

**February 2012 National 8(a) Winter
Conference Current Issues in
Federal Suspension and Debarment**

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Perkins Coie

- Offices: 18 across the United States and China, including Anchorage, Seattle and D.C.
- Perkins has represented ANCs for well over 30 years
- Perkins has a strong government contracts practice
- Law360 Government Contracts Group of 2010
- web based resources for government contractors
- http://www.perkinscoie.com/government_contracts/

Suspension and Debarment Agenda

- Suspension and Debarment Basics
- Suspension and Debarment Strategy Issues
- Suspension and Debarment 8(a) Issues

Procurement Suspension and Debarment Basics



Types of Suspensions and Debarments

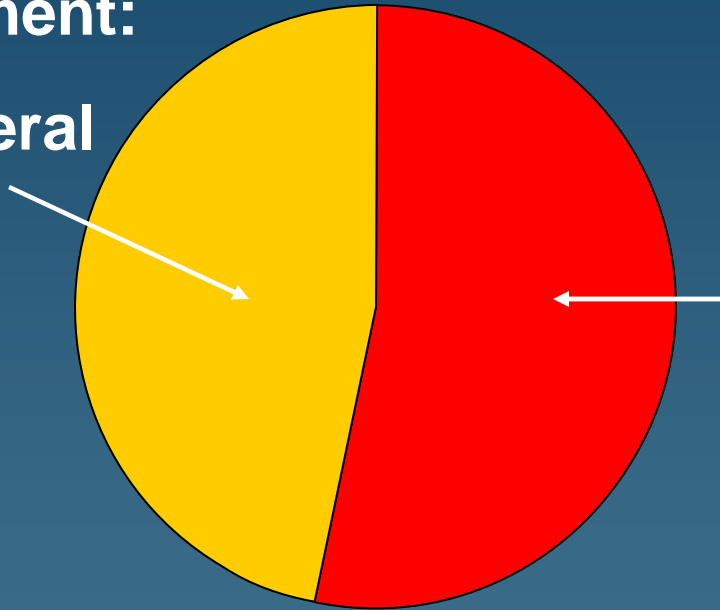
- Administrative
 - Procurement (Federal Acquisition Regulation)
 - Non-Procurement (Non-Procurement Common Rule)
 - Government-wide effect (E.O. 12689)
- Statutory

Basis of Administrative EPLS Cases, Fiscal Years 2006 through 2010

47%

Non-procurement:

**Based on federal
grants and
assistance
regulation**



53%

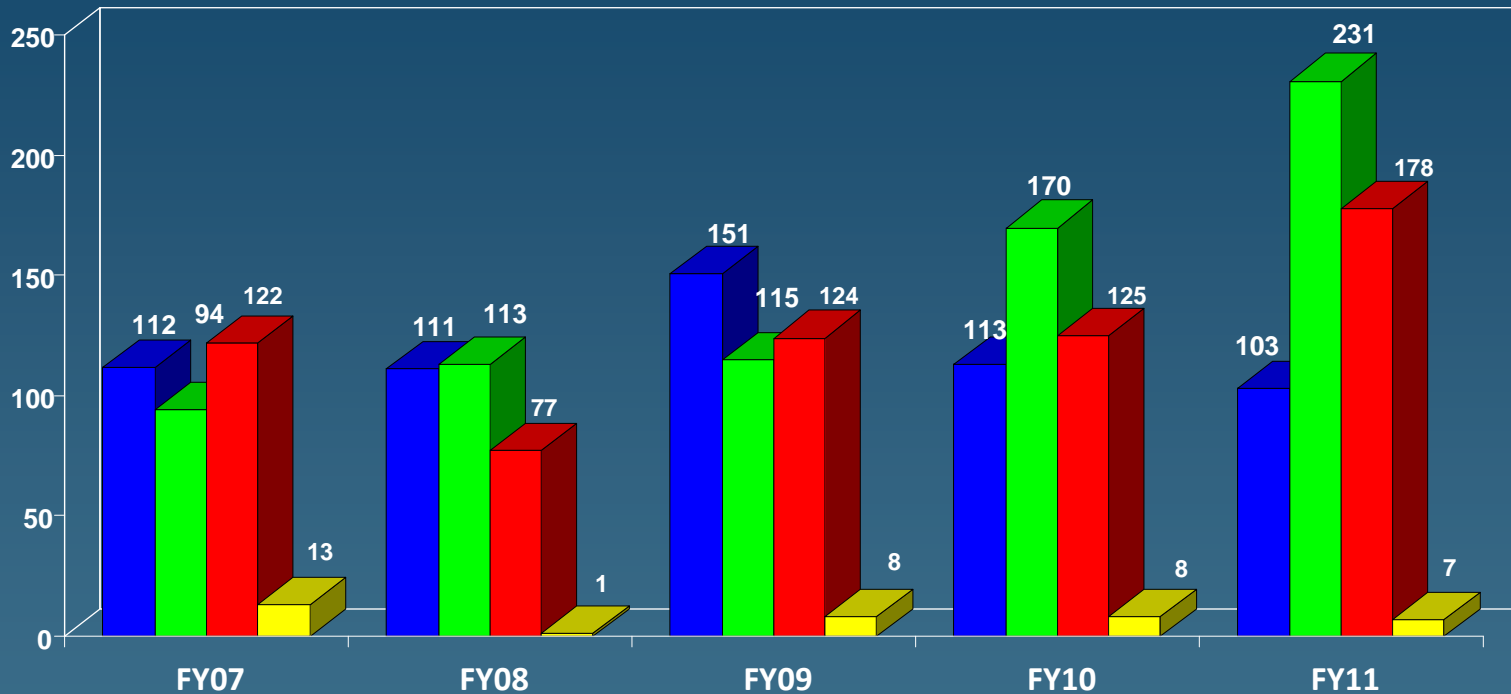
Procurement:

**Based on
Federal
Acquisition
Regulation
(FAR)**

EPLS Procurement Suspension and Debarment Select Agency Cases 2006-2010

DoD	1,592
GSA	269
DHS	116
Interior	94
NASA	41
Nat'l Science Fndtn	40

Army Suspension & Debarment Statistics



SUSPENSIONS
DEBARMENTS

PROPOSED DEBARMENTS
ADMINISTRATIVE COMPLIANCE AGREEMENTS

FAR 9.4 – Debarment, Suspension, and Ineligibility

- Policies and procedures governing suspension and debarment of contractors
- Provides for the listing of contractors on the Excluded Parties List System ("EPLS")
- Sets forth the consequences of EPLS listing

FAR 9.4 Policy

- Protect the U.S. Government
 - Integrity of contracting process
 - Quality goods and services
- In the public interest
- Not punishment



"Suspension and debarment are prospective remedies, in which past misconduct or unsatisfactory performance provides the context and insight to the contractor's present and future responsibility."

Statement of Mr. Uldric Fiore, Jr.
Suspension & Debarment Official
Department of the Army (Feb. 28, 2011)

FAR 9.4 Standard

- "Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only"
- Standard is "Present Responsibility"
 - Past conduct/performance
 - Prospective

Causes for Suspension FAR 9.407-2

Adequate Evidence of:

- Fraud or crime in connection with a public contract
- Antitrust violation relating to submission of offers
- Embezzlement, bribery, false statements, tax offenses, etc.
- Drug-Free Workplace violation
- False “Made in America” inscription
- Unfair trade practice
- Delinquent taxes
- Failure to disclose credible evidence of criminal or False Claims Act violation or overpayments
- Any other offense affecting present responsibility

Causes for Debarment FAR 9.406-2

- Conviction or Civil Judgment
 - Fraud or crime in connection with a public contract
 - Antitrust violation relating to submission of offers
 - Embezzlement, bribery, false statements, tax offenses, etc.
 - False “Made in America” inscription
 - Any other offense affecting present responsibility
- Preponderance of Evidence
 - Serious violation of Gov’t contract terms
 - Drug Free workplace violation
 - False “Made in America” inscription
 - Unfair trade practice
 - Delinquent taxes
 - Failure to disclose credible evidence of criminal or FCA violation or overpayment
- Any other offense affecting present responsibility

"If . . . actionable misconduct did occur and the contractor failed to meet its burden of demonstrating its present responsibility, the contractor likely will be debarred or suspended. If, on the other hand, the contractor proves that it is presently responsible, then the S&D official can decide debarment is not necessary to protect the government's interests, and either terminate the action or require the contractor to enter into an administrative agreement, in lieu of debarment, DFARS 209.406-1(a)(i)."



