

Suspension and Debarment Breakout Session

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Panelists:

- Wilmary Bernal – Attorney, Contract Law Division, Office of General Counsel
- Laura Shin – Deputy Chief, Federal Assistance Law Division
- Melissa Schroder – Policy Analyst – NIST OAAM Policy & Compliance Team
- Barry Berkowitz – Senior Procurement Executive and Director of Acquisition Management (and Suspending and Debarring Officer)

Focusing on “Fact-Based” Cases

- The responsibilities of the contract and financial assistance communities in preventing award funding to excluded parties, and in attempting to unearth potential misconduct which would indicate a lack of present responsibility (with a focus on fact-based, rather than conviction-based, cases)
- Common reasons grantees, contractors, and individuals are proposed for debarment
- Discussion of Sample Suspension and Debarment Case
- Determination of which parties in each case should have been debarred and which shouldn't have, and the reasons why
- Open forum – general questions about S&D, and if you have any grantees or contractors that you're concerned about, please raise them to the panel for recommendation on how to proceed (keep anonymous, but explain situation)

What does the Suspension and Debarment Handbook say about the need to review grants and contracts?

- Grants Officers, Program Managers, and Contracting Officer Representatives
 - Review systems prior to making awards to see if they are on lists. What's the main system? What are some other systems to check? **Main system is SAM Exclusion Listing, other systems to check are FAPIIS, CPARS, and PPIRS.**
 - Assemble information of potential misconduct that indicate lack of present responsibility. Who do you refer this information to? When? **You refer this information to the SDO, and you can do it at any time (pre-award, award or post-award).**
 - Submit request for consideration packages to the SDO for review for entities that have a history of underperformance (what are some examples of underperformance? **Not submitting timely performance and financial reports, not meeting milestones, constantly asking for extensions of grants, constantly changing scope of work under a grant, asking for large amounts of funding under a grant upfront in the form of advance payment, late to submit closeout documentation, employees not being paid or underpaid, subcontractor making more than contractor, audit issues.**
 - Monitor transactions for behavior that could indicate grounds for suspension or debarment.

Common Reasons Organizations and Individuals are Proposed for Suspension or Debarment

- Brenda Browne of the Department of Interior assists David Sims by sending out the material for the monthly Interagency Suspension and Debarment Committee (ISDC) meetings.
- Another role she has is to send out lead agency coordination requests
- This involves giving the name(s) of organizations or individuals being considered for suspension or debarment, and asking us to determine whether we have any grants or contracts with that organization or individual. This is done to determine lead agency to handle the case.
- Brenda also includes the statutes they are alleged and or convicted of violating.
- What do you think are some of the more common statutes that are violated that Brenda presents to the agencies?

Examples of Reasons Organizations and Individuals Have Been Proposed for Suspension or Debarment

- 15 C.F.R. § 14.42 – “No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent **conflict or interest** would be involved.”
(Company A receives a contract for training materials – because it’s a service contract)
- Individuals in power inside the company underpaid employees (Davis Bacon Act).
- Individuals in power inside the company submitted inaccurate payroll records (False Claims Act).
- Contractors or subcontractors were double-billing or overbilling the Federal Government or prime contractors respectively (48 CFR § 9.407-2(a)(1))
- Inaccurate claims to be Service-Disabled Veteran-Owned, or 8(a), or women-owned businesses in order to procure contracts.
- Contractor claimed to be following the Buy American Act when they weren’t (could come into play more in grants with E.O.).
- Authorized advances of funds which were later unaccounted for in a grant. (and what if they’re accruing interest on the funds?)
- Continually late with financial and progress reports, or not reporting at all.
- Audit and closeout problems.

The Importance of Closing out a Grant or Contract

- The inability of a contractor or grantee to complete the final paperwork under their award raises a big flag.
- Currently, there is a grantee whose partner received over \$1 million in grant funds.
- The prime recipient did well on the grant and abided by all the terms and conditions under the award.
- However the partner did not provide a required yearly audit for their work, and claimed they submitted it to the prime.
- But the prime says they never received it; the Government then freed up money for the audit but the partner still did not have one performed.
- Essentially, the grant-making bureau called their bluff.
- The bureau is following through with collections and pushing for proposing debarment.

The Importance of Closing out a Grant or Contract, Cont'd.

- At a different bureau, another grantee has not submitted their single audit report for the past 2 years.
- The bureau has sent them a non-compliance letter saying that not complying with regulations could impact their current grant, and ability to receive them in the future.
- So...don't think just in terms of terminating a grant or contract for cause (where it would show up in Federal Awardee Performance and Integrity Information System - FAPIIS).
- Consider that this problem could be chronic within the organization and could hurt other federal agencies giving this organization a grant or contract.
- These cases should be brought to my attention (as these were) and will be reviewed by the SDO, who will make a final decision.
- Even if we request a show cause letter from the recipient to prove that they are meeting the terms of the grant or contract, we'll have taken an action to protect the Government's fiscal interests.

Sample Case – ABC, Inc.

