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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

SUSPENSION & DEBARMENT

By Joseph D. West, Timothy J. Hatch, Christyne K. Brennan, and Lawrence J.C. VanDyke

The ability—and, to a certain extent, the legal right—to compete for new Government business is critical to a company's short-term success and its long-term survival, yet it is often taken for granted. The reality is that this ability, as well as the legal right, to compete for Government work can be extinguished for a number of reasons, some of which are totally unrelated to the company's performance of, or conduct under, a Government contract.

For over half a century the Government has had the right to suspend or debar contractors from obtaining new business. This right obtains from numerous statutes (some of which govern conduct outside the procurement realm) and has been incorporated into the Federal Acquisition Regulation.

Previous BRIEFING PAPERS on this issue have discussed the policies, practices, and procedures related to suspension and debarment. To a certain extent, much of what they covered remains current and valid. However, over the 17 years that have passed since the last BRIEFING PAPER on this topic,[1] there have been a number of developments (e.g., the "Nonprocurement Common Rule" and the effects of Enron-like corporate scandals) that require a fresh look at suspension and debarment.

This BRIEFING PAPER builds on those earlier efforts and provides a current, basic overview of the suspension and debarment process. It compares and contrasts the rights, obligations,

IN BRIEF

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and procedures in the Federal Acquisition Regulation with those under the Nonprocurement Common Rule and addresses the implications of business conduct outside the procurement area on a contractor's ability to do business with the Federal Government. Finally, it reviews certain state-related statutes and regulations that affect a contractor's eligibility for Government work.

Background

The policies behind current suspension and debarment practices have a time-honored pedigree. As early as 1884, Congress required that military supply contracts be awarded to the "lowest *responsible* bidder."[2] In 1928, the U.S. Comptroller General recognized in an opinion letter that "the interests of the United States" may necessitate debarment in some instances.[3] And with the passage of the Buy American Act of 1933, Congress first expressly authorized statutory debarment.[4]

In the late 1940s, Congress passed two acts that greatly increased the Government's use of suspension and debarment—the Armed Services Procurement Act of 1947[5] and the Federal Property and Administrative Services Act of 1949.[6] These acts formed the basis for the Armed Services Procurement Regulations[7] and the Federal Procurement Regulations,[8] respectively. These regulations established similar debarment procedures for both military and civilian agencies.

In the decades that followed, concerns were expressed that the existing regulations provided insufficient procedural safeguards, and that there was a lack of uniformity in the application of the regulations.[9] Moreover, several key court decisions found suspended or debarred contractors' due process liberty interest violated by insufficient proceedings.[10] These and other concerns eventually led to the release in 1982 by the Office of Federal Procurement Policy of Policy Letter 82-1, which established uniform guidelines for suspension and debarment.[11] A little more than a year later, these guidelines were adopted essentially wholesale into Subpart 9.4 of the FAR, which has governed federal agency procurement—both military and civilian—since 1983.

While suspension and debarment associated with Government *procurement* is regulated by the FAR, "nonprocurement" spending—such as grants, loans, and other forms of Government assistance—accounts for a considerable portion of the Federal Government's budget. The same considerations that gave rise to suspension and debarment in the procurement setting have more recently militated for exclusion of unsuitable participants from nonprocurement Government programs. Accordingly, in 1986 President Reagan issued an Executive Order requiring all executive departments and agencies to "participate in a system for debarment and suspension from programs and activities involving Federal financial and nonfinancial assistance and benefits."[12] In 1988, 28 agencies published a "Nonprocurement Common Rule" (NCR) that provides for "governmentwide nonprocurement suspension and debarment."[13] The NCR, which has recently been recodified in the *Code of Federal Regulations* at 2 C.F.R. Part 180, requires that procurement and nonprocurement

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suspensions and debarments be treated reciprocally and be effective Government-wide.[14] The NCR has been widely adopted by federal agencies,[15] including agencies such as the Department of Health and Human Services, Department of Education, and Department of Agriculture that each manage extensive nonprocurement programs such as Medicare/Medicaid, student financial aid programs, and the Food Stamp program. By its terms, the NCR applies to "any" nonprocurement transaction within the covered agency, including, but not limited to grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurances, payments for specified uses, and donation agreements.[16] In addition to FAR Subpart 9.4 and the NCR, numerous statutes expressly provide for suspension and debarment.[17]

The previous BRIEFING PAPER on this topic reported a rapid growth in the number of suspension and debarments from 1982 to 1988 but a fairly stable plateau thereafter.[18] This leveling-off trend has generally continued in suspensions and debarments related to Department of Defense contracts. For example, in 2004 the four largest agencies in the DOD took 1,198 suspension and debarment actions, only slightly more than the 1,033 such actions taken in 1988.[19] Overall, however, the number of suspensions and debarments have fluctuated in the last several years. There were 9,918 suspensions and debarments in Fiscal Year 2005, 5,045 in FY 2004, 7,607 in FY 2003, 7,684 in FY 2002, and 8,828 in FY 2001.[20] But these numbers do not tell the whole story; there have been significant shifts in the Government's approach to suspension and debarment in the supervening 17 years. For example, as will be discussed later in this PAPER, in recent years agencies have shown an increased willingness to suspend and debar based on corporate malfeasance unrelated to Government contracts.

In discussing suspension and debarment, this PAPER will focus predominately on the FAR and NCR and will avoid detailed discussion of the various statutory bases for suspension and debarment. In the majority of instances, the provisions of the NCR track the FAR; significant differences will be noted. Finally, it is important to note that most agencies have developed agency-specific supplements to the FAR,[21] and therefore the specific grounds and procedures for suspension and debarment may vary somewhat by agency. This is but one important reason to retain experienced advisors early in the process when facing a potential suspension or debarment situation.

Purposes

Administrative suspension and debarment is provided for by the FAR (procurement-related) and the NCR (nonprocurement-related), with supplementation by individual agencies. As expressly stated in both the FAR and the NCR, suspension and debarment are *not* to be employed by the Government "for purposes of punishment."[22] Rather, suspension and debarment are to be used "only in the public interest for the Government's protection" to ensure that the Government only enters into financial relationships with "responsible" entities.[23] Suspension and debarment are intended to protect Government programs from persons who engage in dishonest or illegal conduct or are otherwise unable to satisfactorily perform Government contracts.

In addition, many statutes provide for suspension and debarment as tools to promote compliance. The first such statute was the Buy American Act of 1933, which promotes the use of American-produced materials by providing for debarment of any contractor that violates its provisions.[24] Similarly, labor laws such as the Davis-Bacon Act and Walsh-Healey Act,[25] drug-enforcement laws such as the Drug-Free Workplace Act and Anti-Drug Abuse Act,[26] and environmental laws such as the Clean Air Act and Clean Water Act,[27] promote their various goals by barring noncompliant Government contractors. The Government in recent years has also shown an increased willingness to use exclusion as a means to promote statutory goals outside of the Government contracts area. For example, the Social Security Act requires exclusion of providers found guilty of health care

fraud or abuse from Medicare and Medicaid programs.[28] Likewise, the Generic Drug Enforcement Act provides for debarment of persons who have committed certain drug-related violations from submitting or assisting in the submission of a drug application.[29]

Grounds

Provided that proper grounds exist, the FAR and the NCR permit—but do not require—suspension and debarment. This is an important distinction. The purpose of suspension and debarment is not punitive but rather to protect the Government and the public. Therefore, even if grounds exist for suspension or debarment, an agency is not required to—and indeed should not—debar or suspend a *presently* responsible contractor.[30] In determining whether a contractor is presently responsible, an agency looks to the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors counseling against exclusion.[31]

■ Debarment

Debarment disqualifies a firm from contracting with the Government or participating in Government nonprocurement transactions for a specific period of time (usually limited to a maximum of three years).[32] As already noted, the grounds for debarment may be either statutory or administrative. In the former instance, the specific provisions of the statute govern. Unlike the provisions for administrative debarments, which make debarment discretionary, some statutes mandate debarment for violation of the statute.[33] Courts have also held that, even where a statute does not explicitly allow for debarment, the power to debar is implicitly granted.[34] Finally, courts have broadly interpreted statutory debarment authority to include debarment for failure to cooperate in an agency compliance review.[35]

The FAR enumerates several grounds for administrative debarment. Generally, a contractor or participant in a Government program may be debarred for (1) a conviction or civil judgment for fraud or the commission of a criminal offense, (2) a serious violation of the terms of a Government contract, subcontract, or transaction (established by a preponderance of the evidence), or (3) any other cause so serious or compelling in nature that it affects an entity's "present responsibility."[36]

Specifically, procurement debarment under the FAR can occur for criminal convictions or civil judgment for (a) fraud or a criminal offense in connection with a public contract or subcontract, (b) violation of federal or state antitrust laws, (c) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property, (d) intentionally affixing a "Made in America" label to foreign goods, or (e) any other offense indicating a lack of business integrity or business honesty.[37] Debarment under the FAR may also be based on the serious violation of the terms of a Government contract or subcontract, including willful failure to perform or a history of failure to perform one or more contracts.[38] Further grounds for debarment include violations of the Drug-Free Workplace Act, unfair trade practices, noncompliance with the Immigration and Nationality Act's employment provisions, or "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."[39]

The grounds for nonprocurement debarment under the NCR are similar in most respects to the FAR. Unlike the FAR, the NCR does not specifically provide for debarment for falsely affixing a "Made in America" label to foreign-made products or noncompliance with the employment provisions of the Immigration and Nationality Act.[40] The NCR does, however, provide four additional, unique grounds for nonprocurement debarment. First, in what is a significant expansion over the FAR, the NCR provides for debarment of an entity for "[k]nowingly doing business with an ineligible person."[41] Second, a participant may be debarred for failing to pay debts to "any Federal agency or instrumentality" (except for debts arising under the Internal Revenue Code).[42] Third, in addition to two examples given in the FAR of violations of public agreements

serious enough to merit debarment, the NCR adds a "willful violation of a statutory or regulatory provision…applicable to a public agreement."[43] Finally, the NCR expressly provides for debarment upon violation of a material provision of a voluntary exclusion agreement or any suspension or debarment settlement agreement.[44]

Where one or more of the above grounds for debarment exists, debarment will be imposed where it is "in the Government's interest."[45] It is extremely important to recognize that debarment is often a likely collateral consequence of a criminal conviction or civil judgment. Moreover, it is important to bear in mind that a grant of immunity from prosecution is no guarantee against suspension or debarment.[46]

■ Suspension

Suspension is the temporary disqualification of a firm from contracting with the Government or from participating in Government programs.[47] The grounds for suspension and debarment are substantially similar. Practically speaking, suspension is a temporary debarment that lasts until an investigation, litigation, or agency determination has settled the facts relevant to the grounds for debarment.[48] Accordingly, although a suspension is "temporary," in instances where an investigation or litigation lasts more than three years, the term of a suspension may actually exceed the typical maximum term of a debarment.[49]

Both the FAR and the NCR recognize that suspension is a "serious action" that should only be imposed on the basis of an indictment or "adequate evidence" of the existence of grounds for debarment, and where "immediate action" is necessary to protect the Government's and public's interests.[50] "Adequate evidence" is "information sufficient to support the reasonable belief that a particular act or omission has occurred."[51] In assessing whether adequate evidence for suspension exists, the FAR states that a suspending official "should" examine basic documents such as contracts, inspection reports, and correspondence.[52] The official also "should" consider the seriousness of the contractor's acts or omissions and "may, but is not required to," consider remedial measures or mitigating factors.[53] The NCR, in contrast, states only that the official "may" examine basic documents and does not expressly provide for consideration of the seriousness of a participant's actions or mitigating factors.[54] Under both the FAR and the NCR, however, the adequate evidence requirement is an easier standard for a debarring official to meet than the preponderance of the evidence standard required for debarment.

