American Bar Association
Section of Public Contract Law

Anatomy of a Debarment Action

2018 Annual Meeting
August 2, 2018
Chicago, IL

Section of
Public Contract Law
AMERICAN BAR ASSOCIATION

American Bar Association
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2018 Annual Meeting

Anatomy of a Debarment Action
Thursday, August 2, 2018

Program

Program Co-Chair Biographies

Program Faculty Biographies

Part I: Key Concepts in Federal Suspension & Debarment Practice

Part II: Suspension & Debarment Considerations in Parallel Proceedings
(Excerpted from *The Practitioner's Guide to Suspension & Debarment (4th ed.)*)

Part III: Suspension & Debarment Update: The Latest Key Decisions and a Suggested Path Forward

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The panelists will discuss a hypothetical debarment action from beginning to end, offering perspectives and best practices from a variety of viewpoints, to include those of a suspension and debarment official, agency counsel, counsel for a corporate respondent, and counsel for an individual respondent. Among other issues, the panel will explore:

- How to address the due process and fairness concerns of adverse individual and corporate Respondents;
- The obligation of the SDO to investigate and consider available information reasonably;
- Limitations that may be placed on individual owners/managers accused of wrongdoing as a condition for a company's continued eligibility;
- The proper scope of an administrative agreement and independent monitor responsibilities;
- The viability of administrative agreements or alternative resolutions for individual respondents.

MODERATOR:
Frederic Levy, Partner, Covington & Burling LLP, Washington, DC

PANELISTS:
Dominique Casimir, Partner, Arnold & Porter, Washington, DC

Frank S. Lane, Debarment Counsel, Suspension and Debarment Division, U.S. Environmental Protection Agency, Washington, DC

Mortimer C. Shea, Jr., Director, Soldier & Family Legal Services Office of the Judge Advocate General, Washington, DC

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Annual Meeting Program Co-Chairs

David Black, Annual Meeting Program Co-Chair

David Black is a partner at Holland & Knight LLP in the Firm's Northern Virginia office. He is Co-Chair of the Firm's National Government Contracts Team.

In his practice, David is a solution provider, problem solver, and trusted advisor for government contractors in all stages of growth. On a day-to-day basis, David helps his clients navigate the complex customer relationship with Federal agencies and business relationships with teammates, including contract formation, performance, and compliance issues. He represents protesters and intervenors in bid protests at the agency-level, GAO, and the Court of Federal Claims. He also contractors in disputes at the Boards of Contract Appeals or the Court. He handles investigations and audits and works with his enforcement defense partners defending False Claims Act litigation. David helps clients manage intellectual property and data rights under Federal contracts and subcontracts and understand issues such as organizational conflicts of interest, small business programs, Federal Supply Schedules, labor and employment requirements, and the competitive procurement process. He drafts and negotiates teaming agreements and subcontracts.

David is a Past-President of the NCMA Tysons Corner Chapter and the Boards of Contract Appeals Bar Association. He active in the Public Contract Law Section of the American Bar Association, where he serves as Co-Chair of the Webinar Committee and a Vice-Chair of the Section's Acquisition Reform & Emerging Issues Committee.

Mark D. Colley, Annual Meeting Program Co-Chair

Mark D. Colley is a partner in, and the former Chair of, the Government Contracts & National Security practice at Arnold & Porter in Washington, D.C. Mark's work has involved substantive matters across the broad landscape of the public contracts area, with an emphasis on litigation and investigation projects. He is regularly engaged on bid protests and False Claims Act defense cases, as well as private party contract disputes. His litigation work has cases before all Federal (and some state) bid protest tribunals, administrative proceedings, judge and jury trials, and appellate arguments in multiple Federal Circuits. Mark's clientele reflects the diversity of the government contracting community, including businesses engaged in aerospace and defense,

information technology, health care, telecommunications, professional services, energy, and classified programs.

Mark is a former Chair of the ABA's Public Contract Law Section, and has held many other positions in the Section. He also chairs the Cambridge Forum on Government Procurement Law.

A pure product of the Virginia public school system, Mark earned his J.D. at the University of Virginia and a B.A. (High Honors) from the College of William and Mary. He clerked with the Hon. John W. Kern at the D.C. Court of Appeals. He is a devoted fan of the Washington Nationals.

Amy M. Conant - Annual & Quarterly Program Co-Chair

Amy M. Conant is an associate in the Government Contracts and Procurement Policy group at K&L Gates LLP in Washington, DC. Ms. Conant advises clients on a variety of federal, state, and local procurement matters, with a focus on bid protests, corporate ethics and compliance, internal investigations, and required disclosures under the FAR Mandatory Disclosure Rule. Ms. Conant is an active member of the American Bar Association's Section of Public Contract law. In addition to her role as Annual/Quarterly Program Co-Chair, Ms. Conant currently serves as a Bid Protest Committee Vice Chair, a Scholarship Committee Co-Chair, the Young Lawyer Council Member, and as the Section's Liaison to the Young Lawyers Division.

