

GAO Confirms Suspension and Debarment Activity on the Rise

Suspension and debarment activity is on the rise, even among agencies that do not traditionally suspend and debar contractors and recipients of Federal assistance.

Suspension and debarment activities at six agencies that had “few or no” procurement-related suspensions or debarments prior to 2010 increased these actions 14 fold between 2010 and 2013 – from 19 to 271 – according to a recent Government Accountability Office (GAO) report.¹ The six agencies that GAO surveyed were the Departments of Commerce, Health and Human Services, Justice, State, Treasury, and the Federal Emergency Management Agency, each of which was the subject of an earlier GAO report that was critical of the agencies’ lack of suspension/debarment activity.²

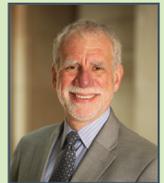
In addition to the increased activity at the surveyed agencies, the number of suspensions and debarments at the Veterans Administration more than doubled – increasing from 34 actions in 2011 to 73 actions in 2013. Activity is on the rise at least in part because of the heightened level of Congressional scrutiny. In response, the agencies have added staff dedicated to the suspension and debarment function, and increased training and awareness of suspension and debarment officials as well as agency investigators and auditors. In the case of Justice, a 2012 memorandum from the Attorney General to all litigating authorities and the FBI, reminding them to consider whether the facts of a case warrant exclusion, has also played a role. Agency Inspectors General are also better coordinating with suspension and debarment officials; a number of the agencies established monthly meetings with agency OIG, general counsel, and ethics officers to track and discuss referrals for suspension or debarment.

It is critical that companies that contract with any of these agencies, or that rely on these agencies for grants, cooperative agreements, scholarships, or other assistance, be aware of the dramatically increased scrutiny these agencies are turning toward suspending or debaring companies that demonstrate a lack of business integrity. Companies that are under investigation for fraud, anti-trust violations, unfair trade practice, or “embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax

1 Agencies Have Taken Steps to Improve Suspension and Debarment Programs (May 2014), available at <http://www.gao.gov/assets/670/663359.pdf>.

2 Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved (August 2011), available at <http://www.gao.gov/assets/590/585277.pdf>.

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evasion, violating Federal criminal tax laws, or receiving stolen property,”³ may be suspended from Federal contracting and assistance for up to 12 months if the agency determines that there is adequate evidence of a violation, even if the company has not been charged. If a company is convicted of any of these violations, it may be debarred from Federal contracting for up to three years, depending on the egregiousness of the violation.

If a company is under investigation or has reached a settlement relating to any of these violations with any of these agencies, the company should consider contacting the agency suspension and debarment office and presenting to that office facts that demonstrate that, notwithstanding any underlying allegations, the company is presently responsible for purposes of receiving the benefits of dealing with the Federal government. Indeed, this applies to all Federal agencies; GAO reports that government-wide, the number of suspensions and debarments more than doubled between 2009 and 2013 – increasing from 1,836 to 4,812.

Of course, an increase simply in the number of suspensions and debarments tells little about whether the agencies actually are doing a better job of ensuring that they contract with or provide assistance to presently responsible entities. However, given the level of scrutiny of agencies’ performance in this area, contractors and recipients of federal assistance should expect the current trend of increased suspension and debarment activity to continue.

³ See FAR 9-407-2 for the complete list of grounds for suspension.

For more information on suspension and debarment generally, and for assistance in presenting to agency suspension and debarment officials, please contact your Arnold & Porter attorney or any of the following attorneys:

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