

28th Annual Ounce of Prevention Seminar

# Welcome

## Predicting the Future: Federal Contracting in an Election Year

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# SUSPENSION & DEBARMENT

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# Suspension and Debarment

- Agenda
  - S/D Basics
  - Today's landscape
  - Practical steps contractors and subcontractors can take now

# Basics

- Procurement S/D: FAR Part 9.4
  - Some case law
- Nonprocurement S/D: 2 CFR Part 180 (OMB Common Rule), plus agency regulations
  - Very little case law
- Many similarities, but some important differences

# Basics

- Purpose:
  - To protect the public interest -- NOT to punish
  - Key concept of “present responsibility”
- Who can be suspended/debarred?
  - Individuals
  - Entities (*e.g.*, corporations, partnerships, divisions or business units within an entity, etc.)
  - Parent and affiliates, if warranted
  - Prime contractors, subcontractors, or participants *at any tier*

# Basics

- Underlying authorities: federal law, Executive Orders, and federal regulations
- EVERY agency has its own SDO
- Agencies to establish own “methods and procedures for coordinating their debarment or suspension actions”
  - Highly inconsistent, no uniformity
  - GAO criticisms (more on this later)

# Basics

- Interagency Committee on Debarment and Suspension
  - Concept of “lead agency”
  - Coordination, share best practices
  - May drive contractor’s decision making re advance disclosure
  - GSA maintains the consolidated list:  
[www.epls.gov](http://www.epls.gov)

# Basics

- *Causes for S/D, e.g.,*
  - Conviction or a civil judgment for fraud or criminal offense in connection with obtaining or performing a public contract or subcontract
    - Even an on-going investigation or a settlement agreement can trigger
    - Conduct need not be related to a public contract, *e.g.*, SEC books and records violation, FCPA infractions, Antitrust misconduct

# Basics

- *Causes, cont'd:*
  - Violation of federal or state antitrust laws relating to submission of offers
  - Embezzlement, theft, falsification, destruction of records, false statements, tax evasion, receiving stolen property
  - “Made in America” label fraud
  - Commission of “any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”

# Basics

- *Causes, cont'd:*
  - Violation of the terms of a Government contract or subcontract, such as
    - Willful failure to perform
    - History of failure to perform
    - Unsatisfactory performance
    - Violation of the Drug Free Workplace Act
    - Delinquent federal taxes in an amount exceeding 3K

# Basics

- *Causes, cont'd:*
  - Knowing failure to disclose to the government certain misconduct (*i.e.*, violation of a criminal conflict of interest law, false claim, or significant overpayment)
  - *“any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor”*

# Basics

- *Evidence*
  - Suspension: *“adequate evidence”*
  - Debarment: *“preponderance of the evidence”*
  - *“from any source”* (e.g., competitor, IG, contracting officer, newspaper, etc.)
  - More on this later

# Basics

- Effect of FAR listing
  - No *new* contracts, orders, option exercises, or contract extensions; agencies cannot solicit offers from, award contracts to, or consent to subcontracts with; no “discussions” or placement in competitive range
    - Cannot act as agent, representative, or surety
  - Continuation of current contracts
    - Agencies “may continue contracts or subcontracts . . .” (*e.g.*, termination not required). The prevailing practice is not to terminate.

# Basics

- Effect of listing cont'd.
  - OMB Common Rule
    - Excluded person may not act as a ***principal***\* under a covered transaction
    - Preexisting transactions may continue but agency practice has been to scrutinize and then terminate some existing agreements

**\*Principal** defined: officer, director, owner, partner, principal investigator or other person with management or supervisory responsibility, or a consultant or other person, whether or not employed by the entity or paid with Federal funds, who is in a position to handle Federal funds, influence or control the use of such funds, or occupies a technical or professional position capable of substantially influencing the development or outcome of performance

# Basics

- Effect of listing, cont'd.
  - Subcontracts at any tier
    - FAR: over 30K, *except for COTS*
    - OMB Common Rule: over 25K, no COTS exception

# Basics

- Effect of list, cont'd.
  - Collateral consequences
    - State and local procurements reciprocity
    - Security clearances
    - Export licenses
    - Commercial customer orders – many give effect to federal EPLS through their purchasing policies

