

THE IMPACT OF CRIMINAL CONVICTION ON PUBLIC SECTOR CONTRACTORS AND GRANTEES

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INTRODUCTION

A criminal conviction can lead to a wide variety of collateral consequences for companies and individuals that receive government contracts, grants, as well as other forms of government assistance. What follows is a summary of some of the most notable consequences and considerations that flow from a criminal conviction. We also offer some observations for addressing these collateral consequences most effectively.

FEDERAL SUSPENSION AND DEBARMENT

OVERVIEW

The federal government only awards contracts and grants to companies and individuals that are “presently responsible.” To enforce this policy, the federal government suspends or debar companies and individuals that it determines are not presently responsible. Suspension and debarment can be initiated and imposed for a wide range of reasons, such as in the wake of a criminal conviction. But, under each cause for suspension or debarment, the common theme is that the company has acted (or failed to act) in a way that leads the government to question its integrity, ethics, and compliance.

A suspension is an exclusion from participating in federally funded programs pending the completion of an investigation or legal proceedings. Debarment is an exclusion from participating in federally funded programs for a definite period of time, typically three (3) years. A suspension or debarment by any federal agency is effective throughout all federal agencies, regardless of whether the suspension and debarment is initiated under the procurement or non-procurement regulations. That is, a company excluded from participating in federal procurement programs is also excluded from participating in federal grant programs.

In order to suspend a company, the government must have “adequate evidence” to justify the suspension. To debar a company, the government must have a “preponderance” of evidence to support the debarment. Under the procurement regulations, a company that is proposed for debarment is automatically suspended while debarment proceedings occur. In practice, at least under the procurement regulations, there is little difference in the immediate effect of a suspension, a proposed debarment, or a debarment. When a company is suspended, proposed for debarment, or debarred, the names and addresses of suspended, proposed for debarment, or debarred companies immediately are listed as ineligible on the System for Award Management (“SAM”) maintained by the General Services Administration. Listed companies are excluded from receiving federally funded contracts and grants.

Statistically, the federal government has become increasingly aggressive in imposing suspension and debarment. Further, increased coordination among suspension and debarment officials and the Department of Justice and the Inspectors General make it more likely that information on

criminal proceedings and investigations will be shared with the suspension and debarment community.

LEAD AGENCY PROCESS AND FACTORS USED TO DETERMINE IF SUSPENSION AND DEBARMENT IS WARRANTED

Because suspensions and debarments are effective government-wide, when more than one agency has an interest in the suspension or debarment of a company, a lead agency is designated to coordinate a resolution among all interested federal agencies. One agency is deemed the lead agency and will make the ultimate decision regarding what suspension and debarment action, if any, is necessary on behalf of the entire government. Typically, in Crowell & Moring's experience, the lead agency is often the agency whose mission is most closely impacted by the alleged wrongdoing or an agency that does significant business with that company.

When evaluating whether to impose or lift a suspension or debarment, suspension and debarment officials consider the factors set forth in the applicable regulations to determine whether the alleged misconduct warrants suspension and debarment. For suspension and debarment under federal procurement regulations, the federal agency considers ten mitigating factors when determining whether to initiate debarment proceedings, which are included as Attachment A. For suspension and debarment under non-procurement programs, such as federal grant programs, the government considers both mitigating and aggravating factors when determining whether to initiate debarment proceedings, which are included as Attachment B.

MANDATORY SUSPENSION AND DEBARMENT

Convictions under certain criminal statutes lead to mandatory debarment. For example, the Clean Air Act and Clean Water Act contain mandatory debarment provisions if there is a conviction.² The U.S. Environmental Protection Agency ("EPA") automatically debars the facility/location involved in the wrongdoing (meaning it cannot be involved in contracts or programs with direct or indirect federal funds). Most often that is the site of the misconduct. But in certain cases, corporate headquarters is viewed as the site of the misconduct, particularly in cases where the factual underpinnings suggest willful blindness or organizational recklessness.

