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FEATURE COMMENT: Do Suspensions And Debarments Of Individuals Exceed Regulatory Authority?

Federal Acquisition Regulation-based suspensions and debarments may extend to individuals when those individuals fall within the FAR definition of “contractor.” This article examines whether the Government suspension and debarment community is appropriately analyzing which individuals are contractors. More specifically, this article argues that some suspensions and debarments of individuals may exceed regulatory authority.

Experienced defense counsel are used to seeing Government suspension and debarment memoranda announce that (a) because of an individual’s experience with Government contracts or (b) because an individual’s skills that are of a type purchased by the Government, then (c) the individual reasonably may be expected to act as a contractor and do business with the Government as an agent or representative of another contractor. This has become rote, appearing more often as pabulum than evidencing thorough analysis. It is time to focus more attention on whether this sort of reasoning appropriately falls within the scope of the regulatory definition of contractor.

For completeness:

Contractor means any individual or other legal entity that-

(1) Directly or indirectly (*e.g.*, through an affiliate), submits offers for or is awarded, or

reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or (2) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.

FAR 9.403 (Definitions, Contractor).

The first step in our analysis is to determine which part of the definition applies to individuals. By its plain language, the first section applies in very limited circumstances where an individual actually submits offers or receives contracts or subcontracts in their own name, or does so through a corporate entity that individual controls, or reasonably may be expected to do so in the future. An individual lower down on the organization chart within a Government contractor does not qualify because they cannot submit offers or be awarded contracts or subcontracts directly in their own name or indirectly through an affiliated company. “Through” is the operative term here. It is not sufficient for the individual to perform duties for a company and that company somewhere, somehow, under someone else’s direction, bids on Government contracts or subcontracts. “Through” implies action—making the decision that causes the offer for a contract or subcontract to be submitted by others.

The second section is broader in application and has two components. The individual (a) conducts business or reasonably may be expected to conduct business with the Government, (b) as an agent or representative of another contractor. Each component must be satisfied for the individual to be a contractor. The Government has yet to define what it means to “conduct business,” though

in practice, suspending and debaring officials tend to view any contact (no matter how attenuated) with a Government contractor at any tier as sufficient to “conduct business.” But that is far too broad. To “[c]onduct” is to direct performance. It suggests control or decision-making authority. Not everyone has such control or authority.

FAR 52.209-5, Certification Regarding Responsibility Matters, provides helpful context for this analysis. Contractors submitting offers for Government work must inform the Government when the company itself and any of its “Principals” are “presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency.” This notice is designed to alert contracting officers prior to the award of new contracts because these types of exclusions of these types of individuals are important to the Government’s decision to award a contract. More directly, these are the categories of individuals from whom the Government may need extra protection.

The FAR indicates that “[p]rincipal means an officer, director, owner partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).” FAR 2.101 (Definitions, Principal). Again, these are the positions that FAR 52.209-5 indicates that the Government needs to be protected from, presumably because these are the positions that control whether to submit offers and how to provide goods and services under those contracts. In short, those are the positions that involve “conduct[ing] business[] with the Government.” FAR 9.403 (Definitions, Contractor).

Additionally, the terms “agent or representative” of a contractor or subcontractor do not exist in a vacuum. In order to be contractors, these agents or representatives must be conducting business with the Government, and therefore must also have decision-making authority, seniority and control sufficient to fit within that definition.

Given the plain text of the regulations, and common-sense comparisons with other relevant regulations, it appears that Government suspension and debarment practitioners may be pulling too many individuals into the definition of “contractor.” The analysis cannot only be that someone worked

for a company engaged in Government contracting at any level. That is too broad. What about a 1099 staff member? What about a consultant who worked 10 hours in a given year? What about an outsourced custodial worker or launderer of uniforms? They all may work directly or indirectly for a company engaged in Government contracting, but the regulations do not automatically permit them to be included within the definition of “contractor” for purposes of suspension and debarment. Otherwise the regulations would say exactly that: anyone doing any work at any level in any quantity for any Government contractor or subcontractor may be suspended or debarred. But that is not what the regulations say. More analysis is needed.

Similarly, it cannot be sufficient to rest on the circular analysis that because someone has skills that might be valuable to a Government contractor in the future, then that person reasonably may be expected to conduct business in the future as an agent or representative of a Government contractor. This type of analysis ignores the meaning of “conducts business” and the limitations that it imposes on who may be a “contractor” and therefore subject to suspension and debarment. The analysis of who is a “contractor” should be more nuanced.

Significant numbers of individuals are suspended and debarred each year. But even the Interagency Suspension and Debarment Committee (ISDC) seems to gloss over the definition of contractor. The ISDC highlights its mission as “protect[ing] the Government’s business interests from potential harm posed by *individuals* or entities whose conduct indicates either serious poor performance or lack of business honesty or integrity.” ISDC Report Fiscal Year 2020 (Report) at 1, available at [ISDC FY 2020 Section 873 Report \(use for web upload\).pdf \(acquisition.gov\)](#) (emphasis added). The Report notes that “[t]he exclusion of individuals ... ensures that the persons in question do not pose a current risk to the Government by temporarily barring the ability to serve as an agent or representative of another entity *in Government transactions*, and prevents the formation of a new entity to evade award ineligibility.” (emphasis added). But the standard is *not* participation in “Government transactions.” The standard is “conducting business” (FAR) and “doing business” (Nonprocurement Common Rule). As discussed herein, there is a significant difference.

The Report also notes that “[i]ndividuals are routinely, and appropriately, subject to actions since business entities engage in misconduct through individuals acting on behalf of the business entity.” Report at 2. That may be true, but individuals must still be contractors in order to be excluded. And the farther the individual sits from controlling the operations of a Government contractor, the less likely it is that the individual meets the regulatory definition of contractor. After all:

The public interest is not served when the end of a more honest and efficient government is sought to be achieved through means other than those prescribed by law, nor is it served by official blacklisting based not on evidence but on the premise that to do otherwise “wouldn’t look very good.” Moreover, our system of laws does not operate on the principle of the Queen in *Alice in Wonderland*—“Sentence first—verdict afterwards.”

It requires the evidence to come first.

Art-Metal USA, Inc. v. Solomon, 473 F. Supp. 1, 8 (D.D.C. 1978) (footnote omitted).

Moreover, the 5th Amendment requires due process when a liberty or property interest is threatened. Liberty includes the right to be free from official stigmatization. Liberty also includes the right to practice a chosen profession. See generally *Board of Regents v. Roth*, 408 U.S. 564, 569–70 (1972); *Kartseva v. Dep’t of State*, 37 F.3d

1524, 1529 (D.C. Cir. 1994); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895–96 (1961); *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1505 (D.C. Cir. 1995); *Old Dominion Dairy Prods., Inc. v. Sec’y of Def.*, 631 F.2d 953, 955–56, 963 (D.C. Cir. 1980).

The Government is required to consider the individual’s liberty interests and balance them with the Government’s need for protection when deciding whether to suspend or propose debarment. “It is the debarring official’s responsibility to determine whether debarment is in the Government’s interest.” FAR 9.406-1(a). The farther away an individual sits from control or decision-making authority within a Government contracting business, the more weight the individual’s liberty interests deserve. When the individual is so far away, their liberty interests prevail completely as the individual does not meet the definition of contractor and may not be suspended or debarred. In a not insubstantial number of cases, Government pablum regarding the exclusion of individuals misses this important nuance.



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