few instances where a listed contractor received an award without the agency first making a compelling circumstances determination. To the extent that the Government Accountability Office has identified such events, they stem primarily from human rather than system failure. Such error may include failure timely to

¹⁹ Similarly, federal contractors review the EPLS before awarding subcontracts under federal contracts.

²⁰ This might become an issue only if a user selects the "exact name" search rather than the general search feature on the EPLS.

enter a listed entity on the EPLS, or failure on the part of a contracting officer to check the list before making an award. Recent studies have revealed that the federal acquisition work force today is inexperienced and understaffed, and would benefit from both additional training and increased support. Exigency contracting to support ongoing military operations may have further contributed to the urgency of certain procurements and the failure of procurement personnel properly to check the EPLS.

In addition, the EPLS is not the only basis for determining whether a contractor is suspended, debarred or otherwise ineligible. Contractors share in the responsibility of identifying whether they are listed. In conjunction with the award of any contract in excess of \$100,000 a contractor is required to certify, among other things, whether it or any of its "principals" are presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any federal agency, whether they have been convicted of or had a civil judgment rendered against them for certain enumerated violations within the past three years, and whether they currently are criminally or civilly charged by a governmental entity with commission of any such offenses.²¹ Review of this certification enables a government acquisition official to determine whether the contractor properly may receive a contract award.

Neither checking the EPLS nor reviewing the debarment certification will enable a government contracting officer to identify a listed contractor that fraudulently creates a new entity so as to avoid the consequences of a debarment or suspension. Neither, however, are any changes to the EPLS system likely to address this issue. Rather, detecting such conduct will stem from a combination of SDOs making sure that they list culpable individuals as well as the corporate entities, and government acquisition personnel making an effort to ensure that they know the companies with whom they are dealing, particularly in the case of small, recently established businesses.

RECOMMENDED CHANGES TO THE SUSPENSION AND DEBARMENT SYSTEM

For the reasons set forth above, it is my view that the EPLS system is an effective and simple tool that readily enables contracting personnel to identify suspended, debarred or ineligible contractors. Any improper awards to ineligible contractors stem primarily from the failure of government personnel properly or timely to enter listed entities into the system, or failure of government acquisition personnel to use the EPLS as required.

²¹ 48 C.F.R. § 52.209-5.

However, I do believe that certain reforms would enhance the suspension and debarment process. As noted in my introduction, during 2008 the Debarment and Suspension Committee of the ABA Public Contract Law Section undertook a study of the suspension and debarment process to identify recommended improvements. The Committee, comprised of both government suspension and debarment personnel and private practitioners in the field, made ten recommendations. Changes recommended by the Committee include the following.

- Because a debarment or suspension by any agency is effective throughout the Executive Branch, any agency can have a substantial impact on the rest of the government's ability to fulfill its mission. Accordingly, there should be a comprehensive process by which all interested agencies have an opportunity to express their interests in the eligibility of a contractor, and there should be a process for the selection of a lead agency to act on behalf of the government. The determination of the lead agency not to debar or suspend should be given government-wide effect, as would its determination to debar or suspend.
- The FAR does not acknowledge the use of administrative compliance agreements and such agreements are now implemented by different agencies on an *ad hoc* basis. The FAR should adopt general terms and conditions for such agreements while preserving SDO discretion and flexibility. Such agreements should be publicly available and should be binding on all agencies.
- Whereas a finding of non-responsibility by a debarring official is binding upon all agencies, a determination that a contractor is presently responsible is not. The Committee recommended that the FAR define "presently responsible" and a "finding of present responsibility," and provide that a finding by a debarring/suspending official that a contractor is presently responsible be binding upon contracting officers and grants officials.
- Some agencies have adopted an informal process of issuing "show cause" letters to contractors about whom it may have some concerns that do not rise to the level of issuing a suspension or debarment. Those letters invite the contractor to address the agency's concerns. The Committee recommended that the FAR implement this practice.
- The FAR provides that issuance of a Notice of Proposed Debarment immediately renders the recipient ineligible, while the Common Rule provides that such a Notice does not result in exclusion until after a determination has been made by the SDO. The Committee recommended that the Common Rule approach be uniformly adopted.

- The Committee recommended that the separate debarment and suspension regulations for procurement and non-procurement programs be combined into one program. The differences between the types of programs can be accommodated in one rule and there are significant advantages to be gained by creating a single, uniformly applicable rule.

The Committee's complete recommendations are available online at http://meetings.abanet.org/webupload/commupload/PC403500/newsletterpubs/ABA_REPORT.PDF.

CONCLUSION

In conclusion, as the federal government embarks on a cycle of increased acquisition activity and contracting in connection with the "stimulus" package, I do not believe that regulatory or system changes are needed to protect it from awarding contracts to non-responsible contractors. However, it will be critical that the federal acquisition workforce be properly trained regarding the need to check the EPLS, the significance of doing so, and the proper procedures for obtaining an exception permitting the award of a contract or other work to a listed contractor. It also will be important that the acquisition work force be properly sized to handle the impending increase in acquisition activity with the attention and care required to avoid procurement miscues.