Ms. Conant received her J.D. from Washington and Lee University School of Law, where she served on the Journal of Civil Rights and Social Justice, the Moot Court Executive Board, and as Student Bar Association President. Ms. Conant received her B.A., with honors, from Washington and Lee University.

Stacy M. Hadeka, Annual Meeting Program Co-Chair

Stacy M. Hadeka is a Senior Associate with Hogan Lovells US LLP in Washington, D.C. With a background in the Aerospace, Defense & Government Services (ADG) industry, Stacy has a deep understanding of the government contracts issues impacting the firm's sector clients.

Stacy's practice encompasses all areas of government contracting, with a focus on matters of compliance, investigations, disclosure obligations, transactional due diligence, and bid protest litigation. She assists clients in manning complex government regulatory requirements in the areas of schedule contracting, cybersecurity, the supply chain, and domestic preferences. She also counsels clients on contract formation and administration.

Prior to joining us, Stacy gained insight into the industry while working as in-house counsel for a major defense contractor and a commercial subsidiary with sales to the federal government.

In her role, she supported the business by assisting with matters of compliance, ethics, and litigation. Stacy also clerked with the Civilian Board of Contract Appeals where she assisted with government contract claims and alternative dispute resolution.

Stacy received her J.D. from Boston College Law School and attended The George Washington University Law School for her LL.M. in Government Procurement. Through the LL.M. program, she deepened her knowledge and strengthened her skills associated with the practice of government contracts

Aaron P. Silberman, Section Chair

Aaron Silberman is a shareholder at Rogers Joseph O'Donnell, PC, in the firm's Government Contracts and Construction Practice Groups. Mr. Silberman has specialized in public contracts and construction advice and litigation since 1992. He represents contractors, suppliers and design professionals in the construction, defense, information technology, and service industries. His experience includes contracts for federal, state and local public entities and for private, commercial projects. He handles procurement and compliance advice, contract negotiation, investigations, administrative bid protests and proceedings, federal and state court litigation, and ADR.

Mr. Silberman has spoken and published books and articles on a wide variety of government contracts and construction law subjects, including false claims, terminations, bid protests, subcontracting and teaming, cybersecurity, Building Information Modeling (BIM), green building, Energy Savings Performance Contracts, IT procurements, abandonment/cardinal change claims, disabled access, and licensing.

Mr. Silberman is a leader in several prominent government contracts and construction organizations. He is Chair of the ABA Public Contract Law Section for 2017-18, having served as Secretary in 2014-15, Vice Chair in 2015-16, and Chair Elect in 2016-17. He is immediate past chair of the Publication Committee of the ABA Forum on Construction Law and is a past member of the Governing Committee and past chair of its Specialty Trade Contractors & Suppliers Division. He is a member and past chair of the Board of Directors of the Bay Area District of AGC-California, a former chair of the AGC-C's Legal Advisory Committee, and a former member of its Executive Committee.

Mr. Silberman earned his J.D. at the University of California Los Angeles Law School with honors and served as an Editor of the UCLA Environmental Law Review. He earned his B.B.A. at the University of Michigan, with honors.

Frank Windham, Jr., Annual Meeting Program Co-Chair

Frank Windham, Jr., currently serves in the Department of the Navy Office of the General Counsel (DON OGC) as an Associate Counsel, Naval Air Systems Command (NAVAIR) for the F-

35 Lightning II/Joint Strike Fighter Program Office in Arlington, Virginia. Mr. Windham previously served as an Assistant Counsel within NAVAIR at Naval Air Station Patuxent River, Maryland, where he provided legal support to several program offices. Mr. Windham practices the full breadth and depth of federal acquisition and fiscal law, and advises clients on matters pertaining to major weapons systems programs, competitive and sole source procurements, bid protests, contract negotiations, contract administration, technical data rights, requests for equitable adjustment, contract claims and disputes, and the Antideficiency Act. Mr. Windham is also a member of the DON OGC Diversity and Inclusion Advisory Council and DON OGC Mobile Workforce Group. Additionally, he is an active member of the American Bar Association's (ABA) Public Contract Law Section (PCLS), serving as a Vice Chair of the Acquisition Reform and Emerging Issues, Bid Protest, Membership, and Scholarship Committees.

Mr. Windham graduated *cum laude* from The University of Alabama, where he obtained an Honors College certificate, in May of 2007 with his Bachelor of Arts degree in Political Science. Mr. Windham earned his Juris Doctor from the Howard University School of Law in May of 2010. While in law school, Mr. Windham served as a summer law clerk with the United States Army's Judge Advocate General's Corps at Fort Meade, Maryland, and legal extern for the Honorable Alexander Williams, Jr., Judge (ret.), United States District Court for the District of Maryland. Mr. Windham is admitted to practice law in the State of New York.

