2021

US Debarment: An Introduction

John Pachter
GW Law Adjunct

Christopher R. Yukins
George Washington University Law School, cyukins@law.gwu.edu

Jessica Tillipman
George Washington University Law School, jtillipman@law.gwu.edu

Recommended Citation

John Pachter, Christopher Yukins & Jessica Tillipman, US Debarment: An Introduction, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE 288 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

21

US Debarment: An Introduction

John Pachter, Christopher Yukins, and Jessica Tillipman

Abstract: This chapter, cowritten by senior members of the bar who teach in the leading public procurement law program in the United States, discusses corruption, compliance, and debarment in government procurement. When a government procures goods or services, it must decide questions of price and quality, and – equally importantly – whether the contractor is qualified ("responsible" in US federal contracting), that is, whether the contractor possesses the requisite physical and financial capability, a record of satisfactory performance, and integrity. For the government buyer, the question is whether the prospective contractor poses disqualifying performance or reputational risks to the government. When those risks are severe, suspension (temporary exclusion) and debarment (exclusion for a term of years) are tools that a government can use to exclude nonqualified individuals and companies from competing for public contracts. Suspension and debarment can be economically devastating – a "death sentence" for contractors. As this chapter reflects, remedial corporate compliance efforts – "self-cleaning," as it is termed in European procurement law – play a central role in a government's decision on whether to debar or suspend a contractor. For US federal contractors, the basic requirements for compliance efforts match the emerging worldwide standards for compliance systems. This chapter focuses on suspensions and debarments under the US federal system, while drawing on illustrative comparative examples from other procurement systems.

21.1 INTRODUCTION

When a government procures goods or services, it must decide questions of price and quality, and – equally importantly – whether the contractor is qualified ("responsible" in US federal contracting), that is, whether the contractor possesses the requisite physical and financial capability, a record of satisfactory performance, and integrity. Stated otherwise, the question is whether the prospective contractor poses disqualifying performance or reputational risks to the government. When those risks are severe, suspension (temporary exclusion) and debarment (exclusion for a term of years) are tools that a government can use to exclude nonqualified individuals and companies from competing for public contracts. Suspension and debarment can be economically devastating – a "death sentence." When a government agency or institution suspends or debars a firm or individual, other public entities may follow in what is known as a "cross-debarment" (Yukins 2013).

A number of prominent companies have been suspended or debarred over the years – or have narrowly avoided being excluded, despite extensive evidence of corruption or poor

https://doi.org/10.1017/9781108759458.021 Published online by Cambridge University Press

performance. Units of the Boeing Company, for example, were suspended from sales to the US government as a result of corruption and fraud, and the World Bank debarred many units of the Canadian construction services firm SNC-Lavalin, as a result of reported misconduct. While the causes of and approaches to debarment have varied enormously, the affected firm's response – typically intensive compliance efforts – is often the same, and the basic approach to compliance has remained relatively constant and uniform, as was acknowledged in the publication *A Resource Guide to the Foreign Corrupt Practices Act*, published by the US Justice Department and the US Securities and Exchange Commission, and as was reflected in the US Justice Department's Criminal Division's 2019 revised guidelines for corporate compliance programs.

Procurement systems take different approaches to excluding contractors. In the US federal procurement system, suspension and debarment are treated as extensions of a contracting officer's responsibility determination in an individual procurement (FAR 2019, §9.4). Suspension and debarment, in contrast, involve blanket exclusions from bidding for all federal agency procurements, grants, and other forms of assistance, with the likelihood of exclusion from state and local procurements and other impairments, including creditworthiness. Suspension and debarment can be imposed when a suspension and debarment official ("SDO") concludes that, based on a review of the administrative record, the contractor should be suspended or debarred for a variety of reasons, including commission of a punishable offense or other conduct indicating lack of integrity. The overall test is whether the contractor possesses "present responsibility."

Other systems, such as the World Bank sanctions regime (Dubois, Ezzeddin, and Swan 2016), take an approach more narrowly based on a principle of sanctioning contractors that have engaged in fraudulent, corrupt, or collusive behavior, or that have acted obstructively or coercively (in the context of an ongoing investigation, for example) (World Bank 2019).

As the discussion below reflects, remedial corporate compliance efforts – "self-cleaning," as it is termed in European procurement law – play a central role in US debarment. For federal contractors, the basic requirements for compliance efforts match the emerging worldwide standards for compliance systems.[1] While most federal contractors in general are required to have compliance systems in place, those compliance efforts are especially critical to contractors facing potential suspension or debarment. For those contractors, which must prove their "present responsibility" to suspension and debarment officials, it is critical to demonstrate that their compliance systems are in place and reliable. As is further discussed later, compliance efforts may be a central element in a negotiated administrative agreement between a contractor and a debarring official, and those efforts may be bolstered by additional measures to ensure present responsibility, such as a corporate monitor.

This chapter will focus on suspensions and debarments under the US federal system, while drawing on illustrative comparative examples from other procurement systems (Yukins and Kania 2019). Section 21.2 will introduce federal suspension and debarment, and discuss recent trends in the federal government. Because compliance systems are an integral part of an SDO's investigation, contractors are advised to implement and maintain a state-of-the-art system, to guard against improper conduct. In any case, a contractor under scrutiny will need to institute remedial compliance measures to convince the SDO that the risk of reoccurrence of improper conduct is minimized. Section 21.3 reviews the compliance systems required of

[1] Compare FAR 2019, § 52.203–13 (clause describing federal contractors' compliance requirements) with DOJ SEC 2019: 56, n.309 (noting emerging common international standards for compliance systems).

federal contractors, and draws parallels between federal compliance requirements and those under the laws of other nations and international institutions. Section 21.4 discusses mandatory disclosures, and Section 21.5 addresses past performance in evaluation and award. Section 21.6 considers the nature of debarment in the federal system, including how agencies coordinate their debarment efforts. Section 21.7 discusses the effects of suspension and debarment, including current and prospective contracting efforts. Section 21.8 reviews "statutory" or "mandatory" suspensions and debarments, driven by statutory requirements such as labeling requirements under the Buy American Act. Section 21.9 discusses whether, and how, corporate affiliates may be suspended or debarred. Section 21.10 gives a detailed description of debarment proceedings, and Section 21.11 describes suspension proceedings. Section 21.12 discusses other suspensions and debarments under US federal law, and Section 21.13 concludes by suggesting that the US model, which is relatively well established and administratively flexible, may be a useful model for other nations.

