THE (UNACCEPTABLE) COST OF GROWING DELAYS IN THE SUSPENSION AND DEBARMENT SYSTEM

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I. INTRODUCTION

The exclusions from federal contracting and federal assistance listed in the System for Award Management[1] show increasing delay between the inception of a proposed debarment or suspension from federal contracting and final disposition of the matter. This delay unduly and irreparably harms the due process rights of contractors and grant recipients, which are without adequate redress except for a judicial action to enjoin the proceedings. This Article addresses due process as it relates to suspension and debarment and focuses on those rights that may be impacted, and ultimately eviscerated, by delayed government action. Industry and the government will never

1. System for Award Management, https://www.sam.gov/ (last visited July 21, 2015).

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work at the same pace. Yet, when decisions that should take weeks last months or years, fundamental due process rights for contractors are lost and corporate existence is imperiled without adequate administrative remedies. The inevitable result is an increase in judicial challenges to suspensions and debarments.

II. SUSPENSION AND DEBARMENT TIMELINESS TRENDS AND DUE PROCESS REQUIREMENTS

Suspensions and debarments are administrative decisions that remove "non-responsible" contractors and awardees from the marketplace for new contracts and awards for specific periods of time. The Federal Acquisition Regulation (FAR) Subpart 9.4[2] and the Nonprocurement Common Rule (NCR)[3] contain the regulatory procedures concerning the suspension and debarment of contractors and recipients of federal funds.[4]

Under the applicable regulations, suspensions and debarments are "serious" in nature and should "be imposed only in the public interest for the [g]overnment's protection and not for purposes of punishment."[5] Nevertheless, there are severe consequences to being suspended, proposed for debarment, or debarred. Under the FAR, "contractors debarred, suspended, proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action. . . ."[6] Given the significance and effect of these actions, due process rights have evolved in regulations and case law over the years that are supposed to ensure fundamental fairness in the application of suspension and debarment.[7] Courts have also long recognized that a de facto debarment, effecting an exclusion action without adhering to the procedures laid out in the regulations, is an unlawful circumvention of due process rights.[8] Accordingly, increasing procedural delays raise de facto debarment concerns before final decisions are ever made.

2. *See generally* FAR 9.4 (containing federal acquisition debarment, suspension, and ineligibility procedures).

3. *See generally* OMB Guidelines to Agencies on Government-Wide Debarment and Suspension (Nonprocurement), 2 C.F.R. § 180 (2006), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/grants/111506_grants_full.pdf (providing guidance for federal agencies on government-wide suspension and debarment for nonprocurement programs).

4. Although there are differences between the FAR and the NCR, the due process requirements for imposing suspensions and debarments are essentially the same; for the purposes of this Article, they will be used interchangeably and referred to as the "applicable regulations."

5. *See* FAR 9.402(b).

6. *See* FAR 9.405(a).

7. *See generally* the FAR and NCR procedural protections contained in FAR 9.4 and 2 C.F.R. § 180.

8. *See, e.g.*, Art-Metal USA, Inc. v. Solomon, 473 F. Supp. 1, 5 n.6 (D.D.C. 1978) (citing Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964)); Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1259 (2d Cir. 1975).

Furthermore, protecting due process rights takes on added importance because of a confluence of three trends. First, the ongoing impacts of the sequestration budget levels and overall government resource constraints have decreased staffing available for suspension and debarment coordination and operations government-wide or caused additional duties to be added to existing resources.[9] Second, as the rules, regulations, and burdens on government contractors increase and as servicing commercial and government contracting customers within the same enterprise becomes increasingly more difficult, exclusions have more devastating effects on contractors and grant recipients because a higher percentage of the enterprise relies on government funds.[10] Third, years of significant political pressure to increase the numbers of suspensions and debarments, including draft legislation to centralize these traditionally agency-specific operations,[11] has caused the overall numbers of suspension and debarment actions to increase.[12] This also resulted in the government explaining its decision making in writing, including decisions to terminate exclusions if the respondent demonstrated present responsibility.[13] Perhaps as a result of these trends, a handful of proposed debarments on the System for Award Management have been extended substantially longer than the regulatory decision deadline of thirty calendar days after the administrative record is completed.[14]

9. Note that this is the impression of one of the authors, Mr. Robbins, based on his interactions with former colleagues since his departure from government service. This observation is not based on sampling (scientific or otherwise) or prior publication.

