

Transcript: Suspension & Debarment

- Hello, and thank you for joining today's acquisition seminar hosted by the Federal Acquisition Institute. Today's seminar entitled Suspension and Debarment: What Makes a Successful Meeting will give us a glimpse into the minds of Suspension and Debarment Officials in the Federal Government, and a behind the closed door look at a successful meeting between a Suspension and Debarment Official and contractor representatives. Suspension and debarment, two terms that probably strike terror into the heart of any company or individual that wants to do business with the Federal Government. But suspension and debarment aren't meant to be punitive. And meetings with Suspension and Debarment Officials are not meant to be contentious or antagonistic. Suspension and debarment are used only as a last resort to protect the interests of the Federal Government. More often than not, a meeting with a Suspension and Debarment Official is an opportunity to help an individual or company get back on track. To enlighten us on the implications of suspension and debarment, we have a team of officials from agencies across the Federal Government. First we'll present two Suspension and Debarment Officials as they discuss, among other things, what they look for when they're determining a contractor's present responsibility and how members of the acquisition workforce can help. Then we'll present an example of a contractor's meeting with a Suspension and Debarment Official. These closed door meetings have wide ranging effects on Federal Government procurement across all agencies. The meetings are necessarily private, but they are one of a Suspension and Debarment Official's most useful and effective tools for enhancing contractor responsibility. I think our presentations will help de-mistify suspension and debarment, and what officials are looking for when they meet with a contractor. And they'll shed light on what contractors can do to most effectively work with government to prevent exclusion. Before we begin, let me remind you that we will hold a live question and answer session at the end of today's presentation. If you have questions about anything you see or hear, we encourage you to submit them at any time using the survey link to the right of the video screen. We will collect and review your questions during the presentations, take a short break, and then we'll return to answer as many as we can. And with that, let's get started. I'm very pleased to introduce to you now, Maria Swaby, Suspension and Debarment Official for the U.S. General Services Administration and Rod Grandon, Suspension and Debarment Official for the U.S. Air Force.

- Hello I'm Maria Swaby, the suspension and debarment official for the General Services Administration, and I'm here with Rod Grandon from the Air Force, and he's also the Air Force's Suspension and Debarment Official. Today we're going to have a conversation about suspension and debarment from the perspective of the Suspension and Debarment Official. You will hear me refer to the Suspension and Debarment Official as the SDO during this process, and we're going to talk about present responsibility as that's the lynchpin of the decisions that the SDO has to make, and we're going to examine the suspension and debarment process, and talk about the whys and the hows, and just get into the mind of

the SDO and how he ultimately, or she ultimately makes a decision regarding the present responsibility of a contractor. So with that as an introduction, Rod I'd like to start off by asking you to define present responsibility.

- All right, well it's very interesting that even though, as you point out, present responsibility is the cornerstone of the suspension and debarment decision making process, it is not defined in any authorities that I'm aware. Instead, suspending and debarring officials have to look basically across a horizon at various different authorities to get an idea of, what are some of the elements or factors that are part of the responsibility determination? We can look to Federal Acquisition Regulation Subpart 9.1, which covers the contracting officer's affirmative responsibility determinations as part of the source selection process. We can look to FAR Subpart 9.4, which is the suspension and debarment language, and within that subpart you find factors, 10 factors that are laid out that are very useful for assessing present responsibility. You can also look to the FAR clause 52.203-13 that lays out certain portions of our considerations for the integrity elements of how a business does conduct itself. Does it have an integrity program? Does it have a business conduct ethics program? We can also look to the U.S. Federal Sentencing Guidelines where again there are a host of considerations set forth that, again, focus on corporate elements of responsibility. But, using these various sources, we really come down to some basic nuggets that we focus on. Integrity: is there integrity in the decision making, whether it's organizational or individual? Is there a willingness to be candid and honest with the customer? Are the products that are provided of quality? Or are there shortcuts that are being made? Again, we're fundamentally looking at various elements of integrity, honesty, and essentially good customer relationships.

- Okay, all right. So the term "present responsibility" has the word present in it, is there an element of time that's considered when you're making a present responsibility determination?

- Absolutely. For suspension and debarment purposes we are focused on what is occurring today and going forward. So the present in present responsibility has a lot of impact on the decision making. And just to illustrate, if we have misconduct that occurred years before, five years before where we have definite acts of misconduct, the challenge for the suspending and debarring official is to figure out, what does that set of events five years ago have to do with conduct today? What changes have occurred? Have people been hired, fired? Have new processes been put into place? So, the present responsibility determination does have a very significant present day impact on the decision making process.

- Okay, thank you. All right, we talked about you determining the present responsibility of a contractor. We all know contractor is a very broad term. Could you define what contractor means?

- Yeah, well contractor actually is defined in Federal Acquisition Regulation subpart 9.4 and it is an incredibly broad definition. It includes individuals, it includes business entities, it includes prime

contractors, subcontractors. Frankly, anywhere in the contracting supply chain. It also includes those competing for federal business opportunities, those performing federal business opportunities, and includes those who may at some point in the future try to secure some sort of federal opportunity. So the definition is just very very broad.

- Right, and I think some people might have difficulty with the definition being someone who may, or may reasonably be expected, to conduct business with the government in the future. Could you give an example of one of those, what that would look like?

- Right, well let me just explain. What we try to do through the suspension and debarment process, and I think largely succeed, is we try to eliminate risk to our federal contracting processes. We don't want to do business with contractors that don't have the appropriate levels of integrity and honesty. Just like you or me going out to buy a house or a car, if we believe that the seller is not trustworthy and is trying to sell us something bad, or is going to give us a bad product, we're not gonna deal with them. Same thing in the federal marketplace, only because we're the Federal Government there's a lot of process that comes into play. But what we're really focussed on is trying to achieve getting rid of risk, trying to buy down risks so that contracting officers and the acquisition community can approach their business transactions with a certain degree of comfort that the business with whom they're going to work with are going to provide the quality products and services we expect, will do so in a timely manner, and that we can expect reasonably good customer-supplier relations.

- So in terms of- Let me ask you this, is a Federal Government employee at any time can be considered a contractor?

- That's an interesting question because under my definitional construct, active Federal Government employees are about the only people in the world that cannot be contractors.

- [Maria] Right.

- But, recognize that should a federal employee engage in some type of misconduct, that would impact their overall integrity, and they'd get fired from their federal job. They're very likely to be the target of a suspension and debarment action because in many many cases, those federal employees go out and work for contractors, and that is exactly the type of risk we do not want our contractors to assume.

- Right, so that would be an example of a person or individual likely to do business with the government, if they're a former Federal Government employee.

- And another example, I mean the supply chain starts at the top with our prime contractor relationship, but if we have a subcontractor or supplier three or four tiers down that is providing questionable products, is being difficult, and delaying what's going on in terms of the overall ability of the prime to successfully perform, that's a concern to us as the customer. That is a risk to our ability to acquire products and services when we need them.

- [Maria] Mm-hmm.

- That is another example of the risk that we have the ability to deal with through the suspension and debarment process. Again, not because they're a contractor in the traditional sense, but because they are participating in that federal marketplace.

- Understood. All right, let's turn now to the acquisition workforce and their role in suspension and debarment. To whom should an acquisition workforce professional report misconduct or poor performance.

