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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

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# Examining and Dispelling Common Misconceptions About Suspension and Debarment

***By Dominique L. Casimir****

*This article explores 10 common misconceptions about suspension and debarment, with the aim of helping contractors understand the landscape and respond effectively.*

Contractors are well aware that being suspended or debarred renders them ineligible for federal contracts and subcontracts. Many contractors may believe that suspension and debarment are not realistic risks for them if they already have a robust ethics and compliance program or strong internal controls.

Nevertheless, the risk of suspension and debarment can crop up suddenly and unexpectedly, such as when misconduct has been concealed or errors have gone undetected. For this reason, contractors should have a baseline understanding about what to do if they must engage with a suspending and debarring official ("SDO").

This article explores 10 common misconceptions about suspension and debarment, with the aim of helping contractors understand the landscape and respond effectively.

## COMMON MISCONCEPTION #1: WE HAVE ALREADY SETTLED WITH ANOTHER AGENCY AND PAID A FINE, SO WE WILL NOT BE SUSPENDED OR DEBARRED.

*Reality check*: Many contractors that enter into settlement agreements with the government look forward to a fresh start. It can therefore come as a surprise when an SDO then sends a show cause notice or a notice of proposed debarment asking for an explanation of the events that led to a settlement agreement. SDOs can do this because criminal and civil settlement agreements are not binding on them. While criminal and civil settlements resolve liability for past misconduct, suspension and debarment aim to protect the government from the risk of *future* contracting with entities that are not presently responsible. Thus, when contractors or counsel refer to "global settlement," this phrase typically expressly excludes suspension and debarment.

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* Dominique L. Casimir, a partner in the Washington, D.C., office of Blank Rome LLP, concentrates her practice on government contracts litigation and counseling. She may be reached at dcasimir@blankrome.com.

The SDO will regard a settlement agreement and payment of a fine as one factor to be weighed in deciding whether to suspend or debar.[1] A contractor should be prepared to demonstrate that it is presently responsible by providing a fulsome submission addressing its internal controls, ethics and compliance function, management structure, employee training, etc. Simply directing the SDO to a prior settlement agreement as evidence of present responsibility will not work.

**COMMON MISCONCEPTION #2: WE SHOULD LAY LOW RATHER THAN PROACTIVELY TELL THE SDO ABOUT OUR PROBLEM.**

*Reality check*: A contractor may be reticent to disclose its mistakes to the government for fear of the consequences that may follow. The "lay low" strategy may seem appealing, but it has significant drawbacks.

In the first instance, the mandatory disclosure rule in Federal Acquisition Regulation ("FAR") 52.203-13(a)(3) may already require the contractor to make a disclosure to the government. If so, there may be no real benefit to laying low, because the Office of the Inspector General and the contracting officer can, and usually do, refer mandatory disclosures to the SDO.

Second, even if the mandatory disclosure rule does not apply,[2] the contractor code of business ethics and conduct, may require the contractor to make a disclosure. For instance, FAR 3.1003(a)(2) states:

> Whether or not the clause at 52.203-13 is applicable, a contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act . . . .

Third, self-reporting an issue to the SDO actually helps the contractor show that it is presently responsible. SDOs consider "whether the contractor brought

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[1] *See* FAR 9.406-1(a) (5) ("Before arriving at any debarment decision, the debarring official should consider such factors as the following: . . . (5) Whether the contractor has paid or agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative administrative costs incurred by the government, and has made or agreed to make full restitution.").

[2] FAR Subpart 3.10.

the activity cited as a cause for debarment to the attention of the appropriate government agency in a timely manner."[3]

Fourth, SDOs and their support staff monitor both the news and government enforcement actions. They may independently uncover the cause for potential suspension or debarment and realize that the affected contractor is choosing to remain silent. The SDO may view the contractor as less than forthcoming, which may make it difficult to resolve the matter on favorable terms.

## COMMON MISCONCEPTION #3: WE ARE TOO BIG AND/OR TOO CRITICAL TO THE GOVERNMENT TO BE SUSPENDED OR DEBARRED.

*Reality check*: Some contractors mistakenly believe that they cannot be suspended or debarred because their products or services are indispensable to the government. Such complacency is unwarranted. Even when a particular contractor is important to the government, an SDO can nevertheless suspend that contractor or propose it for debarment, and if the contractor's products or services are truly indispensable to an agency, the head of that agency can issue a compelling circumstances waiver.[4]

Additionally, because agencies are not required to terminate existing contracts with entities that are suspended or debarred,[5] agencies are not immediately deprived of any truly necessary products or services provided by an excluded entity. Thus, SDOs are able to protect the government's interests without necessarily depriving the government immediately of a necessary source.

Accordingly, while a contractor facing potential suspension or debarment should be prepared to explain to the SDO the nature of any mission-critical work it does for the government, they should not assume that such work makes them immune to suspension or debarment.

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[3] FAR 9.406-1(a)(2).

[4] *See* FAR 9.405(a) ("Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action (see 9.405-1(b), 9.405-2, 9.406-1(c), 9.407-1(d), and 23.506(e))."

[5] FAR 9.405-1(a).

**COMMON MISCONCEPTION #4: WE ARE A LOWER TIERED SUBCONTRACTOR, VENDOR, OR SUPPLIER, SO WE CANNOT BE SUSPENDED OR DEBARRED.**

*Reality check*: While it is generally well known that subcontractors are subject to suspension and debarment,[6] many companies mistakenly believe that they cannot be suspended or debarred if they are not named in the prime contract.

Similarly, some companies believe that they cannot be suspended or debarred if they are identified in the contract as "suppliers" or "vendors." There is no statute or regulation that requires the SDO to focus only on the upper tiers of the contracting chain. Suspension and debarment are used to prevent federal dollars from flowing to companies that are not presently responsible. SDOs can target any company that does business with the government directly or indirectly, even if that company is not the prime contractor or a higher-tiered subcontractor.