Mr. Windham is an active member of his community, supporting both his law school as an alumni and the Walker Memorial Baptist Church in Washington, D.C. He resides in Alexandria, Virginia with his wife, Tinelle, and their son, Elijah. Frank and Tinelle are happily awaiting the birth of their second child in May 2018.

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Dominique Casimir

Dominique Casimir is a partner at Arnold Porter in Washington, DC where she concentrates her practice in government contracts litigation and counseling. She represents government contractors hailing from a wide variety of industries, including defense, healthcare, information technology, and professional services. Ms. Casimir regularly litigates pre-award and post-award bid protests before the US Government Accountability Office (GAO), the US Court of Federal Claims, and the Federal Aviation Administration Office of Dispute Resolution for Acquisition. Ms. Casimir also has extensive experience litigating complex contract claims before the Armed Services Board of Contract Appeals, and has litigated teaming disputes in arbitration proceedings. Ms. Casimir has successfully handled suspension and debarment matters for large and small government contractors, and has appeared before the Suspension and Debarment Officials of several federal agencies.

Frank S. Lane

Frank S. Lane is currently a Senior Debarment Counsel in the Suspension and Debarment Division (SDD) at the U.S. Environmental Protection Agency (EPA) in Washington, D.C. Frank has also served as the Acting Suspension and Debarment Official, Acting Hearing Officer and Division Director in EPA Suspension and Debarment Program. Prior to these positions Frank was Debarment Counsel for EPA in San Francisco serving EPA's Region Nine (California, Arizona, Nevada and the Pacific Islands) for over three years. Before his work in EPA Region 9, Frank was a Debarment Counsel for EPA Region Six (New Mexico, Texas, Oklahoma, Arkansas, and Louisiana), and EPA Region Seven (Iowa, Kansas, Missouri, and Nebraska).

During his nineteen years in the EPA Debarment program, Frank was the lead Debarment Counsel on cases involving companies such as BP plc; Wal-Mart Stores, Inc.; Koch Industries; Alcoa, Inc.; Seven Up / Dr. Pepper Bottling Company; Sevenson Environmental Services, Inc., Quality Water Analysis Laboratories (QWAL); Intertek, Inc.; and Cargill, Inc. and Frank served as an Advisory Attorney on the Volkswagen Aktiengesellschaft case. Frank also provided significant assistance to the EPA Debarring Official as an Acting Hearing Officer on cases involving McWane, Inc.; Martel Laboratories, Inc.; Arasmith Consulting Services, et al.; Tyco International, Ltd. and Sabine, Inc. As Division Director, Frank worked with his staff on numerous debarment cases, most notably IBM; Former Birmingham, Alabama Mayor, Larry Langford and Archer Daniels Midland.

Before working at EPA, Frank worked in a variety of positions including Campaign Manager in a State of New Jersey Assembly race, ECO Intern in the Office of Environmental Management at the Department of Energy and Judicial Law Clerk for the Honorable Reggie Walton in the Superior Court for the District of Columbia. As a Presidential Management Fellow, Frank worked as a staff member on Vice President Gore's Commission on Reinventing Government and as a Legislative Aide for the former Senator from New Jersey, Bill Bradley.

Frank received his J.D. from Howard University School of Law; his Masters Degree in Public Administration from Rutgers University and his Bachelor of Science Degree in Business from Montclair University. Among other honors, Frank has been recognized as a U.S. Housing and Urban Development Fellow and Distinguished Member of Pi Alpha Alpha.

Frederic Levy, Moderator

Frederic Levy, co-chair of the Government Contracts Practice Group at Covington & Burling, LLP, is one of the nation's leading suspension and debarment lawyers, focusing his practice on the resolution of complex compliance and ethics issues. He has successfully represented numerous high-profile corporations and individuals under investigation by the government in civil and criminal matters, including False Claims Act cases, and in suspension and debarment proceedings to ensure their continued eligibility to participate in federal programs.

Mortimer C. Shea, Jr.

Mr. Mortimer C. Shea, Jr. serves as the Director of Soldier and Family Legal Services and the Army's Suspension and Debarment Official. He oversees the Procurement Fraud Division, within the Office of the Army Judge Advocate General. He also is responsible for policy and oversight of legal services provided to Soldiers and their Families, including legal assistance and claims services, legal support to sexual assault victims, and to wounded warriors in the medical disability evaluation process.