Another difference between the FAR and NCR regards a serious violation of the terms of a Government contract or agreement. Under the FAR, a serious violation supported by the preponderance of the evidence is grounds for debarment, but, unlike the other grounds for debarment, there is no corresponding provision in the FAR for suspension based on adequate evidence of such a violation.[55] In contrast, because the NCR provides for suspension upon adequate evidence of the existence of *any* cause of debarment, the NCR does specifically provide for suspension based on adequate evidence of a serious violation of a public agreement or transaction.[56]

Recently, responding to the headline-grabbing scandals at companies like Enron, agencies have shown increased willingness to suspend or debar companies that have engaged in corporate malfeasance unrelated to any Government contract activity. For example, in 2003, the General Services Administration, relying on the FAR's "catch-all" provision allowing debarment for any other cause so serious or compelling in nature that it affects an entity's "present responsibility,"[57] proposed for debarment MCI WorldCom after it was revealed that MCI had "committed the most massive fraud in U.S. history when it overstated its earnings to the [Securities and Exchange Commission]."[58] Similarly, the GSA suspended both Arthur Anderson and Enron in the wake of their well-publicized scandals.[59] In none of these instances was the underlying conduct directly related to contracts with the Government. This means that today's Government contractor or program participant

must give serious consideration to potential suspension and debarment implications of any adverse conduct by its officers or employees, as well as to the resolution of any civil or criminal charges resulting from that conduct.

Procedural Requirements

The procedures required to debar or suspend an individual or organization vary depending upon whether the basis is statutory or administrative. For statutory suspensions or debarments, the statute itself provides the applicable procedural requirements, subject only to the constitutional limits of due process as defined by the courts.[60] A discussion of the various statutory requirements is beyond the scope of this PAPER. The procedures applicable to administrative suspensions or debarments, which are the focus of this PAPER, are explained by the FAR (for procurement) and the NCR (for nonprocurement). As in most respects, here also the FAR and the NCR are very similar; this PAPER will note the instances where they diverge.

■ Suspension & Debarment

To initiate a suspension or debarment, an agency must first become aware of the existence of possible grounds for such action. The FAR accomplishes this by requiring agencies to establish procedures for prompt reporting, investigation, and referral to the applicable debarring official of any "matters appropriate for that official's consideration."[61] Indictments, convictions, and civil judgments are the types of "matters" most commonly referred to debarring officials. However, an indictment or similar official action is not necessary to initiate a suspension action; while less common, a suspension may be initiated by an agency that has developed the facts independent of or even in the absence of a parallel judicial proceeding.[62]

Once an agency has made the decision to formally consider an entity for debarment or suspension, the agency is required by the FAR and NCR to issue either a notice of suspension[63] or notice of proposed debarment.[64] While the regulations require that notice be given *before* debarment (hence the notice of *proposed* debarment),[65] a notice of suspension can be (and usually is) provided with the suspension effective immediately.[66] The agency must provide certain information in the notice, including that the entity has either been suspended or is being considered for debarment, the basis for the agency's action, and the Government-wide effect of the suspension or proposal to debar.[67] In the case of a suspension, the notice also notes that the suspension is for a temporary period pending completion of an investigation or resulting proceedings.[68] Although the agency must state the basis for the suspension or proposed debarment "in terms sufficient to put you on notice," in the case of a suspension, which generally occurs concurrent with some Government investigation or prosecution, the agency is permitted to limit the notice so as not to disclose the Government's evidence.[69]

One crucial difference between the FAR and the NCR is that, while a notice of proposed debarment under the FAR immediately excludes a contractor from procuring additional Government contracts, a notice of proposed debarment under the NCR does not.[70] Only once a participant is actually debarred does exclusion begin under the NCR. However, an entity that is proposed for debarment under the FAR is immediately excluded from participation in nonprocurement programs governed by the NCR.[71] It is also important to note that a notice that an agency is considering or proposing to *suspend* an entity would not immediately exclude that entity, because it would not comply with the requirement under both the FAR and the NCR that a notice of suspension must notify an entity that "you *have been* suspended."[72]

For an entity for whom Government contracts or programs are vital, receipt of a notice of suspension under either the FAR or the NCR or a notice of proposal to debar under the FAR is grave indeed; such a notice immediately excludes the entity from any further contracts or Government programs. In part because of this draconian effect, agencies sometimes issue

"show cause" letters, which inform an entity that it is being considered for suspension or proposed debarment, but do not have the effect of immediate exclusion. Typically, such letters offer an opportunity to respond within a set time period to allegations of misconduct that have been brought to the attention of the debarring official. Neither the FAR nor the NCR require an agency to issue a show cause letter or to provide any notice before the notice of suspension or proposed debarment, and a recent attempt failed to amend the regulations to require the issuance of a show cause letter "except in those cases where the government would be harmed by waiting any period of time" to suspend or propose debarment.[73] Therefore, the issuance of a show cause letter continues to be completely at the discretion of individual agencies. Whether, however, an entity receives a show cause letter, or simply knows by other means that an agency is considering suspension or proposed debarment, that entity is well advised to begin a dialogue with the agency early in the process so as to avoid, if possible, the issuance of an immediately effective exclusionary notice. Agency debarring officials are normally receptive to such approaches. The importance of advice from experienced counsel as early as possible in this process cannot be overstated.

A suspended entity has 30 days after receipt of the notice to submit information and argument in opposition to the suspension, including specific facts that contradict statements contained in the notice.[74] Similarly, an entity has 30 days to contest a proposed debarment by providing specific facts contradicting the basis for the debarment.[75] The NCR requires that, in addition to providing specific information contradicting the basis for the suspension or proposed debarment, an entity contesting suspension or debarment must also inform the agency of all prior exclusions imposed by federal, state, or local agencies, any additional relevant criminal or civil proceedings not included in the notice, and all of the entity's affiliates.[76]

The contesting entity will only be entitled to a hearing where (1) material facts are in dispute, (2) the action was not based on an indictment, conviction, or civil judgment, and (3) substantial interests of the Government in pending or contemplated legal proceedings will not be prejudiced by a hearing.[77] If the debarring official determines that the above conditions are met, the issue is referred to a fact-finder who conducts an independent proceeding.[78] At the conclusion of the proceeding, the fact-finder submits written findings of fact to the debarring official, which are binding unless determined by the official to be arbitrary and capricious or clearly erroneous.[79]

If an entity has been proposed for debarment and there is no suspension in effect, once all issues of disputed material fact have been resolved, the agency must make a debarment decision within 30 days under the FAR and 45 days under the NCR, subject to extension for good cause.[80] Notice of the decision must be promptly provided to any debarred entity and involved affiliates, and if debarment is imposed, the notice must state the reasons for debarment, the period of debarment, and explain that the debarment is effective Government-wide.[81]

■ De Facto Suspension & Debarment

As already noted in this PAPER, the Government will only enter into contracts or transactional relationships with "responsible sources."[82] Accordingly, an agency, without going through the procedures required to expressly suspend or debar, could nonetheless "de facto" debar an entity simply by repeatedly finding it nonresponsible and refusing to contract or transact with the entity. Such a de facto debarment is improper because it circumvents the procedural safeguards required to debar or suspend an entity.[83] Generally, repeated findings of nonresponsibility are necessary to make out a claim of de facto debarment.[84]

Late in the Clinton administration, the Office of Management and Budget promulgated FAR amendments requiring a more searching assessment of contractors' compliance with labor, employment, tax, environmental, antitrust, and consumer protection laws in making

preaward determinations of responsibility.[85] Critics of the amendments argued that they effectively opened wide the door for contractor "blacklisting" without offering the procedural protections required to actually suspend or debar a contractor. However, the issue was mooted when the Bush administration revoked the amendments only a year later.[86]

An agency may also de facto debar a contractor by downgrading its past performance rating in a negotiated procurement. Past performance is a significant nonprice evaluation factor in such Government contract awards, thereby considerably influencing the award decision.[87] The contractor's ability to challenge the agency's decision related to the past performance rating is exceptionally limited, however, since the Government Accountability Office and courts provide broad discretion to agency officials in evaluating an offeror's past performance.[88]

Mitigating Factors & Administrative Agreements

Because the suspension and debarment inquiry is focused on *present* responsibility, the mere existence of grounds does not alone mandate suspension or debarment.[89] Rather, in considering suspension or debarment under the FAR, agency officials "should" consider remedial or mitigating factors such as (1) the presence of effective standards of conduct and internal control systems in place when the misconduct occurred or adopted before any Government investigation; (2) whether the contractor timely brought the misconduct to the agency's attention; (3) whether the contractor fully investigated the misconduct and provided the results of the investigation to the agency; (4) the contractor's cooperation; (5) payment of fines, restitution, and reimbursement of the Government's investigation costs by the contractor; (6) whether the contractor has taken appropriate disciplinary action against the responsible individuals; (7) implementation of remedial measures; (8) institution of a new or revised review and control process and ethics training programs; (9) whether adequate time has passed to eliminate the cause of the misconduct; and (10) management's recognition of the seriousness of the misconduct and role in implementing programs to prevent recurrence.[90]

The NCR provides a more extensive list of mitigating and aggravating factors that a debarring official "may" consider. In addition to those listed in the FAR, the NCR provides the following factors that focus more on the underlying misconduct and a history or pattern of behavior: (a) the actual or potential harm or impact that results or may result from the wrongdoing; (b) the frequency of incidents and/or duration of the wrongdoing; (c) whether there is a pattern or prior history of wrongdoing; (d) whether the entity has been excluded or disqualified previously by a federal, state, or local agency on a basis of similar conduct; (e) whether the entity had already entered into an administrative agreement based on similar conduct; (f) whether and to what extent the entity planned, initiated, or carried out the wrongdoing; (g) whether the wrongdoing was pervasive within the organization; (h) the kind of positions held by the individuals involved in the wrongdoing; and (i) other factors that are appropriate to the circumstances of a particular case.[91]

Once a cause for suspension or debarment has been established—whether under the FAR or the NCR—the burden is on the contractor or program participant to demonstrate, to the satisfaction of the debarring official, that it is presently responsible.[92] While failure by the debarring official to consider mitigating factors in making this determination may provide a basis to challenge the decision as arbitrary,[93] because of the strong deference generally accorded to agency determinations of nonresponsibility, an organization's best opportunity to demonstrate present responsibility is before the suspension or debarment decision. Recognizing this, some agencies have taken a proactive approach, creating voluntary disclosure programs. Examples of such programs include the DOD Voluntary Disclosure Program,[94] initiated in 1986, and the Environmental Protection Agency Voluntary Disclosure Program,[95]

initiated in 1995. Such programs offer incentives for entities to voluntarily discover, promptly disclose, expeditiously correct, and prevent recurrence of wrongdoing. While the programs do not guarantee that compliance with the program's conditions will prevent suspension or debarment, in practice compliant organizations have generally not been suspended or debarred. It is worth noting, however, that the number of voluntary disclosures under the DOD's program has been diminishing for the past few years.[96]

Typically, if grounds for suspension or debarment have been established but the debarring official has been assured that the entity is nonetheless presently responsible, the suspension or proposed debarment process is settled with an administrative agreement. Whether to consider settlement and how to structure it are left to the discretion of the individual agencies; the FAR does not even mention settlement and the NCR states only that settlement is permissible and may include a voluntary exclusion.[97]

Administrative agreements vary from agency to agency and settlement to settlement. Often, however, the agreements will incorporate at least some of the remedial and mitigating factors in the FAR and NCR listed above. Moreover, the agreement will be for a term (often three years), and will require the entity to take certain actions such as implementing or maintaining various compliance, monitoring, and ethics programs, excluding certain individuals from the business or at least involvement with the agency, and notifying the agency on a regular basis regarding compliance. The agreement may also provide for a stated term of voluntary exclusion, which under the NCR has Government-wide effect.[98] Finally, the agreement also often provides for immediate exclusion in the event of material breach thereof.

