

## **Suspension & Debarment – Preparing for the Coming Storm**

Angela B. Styles  
Richard W. Arnholt  
Peter J. Eyre  
Robert J. Wagman, Jr.

### **Introduction**

When facing civil or criminal charges, termination for default, or negative press, the possibility of suspension or debarment from the federal marketplace is often an afterthought. Such thinking is a mistake. To protect the government's interests, federal agencies can exclude companies and individuals that are not "presently responsible" from participating in federal contracts, subcontracts, loans, grants, and other assistance programs. This exclusion, referred to as suspension where the measure is temporary and debarment where it is for a fixed period, can be a death sentence to entities reliant on government contracts or grants or an ethical reputation. Not only are excluded entities prohibited from being awarded federal contracts or grants by any agency, but they may also suffer collateral consequences such as loss of security clearances, inability to obtain export licenses, and possible restrictions on ability to win state and local government contracts. The reputational damage can also significantly affect commercial sales and stock value.

Recent attention to the suspension and debarment ("S/D") process makes it highly likely that there will be an increase in activity in the coming years. Companies that are facing a government investigation or enforcement actions can almost be assured that they will also be facing S/D issues. Given the devastating consequences of exclusion, companies that find themselves in trouble need to proactively manage the administrative risks from the outset of any investigation. Government contractors and grant recipients should understand what agency suspending and debarring officials ("SDOs") expect in response to a proposed exclusion, and should be prepared to reach out to SDOs to affirmatively demonstrate their present responsibility in the event of a criminal or civil investigation, enforcement activity unrelated to government contracts, termination for default, or mandatory disclosure, all of which could trigger an exclusion.

### **Heightened Attention to Suspension & Debarment Will Lead to Increased Activity**

Over the past year, there has been a significant public spotlight on the suspension and debarment process. In an August 2011 report, the GAO found a correlation between the amount of S/D activity and certain characteristics of the agency office with S/D responsibility. Of the ten agencies reviewed, all of which had more than \$1 billion in contract obligations in 2009, six were found to not have robust S/D programs and few, if any, procurement-related exclusions over the past few years. In response to GAO's report, each of the agencies committed to improving its S/D program. As these improved systems come on line,

contractors can expect to see increased exclusion activity by agencies such as the Departments of Health and Human Services, Treasury, Justice, and Commerce, among others.

During congressional hearings on this topic, members of Congress have expressed frustration with the uneven use across the federal government of the S/D process. Also evident has been a desire on the part of some members for Congress to take action to require that agencies put these tools to use. In response, OMB issued a memorandum on November 15, 2011 directing all Executive agencies to take steps to make better use of the S/D tools available to them.

Apparently unsatisfied with the Executive branch's efforts to increase S/D actions, Congress brought its desire to fruition in the Consolidated Appropriations Act of 2012, which included exclusion provisions in five of the nine consolidated appropriations bills. Although each of the provisions uses slightly different language, generally they each prohibit the use of 2012 appropriated funds to enter into a contract, award a grant or cooperative agreement, or make a loan to a corporation that was convicted of a felony within the 24 months preceding its enactment unless the agency SDO has considered suspension or debarment of the entity and determined such action is not necessary to protect the interests of the government. Although some federal agencies are still working to fully implement this restriction, the legislation has already led to the exclusion of a number of corporations.

Finally, and perhaps most importantly, we are seeing an increase in the coordination between the 70-plus federal inspectors general ("IGs"), SDOs, and the Department of Justice. For example, it is now common practice for a mandatory disclosure submitted to an IG to immediately be provided to the agency SDO and the Department of Justice. Further, the Council of Inspectors General on Integrity and Efficiency ("CIGIE") has established a Suspension and Debarment Working Group that is focused on increasing the coordination between IGs offices and SDOs. The motivation for the increased coordination is the belief that increased use of S/D will protect federal funds and that exclusion could be used more often. CIGIE's efforts to educate the IG community about the S/D process and implement enhancements to the process by which IG personnel refer matters to SDOs will almost certainly lead to an increase in activity - especially at those agencies that historically have not had active S/D programs.

Together, these factors have already led to an increase in S/D activity, and we expect this trend to continue for the foreseeable future.

