THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement

APRIL 24, 2024 | VOLUME 66 | ISSUE 16

¶ 103 FEATURE COMMENT: Defending A Small Business Suspension Action

Defending a suspension matter is challenging under the best of circumstances but can be extremely difficult when a closely held, small business is suspended alongside its 100 percent owner. Small Government contractors generally do not have significant cash reserves to fund operations for the many months it can take to end a suspension. Therefore time is very much of the essence for these companies. Dramatic action is often necessary, as close to immediately as possible, in order to give the company the best chance of surviving the suspension. Any unnecessary time spent trying to decide on a strategy, or trying to avoid intensive mitigation and remediation, only increases the risk of the company running out of capital before the suspension ends.

Suspension threatens the existence of small businesses that rely heavily on Government contracts. Revenues are suddenly in doubt, new contract awards are stopped, option years and recompetes are uncertain to occur, and panic is not too far off in the future. Speed matters. Dramatic and deeply personal decisions need to be made by company ownership and management. These choices sometimes include separating individuals that the Government alleges have engaged in misconduct, even if they are company founders or senior officials. The faster those decisions are made, the more chance the company has to survive.

The information necessary to defend a suspension is found in the full administrative record. When suspensions occur, the Government sends the respondent a summary of facts explaining why the suspension occurred. Sometimes the underlying record is sent, while other times the respondents need to ask for the record to see what material the Suspending and Debarring Official relied on in making their decision. Respondents should always ask for the full record.

Once the record is received, it is normal for respondents to feel personally aggrieved by the exclusion. But this resentment needs to quickly be transformed into action to save the company.

The first and most important thing for companies to do is to find a lawyer who can help them think strategically and push past the natural confusion, hurt, and concern that follow a suspension. These emotions will waste valuable time and get in the way of ending the suspension. A lawyer who understands these dynamics and who has successfully counseled clients through the process can be invaluable in keeping the company focused on the most important goal—making the critical decisions necessary for survival.

Second, companies need to take a hard look at the Government's alleged facts. The Government's burden for a suspension is "adequate evidence" (48 CFR § 9.407), meaning companies need to ask themselves the difficult question, "is the Government even a little bit right about their allegations?" If the initial answer is "no, the Government is wrong," then the next question is, "ok, do we have convincing, documentary proof that the Government is wrong and can we prove it in completely convincing fashion?" Only if the company and its counsel agree that their case is a slam dunk, does it make sense to consider challenging the factual basis for a suspension.

Why is it so difficult to challenge the factual basis? The Government has invested time and effort into putting together the suspension package, and the Suspending and Debarring Official reviewed and approved of the exclusion. Challenging the facts underlying the suspension is asking the agency to admit it was wrong. That is worth repeating. Seeking to terminate a suspension on this basis requires Government officials to candidly admit they did not do their jobs properly. There will be lost time as the Suspending and Debarring Official and their staff debate this internally, and human nature indicates people do not like to admit they were wrong. Time will be lost, and prevailing on this basis takes overwhelming evidence of the Government's error. It is a very hard road.

On the other hand, if the company's answer is the Government may have some basis for its position, then the analysis shifts to how best to defend the company. This is a difficult point for small business owners to wrestle with. Naturally, an owner takes pride in their work and their business. But when the owner is also suspended, objectivity may also be impacted. Yet it is vitally important for reasoned, dispassionate analysis to take place. Because unless the Government's factual allegations can be conclusively refuted with overwhelming documentary evidence, then the company needs to take a very different approach that can be difficult for owners to accept.

Specifically, the company needs to accept everything the Government alleges as true, for the purposes of defending the suspension only, and proceed to mitigate each of the Government's concerns. When the owner of the business is implicated in the Government's allegations, saving the company can sometimes require separating that owner from the business through an irrevocable trust that places the owner's control in the hands of someone else until the underlying allegations are resolved. The owner still benefits financially from owning the business, but control needs to be severed. That is because Federal Acquisition Regulation 9.407-5 permits the Suspending and Debarring Official to impute the misconduct of an individual to the business under certain circumstances. Severing the individual's relationship with and control over the business generally will make it harder for the Government to continue an exclusion via imputation and affiliation.

The next step is to take each and every allegation the Government made and erect common sense internal controls around them to make sure the allegation cannot reoccur. Some examples of mitigation include new people in decision making roles, different approval processes, separate audit or assurance methods, or a combination of each of these. The standard is to be able to credibly argue to the Government that the area of concern cannot reoccur because the company has taken independently verifiable steps to prevent the issue from arising again.

Depending on the Government agency involved, independent verification may be required from a third party like a monitoring firm. The monitoring firm is able to attest to the adequacy of the controls and conduct a gap assessment to see if any other areas of the company's compliance program need to be brought up to industry standard. The assessments can take time to complete, so if the suspended company desires to engage in overwhelming mitigation to obtain the best opportunity to end the suspension, then engaging a monitoring firm quickly may make sense.

Training—or, more importantly, foundational retraining—is also incredibly important when defending a suspension. The Government believes there is an ethics or compliance lapse at the company to such a serious degree that the company is no longer responsible to contract with the Government. As a result, the company will need to reestablish a baseline for accept-

able, ethical and compliant conduct. That often requires robust, mandatory Government-contracts focused compliance retraining with a record of the training provided and a log that shows that every company employee has completed that training.

If done correctly, and accompanied by a robust written submission of matters in opposition, this effort should be enough to convince the Government to remove a suspension. However, many Government agencies are nervous about terminating an exclusion at this point. Suspensions are based on ongoing investigations or legal proceedings, and the Government can be nervous about what the underlying investigation might reveal later. The Government can also take the position that rapidly implemented reforms need time to take hold before the Government is comfortable terminating a suspension. This is where an administrative agreement comes in.

Administrative agreements are alternative resolutions that end ongoing suspensions or debarments in exchange for the contractor agreeing to a range of undertakings, generally for a period of three years. Administrative agreements can satisfy the Government that reforms and enhancements to a contractor's ethics and compliance program will remain in place and continue to evolve, but also impose a cost on the Government in terms of dedicating ongoing staffing to a matter that would not be present with either a continued suspension or a termination.

While suspended companies naturally would prefer an outright termination of the suspension, that is not always feasible. Promptly negotiating terms of an administrative agreement after completing initial remediation can help end the suspension as early as possible.

It takes significant remediation to end the suspension of a small Government contractor. Clear and rational assessment of the risks, the facts, the remediation required, and the realistic possible outcomes will help the process move faster. Time spent fighting the process or refusing to make hard decisions can only hurt. Experienced counsel can guide companies through the process and recommend the sort of extreme mitigation and remediation necessary to end a suspension. Counsel can help ownership make the difficult choices, at speed, necessary to save the company.

This Feature Comment was written for THE GOVERNMENT CONTRACTOR by **David Robbins.** ***David is the co-Chair of Jenner & Block's Government Contracts practice and a former Deputy General Counsel and Procurement Fraud Remedies Director for the U.S. Air Force.***