Parallel Proceedings & Coordinated Settlements

Often, the actions that form the basis for the debarring official's consideration of suspension or debarment are also the same actions underlying a parallel criminal or civil proceeding. This raises particularly thorny issues, because settlement of the criminal or civil proceeding is no guarantee against suspension or debarment,[99] and often there is little that can be done to turn parallel into sequential proceedings.[100]

In attempt to bring finality to as many of the proceedings as possible, it is often wise to attempt to reach a "coordinated settlement." While some agencies may entertain interim settlements, most agencies will not consider settlement of a suspension or debarment matter until finality of the underlying civil or criminal case. Since the Department of Justice, and not the relevant agency, primarily controls the underlying civil or criminal case, the contractor's direct coordination with agency debarring officials before, during, and after resolution of the underlying case is imperative. Such coordination may facilitate an expeditious resolution of any proposed debarment or suspension, thereby allowing the contractor to maintain its eligibility and present responsibility.

Even if an agency is unwilling to participate in comprehensive settlement discussions, it may be possible when settling civil or criminal proceedings to influence the likelihood of future suspension or debarment by obtaining as part of the settlement a statement from the prosecutor or adverse party that bears positively on the entity's present responsibility. For example, an affirmative statement by the Department of Justice that "our investigation has uncovered no evidence that suggests a current lack of integrity or business honesty on the part of the company or its current management or employees" (or words to that effect) will be extremely favorable to the contractor in any future suspension or debarment settlement negotiations with the agency.

Effects

For a Government contractor or program participant, suspension or debarment can be the equivalent of an organizational death penalty. In addition to the direct effects of suspension

or debarment discussed below, there are often serious indirect effects, including the potential of reciprocal debarment by state governments (discussed later in this PAPER), and the possibility that obligations under public disclosure laws may be implicated. It is important that an entity facing a potential suspension or debarment consider all of these effects as it works through the process.

■ Duration

Regardless whether an entity is suspended or debarred under the FAR or under the NCR, that entity is immediately excluded from any new procurement and nonprocurement activity Government-wide.[101] Exclusions under the FAR and NCR have reciprocal affect; exclusion under either regulation precludes both procurement and nonprocurement eligibility.[102] Moreover, a notice of proposed debarment under the FAR also immediately excludes an entity from pursuing new procurement *and* nonprocurement awards.[103] In contrast, however, a notice of proposed debarment under the NCR does not exclude an entity in either the procurement or nonprocurement arena.[104]

Because a suspension is considered a "temporary" exclusion, the Government must initiate legal proceedings within 12 months of the suspension notice, or 18 months if the Assistant Attorney General requests an extension.[105] Once legal proceedings are initiated, however, an entity may be suspended until the termination of the proceedings.[106] Thus, a suspension may in fact last longer than a debarment.

A debarment, on the other hand, is for a fixed length of time—generally not to exceed three years.[107] As with a suspension, a debarment (as well as a proposed debarment under the FAR) is effective Government-wide.[108] Where a suspension precedes a debarment, the period of the suspension must be considered by the debarring official when setting the length of the debarment.[109] Once an entity has been debarred, it may request the debarring official to reconsider the debarment decision or reduce the period or extent of debarment.[110] The request must be in writing and supported by documentation of the reasons for reconsideration such as (1) newly discovered evidence, (2) reversal of a conviction or judgment that formed the basis for the debarment, or (3) a bona fide change in control of the debarred organization.[111] Conversely, if a debarring official wishes to extend the period of an existing debarment, the official may do so if necessary to protect the public interest, but not solely on the basis of the same facts and circumstances underlying the original debarment.[112] Moreover, to extend a debarment an agency must use essentially the same procedures as required for a new debarment.[113]

■ Existing Contracts

Suspensions or debarments are prospective; agencies may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment, unless the agency's head directs otherwise.[114] However, unless the agency head makes a written determination of the compelling reasons for doing so, agencies are proscribed from (1) placing orders exceeding the guaranteed minimum under indefinite quantity contracts, (2) placing orders under optional use contracts, blanket purchase agreements, or basic ordering agreements, or (3) adding new work, exercising options, or otherwise extending the duration of current contracts or orders.[115] Agencies also have the discretion to terminate contracts of excluded contractors, but only after review by the agency to "ensure the propriety of the proposed action."[116]

■ Agencies & The Excluded Parties List

When an entity is suspended or debarred—or proposed for debarment under the FAR—that entity is placed on the Excluded Parties List System (EPLS) operated by the GSA.[117] The EPLS is the central mechanism by which the Government gives Government-wide effect to agency exclusions, whether procurement or nonprocurement. Within five working days of taking exclusionary action towards an entity, an agency must provide the name and address

of the excluded entity, the name and contact information of the agency taking the action, the cause for the action, the effect of the action, the termination date, and a DUNS Number, Social Security Number, Employer Identification Number, or other Taxpayer Identification Number where available.[118] Even voluntary exclusions entered into as part of a settlement agreement are entered into the EPLS and thus given Government-wide effect.[119]

Once an entity's name is on the EPLS, that entity is excluded from receiving Government contracts or subcontracts and participating in nonprocurement transactions with the Government. The FAR prohibits agencies from soliciting offers from, awarding contracts to, or consenting to subcontracts with entities listed on the EPLS.[120] EPLS-listed contractors are also barred under the FAR from acting as agents or representatives for other contractors in their Government contracts.[121] Contracting Officers must review the EPLS after the opening of bids or receipt of proposals and immediately before award.[122] The NCR similarly bars federal agencies from entering into a covered transaction with anyone listed on the EPLS.[123] Federal agencies may only contract or transact with an entity listed on the EPLS if the agency's head grants an exception, stating in writing the "compelling reasons" for the exception.[124] Such exceptions are rare, generally limited to very large Government contractors where the Government either does not have readily available alternative sources or cannot quickly change suppliers.[125]

Where the Government inadvertently enters into a contract with an excluded contractor, the contract is voidable at the option of the Government, and the contractor will not be permitted to recover for any expenses incurred in partially performing the contract.[126] Moreover, as will be explained below, the FAR imposes a certification requirement for most contracts,[127] and a false certification could subject an entity to criminal and civil false claims liability.

■ Subcontracts

The FAR restricts Government contractors from entering into any subcontract in excess of $25,000 with an entity that has been excluded, unless there is a compelling reason to do so.[128] A contractor that intends to subcontract with an excluded party must notify the CO, in writing, before entering into the subcontract. The notice must provide (1) the name of the proposed subcontractor, (2) acknowledgement that the subcontractor is listed on the EPLS, (3) the compelling reasons for subcontracting with the listed entity, and (4) how the contractor intends to protect the Government's interests.[129]

Whereas the FAR only restricts subcontracting with excluded parties at the first tier, the NCR contains a pass-down provision that restricts transactions with excluded parties at all tiers of a covered transaction.[130] Thus, a program participant may not use the services of an excluded entity or person, no matter how many tiers removed, except where the federal agency explicitly grants an exception of the same type that would be required for the agency to transact directly with an excluded entity.[131] If a participant knowingly does business with an excluded entity, the agency may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend the participant, or take other appropriate remedies.[132]

■ Certification

To ensure that the Government does not contract or subcontract with excluded entities, the FAR requires that the contractor must provide a certification for all contracts at or above the simplified acquisition threshold (currently at $100,000).[133] In the certification, the contractor states whether (a) it is currently debarred, suspended, proposed for debarment, or otherwise ineligible for federal contracts, (b) it has received a criminal conviction or civil judgment for fraud or a similar offense in connection with a public contract or subcontract or for a violation of federal or state antitrust statutes relating to offers, (c) it is currently criminally indicted or civilly charged for any of the above offenses, or (d) it has had any Government contracts terminated for default in the past three years.[134] The certification applies not only to the contractor, but

also to any "principals" of the contractor.[135] The FAR also requires that for any first-tier subcontract over $25,000, the contractor must require a similar certification.[136]

The NCR similarly imposes an affirmative duty on a direct program participant to notify the agency if it or its principals (1) are presently excluded or disqualified, (2) have in the past three years been convicted or had a civil judgment rendered against them of the type that could form the basis for suspension or debarment, (3) are presently indicted or civilly charged with such an offense, or (4) have had any Government (federal, state, or local) transactions terminated for default within the past three years.[137] And while the NCR does not require a certification from the direct participant regarding lower-tier transactions, it does place an affirmative duty on the participant to verify that a lower-tier entity is not excluded.[138]

■ Imputed Liability & Related Entities

The scope of suspension and debarment is extended considerably by the fact that both the FAR and NCR allow for vertical and horizontal imputation. The FAR and NCR permit fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or any other individual associated with an organization to be imputed to the organization where (a) the conduct occurred in connection with work for the organization, (b) the organization acquiesced in or knew or approved of the conduct, or (c) the organization accepted benefits from the conduct.[139] It is important to note that the regulations essentially impose strict liability where conduct occurs "in connection with the individual's performance of duties for or on behalf of" the organization, and agencies are generally not receptive to arguments that an individual's willful misconduct should not be imputed to the organization because it was not authorized.[140]

Fraudulent, criminal, or other improper conduct can also be imputed in the other direction—from an organization to an individual—if the individual either participated in, had knowledge of, or had reason to know of the organization's conduct.[141] Finally, fraudulent, criminal, or other improper conduct can also be imputed horizontally from one organization to another where (1) the conduct occurs in connection with a partnership, joint venture, joint application, association, or other similar arrangement, (2) where an organization directs, manages, controls, or influences the offending organization, or (3) where an organization accepts benefits derived from the other organization's impermissible conduct.[142]