### **What Suspending and Debarring Officials Expect**

Whether you find yourself before an SDO due to a proactive effort to demonstrate present responsibility or in response to a notice of proposed exclusion, the focus of the SDO's inquiry will be whether the entity being considered for exclusion has the requisite "present responsibility" to continue contracting with, or receiving grants from, the federal government. Guidance about this standard is provided in the Federal Acquisition Regulation, but there are four key things most SDOs will expect: (1) that your company have a values-based ethics and compliance program tailored to address government-contract-specific risks and requirements; (2) if there was wrongdoing, the company, particularly its leadership, shows contrition; (3) the

wrongdoing has been fully remediated and (4) the company is fully cooperative with the SDO's inquiry.

While the Federal Acquisition Regulation requires most contractors to have an ethics and compliance program, the examination by an SDO extends far beyond this basic requirement. SDOs recent focus has been on determining whether an entity being considered for S/D has an ethical culture that inculcates core values. There has also been an increase in attention paid to the method by which employees receive ethics training, with a preference for having employees trained by immediate superiors. This focus is reflected in recent agreements between companies considered for exclusion and SDOs under which companies agree to implement certain ethics and compliance measures, among other actions, in exchange for the agency not excluding the company. These agreements, some of examples of which are available here, <http://www.safgc.hq.af.mil/organizations/gcr/adminagreements/index.asp>, provide a roadmap for what is expected of a responsible government contractor. These requirements typically include: (1) creating or maintaining the position of Chief Compliance Officer, who will report directly to the board; (2) having a code of conduct that is regularly monitored and revised; (3) distributing the code of conduct to each employee; (4) implementing a robust ethics and compliance training program; (5) conducting an annual internal audit of business practices and internal controls; and (6) putting in place policies prohibiting employing or doing business with excluded entities.

## **Be Prepared**

Because each day a company is excluded can mean a significant loss of revenue as no new government contracts, task orders, or modifications adding value to existing contracts may be issued, companies that contract with or receive grants from the federal government are strongly encouraged to prepare in advance a presentation regarding the company's present responsibility. Having this emergency response plan in place will not only enable you to respond quickly and convincingly should you receive an inquiry from an SDO, but will also allow you to proactively seek a meeting with an SDO to explain why S/D is not necessary to protect the government's interests where your company is involved in alleged wrongdoing that may come to the SDO's attention.

First, it is vital that someone at the company have a full understanding of its ethics and compliance program and be ready to brief an SDO on short notice. While outside government contracts counsel can assist with preparation for such a meeting, SDOs are primarily interested in hearing directly from the entity being considered for exclusion. And if you do not have a relationship with counsel familiar with the S/D process, we recommend you consider making that contact sooner rather than later.

If a compliance review finds gaps in the company's ethics and compliance program, fill them now. SDO's will not be forgiving if your ethics and compliance program is found lacking, particularly if the flaw in your compliance program is connected in any way to the alleged wrongdoing. Too often precious time is wasted after a company receives notice of proposed debarment drafting and implementing new policies.

Beyond being able to respond quickly where there is a looming threat of S/D, this preparation has other potential benefits. First, because the government procurement regulations have adopted, in large part, the Sentencing Guidelines elements of an effective compliance program, putting your ethics and compliance house in order will serve the company well in the event of prosecution by the Department of Justice. In addition: (1) studies indicate effective compliance programs are good for the bottom line; (2) large private sector government contractors expect their government contracting partners to have robust ethics and compliance policies in place; (3) sophisticated entities looking to acquire government contractors will examine the ethics and compliance programs of potential targets, and having the proper policies and procedures in place can bolster valuation; and (4) companies with strong ethical cultures and formal ethics/compliance programs are significantly less likely to observe misconduct than organizations without them.

### **What Can You Do Today?**

1. Ask “Am I ready to give a present responsibility presentation next week?” If you are not confident your company has a robust ethics and compliance program, you are not ready.
2. After gathering that material, evaluate whether your ethics and compliance program sufficiently addresses your company’s risk profile and would meet an SDO’s expectations. If the answer is no, upgrade your program.
3. Identify a high-ranking official at the company to make a present responsibility presentation. And if your company does not already have counsel familiar with the S/D process, find someone who can assist.

For more information, please contact the professionals listed below, or your regular Crowell & Moring contact.

Angela B. Styles  
astyles@crowell.com  
202.624.2500

Richard W. Arnholt  
rarnholt@crowell.com  
202.624.2792

Peter J. Eyre  
peyre@crowell.com  
202.624.2807

Robert J. Wagman, Jr.  
rwagman@crowell.com  
202.624.2507