



U.S. General Services Administration

Suspension and Debarment and the Acquisition Workforce: What You Need to Know

Maria Swaby
Director of Suspension and Debarment (GSA)

Danielle Muenzfeld
Acquisition Integrity Associate (GSA)

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Today's Learning Objectives

- To understand...
 - The purpose of suspension and debarment
 - The similarities and differences between suspension and debarment
 - Present responsibility and what makes a contractor presently responsible
 - Effects of suspension and debarment

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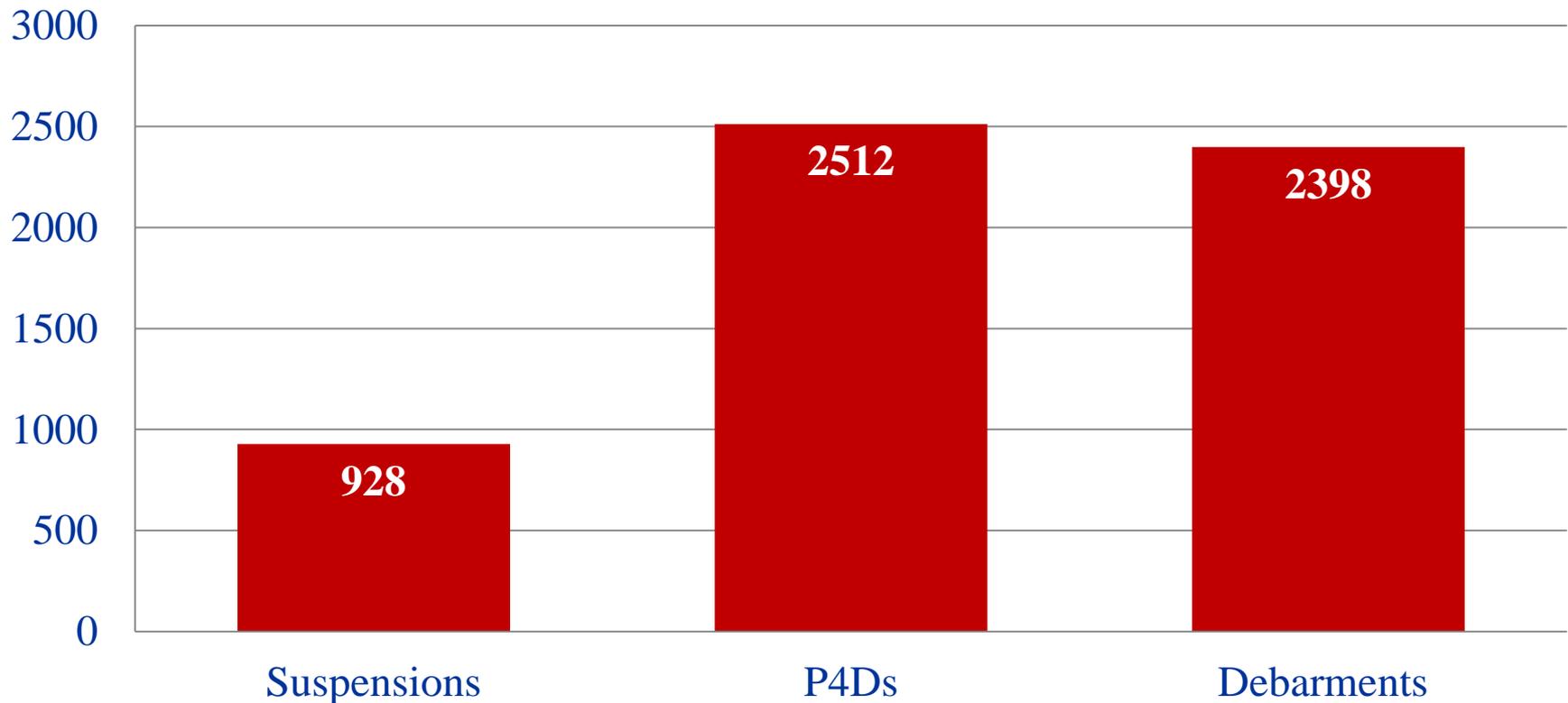
Today's Learning Objectives Continued

- How suspension and debarment works
- Why it is important to follow FAR requirements
- How the acquisition workforce can help prevent fraud, waste, corruption, and abuse through proper reporting and collaboration

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PURPOSE OF SUSPENSION AND DEBARMENT