10. *See*, *e.g.*, Andrew Clevenger, *CSC Split Has Defense Implications—Myerrose Comments*, MeyerRose (May 24, 2015, 11:08 AM), http://www.meyerrose.com/press/csc-split-has-defense-implications/ (discussing the coverage of strategy followed by Computer Sciences Corporation in separating its information technology business into separate federal and commercial entities as representative of the market trend pushing consistently increasing percentages of work into federal-only (or substantially federal) business entities). Shutting off the flow of new contracts and grants to companies that are "pure play" in the government space (or substantially government contract driven) through suspensions or proposed debarments necessarily has a larger impact than the same actions taken against companies that do more work in the commercial space. *See*, *e.g.*, *id.*

11. *See*, *e.g.*, SUSPEND Act, H.R. 3345, 113th Cong. (2014).

12. *See generally* U.S. Gov't Accountability Office, Comm. on Oversight & Gov't Reform, House of Representatives, GAO-14-513, Federal Contracts & Grants: Agencies Have Taken Steps to Improve Suspension & Debarment Programs (2014).

13. David B. Robbins, *Debarments Rise, but Pressure for Reform Strong*, Law360 (May 23, 2014, 3:12 PM), http://www.law360.com/governmentcontracts/articles/540650/debarments-rise-but-pressure-for-reform-remains-strong.

14. *See* FAR 9.406-3(d)(1); *see also* System for Award Management, https://www.sam.gov/ (last visited July 21, 2015) (detailing where data on suspensions, proposed debarments, and debarments may be searched using the "Advanced Search–Exclusion" button). "Ineligible (Proceedings Pending)" is traditionally used for suspensions and proposed debarments, whereas "Ineligible (Proceedings Completed)" indicates a final decision has been reached. *See* U.S. Gen. Servs. Admin., *System for Award Management User Guide*, System for Award Management, at 128, 140 (last visited Aug. 6, 2015), *available at* https://www.sam.gov/sam/SAM_Guide/SAM_User_Guide.htm. Perhaps an unintended consequence of this listing convention is the inability to determine when and whether a respondent has moved from "suspended" to "proposed for debarment."

This delay is harmful. The regulatory process generally permits appeals following final agency action,[15] but there is very little to address the growing (and extraregulatory) delay creeping into the process before a final decision is made. In fact, in a recent court challenge to a fourteen-month suspension followed by an extended proposed debarment, the Department of Justice argued that waiting seven months for additional information to become available to move a proposed debarment toward a final decision "really just isn't that much time. . . ."[16]

But it is a lot of time. Markets change, competitors catch up, and, as the ultimate punishment resulting from government delay, companies fail. Overdrawn government delays harm respondents, but also, more importantly, decrease the job base and run the risk of ignoring measures that can (and indeed must) be considered to mitigate and rehabilitate contractors and awardees as required by regulations[17] and case law.[18] And it risks moving the suspension and debarment regime away from protection and toward punishment, thereby threatening its viability as an agency-specific, discretion-driven remedy, and more toward a collateral consequence of Department of Justice actions in civil and criminal proceedings. This would not be a desirable outcome for federal agencies or for contractors and awardees.

