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EDITOR'S NOTE: SUSPENSION AND DEBARMENT
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EXAMINING AND DISPELLING COMMON MISCONCEPTIONS ABOUT SUSPENSION AND DEBARMENT
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SBA TO SHARPEN SUSPENSION AND DEBARMENT PROCEDURES
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GOVERNMENT CONTRACTORS ARE SUBJECT TO NEW COUNTERFEIT PARTS REPORTING REQUIREMENTS
Mary Beth Bosco and Eric S. Crusius

BID PROTESTS AND BRIDGE CONTRACTS: WHEN IS THE SOLE SOURCE BRIDGE CONTRACT JUSTIFIED BY URGENT AND COMPELLING NEED?
Jonathan A. DeMella

***FEINWACHS* HOLDS FCA RELATOR'S EMAILS TO COUNSEL, EVEN THOUGH ON EMPLOYER'S SERVER, PROTECTED AS WORK PRODUCT**
Pablo J. Davis

IBM WINS DISMISSAL OF FCA *QUI TAM* SUIT ALLEGING IT USED FAKED AUDIT TO PRESSURE THE IRS TO RENEW SOFTWARE LICENSE
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IN THE COURTS
Steven A. Meyerowitz

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Editor's Note: Suspension and Debarment
Victoria Prussen Spears 43

Examining and Dispelling Common Misconceptions About Suspension and Debarment
Dominique L. Casimir 45

SBA to Sharpen Suspension and Debarment Procedures
Frederic M. Levy, Michael Wagner, and Carl Wiersum 51

Government Contractors Are Subject to New Counterfeit Parts Reporting Requirements
Mary Beth Bosco and Eric S. Crusius 54

Bid Protests and Bridge Contracts: When Is the Sole Source Bridge Contract Justified by Urgent and Compelling Need?
Jonathan A. DeMella 57

***Feinwachs* Holds FCA Relator's Emails to Counsel, Even Though on Employer's Server, Protected as Work Product**
Pablo J. Davis 62

IBM Wins Dismissal of FCA *Qui Tam* Suit Alleging It Used Faked Audit to Pressure the IRS to Renew Software License
Pablo J. Davis 66

In the Courts
Steven A. Meyerowitz 70

LexisNexis

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SBA to Sharpen Suspension and Debarment Procedures

By Frederic M. Levy, Michael Wagner, and Carl Wiersum*

Contractors should ready themselves for an uptick in suspension and debarment activity due to changes coming to the Small Business Administration practices. The authors of this article explain the changes.

Changes are coming to the suspension and debarment practices of the Small Business Administration ("SBA"), and contractors should ready themselves for an uptick in suspension and debarment activity as a result. That is the takeaway from a new audit report[1] released by the SBA's Office of the Inspector General ("OIG") criticizing aspects of the agency's suspension and debarment practices. Although the SBA's suspending and debarring officials ("SDOs") for Financial Assistance Programs ("FAP") and All Other Programs ("AOP")[2] disputed certain OIG findings about existing practices, the agency was largely receptive to the OIG's recommendations. As a result, it appears that the SBA soon will be adopting 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 is likely to drive an increase in exclusion actions.

OIG AUDIT FINDINGS

The OIG launched its audit in November 2018 with the goal of "determin-[ing] whether SBA had sufficient controls in place to prevent suspended or debarred entities from receiving federal contracts through SBA's preference contracting programs and small business loans." The final report contained several findings critical of the operation and effectiveness of the SBA's suspension and debarment program.

- The OIG found that the SBA approved $6.7 million in loans to entities without reviewing the System for Award Management ("SAM") to

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[1] https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-19-18.pdf.

[2] The SBA designates two SDOs to process suspension and debarment referrals: one for Financial Assistance Programs, located within the Office of Capital Access, and one for All Other Programs, located within the Office of General Counsel.

confirm the eligibility of loan applicants, including approving a $2.9 million loan to an entity that was listed as an excluded party on SAM. Of the 14 loan files the OIG reviewed, 11 did not have documentation supporting pre-approval SAM review by the lending partners.

