

How Proposed Debarment Became Equal To Suspension

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In 2004, the U.S. General Services Administration issued a proposed rule that would have provided parties being considered for suspension or debarment with a pre-exclusion notification, often referred to as a “show cause notice.”[1] After the comments period closed, the GSA decided not to issue a final rule. Nonetheless, over 10 years later, the comments the GSA received on the proposed rule provide insights into a phenomenon that affects contractors today — the blurring of lines between proposed debarments and suspensions.

Among those who commented on the proposed GSA rule was Robert Meunier, then suspension and debarment official (“SDO”) for the U.S. Environmental Protection Agency. Meunier proposed that rather than promulgating an agency-specific rule, the GSA should raise the issue with the Federal Acquisition Regulatory Council and the Interagency Suspension and Debarment Committee (“ISDC”). As Meunier explained, the problem that GSA was attempting to address was a “fundamental one within the FAR itself,” a problem that emerged when the FAR “began down a slippery slope” by giving preclusive effect to proposed debarments in the early 1980s. This article explores the regulatory history of notices for proposed debarment and examines how the FAR’s trip down a slippery slope led to certain collateral effects that contractors face today.



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Regulatory History of FAR Subpart 9.4

Today’s effects of a notice of proposed debarment under the FAR came about because of a two-part historical evolution combined with a rapid expansion in the type and severity of the collateral consequences of exclusions. As Meunier noted, the first part of the historical evolution occurred in the early 1980s after the release of the Office of Federal Procurement Policy Letter 82-1. The policy letter established uniform guidelines that were meant to protect the government’s interest in awarding contracts only to responsible contractors while affording fundamental fairness to those affected by the suspension and debarment procedures.[2] Policy Letter 82-1 acknowledges the “drastic nature” of suspension and debarment and expressly states that the purpose of these tools is not to punish contractors, but to ensure that the government only enters into contracts with entities that are presently responsible.

The guidelines from Policy Letter 82-1 were incorporated into Subpart 9.4 of the FAR, when the FAR became effective in 1984, replacing the previously existing Federal Procurement Regulations (FPR). In a

notable departure from the FPR, a notice of proposed debarment under the FAR had preclusive effect within the issuing agency — i.e., a contractor could not receive new contracts from the agency that had proposed it for debarment. However, only suspensions had immediate governmentwide effect. In theory, this distinction between suspensions and proposed debarments made sense because SDOs were meant to use these tools for very different purposes. Suspensions were a temporary exclusion used only when the government needed “immediate” protection,[3] a requirement not found in the debarment regulations. By comparison, a notice of proposed debarment was to be used to give contractors an opportunity to be heard before being debarred.

The second part of the historical evolution occurred in the late 1980s, when a change to the FAR further blurred the lines that distinguished suspensions from proposed debarments. This change came about because of a recommendation in a 1987 U.S. Government Accountability Office report that was issued in response to concerns from the House Committee on Government Operations that many executive agencies were reluctant to initiate suspension and debarment procedures.[4] Among its recommendations, the GAO proposed that the FAR be revised so that a proposed debarment would have an immediate preclusive effect throughout the federal government. Following this recommendation, the U.S. Department of Defense, NASA and the GSA proposed this change to the FAR, noting that under the existing regime, a contractor proposed for debarment was ineligible for award only within the agency proposing debarment thus enabling “a seriously nonresponsible contractor to continue to receive contract awards from other Federal agencies until a debarment decision [was] rendered.”[5] The final rule was issued in 1989.[6]

Such a change may have been necessary at a time when the government’s suspension and debarment apparatus was still in its infancy and only a select number of agencies were bringing actions. But the government’s expanded use of the suspension and debarment regulations suggests that immediate preclusive effect is no longer needed today. The GAO’s 1987 recommendations were based on suspension and debarment data from fiscal years 1983-85, which reflected the committee’s concern that the regulations were not being utilized. For instance, in 1983, only 173 parties were suspended and 238 parties were debarred.[7] In contrast, in 2013, there were 887 suspensions and 1,696 debarments.[8] Moreover, the GAO likely did not anticipate the dire consequences of its proposed revision, an excusable oversight given the recent expansion in the collateral effects of exclusions.

Collateral Effects of an Exclusion

Commentators have described suspension and debarment as a corporate death sentence for government contractors,[9] but being proposed for debarment can be just as devastating. Due to the regulatory change that occurred in 1989, the issuance of a notice of proposed debarment under FAR 9.405(a) now has the immediate effect of blacklisting the contractor as an excluded party on SAM.gov. Even if a company does little or no direct work for the federal government, appearing on the government’s blacklist can be debilitating. Loan covenants on revolving credit facilities may permit banks to call loans if a debtor is proposed for debarment. If the company’s customers, which may include state and local governments, engage in significant government contracting or the work is funded by government grants, the customers will likely be prohibited from contracting with a company that is listed as an excluded party on SAM.gov. An exclusion can also impact federal licenses, ability to contract with foreign governments, and increasingly it can result in commercial customers terminating purely commercial contracting relationships.