21.2 US FEDERAL SUSPENSION AND DEBARMENT

In recent years, the emphasis on detecting fraud in government procurement has yielded an increase in the number of suspension and debarment actions in the US government. Several factors have contributed, among them the following:

(1) The Inspector General Act of 1978 and its 1988 amendments (codified at 5 USC Appendix) established federal Inspectors General ("IGs") as permanent, nonpartisan, and independent offices in more than seventy federal agencies (USPS OIG 2012).
(2) Recurring scandals, beginning with Operation Ill Wind in 1988 (FBI n.d.), a major multiagency investigation into defense procurement fraud which resulted in prosecutions of more than sixty contractors, consultants, and government officials, including a high-ranking Pentagon assistant secretary and a deputy assistant secretary of the Navy. The operation resulted in a total of $622 million worth of fines, recoveries, restitutions, and forfeitures, giving credence to the notion of widespread procurement fraud. Other incidents, including a multinational bribery scandal involving Siemens and the BP oil spill in the Gulf of Mexico, have played a significant role in drawing public attention to debarment. The most recent major example is the notorious "Fat Leonard" scandal, involving extensive corruption within the Navy's 7th Fleet (at least nineteen guilty pleas, including fourteen Navy officials, five courts martial and five admirals admonished and disciplined, and one admiral sentenced to eighteen months in prison and a $150,000 fine) (Whitlock and Uhrmacher 2018).
(3) Qui tam "whistleblower" suits, which have resulted in huge Civil False Claims Act judgments and settlements, putting pressure on companies to enter into alternative arrangements (deferred prosecution agreements ("DPAs") and nonprosecution agreements ("NPAs")) rather than face years of potentially ruinous litigation.
(4) Additional federal resources applied to fraud investigation and enforcement, which, in cooperation with Department of Justice prosecutors, have resulted in a formidable capability to investigate, prosecute, and debar individuals and companies.
(5) An increase in debarment of individuals, often contractor employees and other individuals identified in internal investigations disclosed to SDOs.
(6) Concern from Congress and others that debarment is too seldom employed has focused attention on the effectiveness of agencies' debarment systems. (GAO 2013).

Discretionary debarment remains a flexible tool for managing the government's perceived reputational and performance risks – but not for punishment. The Federal Acquisition Regulation ("FAR") states: "The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and *not for purposes of punishment*" (FAR 2019, § 9.402(b) (emphasis added)). Even where a cause for debarment exists, exclusion may not be in the government's interest. A company accused of improper conduct may be able to avoid debarment by demonstrating understanding of the seriousness of the situation and instituting remedial measures to prevent reoccurrence. This would include a showing that the company eradicated the circumstances that gave rise to the conduct, strengthened its ethics and compliance program, and provided assurance that the questioned conduct will not reoccur.

Government contractors live under a regime of ever-increasing stringency. Federal rules require contractors to adopt and implement an ethics and compliance program, including the education and training of employees. Federal contractors have added responsibility to discover and disclose instances of improper conduct in connection with government contracts. The result is that contractors must ensure that they already have an effective program in place *before* the government initiates debarment proceedings. These steps will also help a company make a convincing case that any improper conduct occurred despite the company's vigorous efforts to prevent it from happening. The same measures form a critical affirmative defense under anti-corruption laws around the world, such as the UK Bribery Act.[2] Accordingly, contractors have much at stake in maintaining a sound system of compliance, business integrity and ethics, along with a solid contract performance history.

21.3 CONTRACTOR COMPLIANCE SYSTEMS

Any consideration of debarment and suspension should begin with an understanding of the government's requirement for a Contractor Code of Business Ethics and Conduct – the cornerstone of a contractor's internal controls in a compliance system.[3] The FAR requires that "[g]overnment contractors must conduct themselves with the highest degree of integrity and honesty" and that they have a written code of business ethics and conduct (FAR 2019, § 3.1002(a)–(b)). In addition, contractors "should have an employee business ethics and compliance training program and an internal control system" that (1) are "suitable to the size of the company and extent of its involvement in Government contracting"; (2) "[f]acilitate timely discovery and disclosure of improper conduct in connection with Government contracts"; and (3) "[e]nsure corrective measures are promptly instituted and carried out" (FAR 2019, § 3.1002(b)).

While this policy applies as guidance to *all* federal contracts, two FAR clauses – (FAR 2019, § 52.203–13), Contractor Code of Business Ethics and Conduct, and (FAR 2019, § 52.203–14), Display of Hotline Poster(s) – are mandatory if the contract meets certain conditions, as follows:

[2] Bribery Act of 2010, c. 23, Sec. 7 (Eng.), www.legislation.gov.uk/ukpga/2010/23/contents (discussing the "adequate procedures" defense).

[3] In October 2018, the Justice Department announced new directions in compliance and monitoring. In a speech by Assistant Attorney General Brian Benczkowski and new guidance, the Justice Department indicated that it would place less emphasis on corporate monitors when assessing corporate controls, and that the Department would assess company compliance efforts with a recognition that compliance systems may vary substantially from industry to industry (DOJ 2018; DOJ Benczkowski 2018).

- FAR 52.203–13, Contractor Code of Business Ethics and Conduct is mandatory if the value of the contract is expected to exceed $5.5 million and the performance period is 120 days or more (FAR 2019, § 3.1004(a)).
- FAR 52.203–14, Display of Hotline Poster(s) is mandatory unless the contract is for the acquisition of a commercial item or will be performed entirely outside the United States if –
  - The contract exceeds $5.5 million or a lesser amount established by the agency; and
  - The agency has a fraud hotline poster; or
  - The contract is funded with disaster assistance funds (FAR 2019, § 3.1004(b)(1)).

21.4 MANDATORY DISCLOSURES

These requirements for a compliance system are bolstered by a separate requirement for mandatory disclosure if a federal contractor discovers certain misconduct (ABA PCLS 2010; Yukins 2015). Even if the clause at FAR 52.203–13, Contractor Code of Business Ethics and Conduct, is inapplicable, a contractor may be suspended or debarred for a "knowing failure" by a principal to timely disclose to the government, in connection with the award, performance, or closeout of a government contract performed by the contractor or a subcontract, "credible evidence" of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations in Title 18 of the United States Code or a violation of the Civil False Claims Act (FAR 2019, § 3.1003(a)(2)). Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension or debarment until three years after final payment (§ 3.1003(a)(2)).

The Payment clauses at FAR 2019 §§ 52.212–4(i)(5), 52.232–25(d), 52.232–26(c), and 52.232–27(l) require that, if the contractor becomes aware that the government has overpaid on a contract financing or invoice payment, the contractor shall remit the overpayment amount to the government. A contractor may be suspended or debarred for "knowing failure" by a principal to timely disclose "credible evidence" of a "significant overpayment," other than overpayments resulting from contract financing payments as defined in FAR 32.001(FAR 2019, § 3.1003(a)(3)).