**COMMON MISCONCEPTION #5: IF WE MUST RESPOND TO THE SDO, WE SHOULD BE AGGRESSIVE AND TOUGH.**

*Reality check*: It is not a good idea to treat the SDO office as an opponent in litigation. Adopting a highly adversarial posture is a mistake and will not intimidate the SDO. A contractor that behaves in a brash or abrasive manner toward the SDO is only reinforcing the idea that the contractor is a difficult business partner for the government, and unhelpful when problems arise.

The better approach is to keep a level head, remember that the SDO is responsible for protecting the government's interests, and explain the various ways in which the contractor is presently responsible. Because the SDO has considerable discretion, and a contractor whose present responsibility is in question typically has little leverage, a hostile approach is unhelpful to the contractor's cause.

**COMMON MISCONCEPTION #6: WE ARE ENTITLED TO A PRESUMPTION OF RESPONSIBILITY, AND IT IS THE SDO'S BURDEN TO PROVE THAT WE ARE NOT PRESENTLY RESPONSIBLE.**

*Reality check*: Suspension and debarment are administrative, not criminal, procedures. Accordingly, there is no presumption of "innocence," or present responsibility. The presumption of innocence exists in criminal proceedings because the accused's constitutionally protected liberty interest is at stake. There

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[6] *See* FAR 9.406-2(c) and 52.209-6.

is no analogous constitutionally protected right to contract with the government.[7] When an SDO questions your present responsibility, you have the burden to demonstrate affirmatively that you are presently responsible.

Because there is no presumption of responsibility, a contractor facing potential suspension or debarment typically does not benefit from remaining silent and letting its lawyer do all of the talking when meeting with the SDO.

In fact, SDOs normally expect contractor representatives to have substantive, speaking roles during meetings and presentations. Their participation helps the SDO to assess the contractor's sincerity and commitment to improvement.

**COMMON MISCONCEPTION #7: THE SDO WILL TELL US WHAT TO DO, AND WE WILL JUST DO THAT.**

*Reality check*: Some contractors mistakenly believe that they can simply ask the SDO what to do to avoid suspension or debarment. In fact, some contractors might think it a good idea to tell the SDO that they will implement any new policy or internal control measure the SDO considers necessary. The SDO is unlikely to be receptive to this approach. SDOs want to hear from the contractor about what steps its board of directors and/or management have taken in response to the underlying incident. The SDO is external to the company, and his or her role is to assess whether the contractor is likely to be a trustworthy business partner for the government.

A trustworthy business partner has already developed and implemented effective internal controls, well-functioning governance systems, and robust ethics and compliance functions. A trustworthy business partner has already figured out how to achieve competent performance and avoid default terminations.

Accordingly, an SDO may draw an adverse conclusion about a contractor that asks the SDO to recommend ways to improve the contractor's internal processes and functions. The contractor should enter the SDO's office with a clear and compelling case about the steps already taken and in progress to remedy past issues and prevent future reoccurrences.

**COMMON MISCONCEPTION #8: WE WILL GET A PRE-NOTICE LETTER (*I.E.*, A SHOW CAUSE NOTICE OR REQUEST FOR INFORMATION) PRIOR TO A SUSPENSION OR A NOTICE OF PROPOSED DEBARMENT.**

*Reality check*: It is true that SDOs increasingly make use of pre-notice letters before imposing suspension or issuing a notice of proposed debarment.

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[7] *See Transco Security, Inc. of Ohio v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981) ("[D]eprivation of the right to bid on government contracts is not a property interest.").

Nevertheless, the SDO has the discretion to decide whether to do so or not. The trend toward increased use of pre-notice letters likely reflects the growing maturity of the suspension and debarment functions across numerous agencies. SDOs and their staff are able to triage incoming referrals and respond based on the level of exigency they present.

Contractors should expect that the SDO will not hesitate to impose a suspension if the situation suggests that immediate action is necessary to protect the government's interest. Contractors facing situations that an SDO might interpret as presenting an immediate need to protect the government should consider approaching the SDO proactively.

**COMMON MISCONCEPTION #9: WE ARE AN AFFILIATE OF A COMPANY THAT HAS A PRESENT RESPONSIBILITY ISSUE, AND WE WERE NOT INVOLVED IN THE CIRCUMSTANCES, SO WE WILL NOT BE SUSPENDED OR DEBARRED.**

*Reality check*: The SDO will take as broad an action as he or she believes is required to protect the government. If the cause for suspension or debarment arises from an ineffective or non-existent ethics and compliance function, or from some other overarching cause, the SDO may conclude that affiliates are as much a business risk as the contractor itself.

Affiliates can be suspended or debarred if they are provided notice and an opportunity to respond.[8] A contractor that wants to protect its affiliates should consider proactive engagement with the SDO to explain that its affiliates are sufficiently removed or differentiated so as not to be implicated in the circumstance bringing the respondent before the SDO.

**COMMON MISCONCEPTION #10: WE WON'T BE SUSPENDED OR DEBARRED BECAUSE THE SDO WILL OFFER US AN ADMINISTRATIVE AGREEMENT.**

*Reality check*: An administrative agreement preserves the respondent's eligibility to receive federal contracts, which an SDO will not allow if the contractor is not presently responsible. An SDO could also decline to offer an administrative agreement for other reasons, such as the contractor refusing to terminate a problematic employee, refusing to change an ineffective management structure, or if the SDO does not believe that the contractor is willing or able to comply with the terms of an administrative agreement.

It is also important to keep in mind that the overall number of administrative agreements relative to suspensions and debarments is low.

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[8] FAR 9.406-1(b).