This immediate exclusionary effect is not just devastating for small contractors; it can be problematic for large publicly traded companies as the market reacts to news of the proposed debarment. For instance,

on Nov. 19, 2013, the stock price of W&T Offshore dropped 10 percent in one day after the company was proposed for debarment.[10] In addition to the severe impact in stock valuation, including potential delisting from an exchange, the proposed debarment of contractors can result in loss of significant commercial business opportunities, and loss of key executives and board members who do not want to be tainted by the stain of exclusion. Even when proposed debarments are resolved quickly, the reputational and financial harm to companies may be difficult to overcome, and can threaten the viability of commercially-focused going concerns.

A Notable Difference From the Nonprocurement Common Rule

The FAR only covers procurement spending and does not apply to the nonprocurement spending that makes up a significant portion of the Federal government's budget — e.g., grants, cooperative agreements and loan guarantees. The nonprocurement suspension and debarment procedures were established in accordance with Executive Order 12549, which President Reagan issued in 1986.[11] This order established the ISDC and required all executive agencies to participate in a nonprocurement suspension and debarment system. In 1988, 28 agencies responded to the executive order by publishing a "Nonprocurement Common Rule" (NCR) that provided for "government-wide nonprocurement suspension and debarment." Notably, the joint task force that created the NCR deliberately chose not to give preclusive effect to notices of proposed debarment after observing how the FAR revision had resulted in a blurring of lines between suspension and proposed debarment.

The Path Forward

Some SDOs routinely issue show cause notices prior to issuing a notice of proposed debarment, particularly where the basis for potential exclusion is dated. Show cause notices give contractors the opportunity to present evidence and mitigating factors to the SDO before experiencing the grave reputational and economic damage that comes with an exclusion. However, the issuance of show cause notices is not required and there is no regulatory basis for the practice. One way to address the lack of consistency across the agencies would be for the FAR Council and ISDC to consider a unified federal policy on the use of show cause notices.

The FAR Council could also consider amending FAR Subpart 9.4 so that a notice of proposed debarment no longer triggers a governmentwide exclusion. Such a change would allow the notice of proposed debarment to perform its original purpose — of informing a contractor of an agency's concerns and offering the contractor a brief period to respond. Where an immediate threat to the government of continuing to contract with an entity exists, the government could simultaneously issue a suspension under FAR 9.407. Such a revision would bring the procurement debarment regulations in line with the NCR. Indeed, such harmonization between the procurement and nonprocurement systems was one of the objectives of draft legislations proposed during the 113th Congress by the House Oversight and Government Reform Committee.[12] The proposed legislation would establish within the GSA a board that would serve as a central body to manage all executive agency suspension and debarment activities. Notably, the board would be required to provide advance notice of an adverse action — i.e., contractors would have the opportunity to be heard prior to a suspension or proposed debarment.

It has been over 10 years, since the GSA proposed a rule requiring the use of show cause notices, and it remains to be seen if 2015 will see any developments in this area. But whether it is through discussions among the ISDC members or through formal revisions to the FAR, government contractors should welcome any change that offers the opportunity to respond to allegations before suffering the collateral consequences of a proposed debarment.

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[1] 69 Fed. Reg. 34,248 (June 18, 2004).

[2] 47 Fed. Reg. 28,854 (July 1, 1982).

[3] Earlier this year, a judge on the Court of Federal Claims issued a TRO enjoining the Navy from suspending a contractor under FAR 9.407-1(a) after finding it unlikely that the government would be able to demonstrate an “immediate need” to suspend the contractor because the suspension was based on an alleged impropriety that had occurred years earlier. *Inchcape Services Holdings Ltd., et al. v. United States*, No. 13-953 (Fed. Cl. January 2, 2014) ECF No. 31.

[4] United States Gen. Acct. Office, Briefing Report to the Chairman, House Comm. on Gov't Operations, Procurement: Suspension And Debarment Procedures 1 (1987) [GAO Report].

[5] 52 Fed. Reg. 28642 (July 31, 1987).

[6] 54 Fed. Reg. 19814 (May 8, 1989).

[7] GAO Report 28.

[8] Report by the Interagency and Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities for FY 2012 and FY 2013.

[9] Ralph C. Nash & John Cibinic, *Suspension of Contractors: The Nuclear Sanction*, 3 Nash & Cibinic Rep. ¶ 24, March 1989, at 44.

[10] *Why W&T Offshore, Inc.'s Shares Dropped*, the Motley Fool, November 29, 2013.

[11] Exec. Order No. 12549, 51 Fed. Reg. 6370 (February 18, 1986).

[12] H.R. 3345 - SUSPEND Act (Introduced in House in 113th Congress) (Under Sec. 6403, the OMB Director would maintain one generally applicable regulation on suspension and debarment for procurement and nonprocurement programs.)

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