- Okay, I believe there's two reporting schemes that should come into play for the acquisition community. First of all, if you have suspected misconduct, and again, I'm not saying wait until you have in your own mind confirmed that misconduct has occurred, but if you believe there has been misconduct on the part of a contractor as a business entity, or subcontractor as a business entity, or any employee of a contractor or subcontractor, if you suspect it, report it. In the case of the Air Force we have our Office of Special Investigations, or OSI that is responsible for conducting investigations of suspected procurement fraud. In fact, we have a branch within the organization dedicated to procurement fraud. And I believe a lot of the other federal agencies are organized somewhat similarly, so there are folks who understand how to conduct a procurement related investigation. But often times when a contracting professional sees something that they suspect to be a misconduct, it's usually in the form of a dot, a small you know, perhaps a small mis-charging. If it's not reported, we don't know if that's just a single dot out there, or if that's just a dot on a line that indicates some sort of a trend of a contractor's larger acts of not being honest to its customer. So it's critical that suspected misconduct be reported to the appropriate officials, and again I believe in most cases those should be the investigators. When it comes to poor performance, investigators may not be as anxious to look into performance related matters, simply because from their perspective they are law enforcement officials and this is really an acquisition issue. Most agencies, including the Air Force, have procedures in place that provide a way and means for contracting officials to report to either the suspending and debaring official, or perhaps the Inspector General's office, someone else in the organization, this poor performance on the part a contractor, so that again, the folks who are responsible for assessing whether we should continue to do business with those individuals can do their jobs.

- Okay, well thank you. All right, so for the acquisition workforce is there a dollar threshold or a certain level of misconduct that should trigger reporting?

- No, if we had a dollar threshold involved, what we would essentially be doing is condoning small scale misconduct, and again, that is not the purpose of suspension and debarment. It is to get rid of risks in the supply chain, whether large or whether small, whether at our prime level, whether at somewhere in that lower tier structure, or whether it's an employee somewhere in between. So, no dollar thresholds.

- Okay, so how does acquisition workforce know whether something is worth reporting? What I mean is, how do they know- how do they distinguish between our run of the mill incompetence, and actual bad behavior and misconduct that should be reported?

- You know, I think in most cases you're really talking about a spectrum.

- [Maria] Yeah.

- And my sense is, a contracting official probably could take the time and make the effort to try to figure out, was this just a mistake, incompetence, or is this something intentional? But the bigger point is, that is really not their role. And it also takes away from their time that they need to do their other jobs. So rather than a contracting official, who already has a tremendous burden on their efforts, trying to figure this out, much better to make that report. Whether to the SDO's office, the IG on the performance side or to the investigators on the misconduct side and let those individuals whose job it is to figure those things out, do their job.

- Okay, thanks. So there are a lot of members of the acquisition workforce who think that, you know, because there is no privity of contract between the government and say a second or a third tier subcontractor, there is no duty to report, is that actually the case or no?

- Again, going back to my earlier comments, absolutely not.

- [Maria] Right.

- The supply chain is a continuum. The prime has to rely on its suppliers, and so forth throughout the chain, so if you've got misconduct at anywhere within that supply chain, that affects the ultimate

products or services that are provided to the government customer. So if a contracting officer or an acquisition professional sees misconduct, again at any place in that supply chain, it is critical to identify it, to raise the concern, and let those folks whose job it is to look into that do their jobs.

- All right, let's go back to the topic of present responsibility, sounds rather fluid 'cause there's no clear definition. So how does an SDO determine whether or not it's appropriate to initiate a suspension or debarment action against a contractor?

- All right, what you're really, when you say it's fluid, what you're really hitting on is it is highly discretionary.

- [Maria] Right.

- Very very discretionary, and there is not a lot of legal authority that says, this is the triggering element or this is what you should do in a given case. But there are, generally accepted, a two tier process and this is common throughout the Federal Government. The first tier is whether or not the information that has been provided to the suspension and debarment official in record form, and I emphasize, in record form, we can only make decisions based on what is in the documentation. 'Cause ultimately if our decisions are reviewed by court, that's all they're going to look at. So it is strictly a record review process, but we review the record to determine whether there's adequate evidence or preponderance of the evidence. Adequate evidence to support a suspension, or a preponderance of the evidence to support a debarment. Whether the cause is supported, whether the evidence supports a cause by those evidentiary standards.

- Now before you go on, can you give an example of what constitutes adequate evidence? An example of that.

- So for a suspension, adequate evidence is recognized as an indictment, very simple. That's in the regulations, but in many cases we're not necessarily waiting for an indictment, so we look and we see, an example is, an affidavit by an investigator that says, this company has engaged in this type of misconduct. It's that statement, that statement alone. It doesn't tell me what the sources are for that. There's no independent corroborating evidence, but it is an affidavit, a sworn statement made by an investigator, and whom I'm going to assume is doing their job and doing it correctly, and that this is the best information available to them. In my view, that clears that probable cause, evidentiary hurdle of adequate evidence. Now, ideally we'd want a little more supporting information, but if not there, that would be a useful tool for making that adequate evidence determination. As we go to the preponderance standard, there's a higher standard, and again, the preponderance standard is what is necessary to support a debarment.

- [Maria] Mm-hmm.

- A preponderance is essentially 50% or more of the evidence, weight of the evidence, indicates that something is more likely than not. So again, it's a higher burden, and to go back to that example, that isolated affidavit from the investigator, I would have a little bit of trouble saying that that would clear that preponderance standard. I would want to see supporting information that collaborates, or corroborates excuse me, what is in that declaration or that affidavit. So again, the first tier of the analysis is, does the evidence support a cause? Now just because a cause is established does not mean the suspending and debarring official has to take action, in fact that's very clearly stated in the FAR. It leads to the next analysis, and that is notwithstanding the cause, is there a need to protect the government's interests? If that answer is also yes, then it would be appropriate to go ahead and initiate that action.

- [Maria] Right and if not then, you terminate the review at that time?

- Or if not I would give it back to the stakeholder that brought it to my attention in the first place, talk to them about what was missing from the record, why I made that decision, and if they think that there's more information to be developed, let them do so, and then bring it back again if they would like.

- Okay, all right. So say we're at the stage where you do have cause and you do have evidence meeting the evidentiary standards to take action, what's the next step?

- The next step then is to start complying with the process requirement set out in the FAR. And fundamental to most of the American process is to provide notice. Agencies approach the notice obligation differently. In the Air Force we have, essentially, two documents. We have a notice letter that identifies that we're taking the action, the consequences of the action and the process that is available to the respondent. Separately we have a memorandum that lays out the factual allegations and the causes for the action. Now, some agencies combine those into a single document, but the critical piece is that the Suspending and Debarring Official provides the contractor with enough information that the contractor knows the basis for the cause for the action so that they can respond appropriately.

- In your experience, do most contractors or individuals who get these notices respond?

- Interestingly, no. Most contractors do not respond, and that's interesting because our practice in the Air Force is, as I said earlier, all of these actions are based on a set of documents, the record. We do not

provide the record with our notice letter. Because in most cases that would just be wasted time and effort because most contractors do not respond. But we make it very clear that the contractor may request the record, and then we'll provide the record. But it is interesting, most contractors for whatever reason do not respond to those causes, and I think that's not just the Air Force experience.

- [Maria] Right, that's consistent.

- That's kind of the same across the federal agencies.

- Yes, that's correct. And in cases where they do not respond?

- And in cases where they do not respond, then we will go ahead and take the adverse action against them to suspend or to debar.

- Okay, so let's talk about the contractors that do respond. Tell me some more about what form their responses take. What do those responses look like?