- The OIG identified 15 cases referred for suspension or debarment that had remained open and pending for an average of 620 days each, during which time three of these contractors received an addition $80.3 million in federal awards. The OIG asserted that the "delayed action" of the SDOs "exposed the federal government to potential harm" and "resulted in $80.3 million in contracts to entities who demonstrated causes for debarment."
- The OIG identified four cases in which the SDOs declined to impose suspension or debarment in response to a referral arising from a civil judgment and did not document the basis for the declination. The OIG urged the SDOs to document any declinations under such circumstances to "demonstrate consistent application of procedures in their decisions."

OIG RECOMMENDATIONS AND SBA RESPONSE

Based on its findings, the OIG issued a number of recommendations to the SBA, including updating internal procedures addressing suspension and debarment, allocating more resources to suspension and debarment activities, and even rescinding contracts awarded without adequate vetting for eligibility issues.

The SBA took issue with certain of the OIG's findings—most notably, the suggestion that its "delayed action" on debarment referrals resulted in $80.3 million in contract awards to three non-responsible contractors. (On this point, the agency clarified that it had fully reviewed the referrals concerning the three contractors in question and had elected to forego debarment after determining them to be presently responsible.) But despite some areas of disagreement, the agency has committed to adopting many of the OIG's recommended enhancements to its existing suspension and debarment practices, including:

- Updating the SBA's standard operating procedures ("SOPs") to expressly require lending partners to review SAM listings prior to loan approval;
- Finalizing internal suspension and debarment policies and revising SOPs to require the timely processing of referrals;
- Dedicating additional staff and resources to help monitor and process suspension and debarment actions;

- Developing and deploying a new tracking system for suspension and debarment actions; and
- Revising the SOPs to require that SDOs document (and retain documentation for) declination decisions.

KEY TAKEAWAYS

The SBA has long had an active suspension and debarment program. Indeed, in the latest year for which statistics are available, the SBA instituted more than 70 exclusions and negotiated an additional six administrative agreements. Yet the OIG's audit report and the agency's response likely presage a further emphasis within the SBA on the vigorous pursuit of suspension and debarment. In this respect, the SBA is not alone: the Department of Labor has instituted its own suspension and debarment pilot program aimed at promoting and expediting its suspension and debarment activity.

While contractors cannot be expected to cheer an increased emphasis on suspension and debarment remedies, any concerns about additional scrutiny may be leavened by the promise of increased uniformity, efficiency, and transparency in suspension and debarment actions. For example, dedicating additional resources to support the timely processing of referrals may well combat any trend of suspension and debarment actions (which are supposed to be based on *present* responsibility) premised upon stale conduct. Moreover, by committing to formalize suspension and debarment procedures in its SOPs and document instances of declinations, the SBA is poised to bring a measure of regularity and predictability to a highly discretionary process.

However, other aspects of the OIG's recommendations are less likely to be warmly received by contractors subject to SBA oversight. Most notably, a new policy requiring the SDOs to document the basis for any declination could well have a chilling effect and reduce the likelihood of an SDO declining to impose debarment—both because of the scrutiny to which those decisions will be subjected and the increased administrative burden associated with preparing the documentation.

Ultimately, it remains to be seen precisely how the contemplated changes will be implemented in practice. What is clear, however, is that the SBA is committed to making full use of its suspension and debarment authority. In such an environment, industry players should be reminded that the small business area is fraught with regulatory peril, and that non-compliance carries a significant risk of triggering suspension and debarment—especially in light of what appears to be an increased emphasis on these remedies with the SBA. Contractors would be wise to review and refresh existing ethics and compliance programs—both to prevent and detect noncompliance and to better position themselves in the event they become subject to present responsibility scrutiny.