



Suspension and Debarment: Increased Enforcement Calls for Increased Attention to Compliance

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Agenda

- ❖ **S/D Basics**
- ❖ Today's landscape
- ❖ Practical steps for contractors and subcontractors to take now

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S/D Basics: Two Principal Types

- ❖ Many similarities, but some important differences
- ❖ Procurement S/D: FAR Part 9.4
- ❖ Nonprocurement S/D: 2 CFR Part 180 (OMB Common Rule), plus agency regulations

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S/D Basics: The Target

- ❖ Purpose:
 - To protect the public interest -- NOT to punish
 - Key concept of “present responsibility”
- ❖ Who can be suspended/debarred?
 - Individuals
 - Entities (*e.g.*, corporations, partnerships, divisions or business units within an entity)
 - Parent and affiliates, if warranted
 - Prime contractors, subcontractors, or participants *at any tier*

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S/D Basics: The Method

- ❖ Sources of authority: federal law, Executive Orders, and federal regulations
- ❖ EVERY agency has its own SDO
- ❖ Agencies to establish own “methods and procedures for coordinating their debarment or suspension actions”
 - Highly inconsistent, no uniformity
 - GAO criticisms (more on this later)

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S/D Basics: The Method, Coordinated

- ❖ **Interagency Suspension and Debarment Committee**
 - Concept of “lead agency”
 - Coordination, share best practices
 - May drive contractor’s decision making re advance disclosure
 - GSA maintains the consolidated list:

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S/D Basics: The Various Causes (1)

- ❖ Conviction for a criminal offense or a civil judgment for fraud in connection with obtaining or performing a public contract or subcontract
 - Even an on-going investigation or a settlement agreement can trigger
 - Conduct need not be related to a public contract, *e.g.*, SEC books and records violation, FCPA infractions, Antitrust misconduct

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S/D Basics: The Various Causes (2)

- ❖ Violation of federal or state antitrust laws relating to submission of offers
- ❖ Embezzlement, theft, falsification, destruction of records, false statements, tax evasion, receiving stolen property
- ❖ “Made in America” label fraud
- ❖ Commission 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.”

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S/D Basics: The Various Causes (3)

- ❖ Violation of the terms of a Government contract or subcontract, such as:
 - Willful failure to perform
 - History of failure to perform
 - Unsatisfactory performance
 - Violation of the Drug Free Workplace Act
 - Delinquent federal taxes in an amount exceeding

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S/D Basics: The Various Causes (4)

- ❖ Knowing failure to disclose to the government certain misconduct (*e.g.*, violation of a criminal conflict of interest law, false claim, or significant overpayment)
- ❖ *“any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.”*

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S/D Basics: Evidentiary Standard

- ❖ *Suspension: “adequate evidence”*
- ❖ *Debarment: “preponderance of the evidence”*
- ❖ *“from any source” (e.g., competitor, IG, contracting officer, newspaper)*

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S/D Basics: Exclusion of Affiliates

- ❖ S/D may extend to “affiliates” of the contractor if they are
 - Specifically named; and
 - Given written notice of the S/D and an opportunity to respond
- ❖ Practice tends to be to limit S/D to the particular offending business unit unless evidence of interlocking ownership and management
- ❖ “Affiliate” if, directly or indirectly, one unit has the power to control the other unit, or a third party has the power to control both

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S/D Basics: The Effect of Being Listed (FAR)

- ❖ No *new* contracts, orders, option exercises, or contract extensions
 - Agencies cannot solicit offers from, award contracts to, or consent to subcontracts with
 - No “discussions” or placement in competitive range
 - Cannot act as agent, representative, or surety
- ❖ Continuation of current contracts
 - Agencies “may continue contracts or subcontracts . . .” (i.e., termination not required)
 - The prevailing practice is not to terminate.