- The regulatory structure, again, allows the contractor to respond in writing, in person through a meeting in opposition, or both. And frequently, of those that do respond, they respond with both the written submission and a request for the live meeting. It's interesting, as I said earlier, the suspending and debarring offices are not structured, we don't have the resources, the personnel, the funding, to investigate these matters. So when contractors respond with written submissions, we are not, we the suspending and debarring officials and our offices, are not in a good position to confirm or deny, or really to assess the quality of that information. So when we receive these responses, we frequently look back to the stakeholder that brought the matter to our attention in the first place. If it's the acquisition community, we go back to the acquisition community, provide them with the written response, and invite them to submit comments. Ideally comments saying, well yes that makes sense, or that's right, or in many cases no, that's not at all what occurred. But again, to provide some degree of verification or denial of what's being represented by the contractor. Likewise, when we have these live meetings, the Air Force practice, and again, this is not the same across the Federal Government, but the Air Force practice is to invite the acquisition community if they were the source of the initial referral, or the investigators if they were the source of the referral, to participate in that meeting, whether live or telephonically or otherwise, but to listen to what the contractor is representing and then, again, to provide comments to our office as to whether or not what was being represented makes sense, whether it was true, or whether it was not true. But ultimately if that live meeting process is going to be included in the record, those pieces of information that either party, the government or the contractor wants into the record have to be reduced to writing and made a part of the official record for the SDO, and ultimately should the court review, for the court to review.

- Right, okay, so based on what you just said, it seems that the building of the administrative record is an iterative process, you go back and forth, so it is kind of evolving at some point. Is there a point, when is the administrative record deemed to be complete and that the SDO can make a final decision?

- To clarify, it is an iterative process. When we receive the submission from the contractor we look to the government stakeholder that brought the matter to our attention to provide comments. If we receive those comments, we are then obligated to provide those comments to the contractor, and we invite the contractor to provide comments on the comments. So this iterative process potentially could go on for a very long time, but generally it doesn't. Maybe one or two rounds, but at some point it's clear we're not getting any new information. Either the parties are just done, they don't have anything else to give us, or I make the conclusion or I reach the conclusion that this isn't going anywhere. And in the Air Force, our practice is to close the record, to make it clear to the government side and to the contractor that we have all of the evidence that we're going to collect, and by making that representation that the record is closed, I then start my clock under the FAR, my 30 working-day clock, within which I must make that decision.

- Okay, all right. Well, so we already discussed the definition of contractor, at least for suspension and debarment purposes, and that includes contracting and subcontracting companies as well as individuals. Do the procedures you outlined apply the same to individuals as it does to companies?

- Now, the procedures, the authorities that govern the process, absolutely, they are the same procedures for individuals or for business entities. The application of these procedures or these legal authorities, very different. As I indicated earlier, the authorities that we look to for present responsibility considerations are very much focused on what businesses can do or should do to establish present responsibility. By way of example, we expect businesses that do business with the Federal Government to have ethics programs in place, we expect them to have strong compliance programs, and we expect them to take appropriate steps to prevent misconduct or poor performance from occurring. We expect them to report discrepancies or misconduct when identified, and we expect companies to respond appropriately when they identify problems. That they cooperate fully with their government customer, whether it's investigators, Department of Justice, suspending and debarring officials, or the contracting community. So companies have a lot of tools in which to accomplish these objectives. They can hire people, they can fire people, they can develop policies, they can do training. They can have their leadership suddenly take on a brand new marketing campaign within the organization to promote ethics and compliance. A lot of tools are available to the business entities.

- Before you move on to the individuals, let me go back to the businesses. You have large businesses and small businesses. Could you talk about your expectations as it relates to the size of the business, or any different or scaled- When you talk about ethics and compliance programs for example, can you give me-

- Yes, in my view the simple answer's that these programs are necessary whether you're a small business or a large business, but they're scaleable. A very large business, defense contractor for example, most of them have spent a lot of money to build an infrastructure within their organizations to promote sound ethics and compliance and to develop very robust internal controls. And that same effort should be alive and well within small business concerns, but because it is smaller in terms of population, in terms of revenue, in terms of business operations, they don't need the infrastructure of a large business. In fact, for a very small business it may be nothing more than that senior leader of that organization to set the right tone and say, we're gonna do these things according to our contract, we're gonna be honest and open with our customer, and that may be more than enough to carry that business, but it's a spectrum. We expect more out of our large business suppliers, but we expect the same attention to promoting ethics, to promoting compliance by our small business concerns.

- Okay, thank you. And so back to the individual, to the process.

- Back to the individuals, yes. So again, the individuals, an individual can't hire or fire, can't write policies, so there's really not a lot of tools set forth in the various legal authorities that individuals can use, but with one major exception, and that is recognizing and taking responsibility for the underlying, either poor performance or misconduct. That's sort of the basic element if the evidence suggests or indicates by either preponderance or whatever the appropriate side it's in, that the individual has engaged in misconduct, and they wanna continue to fight about it, that's probably not a very productive conversation. But that's a factual dispute, and we can entertain facts to try to work through that and make appropriate conclusions. When you get to the responsibility side, though, it's much more difficult, again, can't hire, can't fire, can't discipline. But the acceptance of responsibility is a very helpful first step, and then my practice is actually to find out what the individual can do with this situation. They've just been subjected to suspension and debarment, there have probably been other consequences for instance they've been fired from their employer, so what can they do with these very unfortunate set of circumstances today and going forward? Can they identify lessons learned, and carry those forward in their careers? Not only for themselves and how they conduct themselves but perhaps training those that they work with and those that work for them. What goodness in others- what goodness can come out of this thing? If an individual can articulate that type of a vision, that's very helpful.

- Okay, thanks. Well I have one more question for you. This is an issue that has come up from the acquisition workforce too, several SDO offices, and that question is, when a contracting officer is settling a claim, or a controversy, can that contracting officer include language in that settlement that insulates the contractor from suspension and debarment?

- Ah, no. I would say they absolutely can not. A contracting officer derives their authority to obligate the government in these financial transactions through their warrant, and their warrant is- there are dollar

thresholds that are associated with it, and it allows them to obligate financial relationships. The authority of the Suspending and Debarment Official does not travel through that warrant process. It is an independent authority that is vested with the agency head. In the case of the Air Force, the Secretary of the Air Force has delegated the suspension and debarment authority to the General Counsel, and the General Counsel in turn to me and my office. It is a line of authority very separate and distinct from that of the warranted contracting officer. So, bottom line is contracting officers do not have the authority to make those type of determinations and to provide that type of relief to the contractors when settling claims or other related disputes.

- Right, and neither does the Department of Justice.

- And neither does the Department of Justice, and for the most part they're pretty good at that.

- Right, right. Well Rod, this has been very helpful. It is a good refresher on present responsibility and also a good insight into the mind of an SDO, and what he or she thinks about when making responsibility determinations or determinations to take exclusion actions. It's also been helpful for the acquisition workforce to realize that they actually do play an important role-

- [Rod] A huge roll.

- in that process, and we depend on them greatly in having our program a success and protecting the government's interests. So thank you very much for your time.

- Thank you Maria.

- Now that Maria and Rod have laid the foundation, let's see what happens, or should happen, in a meeting between a contractor and a Suspension and Debarment Official. Again, these closed door meetings have wide ranging effects on federal government procurement across all agencies. They're necessarily private, but these meetings are one of the most useful and effective tools the Suspension and Debarment Officials have in enhancing contractor responsibility. Please note that today's mock meeting features members of various Suspension and Debarment Offices from across the Federal Government playing the roles that normally participate in such a meeting. They are not actual representatives of any contractor, and the contractor's name is completely made up, and any similarity to actual facts is totally unintended. With that, let's see how suspension and debarment meetings are supposed to work.

