

## Suspension & Debarment: The Fundamentals

### ===== Video Transcript =====

**Maria Swaby (MS):** Good afternoon, and welcome to this training. My name is Maria Swaby, and I am the director of the Suspension and Debarment division of GSA. My colleague is Danielle Muenzfeld. Good afternoon, and welcome to this training. I will conduct the first portion of the training about suspension and debarment and how it works. Danielle will conduct the second section, which will be about the role of the acquisition workforce. We will also leave some time for questions and answers at the end of the training, and the entire presentation will be available on FAI.gov at some point in the near future. Let's get started.

**MS:** Suspension and debarment in the acquisition workforce. The learning objectives today are: You will understand the purpose of suspension and debarment, the similarities and differences, what "present responsibility" is and what makes a contractor presently responsible and the effects of suspension and debarment. We hope you learn why it is important, especially for the acquisition workforce, and how the acquisition workforce can help prevent fraud, waste, corruption and abuse through the proper recording and collaboration. I want to make clear here that we are talking about suspension and debarment as it relates to FAR 9.4. There are other exclusions on why that happened, but that is not why it happened. For example, the exclusions that HHS does for Medicare fraud, this does not cover. I will start off with some statistics. As you can see, fiscal year 2011, the federal government collected quite a bit of suspension and debarment actions. The proposal for debarment, and 2398 debarment, quite a large number and total. So, this shows the importance of the subject and the affect it has on the contracting community and the role that you also play in suspension and debarment. There are several policy reasons for suspension and debarment. So, what is the purpose? The first thing is the government only wants to do business with responsible contractors, and excluded contractors, people who are suspended or debarred are listed on the System for Award Management, SAM for short. This replaced the Excluded Parties List system, it has been shifted over into the SAM. The other policy reason is each federal government agency is required to have a suspension and debarment program. It is also important to note that a suspension or debarment action by one agency's official is effective for all government agencies. What do I mean? For example, if GSA suspends or debarred a certain contractor, the US Air force must honor the decision and cannot contract with a contractor unless a compelling needs determination is made by the agency head. I also want to highlight there is a committee called the Interagency Suspension and Debarment Committee (ISDC), and this committee is comprised of members of the suspension and debarment programs across the federal government. We meet monthly and talk about issues and practices that are common to all of us. We also coordinate lead agency matters on suspension and debarment issues.

Continuing with the policy reasons, suspension and debarment is the way the government protects itself from contractors that are not presently responsible. This is highly misunderstood by most people that do not understand suspension and debarment. It is not used as a tool for punishment; the Department of Justice takes care of punishment for a contractor. It really is a decision to protect the government from further buying from the contractor. It is also a business decision rather than a legal decision. That means that suspension and debarment officials have the discretion whether or not to take action based on what is in the government's best interest. There has been talk about mandatory debarment, but at this time they are discretionary. I will give you an example of the discretion that the SDO has. Say GSA leases a building to three other federal agencies. The leases coming to an end and there is an opportunity for the leasing specialist to exercise an option. At the same time, information has been

found to lead him or her to believe the contractor has indulged in wrongdoing and it would be necessary to take suspension and debarment action to protect government interest. It would be problematic for the agencies renting that building if the SDO barred the contractor before they renewed the option because the agencies would be left without buildings because they can no longer contract with that contractor. So, the SDO can wait until the option is exercised and then suspend the contractor, since suspension and debarment only occurs to affect future work or contacts, or the SDO can go ahead and suspend and make a compelling needs case, and then bar the contractor. Then a decision could be made to continue to contract with the contractor, providing at least one year to procure a new space for the agencies to work in. That is an example of the discretion an SDO has in making a decision to suspend or debar.

**MS:** What is suspension and debarment as defined under FAR 9.407? I recommend everybody reads this. Suspension is defined as a temporary exclusion. It is generally used when the facts about possible wrongdoing are still being developed either through investigation or legal proceedings. There is a legal basis required in order to suspend a contractor; the SDO needs sufficient evidence to support the belief that a particular act or wrongdoing occurred, and the standard is called “adequate evidence”. Debarment is an exclusion from the federal procurement and non-procurement programs for a specific time, and it is also used when an investigation or legal proceedings have concluded. The legal basis required for a debarment is a civil judgment or a conviction, or in the absence of a court decision, evidence leading one to believe it is more probable than not that the wrongdoing actually occurred.