Mr. Shea's previous civilian positions include Chief of General Law, Headquarters, United States Coast Guard and as a Senior Supervisory Attorney, Financial Management Service, Department of Treasury. He served in a variety of jobs during a 25-year military career, including Staff Judge Advocate of the Military District of Washington; Deputy Staff Judge Advocate, 2nd Armored Division; Chief of the Labor and Employment Law Division, Office of the Judge Advocate General; Chief of General Law, Army Litigation Division; Associate Deputy General Counsel (Personnel and Health Policy), Department of Defense; and in various positions in the 82d Airborne Division and 172d Infantry Brigade.

Mr. Shea is a member of the District of Columbia and Indiana bars.

PART III: REVIEW OF RECENT CASE LAW

Suspension and Debarment Update: The Latest Key Decisions and a Suggested Path Forward

By Frederic Levy, Michael Wagner, and Michelle Willauer[1]
(June 2018)

I. Introduction

Suspension and debarment are perhaps the most significant consequences of non-compliance for government contractors and their employees, and executive agencies continue to demonstrate no reluctance in utilizing these tools. According to the Interagency Suspension & Debarment Committee ("ISDC"),[2] the pace of suspension and debarment activity across the Federal Government remained at a near-record high in FY 2016, the most recent year for which official data is available. Federal agencies initiated a total of 4,249 suspension and debarment-related actions in FY 2016 alone (718 suspensions, 1,676 debarments, and 1,855 proposed debarments). While these figures represent a slight decrease from suspension and debarment activity in FY 2015, the ISDC emphasized that the FY 2016 data still reflects "a significantly greater number of suspension and debarment actions . . . when compared to FY 2009, when the ISDC formally commenced data collection." Indeed, the 4,249 actions initiated in FY 2016 are more than double the number reported in FY 2009.

Along with the high number of suspension and debarment actions government-wide, an increasing number of agencies are making regular use of their exclusion authority. Historically, suspension and debarment activity has been concentrated within the component agencies of the Department of Defense ("DOD") and a select few civilian agencies, such as the Environmental Protection Agency and General Services Administration. But more recently, agencies across the executive branch have begun to embrace suspension and debarment as a tool to protect the

[1] Frederic Levy is a Partner at Covington & Burling LLP and Co-Chair of the Debarment and Suspension Committee of the ABA's Public Contract Law Section. Michael Wagner is a senior associate at Covington & Burling LLP and Vice-Chair of the Debarment and Suspension Committee of the ABA's Public Contract Law Section. Mr. Levy and Mr. Wagner are Principal Editors of the recently released *ABA Practitioner's Guide to Suspension and Debarment (4th ed.)* (2018). Michelle Willauer is an associate at Covington & Burling LLP, specializing in Government Contracts and complex White Collar matters.

[2] The ISDC, established by executive order in 1986 and now comprised of representatives from more than 40 Executive Branch agencies and corporations, aims to support, coordinate, and improve suspension and debarment activities across the Federal Government. Part of the ISDC's mission is to "ensure consistency among agency regulations concerning debarment and suspension" activities, though, as discussed below, practices and procedures can still vary significantly across Federal agencies. Additionally, since the passage of the National Defense Authorization Act of 2009, the ISDC also has been charged with providing to Congress an annual report on the status of the Federal suspension and debarment system. An analysis of this report frequently offers insight into trends and developments in the suspension and debarment area that can prove invaluable to contractors facing the prospect of a present responsibility review.

government's interest and induce compliance among contractors and recipients.[3] For contractors and recipients, this trend translates to an elevated risk of receiving a notice of suspension or debarment.

Among recent suspension and debarment trends, arguably the most significant relates not to how many actions are taken, but rather who is being excluded. One recent analysis of exclusion actions reported in the System for Award Management corroborated anecdotal evidence that individuals are most at risk, concluding that 75% of exclusions in FY 2017 applied to individuals.[4] Similarly, small businesses are more likely to be excluded than large contractors. Less than 10% of actions involving companies in FY 2017 were taken against large entities.

As the trend towards suspending and debarring individuals has grown more pronounced, questions have arisen regarding how well existing debarment laws and regulations translate to cases involving individual respondents. While courts have begun to wade into these questions, suspension and debarment rulings from Federal courts are relatively rare. Given the wide discretion afforded to agency suspension and debarment officers ("SDOs") and the deferential standard of review under the Administrative Procedure Act ("APA"), many respondents decide that their efforts are better spent negotiating an administrative agreement than pursuing litigation. Moreover, individual respondents often lack the financial resources to challenge their proposed exclusion. Thus, since a string of decisions several decades ago that examined the application of due process requirements to suspension and debarment,[5] courts have provided scant guidance on the application of due process principles to exclusion actions, particularly in the current environment that focuses heavily on the exclusion of individuals.

In the past year, however, Federal district courts have issued three decisions examining the procedural requirements of the FAR's debarment regulations in matters involving individuals. We examine the three decisions in more detail below.