- Good morning, thanks for coming in to meet with me, I really appreciate you taking the time to come and talk with me and address my concerns. First of all, let's just start off with some introductions. As you know, I am Maria Swaby, the GSA Suspension and Debarment Official, and to my right is Michael Thompson who is the agency counsel. To my left is Dillon Mooney, who is the case officer in this case, and he's handling this matter. So we'll start off with the introductions on your side.

- Thank you Ms. Swaby, I'm Barry Berkowitz. I'm the general counsel for Clark Industries, and I've been with the company since 2007.

- Hi, I'm Sarah Drabkin, and I am the VP, the Senior Vice President of Operations, and I've been with the company since 2014.

- Good morning, and thank you for hosting this meeting. I am Mike Russell, I am the CEO and President since 2014. I've been with the company since 1993.

- My name is Lori Vassar. I've worked on ethics and compliance programs for many large corporations, and was hired by Clark Industries as the Ethics and Compliance Officer in 2015.

- I'm Bill Schmidt from Schmidt and Duch[◆], outside counsel for Clark Industries. Now I know that you don't want to hear from a lawyer, so I'm just here to watch today.

- [Maria] You got that right, I see you did your homework. All right well as I said, thanks for coming, and as you know the reason you're here is because your company received a show cause letter from my office because we received information from our IG's office that informed us that your CEO and owner, John Clark, was indicted in 2014 for bribing a government official and then was later convicted in 2015 for that crime. As you know, GSA has millions of dollars in contracts with your company, so I'm very concerned about the status of the company and the present responsibility. I'm especially concerned because Mr. Clark, as the CEO and owner, had full control of the company, and I am concerned about whether or not his behavior was so pervasive that it actually went down into the company and became a part of the company culture. So thank you for coming here to address those concerns. And I want to thank Barry for actually making a submission to me a week in advance, giving us enough time to read and absorb so we can talk intelligently about the matters, and I noticed that your submission was very detailed. It addresses one of the FAR 9.4 present responsibility matters that I'm concerned about, and it goes into some of the changes that you've made. I'm not going to spend this meeting going over everything in your submission, but I do wanna talk to the specific concerns I have such as, what changes you've made in your corporate structure since all this happened, what changes in personnel have occurred, what is the culture like in your company, and what internal controls do you have in place and training in place to ensure that you operate with integrity and that bribery and any other illegal acts do

not occur by any company employee? Okay, so just so you know, Mr. Schmidt you did your homework so you know that I don't like to talk to the outside counsel. I'd rather talk to the people who work at the company because you work there and you know what's going on, so I'll be directing most of my questions to all of the Clark Industries representatives, okay?

- Yes, ma'am.

- Okay, all right. So before we go on, anything, just a reminder that this meeting, anything you want to be part of record as a result of this meeting should actually be submitted to me in writing afterwards, and we might actually have other requests for written submissions afterwards. We'll talk about that as we go along the way, and you submit those sometime after the meeting, they'll become a part of record.

- There'll be no problem, we can handle that.

- All right, thank you. All right, so to start off, Mike, Mr. Russell, you are the CEO, and I was just wondering, I have this org. chart here in the submission. I was wondering if you could just take me through it, and explain to me the company structure.

- Certainly, and there's a couple of things that are pivotal in terms of recent changes to our organization since Mr. Clark's misconduct became known to all of us in the company. One is we have Sarah Drabkin has been elevated to Senior Vice President of our Operations to ensure that we have effective training for all of our people, and that she can more closely monitor performance. I once did that, but now I have been elevated. I didn't have the time to give proper attention, we realize how very important this is. The other very significant change is we have hired, for the first time, a full-time ethics and compliance officer, and we have also established a Board of Governors.

- [Maria] Okay, let me ask you this. So you're now the CEO and you've been since 2014, since around the time when Mr. Clark was indicted?

- That is correct.

- So what position did you hold in the company before you actually became CEO.

- I was the Vice President.

- [Maria] Okay.

- And one of the things that I'm sure you're probably thinking that ran through my mind several times, how could I be the Vice President and be with a company for so long, and be blind to Mr. Clark's conduct? And that had to do with, we had an effective paper program. We had all of the little boxes checked if you will, in terms of what you need for a program, but because of the structure of the company, it was not possible for us to see the way that it could be manipulated, and so we have learned a lot. And we've learned that we need a full time, very seasoned Compliance and Ethics Officer, and we need for her to have total independence and if you not in our org. chart, there's a dotted line. And she reports directly to the Board of Governors. Now I have always held myself out to be ethical and I strive to be ethical, but if she should ever have a problem with me, she is not constrained whatsoever, she can go directly to the Board of Governors, and I will have to answer to the Board of Governors.

- Okay, thank you. And so you report up to the Board of Governors, and is there some sort of a, quarterly, and Lori you might get to this when it comes to you, but is there some sort of a quarterly report? I know that Lori can actually go to the Board of Governors if there's an issue that she has that she feels like, the CEO or upper management is not handling properly, but is there a routine sort of reporting, quarter reporting, to the Board of Governors on compliance and ethics?

- Yes, we feel that reporting on compliance and ethics is equally important with our financial accounting, and for the same reasons they monitor our finances on a quarterly, semi-annual, and annual basis they pulse in and get the reports on our ethics and our progress with compliance issues. We flag any issues where we've had difficulties, so they can monitor our progress, see where our obstacles are, and then they can provide us with the appropriate resources.

- Okay, all right you had touched on, before, the fact that you've been in this company for so long, as a Vice President, and you and nobody else knew all of this stuff was going on. It seems to me from what I've read, of the indictment and the conviction documents and everything in your submission that because Mr. Clark was the sole owner of the company, his actions went undetected, that allowed him to actually do whatever he could have done- what he did, and that resulted in the bribery charges, and so his actions went undetected. And it's obvious that you didn't have the proper checks and balances in place to address that. This Board of Governors seems to be a new thing, so was that put in place to address some of these issues?

- It was, we started as a small company. We continued to practice as a small company, even though our revenues had grown exponentially, and that's what I meant when I said we had a paper program, facially

it looked appropriate, but it was not appropriate for the size company that we are, for some of the issues that we had, and it did not protect us from the blind spots of a misbehaving sole owner. Fortunately Mr. Clark was already in the process of selling the company when news of the indictment broke. The sale has been completed. I immediately, upon becoming the CEO I immediately took action to ban him from the premises and to ensure that he does not have access to any of the personnel or IT or other corporate assets.

- [Maria] So Mr. Clark is completely removed from the company, has nothing at all to do with the company?

- That is correct.

- [Maria] Does he have any family members that work at the company?

- There are no residual Clark family members.

- Okay, did he have some family members before?

- He did, but they're gone now.

- [Maria] Okay, all right thank you very much. All right, so I think I have some questions for Sarah.

- Sure.

- Sarah, I understand that you were at the company before. You were in another position, I forgot. What's the position you had before you recently assumed this role?

- Right, I was the Senior Manager of Business Operations previously.

- [Maria] And why was this role created, the new one that you have now, why was that created?

- I think so we have more oversight over everything. I think going from a medium company, or small company, into a larger one we wanted to make sure that the oversight, the procedures and policies were in place, and by having someone that reports directly to me, we could do that.

- [Maria] Okay, so tell me about your role and what you do.

- So I oversee the operations, and what we've done is we've gone ahead and created a bunch of checks and balances and made sure that the policies that we have now are clear and precise, for instance we've created a proposal approval system, and we have different levels of approval so that we can catch anything that we need to. Additionally, we've created a Head of Government Contracts group which is separate from the rest of our business, which we've understood is very important because 45% of our business is government contracts.