So, how does a contractor know if he or she has been suspended or debarred? They are notified through a notice of suspension or a notice of proposed debarment or a debarment notice. The effect of the notice is the contractor is listed immediately on sam.gov. By the time they got the notice, they would have already been on sam.gov because the day the SDO signs the notice is the day they are put on sam.gov. The suspension lasts for up to 12 months before the legal proceedings have initiated. Debarment is longer. It typically lasts three years, however that could be longer or shorter depending on the facts of the case. So, who can be suspended or debarred? The short answer is government contractors, but the definition is very broad so I will go through several scenarios so you can see what we mean by government contractors. This encompasses those companies or individuals directly involved in wrongdoing that have submitted offers for, have been awarded, or are reasonably expected to submit offers for government contracts; or, those individuals or contractors that might be expected to do business with the government as an agent or as a representative of another contractor. This is a broad definition. The phrase encompasses a whole host of possibilities and I will give you some examples. The first example is an employee, a former employee of a government contractor who actually worked with the federal government, and thus has the knowledge, skill and experience that makes him or her likely to seek employment with another government contractor. If that employee engaged in wrongdoing and no longer has that job, that person is considered an individual who reasonably may be expected to contract business with the government because they worked already for a contractor and they have the experience that is attractive. That is one example. Another example, and actually you should be interested in this because we suspend and debar former government employees, and some of them are acquisition workforce members, so it does affect the acquisition workforce directly. I will give you another example of this. There was a former high level SES official that misused his government travel card and purchased massages and expensive dinners in a hotel room for himself and his partner, all paid for on this government credit card. It is important to protect the government from such an individual, and this person, of course, lost their job, but this is the kind of person we would suspend or debarred because they have experience, knowledge and contract that would be attractive and we would want to protect the government from doing business with people such as this individual.

Another example -- to get specific to the acquisition workforce, they can definitely be suspended or debarred. There are specific reasons that apply that I will highlight. If a contracting officer abuses his or her warrant, or if anybody in the acquisition workforce discloses procurement-sensitive information, or they misused government property, or they stole gas cards. For GSA, this is a common issue because GSA issues gas cards and people steal them all the time. We have examples of federal government employees who use the gas card, especially in times when gas prices are high, go to the gas station, line up people to buy gas, paying them cash at a lower amount, a lower amount than they would have paid had they paid their own money, and that is how they make money. We generally do not suspend or debarred current government and please because typically whatever action we are looking at that leads to this cause for suspension and debarment tends to have resulted in employment termination anyway. It is very hard to suspend or debar a contracting officer if they are currently working because they really could not do their job. That is why we wait until after there is employment action taken. Another category of individuals that we suspend and debar are formally elected public officials. Although there is no direct nexus between former elected officials to contracting or any particular agency, because this is a position of public trust and any action that leads to this consideration is most likely a violation of the public trust, we think it is important to protect the government from these sorts of individuals. Again, they have the contacts, experience that would make them attractive to a government contractor and we do not want them to become a representative.

So, let's continue with who can be suspended or debarred. Other companies or individuals that are not directly involved in wrongdoing can also be suspended or debarred. We do that through two methods. One is affiliation, and the other is imputations. Let me explain affiliation. It is defined as business concerns or organizations or individuals, who are affiliated directly or indirectly -- if one controls or has power to control the other, or a third party controls that has the power to control both. So, the other means of suspending or the debarment of a contractor that is not directly associated with the wrongdoing is through imputation, as I stated before. The first example of imputation -- first, let me define imputation. Imputation as defined by FAR 9.406-5 is the fraudulent, criminal or 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. Let me explain. Say we have a guy called Bob and he was convicted for disclosing procurement-sensitive information on a bid that he was doing for his IT company. Bob's conviction can be imputed to the IT company because his actions occurred in connection with performance of his duties for his IT company. So, that is an example of imputation. The second example, which is defined as 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. If Bob's company is proposed for debarment, Suzy, the top contracting officer who knew of this and said nothing about it and knew the company would benefit, she would be eligible for suspension or debarment based on imputation because as an officer of the company she knew, should have known, or had reason to know of this. The third example of imputation as defined by FAR 9.406-5 is the fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to participate in contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement with the knowledge, approval or acquiescence of these contractors. Let's say Bob's company enters a joint venture with another company that distributes hardware to the government, and the other company has been providing counterfeit hardware to the government. Bob's IT company knows this and fails to report it. The other company is indicted and suspended from contracting with the government. That suspension might be imputed to Bob's IT

company based on the joint venture and his company's knowledge of the actions of the other company. That is imputation.