# Basics

- **Ten mitigating factors under the FAR**
  1. Effective standards of conduct/internal controls at the time of the misconduct
  2. Did the contractor disclose?
  3. Has the contractor fully investigated **and** shared the results with the government?
  4. Has the contractor fully cooperated?
  5. Has the contractor made full restitution?
  6. Has the contractor taken appropriate disciplinary action?
  7. Has the contractor adopted remedial measures?
  8. Has the contractor adopted new control procedures and ethics training programs?
  9. Has there been adequate time to eliminate the circumstances that led to the misconduct?
  10. Does management recognize the seriousness and have they implemented programs to prevent a recurrence? **READ: A Demonstrable Ethical Culture**
- ***NOTE: none of the 10 involves arguing the facts (more on this later)***

# Basics

- **Nineteen mitigating factors under the OMB Common Rule**
  1. The actual or potential harm of the misconduct
  2. The frequency or duration of the misconduct
  3. Whether there is a pattern or prior history of wrongdoing
  4. Whether there has been a prior listing
  5. Whether there has been a prior Administrative Agreement
  6. The role of individuals in planning, initiating or carrying out the misconduct
  7. Whether the entity/individual has accepted responsibility/recognized the seriousness
  8. Full restitution
  9. Full cooperation, including whether there was a disclosure and when the cooperation began

# Basics

- **Nineteen mitigating factors under the OMB Common Rule, cont'd.**
  10. Whether the misconduct was pervasive
  11. The kind of positions held by the individuals involved in the misconduct
  12. Whether the **principals** tolerated the misconduct (see broad definition)
  13. Appropriate corrective or remedial measures, including ethics program and training
  14. Whether there was a voluntary disclosure
  15. Whether there was a full investigation **and** the results have been shared
  16. Whether there were effective standards of conduct and internal control systems in place at the time of the misconduct
  17. Whether there has been appropriate discipline
  18. Whether there has been adequate time to eliminate the circumstances leading to the misconduct
  19. "Other factors that are appropriate to the circumstances of a particular case."

# Today's Landscape

- Increased activity due to
  - Increased inter – and intra- agency cooperation (more information available to SDOs)
  - Reporting requirements
  - Reports of contractor misconduct
  - Agency response to Congressional criticisms

# Increased Activity

- Approximate doubling of DoD proposed debarments in FY10 - FY11
  - Air Force, Army, Navy, and DLA
- Others, including SBA, GSA, USAID, becoming more active
  - State Department
    - 0 in FY09
    - 5 each in FY10 and FY11
    - 19 in FY12 (as of April 17, 2012)

# Increased Agency Cooperation

- Sharing of information between IGs, SDOs, DOJ
  - Sept. '11 report by the CIGIE Suspension and Debarment Working Group
    - Need to increase S/D to protect federal funds
    - Stressed availability and viability of fact-based actions, referrals from audits & inspections
    - Encouraged assignment of dedicated OIG personnel, use of investigative audit/inspection reports to identify S/D candidates, enhancements to OIG referral policies

# Reporting Requirements

- More required information, increased likelihood of fact-based exclusions
  - Mandatory disclosure
    - Be prepared! Disclosures will go to SDOs *immediately*
  - FAPIIS

# 2011 S/D Spotlight: Gov't Studies and Reports

- July - DoD IG
- August – GAO
- August – Wartime Contracting Commission
- September - CIGIE
- October – DoD report on contracting fraud
- November – OMB memo
- December - OUSD Memo

# July '11 DoD IG Report

- Title of the report says it all
  - *“Additional Actions Can Further Improve the DoD Suspension and Department Process”*
- Critical of military services (but not DLA)
  - COs not referring “poorly performing contractors,” meaning “poorly performing contractors may still be receiving Federal contracts.”
  - Potential for more fact-based S/D if services CO’s were more engaged with S/D process

# August '11 GAO Report

- “Non-robust” S/D programs at Commerce, HHS, State, Treasury, and FEMA
- Factors for successful S/D programs (read more S/D)
  - dedicated S/D staff
  - detailed S/D guidance
  - systems to encourage referrals
- ISDC struggles to meet its directives because it relies on voluntary agency participation and has limited resources

# August '11 Wartime Contracting Commission Report

- *Transforming Wartime Contracting*
  - “Agencies do not use suspension and debarment processes to full effect.”
  - Cited complexity of S/D procedures as a reason for lack of use – providing hearing on disputed facts difficult if based on disputed facts in a contingency environment
- Recommended
  - Requiring written rationale for not pursuing S/D
  - Increased use of S/D (nix admin agreements)
  - Revise regs to lower procedural barriers to contingency S/D

