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# Time For Hard Questions About Suspension And Debarment

By **David Robbins and Rodney Grandon** (January 27, 2021, 6:16 PM EST)

David Robbins

Rodney Grandon

With the incoming Biden administration, the government suspension and debarment community will once again turn to the ongoing effort to draft a unified suspension and debarment rule.

This effort also comes at a time when American society is asking the hard questions about why our systems and institutions work the way they work and how to reinvigorate confidence in those systems and institutions.

As such, the time may be right to ask some hard questions about suspension and debarment.

In this article we pose timely and necessary questions that policymakers, government suspension and debarment practitioners, contractors, and grant recipients should work together to answer through law, regulation, policy or guidance.

Answering these difficult questions will provide clarity and uniformity to suspension and debarment practice, as well as solidify government and private sector understanding of the purpose of and metrics for successful suspension and debarment operations.

Suspension and debarment are discretionary actions to remove nonresponsible government contractors and recipients of nonprocurement federal assistance from eligibility for future awards.[1] Suspension and debarment may be imposed "only in the public interest for the [g]overnment's protection and not for purposes of punishment."[2]

The process for suspension and debarment is controlled by suspending and debarring officials, or SDOs, in each federal agency. SDOs are empowered to make these decisions. And the decision-making process varies widely among these agencies.

Cases arise from a number of places, including from offices of inspectors general to news articles, to U.S. Department of Justice press releases, to mandatory disclosures under Federal Acquisition Regulation 52.203-13. Direct referrals from acquisition and award officials are comparatively rare.

As former government suspension and debarment attorneys and officials, we believe in the importance of the remedy.

Alongside the U.S. Sentencing Commission's Guidelines Manual and the U.S. Department of Justice Criminal Division's Evaluation of Corporate Compliance Programs, the expectations for contractor conduct announced by the various suspending and debarring officials help shape industry behavior.

But the suspension and debarment remedy, the investment of resources in effecting the remedy and its lack of meaningful metrics may call into question the utility of the remedy, especially at a time when alternative forms of exclusions such as legislative bans on certain companies proliferate.

Our hope is that these questions provoke thought and dialogue about the future of suspension and debarment in order to better articulate the value of the system and increase understanding of how and why it functions.

**Why are contracting officers and award/grant officials not involved in suspension and debarment?**

The suspension and debarment function generally operates independently, without much, if any, coordination with the acquisition or award community.

For some agencies, including those within U.S. Department of Defense, the U.S. Department of State and the U.S. Agency for International Development, separating the suspension and debarment function from the acquisition function is mandated by Section 861 of the fiscal year 2013 National Defense Authorization Act.

If suspension and debarment exist to ensure the government only does business with responsible contractors,[3] then why aren't acquisition and award leadership more involved in the process and decision making?

Historically the answer was that the effort distracted from the business imperative to obtain needed goods and services, and stakeholders expressed concern that the acquisition community could not objectively exercise the authority to render parties ineligible to participate in the federal marketplace.

So a separate body grew up within the vast majority of agencies, largely filled with lawyers, to effect these suspensions and debarments.

But does the duality of serving to protect the acquisition function while remaining substantially separate from it still make sense, especially where the key terms, metrics, and purpose of suspension and debarment are undefined or only minimally described?

For the most part, contracting officers and their staff do what is minimally required to promote contractor responsibility.

This includes assessing the circumstances necessary to address the affirmative responsibility determination required by Title 48 of the Code of Federal Regulations, Sections 9.103 and 9.104-5, and reviewing the list of ineligible contractors as required by Title 48 of the Code of Federal Regulations, Section 9.405(d).

Over time, divorcing acquisition and award professionals from the suspension and debarment process

may have harmed the ability of the suspension and debarment system to serve the government's interests.

What degree of coordination is appropriate for promoting the interests of the acquisition and award community as it relates to initiating suspension and debarment in the public interest for the government's protection?[4]

At a minimum, the acquisition and award community could be more engaged in promoting the relevant interests and determining what steps are necessary in which types of cases in order to protect the government and the public.

If the customer making actual purchasing decisions is not meaningfully involved in the suspension and debarment process, what signal does that lack of involvement send to the marketplace about the importance of the expectations of suspension and debarment officials?