It is a mistake to assume that these disclosure obligations limit the contractor's duty to the reasons enumerated. The FAR debarment mitigation standards discussed later contain an additional backward-looking disclosure obligation: the contractor is asked to address, among other things, whether "[t]he contractor timely brought the activity to the attention of the Government agency" (FAR 2019, § 9.406–1(a)). In this instance "timely" means before receiving notice from the Suspension and Debarment Official ("SDO").[4]

21.5 PAST PERFORMANCE: EVALUATION FACTOR AND RESPONSIBILITY DETERMINATION

The FAR states that "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only" (FAR 2019, §§ 9.103(a), 9.402(a)).[5] One element of "responsibility" requires the prospective contractor to "[h]ave a satisfactory record of integrity

[4] A short note on titles: in the US Department of Defense, these officials are referred to as "Suspending and Debarring Officials" (Grandon 2016).

[5] Special rules apply if the prospective contractor is a small business concern (FAR 2019, §§ 19.6, 19.8).

and business ethics" (FAR 2019, § 9.104–1(d)). A serious integrity-based failure thus can be a ground for denial of award of a single contract.

Corrupt actions or shoddy performance also can affect a contractor's past performance evaluation. With limited exceptions, past performance is included as an evaluation factor "in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold" (FAR 2019, § 15.304(c)(3)(i)). Agencies compile past performance information, to include, among other things, the contractor's record of "[r]easonable and cooperative behavior and commitment to customer satisfaction" (FAR 2019, § 42.1501(a)(4)); "[i]ntegrity and business ethics"(§ 42.1501(a)(6)); and "[b]usiness-like concern for the interest of the customer" (§ 42.1501(a)(7)). In addition to the separate evaluation factor in FAR Part 15 negotiated competitive acquisitions, another element of the general standards of responsibility is that a prospective contractor "[h]ave a satisfactory performance record" (FAR 2019, § 9.104–1(c)).

That past performance information and record of integrity and business ethics are compiled and relied upon by agencies in making award decisions. Agencies "use the Contractor Performance Assessment Reporting System (CPARS) and Past Performance Information Retrieval System (PPIRS) metric tools to measure the quality and timely reporting of past performance information" (FAR 2019, § 42.1501(b)). Past performance evaluations are entered into CPARS, the government-wide evaluation reporting tool for past performance reports on contracts and orders (FAR 2019, § 42.1502(a); GSA 2019a).

In summary, negative past performance assessments and an unsatisfactory record of integrity and business ethics can result in a determination of nonresponsibility for a single contract award. Suspension and debarment, in contrast, involve an agency's blanket disqualification of a contractor from award of *any* contract for a period of time. In addition, a succession of nonresponsibility determinations may constitute a de facto debarment.

21.6 NATURE OF DEBARMENT

Courts have recognized that debarment and suspension are draconian measures with a stigmatizing effect that can put "the very economic life of the contractor . . . in jeopardy."[6] In addition to cutting off eligibility for federal contracts, grants, and other forms of assistance, debarment can mean loss of ability to bid on state and local government contracts, and can lead to "sudden contraction of bank credit, adverse impact on market price of shares of listed stock, if any, and critical uneasiness of creditors generally, to say nothing of 'loss of face' in the business community."[7] The stigmatizing effect of these sanctions gives a powerful weapon to aggressive competitors, especially in other public markets (e.g., state and local government procurements) as well as commercial markets. Thus, even contractors with a relatively small dollar value of federal government contracts can face dire consequences from debarment.

A seminal opinion of the US Court of Appeals for the DC Circuit in 1964 mandated regulations providing due process protections for contractors subjected to debarment.[8]

[6] *Old Dominion Dairy Prods., Inc.* v. *Sec'y of Def.*, 631 F. 2d 953, 968 (D.C. Cir. 1980).

[7] *Gonzalez* v. *Freeman*, 344 F.2d 570, 574 (D.C. Cir. 1964).

[8] Ibid. at 578 ("Considerations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made."). Contractors enjoy similar protections under the European Union's procurement directive (EU 2014), which in Article 57, paragraph 6 requires a "statement of the reasons" when a procuring entity chooses *not* to

Nevertheless, whether the contractor receives notice of specific charges and is granted an opportunity to be heard *before* imposition of suspension or debarment is in the hands of agency debarment officials. SDOs may, but are not required to, issue show cause letters or requests for information to afford the contractor an opportunity to give reasons why it should not be suspended or debarred.

There have also been instances of de facto debarment or suspension: successive determinations of nonresponsibility, amounting to a blanket disqualification. This type of action implicates due process "liberty interests," requiring notice and an opportunity to be heard.[9]

Since debarment and suspension are "discretionary actions" (FAR 2019, § 9.402(a)), the existence of a cause for debarment or suspension does not mandate imposition of the sanction. Moreover, as noted, the FAR states: "The serious nature of debarment and suspension requires that these sanctions be imposed *only in the public interest for the Government's protection and not for purposes of punishment.* Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart" (FAR 2019, § 9.402(b), emphasis added).[10] Finally, a contractor is entitled to seek judicial review of an agency's decision to suspend or debar (Block 2018).

21.6.1 *Relationship to the "Common Rule"*

The FAR suspension and debarment rules apply to federal agency procurements. The Nonprocurement Common Rule, on the other hand, governs debarment and suspension regarding matters such as "grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements" under Executive Order 12549 (FAR 2019, § 9.403).[11] Debarment or suspension under the FAR or the Common Rule excludes entities from eligibility under the other (FAR 2019, § 9.401).

Unlike the FAR, which gives a notice of proposed debarment the same immediate effect as a suspension or debarment, the Common Rule provides for exclusion only upon suspension or debarment. The Common Rule nevertheless gives immediate preclusive effect to notices of proposals to debar issued under the FAR (OMB 2019).

21.6.2 *The Interagency Committee on Debarment and Suspension*

The Interagency Suspension and Debarment Committee (ISDC)[12] ensures that executive departments and agencies "[p]articipate in a government-wide system for debarment and

admit a excluded contractor to a procurement because the contractor's remedial ("self-cleaning") measures regarding past misconduct have been determined inadequate.

9 *Old Dominion Dairy*, 631 F.2d at 961, 963, 966.

10 For a comparison to the World Bank sanctions system, which approaches contractor exclusion using a system of calibrated sanctions for misconduct, through a highly structured adjudicative process, see, e.g., Dubois 2012.

11 Cf. Meunier and Nelson 2017; ISDC 2018: 3 ("The ISDC is exploring the development of a consistent set of procedures for both procurement and nonprocurement suspensions and debarments, including pre-notice tools and the application of exclusion concerning notices of proposed debarment.").

12 Established pursuant to Section 4 of Executive Order 12549 on Debarment and Suspension. 51 Fed. Reg. 6370 (Feb. 21, 1986).

suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits." Federal agency SDOs are listed with contact information at www.acquisition.gov/isdc-debarring-officials.

The ISDC plays a coordinating and leadership role in the suspension and debarment process. When more than one agency has an interest in debarring or suspending a contractor, agencies will usually defer to the "lead agency" – generally the one with the highest dollar value of contracts with the company. The ISDC resolves any lead agency issue and coordinates among interested agencies before any agency initiates suspension, debarment, or related administrative action (FAR 2019, § 9.402(d)).