II. Recent Cases

A. *Friedler v. General Services Administration*

1. Background

The facts of *Friedler v. General Services Administration*, 271 F. Supp. 3d 40 (D.D.C. 2017), are complex and date back nearly a decade, but for purposes of understanding the court's ruling, they can be succinctly stated. The plaintiff, who founded a successful tech company that

[3] Embodying this trend are agencies such as the Department of Health and Human Services (3 actions reported in 2009; 163 actions reported in 2016), the Department of State (8 actions reported in 2009; 114 actions reported in 2016), the Department of the Interior (12 actions reported in 2009; 68 actions reported in 2016), and the Department of Transportation (15 actions reported in 2009; 130 actions reported in 2016).

[4] *See* David Robbins, "Suspension And Debarment: FY 2017 By The Numbers," *Law360* (Nov. 3, 2017).

[5] *See, e.g.*, *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964); *Horne Bros., Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972); *Old Dominion Dairy v. Sec'y of Defense*, 631 F.2d 953 (D.C. Cir. 1980).

provides critical support and services to numerous Federal agencies, had previously been involved in a business dispute that resulted in him pleading guilty to a single count of accessing a protected computer without authorization. Following this plea, GSA proposed him for debarment and, as a condition of not debarring his company, directed plaintiff to relinquish day-to-day control of his company by executing a Voting Trust Agreement ("VTA") that limited his involvement with the company's operations, subject to certain defined exceptions. GSA and the respondent then entered into extended negotiations over the terms of an administrative agreement that would resolve the matter without debarment.

Initially, GSA sought to restrict the respondent's interactions with the company to an extent far greater than necessary to preclude his involvement in Federal programs (e.g., by limiting his ability to receive company financial information even though he was the sole shareholder and dependent upon the company for his livelihood, or by preventing him from engaging in activities unrelated to Federal contracting). After months of further negotiations, the respondent and GSA eventually reached an agreement in principle on an administrative agreement that would resolve the proposed debarment, and GSA informed the respondent that it was "poised to sign" the agreement.

But shortly afterwards, and without warning or prior explanation, GSA abruptly reversed course and debarred the respondent. In the debarment notice, GSA alluded briefly to the respondent's plea that had occurred more than a year earlier, but made clear that its change of heart and ultimate debarment decision was based upon recently learning that the respondent supposedly had violated the terms of the VTA by communicating with personnel at his company. GSA devoted the bulk of its notice of debarment to describing two purported VTA violations, which it repeatedly referred to as "new causes" for debarment.

2. Judicial Challenge

The respondent filed suit in Federal district court challenging the debarment as arbitrary, capricious, and in violation of the law under the APA. The respondent provided evidence that the asserted causes for his debarment—supposed violations of the VTA—were unfounded and contradicted by the administrative record and, in fact, that his actions were expressly permitted by the VTA. Respondent further argued, as a threshold issue, that GSA violated his constitutional and regulatory due process rights by debarring him for purported "new causes," of which he had no prior notice or opportunity to be heard. The Government, in turn, contended that GSA could have debarred the respondent based solely on his conviction, and that there was no "new cause" for debarment but rather just "additional evidence" supporting a longer debarment period. Among other things, GSA argued that its failure to issue a new notice was evidence of the fact that the debarment was not based on new cause. The respondent and the Government cross-moved for summary judgment, and oral argument was held before the court.

3. The Court's Ruling

In a detailed opinion, the court set aside the debarment, finding that GSA "failed to provide [the respondent] with the due process that its rules require." Echoing the respondent's due process argument, the court found that GSA had "disregarded the applicable regulations" set forth at FAR 9.406-3 when it "suddenly reversed course and debarred [the respondent] without

providing any advance notice of the two [new causes]." The court then concluded that "where, as here, the GSA ignores its own regulations and imposes a debarment that does not adhere to the procedural due process mandates of FAR 9.406-3, it has acted arbitrarily and capriciously."[6]

In reaching this conclusion, the court rejected GSA's claim that the debarment was not based on "new cause," dismissing GSA's argument as "entirely circular" and asking rhetorically "how could [the GSA SDO's] notice reasonably be interpreted any other way?" The court also was unmoved by GSA's argument that the procedural defect concerning the new cause was harmless error because the SDO would have debarred the respondent based solely upon the respondent's guilty plea. The court observed that GSA had been "poised to sign" an administrative agreement resolving the debarment notwithstanding the plea, which showed "that GSA would not have debarred Friedler absent the two new causes."

Finally, the court flatly rejected GSA's alternative argument that notice of the new causes was not required because such new causes actually were "mere aggravating factors that justify a longer debarment period." The court noted that GSA's position was "manifestly inconsistent" with FAR 9.406-4, which requires notice and an opportunity to respond when an agency proposes to prolong the period of debarment due to factors above and beyond the basis for the debarment itself: "[The] regulations also make crystal clear that the FAR's various procedural mandates—including the notice and hearing requirements described above—apply equally regardless of whether an initial debarment term is being imposed or the debarring official is issuing an 'extended' term of debarment." The court declared that GSA's argument also "defies logic," stating, "it makes no sense to conclude that the FAR's drafters intended for the regulation's extensive procedural mandates to apply only with respect to the initial [three year] limited period of debarment, and that no procedural safeguards whatsoever are required in connection with the imposition of an extended (and potentially unlimited) debarment period."

