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Debarment: EU-U.S. Comparative Assessment

Stockholm – April 26, 2024

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Co-Principal Investigators

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- Introductions –
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- Exclusion in the EU – the Procurement Directive and the *Infraestruturas* Decision
- Comparisons to the U.S. Debarment System
- Case Study: Mandatory Debarments for U.S. Labor Violations
- Conclusion

Exclusion in the EU

Directive 2014/24/EU – Article 57 – Grounds for Exclusion

Mandatory	"Facultative" (Discretionary)
• Criminal conviction for fraud, criminal organization, corruption, child labor, etc. • Unpaid taxes or social security	• Bankrupt • Grave professional misconduct • Collusive agreements • Conflicts of interest • Prior involvement creates competitive distortion • Deficient performance • Misrepresentation • Undue Influence

Directive 2014/24/EU – Recitals 101 & 102

(101) Contracting authorities should further be given the possibility to **exclude economic operators which have proven unreliable**, for instance **because of violations of environmental or social obligations**, including rules on accessibility for disabled persons or other forms of **grave professional misconduct**, such as **violations of competition rules** or of intellectual property rights.

- Bearing in mind that **the contracting authority will be responsible for the consequences of its possible erroneous decision**, contracting authorities should also **remain free to consider that there has been grave professional misconduct** . . . .
- They should also be able **to exclude candidates or tenderers whose performance in earlier public contracts has shown major deficiencies** with regard to substantive requirements, for instance failure to deliver or perform . . . .
- National law should provide for a **maximum duration for such exclusions.**
- In applying **facultative grounds for exclusion**, contracting authorities should pay particular attention to the **principle of proportionality**. Minor irregularities should only in exceptional circumstances lead to the exclusion of an economic operator.

(102) Allowance should, however, be made for the possibility that **economic operators can adopt compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour**. Those measures might consist in particular of personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviour, appropriate staff reorganisation measures, the implementation of reporting and control systems, the creation of an internal audit structure to monitor compliance and the adoption of internal liability and compensation rules. **Where such measures offer sufficient guarantees, the economic operator in question should no longer be excl**uded on those grounds alone.

- Economic operators should have the possibility to request that compliance measures taken with a view to possible admission to the procurement procedure be examined.
- However, it should be **left to Member States to determine the exact procedural and substantive conditions applicable in such cases**. They should, in particular**, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or decentralised level with that task.**

The Infraestruturas Decision (ECJ December 2023): Contracting Authority Has Sole Authority

- With regard to "facultative" grounds for exclusion, "the EU legislature **intended to confer on the contracting authority, and it alone, the task of assessing whether a candidate or tendered must be excluded from a procurement procedure** during the stage of selecting the tenderers."
- "The option, or indeed obligation, for the contracting authority to apply the exclusion grounds set out in . . . Article 57(4) . . . **is specifically intended to enable [the contracting authority] to assess the integrity and the reliability of each of the economic operators participating** in a public procurement procedure."

Photo: Cédric Puisney

The Infraestruturas Decision: Reasoned Decision Required

" . . . if the right to an effective remedy . . . is not to be disregarded, **a decision in which a contracting authority refuses, even implicitly, to exclude an economic operator . . . on one of the facultative grounds for exclusion . . . must necessarily be capable of being challenged** by any person having . . . an interest in obtaining a specific contract."

Photo: LuxoFluxo

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U.S. Debarment

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US Federal Debarment Process

- Each Federal Agency with independent procurement authority has a Suspension/Debarment Official (SDO).
- SDO's may initiate a suspension or debarment action "sua sponte" based on information that comes to her/his attention
- Normally, suspension/debarment actions are initiated based on referral from contracting officers, Inspector General's, or criminal investigative organization
  - Most SDOs do not have their own investigators
- Initiation of a Suspension/Debarment proceeding other than a "Show Cause," results in the placement of the contractor/individual on the Excluded Parties List (EPLS) now incorporated at www.sam.gov
- Contracting officers and grant officers are required to check SAM.gov to determine whether a potential awardee is currently debarred or suspended
- An award can be made to a party on the list under certain circumstances requiring approval at the highest levels in the agency.

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US Federal Debarment Process

Placement on the "list" means no contracts may be awarded to the party.

- For proposed debarments the length of time lasts until the proposal is resolved.
- Where a decision to suspend or debar is final the exclusion from government contracting lasts for the period of time indicated in the decision
- Note: Many State and Local government use the federal government list, federal prime and subcontractors must use the list, financial institutions and nonprofits choose to use the list

Contractors/individuals proposed for suspension/debarment have the right to respond to the proposal of debarment

- Parties are afforded "Administrative Due Process" - notice and an opportunity to be heard.
- The normal process is conducted on "paper"
- On occasion contractors/individuals may meet with the SDO to present matters for consideration

- Decisions to suspend/debar a contractor/individual are made in writing and delivered to the party.