In addition to assisting agencies with suspension and debarment, the ISDC annual report for fiscal year 2016 (Jan. 12, 2017) noted that the ISDC works with agencies "to identify other practices that protect the government's interest by promoting contractor and program participant responsibility without the need to impose an exclusion through suspension or debarment." Alternative tools identified in the report "include the use of pre-notice engagements that allow the agency to develop information to better assess the risk to government programs and determine what measures are necessary to protect the government's interest without immediately imposing an exclusion. As a result, agencies again reported significant use of Show Cause letters, Requests for Information, or other pre-notice investigative engagement letters." The report also noted continued use of administrative agreements as an alternative to suspension and debarment. These administrative agreements "typically mandate the implementation of several provisions to improve the ethical culture and corporate governance processes of a respondent, often with the use of independent third party monitors."

21.6.3 *The System for Award Management (SAM)*

Names of companies and individuals debarred or suspended under the FAR and the Common Rule are entered into the web-based System for Award Management ("SAM"), administered by the General Services Administration ("GSA") (FAR 2019, § 9.404; GSA 2019b). This element of the SAM, previously known as the Excluded Parties List System, is used by contracting agencies and also by prime contractors in evaluation of prospective contractors and subcontractors.

21.7 EFFECT OF DEBARMENT AND SUSPENSION

Contractors that are "debarred, suspended, *or proposed for debarment*" are ineligible to receive contracts (FAR 2019, § 9.405(a), emphasis added). An unusual feature is that, as noted in Section 21.6.1, "proposed for debarment" under the FAR has the same practical effect as debarred (Meunier and Nelson 2017: 574) (discussing history of preclusive rule). Agencies may not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason (FAR 2019, §§ 9.405–1(b), 9.405–2, 9.406–1(c), 9.407–1(d), 23.506(e)). Listed contractors "are also excluded from conducting business with the Government as agents or representatives of other contractors" (FAR 2019, § 9.405(a)). As noted, and as discussed in more detail later, agencies may not consent to subcontracts with listed contractors. (FAR 2019, § 9.405(b)). Nor may listed concerns act as individual sureties (FAR 2019, § 9.405(c)).

If a contractor's period of ineligibility expires or is terminated before award, the contracting officer "may, but is not required to, consider such proposals, quotations, or offers" from the contractor (FAR 2019, § 9.405(c)(3)).

As to existing contracts, the FAR states that "agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the agency head directs otherwise" (FAR 2019, § 9.405–1(a)). However, for excluded contractors, agencies may not (1) place orders exceeding the guaranteed minimum under indefinite quantity contracts, (2) place orders under Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements, or (3) add new work, exercise options, or otherwise extend the duration of current contracts or orders (FAR 2019, § 9.405–1(b)).

In some instances, government consent to subcontracting is required (FAR 2019, § 44.2). When a contractor that is debarred, suspended, or proposed for debarment is proposed as a subcontractor for any subcontract subject to government consent, consent will be withheld unless the agency head states in writing the compelling reasons for approval action (FAR 2019, §§ 9.405–2(a), 9.405–2(b)).

In the standard contract clause titled "Protecting the Government's Interests When Subcontracting with Contractors Debarred, Suspended or Proposed for Debarment," the FAR (2019, § 52.209–6) provides that contractors shall not enter into any subcontract in excess of $35,000, other than a subcontract for a commercially available off-the-shelf item, with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. If a contractor intends to enter into a subcontract in excess of $35,000, other than a subcontract for a commercially available off-the-shelf item, with a party that has been listed as excluded in SAM, a corporate officer or designee of the contractor must notify the contracting officer, in writing, before entering into the subcontract. The notice must include, among other information, the compelling reasons for doing business with the subcontractor notwithstanding its listing. For contracts for the acquisition of commercial items, the notification requirement applies only for first-tier subcontracts. For all other contracts, the notification requirement applies to subcontracts at any tier.

21.8 STATUTORY DEBARMENTS

The bulk of our discussion has focused on discretionary debarments, undertaken to protect the government from undue performance or reputational risk. A separate class of exclusions (sometimes called "statutory" or "mandatory" suspensions and debarments) stems from statutes that mandate suspension or debarment in the event of a conviction for violation of certain statutes, or formal agency determinations of certain types of wrongdoing. Statutes that contain their own debarment provisions include, for example, the Buy American Act, the Service Contract Act, the Davis-Bacon Act, the Walsh-Healey Act, the Clean Air Act and the Clean Water Act. Some statutes mandating exclusion allow agencies to waive the suspension or debarment; some, however, do not.[13]

21.9 SCOPE OF DEBARMENT: AFFILIATES

Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions,

[13] For a more complete listing of statutory debarments, see, e.g., Manuel 2008: 2–5.

organizational elements, or commodities (FAR 2019, § 9.406–1(b)). The SDO may extend the debarment decision to include any affiliates of the contractor if they are specifically named and given written notice and an opportunity to be heard. Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (1) either one controls or has the power to control the other, or (2) a third party controls or has the power to control both.[14]

The "fraudulent, criminal, or other seriously improper conduct" of an officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred "in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence" (FAR 2019, § 9.406–5(a)). Conversely, the conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor "who participated in, knew of, or had reason to know of the contractor's conduct" (FAR 2019, § 9.406–5(b)). Similar imputation rules apply to participants in a joint venture or similar arrangement (FAR 2019, § 9.406–5(c)).

Debarment and proposed debarment are effective throughout the executive branch of the government unless an agency head or designee states in writing compelling reasons justifying continued business dealings between that agency and the contractor (FAR 2019, § 9.406–1 (c)). Debarment from procurement contracts may extend to disqualification from contracts for the purchase of federal personal property pursuant to the Federal Property Management Regulations (FPMR) 101–45.6 (FAR 2019, § 9.406–1(d)).

21.10 DEBARMENT PROCEEDINGS

21.10.1 *General*

Above all, the SDO must "determine whether debarment is in the Government's interest." The mere finding of a cause for debarment does not require imposition of the sanction. Rather, the debarring official must consider "the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors" (FAR 2019, § 9.406–1(a)).

The contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary.[15]

21.10.2 *Causes for Debarment*

The listed causes for suspension and debarment are essentially the same. In summary, the causes include:

- Commission of fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal laws, receiving stolen property, an unfair trade practice
- Violation of antitrust statutes

[14] Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment (FAR 2019, § 9.403).

[15] Procedures for debarment and suspension in the US Department of Defense are described in Appendix H to the Defense Federal Acquisition Regulation Supplement.

