



Recommendation 95-2

Debarment and Suspension from Federal Programs

(Adopted January 19, 1995)

Introduction

The federal government is very big business in its purchases of products and services and in its provision of grants, loans, subsidies, and other types of economic assistance. Many private companies—small, medium, and large—rely to a significant degree on their business with the government for economic survival. In this recommendation, the Administrative Conference of the United States addresses several significant issues that arise when federal agencies act to protect the public fisc by suspending or debaring individuals and companies who allegedly are not responsible enough to continue to do business with the government.

The Administrative Conference of the United States has considered the topic of debarment and suspension from federal programs several times in the last 35 years. The 1961–62 temporary Administrative Conference issued a series of influential recommendations on the procedural structure of debarment and suspension of federal contractors. A 1975 study done for the Conference found that those recommendations remained sound. Since then, there has been substantial activity in the debarment and suspension area, as the Federal Acquisition Regulation (FAR) and other regulatory programs have been promulgated to authorize such actions both in the procurement and nonprocurement arenas, and Congress has authorized debarment and suspensions in a variety of contexts.

The Conference's recent study focused on the regulatory programs involving procurement debarment coordinated by the Federal Acquisition Regulation Council (FAR Council)¹ and promulgated in the FAR,² and a comparable (but not identical) effort involving nonprocurement debarment coordinated separately by OMB (known as the “Common Rule”).³ The two debarment and suspension programs have similar structures, but they are not identical, and not completely complementary.

¹ The FAR Council includes representatives of the Office of Federal Procurement Policy in OMB, the General Services Administration, NASA, and the Department of Defense.

² 48 CFR §9.400 et seq.

³ 53 Fed. Reg. 19,204 (1988).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Debarment refers to an action to preclude individuals and entities from receiving future contracts or other benefits such as loans or grants for a designated period of time. A suspension is a similar action on a temporary basis. They are intended to ensure government “does business,” in both its contracts and its nonprocurement assistance programs, only with individuals and entities that are “presently responsible.”

The Department of Defense alone debarred or suspended 1,157 persons and businesses in 1994. Across the federal government, almost 6,000 entities were debarred or suspended the same year.

A. Procurement

The regulations set forth in the FAR provide that each agency should promulgate its own regulations consistent with the FAR provisions. The FAR provides that an agency may suspend a contractor on an immediate, temporary basis prior to a hearing, based on “adequate evidence” of a variety of actions relating to a lack of contractor integrity. A proposed debarment, for which there is no minimum evidentiary threshold set out in the FAR, also has the effect of immediately precluding the award of additional federal contracts. Contractors have the opportunity to present information and argument in opposition to a suspension or proposed debarment. In cases where there is a disputed issue of material fact, a contractor is entitled to an informal fact-finding hearing where the contractor may appear with counsel, submit documentary evidence, and present and confront witnesses. The regulations do not specify the type of hearing officer. The regulations do contain a list of mitigating factors the debarring official (who is usually also the suspending official) should consider in deciding whether to debar or suspend. Most debarments involve contractors that have been indicted or convicted; relatively few involve disputed issues of material fact that would warrant a hearing.⁴

Contractor suspensions and debarments have government-wide effect; i.e., no executive branch agency may enter into a contract with a debarred or suspended contractor. The General Services Administration administers a list of debarred and suspended contractors.

⁴ For example, 96 percent of the Air Force's debarments and suspensions are based on indictments and convictions. Neither the Army, Air Force, Defense Logistics Agency, nor the Navy has had fact-based hearings in any debarment or suspension cases in the last 5 years.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

B. Nonprocurement

The nonprocurement debarment and suspension process is based on Executive Order 12549, issued in 1986. OMB led an effort for uniform regulations (the Common Rule), and at least 36 agencies have issued such a rule. The regulatory framework differs slightly from the procurement debarment system. The procedures are basically similar, with suspended persons entitled to appear in person or submit written argument and information after the suspension is effective, and a further informal hearing available in cases with disputed issues of material fact. Unlike in the procurement context, however, a proposed debarment does not have immediate effect. Nor do the nonprocurement regulations contain a list of factors the debarring official should consider in connection with the decision whether to debar or suspend.

As in the procurement context, nonprocurement debarments and suspensions have executive branch-wide effect and the GSA publishes a list of those debarred or suspended. However, those debarred or suspended under one (e.g., the nonprocurement) system are not now debarred from the other; i.e., there is no reciprocal effect.

