

Gov't Contractor Suspension And Debarment: 2019 In Review

By Mike Wagner, Frederic Levy and Evan Sherwood

(January 14, 2020, 6:21 PM EST) -- Ten years have passed since the National Defense Authorization Act of 2009 ushered in a new era of suspension and debarment activity with a requirement that all federal agencies publish an annual summary of the activities and accomplishments of their debarment programs.

This transparency (and accountability) measure achieved its intended effect, as the last decade has seen both a surge in suspension and debarment activity and a steady progression of notable developments and innovations in debarment policy and practice. The past year was no exception.

The government's October 2019 annual report on federal suspension and debarment activity revealed that federal agencies initiated more than 3,300 suspension, debarment and proposed debarment actions in the most recent reporting year. This total marks a slight downturn from recent years, but still is one of the busiest years ever for suspension and debarment — and nearly double the activity level reported in 2009.

In addition, the government's report also noted that federal agencies issued nearly 200 show cause letters, the second-highest annual total ever. Thus, by any measure, suspension and debarment remain potent tools that the government is not afraid to deploy.

Given the level of activity, it should come as no surprise that suspension and debarment policies and procedures have continued to evolve at both the federal and state levels — and that courts and legislatures have continued to wrestle with aspects of suspension and debarment.

In this abbreviated look back at suspension and debarment activity in 2019, we highlight the year's key policy trends and developments, discuss recent legislative and rulemaking activity, and briefly summarize three notable cases issued in the past year.

Policy Trends and Developments

Cybersecurity compliance loomed large.

Cybersecurity requirements have proliferated at a dizzying pace in recent years. In 2019, we saw a resulting increase in enforcement activity in this area, and cyber-related suspension and debarment



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actions have followed suit. Consistent with this trend, the government's annual suspension and debarment report announced that the federal Interagency Suspension and Debarment Committee had established a new subcommittee dedicated exclusively to "tracking and reporting cybersecurity contractor compliance issues and developments."

The creation of a cybersecurity subcommittee signals that the ever-increasing array of cybersecurity rules and regulations is now a part of the present responsibility analysis. The government's willingness to exclude contractors who fall short of cybersecurity obligations should erase any lingering doubts about the weight the government places on cyber compliance — and should supply all the motivation a contractor needs to ensure compliance in this critical area.

Federal agencies enhanced their procedures.

In 2019, several federal agencies signaled an intention to step up suspension and debarment activity with announcements of streamlined exclusion procedures that place greater emphasis on suspension and debarment activity. Three agencies warrant particular attention.

- In April, the U.S. Department of Labor announced a pilot program aimed at promoting and expediting its suspension and debarment activity. In announcing the program, the DOL emphasized that it had received a record number of debarment referrals in the most recent reporting year and that the new pilot program will "allow [suspension and debarment] decisions to be made faster than ever before."
- In September, the U.S. Small Business Administration's Office of Inspector General published a report that was critical of the speed and effectiveness of the SBA's suspension and debarment program. In response, the agency agreed to implement a series of changes aimed at formalizing its suspension and debarment policies, expediting its processing of debarment referrals, and devoting additional resources to suspension and debarment actions — all of which are likely to drive an increase in exclusion actions.
- In November, the U.S. Federal Communications Commission announced a sweeping overhaul of its existing idiosyncratic debarment rules. Most notably, the proposed change would free the FCC of constraints imposed by the agency's current rules, allowing it to make use of the more flexible approach codified in the standard, government-wide nonprocurement debarment regulations currently codified at Title 2, Part 180 of the Code of Federal Regulations.

Contractors recognized the benefit of proactive outreach.

The government's annual debarment report also observes that government contractors continue proactively to engage with the government to address potential present responsibility matters, particularly when a company discovers possible misconduct within its operations.

Ten years ago, contractors rarely proactively engaged a suspending and debarring official. In the intervening decade, agency debarment programs generally have grown more active and more sophisticated, and best practices concerning interactions with suspending and debarring officials have evolved accordingly.

Today, many contractors recognize the benefit of proactively engaging a suspending and debarring official in appropriate circumstances. The government's latest annual debarment report identified at least 40 instances of proactive engagement initiated by potential respondents, and the true number is almost certainly much higher since agencies are not required to track those interactions.

Of course, any engagement with a suspending and debarment official's office should be undertaken only after due care and preparation, including consideration of the unique practices and conventions of each executive agency's debarment program.

Legislative and Rulemaking Activity

New — and controversial — debarment rules were passed in New York.

Arguably, 2019's most significant legislative and regulatory developments in the debarment space occurred not at the federal level, but in the state of New York. Two New York developments are worthy of industry attention.

First, New York Gov. Andrew Cuomo issued Executive Order 192 declaring that the state will conduct business only with responsible entities and pointedly reminding state entities of their authority to debar nonresponsible contractors.

Additionally, although New York historically has made responsibility determinations — commonly known as FLIP reviews — at the time of contract award, the new executive order decrees that the state's "attention to vendor responsibility should not end with the contract award process" and that agencies must ensure that contractors "remain responsible throughout the term of the contracts." The intent of this statement is unclear. It is possible that New York may require termination of ongoing contracts of entities found nonresponsible.

Second, and perhaps more significantly, New York authorities enacted a bill and subsequent implementing regulations that allow the Metropolitan Transportation Authority Inc. to debar any contractor that exceeds 10% of the contract cost or time for a construction project.

