

## 11th Circ. Dropped The Ball In Agility Defense Ruling

*Law360, New York (January 09, 2014, 6:22 PM ET)* -- On Dec. 31, the Eleventh Circuit reversed the ruling of a district court and held that the government may indefinitely suspend affiliates of government contractors even absent any allegation of wrongdoing on the part of the affiliates. *Agility Defense & Government Services Inc. v. U.S. Department of Defense*, No. 13-10757 (11th Cir. Dec. 31, 2013). In so holding, the court relied on its own narrow reading of a provision of the Federal Acquisition Regulation, and missed an opportunity to more meaningfully engage with a thorny legal issue that cries out for nuanced analysis.

### Background

Agility Defense and Government Services Inc., an Alabama-based government contractor, was suspended from government contracting solely because its indirect parent company, a large Kuwaiti corporation with dozens of subsidiaries worldwide, was indicted on fraud charges.

Although there was no suggestion that Agility played any role in the parent's alleged misconduct, FAR 9.407-1 permits an agency to suspend a company based purely on corporate affiliation. However, FAR 9.407-4 provides that all suspensions must be "temporary," and that "[i]n no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period." Notably, the FAR does not specify against whom "legal proceedings" must be brought in order to allow a suspension to exceed 18 months.

Because "legal proceedings" were never "initiated" against Agility, it filed suit in district court when its suspension continued beyond 18 months, arguing that the duration of the suspension was contrary to law. The government countered that even though no "legal proceedings" had been initiated against Agility, proceedings had been initiated against Agility's parent (i.e., in the original fraud indictment), and that the proceeding against the parent meant that the suspension of Agility could continue beyond 18 months. In a detailed opinion addressing this case of first impression, the district court sided with Agility, concluding that both the language of the regulations and the relevant policy considerations indicated that an affiliate could be suspended for longer than 18 months only if legal proceedings were initiated against the affiliate itself.

The case was argued on appeal before the Eleventh Circuit in May, but nothing further was heard until last week. Unfortunately, the wait did not result in the provision of meaningful guidance or analysis for practitioners grappling with this issue. Rather, in a brief opinion that largely ignored the broader purpose of suspension and debarment, the circuit court held that the indictment of a contractor authorizes the government to suspend — indefinitely — any and all affiliates of that contractor for so long as legal proceedings against the contractor remain pending.

## Analysis

Like the district and circuit courts, commentators seem to be split over the correct outcome in this case. Yet regardless of how one views the circuit court's ultimate conclusion, several aspects of the opinion are ultimately unsatisfying.

First, the circuit court's opinion oversimplifies the interpretation of the relevant regulatory language. According to the circuit court, the key to properly understanding FAR 9.407-4 (the provision governing duration of suspension) is the need to interpret it "in context with" FAR 9.407-1 (the provision stating, among other things, that suspension may be based purely on affiliation).

Construing the provisions together in this way, the circuit court declared, leads to the conclusion that "legal proceedings against the indicted government contractor" — not the affiliate — permit the extension of an affiliate's suspension beyond 18 months. Yet the district court also recognized that 9.407-4 and 9.407-1 must be "read in conjunction," but it reached precisely the opposite conclusion when it did so: namely, that "legal proceedings" must be initiated against the affiliate itself to permit the continuation of a suspension beyond 18 months.

A close textual analysis is beyond the scope of this essay, but suffice it to say that both interpretations are defensible. Yet for reasons that are not explained, the Eleventh Circuit's opinion never addresses the competing interpretation adopted by the district court; rather, it simply assumes the validity of its preferred interpretation and quickly moves on to other issues.

The Eleventh Circuit's opinion also fails to account for the investigative purpose of affiliation-based suspension. Affiliation-based suspension reflects the assumption that where one company engages in wrongdoing, other companies under the same ownership and control are more likely to engage in similar wrongdoing, or that the parent will use its affiliate to continue contracting with the government in violation of the parent's suspension.

Thus, to protect the government, the FAR allows agencies to immediately suspend affiliates of an indicted contractor, even absent a showing of wrongdoing by the affiliates themselves, until it can be determined whether the affiliate actually engaged in wrongdoing. This makes sense in the suspension context, where the misconduct need only be "suspected, upon adequate evidence."<sup>[1]</sup> See FAR 9.407-2.

Of course, exclusion from government contracting is a severe penalty, so pure affiliate suspensions cannot be extended indefinitely. Rather, in accordance with FAR 9.407-4, the government has 18 months to investigate to determine whether further action against the affiliate is warranted. If the investigation reveals suspected wrongdoing by the affiliate, then the suspension can be extended as soon as legal proceedings are initiated.<sup>[2]</sup> If no misconduct is found, however, then the suspension must be terminated at 18 months. Yet under the Eleventh Circuit's rationale, an affiliate could remain subject to an indefinite suspension even if the government never identified any evidence, and essentially cleared the affiliate of any misconduct. Such an approach is at odds with the regulatory scheme, as it would contradict the FAR's requirement that suspension be imposed only "on the basis of adequate evidence." FAR 9.407-1(b)(1).

Finally, and perhaps most troublingly, the Eleventh Circuit's opinion gratuitously and unnecessarily declares that "[t]he present responsibility of an affiliate is irrelevant" when determining whether a suspension can be continued beyond 18 months. This statement is particularly surprising in light of the

fact that the concept of present responsibility is widely understood to be the fundamental consideration in a suspension or debarment action. Indeed, the FAR explains that the very purpose of suspension and debarment is to ensure that agencies “solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only.” FAR 9.402(a).

Moreover, FAR 9.402(b) provides that suspension and debarment may be imposed “only in the public interest for the Government’s protection and not for purposes of punishment.” And FAR 9.407-1(b) echoes this rule, explaining that an agency may impose a suspension only “when it has been determined that immediate action is necessary to protect the Government’s interest.” Insofar as it proudly announces that an affiliate’s showing of present responsibility is “irrelevant,” the circuit court’s opinion flies in the face of these foundational principles. If, after 18 months, the government has uncovered no evidence that an affiliate has engaged in any wrongdoing, it can hardly be said that the indefinite continuation of the affiliate’s suspension is necessary to “protect the Government’s interest.”

One could argue with the outcome, but viewed in the broader context of the suspension and debarment regime, it is clear that the Eleventh Circuit dropped the ball on a golden opportunity to provide meaningful guidance to agency suspending officials and practitioners on the appropriate and fair treatment of affiliate contractors.

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[1] Debarment is a different scenario, as it typically is based upon “a conviction of or civil judgment for” various misconduct. See FAR 9.406-2. For this reason, the circuit court’s attempt to rationalize indefinite affiliate suspensions by analogizing to affiliate debarments is unpersuasive; where the parent is debarred, the evidence of wrongdoing typically needs to be much stronger than that required for a suspension.

[2] Alternatively, the discovery of suspected wrongdoing would allow an agency to simply initiate a new suspension against the affiliate under the catch-all provision authorizing suspension for “any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor.” See FAR 9.407-2(c).