Following automatic debarment, a company can seek reinstatement by petitioning the EPA Suspension and Debarment Official ("SDO") and demonstrating that steps have been taken to correct the situation that allowed the misconduct to occur. In Crowell & Moring's experience, if the company engages proactively with the EPA SDO (and the cognizant district office), it is possible to negotiate an administrative agreement that resolves the automatic debarment once the plea is entered.

The following table highlights other examples of statutes that contain mandatory debarment provisions if there has been a statutory violation:

Statute	Cause of Debarment	Duration and Scope
Buy American Act (41 U.S.C. § 8303)	Violations of the Buy American Act in constructing, altering or repairing any public building or work in the United States using appropriated funds.	3 years; government-wide
Drug-Free Workplace Act (41 U.S.C. § 8102)	Violations of the Act as shown by repeated failures to comply with its requirements, or employing numerous individuals convicted of criminal drug violations.	Up to 5 years; government-wide
Service Contract Act (41 U.S.C. § 6706)	Failure to pay compensation due to employees under the Act.	3 years; government-wide

DISCRETIONARY SUSPENSION AND DEBARMENT

In addition to mandatory exclusions, SDOs have discretionary suspension and debarment authority. SDOs have wide-ranging authority to suspend/debar entities and individuals that lack business integrity and ethics. The discretionary authority is not tethered to the particular facility or corporate entity, nor is it tied to the factual recitations in a conviction or indictment. It is quite common for a plea, civil complaint, or criminal indictment to trigger a discretionary action by an SDO, particularly if the factual recitations indicate suggest fraudulent conduct or a lack of business integrity and ethics. When SDOs exercise discretionary authority, they may choose to enter into administrative compliance agreements to resolve suspension and debarment proceedings.

STATE SUSPENSION AND DEBARMENT

Many state and local governments refuse to award funds to entities that are ineligible to receive federal funds, and many states have the practice of initiating debarment proceedings against companies that are debarred by the federal government. While certain states such as Maryland and New Jersey may debar a contractor that has been federally debarred,³ others mandate the simultaneous debarment of a federally debarred contractor. For example, Massachusetts requires that a contractor debarred or suspended by any agency of the United States be simultaneously debarred or suspended, unless “special circumstances exist.”⁴

INTERNATIONAL SUSPENSION AND DEBARMENT

Other countries may also initiate suspension and debarment proceedings or refuse to award contracts to a company that is suspended or debarred in the United States, or that is convicted of certain crimes in the United States. Examples include the following:

- Canadian public sector opportunities generally require offerors to certify if it, or any of its affiliates, have been convicted of or pled guilty to certain violations of Canadian law (including fraud), or any similar foreign offenses. Canada may not award contracts to entities if they, or their affiliates, have been convicted of certain offenses in violation of Canadian law, or convicted of similar foreign offenses.

- The Brazilian government can debar companies for, among other offenses, “intentional commission of any illegal act that reveals a contractor’s improbity to contract with the Government.” In Brazil, if a company is debarred at the federal level, the company is also automatically debarred at the state and local levels.
- Australian procurement policy prohibits the federal Australian government from “seeking to benefit from supplier practices that may be dishonest, unethical, or unsafe...” and its debarment regime is discretionary.
- UK contracting authorities must exclude an economic operator from participating in a procurement procedure if that operator has been convicted of organized crime, corruption, bribery, fraud, money laundering, drug trafficking or terrorism. Operators may be excluded from a procurement procedure for reasons such grave professional misconduct, violation of environmental, social or labor laws, persistent deficiencies in past performance of public contracts, or misrepresentation and the supply of misleading information to the contracting authority.

