



## 29TH ANNUAL OUNCE OF PREVENTION SEMINAR

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

	FY 2010	FY 2011	FY 2012
<b><u>Air Force</u></b>			
Suspensions	83	148	83
Proposed Debarments	159	139	401
Debarments	111	80	266
<b><u>Army</u></b>			
Suspensions	133	112	195
Proposed Debarments	170	235	284
Debarments	125	179	186
<b><u>Navy</u></b>			
Suspensions	25	24	47
Proposed Debarments	78	80	152
Debarments	38	92	146

# 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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