- Willful failure to perform a contract, or a history of failure to perform
- Violation of the Drug-Free Workplace Act
- Delinquent Federal taxes (more than $3,000)
- Knowing failure to disclose "credible evidence" of a violation of criminal law or the Civil False Claims Act, or significant overpayments on a contract
- Any other cause of so serious or compelling a nature that it affects present responsibility (FAR 2019, §§ 9.406–2, 9.407–2).

As noted, a contractor may be also be suspended or debarred for "knowing failure" by a principal to timely disclose "credible evidence" of a "significant overpayment," other than overpayments resulting from contract financing payments as defined in FAR 32.001(FAR 2019, § 3.1003(a)(3); see Section 21.4).

In addition, the government contracting officer must notify the SDO of credible evidence that:

(i) a contractor, contractor employee, subcontractor, subcontractor employee, or agent engages in severe forms of trafficking in persons or procures a commercial sex act during the period of performance of a contract;
(ii) a contractor, contractor employee, subcontractor, subcontractor employee, or agent uses forced labor in the performance of the contract; or
(iii) the contractor fails to comply with contractual responsibilities to combat human trafficking in FAR (2019, § 52.222–50).

21.10.3 *Mitigating Factors*

Mitigating factors to be considered by the SDO include, under the FAR (2019, § 9.406–1(a)), whether:

(1) The contractor had effective standards of conduct and internal control systems in place or had adopted procedures before the Government investigation began.
(2) The contractor timely brought the activity to the attention of the Government agency.
(3) The contractor fully investigated the circumstances and made the result available to the debarring official.
(4) The contractor cooperated fully with Government agencies during the investigation and any court or administrative action.
(5) The contractor paid or agreed to pay criminal, civil, and administrative liability for the improper activity, including investigative or administrative costs incurred by the Government, and has made or agreed to make restitution.
(6) The contractor has taken appropriate disciplinary action against the responsible individuals.
(7) The contractor implemented or agreed to implement remedial measures.
(8) The contractor instituted or agreed to institute new or revised review and control procedures and ethics training programs.
(9) The contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.
(10) The contractor's management recognizes and understands the seriousness of the misconduct and has implemented programs to prevent recurrence.

As a practical matter, the mitigating factors listed in the regulation may help frame a contractor's response to a threatened debarment. In preparing to respond to a potential debarment, for example, the contractor may gather evidence to demonstrate mitigating efforts regarding some or all of these regulatory factors.

Note that these mitigation standards are designed for companies. There are no separate mitigation standards for individuals. As a result, individuals who are noticed for debarment must tailor their response to the facts of their situation, borrowing as much as possible from the mitigation standards in the regulation (Sacilotto 2018). This would include, for example, any role that the individual played in enhancing the company's culture of ethics and compliance.

21.10.4 *Administrative Procedures*

Debarment procedures are informal, giving the contractor "an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment" (FAR 2019, § 9.406–3(b)(1)). If the debarment action is based on a conviction or plea agreement, or a civil judgment, the contractor will not be allowed to challenge the facts found by the tribunal or recited in the plea agreement. In other cases, in contrast, the contractor will be allowed to show that there is a "genuine dispute over facts material to the proposed debarment" (FAR 2019, § 9.406–3(b)(2)). In that case, the contractor will have the opportunity to "appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents" (FAR 2019,§ 9.406–3(b)(2)(i)).

A notice of proposed debarment should, among other things, inform the contractor and any named affiliates that "debarment is being considered"; the reasons for the proposed debarment "in terms sufficient to put the contractor on notice" of the causes relied upon; the effect of the issuance of the notice of proposed debarment; the potential effect of an actual debarment; and that within thirty days after receipt the contractor may submit "information and argument in opposition, including any additional specific information that raises a genuine dispute over the material facts" (FAR 2019, § 9.406–3(c)). Because a notice of proposed debarment automatically results in listing of the contractor in the online SAM (GSA 2019b; FAR 2019, § 9.405(b)), the phrase required by the FAR in the notice that "debarment is being considered" is misleading. To avoid the unfairness in the process, some SDOs instead send show cause letters or requests for information, stating the agency's perceived grounds for debarment and asking the contractor to provide any reasons why debarment should not be imposed.

If the debarment is based on a conviction or civil judgment, or there is no genuine dispute over material facts, "the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the contractor" (FAR 2019, § 9.406–3(d)(1)). "If no suspension is in effect, the decision shall be made within 30 working days after receipt of any information and argument submitted by the contractor, unless the debarring official extends this period for good cause." (§ 9.406–3(d)).

If the matter involves disputed material facts, the debarring official will prepare written findings of fact (FAR 2019, § 9.406–3(d)(2)(i)). If the debarment is not based on a conviction or civil judgment, "the cause for debarment must be established by a preponderance of the evidence" (§ 9.406–3(d)(3)).

21.10.5 *Administrative Agreements*

In some instances, as an alternative to debarment, the SDO may agree to enter into an administrative agreement, usually for three years, to permit the company to continue to bid on government contracts, subject to fulfillment of the requirements of the administrative agreement. These agreements typically require the appointment of an independent monitor who supervises the company's remedial steps and the strengthening of its ethics and compliance program (Pachter 2013). While the FAR does not expressly authorize the use of administrative agreements, it acknowledges them by requiring the SDO to enter information relating to an administrative agreement in the Federal Awardee Performance and Integrity Information System ("FAPIIS"), at www.cpars.gov/fapiismain.htm (FAR 2019, §§ 9.406–3(f), 9.407–3(e)).

In other instances, a US attorney may enter into an alternative agreement (DPA or NPA) that requires the appointment of an independent monitor. The debarring official of the procuring agency (or lead agency) is not bound by the Justice Department's agreement but may recognize the appointment of the monitor and withhold debarment for the same period.

21.10.6 *Period of Debarment*

Debarments generally should not exceed three years (FAR 2019, § 9.406–4(a)(1)). Debarments for violations of the provisions of the Drug-Free Workplace Act of 1988 may be for a period not to exceed five years (FAR 2019, § 23.506).

If the Secretary of Homeland Security or the Attorney General of the United States determines that a contractor is not in compliance with Immigration and Nationality Act employment provisions (Clinton 1994),[16] that determination is not reviewable in the debarment proceeding that is to result from that violation (FAR 2019, § 9.406–2 (b)(2)). The period of debarment is one year, but it may be extended for additional periods of one year if the Secretary of Homeland Security or the Attorney General determines that the contractor continues to be in violation of the employment provisions of the Immigration and Nationality Act (FAR 2019, § 9.406–4(b)).

If the contractor is already subject to suspension, the SDO will consider the period of suspension in determining the term of debarment (FAR 2019, § 9.406–4(a)(2)).

The SDO may extend the debarment for an additional period if the SDO determines that an extension is "necessary to protect the Government's interest." However, the extension may not be based "solely on the basis of the facts and circumstances upon which the initial debarment action was based" (FAR 2019, § 9.406–4(b)).