When an organization is suspended or debarred, the exclusion by default includes all divisions or other organizational elements unless the debarring official expressly limits the exclusion to specific divisions of the organization.[143] Courts and agencies have on some occasions, however, been willing to recognize that, for larger companies, company-wide exclusion may not be appropriate when the misconduct was limited to one or a few divisions.[144] Suspension or debarment may also be extended to "affiliates" of an organization at the discretion of the debarring official, but only if affiliates are specifically named and given an opportunity to contest the action.[145] Organizations are affiliated if (a) one controls or has the power to control the other, or (b) a third party controls or has the power to control both organizations.[146] The power to exclude affiliates enables agencies to stop excluded organizations from circumventing suspension or debarment by simply changing names or reincorporating without any change in effective control.[147]

Organizations must also be very careful when considering hiring individuals who have been suspended or debarred. The NCR expressly prohibits an excluded individual from acting as a "principal" of an organization participating in a covered program.[148] Moreover, the NCR defines "principal" broadly, as (1) any person "with management or supervisory responsibilities," (2) any person who handles or is otherwise in a position to influence the use of federal funds, or (3) any person in a technical or professional position "capable of substantially

influencing" the organization's participation in a covered program.[149] And while the FAR does not contain a similarly harsh provision, if the potential employee would be considered a "principal" within the meaning of the FAR certification provision discussed above, the hiring company would be required to make an affirmative certification of the suspension or debarment for every prospective Government contract above the simplified acquisition threshold.[150] This, in turn, could influence a CO's determination regarding the present responsibility of the company.[151] Therefore, organizations are well advised to carefully consider the risks when hiring debarred or suspended individuals.

Judicial Review

An agency suspension or debarment decision is reviewable in federal district court under the Administrative Procedure Act.[152] The scope of review, however, is deferential to the agency;[153] a court will not set aside an agency decision unless it finds that decision "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[154] In reviewing agency action under the APA, a court will inquire whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for the action including a rational connection between the facts found and the choice made."[155] Moreover, because of sovereign immunity, the only remedy available to an excluded entity is an injunction against the suspension or debarment.[156]

Before judicial review is available, an excluded entity must have exhausted all available administrative remedies.[157] Thus, for example, an organization that fails to submit an opposition to a suspension within 30 days of receiving notice would fail to exhaust its administrative remedies under the NCR.[158] The exhaustion requirement may be waived in "only the most exceptional circumstances."[159] Generally only where the claimant can demonstrate that further agency process would clearly be futile—for example, prolonged agency inaction—will the claimant be permitted to bypass the exhaustion requirement.[160] A claimant is not, however, required to exhaust an agency *appeal* process unless the governing statute or regulations explicitly requires such exhaustion.[161]

A claimant usually desires to have the exclusion lifted pending resolution of the suit. To obtain such preliminary injunctive relief, a claimant will be required to meet a fairly stringent test, which varies slightly depending on the circuit in which the suit is brought. Generally, however, four factors will be considered by the court: (1) whether the claimant has a substantial likelihood of success on the merits, (2) whether the claimant would suffer irreparable harm without the injunction, (3) whether the claimant's need for an injunction outweighs any harm that would result, and (4) whether the preliminary relief would serve the public interest.[162]

To the extent that an agency follows the procedural requirements of the FAR or NCR in making a suspension or debarment decision, it is unlikely that an excluded entity can make out a claim for violation of constitutional due process. The procedures required by the FAR and NCR were developed in response to early court decisions finding deprivations of due process relating to suspension and debarment.[163] The law is fairly settled, therefore, that these procedures adequately represent the process that is due under the Constitution.

State Considerations

■ General

The suspension or debarment of a contractor by a state agency or authority is regulated by state specific statutes and agency regulations. As a result, the effect of a federal suspension or debarment on a contractor's ability to conduct state public work or the state consequences of an admission by a contractor of a federal violation may have different outcomes as determined by each relevant state. Notwithstanding, there are a number of states that include similar bases in their statutes for

imposing suspension or debarment on a contractor, as well as provide for some due process rights in such debarment determinations. In addition, while states have recognized that the determination of affiliation is a fact-intensive inquiry, many states analyze similar indicia for making a determination of affiliation or imputation of liability from a debarred employee to its company.

■ Reciprocal Suspension Or Debarment

(1) *Federal Suspension or Debarment*—Certain states, including Massachusetts, Maryland, New Jersey, and Pennsylvania, may debar a contractor simply because the contractor was debarred by the Federal Government pursuant to Subpart 9.4 of the FAR as discussed above.[164] Some state statutes are permissive when providing for a state debarment of a federally debarred contractor,[165] while other states mandate a simultaneous debarment.[166] Massachusetts, for example, requires that a contractor be simultaneously debarred or suspended by the state if the contractor has been debarred or suspended by the Federal Government, unless "special circumstances exist."[167]

Other states will not automatically debar a contractor that is federally debarred but will consider such federal debarment in determining the contractor's responsibility when awarding a state contract.[168] New York, for example, in its vendor responsibility determinations for state procurements, considers whether the vendor, any principal, owner, officer, major stockholder, affiliate, or any person involved the bidding, contracting, or leasing process has been the subject of a federal, state, or local government suspension or debarment.[169]

(2) *State Suspension or Debarment*—States may debar a contractor if it was debarred by another state.[170] Most states provide that the state may debar a contractor if it has been debarred by another state *for any reason*.[171] Indeed, states give themselves broad authority to debar a contractor based on a variety of causes. Therefore, if a state does not expressly provide for the debarment of a contractor if it has been debarred by another state, it may allow for such a debarment where the contractor has been debarred in another state based on a general cause of "unsatisfactory performance." Some states may also include a "catch-all" cause for suspension or debarment in their statutes, such as Pennsylvania's, which provides that a contractor may be debarred or suspended for "[a]ny other act or omission indicating a lack of skill, ability, capacity, quality control, business integrity or business honesty that seriously and directly affects the present responsibility of a person as determined by the purchasing agency."[172] States may use these broad causes for debarment as a basis for debarring a contractor that has been debarred in another state.

(3) *Suspension or Debarment for Violation of Federal Law*—Some states provide that suspension or debarment may be imposed on a contractor for violation of certain federal laws.[173] While such violation of federal law may not lead to a debarment of the contractor by the Federal Government, a contractor should beware of potential debarment by states. Massachusetts, for example, may impose debarment for the violation of federal antitrust laws, federal laws regulating campaign contributions, federal laws regulating hours of labor, prevailing wages, minimum wages, overtime pay, equal pay, child labor, or worker's compensation, federal laws prohibiting discrimination in employment, federal laws regulating labor relations or occupational health or safety, or federal laws protecting the environment.[174] While most states require that a violation of such federal law result in a conviction or final adjudication by a court or agency,[175] some states, such as New Jersey and Pennsylvania, only require a violation of certain federal laws with no requirement of a final adjudication to debar an entity.[176] Thus, if a state only requires violation of a federal law to impose debarment, a contractor's admission of a violation of federal law in a settlement agreement with the Federal Government that did not lead to a federal debarment may result in a state debarment. Therefore, individuals and companies should be advised that even though they may not be debarred by the Federal Government, they may be debarred by a state if they violate a federal law.

(4) *Suspension or Debarment for Violation of Specific State Statutes or Requirements*—Some states have "stand alone" statutes mandating that contractors will be subject to suspension or debarment for violation of specific state statutes. Such "stand alone" statutes may be employed by states that do not have general suspension and debarment statutes, or they may simply be another statute that a state may use to debar a contractor. For example, "drug-free workplace" statutes[177] and state "Buy American Act" requirements[178] provide for debarment if an entity violates these statutes. Some states debar contractors for violating prevailing wage laws,[179] violating state bid-rigging laws,[180] or discriminating in the "solicitation, selection, hiring, or commercial treatment of vendors, suppliers, subcontractors, or commercial customers."[181] Other states provide for debarment where a contractor has been classified as a small, minority, or woman-owned business based on false information.[182] A review of state statutes to determine the bases for a suspension or debarment should not be limited to a general debarment statute. Many states have specific statutes such as those discussed above that provide a basis for debarment if the entity violates those statutes.

(5) *Suspension or Debarment for Violation of State Public Contract Provisions*—Some states may impose debarment where the contractor fails to perform or unsatisfactorily performs under state contracts over a number of years.[183] Other states may also impose suspension or debarment where the contractor simply fails to timely perform its work under one state contract.[184] In addition, some states may provide for suspension or debarment of a contractor where the contractor has been declared in default, fails to comply with contract specifications or delivery terms, or fails to submit documents required by a contract.[185] A company should consider such state statutes when it is performing a state contract and recognize the risk of debarment if it does not satisfactorily perform or is defaulted. The risk of losing future state work on the basis of a state debarment may warrant a company investing the time and money to affirmatively prevent and cure any unsatisfactory performance or defaults.

(6) *Suspension or Debarment for Negligent Violation of a Statute*—Although most states require that a violation of a statute be intentional for a contractor to be debarred,[186] at least one state has determined that the negligent violation of a statute is sufficient to warrant debarment of a contractor. The Supreme Court of Connecticut determined that a violation was not required to be intentional or willful to place the contractor on the debarment list. Instead, the court held that a negligent violation was sufficient.[187] The relevant debarment statute stated that companies would be placed on the debarment list if "found to have disregarded their obligations under said section."[188] The court analyzed the term "disregard" and determined that it included negligent conduct.[189] Although the plaintiff argued that if the court "conditioned[ed] debarment on conduct that is neither intentional or willful, [it] would leave employers open to the drastic sanction of debarment for a minor error of a few dollars,"[190] the court held that "if the legislature had wished to condition debarment on intentional or willful conduct, then it could have said so."[191] Other states may follow this line of reasoning where they have a broad "catch-all" basis for suspension or debarment as discussed above.

■ Affiliates & Imputed Liability

Similar to the relevant FAR provisions and federal case law concerning affiliates and related entities discussed above, states also will debar a company where an affiliated entity has been debarred or impute liability where an individual has been debarred.

