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Suspension & Debarment: New Trends and the Continuing Due Process Debate

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In a recent interview with Federal News Radio, **Rob Burton**, a thirty-year veteran of federal procurement law and policy and a partner in Venable's **Government Contracts Practice Group**, discussed the recent upward trend in suspension and debarment actions caused by a recent push by Congress and others to increase enforcement. The radio interview can be downloaded by **clicking here**. It is important that companies doing business with the government be aware of these trends, their potential impact, and the resources Venable offers to quickly resolve these actions and minimize the impact on contractors.

The Increase in Debarments and the New Ineligibility Laws

According to the Interagency Suspension and Debarment Committee, the number of suspensions increased by nearly 200 from 2009 to 2010, and the number of debarments increased by 150, an approximately 10 percent increase, over the same period. Though it is important to note that not all agencies use the same method for calculating these numbers, the overall trend is absolutely toward greater use of suspension and debarment. In fact, many in Congress and even some agency officials believe that suspension and debarment should be employed as a way to punish contractors who are not responsible, even though regulations explicitly provide that these actions should be used only to protect the interests of the government, not to punish contractors. *See, e.g.,* 48 C.F.R. § 9.402(b).

A particularly disturbing facet of Congress's recent push for increased debarments is the recent uptick in attempts to impose automatic debarment provisions — the latest effort being an automatic ineligibility for federal contracts and grants for felony convictions contained in appropriations measures. What is particularly troubling is that there is no consistency between these appropriation acts. Some call for automatic ineligibility if the company is convicted of a felony, but do not specify whether this applies to state, as well as federal, felonies. Some only apply if the company itself is convicted of a felony, while others impose automatic ineligibility if any of the company principals are convicted. Further, some appropriations measures allow companies to seek redress from any suspension and debarment official, whereas other measures require the company to approach the agency where it is seeking current work. This of course forces companies to visit each agency's suspension and debarment official as opportunities arise with the various agencies. This piecemeal approach completely ignores the "lead" agency concept, whereby for years agencies would defer to the agency with the greatest interest in a particular contractor.

The Continuing Due Process Debate

Even more problematic for companies facing debarment actions is the lack of due process afforded before a company's ability to solicit new work or renew existing contracts is cut off. As the system currently operates, once a company receives a notice of proposed debarment, it is barred from soliciting new work from the government until the final decision has been reached. This process can last anywhere from six months to a year and sometimes lasts longer than the eventual period of debarment itself.

Regulations and constitutional due process protections have been interpreted to require that contractors be given notice, an opportunity to respond in writing or in person, and a hearing, if the agency decides that there are factual disputes material to the final determination before a suspension or debarment goes into effect. *Kiewit v. U.S. Army Corps of Engineers*, 534 F. Supp 1139, 1153 (D.C. Dist. 1982); *Lion Raisins v. United States*, 51 Fed. Cl. 238, 250 (Fed. Cl. 2001); see 48 C.F.R. § 9.406. Furthermore, the existence of suspension, a procedure designed to provide temporary protection of government interests upon a showing that a contractor poses an immediate risk, alleviates the need for proposed debarments to have an immediate effect. *See* 48 C.F.R. § 9.407-2. However, aside from some recent case law pertaining to suspensions, *see Agility Defense and Government Services, Inc., et al. v.*

U.S. Department of Defense, et al., No. CV-11-S-4111-NE, 2012 WL 2480484 *9 (n. 53) (N.D. Ala. Jun. 26, 2012) (stating "to allow the government to suspend a contractor indefinitely, without suspicion, raises due process concerns"), neither the judiciary nor Congress has settled this issue, and agencies continue to use the constitutionally questionable practice of imposing proposed debarments without due process.

Premature and hasty issuance of proposed debarments not only is fundamentally unfair and extremely harmful to companies that rely on government contracts for much of their business, but also harms the general public, whose tax dollars are being wasted when companies are excluded from the competitive process. A balance needs to be restored between fairness to contractors and the government's interest in ensuring that companies receiving contracts act responsibly and with integrity. This could be done through increased use of show cause or "cure" letters, where an agency tells a contractor to fix something or face debarment. Unfortunately, agencies do not use these letters as often as one would hope, and some agencies do not use them at all. Ultimately, Congress is in the best position to ensure that contractors are afforded sufficient due process in debarment proceedings. However, this is not likely to happen anytime soon, because appearing soft on contractors accused of misconduct is not a politically popular position, especially in an election year.

What Contractors Can Do

In the meantime, Venable helps contractors navigate this uncertainty and identify their risk of facing a debarment proceeding. We also assist companies in understanding and addressing the impact of the new automatic ineligibility laws. Venable has a successful record of representing individuals and companies in debarment proceedings before a wide range of agencies, limiting their time on the sidelines and getting them back into the game.

For more information, please contact the authors of this alert or any members of our **Government Contracts Practice Group**.