So, what are the causes for suspension and debarment? There are several outlined in the FAR. They are numerous, and we will highlight a few. One cause is a conviction or civil judgment for committing fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract. So, Bob's company, the example I gave before of Bob's conviction for revealing procurement-sensitive information is an example of such a cause. Another reason is for violating antitrust statutes, commission of embezzlement, forgery, bribery, falsification, the destruction of records, false statements, tax evasion, violating federal tax laws and receiving stolen property. Also, you can be suspended for using "Made in America" inscriptions on items that are not made in America. In addition, you can be suspended or debarred for committing offenses that indicate a lack of business integrity or business honesty that directly affects the contractor's responsibility. Also, violation of the drug-free workplace act, failure to perform on contracts, or having a history of failure to perform -- this area is a particular area in which the acquisition workforce could be really helpful and partner with suspension and debarment because it is very difficult to know whether or not a contractor is performing or not performing on their contract. The contract -- the contracting officer has knowledge of that, so if there is no documentation of performance being done, or failure to perform, or a history of failure to perform, we are never going to be able to get this sort of poor performance to our attention. This is one way the acquisition workforce can really help with preventing fraud, waste and abuse by reporting these instances of poor performance or failure to perform either to the inspector general's office, or to your suspension and debarment division. Other causes include unfair trade practices and being delinquent on federal taxes in excess of \$3000. Another big cause is a failure of a contractor to disclose after a certain time credible evidence of violations of certain criminal laws, the Civil False Claims Act, or significant overpayments on contracts. Failure to comply with the Immigration and Nationality Act is also a cause for suspension or debarment. Finally, the last cause is broad -- any other cause serious or compelling in nature that affects the present responsibility of the contractor or subcontractor. These are not cases that have been through court, but we have enough facts to support this position that it is so serious and compelling that we do not want to do business with that particular contractor or individual.

So, the causes for suspension and debarment can be judicially-based or fact-based. So, where do we get these facts? These issues are brought to the suspension and debarment officials' attention through the Office of Inspector General's contract audits. Or sometimes, the Office of Inspector General conducts their own investigation, or sometimes contractors themselves come in and disclose information to the OIG or the suspension and debarment official. The SDO does not hear about these actions directly very often, and we would wish the acquisition workforce would be more proactive in reporting violations because that really helps us to control fraud, waste and abuse. It is also important to note that the cause for such suspension does not have to relate to work on a federal government contract. In the examples I gave with Bob, the IT company, if Bob went off and stole something from somewhere that had nothing to do with his work, the suspension or debarment could happen even still because he is a federal government contractor and shows a lack of business honesty and integrity, and we do not want to do business with individuals who we consider to lack those qualities.

So, when a contractor gets a notice that they might be suspended or debarred, they actually get an opportunity to respond to that action. So, the notice lets them know that they have 30 days to respond and submit information were supporting documents in opposition to the action, and the contractor has the right to obtain the administrative record upon which the suspension and debarment is based.

Generally, that is the report we get from the office of inspector general, and the contractor might respond on their own with the assistance of legal counsel.

If a contractor is going to oppose a suspension or debarment the contractor must demonstrate to the satisfaction of the suspension and debarment official the contractor is presently responsible. That leads us to what "present responsibility" is. Present responsibility is distinct from the FAR 9.1 responsibility determination that contracting officers generally make. In that instance, the contracting officers are tracking the financial responsibility of the contractor, the ability of the contractor to perform-- that kind of stuff. That is not the "present responsibility" that the SDO is looking at. They are looking at the action from a holistic point of view, that there was misconduct, and the SDO is attempting to understand that misconduct, saying to himself or herself, that despite the misconduct, is the contractor now presently responsible? The word present is important because the act might have occurred three years ago and at that time there were circumstances that led to the act. It could be that in the time the contractor comes before the SDO, a lot of actions have been taken to prevent or correct what has happened. That is where the SDO looks to see where we are today, what is your status. So, there might have been misconduct, but that alone does not guarantee that you are not responsible. That is what the SDO is looking at, whether the contractor can be trusted to perform in accordance with contract performance in the law. So, what the inquiry focuses on is the perceived ability of a contractor to contract with the government in a responsible manner.

The SDO's inquiry is mostly focused on the contractor's honesty, integrity, competence, and any other key specific features. When a contractor comes in front of an SDO to ask him or her to reconsider his or her decision to impose a debarment or suspension, the contractor needs to prove certain things. FAR 9.406 lays out certain mitigating factors. I will not go through all the details as you will have copies of the slides, but most of these mitigating factors in the FAR are applying to most of the companies and very few to individuals. One of the things that will count in your favor to mitigate the risk of you being not responsible is what standards of conduct, if any, does the company have, or did the company had at the time that the wrongdoing occurred? Another thing is the SDO looks at whether or not the contractor voluntarily disclosed this bad action or wrongdoing before they actually were found out. If that factor counts in terms of mitigating against suspension and debarment. If a bad act occurred, did the company conduct an internal investigation? What were the circumstances? What was the result? Generally, the suspension and debarment official will ask for those results. The fourth mitigating factor is full cooperation. If there is an investigation, did the contractor cooperate? The more cooperative contractor is, then it can likely count in favor when you ask for the decision to suspend or debarred to be lifted. If there are costs or fines associated, was restitution made for whatever was done wrong? Finally, if there was an employee that did something wrong that led to the action, what happened to the employee? Was the employee disciplined or terminated? If the employee is still working there, doing the same thing, that is a sure sign the contractor is not on his way to being presently responsible. What if no immediate actions were implemented since the bad action? What have you done either as an individual or a company to alleviate this? For a company, has there been ethics training, or as an individual have you gone through ethical training to understand how it is to behave ethically? Has there been adequate time passed between the bad act and the present that you are in front of the suspension and debarment official? Some of these practices are so ingrained in company business that they do not even know that it is wrong anymore so if an action happens and you are suspended or debarred and you say you are changing and do not do that anymore -- it does not happen overnight. We know it takes time to change , so generally speaking we like to give some time to make sure the company has learned what it is to be ethical before we would lift a suspension or debarment action. Finally, management recognition of the problem is the last mitigating factor. This is a big deal because a lot of people come in, especially with attorneys who do not understand the process, the attorneys believe they cannot admit to doing