Debarments and suspensions under both regulatory programs generally may not exceed 3 years. They may be terminated on a showing that, among other things, there has been a bona fide change in ownership or management, or that the causes on which the debarment was based have been eliminated.

Discussion

Although the nonprocurement and procurement debarment programs appear generally to be functioning fairly well, the Conference does recommend some changes to make the process more efficient and more fair.

A. Reciprocal Effect

As noted, the procurement and nonprocurement systems, while each having government-wide effect, do not have reciprocal effect. Legislation⁵ and an executive order⁶ have mandated that this problem be resolved, and the Conference underscores the importance of making the appropriate regulatory modifications promptly to ensure that debarment or suspension under one system leads to debarment or suspension under both. The Conference also believes that

⁵ The Federal Acquisition Streamlining Act, Pub. L. No. 103-355 (1994).

⁶ Executive Order 12689, issued in 1989.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

the existing provisions allowing agency heads to waive the applicability of a government-wide debarment or suspension for their agency should be retained.⁷

B. Debarring Officials and Hearing Officers

Neither regulatory framework specifies criteria for appointing the debarring official. Some agencies have written specifications identifying the type of official who is to perform this function, as well as the official who is to serve as a hearing officer in the relatively few cases where informal hearings on disputed issues of fact are held. However, there is no uniformity among the agencies that have established these criteria. For example, at the Department of Housing and Urban Development, where hearings are relatively frequent, administrative law judges or board of contract appeals (BCA) judges serve in effect as debarring officials, while also presiding over the hearings. At the Department of the Air Force, the debarring official is the Assistant General Counsel for Contractor Responsibility, and a military trial judge presides over any fact-finding proceedings. The Environmental Protection Agency's debarring official is the director of its Office of Grants and Debarment, but the agency uses hearing officers who do not have the institutional independence of an ALJ, BCA judge, or military judge. Few agencies expressly require either the debarring official or the hearing officer to have any specific level of institutional independence.

The informal nature of the adjudication, as well as the process for a prehearing suspension, have been consistently upheld by the courts as providing due process. Courts have occasionally discussed the need to ensure some measure of independence on the part of adjudicators.⁸ Neither the FAR nor the Common Rule explicitly addresses the issue. Given the informal character of debarment and suspension determinations, as well as the “business” protection basis for such decisions, the strict separation of functions and total avoidance of ex parte contacts that would apply in more formal contexts may not be needed. However, it is important that the debarring official be sufficiently independent to protect due process. It is, for example, good practice that the debarring official not be supervised by nor directly supervise the investigators or advocates who are developing the cases. It is also good practice for debarring officials generally to ensure that all information that serves as the basis for decision appears in the administrative record, and that it is made available to the respondent in contested cases.

⁷ Waiver and exception procedures are currently found in the FAR at 48 CFR 9.406-1(c), 9.407-1(d), and in the Common Rule at X.215.

⁸ In *Girard v. Klopfenstein*, 930 F.2d 738 (9th Cir. 1991), the court suggested the need for a separation of the prosecutorial and decisionmaking functions in a debarment case, but did not explicitly decide the issue.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

When there is a hearing to resolve disputed issues of material fact in a suspension or debarment case, a greater degree of independence ought to be required on the part of the hearing officer. The Administrative Conference has recently taken the position that cases involving “imposition of sanctions with substantial economic effect” should be heard by administrative law judges.⁹ Debarments and suspensions clearly can have substantial economic effect. Depending on the type of entity and the nature of its business, a debarment from federal contracts or other benefits may bankrupt a company. Therefore, while a full APA formal hearing is not constitutionally required in debarment and suspension cases, even where there are disputed issues of fact, use of a truly independent hearing officer is consistent with notions, and appearances, of fairness. In some statutory debarment programs, Congress has required that post-debarment hearings be presided over by ALJs.¹⁰ ALJs clearly have the requisite independence. Administrative judges from boards of contract appeals and military judges have similar independence. They are experienced in providing hearings that ensure that the respondent has the proper opportunity to present a case. Using only such independent judges for fact-finding hearings would also ensure uniformity among agencies; since a debarment has government-wide effect, the nature of a fact-finding hearing should not depend on the particular agency taking the action. The Conference therefore recommends that, where there are disputed issues of material fact in debarment or suspension cases, the agency assign an ALJ, BCA judge, or military judge to preside over the hearing. If an agency wishes to use some other hearing officer, it should ensure that such officer is guaranteed independence comparable to that of an ALJ.¹¹ Agencies should also provide in their rules whether the judge would issue (a) findings of fact that would be certified to the debarring official; (b) a recommended decision to the debarring official; or (c) an initial decision, subject to any appropriate further appeal within the agency.¹²