Steve Shaw, Deputy General Counsel (Contractor Responsibility), Department of the Air Force

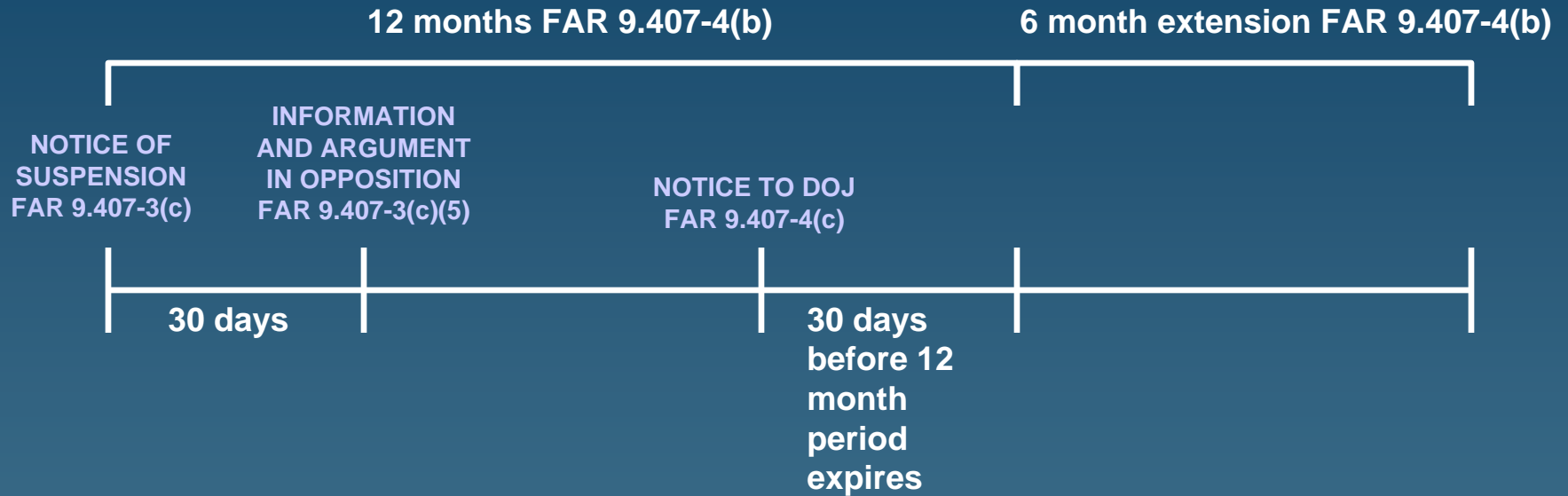
Suspension and Debarment Process



Suspension (FAR 9.407)

- Temporary and indefinite exclusion from contracting
 - Immediate action necessary to protect the Government's interests
 - Generally not to exceed 1 year, poss. 6 months
 - During pendency of investigation or proceeding
- "Adequate Evidence" of non-responsibility
 - Akin to "Probable Cause" standard
 - Indictment for any of causes for suspension constitutes adequate evidence
 - Judicial or Fact-Based
- If not based on an indictment, the contractor has opportunity to present evidence
 - Within 30 days of notice

Suspension Timeline



Proposed Debarment (FAR 9.406)

- Temporary and Indefinite exclusion from contracting
 - Usually following investigation or judicial proceeding
- Basis: "Preponderance of Evidence"
 - Judicial or Fact-Based
- If not based on an indictment, the contractor has opportunity to present evidence
 - Within 30 days of notice
- On the EPLS (i.e. excluded) even if only "proposed" for debarment

