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FEATURE COMMENT: Is It Time To Define ‘Present Responsibility’?

Suspension and debarment are among the tools used by the Federal Government to address improprieties by Government contractors and grant recipients. However, regulations governing when and how suspension and debarment may be used are imprecise. This imprecision may eventually threaten the viability of the system. Accordingly, it may be time to define the term “present responsibility.”

“Present responsibility” is immensely important, and the lack of it can cause debarment under both the Federal Acquisition Regulation and the Nonprocurement Common Rule. See FAR 9.406-1(a), 9.406-2(c); 2 CFR § 180.800(a)(4); 2 CFR § 180.800(d); 2 CFR § 180.860. A contractor can be debarred for, among other things, conviction or civil judgment for committing a crime or other offense indicating a lack of business integrity or business honesty “that seriously and directly affects the present responsibility” of a Government contractor or subcontractor. FAR 9.406-2(a)(5); see also 2 CFR § 180.800(a)(4). Debarment is also possible “based on any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor or subcontractor.” FAR 9.406-2(c); see also 2 CFR § 180.800(d), (together, the “Catch-All Provision”). Yet “present responsibility” is not defined.

The Interagency Suspension and Debarment Committee Report to Congress for Fiscal Year

2020 (ISDC Report) (the most recent report issued by the ISDC), also uses the term “present responsibility” without defining it. For example, the ISDC notes that debarments are “not exercises in punitive action ... [and] if sufficient corrective actions are taken, then present responsibility may be demonstrated” and debarment avoided. ISDC Report at 2, available at [ISDC_FY_2020_Section_873_Report_\(use_for_web_upload\).pdf](#) ([acquisition.gov](#)). The ISDC Report also uses the term relating to proactive outreach by individuals and entities to “provide information relating to their present responsibility,” *id.* at 7, and when noting that “provid[ing] information on ... present responsibility and corrective actions” may result in a debarring official electing not to debar a contractor. *Id.* at 14.

The challenge for contractors and individuals facing debarment is to divine what “present responsibility” means, and how that undefined standard may be judged. It is a daunting task, and the ISDC Report brings the problem into sharp focus by noting that each individual agency Suspending and Debarring Official will make decisions relating to the “risk(s) posed by a business entity or individual” specific to that agency. ISDC Report at 1. These “factors ... can vary significantly between agencies and impact the assessment of risk(s).” *Id.* at 2. This means that the undefined term “present responsibility” means different things to different agencies. Compounding matters, debarment decisions are not public and there is no body of case law that sufficiently defines “present responsibility” in order to guide contractor conduct.

To summarize, multiple different federal agencies (a) apply an undefined standard when making debarment decisions, (b) require businesses and individuals to demonstrate that their conduct

exceeds that undefined standard interpreted subjectively on an agency-by-agency basis when attempting to prove that debarment is not necessary, and (c) on the basis of an extremely broad standard of “any other cause of so serious or compelling a nature that it affects the present responsibility,” can debar for virtually any conduct based on a circular finding that the conduct affects (undefined) present responsibility.

While there are no protected property interests in Government contracts, one has the right to practice their chosen profession free from arbitrary governmental interference. *Schware v. Bd. of Bar Exam'rs.*, 353 U.S. 232 (1957). One also has a liberty interest in being free from the stigmatizing effects of a debarment. *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953, 962–63 (D.C. Cir. 1980) (finding of nonresponsibility gives rise to a stigmatization against the contractor because the Government injured a cognizable liberty interest). Therefore, there must be some balance between the rights of the Government to conduct its business, and the rights of contractors. Without a definition of “present responsibility” sufficient to set easily understood standards for debarment decisions, there can be no balance. This imbalance may ultimately call into question whether the Government’s enormous power to debar, including via the Catch-All Provision, is legally permissible.

More specifically, it is only a matter of time before respondents challenge the debarment system itself as violating the Administrative Procedure Act or being unconstitutionally void for vagueness. Those arguments are not without support. If the Government wishes to prevent those challenges and resulting judicial decisions which may hinder the Government’s debarment authority, perhaps it is time to define “present responsibility.”

The closest analogue in the FAR to “present responsibility” is the different but related acquisition concept of “responsible” prospective contractors. FAR subpt. 9.1. The policy of the U.S. is to make purchases from and award contracts to “responsible prospective contractors only.” FAR 9.103(a). Contracting officers make “affirmative determination[s] of responsibility” or “determination[s] of nonresponsibility.” FAR 9.103(b). Their decision-making is guided by express standards in FAR 9.104-1:

To be determined responsible, a prospective contractor must—

- (a) Have adequate financial resources to perform the contract, or the ability to obtain them;
- (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) Have a satisfactory performance record ...;
- (d) Have a satisfactory record of integrity and business ethics;
- (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them ...;
- (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and,
- (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

(Internal references omitted.) These standards are clear and easy to understand. They also help contractors understand what is necessary to be considered a “responsible” prospective contractor and therefore be eligible for award. While the FAR 9.1 definition of “responsible” shows that the Government is able to define these concepts, the FAR 9.1 definition of “responsible” does not apply to debarment. The introductory text to FAR pt. 9 acknowledges as much, separating “prospective contractors’ responsibility” and “debarment, suspension, and ineligibility” by a semicolon, FAR 9.000, and each subpart notes its application. See FAR 9.000; compare FAR 9.100 (prospective contractor responsibility) with FAR 9.400(a) (debarment and suspension). The contrast between the easily understandable definition of “responsible” prospective contractor and the opaque, undefined “present responsibility” standard for debarment is striking.