III. BACKGROUND CONCERNING DUE PROCESS PROTECTIONS

The due process required for exclusions from federal contracting and assistance is so important that the U.S. District Court for the District of Columbia recognized its significance more than three decades ago:

> The public interest is not served when the end of a more honest and efficient government is sought to be achieved through means other than those prescribed by law, nor is it served by official blacklisting based not on evidence but on the premise that to do otherwise "wouldn't look very good." Moreover, our system of laws does not operate on the principle of the Queen in *Alice in Wonderland*—"Sentence first—verdict afterwards." It requires the evidence to come first.[19]

Removing nonresponsible contractors and awardees from the federal marketplace has long been an important remedy available to Executive Branch agencies. However, the process has not always been perceived as fairly applied.[20]

15. Administrative Procedure Act, 5 U.S.C. § 704 (2012).

16. Transcript of Hearing on Motion for TRO, Legion Constr. v. Gibson, No. 14-01045, at 35 (D.D.C. June 27, 2014).

17. *See*, *e.g.*, FAR 9.406-1(a).

18. *See*, *e.g.*, Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849 (S.D. Cal. 1993) ("[G]overnment contractors must be afforded a *meaningful opportunity to overcome a blemished past*, to ensure that an agency will impose debarment only in order to protect the government's proprietary interest and *not for purpose of punishment*.") (emphasis added).

19. Art-Metal USA, Inc. v. Solomon, 473 F. Supp. 1, 8 (D.D.C. 1978) (footnote omitted).

20. *See* Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 Pub. Cont. L.J. 547, 551 (2009).

In accordance with the Administrative Procedure Act (APA),[21] the applicable regulations contain a specific procedure for creating an administrative record, notifying a respondent of the agency's concerns, and permitting an opportunity to respond.[22] A decision must then be made on the basis of the record,[23] and the decision must be made in a timely fashion.[24] Under the applicable regulations, a final debarment decision must occur within thirty working days of the record closing unless an extension for "good cause" occurs.[25] Case law does not yet exist defining the length of this "good cause" extension, but a reasonable reading of FAR 9.406-3(d)(1) provides that a debarring official may not circumvent the thirty-working-day decision deadline by indefinitely delaying a final decision to achieve exclusion by inaction.

Subjects of suspensions and proposed debarments suffer "debilitating blow[s] to [their] bottom line . . . [and] reputation."[26] These "devastating consequences" emphasize the importance in strictly enforcing due process and regulatory timelines.[27] An agency satisfies the FAR's due process procedures only when it provides a contractor notice of the suspension/proposed debarment, the opportunity to be heard, and, by reasonable extension, a timely decision based on the evidence.[28]

A. *The Government's "Obdurate Uncooperativeness" in a Proposed Debarment Case Violates the Due Process Clause*

Courts have already cautioned the government in its use of excessive delays in suspension and debarment proceedings.[29] In some cases, courts even

21. The Administrative Procedure Act (APA) provides that

> (1) [e]ach agency shall separately state and currently publish in the Federal Register . . . (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available; (C) rules of procedure; descriptions of forms available or the places at which forms may be obtained; and instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency. (2) Each agency, in accordance with published rules, shall make available for public inspection and copying—(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases. . . .

Administrative Procedure Act, 5 U.S.C. § 552 (2012); *see also* Gonzalez v. Freeman, 334 F.2d 570, 577–78 (D.C. Cir. 1964) (citing 5 U.S.C. § 1002(a)–(b) (1958)).

22. FAR 9.400–9.409.

23. FAR 9.406-3(d).

24. *Id.*

25. FAR 9.406-3(d)(1).

26. Andrew T. Schutz, *Too Little Too Late: An Analysis of the General Service Administration's Proposed Debarment of WorldCom*, 56 ADMIN. L. REV. 1263, 1271 (2004); *see also* Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 962–63 (D.C. Cir. 1980) (holding that a finding of contractor nonresponsibility gives rise to a stigmatization against the contractor because the government injured a cognizable liberty interest).

27. *Old Dominion Dairy Prods., Inc.*, 631 F.2d at 955–56.

28. Schutz, *supra* note 26, at 1271–72; *see also* Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972); Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981).