Parties may be suspended/debarred for an appropriate period of time, normally 3 years.

- The object of the exercise is to ensure that the party makes the appropriate efforts to become "responsible"

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US Federal Debarment Process

Parties may seek review of a suspension/debarment in a Federal District Court

- Rare
- Reviews are governed by the Administrative Procedures Act,

The Federal government has an Interagency Suspension and Debarment Committee (ISDC), https://www.acquisition.gov/isdc-home

- Created by Executive Order 12549 https://www.archives.gov/federal-register/codification/executive-order/12549.html

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AIRC Debarment Study

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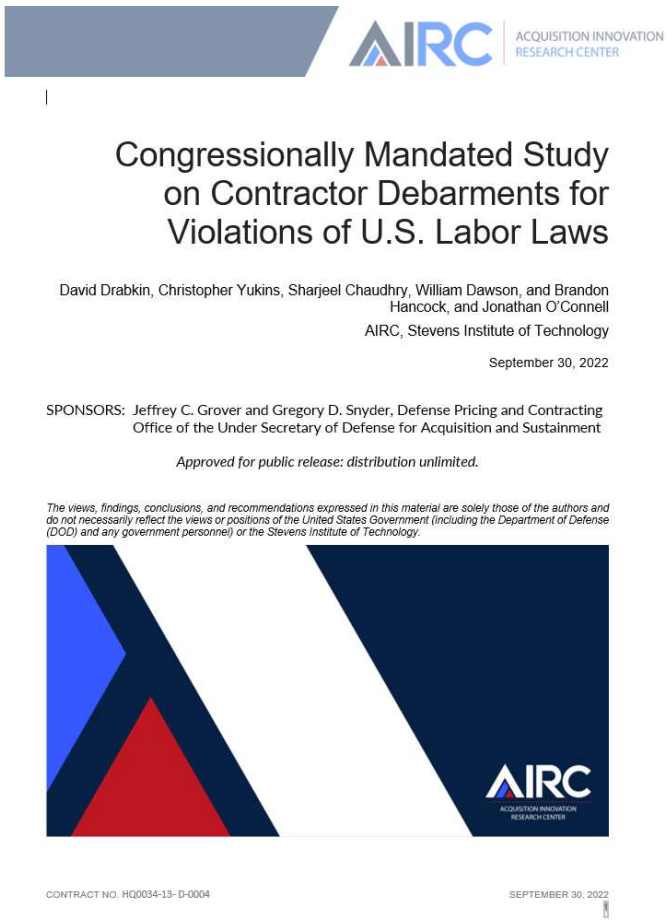
Final Report:
30 September 2022



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Congressionally Mandated Study on Contractor Debarments for Violations of U.S. Labor Laws

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AIRC, Stevens Institute of Technology

September 30, 2022

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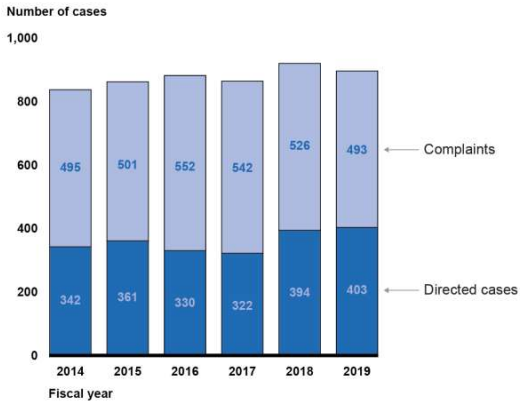
SEPTEMBER 30, 2022

Statutory ("Mandatory") Debarments – Labor Violations

Figure 3: Number of Service Contract Act Cases by Fiscal Year and Source of Case



Source: GAO analysis of data from the U.S. Department of Labor. | GAO-21-11

Statute	FY2020	FY2021
Davis-Bacon Act	9	10
Service Contract Act	8	7

- In practice, the Labor Department does not impose statutory debarment upon federal contractors in the vast majority of cases of non-compliance with statutes that mandate debarment.