The SDO may reduce the period or extent of debarment upon the contractor's request, based on (1) newly discovered material evidence; (2) reversal of the conviction or civil judgment on which the debarment was based; (3) bona fide change in ownership or management; (4) elimination of other causes for which the debarment was imposed; or (5) other reasons that the SDO deems appropriate (FAR 2019, § 9.406–4(c)).

[16] See Exec. Order No. 12989, 59 Fed. Reg. 7629 (Feb. 16, 1994) *as amended by* Exec. Order No. 3286, 68 Fed. Reg. 10619 (Mar. 5, 2003).

21.11 SUSPENSION PROCEEDINGS

Suspension is a "serious action" to be imposed on the basis of "adequate evidence,"[17] pending the completion of investigation or legal proceedings, when immediate action is necessary to protect the government's interest. In assessing the adequacy of evidence, agencies should consider how much information is available, the credibility of the evidence, whether important allegations are corroborated, and what inferences can reasonably be drawn. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence (FAR 2019, § 9.407–1(b)(1)).

As is true for debarments, the existence of a cause for suspension does not require the SDO to suspend the contractor. The SDO should consider the seriousness of the contractor's acts or omissions and may, but is not required to, consider remedial measures or mitigating factors. Another disclosure obligation is contained in the following FAR language: "A contractor has the burden of promptly presenting to the suspending official evidence of remedial measures or mitigating factors *when it has reason to know that a cause for suspension exists*" (emphasis added). The existence or nonexistence of any remedial measures or mitigating factors does not necessarily determine a contractor's present responsibility (FAR 2019, § 9.407–1(b)(2)).

As in the case of debarment, suspension includes all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions, organizational elements, or commodities. The same rules as in debarment apply to affiliates of the contractor (FAR 2019, § 9.407–1(c)). Similarly, suspension is effective throughout the executive branch unless the agency head or designee states in writing the compelling reasons justifying continued business dealings between that agency and the contractor (FAR 2019, § 9.407–1(d)). Suspension may also extend to contracts for the purchase of federal property (FAR 2019, § 9.407–1(e)).

21.11.1 *Causes for Suspension*

The causes for suspension are the same as the causes for debarment, except that the standard is "adequate evidence" (FAR 2019, § 9.407–2 (a)). Indictment for any of the causes in FAR 9.407–2(a) "constitutes adequate evidence for suspension" (FAR 2019, § 9.407–2(b)). A prosecutor obtains an indictment by presenting witnesses, selected by the prosecutor, to a grand jury, asking the grand jury to concur that there is probable cause to proceed in court. No judge is present in the grand jury proceeding, and the accused has no right to participate.

Nevertheless, a contractor may be suspended as soon as the prosecutor obtains the indictment. The FAR states that the agency "shall afford the contractor (and any specifically named affiliates) an opportunity *following the imposition of suspension* to submit, in person, in writing, or through a representative, information and argument in opposition to the suspension" (FAR 2019, § 9.407–3(b)(1) (emphasis added)). In the case of an indictment, the contractor is not allowed to raise disputed issues of fact.

If the suspension is not based on an indictment, the contractor may raise disputed issues of fact. However, the agency may ask the Department of Justice to advise whether "substantial

[17] In *Horne Brothers, Inc.* v. *Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972), the court stated that "'adequate evidence' . . . need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. This is less than must be shown at the trial, but it must be more than uncorroborated suspicion or accusation."

interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced" by the presentation of facts (FAR 2019, § 9.407–3(b)(2)). If the agency makes no such determination based on Department of Justice advice, the agency will "[a]fford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents" (FAR 2019, § 9.407–3(b)(2)).

21.11.2 *Notice of Suspension*

The agency's notice of suspension will inform the contractor and any named affiliates that they have been suspended based on an indictment or other adequate evidence of irregularities of a serious nature in business dealings with the government or seriously reflecting on the propriety of further government dealings with the contractor. The notice should state:

- The suspension is for a temporary period pending the completion of investigation and ensuing legal proceedings "in terms sufficient to place the contractor on notice without disclosing the Government's evidence";
- The causes relied upon;
- The effect of the suspension;
- That the contractor may, within 30 days after receipt of notice, submit "in writing, or through a representative, information and argument in opposition to the suspension, including any additional specific information that raises a genuine dispute over the material facts"; and,
- That additional proceedings to determine disputed material facts will be conducted unless the action is based on an indictment or "[a] determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced" (FAR 2019, § 9.407–3(c)).

21.11.3 *Administrative Procedures: Suspension*

The SDO's decision on suspension will be made on the administrative record, including any submission by the contractor, where the action is based on an indictment, or the contractor's submission does not raise a genuine dispute of material fact, or additional proceedings are denied based on Department of Justice advice (FAR 2019, § 9.407–3(1)). In actions where additional proceedings are conducted to resolve disputed material facts, the SDO will prepare written findings of fact (FAR 2019, § 9.407–3(2)). The SDO may modify or terminate the suspension or leave it in force, without prejudice to suspension or debarment by another agency (FAR 2019, § 9.407–3(3)). If the contractor enters into an administrative agreement to resolve the suspension proceedings, the SDO will enter the information into FAPIIS at www.cpars.csd.disa.mil (FAR 2019, § 9.407.3(e)(1)).

21.11.4 *Period of Suspension*

Suspension is for a temporary period pending the completion of investigation and any ensuing legal proceedings, unless the SDO terminates the suspension sooner (FAR 2019, § 9.407–4(a)). If no legal proceedings are initiated within twelve months after the suspension

notice, the suspension will be terminated unless an Assistant Attorney General requests its extension. In that case the suspension may be extended for an additional six months. In no event may a suspension extend beyond eighteen months, unless legal proceedings are initiated within that period (FAR 2019, § 9.407–4 (b)). If legal proceedings are initiated, the suspension may continue for as long as it takes to complete the proceedings.

The SDO will notify the Department of Justice of the proposed termination of the suspension at least thirty days before the twelve-month period expires, to give that Department an opportunity to request an extension (FAR 2019, § 9.407–4 (c)).

21.12 ADDITIONAL EXCLUSIONS IN US FEDERAL PROCUREMENT

Beyond the discretionary and mandatory suspensions and debarments discussed so far, US law provides for additional potential grounds of exclusion; some of the most commonly encountered are discussed later.

21.12.1 *Vetting of Non-US Contractors in Contingency Operations*

Congress and the US Department of Defense (DOD) have established a system of vetting non-US contractors seeking or performing work in Afghanistan, designed to prevent dollars from flowing to the insurgents the US military is fighting in contingency operations. The program extends to other combatant commands.[18] Each combatant command has a program to identify persons or entities that directly or indirectly provide funds from DOD contracts to a person or entity activity opposing US or coalition forces in a contingency operation. The program also identifies persons or entities that fail to exercise due diligence to prevent persons or entities so identified from receiving contract funds. In Afghanistan the vetting program is conducted in secret, so that a contractor may not be informed that it is barred from contract award eligibility.