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S/D Basics: The Effect of Being Listed (OMB)

❖ OMB Common Rule

- Excluded person may not act as a ***principal**** under a covered transaction
- Preexisting transactions may continue, but agency practice has been to scrutinize and then terminate some existing agreements

Principal defined: officer, director, owner, partner, principal investigator or other person with management or supervisory responsibility, or a consultant or other person, whether or not employed by the entity or paid with Federal funds, who is in a position to handle Federal funds, influence or control the use of such funds, or occupies a technical or professional position capable of substantially influencing the development or outcome of performance

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S/D Basics: Subcontracts and Collateral Effect

- ❖ Subcontracts at any tier
 - FAR: over \$30K, *except for COTS*
 - OMB Common Rule: over \$25K, no COTS exception
- ❖ Collateral consequences
 - State and local procurement reciprocity
 - Security clearances
 - Export licenses
 - Commercial customer orders – many give effect to federal EPLS through their purchasing policies

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S/D Basics: 10 Mitigating Factors (FAR)

❖ The ten mitigating factors under the FAR:

1. Effective standards of conduct/internal controls at the time of the misconduct
2. Did the contractor disclose?
3. Has the contractor fully investigated *and* shared the results with the government?
4. Has the contractor fully cooperated?
5. Has the contractor made full restitution?
6. Has the contractor taken appropriate disciplinary action?
7. Has the contractor adopted remedial measures?
8. Has the contractor adopted new control procedures and ethics training programs?
9. Has there been adequate time to eliminate the circumstances that led to the misconduct?
10. Does Management Recognize the seriousness and have them implemented programs to prevent a recurrence?

READ: A Demonstrable Ethical Culture

NOTE: none of the 10 involves arguing the facts

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S/D Basics: 19 Mitigating Factors (OMB) (1)

❖ The nineteen mitigating factors under the OMB Common Rule

1. The actual or potential harm of the misconduct
2. The frequency or duration of the misconduct
3. Whether there is a pattern or prior history of wrongdoing
4. Whether there has been a prior listing
5. Whether there has been a prior Administrative Agreement
6. The role of individuals in planning, initiating or carrying out the misconduct
7. Whether the entity/individual has accepted responsibility/recognized the seriousness
8. Full restitution
9. Full cooperation, including whether there was a disclosure and when the cooperation began

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S/D Basics: 19 Mitigating Factors (OMB) (2)

❖ The nineteen mitigating factors under the OMB Common Rule, con't.

10. Whether the misconduct was pervasive
11. The kind of positions held by the individuals involved in the misconduct
12. Whether the **principals** tolerated the misconduct (*see broad definition*)
13. Appropriate corrective or remedial measures, including ethics program and training
14. Whether there was a voluntary disclosure
15. Whether there was a full investigation **and** the results have been shared
16. Whether there were effective standards of conduct and internal control systems in place at the time of the misconduct
17. Whether there has been appropriate discipline
18. Whether there has been adequate time to eliminate the circumstances leading to the misconduct
19. “Other factors that are appropriate to the circumstances of a particular case.”

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Agenda

- ❖ S/D Basics
- ❖ **Today's landscape**
- ❖ Practical steps for contractors and subcontractors to take now

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Today's Landscape: Increased Activity

- ❖ Due to:
 - Increased inter- and intra- agency cooperation (more information available to SDOs)
 - Reporting requirements
 - Reports of contractor misconduct
 - Agency response to Congressional criticisms

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Increased Activity: Numbers

- ❖ Approximate doubling of DoD proposed debarments in FY10 - FY11
 - Air Force, Army, Navy, and DLA
- ❖ Others, including SBA, GSA, USAID, becoming more active
 - State Department
 - 0 in FY09
 - 5 each in FY10 and FY11
 - 19 in FY12 (as of April 17, 2012)

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Increased Agency Cooperation

- ❖ Information sharing between IGs, SDOs, DOJ
 - Sept. '11 report by the CIGIE Suspension and Debarment Working Group
 - Need to increase S/D to protect federal funds
 - Stressed availability and viability of fact-based actions, referrals from audits & inspections
 - Encouraged assignment of dedicated OIG personnel, use of investigative audit/inspection reports to identify S/D candidates, enhancements to OIG referral policies

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Increased Reporting Requirements