anything wrong because they think they are in a criminal court proceeding, and an admission of anything wrong is an admission of guilt. Quite the opposite here. If you cannot admit something was wrong, there is no way you can fix it. If you cannot fix it, it is going to occur again, so it is very important that the management or the person recognizes what was done wrong and could then say this is what happened, this is how we will fix it and why it will never happen again. Those are the factors we look at to determine whether or not we will change decisions about suspending or debarred in a contractor. If they do make a convincing case, the SDO can remove the suspension and debarment, which means they are taken off of the sam.gov list. It is important to realize that when you look on sam.gov, you should look under current and active exclusions, not go into the archives or inactive exclusions. Danielle will touch on that later.

What are the effects of suspension and debarment on contractors? They are pretty drastic. Nobody wants this. We do not take these actions lightly. That is why we make sure we have met the evidence standards before we suspend or debarred. It is important to know that contractors that are excluded from doing business with the government cannot receive a contract unless there is a compelling reason for such action. They cannot serve as a subcontractor on a federal government contract, and they cannot conduct business with a government as agents or representatives of contractors. They cannot act as individual authorities. Any submissions from contractors must be rejected unless a compelling needs determination is made. Proposals, quotations or offers submitted by excluded contractors shall not be evaluated for an award, or included in a competitive range, nor shall discussions be conducted with ineligible offerors. It is important to note that suspension and debarment applies to future work, not past work. If the contractor has a contract, you do not have to terminate the contract right then and there because they were suspended or debarred. It can go to its natural end, or the end of its natural option year. So, other effects of suspension and debarment are that the agency cannot place orders exceeding the guaranteed minimum under ID/IQ contracts, nor place orders under FSS contracts, BPA's, or ordering agreements. I get this question. If a GSA schedule a holder is debarred or suspended, the master contract does not have to be terminated. However, please understand that you cannot issue a task order of new work to them under that contract. So, in effect, eventually, they will probably not get any work anyway because there has to be a minimum dollar amount for it to continue.

There are also collateral effects of suspension and debarment that people do not think about. On a personal level, it does have a huge effect. It can ruin a business because if the majority of your businesses government contracting, you have no work left to do then, of course, damage to reputation, loss of goodwill, revenue, security clearance, specialty license. The contraction of credit and /or denial of loans. I get calls every week from institutions who are about to lend money for mortgages to somebody and they do check the sam.gov list to see if their name is important on it. Put your real estate agent or appraiser in sam.gov before you sign up with them because the lending institutions will not allow the mortgage to go through if one of these people are on the list. I have countless examples of people that have changed professions and they think it has not caught up with them, and lo and behold their name is on the list. It can have a real, personal effect on you. It is a big deal. There are also disadvantages for companies that compete for state contracts. Some states do check the federal government exclusion and debarment list to see if those companies are on the list -- and if they are, they will not award the contract.

One final note- I hope none of you ever has to go in front of a suspension and debarment official, but if you do when you are going to hire legal counsel, be sure that you hire legal counsel that does this kind of work, and understand suspension and debarment and government contracts law. It is a niche area and not everybody understands it. If you get your attorney who represented you in a criminal case, for

example, it is a completely different kind of hearing and they do not understand that. They come in with a fighting attitude, and that does not work well. This is an administrative-type hearing. It is almost better that you come in without an attorney than to come in with an attorney who does not know how the process works because that can be detrimental. I think we have reached the end of the first session. We will be back, and then Danielle will join me.