29. *See, e.g.*, ATL, Inc. v. United States, 736 F.2d 677, 687 (Fed. Cir. 1984); Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1259 (2d Cir. 1975); *Horne Bros., Inc.*, 463 F.2d at 1271; Art-Metal USA, Inc. v. Solomon, 473 F. Supp. 1, 5 n.6 (D.D.C. 1978).

went as far as finding irreparable harm where there have been excessive delays.[30] In fact, the U.S. Court of Federal Claims recently recognized the loss of opportunity to bid for contracts to be sufficient harm to justify enjoining a suspension action.[31]

Over thirty years ago, in *Horne Brothers, Incorporated. v. Laird*, the D.C. Circuit noted "an action that 'suspends' a contractor, and contemplates that he may dangle in suspension for a period of one year or more, is such as to require the [g]overnment to insure fundamental fairness to the contractor whose economic life may depend on his ability to bid on government contracts."[32] The court held that "fundamental fairness" requires notice as to at least some of the charges alleged and an opportunity to rebut those charges.[33] The D.C. Circuit emphasized that such serious sanctions as suspension and debarment "cannot be left to administrative improvisation on a case-by-case basis" under the APA.[34] Rather, it noted that administrative regulations must provide due process protection in suspension and debarment proceedings.[35]

In the decades following *Horne Brothers*, courts grappled with due process requirements. Courts balanced the need to eliminate nonresponsible contractors from the marketplace with the need to safeguard the constitutionally protected liberty and property interests to pursue a chosen profession and to be free from the effects of a stigmatizing suspension or debarment action. For instance, in *ATL, Incorporated v. United States*, the Federal Circuit held that the Navy violated the contractor's due process rights when it unduly delayed the suspension/debarment proceedings through its lack of cooperation with the contractor and issuance of a final decision.[36] The Navy's action, or rather inaction, constituted a de facto debarment of ATL, Inc.[37] *ATL*'s facts are well-positioned to illustrate de facto debarment, and how it infringes on a contractor's protected interest.

In *ATL*, the Navy failed to award four contracts to ATL as the lowest bidder. In its decision, the Navy maintained that it had questions concerning ATL's technical ability.[38] However, unbeknown to ATL, the Navy had

30. *See, e.g.*, Inchcape Shipping Servs. Holdings, Ltd. v. United States, No. 13-953, at 1, 4 (Fed. Cl. Jan. 2, 2014) (order granting motion for judgment) (ordering injunctive relief in part because "it is clear that Inchcape is in danger of suffering irreparable harm as a result of the suspension").

31. *Id.*

32. *Horne Bros., Inc.*, 463 F.2d at 1271 (drawing a comparison to the five-year disqualification discussed in Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964)).

33. *Id.*

34. *Gonzalez*, 334 F.2d at 578; *Horne Bros., Inc.*, 463 F.2d at 1271.

35. *Horne Bros., Inc.*, 463 F.2d at 1271 (quoting *Gonzalez*, 344 F.2d at 578) ("The governmental power must be exercised in accordance with basic legal norms. Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.").

36. 736 F.2d 677, 687 (Fed. Cir. 1984).

37. *Id.* at 680.

38. *Id.* at 679.

been investigating ATL for allegations of misconduct in performance of prior and current federal contracts.[39] Both the FBI and a U.S. attorney were involved in the ongoing investigation, and the U.S. attorney told the Navy that it planned to submit ATL's case to the grand jury.[40] With this knowledge, the Navy did not award the contracts to ATL; rather, the Navy explained to ATL that it could not award the contracts because it was conducting an ongoing integrity review of the company.[41] A few months later, after receiving no indication as to when this "integrity review" would end, ATL filed suit in the U.S. Claims Court (the predecessor to the U.S. Court of Federal Claims) requesting a cutoff date for the review and the enjoinment of the contract award.[42] The Claims Court initially denied ATL's request for immediate equitable relief before the Navy formally suspended ATL and awarded three of the four contracts, but the court subsequently enjoined the Navy from awarding these contracts.[43]