C. The FAR and Common Rule

As discussed above, the two sets of procedures, for procurement and for nonprocurement debarment and suspension, are not identical. Some of the variations relate to the differing natures of the programs they address. On other issues, uniformity might serve to eliminate confusion, especially in light of the government-wide effect and (hopefully soon-to-be)

⁹ See Recommendation 92–7, “The Federal Administrative Judiciary,” at ¶ A(1)(c).

¹⁰ See 42 U.S.C. §1320a-7(exclusion of health care providers from Medicare program participation).

¹¹ See 5 U.S.C. § 554(d)(2).

¹² Regarding the need to clearly set forth the appeals procedure, see *Darby v. Cisneros*, 113 S. Ct. 2539 (1993)(in absence of agency regulations governing agency appeal, respondents could proceed directly to court).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

reciprocal impact. At a minimum, there are several issues the Conference recommends be addressed in each set of rules.

Both nonprocurement and procurement debarments and suspensions are discretionary. The procurement regulations include a list of mitigating factors the debarring official should consider in determining whether to debar or suspend.¹³ No such list exists in the nonprocurement context, and neither program has a list of aggravating factors. The Conference recommends that a list of mitigating and aggravating factors be included in the regulations for both programs. These lists should be considered by debarring officials both in determining whether to impose a debarment or suspension, and in determining the period of debarment.¹⁴ The Conference takes no position on whether any such list should represent an exclusive list of factors to be considered, but does recommend that each agency make clear its intention with respect to exclusivity. The Conference also notes that both aggravating and mitigating circumstances should focus on issues relating to the respondent's "present responsibility" to avoid any appearance that the debarment is intended as punishment.

As noted, each type of debarment is effective across the executive branch. There will thus be cases where a particular entity does business with multiple agencies. The Conference recommends that a procedure be developed by which agencies can efficiently and routinely coordinate with each other and determine which agency will serve as the lead agency on behalf of the government in taking debarment and/or suspension action. This would avoid multiple actions with inconsistent results. It may also ensure the agency with the greatest interest will handle the case. The Conference is aware that agencies considering actions relating to the same respondent do confer informally in many cases, but believes a more uniform, regularized process for agencies to determine a lead agency in particular cases would be preferable.

As also noted, suspensions become effective immediately. The suspended respondent may, after the fact, submit written comment and information to the debarring official opposing the continuation of the suspension. In some cases, the lack of advance notice is necessary to allow an agency to protect the integrity of its contracting or nonprocurement program. In other

¹³ The procurement debarment rule indicates that the debarring official "should consider" the mitigating factors in determining whether to debar. The suspension rule provides that the suspending official "may, but is not required to consider" mitigating factors in determining whether to suspend. The Conference recommends that the "should consider" language be used in both debarment and suspension cases.

¹⁴ The Administrative Conference has recommended standards for mitigating statutory money penalty amounts imposed administratively. See Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties."



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

cases, however, it may be appropriate to provide advance notice to the potential respondent that a suspension or proposed debarment may be forthcoming. In fact, some agencies do send what are in essence “show cause” letters in certain situations. In cases where the interests of the government would not be substantially adversely affected by providing advance notice of a suspension of proposed debarment, the Conference encourages agencies to provide such notice.

Given that debarments and suspensions have a government-wide effect and may soon also apply to both procurement and nonprocurement programs, it is especially important that respondents be given notice at the earliest opportunity of these potential impacts.

Suspensions require a finding of “adequate evidence” as a threshold for their issuance. Proposed debarments, which in the procurement context have a similar preclusive effect, have no such threshold. (An ultimate decision to debar must be based on the preponderance of evidence, however.) Given their immediate effect, a minimum evidentiary threshold for procurement proposals to debar would also be appropriate. The Conference recommends that proposals to debar in the procurement context require “adequate evidence of cause to debar.”

The Administrative Conference also recommends that all agencies within the “executive branch” (broadly construed to include “independent” agencies) should implement the “Common Rule” and those portions of the FAR that address suspension and debarment.