**Danielle Muenzfeld (DM):** Hi, and welcome back. I am Danielle Muenzfeld. I will be taking you through the second half of the presentation. At the conclusion of the presentation we will have a brief break for you to send in questions and we will answer your questions -- brief break for you to send in questions and we will answer your questions. First, we will look at the contracting officer or contracting specialist's role. First, as required by the FAR, you are required to check the SAM twice, first with the opening of bids or receipt of proposals, with the requirement to reject any bid from the excluded contractor list unless compelling needs determinations are made. Second, you are required to check SAM prior to an award. Over 5000 were suspended or debarred last fiscal year. This translates to everyday new contractors being put on the exclusion list. So, a contractor, on the time they had submitted a bid or proposal, to the time that you actually go to award could have found themselves to be suspended or debarred. Taking a quick look at the System for Award Management, accessible at [www.SAM.gov](http://www.SAM.gov), it is a system that combines federal current systems and a catalog of federal domestic assistance. A number of different systems are going to be coming together into SAM in a number of phases. The first phase of consolidation included the former systems known as the Excluded Parties List System (EPLS), Central Contractor Registry, otherwise known as CCR, and the Online Representations and Certifications Application, more familiar to you as ORCA, as well as the Federal Agency Registration, or FedReg. As Maria noted, take caution you are doing your said check. Take a look to see if it is an entity or exclusion, whether that is there CCR information, or if the court -- corporation is in there as an exclusion entry or both. You need to take care not to give additional work, extend options on contracts awarded to a contractor prior to their exclusion unless a compelling needs determination has been made. Document poor performance formally, as well as properly entering terminations for default into FAPIIS, which is looked at as a source of referrals. While this is a basis for argument, it is not frequently used, and we believe part of this is because data shows not all terminations are properly reported into FAPIIS.

For contracting officers and specialists it is important to follow FAR requirements. It is problematic in a suspension and debarment referral when the agency has unclean hands. These are derived from actual cases. There is a case where the agency did not properly develop requirements for a procurement, did not give measurable objectives by which contractor performance can be made. A post-award audit of the contract occurred, and the Office of the Inspector General that did this audit found the contractor did not provide value to the government. The office of the inspector general investigation side got involved referring this contractor as a possible case for suspension and debarment. The contractor, in part, attempted to defend against this audit by explaining that the government did not fully do their job and did not properly -- given the unclear if you've -- -- if you will, measures. They effectively gave the contractor the go-ahead to provide materials on a contract that was funded by recovery act dollars that were not complying with the trade agreement act. This contractor gets in trouble for using materials from a country not complying with the trade agreement act. The contractor attempted to use the contractor's acquiescence or approval as a defense. Both cases are problematic for a suspension and debarment official because it is sometimes difficult to determine if the contractor is presently responsible if they have not followed FAR requirements and next accusing the contract.

Additionally, the contracting officer or contracting officer specialist can engage with the Office of Inspector General for your agency when an issue or suspicion of wrongdoing, for example,

overpayment, or a contractor purporting to be a woman-owned small business is not a woman-owned small business and practice, to not engage with them, to call up the office of inspector general. The overall group. There is a group the office of inspector general is part of. There is a webpage where you can find contact information for your oig if you do not know how to reach your office of inspector general, where you can engage with them and provide information. Every office of inspector general is different. There might be different ways to report, whether it is through e-mail, or another forum. Also, consulting with the suspension and debarment official for your agency for a felony convictions for your contractors. The Consolidation Appropriations Act of 2012 entered a couple new requirements. First, a prohibition to award contracts, grants, or cooperative agreements from funds from the 2012 appropriations act to corporations that have been convicted of a felony in the previous 24 months, unless the agency's SDO has made a determination no further action is necessary to protect the interests of the government. The law is poorly written. As you can see from the previous slide, an and the agency is defined as SDO. Is goes to inconsistencies in the article use. And we will talk a little bit about how this will delay the procurement process

How does the suspension and debarment process work? Note that the process talks about the civilian model. The civilian and defense sections of the government have slightly different ways to do suspension and debarment, however the core processes are the same. The differences tend to deal with differences in mission and agency structure. Taking a look at who is involved, there are a number of players in a suspension and debarment case. The office of inspector general for your agency, the acquisition workforce, a contracting officer, a contracting officer representative, and/or a contracting specialist. The suspension and debarment official, the SDO, the agency, legal counsel, and the contractor's contract -- counsel if they have chosen to retain counsel. We will walk you through how a cases initiated and processed. The initiation starts with myself receiving a report of investigation from the inspector general, information from the acquisition workforce or disclosure from a contractor. The report of investigation from the office of inspector general tends to include court documents and/or completed investigations by the inspector general into a particular matter. Second, information from the opposition workforce. This might be an e-mail or a call from a contracting officer or specialist providing information that provides details about an alleged wrongdoing doing of a contractor or subcontractor, or individuals that work for that contractor or subcontractor, on a government contract or information that goes to the integrity or honesty of that contractor, but not within the federal realm. Many contractors have both public and private sectors to their business. Finally, disclosures. There are two types that we see from contractors. First are mandatory disclosures. Under a far clause, they are required to make certain mandatory disclosures to the office of inspector general of the appropriate agency. The second type of disclosure is a voluntary disclosure -- at GSA, we have an open door policy. Contractors are encouraged to come in and preemptively disclose to this is pension and debarment official before the department of justice or the office of inspector general discloses that wrongdoing to us. Berea mentioned mitigating factors. This is one way to get credit under -- Maria mentioned mitigating factors. This is one way to get credit under mitigating factors. Evidence typically found -- evidence typically found in a referral or disclosure varies depending on the type of case it is. Maria talked to judicially- based referrals, and these would include court documents, the charging document and the final disposition. Other types of disclosures that are fact-based might include information from the inspector general. That would be, for example, a report of an interview with the contractor, contractor employees, federal employees, who are aware of, or should have been aware of, the wrongdoing. Processing by the suspension and department division -- e.g. Agency does this differently. At gsa we do this by doing this -- referral. The officer makes a decision based on the referral and the memorandum, outlining different actions could -- that could be taken in the matter and then there is either a suspension letter, proposal for debarment, department notice or goes to the contractor that