Mistake of Law or Fact



Debarment (FAR 9.406)

- Permanent exclusion from contracting for a specified period
 - Generally not to exceed 3 years
- Basis: "Preponderance of Evidence"
 - Judicial
 - Fact-Based
- Factors to be considered – FAR 9.406-1
- Written decision
 - Following opportunity to respond
 - Judicial review available in U.S. District Court

Excluded Parties List System




Excluded Parties List System - Microsoft Internet Explorer provided by General Services Administration

File Edit View Favorites Tools Help

Back Forward Stop Home Search Favorites Refresh Print Mail

Address <http://www.epls.gov/>

EPLS



Search - Current Exclusions

- > Advanced Search
- > Multiple Names
- > Exact Name and SSN/TIN
- > MyEPLS
- > Recent Updates

[View Cause and Treatment Code](#)

Introduction

This World Wide Web site is provided as a public service by General Services Administration (GSA) for the purpose of efficiently and conveniently disseminating information. Parties listed on the Excluded Parties List System (EPLS) are excluded from receiving Federal contracts, certain subcontracts, and certain financial and nonfinancial assistance and benefits, pursuant to the Executive Order, E.O. 12549, E.O. 12689, 48 CFR 9.404, and each agency's Rule for Nonprocurement suspension and debarment.

Security Notice

EPLS

- Contractors debarred, suspended, or proposed for debarment
- Ineligible based on statutory or other regulatory procedures
- Exception to exclusion if agency head makes determination in writing

Effect of EPLS Listing

FAR 9.405

- Agencies shall not solicit offers from, award contracts to, or consent to subcontracts unless the agency determines there is a compelling reason to do so
- After the opening of bids or receipt of proposals, the CO shall review the EPLS
 - Reject bids from EPLS-listed contractors
 - Not evaluate or hold discussions from EPLS-listed contractors regarding proposals, quotations, or offers

Continuation of Current Contracts

FAR 9.405-1

- Agencies may continue contracts or subcontracts in existence unless the agency head directs otherwise
- Any termination action requires internal agency review
- BUT - Ordering activity shall not (unless the agency determines compelling reasons to do so):
 - Place orders that exceed the guaranteed minimum of IDIQ contracts
 - Place orders under optional use contracts
 - Add new work, exercise options, or otherwise extend duration of current contracts/orders

Restrictions on Subcontracting

Consent Subcontracting - FAR 9.405-2(a)

- General rule is that you cannot enter new subcontracts with ineligible contractors
- When an ineligible contractor is proposed as a subcontractor subject to the Government's consent (FAR 44.2), the CO *shall not consent* except for compelling agency reasons

Restrictions on Subcontracting By Contract Clause - FAR 9.405-2(b)

- CO shall insert clause 52.209-6 in solicitations and contracts > \$30,000 (FAR 9.409)
- "Protecting the Gov't's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment"
- Contractor must require each proposed subcontractor (> \$30,000) to disclose whether they are ineligible

Restrictions on Subcontracting By Contract Clause - FAR 9.405-2(b)

- Contractor shall not enter into subcontract with ineligible subcontractor unless compelling reasons to do so
- Contractor shall notify CO of compelling reasons before entering into subcontract with ineligible subcontractor
- Unless the contract is for commercial items, clause 52.209-6 must be flowed down if:
 - > \$30,000
 - Not for COTS items

Subcontractor Issues



New Developments

- 2011 GAO Report
 - Surveyed 10 agencies
 - More than half were lacking in S&D capability
 - No dedicated staff, internal guidance, referral processes
 - Improve S&D and oversight Gov't-wide
- Nov. 15, 2011, OMB issued memo seeking to remedy agency deficiencies
 - May result in more aggressive agency actions

Suspension and Debarment Proceedings Strategic Considerations

Suspension and Debarment Process

- Notice of Suspension
- Notice of Proposed Debarment
- Right to an opportunity to submit evidence and to a hearing