D. Statutory Debarments

The procurement and nonprocurement debarment and suspension programs are based in regulation and/or executive order. There are also many statutorily-based debarment schemes, some of which also involve procurement and nonprocurement programs. In many of these statutory programs, Congress has restricted agencies' discretion whether to debar, or to determine the length of a debarment.¹⁵ Congress has increasingly chosen to require agencies to debar or suspend in particular situations. Debarment and suspension are not intended to be punitive remedies, but rather are premised on the need to protect the integrity of government programs. The Conference believes that Congress should ordinarily allow agencies to retain the discretion to determine (1) whether debarments or suspensions are appropriate in individual cases, and (2) the appropriate length of such debarments. Moreover, Congress should review

¹⁵ For example, DHHS is required to “exclude” from participation in the Medicare and Medicaid programs for 5 years any health care provider who is convicted of a crime related to the provision of services under those programs, or of patient abuse. 42 U.S.C. § 1320a-7(a).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

existing statutory schemes that mandate debarment and/or particular terms of debarment, and determine whether they should be continued. The primary basis for recommending that agency discretion not be limited with respect to most debarment and suspension determinations is the need to retain flexibility to meet the needs of the government and the public. The Conference believes that agency officials generally would be in a better position than Congress to determine appropriate remedial sanctions in individual cases that serve both to protect the fisc and meet program needs.¹⁶

The co-existence of the regulatory debarment programs that are the focus of this recommendation with a broad variety of statutory debarment programs creates a number of issues that relate to the interactions between them. The Conference may in the future study these issues, which include conflicts that arise from inconsistent procedural requirements and questions about whether all statutory programs are intended to have government-wide effect.

Recommendation

I. Entities coordinating the Federal Acquisition Regulation (FAR) and the Common Rule for nonprocurement debarment, and individual agencies in their procurement and nonprocurement debarment and suspension regulations, should promptly ensure the applicable regulations provide that suspensions or debarments from either federal procurement activities or federal nonprocurement activities have the effect of suspension or debarment from both, subject to waiver and exception procedures.¹⁷

II. Entities coordinating the FAR and the Common Rule, and individual agencies in their regulations, should ensure that:

A. cases involving disputed issues of material fact are referred to administrative law judges, military judges, administrative judges of boards of contract appeals, or other hearing officers who are guaranteed similar levels of independence¹⁸ for hearing and for preparation of (1) findings of fact certified to the debarring official; (2) a recommended decision to the debarring official; or (3) an initial decision, subject to any appropriate appeal within the agency.

¹⁶ This recommendation should not be read to discourage Congress from providing guidelines for agencies to consider in exercising their discretion.

¹⁷ Waiver and exception procedures are currently found in the FAR at 48 CFR 9.406-1(c), 9.407—1(d), and in the Common Rule at X.215.

¹⁸ See 5 U.S.C.—554(d)(2).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

B. debarring officials in each agency should:

1. Be senior agency officials;
2. Be guaranteed sufficient independence to provide due process; and
3. In cases where the agency action is disputed, ensure that any information on which a decision to debar or suspend is based appears in the record of the decision.

III. Entities coordinating the FAR and the Common Rule, and individual agencies in their regulations, should provide that each regulatory scheme for suspension and debarment includes:

A. A list of mitigating and aggravating factors that an agency should consider in determining (1) whether to debar or suspend and (2) the term for any debarment;

B. A process for determining a single agency to act as the lead agency on behalf of the government in pursuing and handling a case against a person or entity that has transactions with multiple agencies;

C. (With respect to procurement debarment only) a minimum evidentiary threshold of at least “adequate evidence of a cause to debar” to issue a notice of proposed debarment;

D. A requirement that all respondents be given notice of the potential government-wide impact of a suspension or debarment, as well as the applicability of any such action to both procurement and nonprocurement programs; and

E. Encouragement for the use of “show cause” letters in appropriate cases.

IV. All federal agencies in the executive branch (broadly construed to include “independent” agencies) should implement the “Common rule” and FAR rules on suspension and debarment.

V. Congress should ordinarily refrain from limiting agencies—discretion by mandating suspensions, debarments, or fixed periods of suspension or debarment. Congress should also review existing laws that mandate suspensions, debarments, and fixed periods, to determine whether to amend the provisions to permit agency discretion to make such determinations.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Citations:

60 FR 13695 (March 14, 1995)

__ FR ____ (2012)

1994-1995 ACUS 5