The Court of Federal Claims has acknowledged that this vetting program constitutes a de facto debarment without the normal due process rights accorded contractors. The court ruled, however, that national security interests take priority, and that traditional due process of notice and opportunity to be heard could "compromise national security" because it could "endanger military intelligence sources" and "provide information to entities that pose a potential threat to the United States, thereby placing United States forces at risk."[19]

21.12.2 *Government Corporations*

Government corporations, which are not subject to the FAR or the NCR, may have their own suspension and debarment procedures. For example, the US Postal Service ("USPS") has its own debarment regulation and maintains its own list (USPS 2019, § 601.113). Contractors excluded by the USPS will be reported to the government-wide SAM database (USPS 2019, § 601.113(c)(3)). The USPS Vice President of Supply Management makes

[18] National Defense Authorization Act ("NDAA") for Fiscal Year (FY) 2015, sections 814–43, "Never Contract with the Enemy"; NDAA for FY 2012, section 841 "Prohibition on Contracting with the Enemy in the United States Central Command Theater of Operations"; NDAA for FY 2014, section 831. See Sander and Romero 2015; Cook, Roberson, and Knowles 2017.

[19] *MG Altus Apache Co.* v. *United States*, 111 Fed. Cl. 425, 445 (2013); see also *NCL Logistics* v. *United States*, 109 Fed. Cl. 596 (2012); *Ettefzq-Meliat-Hai-Afghan Consulting, Inc.* v. *United States*, 106 Fed. Cl. 429 (2012).

debarment determinations in conjunction with the USPS General Counsel. The Vice President of Supply Management may also request that the Judicial Officer hold a fact-finding hearing, but the Vice President of Supply Management retains authority to accept or reject the Judicial Officer's findings of fact if such findings are clearly erroneous (USPS 2019, § 601.113(k)(2)). Rules of Practice before the Judicial Officer in proceedings for debarment have been published (USPS 2019, § 957.1–957.18).

There is limited case law involving challenges to USPS debarments. *Myers & Myers, Inc.* v. *United* States *Postal Service*[20] addressed allegations that the USPS refused to renew contracts based on debarment actions that lacked sufficient notice. The US Court of Appeals for the Second Circuit held that the USPS action constituted a claim for wrongful act or omission under the Federal Tort Claims Act.[21]

The USPS (2019) debarment regulation at 601.113 does not cite the "present responsibility" standard. Older USPS administrative decisions adopt the "present responsibility" standard from the USPS Procurement Manual (USPS 1995).[22] However, the USPS has replaced the Procurement Manual with various iterations of the Supplying Principles and Practices ("SPPs"). The current SPPs do not reference the "present responsibility" standard or proscribe debarment as a form of additional punishment (USPS 2018, § 409–413).

Effective November 14, 2007, the USPS issued revised procurement regulations, revoking and superseding all previous postal purchasing regulations, including the Postal Contracting Manual and the Procurement Manual (USPS 2019, § 601.102). Accordingly, the SPPs are "advisory and illustrative of approaches that may generally be used by Postal Service employees to conduct SCM activities, but are intended to provide for flexibility and discretion in their application to specific business situations. They are designed to supplement the Postal Service's purchasing regulations contained in 39 CFR Part 601" (USPS 2018, 1).

The USPS establishes business relationships with suppliers based on quality of service and overall professionalism. The USPS has discretion not to engage suppliers that exhibit unacceptable conduct or business practices, including "questionable or unprofessional conduct or business practices." The regulations do not include eligibility procedures (or a determination of responsibility) prior to awarding a supplier contract (USPS 2019, § 601.105 "Business Relationships").

As noted, the USPS debarment regulation does not include a present responsibility standard. However, the USPS relies upon debarment determinations from federal agencies to refuse awards to "ineligible" suppliers (USPS 2019, § 601.113(b)(5)). In USPS's own determinations, causes for debarment include topics such as offenses "indicating a lack of business integrity or business honesty" (USPS 2019, § 601.113(h)(1)(v)). USPS also considers contractors' written standards of conduct and agreements to institute or revise ethics programs as mitigating factors in the discretionary debarment decision (USPS 2019, § 601.113(i)(1)(i), (viii)).

While the SPPs do not include requirements for responsibility determinations of suppliers or a description of the purpose of debarment, the SPPs reference supplier professionalism, integrity, and ethics. The SPPs also discuss contracting with ineligible suppliers if in the USPS's best interest as integral to USPS procurement policy.

The SPPs provide an introduction to supplier relations that highlight the goals of sound business practices and professional conduct (USPS 2018, 9–10) ("Relations between the Postal

[20] 527 F.2d 1252 (2d Cir. 1975).
[21] Ibid. at 1258-61.
[22] See, e.g., *In the Matter of the Suspension of David K. Gillett Majestic Airlines*, 1995 WL 18241261 (Jan. 20, 1995).

Service and its suppliers will be strong, mutually beneficial, and based upon sound business practices, respect and trust, with both parties working toward a common goal. Within the relationship, both parties – Postal Service supplying professionals and suppliers – are expected to act ethically. . . .").

For evaluation of suppliers, USPS defines contract performance metrics, including "integrity and ethics" within the USPS–supplier relationship (USPS 2018,§ 152–53). USPS also considers past performance and responsibility topics when developing proposal evaluation strategies (USPS 2018, § 161) ("All past performance evaluations should consider the following factors: . . . Business relations (a history of being reasonable and cooperative with customers; commitment to customer satisfaction; integrity and ethics)."). To evaluate supplier capability, USPS considers whether the supplier has "a sound record on integrity and business ethics" (USPS 2018, 162).

In the SPP section on Supplier Suspension, Debarment, and Ineligibility, USPS considers the agency's "best interest" in determining whether to continue performance with a debarred supplier (USPS 2018, 410, 412) (suspension and debarment requests should include

> [a] detailed written explanation why suspension and debarment is in the Postal Service's best interest. . . . If the supplier presents a significant risk to the Postal Service in completing the existing contract, the Contracting Officer must determine whether termination for convenience or otherwise is in the Postal Service's best interest. In making this determination, the Contracting Officer must consult with assigned counsel and consider the following factors: . . . Availability of other safeguards to protect the Postal Service's interest until completion of the contract. . . . In certain circumstances, soliciting or awarding a contract to a suspended, debarred, and ineligible supplier may be in the best interest of the Postal Service.).

21.13 CONCLUSION

Suspension and debarment are well-established tools for combating corruption, compliance and integrity-based concerns, and poor performance in public procurement. By excluding contractors that pose unacceptable risk, governments foster compliance, discourage corruption, and reinforce public confidence in the procurement system. While suspension and debarment systems continue to evolve around the world, the US government has a relatively mature, flexible system that affords due process protections to contractors, and that emphasizes reliance upon contractors' own compliance efforts to reduce risk to the US government customer. Companies working with the federal government should recognize the seriousness of suspension and debarment in the US system, and other nations building their own systems of contractor exclusion may wish to draw lessons from the US model (Yukins and Schnitzer 2016).

