Suspension and Debarment

The ability to bid and perform federal government contracts or federally funded state and local contracts are a contractor’s life blood. As a result, suspension and debarment (S&D) are like capital punishment because they make the contractor ineligible to receive these contracts. This article discusses the regulatory basis for S&D, its procedures and recommendations to avoid S&D.

Regulatory Basis

S&D are designed to protect the government (federal, state and local) by ensuring that they only enter into contracts and financial relationships with responsible entities. S&D applies to: (1) procurement contracts directly with the federal government which are governed by the Federal Acquisition Regulation (FAR) and (2) nonprocurement related contracts in which the federal government has provided financing, such as when a federal agency provides funds to a state agency. For example, Federal Highway Administration provides funding to state departments of transportation for highway projects. The nonprocurement related contract regulations are codified in the Code of Federal Regulations at 2 C.F.R. Part 180, and are referred to as the “Nonprocurement Common Rule (NCR) which has been adopted by most federal agencies as the basis for their government-wide nonprocurement S&D. In addition to these regulations, there are numerous federal and state statutes which also provide for S&D.

Causes For Debarment

The FAR lists various causes for debarment such as conviction of or civil judgment for fraud, violating bidding statutes, bribery, false statements, violation of the Buy American Act, a serious violation of the terms of a government contract, or any other cause so serious that it affects the present responsibility of a government contractor or subcontractor. A complete list of the causes for debarment is found at FAR 9.406-2.

The NCR causes for nonprocurement debarment are similar to the FAR, but they also include some unique grounds not included in the FAR, such as, knowingly doing business with an ineligible person, failing to pay debts to a federal agency, willful violation of a statutory or regulatory provision applicable to a public agreement and violating a material provision of a voluntary exclusion agreement or any suspension or debarment settlement agreement. A complete list of the causes for debarment of contractors for nonprocurement contracts is found at 2 C.F.R. 180.800.

Suspension is a temporary disqualification of a firm from contracting directly with the federal government or in the case of nonprocurement transactions from participating in government assisted programs. A suspension will last until the investigation, litigation or agency determination has decided the facts relevant to the grounds for debarment. Both sets of regulations acknowledge that suspension is a serious action that should only be imposed on the basis of an indictment or “adequate evidence” that a cause for debarment exists and where immediate action is necessary to protect the public interest. However, “adequate evidence” burden of proof for suspension is a lesser standard than the preponderance of the evidence that is required for debarment.

The S&D Process

The Notice: After an agency becomes aware of a cause for S&D, it is required to issue either a notice of suspension or notice of proposed debarment. The notice should state the entity has either been suspended or is being considered for debarment, the basis for the agency action and its government-wide effect.

The Response: After receiving the notice, the respondent has 30 days to submit information and argument in opposition to the suspension or proposed debarment. The response should include specific facts that contradict the statements in the notice. In addition to submitting any contradicting facts, the NCR (but not the FAR) requires the respondent to also inform the agency of any prior exclusions by federal, state or local agencies and any additional criminal or civil proceedings not included in the notice and all of the entity’s affiliates.

The Test for Debarment – Present Responsibility: Debarment is an administrative action designed to exclude nonresponsible contractors from government contracting. It is not to be penal
in nature. The mere existence of a cause for debarment does not require a debarment. All facts and circumstances must be taken into account to determine whether debarment is necessary in the public interest.

The test for debarment is the contractor’s present responsibility, a term of art which includes the honesty and integrity of the contractor as well as its ability successfully to perform the contract. In a S&D proceeding, the contractor may be found presently responsible by demonstrating that the alleged cause for debarment has not been established. Also, in situations where a cause of debarment has been established, the contractor may still be found presently responsible by demonstrating the mitigating factors it has taken steps to ensure that the wrongful act will not recur.

Mitigating Factors in the Response: Before arriving at any debarment decision, the debarring official is required to consider the seriousness of the contractor’s acts or omissions and any remedial measures or mitigating factors that are relevant. While the existence or nonexistence of mitigating factors or remedial measures are not necessarily determinative of a contractor’s present responsibility, the FAR and NCR state what factors may influence the debarring official’s decision. These mitigating or aggravating factors include such items as the actual or potential harm, the frequency or duration of the incidents, pattern or history of wrongdoing, any previous exclusion, paid fines, cooperation in an investigation, corrective action, etc. A complete list of all mitigating or aggravating factors are contained in the regulations.

An S&D Hearing: The respondent will be entitled to a hearing when (1) material facts are in dispute, (2) the S&D action is not based on an indictment, conviction or civil judgment, and (3) substantial government interests in pending or contemplated legal proceedings will not be prejudiced. If these conditions exist, the debarring official will refer the disputed factual issues to a fact finder to conduct an independent proceeding and submit written findings of fact to the debarring official which are binding unless that official determines that they are arbitrary and capricious or clearly erroneous.

S&D Decision: Once any issues of material fact have been resolved, the agency must make a decision within 30 days in a procurement S&D proceeding under FAR or within 45 days in a nonprocurement S&D proceeding under the NCR. The debarring official may be asked to reconsider the debarment decision or to reduce the time period or scope of the debarment, but the request must be in writing and supported with documentation.

Recommendations to Avoid S&D

S&D causes are based on actions such as fraud, criminal conduct, or other offenses indicating a lack of business integrity or honesty which affect the contractor’s present responsibility. In order to avoid S&D, note the following recommendations: have a written code of conduct and business ethics, implement the code through company training and educational programs, be proactive if knowledge of misconduct occurs, initiate or cooperate in any investigation, and take remedial measures if needed to prevent a recurrence.