contains additional information before determining whether or not to take action against that contractor. Maria mentioned contractors had the opportunity to oppose the action and explain why the contractor is presently responsible. This can be done either in writing through submission of matters in opposition, or orally through a meeting with the suspension and debarment official. We briefly touched on the interagency suspension and debarment committee, a committee comprised of individuals involved in suspension and debarment from civilian and defense agencies and federal government corporations. It is a forum for coordination of suspension and debarment efforts, and sharing best practices about suspension and debarment. Why should you care about this? It is a form in which agencies can ordinate who will take the lead on suspending or debar any contractor. Typically, contractors do more -- work with more than one agency, therefore more than one contracting officer can be affected if a contractor is suspended or debarred. It does help to alleviate the surprise factor when a contract officer goes to award a contract and finds, for example, a counterpart civilian agency has filed action against that company. Everything we have done up to now sets you up, giving you a good basis for understanding what the processes, and hopefully that will be helpful as we change gears and look at what is the role of the acquisition workforce in suspension and debarment.

**MS:** There is a prohibition of an award to a contractor convicted of a felony within the preceding 24 months or who has evaded taxes, unless an agency or the agency has made a determination it does not protect the interests of the government. People are confused by that. Unless the agency's SDO has made a determination there's no reason to protect the government by suspending or to bar and that contractor, there could be an expectation that supposedly any agency in the federal can make that determination. And all other agencies go by that decision. Or if you are saying it is the agency, the contractor will think, it is his or her agency that has to make that determination. What happens is the contracting officer thinks they have to go to the SDO and get a determination as to whether this contractor needs to be suspended before he or she can make an award. The suspension and debarment process takes months. We do not want contracting officers to delay in making awards while they're waiting on this sort of determination. That has caused some confusion. What GSA and other agencies have done, they have written deviations to this requirement, and what they have done is they have created a sheet for a certification that every contractor who bids on new contracts have to fill out decertification sheets. Which, really, what they are disclosing is if they have been convicted of a felony within the last 24 months or if they have tax delinquencies. They have to certify that. If they certify no, the contracting officer knows they should go ahead with the award. If they certify yes, the contrasting officer has to report that to the agency SDO or IG. These are the things that will cause a delay in the procurement process. I think that we have a copy of one of these certifications for the GSA version we put on line for you, but that is just something to be aware of for your agency. Need to find out if your agency has one of those.

**DM:** If we can just clarify, Maria, when would a contractor submit this?

**MS:** When the contractor is submitting their proposals. Contracting officers do have to conclude that in the solicitation documents.

**DM:** Switching gears a bit, looking at the contract and officer's role. You need to be sure you are not overstepping or boundaries as subcontracting officer. Additionally, you should encourage contractors to stay out of trouble with suspension and debarment through ethical practices. You should assist with documenting and reporting lack of contractor performance or poor contractor performance to the contracting officer. Documenting this would depend on your contract and agency regulations. All I can say is, please put it in writing. When we are going through investigations, the more it is in writing, the

more you can build a case in particular contractor is a poor performer or has ethics and compliance issues. Also, you can collaborate with the federal agency's office of the inspector general. You are given your boots on the ground. They have a unique lancet that others are not privy to, and therefore you are in a unique position. You are really there at the front line. Looking at the acquisition workforce generally, making referrals to your agency's office of the inspector general, things that you think should be considered for suspension and debarment. They can either be for the contractor generally or individuals working for the contractor. An example of the latter could be every day you come in and by the contractor employees at your government work sit on the phone and you believe they are making calls to a spouse, a family member, and you do not believe this person is in the country, or they could be in the country. You could have two different problems there. One, they are using government resources for personal use. Two, they could be doing this on time they are actually billing to the government. This would be something you would want to alert the contract an officer of this, as well as the office of the inspector general.

**MS:** Could you -- let me just clarify on that example. I do not want to cause confusion. It is not that subcontracting employee can never use of government phone. But we are taking this example from an actual case where a contract in the employee he was on the phone at like an hour or -- an hour at a time calling a foreign country. There were really high bills going on. That can go on for a long time without anybody saying anything. I do not want to cause confusion.