States recognize that a determination of affiliation is a fact-intensive inquiry. As a Massachusetts statute states: "The decision to include a known affiliate within the scope of a suspension or debarment shall be made on a case-by-case basis, after giving due regard to all relevant facts and circumstances."[192] States consider certain indicia of control in determining affiliation similar to the indicia listed in the FAR.[193] For example, the District of Columbia defines an affiliate as "any business in which a suspended or debarred person is

an officer or has a substantial financial interest (as defined by regulations), and any business that has a substantial direct or indirect ownership interest (as defined by regulations) in the suspended or debarred business, or in which the suspended or debarred business has a substantial direct or indirect ownership interest."[194] And a Chicago Public Schools policy manual on debarment lists the indicia of control for determining an affiliate almost verbatim to the federally recognized indicia, stating that 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 or following the suspension, debarment, bankruptcy, dissolution, or reorganization of a person which has the same or similar management, ownership or principal employee as the debarred, excluded or voluntarily excluded person."[195]

New York also considers several indicia of control when determining affiliation. A New York court held that a contractor was a "substantially owned-affiliated entity" where there was a close familial relationship between the owners of the affiliated entity and the debarred contractor, the companies were located in the same building, the companies shared office equipment and a secretary, the affiliated entity hired a former employee of the debarred contractor, the companies were named insureds on insurance policies, and after the contractor was debarred, insurance policies formerly issued to the debarred contractor were reissued to the affiliated entity.[196] Furthermore, the court held that it was significant that before the contractor's debarment, the affiliated entity's public contracts were limited to construction materials, but after the debarment, the affiliated entity began bidding for contracts related to the work of the debarred contractor.[197]

States may also consider whether the affiliated and debarred contractors have participated in joint ventures, thus "creat[ing] the public perception that the two firms are a single entity."[198] And Virginia has expressly stated that a successor company "formed with the same resources, owners or stockholders" as the debarred contractor will also be debarred.[199]

Moreover, similar to federal debarment policy, states recognize that if an individual is debarred, the company that employs the individual may also be debarred.[200] Some states require the debarred employee to be an officer or in controlling capacity of the company to which liability is imputed, while other states do not require the debarred individual to be a high-level employee. Virginia has recognized that "[t]he illegal or improper conduct of an individual may be fully imputed to the firm with which they are, or were, employed when the conduct in question occurred."[201] Maryland requires that a entity be debarred where the state has debarred "an officer, director, controlling shareholder, or partner" or "an employee directly involved in the process of obtaining contracts with public bodies."[202] And New Jersey provides for imputation of liability to a company where the conduct was "accomplished within the course of the person's official duty or was affected by the person with the knowledge or approval of the affiliate."[203]

Likewise, states may impute the liability of a debarred company to the individuals who control the company. A Virginia policy manual states that "the illegal or improper conduct of a firm may be fully imputed to an individual or individuals having control over the affairs of the firm." [204] Therefore, whether the an individual's debarment may impute liability to a company or a company's debarment may be imputed to an individual will be determined by the individual's role in the company and the state's regulations regarding such imputation of liability.

■ Duration

States generally debar contractors from one to five years[205] and suspend contractors as long as ten years.[206] However, a California court has upheld the permanent debarment of a contractor where the court concluded that the contractor's "corrupt practices involved the 'administration' of City contracts so as to

warrant permanent debarment."[207] While states may determine the duration of debarment on a case-by-case basis,[208] most states require that the duration of suspension or debarment be definite.[209]

■ Parallel Proceedings

Individuals and corporations may be debarred or suspended where they refuse to waive immunity or answer questions in parallel or previous proceedings. New York disqualifies contractors from submitting awards or receiving bids from the state for five years if the contractor "refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question" concerning contracts or transactions with the state of New York, when called to testify before a grand jury or to testify in an investigation.[210] An almost identical New York statute applicable to municipal contracts, however, was held unconstitutional because it violated the Fifth Amendment to the U.S. Constitution.[211] It is yet to be determined whether the state statute will also be challenged as unconstitutional.

Maryland's debarment statute also contemplates that a contractor that testifies in a grand jury proceeding and admits to an act that constitutes "grounds for conviction or liability under any law or statute" set forth in the state debarment statute may be debarred.[212] Therefore, a contractor should carefully consider the effect of its actions and statements in parallel and previous proceedings on its potential for suspension or debarment by states.

■ Due Process

Similar to the clear federal recognition of due process for contractors in suspension or debarment matters,[213] state courts have also increasingly held that a contractor has due process rights to a hearing when the state seeks to debar that contractor.[214] Some states have provided for such a hearing or at least contemplated a hearing in their suspension and debarment statutes and procedures.[215] For example, Pennsylvania's debarment statute provides that "[a]fter reasonable notice to the person involved and reasonable opportunity for that person to be heard, the head of a purchasing agency, after consultation with the head of the using agency, shall have authority to debar a person from consideration for the award of contracts."[216] And Georgia procedures for suspension and debarment state that "[p]reliminary hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements."[217]

Such due process rights, however, do not necessarily include a constitutional right to a "full panoply of judicial trial procedures."[218] A California court has held that a contractor was provided due process in a debarment proceeding where the contractor had an "effective opportunity to defend, including the ability to conduct discovery, present unlimited documentary evidence, cross-examine adverse witnesses at their depositions, present witness statements and testimony, submit written argument and make an oral presentation before the decision-maker."[219] However, cross-examination of witnesses during a debarment hearing is not necessarily required for a contractor to receive due process.[220] Moreover, where one state agency debars a contractor, another state agency may also impose a similar debarment without providing the contractor an opportunity for a hearing.[221] New Jersey provides that "where another Department or agency has imposed debarment upon a party, the Department may also impose a similar debarment without affording an opportunity for a hearing, provided that the Department furnishes notice of the proposed similar debarment to that party, and affords that party an opportunity to present information to explain why the proposed similar debarment should not be imposed in whole or in part."[222] Other states provide that hearing should be held, but it may be held *after* debarment is imposed.[223]

■ Certifications

In addition to reviewing the federal Excluded Parties List,[224] states may determine whether a contractor has been debarred or suspended by a federal or state entity or been convicted

of or violated a federal or state law by requiring a certification similar to the certification required by the FAR (discussed above).[225] California, for example, provides that a "state agency may determine the eligibility of any person to enter into a contract...by requiring the person to submit a statement under penalty of perjury declaring that neither the person nor any subcontractor to be engaged by the person has been convicted of ["fraud, bribery, collusion, conspiracy, or any other act in violation of any state or federal antitrust law in connection with the bidding upon, award of, or performance of, any public works contract"] within the preceding three years."[226] New York requires a certification by the contractor that its bid submitted to the state has been "arrived at independently without collusion, consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other bidder or with any competitor.[227] Therefore, before being awarded a state contract, contractors may be required to certify that they have not been federally debarred or suspended, as well as that they have not been convicted of or violated federal laws.

■ State Debarred & Suspended Lists

Most states maintain a list of debarred and suspended companies similar to the federal Excluded Parties List.[228] Such lists are published on state government websites, in state procurement bulletins, and in state central registers and may include information such as the basis for suspension or debarment, the extent of the restrictions imposed on the contractor, and the termination and/or hearing date.[229]

GUIDELINES

These *Guidelines* are designed to assist you in avoiding suspension and debarment. They are not, however, a substitute for professional representation in any specific situation.

1. Make certain that you understand the differences between the FAR and the NCR, especially if you are a Government contractor involved in "nonprocurement" spending such as grants, loans, and other forms of Government assistance. Note that the NCR provides four additional grounds for debarment: (1) for "knowingly doing business with an ineligible person," (2) for failing to pay debts to "any Federal agency or instrumentality" (except for debts arising under the Internal Revenue Code), (3) for "willful violation of a statutory or regulatory provision...applicable to a public agreement," and (4) upon violation of a material provision of a voluntary exclusion agreement or any suspension or debarment settlement agreement.

2. When entering into a joint venture or other affiliated relationship, be cautious of joint venture partners or affiliates that have been debarred or suspended at the federal or state level. Such suspension or debarment may be imputed to the Government contractor.

3. Carefully consider the risks when hiring debarred or suspended individuals. A Government contractor may be required to make an affirmative certification as to the suspension or debarment of such individual when seeking Government contract awards.

4. Before entering into a subcontract, confirm that the subcontractor is not currently debarred or suspended. The FAR restricts a Government contractor from entering into a first-tier subcontract in excess of $25,000 with an entity that has been excluded, unless there is a compelling reason to do so. The NCR restricts subcontracting with an excluded entity at any tier.

5. Before settling an alleged violation of any federal law with the Government, be wary of settlement language that causes you to expressly admit to the violation. In addition to causing problems at the federal level, such an admission alone may be cause for suspension or debarment at the state level. Remember that settlement of a criminal or civil proceeding is no guarantee against suspension or debarment, particularly when the settlement is made with the Department of Justice and not the contracting agency.

6. Be aware that a Government contractor's testimony in a grand jury or other investigation may be used as a basis for its suspension or debarment.

7. Give serious consideration to potential suspension and debarment implications of any adverse conduct of your officers or employees, whether such conduct is related to an ongoing Government contract you are performing or not. Such adverse conduct may be a basis for suspension or debarment of a Government contractor under the "catch-all" provisions of debarment and suspension regulations at both the federal and state levels.

8. If you have reason to believe that you might be considered for suspension or debarment (e.g., as a result of settling an alleged violation of the antitrust laws), you should "get out in front" of the problem and approach the appropriate debarring official to open a dialogue with that official.

9. Recognize that state suspension and debarment laws, regulations, and processes can be more severe than their federal counterparts. If you are a Government contractor with a substantial state business base, you need to pay close attention to these state procedures.

10. If you are unable to convince the debarring official that you unequivocally satisfy the "presently responsible" standard, you should seek to enter into an administrative agreement that would allow you to continue acquiring new work, albeit with significant risks if you fail to adhere to the terms of the agreement.

11. Although the same rules (whether the FAR or the NCR) apply to all agencies alike, bear in mind that the debarring official in each agency has significant discretion as to how the rules are applied and whether any particular action or inaction constitutes sufficient grounds to make a determination of present responsibility. There is no scorecard that objectively rates an entity's performance; rather, the decision to suspend or debar is highly subjective. Some officials have been known to use that subjectivity to essentially impose punishment, while others have maintained the focus on present responsibility. It is important to know the track record of an agency's debarring official before initiating contact with that official.

★ REFERENCES ★

1/ Toomey, Fisher & Shapiro, "Debarment & Suspension/Edition III," Briefing Papers No. 89-4 (Mar. 1989). In part because of the long period since the previous Briefing Paper, this Paper is written as a stand-alone resource, not as a subsequent edition. This Paper has, however, generally retained the organizational structure of Edition III. Accordingly, it contains material that of necessity overlaps with that edition, the authors of which are gratefully acknowledged. See also Johnson & DeVecchio, "Debarment & Suspension/ Edition II," Briefing Papers No. 83-9 (Sept. 1983); Dembling, "Debarment & Suspension," Briefing Papers No. 78-6 (Dec. 1978). See generally McCullough & Pafford, "Feature Comment: Government Contract Suspension and Debarment—What Every Contractor Needs To Know," 45 GC ¶ 465 (Nov. 19, 2003).

2/ Act of July 5, 1884, ch. 217, 23 Stat. 107, 109 (emphasis added).

3/ 7 Comp. Gen. 547 (1928).

4/ Pub. L. No. 72-428, ch. 212, 47 Stat. 1520.

5/ Pub. L. No. 80-413, ch. 65, § 2, 62 Stat. 21 (1948).

6/ Pub. L. No. 81-152, ch. 288, § 303, 63 Stat. 377, 393.

7/ 32 C.F.R. § 401 et seq. (1951).

8/ See 24 Fed. Reg. 1933 (Mar. 17, 1959) (codified at 41 C.F.R. pt. 1-1 et seq.).

9/ See, e.g., Senate Subcomm. on Admin. Practice and Procedure, Selected Reports of the Administrative Conference of the United States, S. Doc. No. 24, at 265 (1st Sess. 1963) (relating problems with the suspension and debarment process).