# November '11 OMB Memo

- Stated agencies have failed to adequately use S/D
- Directed agencies to appoint a senior accountable official to
  - Review internal policies, procedures, and guidance to ensure agency is protecting gov't interests and taxpayer funds by effectively using S/D where appropriate
- Use relevant information sources to prevent awards to non-responsible parties
- Take prompt corrective action when improperly made award is identified

# December '11 OUSD Memo

- Referenced OMB Nov '11 memo, and appointed SDOs the Senior Accountable Officials
- Reserved remaining tasks for Defense Procurement and Acquisition Policy office
- Released statistics on DoD S/D

# Congressional Reaction

- Legislative “fixes”
  - Pushing automatic S/D – Appropriations Act, Contingency Contracting Reform, FCPA
- Hearings focused on need to exclude contractors
  - SDOs trying protect discretion
- Letters to agency heads “directing” S/D, either generally or against specific entities

# 2012 Consolidated Appropriations Act

- Consolidated 9 appropriations bills - S/D provisions in 5
- Prohibit use of funds for contract, grant, cooperative agreement, loan, etc. if corporation:
  - Convicted of felony criminal violation of any federal law
  - Within the preceding 24 months
  - Where the agency is aware of the conviction
- *UNLESS* the agency has considered S/D and made the determination further action is not necessary to protect the interests of the gov't
- Differences between sections – some include convictions of officers or agents of corporation, state law violations

# Contingency Contracting Reform Act

- Introduced by Senators McCaskill & Webb
- Section 113 - automatic suspension for:
  - If a contractor is charged with a criminal federal offense related to the performance of a contract related to “overseas contingency operations” for the Department of Defense, Department of State, or U.S. Agency for International Development.
  - If the head of one of the above named agencies makes a final determination that the contractor failed to pay or refund amounts due or owed to the federal government in connection with an “overseas contingency operation.”
  - If the federal government alleges fraud against a contractor in a civil or criminal proceeding related to a federal contract, whether or not connected to “overseas contingency operations,” and whether or not the alleged acts were committed by the contractor, its employee, affiliate, or subsidiary, or any business owned or controlled by the contractor.

# April 2012 Testimony on the CCRA

- Patrick Kennedy, Under Sec for Mgmt at DOS
  - Office of the Procurement Executive, State's SDO, significantly strengthened S/D processes
  - Do not need a separate S/D staff as proposed by section 112
  - Already increasing use of S/D
  - Favors discretion
    - Reasoned decision by SDO based on totality of information favorable to automatic suspension in section 113
    - Automatic exclusion will likely lead to due process challenges and court action that could delay necessary action

# Steps You Can Take Now

- Mitigating factors to S/D are essentially a snapshot of the contactor's ethics/compliance program and culture
- Ensure your ethics and compliance program is robust
  - Does it adequately address the risks your company faces?
  - Does the ethics and compliance officer have adequate resources to address those risks?
  - ECO independence?
  - Values-based ethics that inculcates core values?

# SDO's Expect More Than Compliance

- Not just mere compliance
  - Expectation is that contractors adopt values-based ethics programs
- Address culture holistically
  - Train employees to do more than just comply with rules
- Encourage employees to adopt a new way of approaching their work and issues they encounter
- Encourage employees to think before they act and to always “do the right thing”
- Give contractors a competitive advantage over those that simply follow the rules

# Core Values

- **Integrity** - maintaining a moral compass that guides you to do the right thing
- **Honesty / Candor** - being truthful with yourself and those you come in contact with
- **Respect** - respecting yourself and those you come into contact with
- **Transparency / Openness** - being open about your views and being open to others so they share their views with you
- **Trust** - maintaining confidences and being loyal and recognizing this is hard to gain but easy to lose
- **Communication** - being clear and concise in communications and when sensitive issues are discussed, communicating in person

# Timely Engagement of SDOs

- Engage the SDO promptly
  - Mandatory disclosures will go to SDOs immediately, so contact SDO early
  - FCA? FCPA? T for D? Tell the SDO before you get a show cause notice or notice of proposed debarment
  - Keep SDO informed during ongoing investigations

# S/D Toolkit (contemporaneous, not post-hoc)

- Documentation
  - Policies, procedures, training material, messages demonstrating the right “tone from the top,” etc.
- Company spokesman
  - Identify **high-ranking** official knowledgeable about ethics/compliance program, capable of making a compelling, sincere, presentation to an SDO
- Counsel