Appropriations Act Will Shake Up Contractor Suspensions

By **Dietrich Knauth**

Law360, New York (February 03, 2012, 8:16 PM ET) -- The omnibus federal spending act passed in December will likely shake up the existing framework for excluding companies from government contracts by preventing agencies from contracting with companies convicted of a crime unless they first formally consider using suspension or debarment tools, attorneys say.

The Consolidated Appropriations Act of 2012 contains nine different appropriations bills, and five of the bills contain new language intended to prevent federal funds from flowing to criminal or irresponsible companies. The restrictions apply to contractors convicted of federal felonies within the past 24 months and contractors with unpaid federal tax liabilities.

The rules now require each agency to make a written determination on suspension and debarment before handing out a contract, which could lead to duplicative work and conflicting decisions if two or more agencies try to contract with the same convicted company.

“Agencies are going to have to rethink the way they've been doing business,” said John M. Farenish , a partner at Venable LLP. “In the interim, I think there's going to be some confusion and some challenges.”

Under the previous system, one agency would take the lead in a suspension and debarment proceeding, and other agencies would follow that decision, coordinating the work through the Interagency Suspension and Debarment Committee.

The new statute could confuse the chain of command for such decisions, forcing agencies to make an official determination each time they award a contract. And because suspensions and debarments apply across the entire executive branch, agencies must be careful to avoid situations such as suspending a contractor after another agency has decided the contractor is reliable.

Agencies will need to figure out a way to coordinate their suspension and debarment decisions, and some less experienced agencies may need to invest money and personnel to beef up their suspension and debarment offices, attorneys said.

Government contracts attorneys also expressed concern about inconsistencies and ambiguities in the law. Some questioned why the new language was included in only five of the nine appropriations, and why the section covering military construction and Veterans Affairs — and only that section — extended the funding ban to companies convicted of state-level felony offenses.

In short, “these are not carefully drafted provisions,” said Ronald A. Schechter, a partner in Arnold & Porter LLP's government contracts practice.

Angela Styles, head of Crowell & Moring LLP's government contracts practice, said the statute applies to "corporations," not "contractors," opening up ambiguities about how it should be applied if a contractor's affiliated companies are the ones that are convicted.

"It's still a little fuzzy," she said. "Let's say a subsidiary was convicted, does that count?"

Styles also pointed out that the appropriations language for most of the affected agencies — but not the DOD — also triggers the ban if an "officer or agent" of a corporation is convicted or owes taxes, adding another layer of ambiguity, as the executive branch works out how to define "agent" in this context. Subcontractors and other companies partnering with a contractor could potentially trigger the ban, depending on how broadly the language is interpreted, she said.

Farenish, a former government attorney who headed the Interagency Committee on Suspension and Debarment while working for the Navy, said that the new rules could throw the government back to the days before that committee was formed.

Typically the interagency committee would take the lead in suspensions and debarment, nominating a lead agency — usually the one that does the most business with a contractor — to make a final decision, and expecting other federal agencies to respect that decision, Farenish said.

But now that all agencies are being called upon to make the decisions, there is less predictability for contractors, who must proactively protect suspension and debarment decisions made in their favor.

"A contractor that is convicted could arrive at administrative agreement with their prime customer in the government, but if that information isn't shared with other agencies, they could be suspended or debarred by another agency anyway," Farenish said. "It puts an added burden on the contractor."

Inconsistency is a big concern for contractors, according to Styles, who said that some government agencies simply don't have much experience or expertise in suspension or debarment.

The appropriations law also creates some potential traps for contracting officers, attorneys said. If contracting officers violate the appropriations restrictions, they themselves can be convicted of a criminal violation under the Anti-Deficiency Act, Styles said.

The funding ban only applies when the "agency" is "aware" of criminal convictions or unpaid taxes – language that might refer to contracting officers, higher-level procurement officials, or even agency employees who have nothing to do with contracts.

The act contains no mechanism for getting information about convictions into the hands of contracting officers, and is unclear about whether contracting officers are expected to actively search for convictions, attorneys said.

"There's no requirement in the statute that they exercise any diligence," Schechter said. "It's not 'known or should have known;' it's actual awareness."

The Department of Defense has addressed one of the implementation questions in a Jan. 23 internal memo. The DOD said it will insert language into all new solicitations asking contractors whether they've been convicted of a felony or have unpaid tax liabilities. No agency has yet followed the DOD in changing its policies to match the new appropriations law.

“DOD is trying to put a process in place to mitigate the burden on themselves,” Styles said. “But it's really not clear how agencies other than the DOD are dealing with this.”

The new rules are part of a larger push in Washington toward increased use of suspension and debarment to protect the government's interests, attorneys said.

The government handled almost 6,000 suspension and debarment investigations in 2010, up from 4,000 in the year 2000, and barely 1,000 in 1995, according to Schechter. And while the DOD has always been aggressive, other agencies are also ramping up their use of the tools, he said.

The U.S. Agency for International Development handed out 40 suspensions and four debarments during an 18-month period that ended in summer 2011, which was nearly double the number of suspensions and debarments carried out by USAID in the previous seven years, according to an August 2011 Office of Management and Budget memo.

“In an increasingly aggressive environment, contractors are going to have to be particularly vigilant to ensure that they preempt that action by getting in ahead of the game,” Schechter said.

The new language is also more aggressive than the language in the Federal Acquisition Regulations, because it lists any felony conviction as a potential cause for suspension and debarment, Schechter said. The FAR specifically mentions criminal violations related to contract performance, embezzlement, theft, forgery and lack of business integrity, as grounds for debarment, he said.

“It's not every criminal statute, there's a list,” Schechter said. “This statute, by the language it uses, is broader than the grounds for suspension and debarment in the FAR.”

The new language will cause most of its disruption in the short term, while agencies struggle with implementation and coordination. But some of the concern could linger longer, attorneys said. The appropriations acts are set to expire at the end of 2012, but new restrictive language tends to find its way into new appropriations bills, according to Farenish.

“This may be something were going to have to live with for the long term,” Farenish said.

--Editing by Sarah Golin.