4. Key Takeaways

- ***Think strategically about building an administrative record.*** This is critical at both the administrative and litigation phases of a debarment matter. As the court affirmed in this case, "a debarring official . . . is required to consider the entire record on review when she makes the debarment decision." Thus, a well-developed administrative record will work in the respondent's favor when contesting a debarment at the agency level, because the SDO *must* consider *all* of the information in the record when making a debarment determination. Second, although many debarment matters are resolved without resorting to litigation, a well-developed administrative record is critical in the event that a matter does proceed to litigation. In an APA case, a district court's review is confined exclusively to that which appears in the administrative record. Strategically building an administrative record will give a respondent more material to work with when litigating a debarment challenge; conversely, the failure to build a robust record may hamstring

[6] Although the court did not have to reach the merits of whether the asserted new causes were actually supported by the record, it characterized as "entirely plausible" the respondent's argument that "the lack of notice *mattered* . . . because, had he been given the chance, he would have demonstrated why GSA's conclusions were factually and legally deficient."

efforts to pursue a judicial challenge because the respondent likely will not be able to rely upon material outside of the administrative record.

- ***Don't overlook the significance of procedural requirements.*** Given both the economic impact of a debarment and the associated reputational harm, it may be tempting to focus exclusively on rebutting the substance of the asserted causes for a debarment action. As this case shows, however, it can be just as fruitful for a respondent to closely analyze whether the agency has complied with applicable procedural requirements. The respondent in this case had a strong argument—supported by substantial evidence—that the asserted cause for his debarment was unfounded. But as is often the case, the procedural argument, which highlighted an objective defect in GSA's process, rendered an analysis of the substance unnecessary.

- ***Persistence may be required—and rewarded.*** This case also is reminder that while quick victories are possible when challenging a suspension or debarment, in many cases greater persistence is required to fully resolve an exclusion, especially where an agency is particularly invested in a given outcome. Remarkably, not even the court's emphatic reversal of GSA's illegal debarment resulted in the termination of the exclusion. Instead, GSA took the position that while the *debarment* had been overturned, the underlying *proposed debarment* remained in place, therefore preserving the exclusion. There is no basis in fact or law for this position, and GSA ultimately relented and terminated the proposed debarment as well. Thus, while justice ultimately was served, it required dogged persistence by the contractor even beyond formal litigation.

B. *International Exports, Inc. v. Mattis*

1. Background

International Exports, Inc. et al. v. Mattis, 265 F. Supp. 3d 35 (D.D.C. 2017), has its roots in False Claims Act allegations brought against a contractor alleging fraud connected to exports of food to United States troops in the Middle East. Samir Itani ("Samir"), the individual owner of S & S Itani, a government contractor, pled guilty and was sentenced to a twenty-four month term of imprisonment. Separate from the criminal case, Samir was facing a civil *qui tam* case in Federal district court brought by a former employee alleging a scheme to modify expiration dates on exported food. The *qui tam* complaint also named Samir's wife, Suzanne Itani ("Suzanne"), and brother, Ziad Itani ("Ziad"), along with several entities owned or managed by defendants. The *qui tam* action ultimately was resolved in a settlement agreement in which the defendants agreed to pay the United States $15 million. The settlement agreement specified that defendants did not concede liability; rather, the agreement was reached to avoid protracted litigation.

Several months after the settlement agreement, the Defense Logistics Agency ("DLA") issued notices proposing for debarment various individuals and entities based on affiliation with S & S Itani, including Suzanne, Ziad, and International Exports, Inc., which Suzanne founded after the settlement of the *qui tam* complaint. In its final decision, issued in September 2011, DLA imputed the misconduct underlying the Samir's conviction to S & S Itani, then debarred the other individuals and entities as affiliates of S & S Itani. DLA then imposed a 15-year

debarment period for Suzanne, Ziad, and International Exports, Inc. DLA asserted that the 15-year debarment was justified by aggravating circumstances, specifically the "seriously improper conduct" underlying the *qui tam* suit.

2. Judicial Challenge

The respondents filed suit in Federal district court challenging the debarment as arbitrary, capricious, and in violation of the law under the APA and seeking declaratory judgment in their favor. The respondents' challenge to their proposed debarment relied on two arguments: (1) that DLA made no finding of wrongdoing on their part, and the FAR does not permit debarment of "affiliates of affiliates"; and (2) in debarring and/or extending the period of debarment, DLA improperly relied on unproven allegations in the *qui tam* action rather than conducting its own factfinding regarding fact issues challenged by the respondents. The respondents and the Government cross-moved for summary judgment.