Before the Process Begins

- If a contractor is dealing with issues that may be referred to the Suspension and Debarment official (SDO) (investigation, indictment, conviction), consider early communication to begin shaping the perspective of the SDO

Suspension and Debarment Official (SDO)

- Understand the SDO's responsibility
 - Not to punish, but to protect the federal agency
 - Assess the present responsibility of the named party
 - Once the SDO has suspended a party or proposed a party for debarment, the practical burden to demonstrate responsibility shifts to the named party

Suspension and Debarment Official (SDO) (cont)

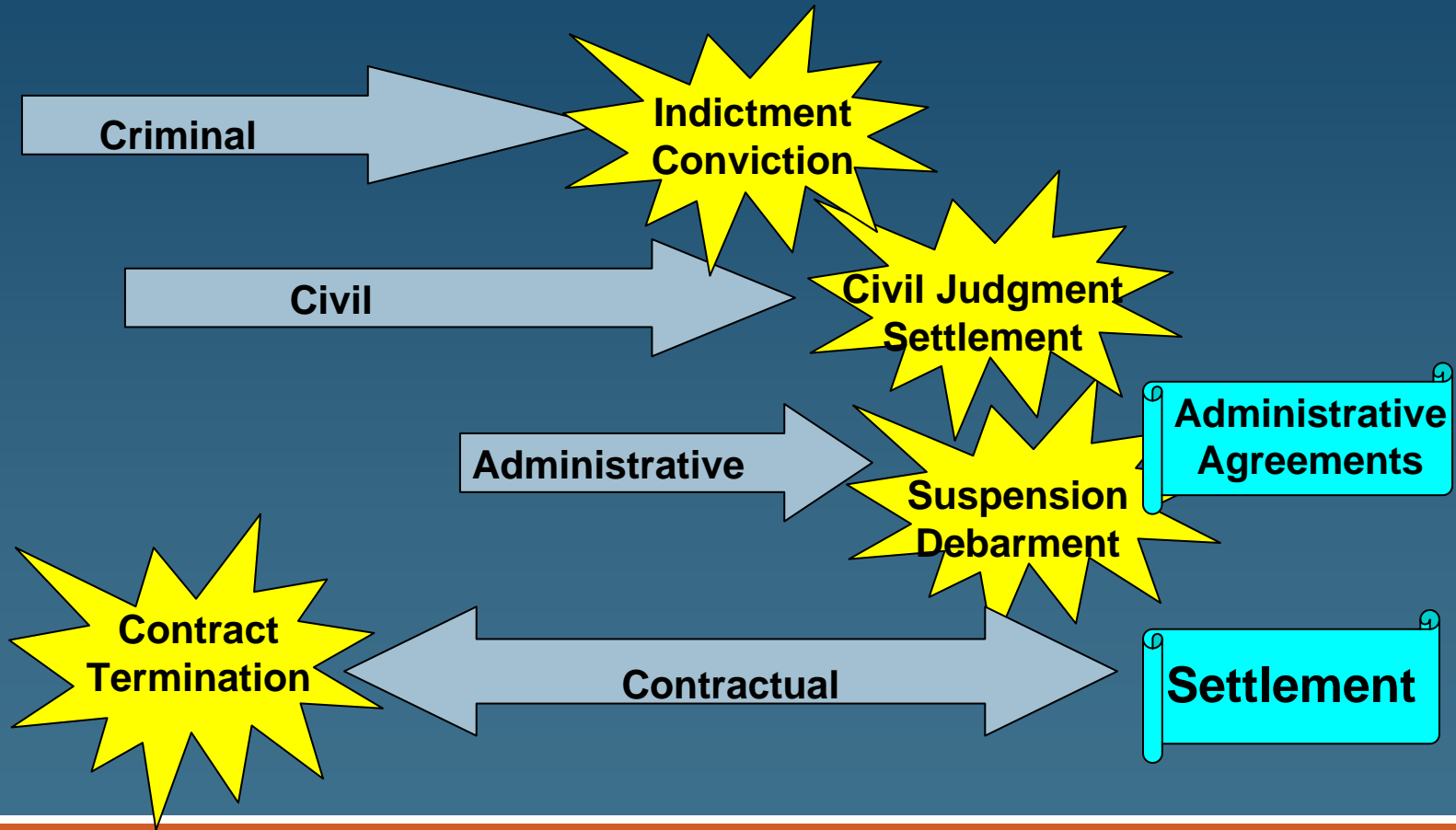
- Recognize the SDO's discretion
 - Responsibility is a subjective assessment
 - SDO final action is subject to review, but historically difficult to reverse
 - SDO has authority to debar for extended periods – one Army debarment was for 14 years
 - Act with deference, show respect, listen and respond to suggestions