Needless to say, this is an extraordinarily low threshold for an action as consequential as a five-year debarment, particularly given the scale and complexity of many large MTA projects. Although the new provisions were quietly slipped into law in early 2019, they have generated increasing concern and controversy, and currently are the subject of a litigation challenge pending in federal court.

Progress was made toward an elusive uniform federal debarment rule.

At the federal level, 2019 saw plenty of rumblings about regulatory developments, but actual regulations have yet to materialize. For years, contractors and legal practitioners have been frustrated by the parallel and not-entirely-consistent regulatory regimes that govern suspension and debarment in the procurement and nonprocurement contexts. Various proposals have been advanced, with increasing specificity, to bring the two regimes into alignment, but the promise of a unified rule thus far has gone unrealized.

This past year, however, the government took a concrete step towards this goal, establishing a federal acquisition regulation reform case and tasking the Defense Acquisition Regulatory Council with drafting a proposed unified rule that would reconcile the two debarment regimes.

A report on the new rule was due in October 2019, but this deadline came and went — and then was pushed back to January. It remains to be seen whether and when a unified rule actually will be issued, but it is an issue that we are closely watching given the significant implications for suspension and debarment practice.

Case Law Developments

Courts faced the promise — and challenge — of a de facto debarment suit.

In some cases, agencies have acted improperly to freeze out a contractor from contracting opportunities without providing any notice, opportunity to be heard or other procedural protections. Courts have long recognized that contractors can challenge such an improper action — known as a de facto debarment — under the due process clause of the Fifth Amendment. However, as two cases from 2019 demonstrate, courts will apply a demanding standard to lawsuits alleging an improper de facto debarment.

First, in *Phillips v. Spencer*,^[1] the U.S. District Court for the District of Columbia considered a contractor's claim that the U.S. Department of the Navy had de facto debarred it from task orders under two indefinite-delivery/indefinite-quantity programs. The contractor sought summary judgment based on evidence that agency officials had deliberately cut off funds for future task orders only to the plaintiff.

The court rejected that motion and granted summary judgment for the Navy, finding that the Navy had continued to award work to the contractor on other Navy programs, but a de facto debarment requires evidence of a systematic effort to reject all of the plaintiff's bids for an agency's work, not just some of it.

Second, in *Sigmattech Inc. v. United States*,^[2] a contractor alleged that the Army had de facto debarred it from competing for the follow-on award of its Army task order first by setting aside the task order for small businesses and then by competing it under a different umbrella contract altogether.

The U.S. District Court for the Northern District of Alabama was unmoved and dismissed the case for lack of jurisdiction, finding that Sigmattech's claim was directed at the award of a particular task order, and thus was a challenge to the "award" of a contract within the exclusive Tucker Act jurisdiction of the Court of Federal Claims.

Together, these cases serve as a reminder of the challenges in bringing suits for de facto debarment. A would-be plaintiff must (1) determine the appropriate forum for its challenge to avoid jurisdictional stumbling blocks, (2) address whether the agency has repeatedly acted to prevent it from obtaining work on a systematic level, and (3) consider how best to establish proof of the government's blacklisting through the discovery process.

Where a plaintiff can satisfactorily address each of these points, it may have a meritorious case, but otherwise the demanding standard applied to de facto debarment claims presents a high hurdle to recovery.

Affiliation was a basis for extending debarment.

When issuing suspension and debarment decisions, agencies have broad authority to extend the exclusion to the contractor's corporate and individual affiliates, along with other entities that may, by imputation, share responsibility for the contractor's actions. In other words, an agency may act to exclude not only a contractor, but its owners, subsidiaries, employees or other entities that have a close relationship to the contractor.

In *JBL System Solutions LLC v. U.S. Defense Logistics Agency*,^[3] a contractor and its sole owner were suspended and then proposed for debarment for allegedly mishandling controlled information. Then, relying on principles of affiliation, the agency also excluded the owner's wife and a separate company that she owned.

The plaintiffs quickly filed suit challenging the extension of the exclusion, arguing, inter alia, that there was no evidence that the wife or her company had mishandled any controlled information or posed any risk to the government.

The U.S. District Court for the Eastern District of Virginia denied the plaintiffs' request for emergency injunctive relief, commenting that the "standard for debaring an affiliate is broad and does not require any showing that the debarred affiliate committed or had knowledge of the contractor's wrongdoing."

As this case highlights, suspending and debaring officials have wide discretion to extend a suspension and debarment even to individuals or affiliated companies with no involvement in — or even knowledge of — the alleged misconduct.

To mitigate the risk that a compliance issue in one area might trigger broader exclusion ramifications, it is essential that contractors appropriately scope their corporate ethics and compliance programs to cover all affiliated entities and personnel. Doing so can reduce the risk of an individual or far-flung affiliate stumbling into a compliance issue in the first instance, and if an issue does arise, the presence of a robust and well-functioning compliance program can help dissuade the suspending and debaring official from extending any exclusion throughout the enterprise.

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[1] Phillips v. Spencer, 390 F. Supp. 3d 136 (D.D.C. 2019).

[2] Sigmatech Inc. v. United States, 365 F. Supp. 3d 1202 (N.D. Ala. 2019).

[3] JBL System Solutions LLC v. U.S. Defense Logistics Agency, 19-cv-226-AJT-TCB (E.D. Va. Mar. 22, 2019)