3. The Court's Ruling

The court initially dispensed with the argument that DLA could not debar "affiliates of affiliates," concluding that it was within the agency's authority to extend the debarment of a contractor to any affiliates. Finding that the contractor's criminal conduct was directly imputed to S & S Itani, and that respondents had the power to control S & S Itani, the court held that the agency properly debarred respondents under FAR 9.406-1(b). The court found nothing to support respondents' claim that the FAR requires an independent finding of an affiliate's wrongdoing, since respondents had ownership or management interest in the company.

As for the second argument, however, the court overturned the 15-year debarment, finding that the agency "fail[ed] to adhere to its own rules and regulations" in imposing an extended period of debarment. The court noted that the aggravating "facts" upon which the agency relied to issue the 15 year debarment were "bald" allegations unsupported by documentary evidence, controverted by other information in the record, and disputed by respondents. Nonetheless, the debarring official did not pursue additional proceedings to address these disputed facts. The court found that the agency's "failure to make specific findings of fact . . . on the issue of 'aggravating circumstances'" violated FAR 9.406-3(d)'s mandate to develop written findings of fact in the case of a "genuine dispute over material facts." The court then concluded that the agency's "reliance on the unproven allegations in the *qui tam* complaint[,] which the plaintiffs' challenge as unproven and untested," was arbitrary and capricious.

4. Key Takeaways

- ***The requirement to conduct factfinding proceedings cannot be ignored.*** The court refused to uphold an SDO's discretionary extension of a debarment due to the SDO's failure to hold factfinding proceedings to address disputed issues of material fact he relied upon to extend the period of debarment. There is a perception that agencies seek to avoid such proceedings, even though they are expressly required, rationalizing that once an SDO believes that sufficient evidence exists to support any of the proposed bases for an exclusion, no other factual dispute could be material. The result is that, in practice, formal fact-finding proceedings have been exceedingly rare. The *International Exports*

holding casts doubt on this approach. An SDO may not rely on unsupported, disputed facts to support an extended debarment, even if the basis for the underlying debarment is substantiated. It is critical that contractors and recipients facing a potential debarment request fact finding regarding any disputed allegations of fact, even when there are other facts sufficient to support an agency action. The agency's refusal to conduct such a factfinding proceeding will preclude it from relying on those allegations to support an extended period of debarment.

- ***Unsubstantiated allegations in a civil complaint or settlement are not evidence supporting an exclusion.*** Further, *International Exports* is a reminder that an agency may not simply rely on unsupported allegations in a lawsuit as the basis for a debarment or extended period of debarment, even if those allegations are repeated in a settlement agreement. *International Exports* also underscores the significance of including a non-admission provision in a False Claims Act settlement for purposes of mitigating collateral consequences.

- ***Address all of the allegations in the administrative record in your response to an SDO.*** Given the significance of establishing a genuine dispute of material facts, it is evident that a thorough response to a notice of proposed debarment can be advantageous for contractors. Regardless whether the agency conducts a factfinding proceeding, contractors should include in their initial opposition any information that raises a genuine dispute as to a material fact. Including such information in the initial opposition triggers the agency's obligation to go beyond the administrative record and the contractor's submission before making a determination. The failure to provide specific details and information supporting the contested factual allegations may hamstring the respondent's later efforts to pursue a judicial challenge.

C. *Vinson Mortgage Services, Inc. v. Carson*

1. Background

Vinson Mortgage Services, Inc. v. Carson, 2018 WL 1792210, at *1 (E.D. Mo. Apr. 16, 2018), arose out of a decision by the Department of Housing and Urban Development ("HUD") to withdraw plaintiff's Federal Housing Administration Title II license ("FHA license") on the grounds that false financial filings had overstated the company's capitalization. The FHA license authorized plaintiff to originate FHA home loans and had to be recertified annually. Vinson Mortgage Services filed a complaint in Federal district court seeking judicial review of the HUD decision under the APA, and also moved for an emergency stay of the license withdrawal pending the court's review. HUD consented to the request, and the court granted the stay.

Two months after the court's stay, and as the culmination of proceedings that had been initiated prior to HUD's revocation of the license, HUD implemented a three-year debarment of Ray Shawn Vinson and Kevin Vester, the president and vice president, respectively, of Vinson Mortgage Services, Inc. In an email, HUD counsel notified plaintiff's counsel of the debarment of the individuals and that the debarment precludes those individuals from participating in any Federal executive branch programs. The email further stated that "Vinson Mortgage Services is

prohibited from participating in the FHA program so long as Mr. Vinson or Mr. Vester retains either an ownership interest of or employment with" the company.