REFERENCES

ABA PCLS (American Bar Association, Public Contract Law Section). 2010. Guide to the Mandatory Disclosure Rule: Issues, Guidelines, and Best Practices. Washington, DC.

Block, Samantha. 2018. "Defying Debarment: Judicial Review of Agency Suspension and Debarment Actions." *George Washington University Law Review* 86: 1316. www.gwlr.org/wp-content/uploads/2018/10/86-Geo.-Wash.-L.-Rev.-1316.pdf.

Clinton, William J., Executive Order 12989 (1996), amended by Executive Order 13286 (2003).

Cook, Daniel, Eric P. Roberson, and Sam Knowles. 2017. "Prime Contractor Found Nonresponsible Based on Undisclosed Vendor-Vetting Process – Contingency Contractors Beware." *Westlaw Journal on Government Contracts* 31(1).

DOJ (US Department of Justice). 2018. Assistant Attorney General Brian A. Benczkowski Delivers Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance. www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program.

DOJ Benczkowski (US Department of Justice), Criminal Division, Office of the Assistant Attorney General Brian Benczkowski. 2018. Memorandum: Selection of Monitors in Criminal Division Matters. Washington, DC. www.justice.gov/opa/speech/file/1100531/download.

DOJ SEC (US Department of Justice and US Securities and Exchange Commission). 2019. A Resource Guide to the U.S. Foreign Corrupt Practices Act. Washington, DC. www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

Dubois, Pascale. 2012. "Domestic and International Administrative Tools to Combat Fraud and Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System." *University of Chicago Legal Forum* 2012(1): 195–235. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1497&context=uclf.

Dubois, Pascale, Paul Ezzeddin, and Collin D. Swan. 2016. "Suspension and Debarment on the International Stage: Experience in the World Bank's Sanctions System." *Public Procurement Law Review* 25(61). https://ssrn.com/abstract=2792137.

EU (European Parliament and Council of the European Union). 2014. "Directive 2014/24/EU." *Official Journal of the European Union*. Article 57. https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN.

FAR (Federal Acquisition Regulation). 2019. "*Code of Federal Regulation* (CFR). Title 48. www.acquisition.gov.

FBI (Federal Bureau of Investigation). n.d. "Operation Illwind." Accessed July 21, 2019. www.fbi.gov/history/famous-cases/operation-illwind.

GAO (Government Accountability Office). 2013. Suspension and Debarment: Characteristics of Active Agency Programs and Governmentwide Oversight Efforts (GAO-13-707 T, June 12), www.gao.gov/products/GAO-13-707T.

Grandon, Rodney A. 2016. *DoD Suspension and Debarment: Protecting the Government and Promoting Contractor Responsibility*. Washington, DC: Department of the Air Force. www.safgc.hq.af.mil/Portals/80/documents/AFD-160729-001.pdf?ver=2016–08-05-104750–383.

GSA (General Services Administration). 2019a. "Contractor Performance Assessment Reporting System (CPARS)." http://www.cpars.gov/.

2019b. "System for Award Management (SAM)." www.sam.gov/SAM/.

ISDC (Interagency Suspension and Debarment Committee). 2018. "Annual Report to Congress on the Status of the Federal Suspension and Debarment System." Washington, DC. 3. https://acquisition.gov/sites/default/files/page_file_uploads/Control%20ISDC%20FY%202017%20Report_Final_07_31_2018%20–2.pdf.

Manuel, Kate M. 2008. *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*. Washington, DC. Congressional Research Service. 2–5. https://fas.org/sgp/crs/misc/RL34753.pdf.

Meunier, Robert F. and Trevor B. A. Nelson. 2017. "Is It Time for a Single Federal Suspension and Debarment Rule?" *Public Contracts Law Journal* 46: 553.

OMB (Office of Management and Budget). 2019. "Does an Exclusion under the Federal Procurement System Affect a Person's Eligibility to Participate in Nonprocurement Transactions?" *Code of Federal Regulation* (CFR). Title 2: 180.145.

Pachter, John S. 2013. "Independent Monitors: What They Do and How to Avoid the Need for Them." *Federal Contracts Report* 100 FCR 637. www.smithpachter.com/post-detail.php?id=11654.

Sacilotto, Kara. 2018. "One Is the Loneliest Number: A Case for Changing Suspension and Debarment Regulations to Better Address Potential Exclusion of Individuals." *Public Contracts Law Journal* 47: 479.

Sander, Brett, and Joe Romero. 2015. "Vendor Vetting of Non-US Contractors in Afghanistan." *ABA PCLS Procurement Law Newsletter*. 50(4).

USPS (US Postal Service). 1995. "USPS Procurement Manual." Washington, DC. http://about.usps.com/publications/pub41/pub41toc.htm.

2018. "Supplying Principles and Practices." Washington, DC. 409–13. https://about.usps.com/manuals/spp/html/welcome.htm.
2019. "Postal Service." *Code of Federal Regulation* (CFR). Title 39.
USPS OIG (Office of the Inspector General, US Postal Service). 2012. Suspension and Debarment Program Audit Report. Report Number CA-AR-12-002. Arlington, VA. www.uspsoig.gov/sites/default/files/document-library-files/2015/CA-AR-12-002.pdf.
Whitlock, Craig and Kevin Uhrmacher. 2018. "Investigations: Prostitutes, Vacations and Cash: The Navy Officials 'Fat Leonard' Took Down." *Washington Post*, www.washingtonpost.com/graphics/investigations/seducing-the-seventh-fleet/.
World Bank. 2019. World Bank Sanctions Regime. www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/The_World_Bank_ Group_Sanctions_Regime.pdf.
Yukins, Christopher R. 2013. "Cross-Debarment: A Stakeholder Analysis." *The George Washington International Law Review* 45:219. http://ssrn.com/abstract=2316252
2015. *Mandatory Disclosure: A Case Study in How Anti-corruption Measures Can Affect Competition in Defense Markets*. Philadelphia, PA: Center for Ethics and the Rule of Law, University of Pennsylvania Law School. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600676.
Yukins, Christopher R., and Michal Kania. 2019. "Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement." *Upphandlingsrättslig Tidskrift* (UrT) 19(2): 47–73. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422499.
Yukins, Christopher R., and Johannes Schnitzer. 2016. "Combating Corruption in Procurement: Debarment Present and Future, in UNOPS, Future-Proofing Procurement." *Future-Proofing Procurement*. Copenhagen, DNK. United Nations Office of Project Services. 26. https://content.unops.org/publications/ASR/ASR-supplement-2015_EN.pdf?mtime=20171214185135.