PRESUMPTIVE EXCLUSION REQUIRED BY FEDERAL APPROPRIATIONS STATUTES

Federal appropriations statutes prohibit certain federal agencies from using appropriated funds to enter into a contract or grant with a corporation that is convicted of a felony criminal violation of federal law within the two years preceding the award, unless the agency determines that such exclusion is not necessary:

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

See Consolidated Appropriations Act, 2016 (P.L. 114-113), Division E, Financial Services and General Government Appropriations Act, 2016, § 746 (hereinafter “2016 Appropriations Act”). For FY 2016, the prohibition applies government-wide for appropriated funds under the 2016 Appropriations Act.⁵

While the appropriations prohibition seemingly applies “where the awarding agency is aware of the conviction,” agencies now must consider criminal convictions when awarding contracts pursuant to FAR 52.209-7, “Information Regarding Responsibility Matters” and FAR 52.209-5 “Certification Regarding Responsibility Matters.” These clauses require certain vendors submitting proposals for federal contracts to report or certify to information pertaining to criminal proceedings and convictions. In addition, on December 4, 2015, the FAR Council issued an interim rule – with an effective date of February 26, 2016 – that requires a corporation responding to any federal solicitation to represent whether it (1) has a felony conviction for a violation under any federal law within the preceding 24 months or (2) has any unpaid federal tax

liability that has been assessed and is not being appealed or paid in a timely manner. Consistent with the Consolidated and Further Continuing Appropriation Acts, any affirmative response made by a corporation to either representation would effectively create an automatic exclusion that precludes award of federal contracts.

If a company is convicted of a felony under federal criminal law (for these purposes a plea leads to a conviction), that specific corporate entity cannot be awarded federal contracts or grants using appropriated funds subject to this prohibition until each individual agency awarding funds has made an affirmative determination that suspension or debarment is not necessary to protect the government's interest. Notably, the lead agency process does not apply in this context.

In other words, companies in this situation must engage with numerous agencies to continue to receive funds subject to the prohibition. Even if one agency favorably resolves a suspension and debarment issue in favor the contractor, and determines that suspension and debarment is not necessary to protect the government's interest, that agency's decision is not binding on other federal agencies. Although certain agencies may defer to a favorable resolution, other agencies will conduct their own inquiry and make their own determination.

STATUTORILY MANDATED DEBARMENT OF INDIVIDUALS

There are notable statutory provisions that provide for the mandatory debarment of individuals. As an example, Section 2408 of Title 10 of the United States Code places a five-year ban on persons who have been convicted of fraud or any other felony arising out of a contract with the Department of Defense ("DoD") from working in management or supervisory capacities on any DoD contract, or engaging in similar activities. Contractors who knowingly employ such "prohibited persons" are themselves subject to criminal penalties.

IMPACT OF CONVICTION ON RESPONSIBILITY DETERMINATIONS

In addition to the government's suspension and debarment regime, a criminal conviction may also impact a contractor's responsibility determination (and, therefore, whether or not it can receive government contracts). As part of any source selection for government contracts, the awarding entity must consider whether or not a contractor is presently responsible. To that end, the contracting officer must weigh the information required under FAR 52.209-5 "Certification Regarding Responsibility Matters," which requires a "check-the-box" response on whether or not the contracting entity or its principals have been convicted of a number of criminal offenses, including embezzlement, theft, and false statements, among others. If a contractor affirmatively certifies to a criminal conviction, the contracting officer must weigh that certification, which could be an impediment to contract award.

In addition to the certification required by FAR 52.209-5, the Federal Awardee Performance and Integrity Information System ("FAPIIS") further enhances the government's ability to make responsibility determinations by evaluating the business ethics and performance of prospective contractors competing for federal business. FAPIIS is a broad system that aggregates information from existing sources and collects new categories of information. It contains contractor self-reporting of criminal convictions, civil liability, and adverse administrative actions, and also includes contracting officers' non-responsibility determinations, contract terminations for default or cause, and administrative agreements entered into by suspension and

debarment officials to resolve a suspension or debarment, among other information. Contracting Officers must review the information in FAPIIS to make a responsibility determination.

ADDITIONAL COLLATERAL CONSEQUENCES OF CONVICTION

Not only are excluded entities prohibited from being awarded federal contracts or grants by any agency, they may also suffer the loss of security clearances, the inability to obtain export licenses, and possible restrictions on the ability to win state and local government contracts.

