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NEWSLETTER

Suspension & Debarment Attention Continues in First Half of 2013

Summer 2013

Recently, suspension and debarment (S&D) has been a hot topic in the annual defense authorization process in Congress. For fiscal year (FY) 2013, for example, Section 861 of the National Defense Authorization Act (NDAA) included (1) a requirement for separate suspension and debarment officials (SDOs) within the Department of Defense (DoD) for the Army, Navy, Air Force, and Defense Logistics Agency, and separate SDOs for the Department of State (DoS), and the United States Agency for International Development; (2) a prohibition on SDOs reporting to or being supervised by an acquisition function or the agency Office of Inspector General (OIG); (3) a requirement that the SDOs have the staff and resources "adequate for the discharge of suspension and debarment responsibilities"; (4) a mandate that SDOs document the basis for their final decisions; and (5) a requirement that SDOs consult with agency General Counsel regarding referral processes. Section 1682 amended 15 U.S.C. § 645 to provide that businesses that make misrepresentations that they are a "small business concern" or satisfy the requirements for small business preferences, such as HUBzone status, to receive a federal contract or subcontract "shall" be subject to suspension or debarment under Federal Acquisition Regulation (FAR) subpart 9.4.

In 2013, looking ahead to the FY 2014 NDAA, S&D has continued to draw legislative attention. The first six months of the year saw two proposals of note, both of which would reshape the S&D functions now within many agencies. One proposal would allow SDOs at DoD and the National Aeronautics and Space Administration (NASA) to enforce certain administrative procurement-fraud remedies internally. The other proposal would consolidate civilian agencies' SDOs into a

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single S&D review board.

Both proposals may be well-intentioned efforts to protect taxpayer dollars. But both proposals also reflect misunderstandings about the S&D processes and goals, which could ultimately leave contractors in untenable positions and fundamentally alter the role of SDOs.

Proposal to Grant Fraud Enforcement Authority to DoD and NASA SDOs

In a legislative request made to Congress, DoD and NASA have proposed allowing their SDOs to impose administrative fines upon contractors for submitting false claims of up to $500,000 or for making false statements. The proposal calls for a multi-step investigation and enforcement process:

- After investigating allegations of false statements or claims, an SDO can notify the Department of Justice (DoJ) of the SDO's intent to initiate an administrative recovery action.
- If DoJ approves, then the SDO notifies the affected contractor(s) of the alleged false claim(s) or statement(s). The contractor can respond with evidence and arguments within 30 days (or another agreed-to time period).
- Next, the SDO can decide whether a preponderance of the evidence in the record supports a finding of false claim(s) or statement(s); the SDO can also convene a hearing to resolve disputes over material facts. The legislative proposal does not prescribe hearing procedures but does require written decisions within 60 days of a hearing.
- A contractor ultimately found liable, with or without a hearing, may be subjected to fines of $5,000 per incident and penalties of up to two times the value of any false claims. SDOs' findings of liability would be reviewable under the Administrative Procedure Act.

DoD has for several years argued for this proposed remedial scheme because, in its view, many false claims and statements do not lead to recoveries for the specific programs involved—or at all in some cases. According to DoD, DoJ generally pursues only large civil False Claims Act (FCA) cases, and the existing administrative fraud remedies available under the Program Fraud Civil Remedies Act of 1986 (PFCRA or Act), 38 U.S.C. § 3801 *et seq.*, are too cumbersome to use. DoD and NASA have thus proposed essentially a streamlined PFCRA applicable to just those two agencies. (The proposal, in fact, calls for the new DoD and NASA-specific version of the PFCRA at 10 U.S.C. § 2751 *et seq.*)

The existing PFCRA procedures are similar to those proposed for DoD and NASA but with at least one critical difference that should concern contractors: The existing PFCRA requires much more independent review than does the proposed administrative program. The PFCRA allows investigations only by OIGs or other senior officials specified by the Act; the DoD-NASA proposal allows investigations within the agencies' SDO offices. The PFCRA requires senior agency officials independent from the investigating officials to approve forwarding a matter to DoJ for review; the DoD-NASA proposal does not. The PFCRA then requires DoJ-approved matters to be referred to an administrative law judge or equivalent hearing examiner for consideration of liability; the DoD-NASA proposal allows SDOs to determine both the need for an evidentiary hearing and liability. The DoD-NASA proposal, in effect, concentrates fact-gathering, review, and liability determinations in their SDOs—

with DoJ as the only outside review.

This proposed enforcement system framework thus offers contractors far less protection than does the PFCRA system. And it does so for much higher-value claims. The PFCRA limits administrative fraud remedies to claims of up to $150,000, less than one-third of the $500,000 limit set in the DoD-NASA proposal. Today, federal fraud claims that do not fall within the limits of the PFCRA are prosecuted by DoJ. In other words, today, for claims over $150,000, a defendant has the full opportunity to conduct discovery and present its defense before an impartial tribunal. Thus, whereas a $300,000 fraud claim is now subject to the full due process available in federal court, the DoD-NASA proposal would arguably provide less due process to a defendant responding to a DoD or NASA claim of the same size.