Prior to the Claims Court's decision, the Navy issued a suspension letter to ATL outlining nine items reflecting ATL's alleged lack of integrity.[44] The letter also stated that the government would not engage in a fact-finding proceeding at the request of the U.S. attorney, but that ATL could present information in opposition to the suspension either in writing or through representation.[45] ATL did in fact make a presentation to the Navy Debarment Committee and asked that the Navy present its facts and documents in support of the suspension.[46] The Navy refused, noting that the letter "sufficiently placed" ATL on notice.[47] Five months later, the Navy notified ATL that the suspension would continue based on two of the items in the suspension letter.[48] As a result, ATL filed an amended complaint in the Claims Court requesting a "new hearing," as the Navy had violated its due process rights.[49] The Claims Court granted ATL's requests, and the Navy appealed the decision to the Federal Circuit on the grounds that the Claims Court upheld ATL's due process rights while validly refusing new contract awards.[50]

The Federal Circuit affirmed the Claims Court's granting of injunctive relief, holding that while notice was sufficient, the Navy must provide ATL with additional information in support of its suspension.[51] In doing so, the Federal Circuit recognized that "in suspension cases . . . , although

39. *Id.*
40. *Id.* at 680.
41. *Id.*
42. *Id.*
43. *Id.* at 680–81.
44. *Id.* at 681.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 686 (not affirming the Claims Court's granting of a "new hearing" to ATL).

a citizen has no *right* to a [g]overnment contract, and a bidder has no constitutionally protected *property* interest in such a contract, a bidder does have a liberty interest at stake, where the suspension is based on charges of fraud and dishonesty."[52] The court noted that it was "struck" by the "Navy's secretive attitude" in its refusal to provide ATL with access to "meaningful records."[53] Accordingly, after noting "[t]hat process was lacking" (and, perhaps, that the process was over-long), the court held agencies "must work to 'carve out' as much evidence as is reasonable for release to the contractor."[54] Indeed, it recognized the government's right in protecting an ongoing criminal investigation but cautioned that the government "cannot extend to obdurate uncooperativeness where the suspended contractor's interest is great."[55]

B. *Debarment Is Imposed Only to Protect the Government's Proprietary Interest, Not to Punish a Government Contractor*

Debarment is not punishment for *past* wrongdoing.[56] Rather, debarment requires ascertaining the "*present responsibility*" of the contractor, an inquiry focused on the current state of the contractor, and "relates directly to the contractor itself, not to the agent or former agent personally responsible for past misdeeds."[57] This is of utmost importance. A contractor may only be suspended or debarred "for any . . . cause . . . so serious or compelling a nature" that it affects the contactor's *present* responsibility.[58] Thus, "government contractors must be afforded a meaningful 'opportunity to overcome a blemished past,' to ensure the agency 'will impose debarment only in order to protect the government's proprietary interest and not for the purpose of punishment.'"[59]

In *Robinson v. Cheney*, the D.C. Circuit became one of the first courts to recognize that "the ultimate inquiry as to 'present responsibility' relates directly to the contractor itself, not to the agent or former agent personally responsible for its past misdeeds."[60] The court held that "the contractor can meet the test of present responsibility by demonstrating that it has taken steps to ensure that the wrongful acts will not recur."[61]

52. *Id.* at 682–83 (citing Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964)); Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981); Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 962–63 (D.C. Cir. 1980) (emphasis in original).

53. *ATL, Inc.*, 736 F.2d at 685.

54. *Id.* at 685–86 (noting that it is not unreasonable or burdensome to provide ATL, Inc. access to certain records, particularly when the Navy is "flat-out" denying fact-finding, and a "cooperative process" is due to the contractor at a minimum).

55. *Id.* at 685 (noting that the government "must not allow a busy U.S. attorney to dictate the terms of a civil investigation").

56. Robinson v. Cheney, 876 F.2d 152, 160 (D.C. Cir. 1989); Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849 (S.D. Cal. 1993).

57. *Robinson*, 876 F.2d at 160; *see also*, *e.g.*, FAR 9.406-1(a); FAR 9.406-2(a)(5).

58. FAR 9.407-2(c) (emphasis added).

59. *Silverman*, 817 F. Supp. at 849 (quoting *Robinson*, 876 F.2d at 159–60).

60. 876 F.2d at 160.