Government-wide Suspension and Debarment Actions: FY11





Policy Reasons for Suspension and Debarment

- Federal Government only does business with responsible contractors (FAR 9.402(a))
 - Excluded contractors are listed on the System for Award Management (www.sam.gov)
 - This replaces the Excluded Parties List System (EPLS)
- Each Federal Agency is required to have a Suspension and Debarment program
 - A suspension or debarment action by one agency's Suspension and Debarment Official (SDO) is effective for all Federal agencies (Decision is reciprocal)



Policy Reasons for Suspension and Debarment Continued

- Suspension and debarment is the way to protect the Federal government from contractors that are not presently responsible
 - It is not a tool for punishment
- It is a business decision
 - SDOs have the discretion to decide when suspension and debarment is necessary to protect the Federal Government's interests
 - Difference between discretionary debarment and mandatory, statutory debarment

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WHAT IS SUSPENSION AND DEBARMENT? (FAR 9.4)



Suspension (FAR 9.407)

➤ What is it?

- *A temporary exclusion used only when the Government needs immediate protection*
- Used when facts about possible wrongdoing are still being developed through an investigation or legal proceedings
- **Basis Required:** The SDO needs information sufficient to support the reasonable belief that a particular act or omission occurred (Adequate Evidence)



Proposal for Debarment/Debarment (FAR 9.406)

➤ What is it?

- An exclusion from Federal procurement and non-procurement programs for a specified period of time
- Used when an investigation or legal proceedings have concluded
- **Basis Required:**
 - A civil judgment or conviction
 - In the absence of a court decision, evidence that leads to the conclusion that the fact is more probably true than not (Preponderance of the Evidence)



Notification and Effect of Suspension and Debarment

- **Contractor Is Notified of Suspension or Debarment Through:**
 - Suspension Notice
 - Notice of Proposed Debarment; Debarment Notice
- **Effects** of suspension and debarment on a contractor: immediate government-wide exclusion from Federal procurement and non-procurement programs



Duration of Suspension and Debarment

➤ Duration:

- **Suspension:**

- Generally, suspensions may last up to 12 months before legal proceedings are initiated
- Once legal proceedings are initiated, the suspension may stay in effect until proceedings are concluded

- **Debarment:**

- Typically three years
- May be longer or shorter depending on the facts of the case



Who Can Be Suspended or Debarred?

- Those companies or individuals directly involved in the wrongdoing that:
 - Have submitted offers for, have been awarded, or reasonably may submit offers for a Government contract
 - Reasonably may be expected to do business with the Government as agent/ representative of another contractor
 - This includes (but is not limited to):
 - Former acquisition workforce members/ Federal employees
 - Former elected officials



Who Can Be Suspended or Debarred? Continued

- Companies or individuals not directly involved in the wrongdoing. This is done through:
 - **Affiliation** (FAR 9.403): “Business concerns, organizations, or individuals of each other if, directly or indirectly,
 - (1) Either one controls or has the power to control the other, or
 - (2) A third party controls or has the power to control the both. [. . .]”



Who Can Be Suspended or Debarred? Continued

- **Imputation** (FAR 9.406-5):
 - (a) “The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual’s performance of duties for or on behalf of the contractor, or with the contractor’s knowledge, approval or acquiescence. [. . .]”



Who Can Be Suspended or Debarred? Continued

- **Imputation** (FAR 9.406-5)- Continued:
 - (b) “The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor’s conduct.”



Who Can Be Suspended or Debarred? Continued

- Imputation (FAR 9.406-5)- Continued:
 - (c) “The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.”



Causes for Suspension and Debarment

- A conviction or civil judgment for committing fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract
- Violating antitrust statutes related to offer submission
- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property



Causes for Suspension and Debarment- Continued

- Intentionally using “Made in America” or similar inscription on item sold or shipped to US/outlying areas when not made in either
- Committing other offenses indicating a lack of business integrity or business honesty (that affects the present responsibility of the contractor)
- Violation of Drug-Free Workplace Act



Causes for Suspension and Debarment- Continued

- Violation of terms of Government contract/subcontract “so serious to justify debarment.” For example:
 - Willful failure to perform one or more contracts
 - History of failure to perform, or unsatisfactory performance, of one or more contracts

- Committing Unfair Trade Practice

- Delinquent Federal taxes (in excess of \$3,000)



Causes for Suspension and Debarment- Continued

- Knowing failure of a principal of a contractor, until 3 years after final payment on any Government contract awarded to contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract there under:
 - Credible evidence of violations of certain criminal laws
 - The civil False Claims Act
 - Significant overpayment(s) on contract



