

Contractor Suspensions Inconsistent, House Panel Hears

By Dietrich Knauth

Law360, New York (June 12, 2013, 10:25 PM ET) -- The House Oversight Committee heard Wednesday from experts who advocated more consistency and transparency in the government's suspension and debarment of contractors, furthering planned reform legislation that chairman Darrell Issa, R-Calif., promised to introduce "very shortly."

Witnesses from the nonprofit Project on Government Oversight, the U.S. Government Accountability Office, and Washington D.C. law firm Crowell & Moring LLP told the panel that Issa's Stop Unworthy Spending Act offered an opportunity to inject more consistency and transparency into a procedure that can vary wildly depending on which agency is enforcing the rules.

The SUSPEND Act, as it is known, **received mixed reviews** from experts when an early discussion draft was circulated in February. That version of the bill would have consolidated the suspension and debarment offices of 41 civilian agencies into a single centralized board. While some praised the transparency and consistency offered by the new board's judicial approach, critics said the change would make suspension and debarment proceedings slower and more expensive for contractors, while depriving agencies of their ability to leverage the threat of debarment to change questionable contractor practices.

Angela Styles, the chair of Crowell & Moring's government contracts group and a former head of the Office of Federal Procurement Policy, said Wednesday that writing existing best practices into law would help both contractors and agencies as less-experienced civilian agencies ramped up their suspension and debarment efforts.

Contractors have been fortunate to have "objective and fair-minded civil" officers running the suspension and debarment processes at the Department of Defense, the General Services Administration and the Environmental Protection Agency for many years, Styles told the panel. But other, less experienced, agencies pursue an "ad hoc" approach or rely on regulations that "take a cryptologist to interpret," she said.

"I have great confidence in the abilities, objectivity and fairness of [suspension and debarment officers] working in these three agencies," Styles said. "I am less confident, however, that the agencies new to suspension and debarment can ensure fairness and consistency without some modifications to the current system."

The differences even among experienced agencies can be as stark as "night and day," Styles said. While the Army and the EPA make suspension and debarment decisions through quasi-judicial hearings, others, like the Air Force, General Services Administration and Defense Logistics Agency, pursue a more flexible, less formalized approach.

Most experienced agencies will issue “show cause” letter that gives contractors a chance to respond to damaging information before they are suspended or proposed for debarment, and may enter into an administrative agreement in lieu of a suspension. But those practices are not written into the Federal Acquisition Regulation, and less-experienced agencies may not know they have those options, Styles said.

“Putting a lot of these unwritten practices, policies and tools into the FAR can help agencies and contractors know the ground rules,” Styles said.

The new legislation could also improve the currently informal process for determining which agency will take the lead in suspension and debarment decisions, which apply across the government, Styles said. One contractor, she said, approached one agency with a potential problem, “only to have a completely different agency debar the company the very next day for the same issues,” she said.

“All the effort that the company had done to prove that they had remediated the problem was for naught, because they were then publicly suspended,” Styles said.

The Project on Government Oversight’s general counsel, Scott Amey, said the public release of agencies’ suspension and debarment decisions, along with other transparency measures, would restore public trust in government contracting.

“Consistency is needed because we often hear about government reports and audits or media stories alleging criminal activity or poor performance one day and new multimillion-dollar contracts or grants awarded to the same entity within days,” Amey said.

While several lawmakers expressed frustration that about the government’s seeming inability to cut ties with companies that engaged in unethical behavior, Amey warned against “knee-jerk” legislation that would mandate suspension or debarment for certain offenses. An agency needs the flexibility to weigh a contractor’s present responsibility and ensure competition for contracts.

“You don’t want to eliminate competition and eliminate options for the federal government,” Amey said. “Suspension and debarment is not a punishment, so it may not matter what [a contractor] did a week ago. Unfortunately, I think we buy too much into the promises made by the contractor.”

Rep. Eleanor Holmes Norton, D-D.C., said she viewed debarment “as a kind of nuclear weapon” against contractors, and asked whether fines or “calling people out” would be a useful interim step. Amey said that since fines rarely work against rich companies, going public with a contractor’s misdeeds may be a better way to change its behavior.

--Editing by Kat Laskowski.

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