- [Maria] Well that's good, so before this you really had the government contracts mixed in with the commercial business?

- Correct, as Mike was talking about. As a small business we had everything kind of a little bit intertwined.

- [Maria] Okay, I know. So this new Government Contracts group that you've created, who leads it? Who's the leader of that group?

- So we have a Government Contract Manager now, who has experience in government contracts, but we're looking for a person to actually head that division.

- [Maria] Okay, so what kind of qualifications and experience are you looking for for that person?

- We've put out a vacancy announcement, and we are looking for someone with a huge knowledge of government contracts. We want to make sure that they are extremely qualified and experienced in all of the nuances that government contracts have.

- [Maria] So you're looking for somebody who probably had experience doing something similar in another company,

- Absolutely.

- [Maria] and that has run it successfully?

- Yes

- [Maria] All right, so I want to be kept informed of when you actually do hire that person, and I'd also like to get a copy of their resume once you've hired them.

- That's not a problem.

- [Maria] Okay, all right-

- Before we progress, are you asking for the resume before we actually hire someone?

- [Maria] No, no just afterwards. After you've done your hiring, I just need to know the name of the person, and their resume.

- No problem.

- I trust that you are going to hire somebody that is qualified. So, give me an example, you said the checks and balances you put in place, you said, like your proposal approval system, I'm assuming you're saying now that you've put one in place that there was not one in place before? Was it that the person who put together a proposal probably only had to go through one level of approval, and now are you saying there are multiple layers?

- That's correct, and I think that they weren't actually written out policies and procedures in terms of an approval system, so now anyone who steps into a position is well aware of what their responsibilities are.

- [Maria] Okay, I remember seeing that in the submission, thanks for refreshing my memory. Okay, is there anything else that you'd like to tell me about the changes that have occurred?

- I think that's it, I just wanna make sure to emphasize that we've put in all these different procedures and that I've come from a larger company, previously, when we were growing, and I was able to implement these procedures and policies there, and I think they really are working here.

- [Maria] So you do have experience in moving a company from that small business mindset to a larger business,

- Exactly.

- [Maria] and that's what you did before.

- And I believe that's why I was brought on, yes.

- [Maria] Okay, all right. And I understand that you also created an ethics and compliance division?

- That's correct, that Lori can talk more about.

- [Maria] All right, Lori. Ready to just talk to me about-

- Sure.

- [Maria] your ethics and compliance.

- Mike discussed previously that I do a presentation before the Board of Governors in their quarterly meetings, but there's an open-door policy that I am free to go directly to the Board of Governors, Mike, or to Sarah if I have any issues or concerns that need to be addressed immediately. When I first arrived, I did a comprehensive risk assessment and when we conducted it, I spoke with the CFO, the Chief Financial Officer, personnel, general counsel's office, talked to human resources division, external audits and internal auditors, some of our environmental health and safety people, but the program managers, and from there we determined where were the biggest risks, so that we could develop a strong ethics and compliance program.

- [Maria] So what did you find to be your biggest risk area?

- Well, there did need to be revisions in the Code of Conduct, but another part of it was, you know, Mike has been very supportive of our efforts to totally revise the tone at the top, the culture, and so one of the first things he did, is we did revise and strengthen our Code of Conduct. But he issued on top of that a letter to all employees saying, look everyone is held accountable. It doesn't matter if it's him as the CEO, or the Board of Governors, everyone is, and emphasized that there was a non-retaliation program. Although there was a hotline implemented, and you know we have a private contractor doing it, so there's anonymity, we didn't really see many complaints. And so we found that after Mike had issued this letter and said, we totally believe in a non-retaliation program, if you in good faith raise complaints, nothing will happen to you, and in fact Mike has, can probably explain to you, he actually has kind of a bonus program where it's a, you know, they're rewarded for coming forth.

- [Maria] Oh, really? Tell me about that Mike.

- Well, when I said before that we had a facially acceptable program before, we had the perfunctory training, but we have realized now that that is not sufficient. We had to weave in to the fabric of the culture itself, on a daily basis with different signals that the employees would clearly receive. Part of that is if we have a hotline complaint, or just a complaint where the person comes forward directly and it's validated that they identified a shortcoming, we have a bonus program and it's tiered basically to the degree of the potential damage to the corporate image of our company. Sometimes it's time off, sometimes it's cash. We have woven in to the annual evaluations the requirement for ethics and compliance issues. We also use the other half of the carrot, if you will, and that if we become aware of misconduct, that the employee is held accountable. We do not say, it was Jane or John but we mask the specific identity, but we put it on our blog so that the employees are aware that there is a reward for doing ethical things and there is a punishment for failure to comply with our cultural norm. And I've found that by working with Lori and Sarah, weaving it into the educational format, the operational format, the monitoring format, and giving day to day feedback, that it now is not just a paper program, it's not a box that's been checked. It is something that is actually part of our culture, and the employees have warmed to that. There was a little apprehension at first, but they have warmed to it now and they're actually coming forward. And sometimes they bring things to our attention that really isn't inappropriate, but that's not a bad thing because it let's us know that we need to work on our education to ensure that people understand things in context.

- Oh, that's good. Now back to Lori, the hotline. Well first of all, I tried the number and it works. You'd be amazed at sometimes we get these numbers and they're not in service. So yours works, that's a good thing, right? And second, just give me some examples of hotline calls you've received and how you handled it.

- A majority of the hotline complaints are personnel issues, complaints about the way a manager is supervising them perhaps. But occasionally we have had situations in which, we had an instance where somebody complained about time and attendance on a government contract. It was investigated promptly, we have investigative policies on how it's to be conducted. It was validated, and the employee, a 10 year employee, was fired. Because obviously it's a false claim as to the hours being performed for the government. And then it was posted on the intranet blog. It's only accessible by employees, but we give them instances of when the Code of Conduct has been violated, and what the consequences are, so that they do understand there's accountability. And we found that by taking a lot of the often-asked questions that are submitted to the hotline, and addressing it on the blog, you know if two or three employees have the same question, then probably everybody else is thinking it and just hasn't expressed it. So we use that blog just kind of as a way to communicate when there are concerns. I think it's opened up the air for employees to finally express things, I think morale has improved because of it.

- I agree wholeheartedly.

- Obviously some people were very concerned about Mr. Clark's conduct, no one felt free to say any comments, and we did, that was the first example on our intranet blog, was discussing what had happened, and the consequences. In addition we have a training program. Our ethics and compliance training program, which is mandatory for all employees. It is based on the risk inherent in those particular programs, so not everybody gets the exact same training, but in order to enforce it, what we did was, it's online training, there are questions asked, but failure to do so will mean that you don't get your next paycheck. And we found that it's a wonderful way of ensuring 100% compliance. Within 30 days of arriving at our company, Clark Industries, you have to complete the first preliminary ethics and compliance training.

- [Maria] And so there's a certification tracking process that-

- There is, they certify it, and then annually all employees must be trained.

- And if I could just add on, I wanted to make sure that you're aware, our Government Contracts Division has its own specialized training for that particular thing as well.

- [Maria] All right, that's good.

- And one of the benefits of our former CEO being indicted and removed from-

- [Maria] There's benefits?

- The benefit is that it showed the employees that people are accountable.

- [Maria] Right.

- Because before, there was, in hindsight I can say, things I didn't see then, there was the culture of actually advocating ethics and compliance, and having training, but there was this sense that maybe at the very top there was not buy-in. And so we've shifted radically in terms of the culture, and as Lori mentioned it has had a pronounced impact on the morale.

- [Maria] Okay, all right well that's good.