Causes for Suspension and Debarment- Continued

- Failure to comply with the Immigration and Nationality Act
- Any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor



Causes for Suspension and Debarment- Continued

- The cause for suspension and debarment can be judicially based or “fact-based”
 - Fact-based grounds often come from:
 - Issues brought to the SDO’s attention through OIG contract audits
 - OIG investigations
 - Disclosures from contractors
 - Acquisition workforce reports of violations

The cause for suspension and debarment does not need to relate to work on a Federal contract



Contractor Has Opportunity to Respond to Suspension or Debarment Action

- Contractor afforded thirty days to respond and to submit arguments and supporting documents against the action
 - The contractor may obtain the administrative record upon which the action is based
 - The contractor may respond on own or with assistance of counsel
- Contractor must demonstrate to the satisfaction of the SDO that the contractor is **presently responsible**

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WHAT IS PRESENT RESPONSIBILITY?



Present Responsibility

- Distinct from FAR 9.1 responsibility determination
- This assessment only comes after there is a common understanding of the underlying misconduct
- SDO asks about the contractor:
 - Despite the contractor's prior misconduct, is the contractor presently responsible?
 - Can the contractor be trusted to perform in accordance with contract requirements, governing law, and overall, to conduct themselves ethically?
- Inquiry focuses on the perceived ability of a contractor to contract with the Government in a responsible manner

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Present Responsibility Continued

- SDO's inquiry into a contractor's present responsibility focuses on the contractor's:
 - Honesty
 - Integrity
 - Competence
 - Other case-specific features

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FAR Mitigating Factors

1) Standards of Conduct - 9.406-1(a)(1):

Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.



FAR Mitigating Factors Continued

2) Voluntary Disclosure- FAR 9.406-1(a)(2):

Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

3) Internal Investigation- FAR 9.406-1(a)(3):

Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.



FAR Mitigating Factors Continued

4) Full Cooperation- FAR 9.406-1(a)(4):

Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

5) Paid Costs/ Restitution- FAR 9.406-1(a)(5):

Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.



FAR Mitigating Factors Continued

6) Disciplined Employee- FAR 9.406-1(a)(6):

Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

7) Agreed to Implement Remedial Actions- FAR 9.406-1(a)(7):

Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.



FAR Mitigating Factors Continued

8) Ethics Training- FAR 9.406-1(a)(8):

Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

9) Adequate Amount of Time Passed- FAR 9.406-1(a)(9): Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

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FAR Mitigating Factors Continued

10) Management Recognition of the Problem- FAR 9.406-1(a)(10):

Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

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EFFECTS OF SUSPENSION AND DEBARMENT



Direct Effects of Suspension and Debarment on Contractors

- Per FAR 9.405, contractors are excluded from:
 - Receiving contracts, unless there is a compelling reason for such action
 - Serving as a subcontractor on a Federal contract
 - Conducting business with the Government as agents or representatives of other contractors
 - Acting as individual sureties



Direct Effects of Suspension and Debarment on Contractors- Continued

- Bids submitted from excluded contractors must be rejected (unless compelling needs determination made)
- Proposals, quotations or offers submitted by excluded contractors shall not be evaluated for award or included in the competitive range, nor shall discussions be conducted with ineligible offerors (unless compelling needs determination has been made)



Direct Effects of Suspension and Debarment on Contractors- Continued

- Per FAR 9.405-1, contracts/ subcontracts held at time excluded can continue, however (unless compelling needs determination is made), the agency **cannot**:
 - Place orders exceeding guaranteed minimum under ID/IQ contracts
 - Place orders under optional FSS contracts, BPAs, basic ordering agreements
 - Add new work, exercise options, extend current contracts



Collateral Effects of Suspension and Debarment on Contractors

- Potential ruin of business
- Reputational damage
- Loss of:
 - Goodwill
 - Revenue
 - Security clearance
 - Specialty license
- Contraction of credit and/or denial of loans
- Disadvantage when competing for state contracts

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HOW DOES THE SUSPENSION AND DEBARMENT PROCESS WORK?



Who is Involved in a Suspension and Debarment Case?