Agency Options

- Show Cause Letters / Requests for Information
- Administrative Agreements
- Narrow scope of the debarment
- Expand scope of debarment
 - Affiliates
 - Imputation
 - Joint Venture

Coordination of Remedies

Actual Parallel Process



Government Coordination of Remedies

- Suspension and debarment activity is monitored by Government fraud counsel
- Early suspension and debarment can “enhance” parallel criminal and civil proceedings for Government or vice versa
- Government does not have a policy of global settlements

FAR Mitigation Factors

- Debarment – FAR 9.406
- Suspension – Uses the same factors as debarment
- A contractor has to consider which mitigation factors it has satisfied or can satisfy prior to presentation of its position and then implement the mitigation factors, as appropriate in the individual case

FAR Mitigation Factors (cont)

- Whether the contractor:
 - Had effective standards of conduct and internal controls
 - Brought the matter to the Government's attention in a timely manner
 - Has fully investigated the matter and made the results of the investigation available to the Government

FAR Mitigation Factors (cont)

- Whether the contractor:
 - Cooperated fully with the Government
 - Has paid or agreed to pay all liability including costs of investigation and full restitution
 - Taken appropriate disciplinary action against the responsible individuals
 - Has implemented remedial measures

FAR Mitigation Factors (cont)

- Whether the contractor:
 - Has instituted new or revised review and control procedures
 - Has had adequate time to eliminate the offending circumstances within the contractor's organization
 - Whether management recognizes the seriousness of the misconduct and implemented remedial programs

FAR Mitigation Factors (cont)

- The existence/nonexistence of any single mitigating factor is not necessarily dispositive
- Contractor must demonstrate to SDO's satisfaction that it is presently responsible and that suspension or debarment is unnecessary

Administrative Agreements

- Used as alternatives to debarment
- Typical Contractor Obligations
 - Contractor admits wrongful conduct
 - Separation of bad actors
 - Agreement to provide restitution
 - Implement/extend compliance programs, process and/or internal controls
 - Employee training

Administrative Agreements (cont)

- Typical Contractor Obligations (cont)
 - Outside ombudsman/auditor
 - Reporting obligations to the federal agency
 - Access to records by the federal agency
- Typical Agency Commitments
 - Lift suspension and forego debarment
 - Reserve right to impose these sanctions if contractor fails to comply with Agreement or engages in further misconduct

Trends

- Criticism of SDO's for not doing enough to protect Government (Congress, GAO, IG)
- Suggestions include
 - Agencies need not wait for indictments or convictions in order to act
 - Suspensions should be mandatory and automatic for certain indictments/violations
 - Prohibit DOJ from making any promises regarding suspension and debarment

Special Considerations for the 8(a) Contractor

Special Considerations for the 8(a) Contractor

- SBA 8(a) program has certain admission requirements
- SBA regulations state that “good character” is required for admission into the program. Good character means: (1) no past / present criminal conduct; (2) no debarment or suspension; and (3) no violations of SBA rules
- If statements on admission application are not true there are consequences

SBA 8(a) Suspension: 13 CFR 124.305

- Following a notice of intent to terminate participation in the 8(a) program, the SBA may suspend a participant when the SBA determines that suspension is needed to protect the interests of the Federal Government
 - Clear lack of program eligibility
 - Conduct indicating a lack of business integrity
 - Biggie: false statements to the Federal Government

