

Contractors Should be Concerned With Losing More Than Just Dollars in a Civil Suit

Despite the tremendous attention given to various *qui tam* settlements recently, such as those concerning Office Depot, Office Max and Staples, contractors accused of defrauding the government must also be aware of the administrative remedies available to the government to develop a comprehensive response to any allegation of fraud made against the contractor. This month's *Government Contracts Update* provides a brief review of the government's ability to suspend or debar a government contractor from the federal marketplace.

Background

In 2005, the public procurement sector was rocked by settlements involving Office Max, Office Depot and Staples for \$9.8 million, \$4.75 million and \$7.4 million, respectively. These settlements were the result of a *qui tam* action brought by a competitor of these office supply giants. Generally, *qui tam* suits, which are exclusively available under the False Claims Act ("FCA"), permit private citizens to sue contractors, on behalf of the federal government, that they believe have defrauded the government in some way. While most fraud actions arise under the FCA, there are a host of other statutes that prohibit false statements or other fraudulent conduct, including: the Truth-in-Negotiations Act, the Anti-Kickback Act and the criminal false statements statute (18 U.S.C. § 1001).

Depending on the specifics of the allegedly false statement or fraudulent conduct, the government may pursue criminal rather than civil charges against an individual or corporation for a false statement or other fraudulent conduct. If the government's prosecution of its criminal case results in a conviction, criminal penalties, imprisonment or probation may be imposed. Potentially lost in the concerns regarding a civil penalty or a criminal conviction, however, are the government's administrative remedies of suspension and debarment.

Suspension and Debarment

Suspension and debarment are two processes by which an agency can exclude a government contractor from bidding on or entering into federal government contracts or sub-contracts under federal contracts, or working under federal grants, assistance, loan and benefit programs (hereinafter collectively referred to as "federal work"). This prohibition is based primarily on the government's concerns about contracting with a party that is not "presently responsible."

Suspension is a temporary exclusion requiring "adequate evidence," which means "information sufficient to support the reasonable belief that a particular act or omission has occurred." FAR 2.101. One example of such information would be an indictment. Due to their limited nature, suspensions are not to exceed 12 to 18 months. Debarment, on the other hand, is a much more severe exclusionary action used by the government that is set for a specific period of time, typically three years. Prior to issuing a debarment decision, the government issues a notice of proposed debarment, which has the same effect as a suspension in procurement cases. For nonprocurement matters, it will depend on the specific rules of the agency proposing the debarment.

As one can imagine, the ramifications of suspension or debarment may be significant in that they effectively foreclose the contractor from entering into new federal work. That said, contractors may ordinarily continue to perform those contracts and projects entered into prior to the suspension or debarment. Agencies usually cannot, however, add new work to existing contracts, exercise existing options or extend the period of performance under the existing contract. The extent of a suspension or debarment may also have repercussions outside of the federal marketplace as many states and private entities often inquire into a contractor's suspension/debarment status, and may preclude offers from contractors that have been suspended or debarred by the federal government, especially for violations implicating the contractor's integrity, such as fraud. Thus, special attention should also be given to all public contracts when suspended or debarred, because further issues could arise if a contractor were to improperly certify to a suspension/debarment inquiry, such as criminal prosecution under 18 U.S.C. § 1001.

Contractors finding themselves embroiled in an investigation implicating fraudulent conduct are entitled to due process, which typically occurs after the imposition of a suspension or a proposed debarment. Just as counsel would be retained to defend against a criminal or civil action, counsel should also be consulted regarding suspension and debarment matters. Both suspension and debarment have a complex procedural process and a number of nuances understood by experienced counsel. Further, because these administrative actions frequently run on parallel tracks with the government's criminal and civil actions, it is imperative that a global strategy be developed among counsel so that the issues arising in each area may be dealt with in a coordinated matter as findings and admissions in one action may adversely impact the contractor's position in one or more of the other parallel actions. Contractors must be mindful of the fact that the resolution or settlement of a fraud claim with the Department of Justice (which handles criminal and civil matters) does not control the resolution of the government's administrative actions, which are handled by other executive agencies which are not typically parties to plea and settlement agreements.

Navigating the Waters

As a result, contractors that do not consider the administrative remedies available to the government as part of any strategy for responding to an allegation of fraud run the risk of "winning the battle" while "losing the war" to remain a viable government contractor. Indeed, a contractor could successfully resolve an alleged fraud claim with the Department of Justice only to find itself suspended or debarred from future government work. Thus, the implications of the suspension or debarment can far outweigh the costs associated with a one time civil penalty.

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