**DM:** Thank you.

**DM:** Another example is if you are working with a contract that does require inspections, to make sure that you are doing inspections and reporting. Please note that alleged wrongdoing does not need to be limited to contract performance. If you find out through the express that the contractor you work with everyday has been indicted for an issue with the Securities and Exchange Commission, this could be a basis for suspension and debarment. You could report that to the inspector general or the disbarment official. Finally, communicating with the disbarment official is important if you have any questions. Similar to the office of the inspector general. We have a list of the disbarment contacts if you do not know who the office of suspension and debarment contact is at your agency. This process of suspension and debarment does help the federal government not only combat fraud, waste, and abuse, by keeping these contractors from giving future contracts, but it helps you in your day-to-day if you have someone with habitual poor performance, it does prevent them from being in the pool of eligible employees. One final slide here on that debarment is something for you to be aware of. "De facto debarment" is using means other than the official process. Using processes outside the suspension and debarment process is problematic because of due process. Contractors have the ability to present their case, to give their side of the story. Using de facto debarment, you do not as a contractor have the ability to really defend yourself. That would occur in a number of situations. One example would be a misuse of an administrative agreement in FAPalleged adalIS agencies. The contrasting officer goes on, sees the administrative agreement. He sees the wrongdoing and says no, not going to award to them. The contractor bids again three weeks later, again goes back in his or her memory to the wrongdoing, says no, not going to award. Hear the officer is De Facto debarring the contractor. They are effectively being prohibited when there is no basis in the administrative agreement. That is not something that should be used to determine for the contracting officer to determine who should get contracts. Next, there is the inactive area of SAM. They've received new information indicating the performance is good. The injury goes into what was formerly known on EPLS as the "archives". That is now known as the inactive section. That information should not be used in making determinations. And finally, the use of state-level suspension and debarment information. If it comes to your attention a contractor has been

suspended or debarred at the state level, it does not necessarily mean that they have been suspended or debarred at the federal level.

Important links for you. You will be able to click through these. First, the System for Award Management. Second, the interagency suspension and debarment website. The important part of this is the member link that gives you contact information for your agency's suspension and debarment official, as well as those who work in the suspension and debarment office. VEEP director's directory. This will provide you with e-mail addresses. And finally, FAR 9.4 is listed here for your reference. We will take a brief break to review questions. Thank you.

**DM:** Now we are going to get into the question and answers section. I see a number of questions asking for the meanings of acronyms. I apologize for not fully having done that before. "SDO" stands for Suspension and Debarment Official. "PFD" - Proposal for Debarment. "SAM" is the System for Award Management. In that is where the excluded contractors are listed, SAM.gov. "EPLS" stands for Excluded Parties List System. This was a previous system that housed excluded contractors. The system is no more. "ORCA" stands for Online Representation and Certification Application. And lastly, we have the Contractor Performance Assessment Reporting System, or CPARS. Let's get into questions.

**DM:** Another great question is can we debar state or local officials? Yes. Most commonly at GSA, but state or local officials can be suspended or debarred. A lot of this goes to knowledge, expertise, political associations that would make these officials likely to seek employment with a contractor that does the federal business. Next, how often the suspension take place? Suspension, as Maria noted, in FY11 actions occurred just under 1000 times. It tends to occur a little bit less often than proposed debarment, because suspensions' goes to the immediate need and there is a higher burden on suspension. I found the definitions of affiliations hard to understand. Can you reinterpret it? With the affiliation, the base idea to understand is that affiliation centers around control. A lot of times in my experience with suspension and debarment I have seen it be a situation where one gentleman or woman has the ability to control five or six other businesses. You are concerned with the affiliation this one gentleman or woman is going to get with company A and transfer the operations to company B. We are looking to the short circuit that process and prevent the person from transferring from one company they control operations to another. Similarly, a third-party controls or has the power to control the entities. If the contractor on company a does not have the supply programs, that individual him or herself as not have good ethics, likely these problems are repeating throughout the other companies, which is another problem. You do want to protect the government from all the businesses, not just the one. Finally, I will turn this back over to Maria. Where do subcontractors fit in? I apologize we neglected to tease out that part of the FAR. Some subcontractors can be suspended or debarred.

How long does it typically take to suspend a contractor? Is there a backlog of requests? It varies agency by agency. Typically on the quicker side, because we have our rigorous process, typically it takes about -- what would you say, two to three months?

**MS:** We have agencies where the office's legal counsel are processing suspension and debarment. It can take about a month for suspension.

**DM:** Right, that is true. About a month. And they have notices. Yes, I guess about a month, two weeks if there is an extreme case. That would be the quickest. That is not the typical cycle. It go -- it can go from there to a few years.

**MS:** A few years. If you are suspended, there are contractors that have been suspended since 2010 because the cases are ongoing because of litigation.