10/ See Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (holding that debarment must, at a minimum, be preceded by notice of the grounds for debarment, an opportunity to rebut those grounds, and an administrative record consisting of the agency's findings and conclusions); Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972) (holding that a suspension should not "exceed one month" without providing the suspended party an opportunity to rebut the basis for the suspension); Old Dominion Dairy Prods., Inc. v. Secretary of Def., 631 F.2d 953, 955–56 (D.C. Cir. 1980) (holding that, if the Government has not gone through the procedures necessary to overtly debar or suspend a contractor, but nonetheless "effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity," then "due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken").

11/ 47 Fed. Reg. 28,854 (July 1, 1982).

12/ Exec. Order No. 12549, 51 Fed. Reg. 6370 (Feb. 18, 1986).

13/ 53 Fed. Reg. 19,160 (May 26, 1988).

14/ See 70 Fed. Reg. 51,863 (Aug. 31, 2005); 68 Fed. Reg. 66,534 (Nov. 26, 2003).

15/ For a list of adopting agencies, see http://www.epa.gov/isdc/reg.htm.

16/ See 2 C.F.R. §§ 180.210, 180.970. Direct foreign aid, personal entitlements such as Social Security benefits, federal employment, disaster-related transactions, permits, licenses, or certificates issued to regulate health, safety, or the environment, and incidental benefits resulting from ordinary governmental operations are exempted from coverage by the NCR. 2 C.F.R. § 180.215.

17/ For a list of various statutes expressly providing for debarment and suspension, see GAO, Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process 23 tbl.4 (GAO-05-479, July 29, 2005).

18/ See Toomey, supra note 1, at 2.

19/ Compare id. with GAO, supra note 17, at 12 tbl.2.

20/ President's Council on Integrity and Efficiency, Executive Council on Integrity and Efficiency, A Progress Report to the President Fiscal Year 2005, at 12 (2006).

21/ See GAO, supra note 17, at 10 tbl.1.

22/ FAR 9.402(b); 2 C.F.R. § 180.125(c).

23/ FAR 9.402(a), (b); see 2 C.F.R. § 180.125.

24/ 41 U.S.C.A. § 10b. See generally Chierichella, Aronie & Skowronek, "Domestic & Foreign Product Preferences," Briefing Papers No. 00-13 (Dec. 2000).

25/ 40 U.S.C.A. § 3144; 41 U.S.C.A. § 37. See generally Greenberg, Abrahams & Katz, "Complying With the Davis-Bacon Act," Briefing Papers No. 03-11 (Oct. 2003).

26/ 41 U.S.C.A. § 701; 21 U.S.C.A. § 862.

27/ 42 U.S.C.A. § 7606; 33 U.S.C.A. § 1368.

28/ 42 U.S.C.A. § 1320a-7.

29/ 21 U.S.C.A. § 335a.

30/ 2 C.F.R. § 180.125; FAR 9.406-1(a), 9.407-1(b).

31/ FAR 9.406-1(a), 9.407-1(b).

32/ FAR 2.101, 9.406-4; 2 C.F.R. §§ 180.865, 180.925.

33/ See, e.g., Generic Drug Enforcement Act, 21 U.S.C.A. § 335a.

34/ See, e.g., Janik Paving & Constr., Inc. v. Brock, 828 F.2d 84 (2d Cir. 1987) (permitting debarment for failure to comply with the overtime requirements of the Contract Work Hours and Safety Standards Act, even in the absence of an express debarment provision in the Act); Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C. Cir. 1961) (noting that the "power to enter into contracts" includes the authority to debar).

35/ See, e.g., First Ala. Bank of Montgomery v. Donovan, 692 F.2d 714 (11th Cir. 1982) (permitting debarment for refusal to cooperate with compliance review associated with an Executive Order prohibiting discrimination by Government contractors).

36/ FAR 9.406-2; see 2 C.F.R. § 180.800.

37/ FAR 9.406-2(a).

38/ FAR 9.406-2(b)(1)(i).

39/ FAR 9.406-2(b), (c).

40/ See 2 C.F.R. § 180.800.

41/ 2 C.F.R. § 180.800(c)(2).

42/ 2 C.F.R. § 180.800(c)(3).

43/ 2 C.F.R. § 180.800(b)(3).

44/ 2 C.F.R. § 180.800(c)(4).

45/ FAR 9.406-1(a); cf. 2 C.F.R. 180.845.

46/ American Floor Consultants & Installations, Inc. v. United States, 70 Fed. Cl. 235 (2006) (permitting debarment notwithstanding an agreement immunizing the contractor from criminal prosecution).

47/ FAR 2.101; 2 C.F.R. § 180.1015.

48/ FAR 9.407-1(b)(1), 9.407-4(a); 2 C.F.R. §§ 180.700, 180.760.

49/ See, e.g., Frequency Elecs., Inc. v. U.S. Dep't of the Air Force, 151 F.3d 1029 (4th Cir. 1998) (upholding a "temporary" suspension of almost five years).

50/ FAR 9.407-1(b)(1); 2 C.F.R. § 180.700.

51/ 2 C.F.R. § 180.900; FAR 2.101. Both the FAR and the NCR state that an indictment constitutes adequate evidence for suspension actions. FAR 9.407-2(b); 2 C.F.R. § 180.705(b).

52/ FAR 9.407-1(b)(1).

53/ FAR 9.407-1(b)(2).

54/ 2 C.F.R. § 180.705.

55/ Compare FAR 9.406-2(b)(1) with FAR 9.407-2.

56/ 2 C.F.R. § 180.700(b).

57/ FAR 9.406-2(c).

58/ Letter from Joseph A. Neurauter, Suspension and Debarment Official, GSA, to Michael D. Capellas, Chairman and CEO, WorldCom, Inc. (July 31, 2003).

59/ See News Release, GSA, GSA Suspends Enron and Arthur Andersen and Former Officials (Mar. 15, 2002) (GSA # 9930).

60/ See Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (holding that debarment must, at a minimum, be preceded by notice of the grounds for debarment, an opportunity to rebut those grounds, and an administrative record consisting of the agency's findings and conclusions); Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972) (holding that a suspension should not "exceed one month" without providing the suspended party an opportunity to rebut the basis for the suspension); Old Dominion Dairy Prods., Inc. v. Secretary of Def., 631 F.2d 953, 955–56 (D.C. Cir. 1980) (holding that, if the Government has not gone through the procedures necessary to overtly debar or suspend a contractor, but nonetheless "effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity," then "due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken").

61/ FAR 9.406-3(a); see also FAR 9.407-3(a); 2 C.F.R. § 180.600. A list of federal agency suspension/debarment contacts is available in American Bar Ass'n, The Practitioner's Guide to Suspension and Debarment app. A (3d ed. 2002).

62/ See, e.g., Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984) (upholding a suspension based on the Air Force's independent finding of "adequate evidence" of wrongdoing after the issuance of search warrants but before indictment).

63/ FAR 9.407-3(c); 2 C.F.R. § 180.715.

64/ FAR 9.406-3(c); 2 C.F.R. § 180.805.

65/ FAR 9.406-3(c)(1); 2 C.F.R. § 180.805(a).

66/ FAR 9.407-3(c)(1); 2 C.F.R. § 180.715(a).

67/ FAR 9.406-3(c), 9.407-3(c); 2 C.F.R. §§ 180.715, 180.805.

68/ FAR 9.407-3(c)(2); 2 C.F.R. § 180.715(e).

69/ 2 C.F.R. § 180.805(b); 2 C.F.R. § 180.715(c); FAR 9.406-3(c)(2), 9.407-3(c)(1)(ii); see also Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984).

70/ Compare FAR 9.405(a) with 2 C.F.R. § 180.810.

71/ 2 C.F.R. § 180.940(a).

72/ See 2 C.F.R. § 180.715(a) (emphasis added); FAR 9.407-3(c)(1).

73/ 69 Fed. Reg. 34,248 (June 18, 2004); see 46 GC ¶ 252(n); see also FDIC v. Mallen, 486 U.S. 230 (1988) (finding no due process violation for suspension without a hearing).

74/ FAR 9.407-3(c)(5); 2 C.F.R. §§ 180.725, 180.730.

75/ FAR 9.406-3(c)(4); 2 C.F.R. §§ 180.820, 180.825.

76/ 2 C.F.R. §§ 180.825, 180.730.

77/ FAR 9.407-3(b)(2), 9.406-3(b)(2); 2 C.F.R. §§ 180.735, 180.830.

78/ FAR 9.407-3(d)(2)(ii), 9.406-3(d)(2)(ii); 2 C.F.R. §§ 180.750, 180.845.

79/ FAR 9.407-3(d)(2)(ii), 9.406-3(d)(2)(ii); 2 C.F.R. §§ 180.750, 180.845.

80/ FAR 9.406-3(d); 2 C.F.R. § 180.870(a).

81/ FAR 9.406-3(e); 2 C.F.R. § 180.870(b).

82/ FAR 9.402; 2 C.F.R. § 180.125. For a more detailed discussion of contractor responsibility, see generally Bodenheimer, "Responsibility of Prospective Contractors," Briefing Papers No. 97-9 (Aug. 1997).

83/ See Old Dominion Dairy v. Secretary of Def., 631 F.2d 953 (D.C. Cir. 1980) (finding that a contractor has a due process right to notice of the charges of a lack of integrity and of at least a minimal opportunity to respond to those charges before being denied Government contracts); Leslie & Elliott Co. v. Garrett, 732 F. Supp. 191 (D.D.C. 1990) (finding de facto debarment where the representatives of the Navy found a low bidder nonresponsible on two contracts and made statements evidencing that the Navy did not want to do business with the contractor); Shermco Indus., Inc. v. Secretary of the Air Force, 584 F. Supp. 76 (N.D. Tex. 1984) (finding de facto suspension where the agency made repeated determinations of nonresponsibility on the same basis). See generally Everhart, "'Graylisting' of Federal Contractors: Transco Security, Inc. of Ohio v. Freeman and Procedural Due Process Under Suspension Procedures," 31 Cath. Univ. L. Rev. 731 (1982).

84/ See, e.g., Geo-Con, Inc. v. United States, 783 F. Supp. 1 (D.D.C. 1992) (noting that "in contrast to de facto debarment cases in which contractors have lost several government contracts, the disqualification in this case is limited to one award").

85/ See 65 Fed. Reg. 80,256 (Dec. 20, 2000); see 42 GC ¶ 505.

86/ See 66 Fed. Reg. 66,983 (Dec. 27, 2001); see 44 GC ¶ 5.

87/ FAR 15.304(c)(3), 15.305(a)(2).

88/ For additional information on past performance issues, see generally West & Wagman, "Past Performance Information," Briefing Papers No. 99-10 (Sept. 1999).

89/ FAR 9.406-1(a), 9.407-1(b)(2); 2 C.F.R. § 180.845(a).

90/ FAR 9.406-1(a).

91/ 2 C.F.R. § 180.860.