(The Civilian Agency Model)

- Office of Inspector General
- Acquisition Workforce – COs, CORs, Contracts Specialists
- Suspension and Debarment Official
- Suspension and Debarment Staff
- Agency Legal Counsel
- Contractor
- Contractor's Counsel (if retained)



How is a Suspension and Debarment Case Initiated and Processed? (The GSA Model)

- **Initiation:** Report from Office of Inspector General, Information from Acquisition Workforce, or Disclosure from a Contractor
 - Evidence typically found in referral or disclosure
- **Processing:** by Suspension and Debarment Division
 - Review of referrals, drafting of internal memorandum
 - Review process differs agency-by-agency
 - Signature of decision letter by SDO

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Case Processing Continued

- Contractor has opportunity to oppose action, explain why the contractor is presently responsible
 - May submit written matters in opposition
 - May meet with the SDO in person



Interagency Suspension and Debarment Committee

- Membership comprised of individuals involved in suspension and debarment from civilian and defense agencies, Federal Government corporations
- A forum for:
 - Coordination of suspension and debarment efforts
 - Sharing best practices about suspension and debarment

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WHAT IS THE ROLE OF THE ACQUISITION WORKFORCE IN SUSPENSION AND DEBARMENT?

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Contracting Officer /Specialist's Role

- Required by the FAR to check SAM twice
 - After opening of bids or receipt of proposals
 - Must reject any bid from an excluded contractor (unless compelling needs determination made)
 - Immediately prior to award (FAR 9.405(d)(4))



System for Award Management

www.sam.gov

- A system that combines Federal procurement systems and the Catalogue of Federal Domestic Assistance
 - First phase includes:
 - Excluded Parties List System (EPLS)
 - Central Contractor Registry (CCR)
 - Online Representations and Certifications Application (ORCA)
 - Federal Agency Registration (FedReg)
- **Caution!** Entity vs. Exclusion Entry



Contracting Officer's /Specialist's Role Continued

- Must take care not to give additional work, extend options, etc. on contracts awarded to a contractor prior to their exclusion (unless a compelling needs determination has been made)
- Document poor performance
- Properly enter any Terminations for Default into FAPIIS



Contracting Officer's/Specialist's Role Continued

- Extremely important to follow FAR requirements when working with contractors
 - Problematic in a suspension and debarment referral when the agency has unclean hands
- Engage with OIG when issue or suspicion of wrongdoing (act or omission) arises, overpayment issues
- Consult with SDO on tax delinquency and Federal felony conviction issues with contractors
 - Certification



Public Laws 112-55 and 112-74

- **Prohibit** the award of contracts, grants, or cooperative agreements using funds from the 2012 Appropriations Act to corporations that:
 - Have been convicted of a felony within the preceding 24 months; or
 - Have unpaid tax delinquencies,
- **Unless** *an/the* agency's SDO has considered suspension and debarment of the corporation and has made a determination that no further action is necessary to protect the interests of the Government.

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Challenges in Implementing PL 112-55 and 112-74

- Law is poorly written- (an agency) vs. (the agency)
- Delayed procurement process
- Might encourage forum shopping
- FAR implementation

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Contracting Officer Representative's Role

- Maintain clean hands and Encourage contractors to stay out of trouble with suspension and debarment
- Document and report lack of contractor or poor contractor performance to Contractor Officer
- Assist Contracting Officer with collaborating with their Federal Agency's Office of Inspector General



Acquisition Workforce Generally

- Make referrals to OIG and/or SDO re: contractors who should be considered for suspension and debarment
 - Can be for contractor generally or individuals working for the contractor
 - Information of wrongdoing or alleged wrongdoing need not be related to contract performance
- Communicate with SDO
 - Utilize Interagency Suspension and Debarment List of SDOs and S&D contacts if you do not know who your SDO is
 - See Links page *infra*



De Facto Debarment

- *De Facto* Debarment: Using other means than suspension and debarment to effectively exclude a contractor from Federal procurement and non-procurement programs
 - A due process issue: Contractors do not have the opportunity to present their case
- Possible Areas Where *De Facto* Debarment Can Arise:
 - FAPIIS: Misuse of Administrative Agreement Information
 - SAM Inactive Section
 - State-level suspension or debarment



Important Links

- **System for Award Management:** www.sam.gov
- **Interagency Suspension and Debarment Committee:**
<http://www.epa.gov/ogd/sdd/isdc.htm>
- **Inspector Generals Directory:**
<http://www.ignet.gov/igs/homepage1.html>
- **FAR 9.4:**
https://www.acquisition.gov/far/current/html/Subpart%209_4.html#wp1083280

Any Questions?





Contact Information

- Maria Swaby, Director, GSA Suspension and Debarment Division
 - Maria.Swaby@gsa.gov, 202-208-0291
- Danielle Muenzfeld, Acquisition Integrity Associate
 - Danielle.Muenzfeld@gsa.gov, 202-208-6073