**MS:** Right. So, it or procedures are ongoing, it could be going on for a while -- so if court procedures are ongoing, it could be going on for a while.

Should we look at the archives for past performance before a contract in an award? I would think not. This may be giving information to the contractor that is not really relevant to the eligibility to contract with the government right now. In assessing past performance, someone being listed on SAM does not necessarily mean it was poor performance that caused them to be listed on SAM. You do not want to assume that that was the reason they were suspended or debarred. There are other reasons someone could be suspended or debarred. The best practice is not to use the archives to make any decisions regarding a contractor.

The next question -- all bids should be checked in SAM? Whose responsibility is it, the CO or the COR?

**MS:** Yes, you do need to check and see if the contractor is listed there. It is the Contracting Officer's responsibility. This should be done literally immediately before an award. Not two days before, three days before. People can get on the list in that short a time. It is the contracting officer's responsibility to check that.

A couple more questions and we are done. In SAM, should we search for a company by their company name or key individual names to determine if they are the barred or suspended? The answer is both. If it is a company, you search by the company name. If it is a small company, and the owner may be the one suspended or debarred, then definitely search by that name, too. To be safe, I would search for both. If you have a principal's name, I would search by that. I would search anyway I can find it, because you really do not want to award. As a contracting officer coming you do not want to award a contract to a suspended or debarred contractor. Search anywhere that you can to find the information.

There's a question about how can debarred contractors be reinstated? There's nothing that they literally have to do. The name drops to the archive and it is not there anymore. As long as the name is not there anymore in the active system, there's nothing physically they have to do to get reinstated.

Next question -- are you allowed to exercise an option? No. That comes with new work, and it is expressly forbid according to the FAR unless a compelling needs determination has been made by the agency head.

When a contractor is noticed, does the co also get noticed?

**MS:** Normally, no -- not necessarily. It does happen in a few agencies. I know in certain agencies when a contractor who contracts with a particular agency is suspended or debarred, the office will send out the actual notice or the letter to the contrasting environments. "please note that such and such has been debarred from federal contracts." if we know there is a construction contractor who has been debarred, we send that letter to the heads of public building services, and that gets booted up. But not every notice or contractor is going to know -- you just cannot point to know every contractor that has been suspended or debarred. Generally if it is a large contractor, if it is one that has quite a bit of business with the agency, the agency disseminates the information to the contract thing work force.

**MS:** We ensure that the appropriate agencies are kept aware.

**DM:** What are the most common indicators for a COR to consider suspension? First, it would not be the COR that would consider suspension and debarment. What would raise red flags that would lead him or her to make a recommendation to the suspension and debarment official? It does vary contract to contract, however, I hate to put it this way, but use the “sniff” test. Does something “smell” or seem funny in the contracting process? The indicators rarely vary beyond that though, because the various types of abuse and ethics issues are so varied, the indicators may be confusing. Just look on the FAR Parts. If you see someone is doing something, that is obvious. If they are supposed to work eight hours a day, if they are coming in one hour later, leaving two hours earlier. Just common everyday things. If it smells wrong or it looks wrong, maybe it is wrong. Common sense type issues. And of course, anything particular to the contract that you know they should be doing and are not doing. Those are common issues.

**DM:** What is the best practice if we believe undocumented workers are hired by subcontractors? Subcontractors -- just so you know, the responsibilities of the prime contractor, they do flow down to the subcontractor from the prime. Your best bet is to keep the prime accountable for making sure the subcontractors are meeting their requirements of the main contract. If your prime is hiring a subcontractor of illegal aliens, then the prime gets in trouble as well. In both cases. Not just as a contracting officer, you have an obligation to report both the prime and of the subcontractor for hiring - - and the subcontractor for hiring undocumented workers. The same channels. Reported to your IG. As a contracting officer, I would think you would go to your prime and say, hey, this has come to our attention. You should do something about it. If nothing is done about it, definitely reported to your IG. Generally, the responsibility flows down.

This question says who or whom would pay for the attorney? Does the government provide one? No. If you are proposed for suspension and debarment and you want to retain an attorney, that is totally up to you and it is totally at you/your agency's expense. The government never provides.

What about contractors who change their names and come back as a different company? Very good question. This happens frequently. That is the reason why we have affiliation -- people do try to get around the system that way. If we know these people have these companies and the power to control them, that is why we to bar all the companies associated with that person, or else we risk the same result with a different name. Sometimes we do not catch somebody, and this happens. Sometimes a person does get away with doing that. Generally speaking, if it is an individual and they are suspended or debarred, if their name shows up on any other company thing, that is a flag. It does happen. We try to catch it. It does not always happen.

I think that is all the time we have for questions. We want to thank you so much for attending this training. We hope that you did learn something. Please do not hesitate to contact us if you should out additional questions. And we expect to have slides of the information online some point. Thank you.