- Lori, I think if we could, could you provide a copy of maybe the introductory training program and the government contracts specific-

- We'd be happy to give you the powerpoints, maybe a sample blog?

- [Michael] Yeah, I think that'd be helpful.

- In addition to that, you mentioned the hotline usage. Could you provide those hotline usage reports to us as well?

- Certainly, we'll give you the hotline, the allegation, generally what response was done, and if any personnel action, or whether there were any program safety improvements or other program improvements were made, we'll give you the final result because we do track it. We found that when you track compliance, that's a way you make sure it's actually addressed in the end.

- [Dillon] Wonderful.

- So we've done that.

- [Dillon] Thank you.

- Thank you, so one of the things I've noticed since, Mr. Clark is the 100% owner of the company, or was the 100% owner of the company and he was convicted, I noticed there were no charges filed against the company, can you speak to that?

- Yes, I can do that, I'd be happy to. It will also allow me to highlight some of the other elements that shows our present responsibility.

- [Maria] Mm-hmm.

- Well we at the company knew nothing about Mr. Clark's actions until the day that his indictment was unsealed, and then we immediately took the action to start an internal investigation, which we shared with you in our response. We also brought in outside experts to help us with the investigation and conduct audits. Some of the things we had to find out were, was there anybody else involved in this misconduct? And also to find out if there was anything that happened that we still didn't know about, and take care of that. What we did uncover was a lot of the gaps that Lori and Sarah and Mike have already discussed, and taken the actions to correct those. But we also totally cooperated with the DOJ investigation, as a matter of fact we opened up all of our records and gave them full access to our employees, systems, and during their investigation they found that there was no other perpetrators involved and that there was no other misconduct that they uncovered, and so that's why they brought no charges to the company or anybody else in the company.

- Okay, well thank you. I understand Mr. Clark is no longer connected to the company, and so in that respect the source of the misconduct that led to this conviction has been eliminated. But I guess, Mike I'll direct this to you, being at the company the longest, do you think sufficient time has passed for the changes that you have put in place to take root, and the culture change that has to take place to ensure that you as a company continue to improve, and/or act ethically going forward?

- I will answer that in a bifurcated way. For today, yes, however if we do not continue with these changes on a day to day basis, incorporating it into the actual culture and fabric of the organization, even though that's where we are today, that may not be where we're at tomorrow or next week, but we are committed to doing this every day, working with Sarah and her team with operations and training, and Lori with compliance and ethics and training, and working with our counsel to make sure that we're cognizant of the laws, rules, regulations, specific requirements for each of our undertakings. As Sarah

pointed out, dealing with the government is very much different from dealing with the commercial setting. I will say this was deeply embarrassing for all of us at Clark Industry, I did a lot of soul searching as being the number two while this was going on. We realize now that we needed to, take additional steps, we've taken those steps. We understand we're a work in progress, any business is always going to be a work in progress. We screen people as effectively as possible during the hiring process, we have minimum training depending upon their job. We have minimum levels of ethics training, again depending upon the job. We have positive and negative rewards built into the evaluation system, the compensation system, but we understand that we have to remain vigilant, that this is a day by day forever situation if we're going to have our corporate image as one of integrity and honor, which is very important to us. And I know it must be important to you, because you have to know if you can trust us, and I sit here today and tell you, today you can definitely trust Clark Industries, and tomorrow you can rest assured we're still going to be ethical and honorable.

- [Maria] Well thank you. Does anybody have any questions? Is there anything I missed, or-

- Yeah, I just wanted to ask Barry, you mentioned the internal investigation. The internal report came from that, I think I remember it being in your submission, but I just wanted to double check.

- Yes, it was but we can always provide other copies if you need them.

- [Michael] No, that's good, I just want to make sure that we've seen it and-

- [Dillon] I do believe it was in the submission.

- [Michael] Great, excellent. And then, I just wanted to kind of wrap up the things that we've asked for you guys to submit after the meeting. The resume of whomever you hire in the Government Contracts Management position. A copy of the training and an example of the blog, and then the hotline usage report. Is that everything?

- Yeah.

- Yeah.

- Great.

- And if there's any other thing you think you need to submit, then please go ahead and do so. One last question about, you said you have the vacancy announcement out. About what's the time period you think you might have somebody on board for this new government contracts position?

- Well we would hope tomorrow, but we're looking within the next month. We want to make sure that we vet everyone and select the best candidate, so we're going to start the interview processes next week.

- And as you might imagine, with our government portfolio being 45% of our business, we're very anxious and nervous at this time, and I would ask if you have a projected timeline for when you will reach your decision?

- Okay, well what I can tell you is that based on the submission and our meeting today, that I believe that you have, first of all, you've addressed my concerns about the company culture, about the changes that you have made. I didn't know before coming to this meeting that Mr. Stark is no longer associated with the company.

- Mr. Clark.

- Mr. Clark, I'm sorry is no longer associated with the company, so that-

- Neither is Mr. Stark.

- That's good to know! That's good because it eliminates the biggest risk that you have, so that puts you in a much better position than I thought you were in before you came to meet with me. So, and I see that you've candidly answered my questions, you've admitted where there have been gaps, and where you're working on, and you've made the appropriate changes, and put the proper controls in place in the reporting relationship. So I think that's all good, I don't see any reason why I would take any administrative action against the company at this point at all. But what my decision will rest on, not rest on, I've made the decision, but the quicker you send me the documents that we've asked for, the record, the quicker we'll send you a letter terminating the review and letting you know that I've decided there's no need to take action at this time, and then of course I will follow up with the resume of whoever it is you hire for the position, but I just want to thank you so much for coming in to meet with me, and I appreciate the candor and the information you've passed on, and for alleviating the concerns that we have. All right?

- [Sarah] Thank you.

- [Mike] Thank you.

- [Lori] Thank you.

- [Barry] Thank you very much.

- Dillon will escort you out.

- Thank you very much.

- Hi, this is Maria Swaby again, and I'm the GSA Suspension and Debarment Official. Thank you for watching the role-play, and I'm going to spend a few minutes just explaining to you why in my eyes as the SDO, the role-play, the meeting with the SDO and the contractor was a success. Number one, they provided written materials a week in advance of the meeting. That gave me and my staff enough time to properly review the documents. The actual submission had laid out the corrective actions that the company had taken since the bribery conviction, and it went through the FAR 9.4 presently responsibility determinations and gave evidence as to why they were presently responsible. Second, the contractor brought the right people to the meeting. They brought people that were knowledgeable of the events that occurred at the company, people who were in charge, and who had the power to effectuate change. Also, during the meeting, the company representatives led the discussion, rather than the outside counsel. Another reason why the meeting was a success was that the company did not re-litigate the case that led to the conviction of Mr. Clark, the company actually accepted responsibility for his actions, and actually took responsibility for the gaps that were in their company culture and pointed out how they took care of those gaps by implementing remedial measures. This acceptance of responsibility allowed the SDO and the contractor to focus on the company's present and future responsibility, and did not spend time going over things that happened in the past. The other reason why the meeting was a success was because the company discussed in detail the changes that were made to the corporation during the time between the conviction and the meeting with me. They discussed for example, the changes in the corporate reporting structure, the institution of a Board of Governors and a reshuffling of staff to make sure that there was adequate management at the top. Also, the company used the right tone with the SDO. They spoke with candor, they were transparent, and they allowed the SDO to see into their company and their processes and they were very open and honest in their presentation. And finally, the company was prepared to address specific concerns that the SDO had. They talked about the corporate culture, they talked about training, ethics, compliance,

and they even talked about the fact that they have created a new Government Contracts Unit to separate their government contracts from their commercial business. Thank you for taking the time today and for watching these videos. I hope that they were informative and that you learned something. Thank you, again.

