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NEWSLETTER

Push to Consolidate and Expand Suspension and Debarment Continues on the Hill

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Furthering a trend, Congress has continued to give significant attention to the suspension and debarment (S&D) remedies available to federal agencies. Two bills introduced by members of the House Committee on Oversight and Government Reform (Committee) are at the center of the most recent developments: the revamped Stop Unworthy Spending Act (SUSPEND Act; HR 3345) and the Afghanistan Suspension and Debarment Reform Act (HR 2912). Both bills, which have bipartisan sponsorship, could alter how the federal Government considers and resolves S&D matters, including several significant changes that contractors should carefully monitor.

The SUSPEND Act

In October, the Committee considered and passed the SUSPEND Act, which would consolidate resolution of many S&D matters at a central Government board. (Earlier this year, the Committee's chair, Rep. (R-CA) Darrell Issa released a discussion draft of the Act, which we described in the last issue of *Government Contracts Issue Update*. The current bill has been revised from the discussion draft.) The SUSPEND Act aims to achieve the laudable goals of improving efficiency, effectiveness, and transparency of S&D. It aims to do so, however, by overhauling the current S&D practice that has developed incrementally and has taken on increased strength in recent years.

Today, S&D is decentralized within the Government. Agencies have their own suspension and debarment officials (SDOs), with some agencies having SDOs for individual activities or components rather than a single agency-wide SDO. Some SDOs have substantial staffs and operate independently; other SDOs handle S&D matters as only part of their duties. SDOs also vary in how and when they consult

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with program teams, contracting officers, offices of inspector general (OIGs), the Department of Justice (DOJ), and other interested parties before taking certain actions. Similarly, SDOs use different combinations of tools, such as show-cause letters and administrative agreements, in addition to the basic S&D remedies.

But despite these differences, there is one constant principle: S&D is a remedy to be used only to protect the Government from contracting with (or providing non-procurement funds to) firms and individuals lacking "present responsibility." S&D is not to be used as punishment for contractors' and individuals' prior bad acts.

The SUSPEND Act aims to centralize S&D without changing this core purpose of protecting the Government from contractors lacking present responsibility. Most notably, the Act would create a new Board of Suspension and Debarment (Board), housed within the U.S. General Services Administration (GSA), that would make S&D determinations that are "conclusive on a Governmentwide basis." The Act would require nonpartisan appointees to the Board but otherwise defers many details about the Board's operations to rulemaking. The Act further requires the Office of Management and Budget (OMB) to develop "one generally applicable regulation on suspension and debarment for procurement and nonprocurement programs." Thus, in addition to proposing a new forum for resolution of S&D matters, the Act also proposes a new regulatory regime, which may or may not resemble the current Federal Acquisition Regulation (FAR) provisions or Governmentwide non-procurement procedures.

Still, some existing practices may nevertheless continue. The bill would allow any agency (except GSA—ironically, one of the examples of effective S&D programs cited by prior Government Accountability Office (GAO) reports) to receive a renewable waiver from having the agency's S&D functions consolidated into the Board. An agency would need to satisfy several requirements to receive the waiver, which would be issued by the OMB. Several requirements appear reasonable: The agency must have a dedicated SDO, agency-specific S&D policies and procedures, and practices that encourage S&D referrals. Two other waiver requirements are more questionable:

- An agency with multiple bureaus, offices, or departments would have to consolidate S&D activities with a single SDO. Thus, such agencies can consolidate specialized SDOs, thereby eroding their SDOs' intimate understanding of components' businesses and contractors, or they can cede their S&D functions to the Board, which also may eliminate that intimate business understanding altogether.
- An agency would have to average 50 or more S&D dispositions (of any outcome) over three consecutive fiscal years before the waiver. The 50 S&D disposition requirement seems arbitrary and inconsistent with the premise of S&D as a remedy used only to protect the Government. In addition, the number of matters an SDO can consider is dependent on the number of matters referred to the SDO; a quota fails to consider that an SDO office does not control its workflow. Furthermore, setting any minimum may encourage agencies with immature or nonexistent S&D programs to churn through S&D matters in pursuit of a waiver. Agencies may have strong incentive to pursue waivers because, as the Act is drafted, agency S&D activities terminate on October 1, 2016. If an agency has not already qualified for a waiver, it is unclear whether it could ever meet the requirements to earn one after this date.