61. *Id.*

Similarly, in *Silverman v. Department of Defense*, the U.S. District Court for the Southern District of California considered an opportunity for a contractor to overcome a blemished past. In *Silverman*, the government contractor pleaded guilty to a misdemeanor count after the government alleged that he misrepresented his company as a producer, which prevented the U.S. Department of Defense from receiving products from the true producer.[62] When faced with the choice to plead guilty or be indicted, the contractor pled guilty to quickly end the investigation, even though he believed he did not misrepresent his company.[63] Six years later, the Defense Logistics Agency (DLA) debarred the contractor—despite the fact that the government still awarded contracts to him after he pled guilty to the misdemeanor.[64] The court thus recognized that it appeared the contractor pled guilty to the misdemeanor to end the investigation and rebuild his business.[65] In doing so, the court held that DLA refused to consider the mitigating effects of the contractor's motivation in pleading guilty.[66] Accordingly, the court rendered DLA's refusal "arbitrary, capricious, and an abuse of discretion" and terminated the contractor's debarment.[67] Because the facts in *Silverman* illustrated that the government punished the contractor for its past misdeeds, the court took the opportunity to emphasize that debarment is not punitive.[68]

C. *A Proposed Debarment Is a Government Stigmatization That Deprives Individuals and Corporations of a Liberty Interest*

Since the 1950s, the D.C. Circuit has long recognized that "a person's 'right to . . . follow a chosen profession free from governmental interference comes within the "liberty" . . . concept[] of the Fifth Amendment.' "[69] The D.C. Circuit has thus held on "several occasions that government stigmatization that broadly precludes individuals or corporations from a chosen trade or business deprives them of liberty in violation of the Due Process Clause."[70] Accordingly, "formally debarring a corporation from government

62. *Silverman*, 817 F. Supp. at 848.
63. *Id.*
64. *Id.* at 849.
65. *Id.*
66. *Id.*
67. *Id.* at 849–50.
68. *Id.* at 848.
69. Trifax Corp. v. Dist. of Columbia, 314 F.3d 641, 643 (D.C. Cir. 2003) (quoting Greene v. McElroy, 360 U.S. 474, 492 (1959)); *see also* Kartseva v. Dep't of State, 37 F.3d 1524, 1529 (D.C. Cir. 1994) (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895–96 (1961)) (acknowledging a "constitutionally protected 'right to follow a chosen trade or profession' ").
70. *Trifax*, 314 F.3d at 644; *see also* Taylor v. Resolution Trust Corp., 56 F.3d 1497, 1505 (D.C. Cir. 1995) (stating that "[g]overnment action precluding a litigant from future employment opportunities will infringe upon his constitutionally protected liberty interests . . . when that preclusion is either sufficiently formal or sufficiently broad"); *Kartseva*, 37 F.3d at 1528 (holding that a liberty interest was implicated if the State Department's action (1) "formally or automatically excludes Kartseva from work" or (2) "has the *broad* effect of largely precluding

contract bidding constitutes a deprivation of liberty that triggers the procedural guarantees of the Due Process Clause."[71]

Violations of a contractor's due process rights may be found when the government has suspended a contractor or proposed a contractor for debarment and delays the proceedings so that the contractor cannot earn a living or support his business because of the government's *inaction*. An agency's inaction, or refusal to act, "ha[s] just as devastating effect on life, liberty and the pursuit of happiness as coercive governmental action."[72] Therefore, courts have not only reviewed an agency's inaction but compelled an agency to act.[73]

IV. AN AGENCY'S INACTION IN SUSPENSION AND DEBARMENT PROCEEDINGS MAY BE REVIEWABLE BECAUSE OF DUE PROCESS CONCERNS

An agency is not entitled to refuse to make a final decision, thereby evading judicial review by claiming that its failure to follow enforcement procedures is an unreviewable nonenforcement decision.[74] An agency's inaction *is*

Kartseva from pursuing her chosen career as a Russian translator") (emphasis in original); Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 955–56, 963 (D.C. Cir. 1980).