- We're glad you've taken the time to experience these great insights on suspension and debarment, and its practice in the acquisition process, but the learning isn't done. Now it's your turn. During our seminar we've been compiling questions that you've submitted using the survey link. We'll be back in a few moments to answer what we can. Stay tuned.

- [John] For our question and answer session, joining us are Maria Swaby and Michael Thompson from the U.S. General Services Administration. So let's jump into these questions we've received from our audience members. The first question up, what's the role of outside counsel, considering that the Suspension and Debarment Official specifically did not want to hear from lawyers?

- [Maria] Thanks John for that question. The outside counsel actually plays an important role in this process, even though he or she does not get to talk that much during the meeting. One of the major roles of the outside counsel is to prepare and submit the written submission that is given in to me a week in advance. Their role is to advise their client as to what elements the SDO will consider to make them presently responsible, and to help them through that process. For example, in the role play you saw that the company employed a new Chief Compliance Officer. That is something that the outside counsel can help advise the client on how to go about employing the proper Chief Compliance Officer. The other thing that is not obvious from the meeting, but a lot of contractors are very emotional about having a meeting with an SDO, they tend to be scared or angry when they get these notices, and it is the role of the outside counsel to calm the client down, kind of get rid of the emotion and get them to focus on the business matters that are of concern to the Suspension and Debarment Official and to properly address those during the meeting. The outside counsel also plays the important role of actually practicing with the client, how to present the information in the meeting since they know that the SDO really wants to speak to the contractor and not the attorney himself or herself.

- [John] Okay, so again, more the preparation role is what the counsel plays, as opposed to an active role during this meeting.

- [Maria] Correct.

- [John] Excellent, well, then let's take a look at our next question, question number two. Continuing to consider the scenario we just saw with Clark Industries, why did the sole owner allow the other employees to begin running his company? And what would happen after the meeting we just saw?

- [Michael] Thanks, John, for that question as well. So in many real world examples, if a single employee engages in a wrongdoing, then the contractors going to separate itself from that wrongdoing employee. Of course here in this example, the wrongdoing employee was actually the owner of the company, which is a unique and more difficult situation, but the contractor's owner was in the middle of a court case, couldn't effectively run the company, was actually already considering selling, of course this is all hypothetical, but this is based on real world examples that we have seen at GSA and other agencies. So the owner was embroiled in all these other things and kind of gave up control of the company, allowed other employees to begin taking over the company, so that the company could continue its government business, because we can't as stewards of taxpayer money, we can't allow convicted people who have done wrong things to continue to run companies that are going to be receiving public funds, receiving taxpayer money. So that's what the role of the Suspension and Debarment Official is to look into that, and so in this case once that separation happened, then Clark Industries is able to continue functioning as a government contractor. And then you had a follow up question there, what would happen next?

- [John] Yeah.

- [Michael] Right, so in Clark Industries they submitted a written response prior to the meeting, in that written response and in the meeting itself Clark Industries just was demonstrating to the Suspension/Debarment Official that it was presently responsible. Showing that it accepted responsibility for the actions that happened, that it had taken remedial measures, i.e. separating itself from the owner, and it had taken preventative measures to prevent this from happening again in the future. They talked about the new Office of Compliance and Ethics, the new Compliance and Ethics Officer, the extra power given to the now Senior Vice President, who is allowed to go around the President and the CEO if that person is a new wrongdoer, and go straight to the Board of Directors, so there's more controls, there's a whole ethics and compliance program, more training, so basically all of those things demonstrate to the Suspension and Debarment Official that Clark Industries is presently responsible, that they are going to be responsible members of the community, not just in relation to what already happened, but also going forward.

- [John] And, granted, this is a mock scenario, it's a made up scenario with what it is that we're looking at. So I was just looking at that question again, what would happen after the meeting we just saw? I wonder, is that, what would the Suspension and Debarment Official do, what decision would he or she make in that scenario? Because you've already said, the company has done an awful lot to, as you said, make themselves presently responsible.

- [Michael] Yeah, so likely this Suspension and Debarment Official can terminate review of the company, and in that case to formally terminate the review, the Suspension/Debarment Official would send a letter to the contractor in that case.

- [Maria] And let me just add, as you saw in this scenario, at the end of the meeting the Suspension and Debarment Official made it clear that the information presented during the meeting and as a result of the submission gave her enough comfort that they were presently responsible and she had decided then, not to take any action, and then she also told them that they would get a letter from her stating that the review was closed. So that's generally the next step. After the review is closed, the case is over, unless some new evidence comes in there's nothing else that's going to be done at that point with that company in terms of suspension and debarment.

- [John] Okay, that sounds good. Let's move on to our next question. Do all contractors who meet with a Suspension and Debarment Official avoid exclusion?

- [Maria] No. Suspension and Debarment is a case by case determination by the SDO. It's discretionary, and it's also based on the facts and the circumstances that are before the SDO to consider. So it is possible that a company, even when they meet with the Suspension and Debarment Official, or an individual, if they're not presently responsible, if the SDO can not deem that company or contractor presently responsible regardless of the meeting then that contractor or individual would be suspended or debarred.

- [John] Okay great, next question. Maybe a little bit more basic, I think it'll certainly help me out. What is the difference between suspension and debarment?

- [Michael] So that's a good question. Obviously suspension and debarment, we use that as the name of the entire process, the whole system, we call it Suspension and Debarment. But suspension and debarment are actually two actions that can be taken by the Suspension and Debarment Official. The first one, suspension, is usually- is a temporary measure, usually taken in conjunction with a court proceeding or an investigation by a criminal investigative body, the Office of the Inspector General, something like that, or even an investigation by a Suspension and Debarment Official's office, should that office engage in an investigation. So it's a temporary measure, and the evidentiary standard is lower than with a debarment. Evidentiary standard is called, in the regulations, adequate evidence, and this is very similar to the probable cause evidentiary standard we're all familiar with from watching Law & Order, basically is it more probably than not that- no I'm sorry, is it reasonably probable that this could have happened. So it's a lower evidentiary standard, and again it's temporary, it can't last more than a year with a few exceptions, and it's usually in conjunction with a court proceeding. And a great example of something that would meet that standard would be a criminal indictment or criminal information that's the courts- that persay meets our evidentiary standard for suspension. Debarments are a longer term, final action, and it's used when basically the court proceeding is over, or all the facts in the record have been completed. The evidentiary standard there is called preponderance of the evidence, and that is the 50% plus. This is the same as a civil court evidentiary standard, and that's the more probable than

not standard. So if it's more probable that it happened than it didn't, then that meets the standard of preponderance of evidence. By rule, any criminal or civil judgement meets that standard from a court, so we can use that information to then take the debarment and those facts are then set because they're set by the court. The debarments usually last three years, they can last shorter or longer depending on mitigating or aggregating factors, and that's up to the discretion of each Suspension and Debarment Official each time. But, again, so basically suspension is temporary, about a year, debarments are a final action and they're usually three years, and they have a higher evidentiary standard.

- [John] Okay, and you touched on this in your answer a bit before, I didn't ask it here but now I do. Do reports from Inspectors General generally support suspension or debarment?