SBA 8(a) Suspension: 13 CFR 124.305 - Notice

A notice of suspension will provide the following information the basis of the suspension and that

- Suspension is immediate and will continue pending:
 - completion of further investigation
 - a final program termination determination,
 - or some other specified period of time;
- 8(a) contracts, will not be made during the pendency of the suspension unless
 - it is determined by the head of the relevant procuring agency or an authorized representative to be in the best interest of the Government to do so,
 - and SBA adopts that determination;

SBA 8(a) Suspension: 13 CFR 124.305 - Notice

- Company must complete previously awarded section 8(a) contracts
- Suspension is effective throughout SBA
- A request for a hearing on the suspension will be considered by an Administrative Law Judge at OHA, and granted or denied as a matter of discretion
- The program term will resume only if the suspension is lifted or the firm is not terminated

SBA 8(a) Suspension: 13 CFR 124.305 - Appeal

- A company can appeal a suspension decision
 - the suspension remains in effect during appeal
- On appeal, the SBA has the burden of showing that "adequate evidence" exists for the suspension
- "Adequate evidence"
 - Information in the record before SBA
 - Sufficient to support the belief that suspension is necessary
- SBA need not demonstrate that an act or omission actually occurred

SBA 8(a) Termination: 13 CFR 124.303

- The SBA can terminate a company's participation in the 8(a) program if the contractor or its principles is debarred or suspended under the FAR
- The SBA may also terminate a company's participation in the 8(a) program for other reasons, including conduct by the company, or a principal of the company, indicating a lack of business integrity
- Such conduct may be demonstrated by information related to a criminal indictment or guilty plea, a criminal conviction, or a judgment or settlement in a civil case

SBA 8(a) Termination: 13 CFR 124.303 - Examples

- False information on 8(a) application
- Failure by the company to maintain its eligibility for program participation
- Failure by the company for any reason, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals-including death; [ownership/control]

SBA 8(a) Termination: 13 CFR 124.303 - Examples

- Failure to get pre-approval for material changes
- Failure to disclose to SBA the extent to which non-disadvantaged persons or firms participate in the management of the Participant business; Failure by the company or one or more of the company 's principals to maintain good character
- Pattern of failure to make required submissions or responses to SBA in a timely manner

SBA 8(a) Termination: 13 CFR 124.303 - Examples

- Cessation of business operations
- Failure by the company to pursue meet mix (BAT) requirements, not meeting business plan
- A pattern of inadequate performance by the company of awarded section 8(a) contracts
- Failure by the company to pay or repay significant financial obligations owed to the Federal Government
- Failure by the company to obtain and keep current any and all required permits, licenses, and charters, including suspension or revocation of any professional license required to operate the business

SBA 8(a) Termination: 13 CFR 124.303 - Examples

- Excessive withdrawals
- Misuse of SBA loan or violation of loan agreement
- Submission by or on behalf of a Participant of false information to SBA, including false certification of compliance of mix requirements or failure to report changes that adversely affect the program eligibility of an applicant or program participant under where responsible officials of the 8(a) Participant knew or should have known the submission to be false

SBA 8(a) Termination: 13 CFR 124.303 - Examples

- Debarment, suspension, voluntary exclusion, or ineligibility of the company or its principals
- Conduct by the company, or any of its principals, indicating a lack of business integrity.
- Willful failure by the Participant to comply with applicable labor standards and obligations
- Material breach of any terms and conditions of the 8(a) Program Participation Agreement
- Willful violation by a company, or any of its principals, of any SBA regulation pertaining to material issues

Summary

- Suspension and Debarment are scary words
- Know what it means and how to get help
- Know who can help and how quickly you must act
- Consider opening dialogues with agencies and SBA with appropriate consultation

Summary

- Consider mitigation factors
 - How quickly did you act once a problem was discovered
 - Do you need to self report
 - What types of programs do you have in place to monitor compliance
 - FAR Regulations
 - SBA Regulations and Reporting
 - Specific Contract Terms

Questions or comments, please write, call or email:

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