

One Minute Memo®



What Every Government Contractor Needs to Know About Debarment

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Debarment could be a death sentence - particularly for contractors that rely on government clients for business. In recent years, the federal government as well as state and local governments have taken increasingly aggressive approaches to exclude from government contracting businesses that commit crimes or fail to adhere to various regulations, laws, and rules, that apply when doing business with the government.

Each state and local agency has adopted its own debarment rules that tend to mirror the debarment rules found in the Federal Acquisition Regulation (FAR). Pursuant to the FAR, a federal agency may debar a contractor who has been convicted or subjected to a civil judgment for a variety of offenses, including committing fraud or engaging in a criminal offense in connection with obtaining or performing public contracts, violating federal or state antitrust laws relating to the submission of offers, committing embezzlement, forgery, bribery, and the falsification or destruction of records. Debarment also may be imposed for engaging in tax evasion, violating Federal criminal tax laws, or receiving stolen property, as well as committing any other offense that evidences a lack of business integrity or business honesty affecting the present responsibility of a contractor.

While common sense dictates that a contractor can be debarred for engaging in criminal conduct, a contractor might not expect to be debarred for lesser conduct, including non-criminal conduct. Yet, we have seen where debarment occurs in situations where there has been no conviction or civil judgment. For example, debarment has been imposed where a government agency finds by a preponderance of the evidence that a contractor has violated important government contract terms, such as willfully failing to perform in accordance with the terms of a contract, or demonstrating a history of failing to perform or of unsatisfactory performance of a contract. Debarment can also occur for failing to comply with D/M/WBE rules and regulations, violating the Drug Free Workplace Act, committing unfair trade practices, being delinquent in paying federal taxes in excess of \$3,000.00, as well as failing to comply with Immigration and Nationality Act employment provisions.

Fortunately, and regardless of whether the conduct is criminal or not, all debarment rules make it clear that debarment may only be imposed to protect the public interest. Significantly, debarment may not be imposed solely to punish a contractor. As such, the ultimate inquiry in a debarment proceeding is whether the contractor is presently responsible. In fact, Federal courts recognize the importance of mitigating factors in determining present responsibility in debarment proceedings. Some of those factors include the amount of time that has passed between conduct and debarment decision, whether the government has continued to do business with a contractor that is the subject of a debarment proceeding, the contractor's character before and after the conduct occurred, and the payment of a fine.

Because the focus is on present responsibility, the existence of a potential basis for debarment does not necessarily require debarment. Accordingly, agencies have been willing to enter into administrative agreements to settle debarments where grounds for debarment existed, but the agency was persuaded that the contractor was presently responsible. Administrative agreements vary from agency to agency, but usually include agreement on various remedial and mitigating factors found in the FAR. They also typically last for a minimum of three years, require the implementation and reporting of compliance, monitoring, and ethics programs, and also require outside and independent reviews and audits to be conducted. Administrative agreements also typically include a term of voluntary exclusion from government contracting for a specified period, and impose immediate debarment in the event of a material breach of the agreement by the contractor.

As part of its ongoing efforts to keep abreast of these issues, Seyfarth Shaw has conducted a nationwide survey that revealed trends in debarments issued by state governments and by the largest county and city governments since 2008, which confirm the grounds for debarment noted above. We also learned that debarment frequently is not the result of intentional criminal conduct. Rather it is the result of the simple failure to read, understand, or adhere to the various regulations, laws, and rules that govern doing business with the government. Remember, ignorance of the law is no excuse.

So, what does this mean for contractors that do business with the government? It is time to implement internal ethics and compliance controls as well as compliance training programs. The business risks for contractors and subcontractors are substantial. In a highly regulated and competitive government environment, simple mistakes and pressures to cut corners increase dramatically. Contractors must be vigilant about complying with government rules, regulations, and policies by focusing on proactive prevention, internal controls, and compliance training. The government is watching. Don't wait until they come knocking to try to avoid debarment. Minimize your risks by acting now.

Seyfarth's Government Contracts Practice and Construction Law Practice Groups have experience in assisting government contractors and consultants in federal, state, and local debarment and suspension proceedings. We have represented clients in administrative hearings and in negotiating settlement agreements with government agencies. Often, these settlement agreements avoid debarment altogether. We have conducted compliance training sessions for contractors and subcontractors, and have prepared contract compliance manuals. We also have represented government agencies.

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