92/ FAR 9.406-1(a); 2 C.F.R. § 180.855. For a more extensive discussion of the role of remedial measures and mitigating factors in avoiding suspension and debarment, see American Bar Ass'n, supra note 61, ch. IV.

93/ Compare Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849–50 (S.D. Cal. 1993), 35 GC ¶ 385 (finding an agency debarment decision arbitrary, capricious, and an abuse of discretion because it did not focus on mitigating factors surrounding the plaintiff's guilty plea) with Kirkpatrick v. White, 351 F. Supp. 2d 1261, 1285 (N.D. Ala. 2004) (noting that a key factor in the Silverman decision was the six-year period between the misconduct and debarment).

94/ See DOD, The Department of Defense Voluntary Disclosure Program—A Description of the Process (May 24, 2000). In 1986—the same year that the DOD's voluntary disclosure program began—24 defense contractors joined together to establish the Defense Industry Initiative (DII), an organization dedicated to ethics-based corporate self-governance and voluntary disclosure of violations of federal procurement laws. There are now almost 70 DII signatories. See Defense Industry Initiative on Business Ethics and Conduct, 2005 Annual Report to the Public (Feb. 22, 2006) [hereinafter 2005 DII Report].

95/ See 65 Fed. Reg. 19,618 (Apr. 11, 2000).

96/ See 2005 DII Report, supra note 94, at 45.

97/ 2 C.F.R. §§ 180.635, 180.640.

98/ 2 C.F.R. § 180.640.

99/ See, e.g., American Floor Consultants & Installations, Inc. v. United States, 70 Fed. Cl. 235 (2006) (dismissing a contractor's challenge to a debarment where the contractor had entered into a no-prosecution agreement).

100/ See, e.g., United States v. Kordel, 397 U.S. 1, 11 (1970) ("It would stultify enforcement of federal law to require a governmental agency…invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial."); Securities & Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980) ("The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence."); Arthurs v. Stern, 560 F.2d 477 (1st Cir. 1977) (refusing to stay civil proceedings until the termination of concurrent criminal proceedings).

101/ FAR 9.405(a); 2 C.F.R. §§ 180.710, 180.810.

102/ 2 C.F.R. §§ 180.140, 180.145.

103/ FAR 9.405(a); 2 C.F.R. § 180.940(a).

104/ 2 C.F.R. § 180.810.

105/ FAR 9.407-4(b); 2 C.F.R. § 180.760.

106/ FAR 9.407-4(a); 2 C.F.R. § 180.760.

107/ FAR 9.406-4(a); 2 C.F.R. § 180.865.

108/ FAR 9.406-1(c); 2 C.F.R. § 180.155.

109/ FAR 9.406-4(a)(2); 2 C.F.R. § 180.865(b).

110/ FAR 9.406-4(c); 2 C.F.R. §§ 180.875, 180.880.

111/ FAR 9.406-4(c); 2 C.F.R. §§ 180.875, 180.880.

112/ FAR 9.406-4(b); 2 C.F.R. § 180.885.

113/ FAR 9.406-4(b); 2 C.F.R. § 180.885.

114/ FAR 9.405-1; 2 C.F.R. § 180.415.

115/ FAR 9.405-1(b); 2 C.F.R. § 180.415(b).

116/ FAR 9.405-1(a); 2 C.F.R. § 180.415(a).

117/ FAR 9.404; 2 C.F.R. § 180.155. The web-based EPLS is available at http://epls.gov.

118/ FAR 9.404(b); 2 C.F.R. §§ 180.515, 180.520.

119/ 2 C.F.R. § 180.645(a).

120/ FAR 9.405(a).

121/ FAR 9.405(a).

122/ FAR 9.405(d).

123/ 2 C.F.R. §§ 180.400(a), 180.430(a).

124/ FAR 9.405(a); 2 C.F.R. § 180.135.

125/ See Kramer, "Awarding Contracts to Suspended and Debarred Firms: Are Stricter Rules Necessary?," 34 Pub. Cont. L.J. 539 (2005) (noting that Boeing and MCI WorldCom continued to receive significant Government business even after being excluded).

126/ See American Heritage Bancorp v. United States, 61 Fed. Cl. 376, 387 (2004) (collecting cases).

127/ See FAR 9.409(a); 41 U.S.C.A. § 403(11).

128/ FAR 9.405-2(b).

129/ FAR 9.405-2(b).

130/ 2 C.F.R. §§ 180.330, 180.355.

131/ 2 C.F.R. §§ 180.305, 180.135.

132/ 2 C.F.R. § 180.325.

133/ FAR 9.409(a); 41 U.S.C.A. § 403(11).

134/ FAR 52.209-5, para. (a)(1).

135/ See FAR 52.209-5, para. (a)(2) (defining "principals" as "officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions)").

136/ FAR 9.409(b), 52.209-6.

137/ 2 C.F.R. § 180.335.

138/ 2 C.F.R. § 180.300.

139/ FAR 9.406-5(a), 9.407-5; 2 C.F.R. § 180.630(a).

140/ FAR 9.406-5(a); 2 C.F.R. § 180.630(a); see, e.g., Coast Indus. v. Administrator, Wage & Hour Div., No. 04-004, 2005 WL 489737 (DOL ARB) (Feb. 28, 2005).

141/ FAR 9.406-5(b); 2 C.F.R. § 180.630(b).

142/ FAR 9.406-5(c); 2 C.F.R. § 180.630(c).

143/ FAR 9.406-1(b), 9.407-1(c); 2 C.F.R. § 180.625(a).

144/ See, e.g., Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 534 F. Supp. 1139, 1148 (D.D.C. 1982), rev'd on other grounds, 714 F.2d 163 (D.C. Cir. 1983) (noting that misconduct within a few divisions of the company did "not establish that the entire Kiewit organization, with its 11,000 employees, lack[ed] responsibility"); Dowling Group v. Williams, No. 82-1775, slip op. at 12–13 (D.D.C. Oct. 29, 1982) (distinguishing Peter Kiewit Son's Co. on the basis that "[a]lthough Dowling is relatively small, the Kiewit Co. is a large corporation with over 11,000 employees"); Press Release, U.S. Air Force, AF Announces Boeing Inquiry Results (July 25, 2003) (noting that the Air Force suspended three of Boeing's business units for "serious violations of federal law").

145/ FAR 9.406-1(b), 9.407-1(c); 2 C.F.R. § 180.625(b).

146/ FAR 9.403; 2 C.F.R. § 180.905.

147/ See, e.g., Herb Richards Constr. Co., Comp. Gen. Dec. B-262177, 95-2 CPD ¶ 231 (noting that "in the absence of any evidence to the contrary, an agency may reasonably assume that family members generally have an identity of interest"); Howema Bau-GmbH, Comp. Gen. Dec. B-245356 et al., 91-2 CPD ¶ 214 (transferring ownership to a suspended individual's three sons did not prevent extension of the suspension to the company as an affiliate).

148/ 2 C.F.R. §§ 180.130(b), 180.405.

149/ 2 C.F.R. § 180.995.

150/ See FAR 52.209-5.

151/ See Bodenheimer, supra note 82.

152/ 5 U.S.C.A. § 706.

153/ See, e.g., WEDJ/Three C's, Inc. v. Department of Def., No. 4:CV-05-2427, 2006 WL 2077021, *5 (M.D. Pa. July 24, 2006), 48 GC ¶ 290 (noting that it "is not our role under the [APA]…to sit in the shoes of the [debarring official] and judge the facts differently").

154/ 5 U.S.C.A. § 706(2)(A); IMCO, Inc. v. United States, 97 F.3d 1422, 1425 (Fed. Cir. 1996), 38 GC ¶ 521.

155/ Franklin v. Massachusetts, 505 U.S. 788, 822 (1992) (internal alterations, quotation marks, and citations omitted).

156/ IMCO, 97 F.3d at 1424–25; Art Metal-U.S.A., Inc. v. United States, 753 F.2d 1151, 1154–55 (D.C. Cir. 1985).

157/ Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163, 167 (D.C. Cir. 1983).

158/ 2 C.F.R. §§ 180.720, 180.725.

159/ Peter Kiewit Sons' Co., 714 F.2d at 168–69.

160/ Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 106 (D.C. Cir. 1986).

161/ Darby v. Cisneros, 509 U.S. 137 (1993), 35 GC ¶ 426; Gleichman v. U.S. Dep't of Agric., 896 F. Supp. 42, 44 (D. Me. 1995).

162/ See, e.g., Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

163/ See Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964) (holding that debarment must, at a minimum, be preceded by notice of the grounds for debarment, an opportunity to rebut those grounds, and an administrative record consisting of the agency's findings and conclusions); Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972) (holding that a suspension should not "exceed one month" without providing the suspended party an opportunity to rebut the basis for the suspension); Old Dominion Dairy Prods., Inc. v. Secretary of Def., 631 F.2d 953, 955–56 (D.C. Cir. 1980) (holding that, if the Government has not gone through the procedures necessary to overtly debar or suspend a contractor, but nonetheless "effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity," then "due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken"). See generally Everhart, supra note 83.

164/ Mass. Gen. Laws Ann. ch. 29, § 29F(c)(2) ("Notwithstanding any other provision of this section, any contractor debarred or suspended by any agency of the United States shall by reason of such debarment or suspension be simultaneously debarred or suspended under this section, with respect to non-federally aided contracts; the secretary or the commissioner may determine in writing that special circumstances exist which justify contracting with the affected contractor."); Md. Code Ann., State Fin. & Proc. § 16-

203(c) ("A person may be debarred from entering into a contract with the State if the person, an officer, partner, controlling stockholder or principal of that person, or any other person substantially involved in that person's contracting activities has been debarred from federal contracts under the Federal Acquisition Regulations, as provided in 48 C.F.R. Chapter 1."); 62 Pa. Cons. Stat. Ann. § 531(b)(9) ("Debarment by any agency or department of the Federal Government or by any other state."); N.J. Admin. Code § 17:19-3.1(a)(13) ("Debarment or disqualification by any other agency of government").

165/ Md. Code Ann., State Fin. & Proc. § 16-203.

166/ Mass. Gen. Laws Ann. ch. 29, § 29F(c)(2).

167/ Mass. Gen. Laws Ann. ch. 29, § 29F(c)(2).

168/ State of Maryland Bd. of Public Works Advisory, Suspension & Debarment (Aug. 31, 2005 ("A bidder who appears on the federal list is not automatically barred from State contracts but that federal (or other jurisdiction) debarment must be factored into the contractor responsibility determination.").

169/ New York State Procurement Bulletin, Best Practices Determining Vendor Responsibility (Oct. 2005).

170/ Ohio Rev. Code Ann. § 153.02(A)(9) ("Been debarred from bidding on or participating in a contract with any state or federal agency."); Commonwealth of Virginia Dep't of Transp., Debarment and/or Suspension Policy (1995) ("Debarment by some other state or federal agency for any reason").

171/ Ohio Rev. Code Ann. § 153.02(A)(9) ("Been debarred from bidding on or participating in a contract with any state or federal agency."); Commonwealth of Virginia Dep't of Transp., supra note 170 ("Debarment by some other state or federal agency for any reason").