2. Judicial Challenge

Plaintiff alleged that the debarments circumvented the stay and precluded Vinson Mortgage Services from engaging in HUD business. It filed a motion in the ongoing Federal district court litigation to hold defendants in contempt for violating the order staying the effect of HUD's withdrawal of the FHA license, for attorney fees, and to enforce the terms of the court's stay. Defendants opposed the motion.

3. The Court's Ruling

Holding that the debarment of individual employees was a separate administrative proceeding from the challenge to HUD's withdrawal of Vinson Mortgage Services' license at issue in the underlying case, involving different regulations and legal standards, the court denied plaintiff's motion. The court concluded that HUD was compliant with the terms of the stay, which mandated plaintiff "still participate in the FHA program consistent with terms of original approval." The terms of original approval included a requirement that owners not have been suspended or debarred. While the debarment precluded the plaintiff from engaging in HUD business, "Vinson Mortgage Services remains free to do business under different ownership."

4. Key Takeaways

- ***Suspension and debarment are separate, collateral proceedings that must be addressed.*** Too often, contractors focus their efforts on addressing the underlying allegations of wrongdoing and fail timely to initiate interaction with the appropriate suspension and debarment official so as to mitigate potential consequences. This is particularly true when the contractor achieves what it perceives to be a successful resolution of the underlying case. Yet, a declination in a criminal matter or a favorable civil settlement does not preclude a suspension and debarment official from considering whether those same allegations give rise to present responsibility concerns. *Vinson Mortgage Services* is a reminder that suspension and debarment are collateral proceedings that are separate and distinct from the underlying matter, and the debarring official has the authority to exercise his/her discretion to initiate an action regardless of the outcome of that matter. Timely engagement with the suspension and debarment official is critical.

III. The Way Forward

As these three recent cases demonstrate, suspension and debarment actions against individuals can have enormous implications not only for the individual respondents, but also for the entities with which they are associated. In *Friedler*, the individual's debarment led to overly aggressive restraints on the company's ability to engage with its founder, even on matters unrelated to Federal contracting. In *International Exports*, the debarment and conduct of one individual in one company resulted, through affiliation, in the debarment of other individuals and a different company. And in *Vinson Mortgage Services*, the debarment of individuals resulted in

the company having to terminate individuals or itself face exclusion even before the merits of the underlying allegations had been adjudicated.

The effects on the individuals are even more profound. As in *Friedler* and *Vinson Mortgage Services*, individuals involved in suspension and debarment actions often become unemployable in their chosen field and their ability to support themselves and their families is jeopardized. Such individuals also may be unable to secure approval for credit lines or other financing even in a purely commercial context. And once suspended or proposed for debarment, the resulting stigma is permanent, regardless whether the suspension or proposed debarment is terminated without further action. The exclusion is listed publicly in the Federal Government's System for Award Management ("SAM") database, and remains accessible in the "archive" section of SAM even after termination of the exclusion.

Yet, individuals' ability to challenge a potential exclusion and demonstrate present responsibility is extremely limited. As noted above, even prevailing in the underlying matter sometimes is not enough. Investigators unable to convince the Department of Justice to pursue an action still may refer an individual for consideration for suspension or debarment, and SDOs have taken action to exclude individuals based solely upon the "facts" as alleged by those agents. And once referred for suspension or debarment, individuals have limited options for demonstrating that an exclusion is not necessary to protect the Government's interests. The specified "mitigating factors" that an SDO must consider when imposing an exclusion, as set forth in the FAR and non-procurement debarment regulations, are designed for corporate entities. For example, individuals cannot take "appropriate disciplinary action," "implement remedial measures" or "institute new . . . control procedures and ethics training programs," and cannot have "effective standards of conduct and internal control systems in place." And individuals generally cannot afford the specialized legal representation with expertise in the suspension and debarment process. As a result, individuals disproportionately suffer the consequences of suspension and debarment.

To address these issues, the suspension and debarment regulations should be examined carefully to ensure that individuals receive adequate due process before becoming permanently stigmatized and have a fair opportunity to demonstrate that they are presently responsible, notwithstanding past conduct. Among other things, consideration should be given to revising existing suspension and debarment regulations to address the following objectives:

- providing notice and an opportunity to be heard *before* imposing an exclusion action, unless there is an objective and demonstrable need immediately to protect the government's interests;

- promulgating mitigating factors designed for individuals that an SDO must consider before taking a suspension or debarment action; and

- ensuring immediate expungement of any record in SAM if a suspension or proposed debarment is terminated without an exclusionary action.

These suggestions constitute a starting point for potential enhancements to existing regulations, and both Government attorneys and members of the private bar already are debating

a variety of other proposals. But at a minimum, adoption of these measures can help to strike a fairer balance between protecting the Government's interests and ensuring fundamental fairness to individuals doing business with the Government.