71. *Trifax*, 314 F.3d at 643 (quoting *Old Dominion Dairy Prods, Inc.*, 631 F.2d at 961–62).

72. Heckler v. Chaney, 470 U.S. 821, 851 (1985) (Marshall, J., concurring).

73. *See id.* at 850 (Marshall, J., concurring) (citing Bargmann v. Helms, 715 F.2d 638 (D.C. Cir. 1983) (stating that "a firmly entrenched body of lower case law . . . holds reviewable various agency refusals to act" because "governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action"). *See also, e.g.*, Natural Res. Def. Council, Inc. v. U.S. Envtl. Prot. Agency, 683 F.2d 752, 753, 767–68 (3d Cir. 1982); WWHT, Inc. v. Fed. Commc'ns Comm'n, 656 F.2d 807, 809 (D.C. Cir. 1981); Carpet, Linoleum & Resilient Tile Layers v. Brown, 656 F.2d 564, 566 (10th Cir. 1981); Natural Res. Def. Council, Inc. v. Sec. & Exch. Comm'n, 606 F.2d 1031, 1036 (D.C. Cir. 1979); British Airways Bd. v. Port Auth. of N.Y. & N.J., 564 F.2d 1002, 1012–13 (2d Cir. 1977); Pennsylvania v. Nat'l Ass'n of Flood Insurers, 520 F.2d 11, 15 (3d Cir. 1975); REA Express, Inc. v. Civil Aeronautics Bd., 507 F.2d 42, 45 (2d Cir. 1974); Davis v. Romney, 490 F.2d 1360, 1360 (3d Cir. 1974); Adams v. Richardson, 480 F.2d 1159, 1159 (D.C. Cir. 1973) (en banc); Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 616 (D.C. Cir. 1973); Rockbridge v. Lincoln, 449 F.2d 567, 567 (9th Cir. 1971); Envtl. Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 584 (D.C. Cir. 1971); Envtl. Def. Fund, Inc. v. Hardin, 428 F.2d 1093, 1093 (D.C. Cir. 1970); Med. Comm. for Human Rights v. Sec. & Exch. Comm'n, 432 F.2d 659, 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); Trailways of New England, Inc. v. Civil Aeronautics Bd., 412 F.2d 926, 926 (1st Cir. 1969); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Nat'l Labor Relations Bd., 427 F.2d 1330, 1330 (6th Cir. 1970); Pub. Citizen Health Research Grp. v. Auchter, 554 F. Supp. 242, 242, 251 (D.D.C. 1983), *rev'd in part*, 702 F.2d 1150 (D.C. Cir. 1983); Sierra Club v. Gorsuch, 551 F. Supp. 785, 789 (N.D. Cal. 1982); Hoffmann-LaRoche, Inc. v. Weinberger, 425 F. Supp. 890, 894–95 (D.D.C. 1975); Nat'l Ass'n for Advancement of Colored People v. Levi, 418 F. Supp. 1109, 1110 (D.D.C. 1976); Guerrero v. Garza, 418 F. Supp. 182, 182 (W.D. Wis. 1976); Souder v. Brennan, 367 F. Supp. 808, 811 n.1 (D.D.C. 1973); City-Wide Coal. Against Childhood Lead Paint Poisoning v. Philadelphia Hous. Auth., 356 F. Supp. 123, 123 (E.D. Pa. 1973); Am. Pub. Health Ass'n v. Veneman, 349 F. Supp. 1311, 1312 (D.D.C. 1972).

74. *See* Lisa Shultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1697 (2004) (stating that "[a]t a minimum, it must *demonstrate* to a court that it has rational, public-minded reasons for a particular nonenforcement decision. It also

coercive governmental action when it has a devastating effect upon a contractor's livelihood and business. Contractors have a right to pursue a profession and livelihood free from government interference—this is a constitutionally protected liberty interest.[75] Because an agency's inaction violates these rights, courts may and should review this inaction with respect to the suspension or proposed debarment of a contractor.