In addition to exclusion, a criminal conviction can lead to a variety of other collateral consequences. It could hamper the company's ability to establish or maintain lines of credit, lead to increased scrutiny from public auditors, and the reputational damage can significantly affect commercial sales and stock value. A criminal conviction may also damage contractor's past performance rating, an evaluation factor in most procurements, which would risk its ability to win future government contracts.

PROACTIVELY MITIGATING THE RISK OF COLLATERAL CONSEQUENCES

Given the devastating collateral consequences of a criminal conviction, companies that find themselves in trouble can/should proactively manage the administrative risks from the outset of any criminal investigation or enforcement action. While many of the collateral consequences of criminal conviction can be managed reactively post-conviction, those consequences – such as suspension and debarment – can often be best mitigated pre-conviction, or in the process of resolution. It is important for the government contracts and suspension/debarment strategy to be integrated into the overall strategy for the matter. The company should have the right pieces in place so that it can proactively engage with the cognizant suspension and debarment officials (ideally well before an indictment, plea, settlement, or complaint becomes public).

Most often, the scope and period of debarment can be reduced or eliminated if companies have engaged early and started to preview why the company is presently responsible. For example, it is often best for the company to reach out to suspension and debarment officials before a plea is finalized, with the goal of negotiating resolutions and securing favorable responsibility determinations in advance. In other words, the impact of the statutory preclusion can be mitigated (and, in some cases, avoided altogether) through careful planning, decisive action by the company, and proactive communication.

Conversely, failure to engage early with the suspension and debarment officials increases the likelihood that debarment will impact a wider swath of the company and will make it much harder to resolve the suspension and debarment. Suspension and debarment officials expect companies to provide detailed information about the key facts and what steps the company is taking to address the issues prospectively. This will involve work with the entity or individual on remediation efforts and corrective action activities.

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Attachment A

Procurement Mitigating Factors FAR 9.406-1(a)(1)-(10)

- (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.
- (2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.
- (3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
- (4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.
- (5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.
- (6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.
- (7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.
- (8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.
- (9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.
- (10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

Attachment B
Non-Procurement Mitigating and Aggravating Factors
2 C.F.R. § 180.860

- (a) The actual or potential harm or impact that results or may result from the wrongdoing.
- (b) The frequency of incidents and/or duration of the wrongdoing.
- (c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.
- (d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.
- (e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.
- (f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.
- (g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.
- (h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.
- (i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.
- (j) Whether the wrongdoing was pervasive within your organization.
- (k) The kind of positions held by the individuals involved in the wrongdoing.
- (l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.
- (m) Whether your principals tolerated the offense.
- (n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.

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² *See* Clean Air Act (42 U.S.C. § 7606) (“No Federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) of this title for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such a conviction has been corrected.”); *see also* Clean Water Act (33 U.S.C. § 1368) (“No Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected.”).

³ *See* Md. Code Ann., State Fin. & Proc. § 16- 203(c) (“A person may be debarred from entering into a contract with the State if the person, an officer, partner, controlling stockholder or principal of that person, or any other person substantially involved in that person's contracting activities has been debarred from federal contracts under the Federal Acquisition Regulations, as provided in 48 C.F.R. Chapter 1.”); *see also* N.J. Admin. Code § 17:19-4.1 (“In the public interest, the DPMC may debar a firm or an individual for . . . Debarment or disqualification by any other agency of government.”).

⁴ Mass. Gen. Laws Ann. ch. 29, § 29F(c)(2) (“Notwithstanding any other provision of this section, any contractor debarred or suspended by any agency of the United States shall . . . be simultaneously debarred or suspended under this section, with respect to non-federally aided contracts; the secretary or the commissioner may determine in writing that special circumstances exist which justify contracting with the affected contractor.”)

⁵ In FY 2014, the prohibition was tied to the use of specific funds appropriated under certain divisions, such as Division B, Commerce, Justice, Science and Related Agencies; Division C, Department of Defense; and Division D, Energy and Water Development and Related Agencies, among others. The 2016 Appropriations Act now inserts the prohibition into Title VII of Division E, Financial Services and General Government Appropriations, which is titled “General Provisions–Government-wide.”