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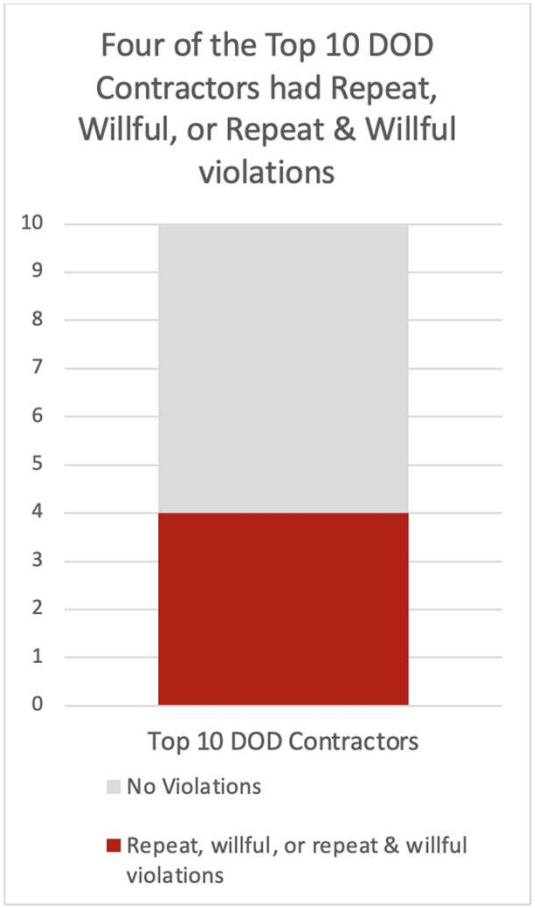
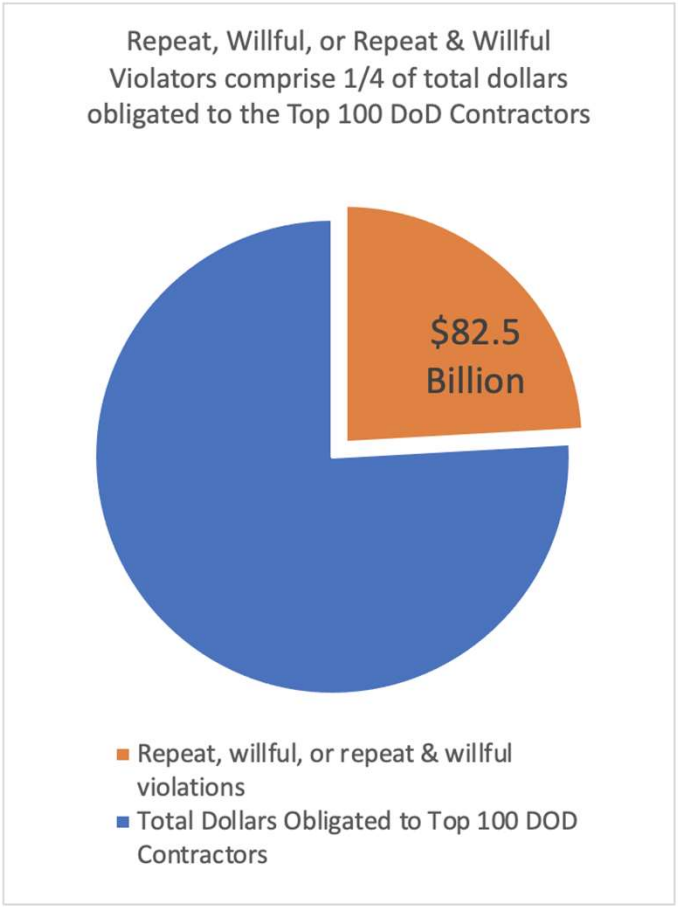
Potential Impact of Mandatory Debarment for FLSA Labor Violations on DoD Industrial Base





Debarment Report Findings

- Existing statutory debarment provisions **do not result** in debarment of many violators
- **Data concerning companies found to have violated labor laws is not readily available** for use by Suspension Debarment Officials (SDOs) or Contracting Officers
- **Labor law expertise** outside the Department of Labor is **not readily available** to SDOs or Contracting Officers
- There are **four possible ways** to address companies found to have violated labor laws
  - **DoL consider the companies for debarment**
  - **SDOs** once apprised of a company's violations consider the companies for debarment
  - **COs** once apprised consider whether a company is responsible before making award
  - **Require companies to certify or represent** that they have not been found to have violated labor laws in their SAM.gov reps/certs

