Weathering the Rough Seas of Regulation
Suspension & Debarment
Mitigating the Increased Risk

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Introduction

• Latest Statistics and Legislative Developments
• Blossoming Causes
• Best Practices
• Mandatory Disclosure
### Continued Increase in S/D Activity

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Continued Increase in S/D Activity

• More show cause letters
• More referrals
  – Focus on coordination of remedies, automatic/mandatory referrals, and parallel proceedings
• More actions focused on individuals
• More active civilian agency S/D programs
  – DHS, Education, Transportation, VA
Legislative Developments

• Recent mandatory exclusions:
  – VA debarment for firms that misrepresent status for purpose of VA’s Veterans First Contracting program
  – Generally prohibit use of funds to enter contracts or other agreements with corporations that have unpaid federal tax liability, or that have been convicted of a felony under federal law within the preceding 24 months, unless the agency has determined that such action is not “necessary to protect the interests of the Government”

• Renewed focus on enforcement of existing mandatory exclusions?
Legislative Developments

• SUSPEND Act
  – On February 7, 2013, House Oversight Committee released discussion draft of legislation that would consolidate more than forty civilian agency suspension and debarment offices
  – Would create centralized "Board of Civilian Suspension and Debarment" in GSA on October 1, 2014
  – Focus on expedited processes and public availability of proceedings
The Expanding and Diversifying World of Suspension and Debarment

• One size does not fit all; little coordination between agencies leads to differing goals and philosophies

• Different agencies employing significantly different approaches to S/D process
  – Amount of focus on individuals vs. companies
  – Frequency of use of show cause letters vs. direct notices of proposed S/D
  – Different views on acceptable remedial measures
S/D Officials Moving into New Areas of Law

• S/D Process no longer reserved for criminal convictions, FCA violations, and clear cases of fraud

• SDOs becoming bolder about expanding the interpretation of § 9.406-2(a)(5):
  
  “(5) 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.”

• This is where it starts to get scary...
Other Areas of Expansion

• Individuals being suspended for “having reason to know” that other employees were engaging in improper conduct, but not reporting that conduct

• SDOs have stated intent to use S/D process in response to “dodgy litigation tactics” in contract disputes with the Government

• SDOs looking reviewing contractors when contracts get terminated for default due to poor performance
Best Practices – Minimizing S/D Risk

• Robust compliance program
  – Scaled to size of business
    • internal reporting mechanism
    • ethics officer independence
    • tone from the top
    • gov’t contract/grant policy
    • training

• Identify agency with responsibility
  – Lead agency - dominant financial interest?

• Early engagement with SDO
Best Practices – Minimizing S/D Risk

• Bad things happen – respond appropriately
• S/D mitigating factors are a guide
  – Effective standards of conduct and internal control systems
  – Timely disclosed
  – Fully investigated
  – Full cooperation
  – Paid fines, full restitution
Best Practices – Minimizing S/D Risk

• Mitigating factors (continued)
  – Appropriate disciplinary actions
  – Remedial measures
  – Revised review & control procedures and ethics training programs
  – Adequate time to eliminate circumstances that led to exclusion
  – Management understands seriousness of misconduct; implemented programs to prevent recurrence
Best Practices – Preparing for S/D

• Businesses dependent on government contracting/grants should be ready
  – Delay may be fatal

• Emergency toolkit
  – Gather compliance materials
  – Identify company official to make present responsibility presentation
  – Identify counsel
Best Practices – Responding to SDOs

• Know the process
  – Varies by agency

• Don’t litigate
  – Identify common ground
  – Compliant, ethical procurement system

• Don’t argue the facts unless clear error

• Use mitigating factors to frame response

• Know SDO’s expectation for administrative agreements

• “Only the penitent man will pass”
Mandatory Disclosure

• Know agency process/practice (DoD vs. GSA)
  – DoD – immediately informs SDO
  – GSA – informs SDO after investigation

• Proactive engagement of SDO?

• Lead Agency

• Drafting Disclosure
Questions?

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