If the SUSPEND Act prompts many agencies to seek waivers, fewer agencies will have their S&D functions consolidated, and the more likely it is that the S&D landscape will remain a decentralized, agency-specific process. The Board, therefore, may ultimately turn out to be an outlier forum.

Contractors should nonetheless carefully evaluate several aspects of the revamped SUSPEND Act. First, the Board's rules may provide for proceedings resembling litigation, with formal rules of evidence and adversarial briefings, rather than the less formal procedures often now used by SDOs. Such a shift could drive up the costs of responding to and resolving S&D matters, both in dollars and time, for contractors and agencies alike.

Second, as S&D matters become more akin to adversarial litigation, their resolution likely will be based less on the business-oriented considerations that now underlie (or should underlie) resolution of most S&D matters. Certainly, some contractors may favor the more uniform, procedure-based approach to resolution of S&D matters envisioned by the Act. But the loss of the ability to reach a business solution is a negative for other contractors. It also is likely a negative for agencies, which often are better off with a solution that provides the affected component with remedies that further their missions.

Third, even if the Board's rules retain the less-formal process now used by many SDOs, the Board may still have limited insight into agencies' (and thus contractors') business interests. The Act contemplates consolidating dozens of agency SDO offices into a single body. Unless the Board designates members to specialize in S&D matters from particular agencies, then Board members handling matters referred from a broad rotation of agencies will inevitably have less familiarity with any individual agency's needs than the SDOs who now serve a single agency (or activity within an agency). Thus, the Act vests the authority to make "conclusive" determinations in a body that may have little familiarity with the details of an agency's missions or its relationships with its contractors. As a result, affected agencies may have a lot to lose if a GSA-based Board makes determinations regarding with whom the agency can and cannot do business.

Fourth, an amendment to HR 3345 would allow 30 days for acceptance or rejection of an S&D referral and would require resolution of all S&D matters within six months of the initial referral. These timelines may on their face appear fair, or even generous, but they could hamper agency investigations undertaken after a referral but before implementation of S&D action as well as the agency-contractor exchanges that occur after an action (such as suspension) has been taken or proposed. Contractors and the Board or an SDO would be required to put these activities on a fast track to meet the statutory deadlines, which, while preventing S&D actions from lingering, may prevent full analysis of the facts and issues or implementation of remedial measures.

Fifth, the SUSPEND Act may also inadvertently impact negatively some of the positive features of existing S&D practices. For example, many SDOs encourage contractors to provide preliminary notice to an SDO of matters that may reflect on their present responsibility; sometimes the SDO will ask for periodic updates from the contractor on the matter and any remedial actions, and sometimes the notice may initiate a parallel investigation. Under the FAR today, providing such notice and cooperating with an agency investigation are mitigating factors that the SDO considers in deciding whether S&D is necessary. It is unclear under the

SUSPEND Act regime where and how contractors might provide such early notice to demonstrate their present responsibility and stave off S&D proceedings or how cooperation will or will not be considered.

Sixth, the SUSPEND Act mandates a case management system to be used by the Board and all agencies granted waivers. The contents of the database are not to be released to the public unless necessary to protect the Government's interests. Still, the existence of a centralized case tracking system may raise concerns with contractors of *de facto* debarments taken before a pending S&D matter is fully resolved.