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THANK YOU

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BACKUP SLIDES

Background to AIRC Studies

- The Acquisition Innovation Research Center (AIRC) was established in September 2020 by the Department of Defense (DoD) to infuse innovation and alternative disciplines from academia to better respond to rapidly changing threats and technological advances.
- Principal investigators on this initiative:
  - **David Drabkin -** former GSA Senior Procurement Executive and debarment official; previous chair of Section 809 panel on acquisition reform, including on bid protests
  - **Christopher Yukins -** George Washington University Law School; author of prior study for Administrative Conference of the United States (ACUS) on agency-level protests
- Researchers:
  - **Will Dawson** – GW Law, JD 2022
  - **Jonathan O'Connell** – GW Law, LLM candidate; labor/employment attorney, government & private sector
  - **Roxanne Reinhardt** – GW Law, JD 2022; research assistant
  - **Brandon Hancock –** GW Law, JD candidate; research assistant
  - **Sharjeel Chaudhry** – Federal Consult; data analyst

Possible Approaches to Labor Violations

Department of Labor – both mandatory and discretionary

Contracting Agency Discretionary Debarments

Contracting Officers' Responsibility Determinations

Vendor Reporting

Department of Labor: Statutory Debarment Exit

The Labor Department allows contractors debarred because of certain types of labor violations to "reenter" the federal market, by showing that they have undertaken compliance and remedial measures. **This approach—grounded in responsibility, risk mitigation and, where appropriate, restitution—echoes the risk-based approach to discretionary debarments** called for under FAR 9.406-1.

Agencies' Discretionary Debarments

- It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. ***The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.***

Discretionary Debarment for Labor Violations: Findings

- Regarding labor law violations specifically, the use of discretionary debarment is **used sparingly.**
- Contracting officials and debarring officials have confirmed **that contracting agencies rarely have the expertise** and background information to initiate discretionary debarment actions based on labor law violations.
- Further, while the Department of Labor does have discretionary debarment authority, research indicates that the **Labor Department reserves its use of discretionary debarment to address labor law violations for instances in which there is an associated criminal indictment.**

Report: Possible Next Steps

- **Improving Transparency Regarding Debarment Actions.**
- **Improving Procurement Officials' Access to and Understanding of Information Regarding Labor Law Violations**
- **Transferring Data Regarding Labor Law Violations to System for Award Management (SAM.gov)**
- **Requiring Contractors to Disclose Labor Law Violations in SAM**
- **Requiring Contractor Disclosure of Labor Law Violations to the Contracting Agency**

Follow-Up: Congressional Direction -- Joint Explanatory Statement for NDAA FY2023

Provisions Not Adopted

Prohibition on contracting with employers that violated the National Labor Relations Act: The House bill contained a provision (sec. 868) that would prohibit the Secretary of Defense from entering into a contract with an employer found to have violated section 8(a) of the National Labor Relations Act (Public Law 74-198) during the 3- year period preceding the proposed date of award of the contract. The Senate amendment contained no similar provision. The agreement does not include this provision. We note that if an offeror is found to have received final adjudication of a violation of the National Labor Relations Act, a contracting officer has authority to determine the offeror not responsible, thereby disqualifying it from award of a contract. However, as **the Acquisition Innovation Research Center (AIRC) stated in a report titled "Congressionally Mandated Study on Contractor Debarments for Violations of U.S. Labor Laws," published pursuant to the Joint Explanatory Statement to Accompany the National Defense Authorization Act for Fiscal Year 2022 (Committee Print No. 2), contracting officers "are tasked with a myriad of responsibilities throughout the acquisition lifecycle….[and in] making their responsibility determinations Contracting Officers often do not have the necessary information or knowledge base to make informed decisions regarding the relevance and weight of various labor law violations.**" Recent **reports from the Comptroller General of the United States indicate efforts are underway to improve information sharing between the Department of Labor and Federal agencies to ensure access to comprehensive and accurate information when making such responsibility determinations, however, in its report the AIRC observed such information transfer may not provide contracting officers or suspension and debarment officers** the context and background needed to make fully informed decisions. The **AIRC recommends additional training for contracting officers i**n how to find and assess data regarding labor violations and suggests requiring contractors to submit data regarding finally adjudicated labor law violations as part of regular representations and certifications to improve transparency, accuracy, and decision-making. We **therefore direct the AIRC to post the aforementioned report on its publicly accessible website and encourage the Under Secretary of Defense for Acquisition and Sustainment to host a conference with AIRC, and participants from government, industry, and academia, and create a summary of such conference, to improve reporting processes and understanding of labor violations within the existing statutory and regulatory framework.**

Congress Called for Assessment of Adjudicative Debarments

- **Not used by U.S. agencies – used by other institutions, e.g., World Bank**
- **Typically focused on "punishment" for certain bad acts**
- **Not focused on supply chain or performance risk**