Justice Thurgood Marshall emphasized this important principle in his concurrence in *Heckler v. Cheney*.[76] He stated that although "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2) . . . in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers."[77] Additionally, in his concurrence, Justice Brennan recognized this, stating that "Congress does not intend administrative agencies, agents of Congress's own creation, to ignore clear . . . regulatory . . . or constitutional commands."[78]

Although the Supreme Court in *Heckler* held that the agency's inaction was unreviewable for that particular set of facts, there is "a firmly entrenched body of lower court case law that holds reviewable various agency refusals to act."[79] This body of case law is important because courts have recognized that "one of the very purposes fueling the birth of administrative agencies *was the reality that governmental refusal to act could have just as devastating an effect* upon life, liberty, and the pursuit of happiness *as coercive governmental action*."[80] Justice Marshall thus noted that "[t]he interests at stake in review of administrative enforcement decisions are . . . more focused and in many circumstances more pressing than those at stake in criminal prosecutorial decisions."[81] This is no more apparent than in suspension and debarment proceedings.

should demonstrate to a court that it has promulgated and followed rational, public-minded standards governing all enforcement decisions.") (emphasis in original).

75. *Trifax Corp.*, 314 F.3d at 643 (quoting Greene v. McElroy, 360 U.S. 474, 492 (1950)); *see also Kartseva*, 37 F.3d at 1529 (quoting Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 895–96 (1961)) (acknowledging a "constitutionally protected 'right to follow a chosen trade or profession'").

76. 470 U.S. 821 (1985).

77. *Id.* at 833 (Marshall, J., concurring) (noting in its holding that the respondents in *Heckler* did not claim that the agency's refusal to institute proceedings violated any constitutional rights).

78. *Id.* at 839 (Brennan, J., concurring); *see also* Gonzalez v. Freeman, 334 F.2d 570, 578 (D.C. Cir. 1964) (holding that "[t]he command of the APA is not a mere formality").

79. *Heckler*, 470 U.S. at 849 (Marshall, J., concurring) (footnote containing a lengthy string cite of case law from these lower courts) (emphasis added); *see also* Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849 (S.D. Cal. 1993).

80. *Heckler*, 470 U.S. at 851 (emphasis added); *see also* Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939) (stating that "any distinction, as such, between 'negative' and affirmative' orders, as a touchstone of jurisdiction to review [agency action] serves no useful purpose").

81. *Heckler*, 470 U.S. at 847–48 (Marshall, J., concurring).

V. CONCLUSION

There is a strong public interest in protection from irresponsible contractors. The suspension and debarment processes serve that interest when the processes are followed and when cases are timely resolved. Timeliness, especially with the speed of business in today's "digital age," is of the utmost importance. The perhaps inevitable consequence of government delay is an increase in judicial challenges to suspensions and debarments, carrying a growing risk of "bad law" that impacts all parties.

Courts have the power to compel agencies to act when in violation of a contractor's due process rights and constitutionally protected liberty interests.[82] Should these actions become the norm, contractors will not be asking courts to direct *how* an agency should decide on its suspension or proposed debarment, only that an agency *must* decide and must be enjoined from maintaining its unlawful exclusion while it does decide.[83] Once the record is complete, an agency must state its position, one way or the other. The public interest demands no less.[84]

82. *See id.* at 849 (Marshall, J., concurring) (stating that "the 'tradition' of unreviewability upon which the majority relies is refuted most powerfully by a firmly entrenched body of lower court case law that holds reviewable various agency refusals to act"); *see also id.* at 848 (Marshall, J., concurring) (stating that "[t]he interests at stake in review of administrative enforcement decisions are thus more focused and in many circumstances more pressing than those at stake in criminal prosecutorial decisions").

83. *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004) (holding that "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be").

84. *See Heckler*, 470 U.S. at 851 (Marshall, J., concurring) (stating that "one of the very purposes fueling the birth of administrative agencies *was the reality that governmental refusal to act could have just as devastating an effect* upon life, liberty, and the pursuit of happiness *as coercive governmental action*") (emphasis added).