- [Michael] Right, so our referral from the Inspector General's office or from the acquisition workforce, or information gathered from the media, or anywhere. Any referral that goes to Suspension and Debarment Official can support either suspension or debarment or one of the non-exclusionary actions the Suspension and Debarment Official can take. It all depends on what evidentiary standard is met. If the referral from the Inspector General includes an indictment and nothing more than that would satisfy suspension. If there's no court case at all, then it becomes a question of how many facts are here? Is this more probable than not, or is it just probably true under the adequate evidence standard, so would it be preponderance of the evidence or adequate evidence, debarment or suspension? If it's a criminal conviction forwarded to us by a Contracting Officer, that would meet the preponderance of the evidence standard and that would support a debarment. So it just depends on what evidence is included in whatever report we get from whatever entity submits that referral.

- [John] Great, great. Now getting to the next question, more on I suppose, the process of suspension and debarment. According to the Federal Acquisition Regulation, or FAR, notices from Suspension and Debarment Officials must be sent by Certified Mail. What happens if the notice is returned "refused"?

- [Maria] Okay, so if the notice is returned refused for Suspension and Debarment purposes that is deemed as adequate notice having been served. The fact that the contractor or individual chooses to ignore the notice, or not pick up the notice, or give back the notice does not negate the fact that notice was given, so refused means notice given.

- [John] Easy enough, straight forward. Don't refuse those notices. Is there anything a contractor could do that would require the Suspension and Debarment Official to suspend or debar the contractor?

- [Michael] So that's a good question. We operate here at GSA under FAR 9.4, Federal Acquisition Regulation 9.4 and there's a bunch of causes listed there, but they're all considered discretionary debarment. So you heard Maria use that term earlier, what that means is the Suspension and

Debarment Official gets to choose whether or not to take that action, and that's going to be based on facts, not a whim. But based on the facts of the case, is it necessary to protect the governments interests by suspending or debarring this specific contractor? So that's a discretionary debarment, and the same is true under what's called the Non-procurement Common Rule which is used for grants and other sorts of federal awards, people, companies, entities that receive those types of awards can also be suspended or debarred, again, based on a bunch of causes. Again, that's discretionary. So under those two regimes, no there is nothing that would require the Suspension and Debarment Official to suspend or debar the contractor, it's always a question of, what are the facts? What does the government's interest require? However, there are some statutory causes for debarment that do require a suspension or debarment action to be taken. Those include violations of certain environmental laws like the Clean Air Act, the Clean Water Act, as well as certain types of Medicare and Medicaid fraud, and there are some others as well including some tax convictions related to Department of Defense contractors, and various other ones, so there are some statutory ones that require, if this conduct happens, then this contractor will be debarred. However, that's not the most. The loins share of the debarments that you hear about are the ones that are done under FAR 9.4 or the Non-procurement Common Rule. And those are ones that are all discretionary, and it's all based on the facts.

- [Maria] And let me just add a point of clarification. Although, the vast majority of suspension and debarments we do here are the discretionary ones, but the vast majority of exclusions or suspensions are actually the required statutory ones. Just to be clear of that.

- [Michael] Yeah, a lot happens under Medicare and Medicaid fraud, there are lots of people that do that, and those are individual doctors or individual medical clinics, and a lot of those happen really quick. They're very easy because there's no question, they just happen, and you're right the vast majority of ones that are taken are those, but those are the ones that are simple and easy, and there's not much to argue because the statues require- it's out of the hands of the Suspension and Debarment Official at that point.

- [John] Very good. The next question has to do with actually one of the resources that we've posted with today's presentations and that is, the best practices for meeting with an SDO or Suspension and Debarment Official. It states that the contractor should never engage in re-litigating a case before an SDO. What does that mean?

- [Maria] Great question. Let me just give you some context before I answer that question. In those cases, most we're referring to suspension or debarment actions based on for example, a criminal conviction. So if there's been a criminal conviction, there has been a court case where you have argued and defended your case and litigated your case, and you've argued what the facts are. A court of law has determined that, based on whatever it is that was presented that this contractor is guilty of a crime. And so that's a fact, that's determined, that's an open and shut case. When you come before the Suspension and Debarment Official the Suspension and Debarment Official is not interested in you going over the

same material you went over in court to prove your innocence or guilt. That's already been established. What the Suspension and Debarment Official is interested in is having a conversation about what it is that he or she's concerned about in terms of protecting the government's interests. So it's not meant to be a litigious or unpleasant meeting, or it's not meant to be contentious at all. It's meant to put aside whatever emotions there are and to actually deal with the business aspects of the case and the concerns of the SDO. And that's why the SDO focuses on the present going forward, and acknowledges the past, but doesn't spend time in the meeting going over that, because that is not the point of her meeting with the contractor.

- [Michael] You know Maria, I've heard you explain before that a bad act is an indicator that a bad act occurred and could happen in the future, and then your job is just to see, to make sure that there are sufficient controls in place now to prevent that bad act from reoccurring.

- [Maria] Right.

- [Michael] So you're focused on today and tomorrow, not yesterday.

- [Maria] Right, correct.

- [John] Now looking at, say, an entire Suspension and Debarment Office and what it has to deal with throughout the year, what percentage of contractors who are referred to the Suspension and Debarment Official end up being suspended or debarred in a typical year?

- [Michael] Well John, that's a hard question. That varies widely in each year and at each agency because each decision by a Suspension and Debarment Official is unique, it's based on that specific contractor and the specific facts, so the percentage varies based on the nature of the cases referred to each agency's Suspension and Debarment Official each and every year. Speaking for my agency, the General Services Administration only, the vast amount of cases referred to Maria, our Suspension and Debarment Official, for consideration result in some action by Maria. Whether that action is an exclusion, a suspension or debarment, or a non-exclusionary action such as a show cause letter and/or a meeting. A good example of a referral that resulted in a non-exclusion action is the mock meeting we just saw with Clark Industries. Their Suspension and Debarment Official, Maria in her role as the mock Suspension and Debarment Official sent Clark Industries a show cause letter, Clark Industries came in and showed that it was presently responsible, no exclusion resulted. However, the Suspension and Debarment Official did take action, and those actions resulted in Clark Industries, in this hypothetical scenario, realizing how seriously this type of misconduct is taken by the Federal Government and becoming a better contractor, putting in a lot of those controls that it needed all along, but just didn't know, and moving forward as a better member of the procurement community.

- [John] Right, because I guess you might say, you're not grading on a curve, there aren't a certain set of contractors you want to suspend, debar, exclude from competing. You want them all to be able to participate.

- [Michael] Yeah, if we suspend or debar every contractor then we can't procure anything, so Suspension and Debarment Official always has to- always is looking to make people as presently responsible, if they are, find them presently responsible, help them become presently responsible. And only in the cases where it's necessary to protect the government's interests, exclude them from further business with the Federal Government.

- [John] Very good. Well unfortunately, we need to stop there because that's all the time that we have for today. But I'd like to thank you, our viewers, for the fantastic follow-up questions and certainly our speakers, Maria Swaby and Michael Thompson.

- [Maria] Thank you.

- [Michael] Thank you, John.

- As always, we hope you found today's seminar very educational and useful in de-mistifying Suspension and Debarment. And now we'd also like to extend a hand to our colleagues in industry to share advice on meeting with a Suspension and Debarment Official should you ever find yourself in that position. If you're a contractor meeting with a Suspension and Debarment Official, keep in mind that the meeting is for three things. It's for you to present matters in opposition to an exclusionary action, provide information requested, and disclose misconduct or violations and what you and your company are doing to correct them. One final bit of advice, is that you should never try to engage in re-litigating a case before a Suspension and Debarment Official. That decision has already been made. What's important now is understanding how and why that decision came about, and what you and your company can do to properly respond. Once again, the Federal Acquisition Institute thanks you for your time and your attention.