We believe that greater integration — communication, cooperation and coordination — between SDOs and acquisition/award officials would benefit the system.

The Federal Acquisition Regulation states that SDOs should consider as part of the exclusion decision whether contractors had in place "effective standards of conduct and internal control systems."[5] How high should SDOs set the bar for this factor?

While the vast majority of government contractors and recipients of federal funds are ethical, and work very hard to meet or exceed the standards set for them and to perform with integrity, ethics and compliance expenses generally are overhead expenses.

Is it appropriate for SDOs to impose overhead burdens on organizations that exceed those deemed necessary by acquisition/award officials, especially when the acquisition system is pushing contractors and recipients of federal funds to reduce or absorb overhead expenses?

By contrast, where the acquisition/award system wishes to signal importance of a subject, there are a number of tools at its disposal.

We believe that the current Cybersecurity Maturity Model Certification process can offer insight into the impact on industry of minimum compliance standards set across the acquisition enterprise.

By setting minimum standards and having those standards play a role in source selection decisions, the government clearly signals what is important, what is expected, and how to comply.

Minimum standards for suspension and debarment likely would help streamline the process and make it more uniform in application.

At a minimum, we encourage federal acquisition/award officials to expressly embrace the Sentencing Commission's guidelines and the Justice Department's corporate compliance programs evaluation as appropriate standards for assessing standards of conduct and internal control systems.[6]

**What is present responsibility?**

Suspending and debarring officials are asked to judge contractors' and recipients' present responsibility

with potentially devastating consequences for respondents, but "present responsibility" is not defined by regulation.

And in practice there is not an objective standard of present responsibility applied governmentwide. In this vacuum, each buying agency can — and does — define and apply present responsibility differently.

The suspension and debarment regulations are largely promulgated and periodically revised by government bodies without outside stakeholder input. This may have permitted the term "present responsibility" to persist undefined under the guise of preserving SDO discretion.

But we believe a definition of present responsibility would enhance SDO discretion by offering a uniform standard for SDO decision making. Additionally, defining present responsibility would enable cleaner and more precise communication of SDO expectations to industry.

**What is the purpose of suspension and debarment?**

This may be the ultimate question. Why do we still have suspension and debarment?

A more clearly defined purpose for suspension and debarment might include giving organizations and individuals information necessary to avoid ever entering the suspension and debarment system in the first place.

It might also help promulgate standards for successfully exiting the suspension and debarment system that apply to companies and to individuals.

The annual report to Congress on the state of government wide suspension and debarment, published on the Interagency Suspension and Debarment Committee's website — which is current through the fiscal year 2018 report, though we are nearly a third of the way into fiscal year 2021 — explains the throughput in the government suspension and debarment system.[8]

The ISDC reports also explain that numbers of actions are not the measure of health of the suspension and debarment system. Stated differently, doing more is not a measure of success.

We agree. But what are useful metrics for measuring success? We do not believe it is easy to arrive at those metrics without an overarching purpose for suspension and debarment in the first place.

The ISDC reports discuss protecting the government's business interests from potential harm, but the business interests are not defined, the standard for present responsibility is not defined and the very individuals charged with minding the government's business interests — acquisition and award officials — are generally not involved beyond basic, minimum coordination.

In summary, a holistic look at suspension and debarment, starting with a clearly articulated purpose, may be timely.

**Which categories of respondents bear the brunt of suspension and debarment?**

There have been many concerns expressed over the years that some companies are too big to suspend or debar.[9] These concerns are based on the disproportionate number of exclusions involving individuals and small business concerns.

While we largely reject the "too big to fail" proposition, the trends toward individuals raise valid concerns.

The ISDC report does not divide up respondents by category or offer insight into categories of companies or individuals who become the focus of suspension and debarment action. Nor do the reports explain the sources of referrals.

System for award management data indicate that the overwhelming majority of excluded parties are individuals and small businesses with very small revenues.[10] While the disparate results may be appropriate, should the agencies be more transparent in reporting suspension and debarment actions?

The substantial emphasis on small businesses and individuals can cause the public to question the scope of the suspension and debarment remedy, and whether it is used — impermissibly — to punish certain groups of contractors and award recipients.