- ❖ More required information; increased likelihood of fact-based exclusions
 - Mandatory disclosure
 - Be prepared! Will go to SDOs *immediately*
 - FAPIIS
 - “Designed to facilitate Govt’s ability to evaluate the business ethics of prospective K’ors and protect the Gov’t from awarding Ks to K’ors that are not responsible sources”
 - OFPP seeking comments on improving CO’s access to relevant information about “contractor business ethics

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Increased Government Studies and Reports

- ❖ 2011 S/D Spotlight:
 - July - DoD IG
 - August – GAO
 - August – Wartime Contracting Commission
 - September - CIGIE
 - October – DoD report on contracting fraud
 - November – OMB memo
 - December - OUSD Memo

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July '11 DoDIG Report

- ❖ Title of the report says it all
 - *“Additional Actions Can Further Improve the DoD Suspension and Department Process”*
- ❖ Critical of military services (but not DLA)
 - COs not referring “poorly performing contractors,” meaning “poorly performing contractors may still be receiving Federal contracts.”
 - Potential for more fact-based S/D if services CO’s were more engaged with S/D process

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August '11 GAO Report

- ❖ “Non-robust” S/D programs at Commerce, HHS, State, Treasury, and FEMA
- ❖ Factors for successful S/D programs (*read: more S/D*)
 - dedicated S/D staff
 - detailed S/D guidance
 - systems to encourage referrals
- ❖ ISDC struggles to meet its directives because it relies on voluntary agency participation and has limited resources

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August '11 Wartime Contracting Commission Report

- ❖ *Transforming Wartime Contracting*
 - “Agencies do not use suspension and debarment processes to full effect.”
 - Cited complexity of S/D procedures as a reason for lack of use
 - providing hearing on disputed facts difficult if based on disputed facts in a contingency environment
- ❖ Recommended :
 - Requiring written rationale for not pursuing S/D
 - Increased use of S/D (*not administrative agreements*)
 - Revise regulations to lower procedural barriers to contingency S/D

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November '11 OMB Memo

- ❖ Stated that agencies have failed to adequately use S/D
- ❖ Directed agencies to:
 - Appoint a senior accountable official to review internal policies, procedures, and guidance to ensure agency is protecting gov't interests and taxpayer funds by effectively using S/D where appropriate
 - Use relevant information sources to prevent awards to non-responsible parties
 - Take prompt corrective action when improperly made award is identified

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December '11 OUSD Memo

- ❖ Referenced OMB Nov '11 memo, and appointed SDOs the Senior Accountable Officials
- ❖ Reserved remaining tasks for Defense Procurement and Acquisition Policy office
- ❖ Released statistics on DoD S/D

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Congressional Reaction

- ❖ Legislative “fixes”
 - Pushing automatic S/D – 2012 Appropriations Act, FCPA
 - Pushing automatic referral – Contingency Contracting Reform Act (*proposed legislation*)
- ❖ Hearings focused on need to exclude contractors
 - SDOs trying to protect discretion
- ❖ Letters to agency heads “directing” S/D, either generally or against specific entities

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2012 Consolidated Appropriations Act

- ❖ Consolidated 9 appropriations bills for 2012 – S/D provisions in 5
- ❖ Prohibits use of funds for contract, grant, cooperative agreement, loan, etc., if corporation:
 - Was convicted of felony criminal violation of any federal law
 - Within the preceding 24 months
 - Where the agency is aware of the conviction
- ❖ *UNLESS* the agency has considered S/D and made the determination that further action is not necessary to protect the interests of the government
- ❖ Differences exist between sections – some include convictions of officers or agents of the corporation, or state law violations

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Contingency Contracting Reform Act (CCRA)

- ❖ Introduced by Senators McCaskill & Webb
- ❖ *Revised:* When originally introduced, provided for automatic suspension and allegations did not have to be connected to overseas contingency operations and extended to employees, affiliates, subsidiaries, and controlled businesses
- ❖ Now – Sec. 113 - automatic referral to SDO for S/D determination:
 - If a person is charged with a federal criminal offense related to the award or performance of a contract related to “overseas contingency operations” for the Department of Defense, Department of State, or U.S. Agency for International Development.
 - If the head of one of the above named agencies makes a final determination that the person failed to pay or refund amounts due or owed to the federal government in connection with an “overseas contingency operation.”
 - If the federal government alleges fraud against a person in a civil or criminal proceeding related to the award or performance of a contract related to “overseas contingency operations” for the Department of Defense, Department of State, or U.S. Agency for International Development.

