



March 18, 2019

Centre of European Law with GWU Law: Annual Symposium on Debarment

Overview of Suspension and Debarment in the United States

General overview of U.S. Federal spending (of \$4 trillion annually)

- Total amount expended on awards of federal contracts & grants: \$1.23 trillion
 - \$510 billion in procurement contracts to commercial entities
 - \$720 billion in federal assistance (e.g., grants, credit programs, and subsidies) to non-federal entities including:
 - state & local governments
 - nonprofits
 - universities

U.S. Responsibility Regime – 2 levels of protection

- **Purpose:** NOT PUNITIVE. Must be used strictly to protect the integrity of Federal procurement and non-procurement program activities.
- First: awarding officials must make an affirmative finding of responsibility at the agency level
- Second: Awardee may not have a government-wide exclusion (exclusion database on SAM.gov)

Government-wide Exclusions

- **Exclusion authority:** Agency Suspension and Debarment Official (SDO), not contracting officials or law enforcement entities
- **Types of exclusions**
 - Suspension – temporary exclusion action taken pending completion of an investigation or legal proceedings
 - Debarment – exclusion action taken after completion of investigation or legal proceedings
- **Common causes for exclusion**
 - Offense based (criminal conviction or indictment)
 - Fraud or other offenses related to a public contract or agreement
 - Honesty or integrity related offenses – e.g., embezzlement, bribery, false statements, tax evasion, etc. (may be unrelated to a public contract)
 - Or any other offense indicating a lack of business honesty or integrity
 - Fact-based (absent a court judgment)
 - Any other serious or compelling cause (catch-all)
 - Serious violation of the terms of a public agreement
- Other bases for exclusion: affiliation (parent entities & subsidiaries) & imputation
- **Effects of exclusion**
 - Reciprocal effect: exclusion is binding across all agencies of the Federal Government
 - Prospective: affects eligibility for new awards only; may continue current contracts.
 - Listing on public database: SAM.gov

- **Self-cleaning mechanism:**
 - An entity can demonstrate its “present responsibility” notwithstanding a cause to debar
 - **Burden shifting**
 - Burden is on the Government to establish cause
 - Burden shifts to the Respondent to present mitigating factors and/or show that it has taken appropriate remedial measures to prevent recurrence (self-cleaning)
 - **Mitigating factors & remedial measures include:**
 - Whether the contractor fully investigated and shared investigation results with debarring official;
 - Whether contractor cooperated fully with government agencies;
 - Whether contractor has taken appropriate disciplinary actions against individuals responsible for the activity in question;
 - Whether contractor has implemented remedial measures, review and control procedures, and ethics training programs;
 - Whether contractor management recognizes and understands the seriousness of the misconduct.
- **Exclusion process**
 - Investigation & referral to SDO
 - Notice issuance
 - Contested proceedings
 - Development of the Administrative Record
 - SDO decision/determination
 - Reconsideration & appeals
 - Judicial review
- **SDO Has the Discretion to:**
 - Decline a referred matter
 - Issue a show-cause notice in lieu of immediate exclusion
 - Enter into an Administrative agreement (public agreement) to resolve an exclusion
 - Terminate an exclusion during or after a contest
 - Set the scope of suspension/debarment
 - Modify the duration of debarment term
- **Constitutional right to due process during S&D proceedings**
The Government must:
 - Provide proper notice with particularities as to time, place, and nature of the alleged misconduct
 - Have procedures in place to facilitate a meaningful opportunity to contest
 - Submission of written matters into the record
 - In-person meeting to present evidence
 - Access to the entire administrative record on which the SDO will base his/her decision
 - Informal non-judicial proceedings
 - Provide a written determination on the record by the SDO
 - Defend the decision upon judicial review in Federal court
- **Key Government databases**
 - SAM.gov
 - Contains a list of all excluded parties, the type of exclusion, and the Agency responsible
 - Contractor self-certifications regarding indictments, civil judgments, convictions, and tax delinquencies
 - Federal Awardee Performance and Integrity Information System (FAPIIS)
 - Negative past performance and other adverse information on contractors and grantees
 - Terminations for default
 - Administrative Agreements

**Government-Wide Suspensions & Debarments
FY 2012- 2017**