172/ 62 Pa. Cons. Stat. Ann. § 531(b)(12); see also N.J. Admin. Code § 17:19-3.1(a)(12).

173/ Mass. Gen. Laws Ann. ch. 29, § 29F(c)(1); 62 Pa. Cons. Stat. Ann. § 531(b); N.J. Admin. Code § 17:19-3.1.

174/ Mass. Gen. Laws Ann. ch. 29, § 29F(c)(1).

175/ Mass. Gen. Laws Ann. ch. 29, § 29F(c)(1); Md. Code Ann., State Fin. & Proc. § 16-203.

176/ N.J. Admin. Code § 17:19-3.1; 62 Pa. Cons. Stat. Ann. § 531(b).

177/ 30 Ill. Comp. Stat. Ann. 580/6; Ga. Code Ann. § 50-24-5; Cal. Gov't Code § 8356.

178/ N.J. Stat. Ann. § 52:33-4.

179/ Ohio Rev. Code Ann. § 4115.133; N.J. Stat. Ann. § 34:11-56.38.

180/ 62 Pa. Cons. Stat. Ann. § 4505.

181/ Md. Code Ann., State Fin. & Proc. § 19-101; Md. Code Ann., State Fin. & Proc. § 16-203 (as approved May 2, 2006).

182/ N.J. Stat. Ann. § 52:32-30.

183/ Md. Code Ann., State Fin. & Proc. § 16-203(d)(3)(ii) ("A person may be debarred from entering into a contract with the State…for one of the following violations of a contract provision if the Board believes it to be serious enough to justify debarment…within the preceding 5 years, the failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, unless the failure to perform or unsatisfactory performance was caused by acts beyond the control of the person"); 62 Pa. Cons. Stat. Ann. § 531(b)(11); State of Georgia, Dep't of Admin. Servs., State Purchasing Div., Georgia Vendor Manual § 7.21 (June 2006); N.J. Admin. Code § 17:19-3.1.

184/ 62 Pa. Cons. State. Ann. § 531(b)(11)(iii); D.C. Code § 2-308.04(b)(4)(A) ("Willful failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract").

185/ 30 Ill. Comp. Stat. Ann. 500/50-65 ("Any contractor may be suspended for violation of this Code or for failure to conform to specifications or terms of delivery."); Georgia Vendor Manual, supra note 183; N.J. Admin. Code § 17:19-3.1, 3.4; D.C. Code § 2-308.04(b)(4)(A); 62 Pa. Cons. Stat. Ann. § 531(b)(11).

186/ Duffy v. Department of Labor & Indus., Prevailing Wage Div. 160 Pa. Commw. 140, 634 A.2d 734, 737 (1993); 43 Pa. Stat. § 165-11(e) ("In the event that the secretary shall determine…that any person or firm has failed to pay the prevailing wages and that such failure was intentional, he shall thereupon notify all public bodies of the name or names of such persons or firms and no contract shall be awarded to such persons or firms or to any firm, corporation or partnership in which such persons or firms have an interest until three years have elapsed from the date of the notice to the public bodies aforesaid.").

187/ Electrical Contractors, Inc. v. Tianti, 223 Conn. 573, 583, 613 A.2d 281, 286 (1992).

188/ Conn. Gen. Stat. § 31-53a.

189/ Electrical Contractors, Inc., 223 Conn. at 582.

190/ Id. at 583.

191/ Id.

192/ Mass. Gen. Laws Ann. ch. 29, § 29F(f); see also N.J. Admin. Code § 16:44-8.3(d) ("A debarment may include all known affiliates of a person, provided that each decision to include an affiliate is made on a case-by-case basis after giving due regard to all relevant facts and circumstances.").

193/ Chicago Public Schools Policy Manual, Debarment Policy on Non-Responsible Persons in Procurement Transactions (Mar. 22, 2000); D.C. Code § 2-308.04(f); see FAR 9.403.

194/ D.C. Code § 2-308.04(f).

195/ Chicago Public Schools Policy Manual, supra note 193; see FAR 9.403.

196/ Bistrian Materials, Inc. v. Angello, 296 A.D.2d 495, 747 N.Y.S.2d 97 (2d Dep't 2002).

197/ Id. at 497.

198/ Commonwealth of Virginia Dep't of Transp., supra note 170.

199/ Id.

200/ Md. Code Ann., State Fin. & Proc. § 16-307(a); Commonwealth of Virginia Dep't of Transp., supra note 170; N.J. Admin. Code § 16:44-8.3(d).

201/ Commonwealth of Virginia Dep't of Transp., supra note 170.

202/ Md. Code Ann., State Fin. & Proc. § 16-307(a).

203/ N.J. Admin. Code § 16:44-8.3(d).

204/ Commonwealth of Virginia Dep't of Transp., supra note 170.

205/ 30 Ill. Comp. Stat. Ann. 580/8 ("Upon issuance of any final decision under this Act requiring debarment of a contractor, grantee or individual, such contractor, grantee or individual shall be ineligible for award of any contract or grant by the State for at least one year but not more than 5 years, as specified in the decision."); 62 Pa. Cons. Stat. Ann. § 531(a) ("A debarment may be for a period of not more than three years."); Georgia Vendor Manual, supra note 183 (debarment may not exceed five years); Colo. Rev. Stat. § 24-109-105(1)(a) ("The debarment shall not be for a period of more than three years."); N.J. Admin. Code § 16:44-8.3(b) ("Debarment shall be for a reasonable, definitely stated period of time, which as a general rule shall not exceed five years.").

206/ 30 Ill. Comp. Stat. Ann. 500/50-65 ("Suspension shall be for cause and may be for a period of up to 10 years at the discretion of the applicable chief procurement officer."); 4 Pa. Code § 60.7 ("Suspensions will be for a temporary period pending the completion of an investigation and legal proceedings as may ensue."); 62 Pa. Cons. Stat. Ann. § 531(a) ("The head of the purchasing agency may suspend a person from consideration for an award of contracts for a period of up to three months if there is probable cause for debarment."); Georgia Vendor Manual, supra note 183 ("The suspension is for the period it takes to complete an investigation into possible debarment including any appeal of a debarment decision but not for a period in excess of one hundred twenty (120) days.").

207/ Southern Cal. Underground Contractors, Inc. v. City of San Diego, 108 Cal. App. 4th 533, 538, 133 Cal. Rptr. 2d 527, 531 (4th Dist. 2003) (reversing lower court judgment insofar as it imposed a three-year rather than a permanent debarment).

208/ Commonwealth of Virginia Dep't of Transp., supra note 170 ("The debarment may be imposed for any length of time.").

209/ N.J. Admin. Code § 16:44-8.3(b) ("Debarment shall be for a reasonable, definitely stated period of time….").

210/ N.Y. State Fin. Law § 139-b.

211/ Lefkowitz v. Turley, 414 U.S. 70, 83, 94 S.Ct. 316, 325 (1973) (where the court agreed with the district court, which held that "the plaintiffs' disqualification from public contracting for five years as a penalty for asserting a constitutional privilege is violative of their Fifth Amendment rights"); People v. Avant, 33 N.Y.2d 265, 352 N.Y.S.2d 161 (1973) (where the court held that the municipal law, which provided that a contractor would be disqualified from submitting bids or receiving awards if it refused to sign a waiver of immunity against subsequent criminal prosecution when it testified in an investigation concerning any transaction or contract with the state, was unconstitutional).

212/ Md. Code Ann., State Fin. & Proc. § 16-203(b) ("A person may be debarred from entering into a contract with the State if, during the course of an official investigation or other proceedings, the person, an officer, partner, controlling stockholder or principal of that person, or any other person substantially involved in that person's contracting activities has admitted, in writing or under oath, an act or omission that constitutes grounds for conviction or liability under any law or statute described in subsection (a) of this section.").

213/ Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981) ("One who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards including notice of the charges, an opportunity to rebut those charges, and, under most circumstances, a hearing.").

214/ Boyle v. Maryland-National Capital Park & Planning Comm'n, 385 Md. 142, 867 A.2d 1050 (2005); Golden Day Schools, Inc. v. State Dept. of Educ., 83 Cal. App. 4th 695, 99 Cal. Rptr. 2d 917 (2d Dist. 2000).

215/ Md. Code Ann., State Fin. & Proc. § 16-304; 62 Pa. Cons. Stat. Ann. § 531(a); Georgia State Financing and Investment Comm'n, Procedures for Suspension and Debarment (July 2001).

216/ 62 Pa. Cons. Stat. Ann. § 531(a).

217/ Georgia State Financing & Investment Comm'n, supra note 215.

218/ Southern Cal. Underground Contractors, Inc. v. City of San Diego, 108 Cal. App. 4th 533, 542–543, 133 Cal. Rptr. 2d 527, 534 (4th Dist. 2003).

219/ Id. at 550.

220/ Stacy & Witbeck, Inc. v. City & County of San Francisco, 36 Cal. App. 4th 1074, 1088, 44 Cal. Rptr. 2d 472, 480 (1st Dist. 1995).

221/ N.J. Admin. Code § 16:44-8.3(a).

222/ N.J. Admin. Code § 16:44-8.3(a).

223/ Commonwealth of Virginia Dep't of Transp., supra note 170.

224/ New York State Procurement Bulletin, Best Practices Determining Vendor Responsibility (Oct. 2005) ("Agencies may also use a variety of resources to obtain or verify vendor information…. Information regarding vendor debarments with the federal government may be found at the Excluded Parties list System."); see FAR 9.404; http://epls.gov.

225/ Illinois State Bd. of Educ., Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion Lower Tier Covered Transactions; see FAR 52.209-5

226/ Cal. Pub. Cont. Code § 10285.1.

227/ N.Y. State Fin. Law § 139-d.

228/ Mass. Gen. Laws Ann. ch. 29, § 29F(b); Ohio Rev. Code Ann. § 153.02(D) ("The director, through the office of the state architect, shall maintain a list of all contractors currently debarred under this section. Any governmental entity awarding a contract for construction of a public improvement may use a contractor's presence on the debarment list to determine whether a contractor is responsible or best under section 9.312 or any other section of the Revised Code in the award of a contract."); see FAR 9.404; http://epls.gov.

229/ State of Illinois, Department of Labor List of Contractors Prohibited From an Award of a Contract or a Subcontract for Public Works Projects, http://www.state.il.us/agency/idol/listings/debar.htm; Maryland Bd. of Public Works, Businesses & Persons Suspended or Debarred, http://www.bpw.state.md.us/bpw_db.asp; State of New Jersey Consolidated Debarment Report, http://www.state.nj.us/treasury/debarred/; State of New York, Department of Labor List of Employers Ineligible To Bid On or Be Awarded Any Public Work Contract, http://www.labor.state.ny.us/workerprotection/publicwork/PDFs/debarred.pdf#page=1; State of North Carolina Debarred Vendor List, http://www.doa.state.nc.us/PandC/actions.htm; Ohio Dep't of Transp., Division of Contract Administration Debarments List, http://www.dot.state.oh.us/CONTRACT/Notice/Debarments.pdf.