Government suspension and debarment practitioners will defend their efforts as appropriate given the cases before them. But that is difficult for members of the public to understand when available statistics do not explain the disparate impact of the remedy.

We believe more data would be helpful and offer the following questions to help guide the discussion around which data would be most useful.

Is it time for the government to report on the types of entities and individuals involved and the types of issues that gave rise to suspension and debarment? We believe this type of data would help the public understand both the purpose and the impact of the remedy.

If those metrics show that mandatory disclosures of time mischarging, of even small amounts, lead to debarments an overwhelming percentage of the time, would we then ask what potential innovation, products and services might we be excising from the market where companies could otherwise seek to rehabilitate, retrain, and appropriately supervise these individuals?

We might need to consider whether the government is actually protecting its — undefined — business interests, or is it instead effectively punishing these individuals and entities.

We also wonder what role Congress should have in the suspension and debarment system. By requiring reporting of pure numbers of actions, has Congress created an incentive for SDOs to exclude more, rather than giving the SDO community enough guidance to demonstrate its value in other ways that align with the public interest?

**How does the government measure success of suspension and debarment?**

We believe the government should offer meaningful metrics to measure the success of the suspension and debarment system. The metrics should flow from the definition of present responsibility and any related policy directives as to how SDOs are to protect the government's interests by assessing present responsibility.

Metrics could then explain how and how well SDOs protect the government's interests.

We therefore offer the following questions to help focus the discussion on appropriate metrics for suspension and debarment.

Does the suspension and debarment system — fragmented across government agencies as it is — collect and report the appropriate information to enable Congress and the American public to know whether the system is meeting its objectives?

Dozens of dedicated public servants are coordinating daily across the suspension and debarment enterprise. Why is more not said about those efforts, and what they have achieved?

These are honorable professionals — many we count as friends and former colleagues — engaged in public service. The public would benefit from hearing more about what they are doing to benefit the integrity of the acquisition and award systems, with perhaps more applicable metrics.

These are difficult questions to be sure. But having this discussion may be useful, especially because we may be at an inflection point.

Economic stimulus from the Coronavirus Aid, Relief and Economic Security, or CARES, Act rushed to help the U.S. economy in 2020 with tremendous amounts of money flowing rapidly to individuals and businesses. Much has been written about efforts to bring accountability to that spend, and hold unscrupulous recipients accountable.

Those efforts will inevitably increase throughput in the suspension and debarment system. As numbers of actions inevitably tick upward again in the coming years, will our collective understanding of the suspension and debarment system increase?

Will we have a common understanding of what the system exists to do, its role, who the participants should be, what the standards for decisions are and what metrics for success are? If so, faith in the system will increase across the board.

After all, government officials know how to bring suspension and debarment actions, lawyers know how to defend them and independent monitors know how to provide assurance that improvements are occurring.

But are we missing opportunities to answer bigger questions and instill faith in the system by the public and all participants, including respondents? These are the important questions that need answering.

We are believers in the suspension and debarment system, but it may be time for this discussion.

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*David Robbins is co-chair of the government contracts practice at Jenner & Block LLP and a former acting U.S. Air Force suspending and debarring official.*

*Rodney A. Grandon is a managing director at Affiliated Monitors Inc. and a former U.S. Air Force suspending and debarring official.*



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[1] 48 C.F.R. 9.406 (debarment), 48 C.F.R. 9.407 (suspension), 2 C.F.R. 180 (Nonprocurement Common Rule).

[2] 48 C.F.R. 9.402(b).

[3] See 48 C.F.R. 9.402.

[4] 48 C.F.R. 9.402.

[5] FAR 9.406-1(a)(1).

[6] https://www.ussc.gov/guidelines; https://www.justice.gov/criminal-fraud/page/file/937501/download.

[7] https://www.acquisition.gov/isdc-home.

[8] See, e.g., Drury D. Stevenson & Nicholas J. Wagoner, FCPA Sanctions: Too Big to Debar?, 80 Fordham L. Rev. 775 (2011).

[9] https://www.law360.com/articles/1219009/suspension-and-debarment-fy-2019-by-the-numbers.