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Debarment and Suspension

Space 'Watch List' Can Exclude Contractors Without Due Process

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Space contractors, beware. There's a new sheriff in town.

With the passage of the fiscal 2018 National Defense Authorization Act, contractor responsibility determinations under FAR 9.1 and 9.4 are no longer the largest risks for exclusion from government contracting. Under Section 1612 of the bill, the commander of the Air Force Space and Missile Systems Center is required to develop a watch list of contractors with a history of poor performance on space procurements or research, development, test, and evaluation of space program contracts. The commander ''may'' place a contractor on the watch list upon determining that a contractor's ability to perform a space program contract is ''uncertain,'' based on any of the four following grounds: (1) poor performance or award fee scores of under 50 percent; (2) financial concerns; (3) felony convictions or civil judgments; and (4) security or foreign ownership and control issues. *Id.* § 1612(b)(1).

The provision vests the commander with the sole discretion to place contractors on the watch list, to include an entire company or a specific division for listing, and to delist a contractor. *Id.* § 1612(b)(2). A contractor on the watch list may petition the commander in writing for removal from the list, by including evidence that it has resolved the underlying grounds for the original listing. *Id.* § 1612(d). However, Section 1612 does not require the commander to provide any notice or opportunity for a hearing *before* a contractor's inclusion on the watch list. Similarly, Section 1612 does not establish the evidentiary standard required for the commander's determination, or provide for an independent review of such determination. *Cf.* FAR Pt. 9.4 (prescribing baseline due process for the suspension and debarment of contractors, including enumerated causes of suspension and debarment such as a history of poor performance, financial concerns, convictions and certain judgments, and the like).

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Absent approval from the commander, a contractor that is included on the watch list cannot bid for or receive new contract awards, engineering change proposals and options on any space program. 2018 NDAA, § 1612(c)(1). Absent such approval, a contractor on the watch list is also ineligible to receive, under a prime contract with the Space and Missile Systems Center, any subcontract valued over $3 million or 5 percent of the prime contract value, whichever is more restrictive. § 1612(c)(2). The rule does not address whether the watch list will be shared with other entities, how long the listing term lasts, or whether any circumstances would justify waiver of the exclusion, whether formal suspension and debarment consideration would (or could) occur in parallel with the watch list listing, or whether the watch list is designed to operate like intelligence agencies' special restriction lists or vendor vetting-related exclusions. Particularly troubling would be if the watch list operates like the vendor vetting exclusion, where commanders make exclusion decisions and are then extraordinarily difficult — if not impossible — to reach and the decisions are similarly difficult to overturn.

The NDAA specifically proclaims that the ''inclusion on the watch list shall not be construed as a punitive measure or de facto suspension or debarment of a contractor.'' *Id.* § 1612(e). However, it is doubtful whether reviewing courts would reach the same conclusion, as the watch list is an exclusion from a chosen industry without the due process requirements that have evolved in the suspension and debarment process over many decades. Although certain war zone-related national security exigencies have justified departures from traditional notice and due process requirements, no such exigencies exist in space contracting. *Cf. NCL Logistics Co. v. United States*, 109 Fed.Cl. 596 (Fed. Cl. 2013) (National security concerns trumped the notice requirement of due process in a challenge to exclusion under the Defense Department's vendor vetting process in Af-

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ghanistan). Satellites generally take years to design and build, are subject to constant technological upgrades while the work is in progress, and are subject to intense quality control often with multiple contractors involved to confirm that the satellite performs as required. Traditional contract administration channels are, and should be, sufficient to address performance issues during such a lengthy process.

Also absent from the NDAA provision is any evidence of the need for such a watch list. Moreover, the provision does not appear to consider the amount of work the commanders and their staffs have inherited to administer the watch list especially as it is likely that constitutionality of any exclusion is likely to be challenged in court.

Even more curious is the absence of any detail about how the watch list operates and coexists alongside suspension and debarment consideration. In the Air Force, suspension and debarment is accomplished through the Office of the Deputy General Counsel for Contractor Responsibility and Conflict Resolution, based in Virginia. Although the suspension and debarment office is currently manned by an acting office leader and has experienced significant staff turnover, it continues to suspend and debar contractors. As a result, contractors may well face simultaneous proceedings on both coasts — a watch list inquiry initiated by the Space and Missile Systems Center commander in Los Angeles, and a present responsibility inquiry initiated by the suspending and debarring official in Virginia.

Perhaps a silver lining for space contractors is the watch list will take time to develop and implement. In that time, space contractors are well advised to review the factors that might lead to watch list exclusion and work to resolve the underlying issues that could lead to an exclusion in the first place. Additionally, to the extent that relations with the Space and Missile Systems Center contracting shop are frayed, space contractors should redouble efforts toward improving them. Presumably, exclusions will rely on referrals from the contracting office, and relationships can influence those decisions. Space contractors with risk factors for potential exclusions should also consider reviewing general ethics and contract administration policies and procedures. Proactive corrective actions in those areas could provide space contractors with material to present to an excluding official as part of a presentation to avoid or to remedy inclusion on a watch list to the extent that the opportunity to make such a presentation is provided and certainly would be beneficial in a suspension/debarment context.

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