

Calls For Contractor Debarment Carry Political Appeal

By **Dietrich Knauth**

Law360, New York (May 13, 2013, 10:38 PM ET) -- Barring unscrupulous companies from getting government contracts has become a politically popular topic on Capitol Hill and in state legislatures, but some contracting experts worry that lawmakers are pushing unhelpful proposals in an effort to appear tougher on wasteful spending.

Congressional interest in suspension and debarment has risen sharply over the past few years, driven by widely publicized reports of contracting corruption and by the closer scrutiny on federal spending that the recent recession ushered in. Government contracting experts expect the interest will continue to grow, because debarment is a media-friendly way for lawmakers to signal that they're tough on waste and fraud.

"There's constant interest in suspension and debarment, so I expect to see more legislative proposals," said Steven Shaw, a senior of counsel at Covington & Burling LLP. "'Debar bad contractors' fits on a bumper sticker, so it becomes policy."

New legislation is likely to focus on three areas, experts said: a move toward more automatic suspensions and debarments, efforts to improve the operations of existing suspension and debarment offices, and state-level legislation emulating already-developed federal law.

Some older statutes — notably the Clean Air Act and the Clean Water Act — include automatic suspension for violations. But these laws are outliers, and most agencies have suspension and debarment officials who prize their independence and ability to make fact-based decisions.

For Shaw, who recently served as the U.S. Air Force's suspension and debarment officer and deputy general counsel for contractor responsibility, preserving the independence of suspension and debarment officials is paramount. With the discretion to negotiate proactively with contractors, a debarring official can act to strengthen a company's ethics and compliance programs, rather than simply punishing a contractor after a fraud has been committed, he said.

"Having a program that prevents fraud from happening at the front end is more important than increasing the numbers of suspensions and debarments," Shaw said. "You can combat fraud much better when you have discretion, when a debarring official can go out into the field and work with contractors to prevent fraud."

Automatic suspension has recently expanded. At the end of 2012, Congress imposed mandatory debarment for companies that misrepresent themselves as small or veteran-owned businesses to win special set-aside contracts. And the 2012 appropriations bill prevents some agencies from funding contracts with companies that have been convicted of crimes — a kind of de facto debarment. Those provisions were also included in the renewed continuing resolutions that will keep the government funded through September.

While many contracting experts view automatic or mandatory suspension as a poor substitute for discretionary debarment, they expect Congress will continue to try to expand the practice to drive up the number of suspensions.

“The view in Congress seems to be that a single misstep should preclude companies from receiving further government contracts, and that's inconsistent with the notion that sometimes the best outcomes happen when contractors work hand in hand with their government customers to become even better, stronger and more compliant contractors,” Peter Eyre of Crowell & Moring said. “Making it automatic is inconsistent with a core purpose of the suspension and debarment system.”

Congress has also shown an appetite for reforms that increase the effectiveness of discretionary debarment programs. House Oversight Committee Chairman Darrell Issa, R-Calif., has introduced a draft bill, the Stop Unworthy Spending Act, that would radically reshape the government's practices, consolidating the suspension and debarment offices of all civilian agencies into a single entity. Critics say the plan could deprive agencies of key leverage to change questionable contractor practices, and Issa has yet to introduce the bill in his committee.

Though a centralized, judicial approach would boost consistency and transparency, it would likely be slower and more expensive for contractors, critics say. The restructuring could also deprive agencies of their leverage in negotiating concessions from contractors during debarment negotiations, and likely would lead to duplication and inefficiency as the agencies try to coordinate their suspension and debarment activities with a new government entity, critics say.

"It made for great headlines, and it was easy for Congressman Issa to talk about 'fraudsters' when he introduced the Suspend Act, but it's much harder to craft a piece of legislation that serves a government need," said Ron Schechter, a partner with Arnold & Porter LLP. "It's a solution in search of a problem."

Action against corrupt contractors has a lot of appeal for policymakers, but Shaw said Congress focuses too much on increasing the raw numbers of suspensions and debarments, rather than taking a more comprehensive look at the number of investigations, the number of administrative agreements signed as a result of investigations, and the number of instances in which the government investigated but declined to act.

The focus on numbers may also be feeding a trend toward agencies suspending more individuals, while allowing their companies to continue doing business with the government.

"We're seeing a lot more focus on individual suspensions and debarments, particularly in certain agencies," Eyre said. "Statistics are playing an important role in this, and I think that is one of the things that is driving the focus on individuals."

Experts also expect more legislation on the state level, as states tighten the rules on their own procurements. New Jersey's Senate passed a bill in October that would permanently ban companies that are convicted of fraud from receiving any additional state contracts. The bill was sent to the Assembly, which has until the end of 2014 to act on it.

“New Jersey’s proposed law to permanently debar contractors convicted of fraud is especially harsh, especially when viewed against the federal standard of three years,” said David Nadler, a partner in Dickstein Shapiro LLP’s government contracts group. “A permanent debarment makes no distinction between the nature and severity of the offense, and leaves no room for mitigating factors, such as cooperation with law enforcement, disciplinary action, new management, monitoring or other corrective action.”

Although the New Jersey bill may be exceptionally strict, it indicates states are taking notice of a topic that has been active at the federal level for a few years.

"I'm not terribly surprised to see legislation at the state level, because there's been so much attention at the federal level," said Kristen Ittig, a partner at Arnold & Porter LLP.

Contracting attorneys say that many of the proposals could do more harm than good, disrupting a system that, at its core, is working well. Even without significant legislative reforms, agencies have redoubled their efforts to suspend or debar contractors —sometimes for fear of being embarrassed during oversight hearings — and are making better use of available data. The Air Force, for example, suspended or debarred 750 contractors in 2012, a sharp increase from the 367 actions it took in 2011.

"I would caution folks who are looking for legislative solutions is to make sure there's really a need for them," said Schechter. “New legislation is necessarily going to add more complexity, and probably ambiguity and confusion, during a transition period.”

--Editing by Kat Laskowski and Jeremy Barker.

All Content © 2003-2013, Portfolio Media, Inc.