INTRODUCTION AND OVERVIEW OF SUSPENSION AND DEBARMENT

A. Introduction

Suspension and debarment are actions that federal agencies take to disqualify entities or persons deemed not “presently responsible” from doing business with the government. Suspension refers to the temporary disqualification of a person or company for up to eighteen months, typically during the pendency of an investigation and ensuing legal proceedings.¹ Debarment, meanwhile, refers to a final decision to disqualify a person or company for a fixed period, generally not to exceed three years, although longer disqualifications are permitted where circumstances warrant.² Both suspension and debarment have a government-wide effect: if an entity is suspended or debarred by one agency, it is prohibited from obtaining any federal contracts or participating in nonprocurement transactions (e.g., grants, cooperative agreements, leases, loans, etc.). Many state and local governments also have adopted similar procedures to exclude potential contractors and participants³ from doing business with their governments, as have quasi-governmental organizations, such as the World Bank.

¹ FAR 9.407-4(a), (b); 2 C.F.R. § 180.700 The period of suspension typically does not exceed twelve months, but it may be extended to eighteen months upon the Department of Justice’s (DOJ) request. However, where suspension is based on an indictment, it may continue until the completion of legal proceedings. FAR 9.407-4(b); 2 C.F.R. § 180.760.
³ In this book, the term contractor generally refers to corporations, other entities, or individuals that seek or hold, directly or indirectly (i.e., through affiliates), one or more federal procurement contracts or subcontracts governed by the Federal Acquisition Regulation (FAR), codified in Title 48 of the Code of Federal Regulations. The terms participant and recipient generally refer to corporations, other entities, or individuals that seek or hold assistance awards or otherwise participate in nonprocurement transactions, as defined at 2 C.F.R. § 180.970, governed by regulations codified in Title 2 of the Code of Federal Regulations. The terms entity and respondent generally refer to both procurement contractors and nonprocurement participants or recipients.
The government imposes suspension or debarment for two reasons: first, to protect the government from business relations with entities or persons it considers dishonest, unethical, or otherwise irresponsible; and second, to induce compliance with national socioeconomic programs and initiatives. Especially in contracting, the two purposes reflect the government’s dual capacity: the government acts both as a sovereign and as a contracting party. The government accomplishes these objectives through both discretionary suspension and debarment actions, in which a suspending and debarring official (SDO) determines that sufficient evidence exists to find an entity not presently responsible, and mandatory suspension and debarment actions, in which exclusion is legislatively mandated upon violation of a particular law, such as the Clean Water Act or Clear Air Act.

Suspension and debarment actions may have devastating consequences for those whose business or livelihood depends on eligibility to receive contracts, grants or benefits from the government. Indeed, in the federal contracting community, debarment is commonly referred to as the “corporate death penalty”—and for good reason. Companies that are debarred often suffer

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6 See, e.g., Jessica Tillipman, A House of Cards Falls: Why ‘Too Big to Debar’ Is All Slogan and Little Substance, 80 Fordham L. Rev. 49 (2012) (describing debarment as “the corporate equivalent of a death sentence”); Stefani Bonato, Death by Affiliation: The FAR Reach of Suspension and Debarment, Construction Executive: Risk Management (Apr. 7, 2014) (“The corporate death penalty, as suspension and debarment is often referred to, can kill more than just a contractor; it has the potential to wipe out an entire corporate family.”); Lauren Caplan,
crippling financial, reputational, and operational consequences, particularly where the debarment is extended to affiliated entities. Most obviously, a debarred or suspended company is prohibited, effective immediately, from receiving new awards (including task orders) or extensions of existing contracts. There are narrow exceptions to this prohibition in the event of “compelling reasons,” and completion of existing contracts is permitted, but in most cases a suspension or debarment constitutes a total and immediate cessation of new government work.

This difficulty is compounded by the numerous and far-ranging collateral consequences of debarment. Federal suspension and debarment actions are publicly reported on the System for Award Management (SAM), the federal government’s centralized online procurement portal. Because this information is readily accessible to prospective customers or business partners, debarred entities often suffer adverse effects outside of the federal contracting context, ranging from generalized reputational harm to specific consequences, such as reciprocal exclusion actions by state or local governments or the denial of financing from private banks that discover the debarment as part of underwriting due diligence. Moreover, companies that have been debarred frequently are forced to confront acute operational issues, ranging from cash-flow issues to workforce attrition as they are forced to trim their workforce to reflect reduced future opportunity and other employees take positions with employers they perceive to be more stable. And for individuals, the effects can be even more dire: a suspension or debarment action can effectively render an individual unemployable in the federal contracting industry.

__Debarment: Not Just a Contractor’s Concern__, Holland & Hart (May 2014) (noting that companies that do regular business with governments have “long considered debarment a death sentence”).

7 FAR 9.405; 2 C.F.R. § 180.130(a).

8 FAR 9.405-1, 9.406-1(c); see also 2 C.F.R. § 180.135.