



Softer Gov't Contractor Suspension Rule Boosts Reform Bill

By **Dietrich Knauth**

Law360, New York (June 14, 2012, 10:03 PM ET) -- A controversial provision that would automatically suspend government contractors accused of crimes has been stripped from the U.S. Senate's contracting reform legislation, a move experts say will preserve agencies' flexibility while still pressuring them to crack down on wayward contractors.

The new version of the Comprehensive Contingency Contracting Reform Act softens the automatic suspension rule into an automatic referral to suspension and debarment officials, and picked up five sponsors in addition to Sens. Claire McCaskill, D-Mo., and Jim Webb, D-Va., including Homeland Security Committee leaders Joe Lieberman, I-Conn., and Susan Collins, R-Maine.

In hearings on the bill, the automatic suspension rule had been consistently opposed by contractors as well as witnesses from the U.S. departments of Defense and State and the U.S. Agency for International Development, which said automatic suspension would gut agencies' discretion and put contractors at risk of being suspended without a full, fact-based inquiry.

In an April hearing, Richard Ginman, director of defense procurement and acquisition policy at the DOD, said efforts to automatically suspend or debar contractors would undermine the government's interest by opening it up to more protests and litigation.

"There's a good reason why everybody from the [Office of Management and Budget] to the DOD to the State Department to the contractors opposed this," said Alan Chvotkin, executive vice president and counsel at Professional Services Council, a trade group for contractors. "It's a bad idea. So we're very pleased to see Sen. McCaskill and the other sponsors of the bill recognize that and make a significant change to the bill in that regard."

Because suspension can have business-threatening ramifications for contractors, federal suspension and debarment officers need to seriously consider all the facts and mitigating factors, said Peter Eyre, a counsel in Crowell & Moring LLP's government contracting practice.

"A problem with bright lines is that they don't give suspension and debarment officials the ability to weigh the facts and circumstances," Eyre said. "And I think that's a legitimate concern from the contractor community."

The change from automatic suspension to automatic referral is consistent with government reports and feedback from the U.S. Government Accountability Office and DOD inspector general, which recommended preserving agencies' flexibility on suspension and debarments, according to Eyre.

While the Senate bill moved away from automatic suspensions, it still carries the implicit assumption that agencies must do more to suspend more companies, Eyre said.

"There has been a lot of pressure from the Hill, from OMB, and from GAO to do fact-based suspensions more willingly," Eyre said. "There is an expectation that there will be more suspensions and debarments because SDOs have more tools and more information that will potentially lead to more suspensions and debarments."

The bill also would shake up agencies' internal structure, requiring every agency to have at least one full-time, dedicated suspension and debarment official with enough authority that he or she would not have to report to either the agency inspector general or to its acquisition department. Currently, only the U.S. Air Force, Navy and Environmental Protection Agency have full-time, dedicated suspension and debarment officials who have no other job duties.

GAO has reported that several agencies simply do not have any expertise in suspension and debarment, and Chvotkin said that congressional spotlight, along with recent guidelines from the OMB, could shore up the weaknesses in agency suspension and debarment programs.

"I'm hoping that there will be increased knowledge and capabilities in suspension and debarment officials across government," Chvotkin said. "We're not there yet."

The Project on Government Oversight, a government spending watchdog, acknowledged that automatic suspension has been a controversial idea and hoped that the revised bill, with its increased bipartisan support, could better protect the government and taxpayers from risky contractors and speed up suspension decisions.

"Waiting months or years for the conclusion of criminal, civil or administrative proceedings works against the public interest," POGO counsel Scott Amey said. "The addition of bipartisan cosponsors and the inclusion of some of the provisions in the defense authorization bill are proof that Congress is serious about improving contractor accountability measures in combat operations."

The revised bill also rolled back a limitation on subcontracting tiers that DOD and State Department witnesses had slammed as unworkable. The original bill would not have allowed any levels of subcontracting beyond the first tier, in an effort to boost visibility into government spending, after reports found that some U.S. cash ended up in the hands of insurgents after passing through a maze of subcontracts.

The bill is a direct response to the recommendations of the bipartisan Commission on Wartime Contracting, which reported in August that the U.S. wasted between \$31 billion and \$60 billion out of the more than \$200 billion spent on government contracts related to the wars in Afghanistan and Iraq.

Lieberman said the bill would help curb poor contracting practices for the next contingency by forcing agencies to improve planning and oversight of overseas contracts.

"Contracting in support of our war efforts too often has been carried out by the seat of our pants," Lieberman said. "Poor planning and sloppy oversight of contractors only lead to wasteful projects. This bill will establish clear lines of responsibility within the government for carrying out wartime contracting and will also help ensure that we don't do business with contractors who perform poorly or engage in misconduct."

--Editing by John Quinn and Richard McVay.

All Content © 2003-2012, Portfolio Media, Inc.