The Government might argue that “present responsibility” does not need to be defined, because contractors receive due process through the administrative decision-making process. As the ISDC Report notes, “[t]he Government uses suspension and debarment procedures to exercise business judgment in accordance with the principles of fairness and due process. These procedures give Federal officials discretion to exclude parties ... as needed

to protect Government operations and financial resources, while affording those parties due process.” ISDC Report at 2.

There is no doubt that due process is necessary and important. But due process does not solve the lack of definitions of key terms like “present responsibility” (or “serious” or “compelling” for that matter). It makes no difference if the respondent is afforded process when the decisionmaker is not constrained in what they may conclude about a respondent’s (undefined) present responsibility. In that regard, process itself cannot ensure fairness because there is no standard for decision-making, and the regulations are admittedly subjectively interpreted based on individual agency whims, which “vary significantly.” *Id.* at 1.

The D.C. Circuit, through a panel including then-Judge Merrick Garland, found “merit” in the argument that an undefined regulatory standard violated the Administrative Procedure Act in *Pearson v. Shalala*, 164 F.3d 650, 654 (D.C. Cir. 1999). This case dealt with the Food and Drug Administration’s (FDA) pre-approval process for marketing of dietary supplements, and the standard the FDA used to approve specific marketing claims before they could be added to the supplement’s label. The FDA would authorize a marketing claim if the FDA found “significant scientific agreement” among experts that the claim is supported by the available evidence. *Id.* at 651. Responding to the attack that the “significant scientific agreement” standard was impermissibly vague, the FDA argued that the standard is “based on objective factors” and that its “procedures for approving health claims ... sufficiently circumscribe its discretion.” *Id.* at 653. But the FDA did not describe how the agency measured “significant” in this context. *Id.*

Process alone was insufficient for the FDA’s decision-making to survive challenge. The D.C. Circuit noted that “the FDA was obliged, at some point, to articulate a standard a good deal more concrete than the undefined “significant scientific agreement.” *Id.* at 654. In ruling that the FDA needed to provide definitional context for “significant scientific agreement,” the D.C. Circuit explained,

[w]e think this proposition is squarely rooted in the prohibition under the APA that an agency not engage in arbitrary and capricious action. It simply will not do for a government agency to declare—without explanation—that a pro-

posed course of private action is not approved. To refuse to define the criteria it is applying is equivalent to simply saying no without explanation.

Id. at 660 (internal citations omitted). Definition is necessary in order to make it possible “for the regulated class to perceive the principles which are guiding agency action.” *Id.* at 661.

Some bases for debarment, such as exclusions following conviction or civil judgment for certain enumerated offenses, are not analogous to the FDA’s impermissible decision-making in *Pearson*. Other bases that mention (undefined) present responsibility, and especially the Catch-All Provision, however, likely fail under *Pearson* analysis.

The lack of definition of “present responsibility,” and especially as it is applied in the Catch-All Provision, may also be subject to attack as unconstitutionally void for vagueness. Vagueness is analyzed in two ways, facially when infringing on a constitutionally protected right (typically First Amendment restrictions), or as applied. Because it is more likely to apply to a debarment challenge, we cover “as-applied” vagueness here.

A two-part test controls for as-applied vagueness: whether the statute “give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited and then consider whether the law provide[s] explicit standards for those who apply [it.]” *U.S. v. Nadi*, 996 F.2d 548 (2d Cir. 1993) (internal quotation marks omitted); 35 GC ¶ 635. A statute that is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). “This rule applies to regulations.” *Brennan v. Occupational Safety & Health Rev. Comm’n*, 505 F.2d 869, 872 (10th Cir. 1974).

It is challenging to understand how a “person of ordinary intelligence” would be able to divine the meaning of “present responsibility” in the absence of any definition, compendium of published decisions from every agency, or a clearly expressed analytical framework such as a decision-making worksheet perhaps akin to those published by the United States Sentencing Commission, available at www.ussc.gov/product-type/worksheets. Otherwise, a person without any specialized knowledge is left to divine—in the absence of interpretive

aids—what standard will apply when a “debar[ing] official ... debar[s] ... [a] contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor,” FAR 9.406-2(c), especially when the ISDC touts different agency interpretations that “can vary significantly between agencies and impact the assessment.” ISDC Report at 2.

It may be time for the Government suspension and debarment community to define “present responsibility.”



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