Seventh, contractors have raised concerns in the past with SDOs taking action, such as suspension or proposed debarment, without providing notice to contractors. In the press release accompanying the Act, the Committee stated that the Act would "[e]nsur[e] [that] accused parties have the opportunity to be heard prior to any adverse action being taken against them by requiring 'show cause' letters." The Act, however, provides less comfort, stating that "advance notice of adverse action" will be provided unless the Board or the SDO for an agency with a waiver "determines that expedient action is necessary to protect the interests of the Government." Today, SDOs have the ability to issue "show cause" letters if there is no need for immediate protection of the Government's interests. It is unclear, therefore, whether the Act really provides any "additional" protection, as the press release suggests.

Finally, contractors also rightly may worry that the SUSPEND Act will unfairly draw negative attention to their enterprises. The uniform regulations contemplated under the Act would require "public availability of the outcome of all referred cases, including the rationale for the decision to take or not take an adverse action." Thus, whether an S&D referral involves a single "bad actor" or is unfounded, the fact of the referral and the disposition will be publicized. In contrast, currently, not all S&D matters are identified publicly. Although agencies must list all contractors and individuals that are suspended, debarred, or proposed for debarment in the public System for Award Management (SAM), they are not required to post information regarding contractors for which a "show cause" notice has been issued or against which no proceedings are ever initiated. There are sound reasons for this limited public notice: Notice that a contractor or individual was referred for S&D consideration draws negative attention, even where none turns out to be warranted, to the individual employee and the contractor. Under the SUSPEND Act, such notice and attention may become a matter of course.

The press release accompanying the legislation states that the vast majority of contractors perform responsibly. Yet, the Act currently proposes a one-size-fits-all solution for S&D (except for agencies where it will not on account of waivers) without regard for agencies' business and other needs. Although GAO has noted concerns with various agency S&D programs in the past, its June 12, 2013, report noted three features of successful programs: (1) dedicated S&D staff; (2) detailed policies and procedures; and (3) active referral of matters. All of these best practices can be met under the existing system with less disruption than the SUSPEND Act may usher in. Moreover, GAO noted that of the agencies it examined in 2011, those with less-effective programs had taken actions to improve them. The Interagency Suspension and Debarment Committee (ISDC), which is already dedicated to coordinating S&D activities and promoting best practices, had also taken actions to improve coordination and emphasize S&D governmentwide. Thus, with progress being made and most contractors behaving responsibly, it is unclear how necessary the SUSPEND Act is.

The bill has been reported from committee; as of the date of this newsletter, there has been no action taken.

The Afghanistan Suspension and Debarment Reform Act

In August, the Afghanistan Suspension and Debarment Reform Act was introduced with sponsorship and co-sponsorship from three members of the House Committee on Oversight and Government Reform and one other cosponsor. The Act prescribes procedures for how the Special Inspector General for Afghanistan Reconstruction (SIGAR) refers potential S&D matters to an agency SDO or to the ISDC for determination of which agency SDO should be the "lead agency" in these matters.

More important, the Act would allow the ISDC to designate SIGAR as the SDO if the designated lead agency SDO declines the matter or does not respond. The Act limits the matters in which SIGAR can act as SDO to those involving "a person that is an Afghan national or foreign national or foreign company operating in Afghanistan" that has received, is receiving, or may receive funds from certain contracts and subcontracts. Even with these limitations, the Act commingles SIGAR's investigative function with the business-oriented decision-making function performed by an SDO. Indeed, the very entity that will have referred a matter for suspension or debarment will then be tasked with objectively determining whether these remedies are warranted. Ironically, the Fiscal Year 2013 National Defense Authorization Act (NDAA) took pains to separate SDOs from the investigative wings of their agencies. Specifically, the FY 2013 NDAA required that the SDOs at DOD (including the military departments), the U.S. Department of State, and the United States Agency for International Development not "report to or be subject to the supervision" of their respective acquisition offices or OIGs. *See* FY 2013 NDAA §861(a)(2), Pub. L. No. 112-239, 126 Stat. 1857-58. It is not clear why SIGAR should be exempt from this policy determination.

Congress has taken no action on the Act since it was introduced, and referred it to the Committee on Oversight and Government Reform and the Committee on Foreign Affairs in August.