The streamlining of independent review should not be contractors' only concern. If DoD and NASA SDOs can *both* impose retroactive fines *and* order suspension or debarment, these SDOs will have substantial power over contractors appearing before them. Contractors would have to question how vigorously to fight findings of liability and proposed fines (or to negotiate settlements) in an administrative recovery with the same offices that would also determine whether the contractors should be suspended or debarred from receiving new awards across the federal government.

The proposal would also force contractors into inconsistent approaches when dealing with DoD and NASA SDOs on a single matter. In the main, contractors responding to a notice of proposed debarment or suspension work with the SDO office informally to demonstrate their present responsibility. This is largely because under FAR 9.402, the SDO is charged with protecting the Government's interests, not with punishing contractors. The FAR's mitigating factors, FAR 9.406-1, encourage contractors to acknowledge past failures, and then demonstrate to the SDO the additional steps they have taken to assure their present responsibility. (In a normal S&D matter, a hearing is rare.) This informal, more conciliatory approach likely will not be the best defense in responding to an administrative recovery alleging false claims or statements—for which the contractors' prior actions and the legal implications of them under the FCA may be in dispute. Thus, under this odd dynamic, contractors might concede past failures and bad acts while DoD and NASA SDOs wear one hat, then contest similar allegations when the SDOs wear their other hats. The DoD-NASA proposal leaves undefined how the SDOs should handle these competing approaches, if it can be done at all.

Finally, it is questionable, at best, whether SDO offices have the resources to assume these additional obligations. Most SDO offices are leanly staffed, and only recently has Congress declared that they should have "adequate" resources to perform their S&D responsibilities. In these days of budget limitations, expanding the role of the SDO to include actions that may, more often than not, entail evidentiary hearings seems unrealistic.

Despite these concerns, this proposal has gained some traction in Congress since being introduced by DoD and NASA in late April. As this article went to print, the Senate began considering an FY 2014 NDAA that included the proposal; while the full House passed its version of the 2014 NDAA that, in contrast, did not include the proposal. But whether the DoD-NASA proposal appears in the final 2014 NDAA enacted into law, in future NDAAs, or in other legislation, contractors should monitor this proposal for any advances toward

passage.

Proposal to Consolidate Civilian Suspension & Debarment Offices

The proposal to consolidate civilian SDOs into a single body was released in February 2013. Rep. Darrell Issa (R-CA), the chair of the House Oversight and Government Reform Committee, released draft legislation to consolidate civilian agencies' S&D functions into a new Board of Civilian Suspension and Debarment. The draft bill, the Stop Unworthy Spending Act (or SUSPEND Act), calls for the new Board to be housed in the General Services Administration; the Board would share resources with the Civilian Board of Contract Appeals.

The draft SUSPEND Act delegates most details about the Board to rulemaking, but does identify the purposes of consolidation, which include improving transparency and efficiency in handling S&D matters, assuring consistency and fairness in treating parties, and improving engagement with agency procurement personnel. The draft Act would also require a single set of regulations generally applicable to procurement and nonprocurement S&D matters—including a rule that Board determinations will be binding government-wide.

Contractors can reasonably question whether the proposed Board could achieve the draft SUSPEND Act's stated goals. For example, it is unclear how centralizing S&D matters in a single body will improve how efficiently S&D matters are handled or even how "efficiency" will be measured. It seems equally possible that centralized handling of matters from multiple agencies with competing priorities will actually slow down resolutions, leaving contractors waiting longer for final decisions on S&D matters. The Act also leaves unclear what it means for the Board to resolve matters more consistently and fairly than SDOs do currently. S&D matters inherently call for SDOs to exercise discretion in resolving fact-specific matters that turn on each agency's business needs and approaches and the present responsibility of contractors. Contractors could expect that what matters to one agency and SDO may be less important to another agency and SDO. A centralized, consistent Board may leave no room for such varying priorities. Indeed, a centralized Board may lack insight altogether into specific agency experiences and priorities. As with the DoD/NASA proposal discussed above, centralizing S&D functions seems likely to impair the informal resolution of S&D matters, because the centralized Board may have less familiarity with individual contractors or the agency's priorities or experiences with that contractor, all of which helps to resolve matters in a less formal manner.

The House Oversight and Government Reform Committee chaired by Rep. Issa held a hearing that included testimony on the proposed legislation on June 12, 2013. As this article went to print, Rep. Issa stated he would soon meet with the staff of ranking member Rep. Elijah Cummings (D-MD) to revise the draft before introducing the bill in the House.

Conclusion

This year's proposed legislation continues Congress' heightened attention to S&D. The focus of these proposed bills, however, is different from many earlier proposals. Rather than just encourage increased S&D actions and reporting, this year's proposals would reshape how civilian agencies' suspension and debarment is conducted

and what powers DoD and NASA SDOs have. They would, in other words, represent a significant shift in how S&D matters are currently handled. Changes of such magnitude require careful consideration. Whether the two proposals from this year receive that consideration remains to be seen.