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Reactions: April 2012 Testimony on the CCRA

- ❖ Patrick Kennedy, Under Sec for Mgmt at DOS
 - Office of the Procurement Executive, State's SDO, significantly strengthened S/D processes
 - Testified that:
 - Do not need a separate S/D staff as proposed by Section 112 of the CCRA
 - Already increasing use of S/D
 - Favors discretion
 - Reasoned decision by SDO based on totality of information favored to automatic suspension in section 113
 - Automatic exclusion would likely lead to due process challenges and court action that could delay necessary action
 - *(Comments based on pre-revision CCRA language)*

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Reactions: DOJ IG Report on Statutory S/D

- ❖ June 2012 Audit Report identified widespread problems with DOJ's administration of statutorily mandated debarment
 - 10 USC sec. 2408 – for fraud or felony convictions “arising out of” a DoD contract
 - Individual prohibited from involvement in defense contract or first-tier subcontract
 - Not less than 5 years unless DoD national security interest determination
 - Criminal penalties up to \$500k if contractor knowingly employs person debarred under this authority or allows the person to serve on the board of directors
 - 21 USC sec. 862 – for conviction of trafficking in or possession of drugs
- ❖ Concluded that problems may result in inappropriate awards to excluded individuals (and exclusion in non-qualifying cases)
- ❖ DOJ “remedied” problems by excluding hundreds of people under this provision in last month, including retroactively

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Reactions: *Agility Def. and Gov't Servs.*

- ❖ June 26, 2012, Alabama District Court rejected the government's assertion that an agency's suspension of contractor was beyond judicial review
- ❖ Overturned suspensions of affiliates because they exceeded 18 months (violates FAR 9.407-4(b))
 - Suspension based on affiliation with indicted contractor
 - Initial suspension of affiliates deemed proper
 - Extension beyond 18 months was improper because legal proceedings not initiated against affiliates themselves

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Steps Contractors Can Take Now

- ❖ S/D Mitigating factors are essentially a snap-shot of the contractor's ethics/compliance program and culture
- ❖ Ensure your ethics and compliance program is robust
 - Does it adequately address the risks your company faces?
 - Does the ethics and compliance officer have adequate resources to address those risks?
 - ECO independence?
 - Values-based ethics that inculcates core values?

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SDO's Expect More Than Compliance

- ❖ Expectation is that contractors adopt values-based ethics programs
- ❖ Address culture holistically
 - Train employees to do more than just comply with rules
- ❖ Encourage employees to adopt a new way of approaching their work and the issues they encounter
- ❖ Encourage employees to think before they act and to always “do the right thing”
- ❖ These give contractors a competitive advantage over those that simply follow the rules

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Core Values

- ❖ **Integrity** - maintaining a moral compass that guides you to do the right thing
- ❖ **Honesty / Candor** - being truthful with yourself and those you come in contact with
- ❖ **Respect** - respecting yourself and those you come in contact with
- ❖ **Transparency / Openness** - being open about your views and being open to others so they share their views with you
- ❖ **Trust** - maintaining confidences and being loyal and recognizing trust is hard to gain but easy to lose
- ❖ **Communication** - being clear and concise in communications and when sensitive issues are discussed, communicating in person

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Timely Engagement of SDOs

- ❖ Engage the SDO promptly
 - Mandatory disclosures will go to SDOs immediately, so contact SDO early
 - FCA? FCPA? T for D? Tell the SDO before you get a show cause notice or notice of proposed debarment
 - Keep SDO informed during ongoing investigations

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S/D Toolkit (contemporaneous, not post-hoc)

- ❖ Documentation
 - Policies, procedures, training material, messages demonstrating the right “tone from the top,” etc.
- ❖ Company spokesman
 - Identify **high-ranking** official knowledgeable about ethics/compliance program, capable of making a compelling, sincere, presentation to an SDO
- ❖ Counsel

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