- ABC was a sub-grantee of a \$10 million award, and was allocated \$2.5 million of the grant.
- The purpose of the grant was to establish and operate public computer centers in rural areas.
- The prime recipient, Acme, disbursed \$400,000 of grant funds to ABC, which was terminated early from the grant due to performance reasons.

Sample Case Continued

- The purpose of the grant was to establish and operate public computer centers (PCC) in rural areas.
- OIG discovered that a PCC was established inside ABC's office named Affiliate 1.
- This was a company established by Mr. John Doe.
- Acme believes that Affiliate 1 was never used as a PCC.
- From September 2010 to August 2011, several ABC employees stated they never observed members from the public using the center outside of Mr. Doe's friends.
- A site visit in 2011 revealed an exterior sign that read "Affiliate 2."
- The center was located down a dirt path off a highway service road that was not visible from the service road due to trees.
- Doe was listed as Executive Director of both Affiliate 1 and Affiliate 2.

Sample Case Continued

- ABC submitted monthly usage statistics for Affiliate 1 and other PCCs to Acme. Mr. Doe says his friends never used the PCCs to generate usage, and that his statistics submitted to Acme were accurate.
- However, an ABC employee stated that Mr. Doe used three employees to increase statistics a couple of times each day.
- The granting agency stated that intentionally boosting the usage statistics is improper.

Aggravating Factors

- Mr. Doe, when interviewed with the OIG, gave inconsistent answers to questions.
- Evidence shows he terminated an ABC employee in reprisal for whistleblowing regarding matters with Affiliate 1 and Affiliate 2.

Mitigating Factors

- Mr. Doe consented to the interview with the OIG and voluntarily provided some documents.
- SAM indicates that neither ABC, Mr. Doe nor any of his affiliates had any prior instances of suspension or debarment.

Based on the Mitigating Factors Presented, Who Do You Think Should Have Been Referred, and Why?

- ABC?
- Acme?
- Affiliate 1?
- Affiliate 2?
- Mr. Doe?

Final Outcome (with Panel Discussion For the Reasons Why Each Decision Was Made)

- Acme not considered for debarment
 - Why not? No reason to think they were aware of Affiliate 1 and 2, or knew of false usage statistics.
- Mr. Doe debarred for 3 years
 - Why? 15 C.F.R. § 14.42 – “No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent **conflict or interest** would be involved.” 2 C.F.R § 180.800(d) – Doe’s self-dealing with creation of potential shell companies that we know inflated usage statistics is a cause “so serious or compelling of nature that it affects present responsibility.”
- ABC, Affiliate 1, Affiliate 2 debarred for 3 years
 - Why? ABC – Doe is the principal and Executive Director. He was never removed from the Company.
 - Affiliate 1 and Affiliate 2 – debarment through affiliation with Doe. (FAR Subpart 9.403) – defined as organizations or individuals where one control, or the power to control the other. Doe had control of both companies, and not removed.
- Lessons learned – could this have been prevented?
- Were there any fraud indicators? If so, what were they?

Bureau Points of Contact

- OS – Kirk Boykin (kboykin@doc.gov)
 - NIST – Melissa Schroeder (melissa.schroeder@nist.gov) or Megan Boblitt (megan.boblitt@nist.gov)
 - Census – Samantha Brady (samantha.brady@census.gov)
 - PTO – Lisa Wade (lisa.wade@uspto.gov)
 - NOAA – Justin Cofer (justin.l.cofer@noaa.gov) or Dale Henderson (dale.henderson@noaa.gov)
 - *MBDA – Nakita Chambers (nchambers@mbda.gov)
 - *ITA – Brad Hess (brad.hess@trade.gov)
 - *NTIA – Michael Dame (mdame@ntia.doc.gov)
 - EDA – Susan Shanahan (sshanahan@eda.gov)
 - OGC – Wilmary Bernal (wbernal@doc.gov)
 - OAM – Greg Coss (gcoss1@doc.gov) – general questions
 - OIG Hotline – 1-800-424-5197 or Hotline@oig.doc.gov
 - OAM External Website: <http://www.osec.doc.gov/oam/> (click on “Suspension and Debarment – Click to Follow” link.) Contains S&D handbook, last year’s breakout session, S&D guidance, fraud indicators, and more.
- * Grants Only

Backup Slides – Examples of OIG Referrals (Involving Fraud)

Case 1 – Acme Contract Company

- Acme Contract Company (ACC) was awarded seven contracts for a total of \$3 million in September 2013, and they were scheduled to run through December 2014.
- Jane Doe was the CEO and President of ACC.
- ACC performs acquisition support and management services including contract planning assistance, proposal evaluations, project planning and scheduling.

Case 1 - Continued

- In April 2014, OIG begins initiating an investigation based on allegations that the respondent submitted false invoices.
- In one example, ACC double billed the government by submitting the same documentation to justify reimbursement for travel costs on separate contracts for the same trip to Italy.
- In another example, ACC overbilled the Government on reimbursement requests for travel. On one invoice the amount was \$23,000, but the supporting documentation only accounted for \$17,000.
- Other irregularities were found and the total overbilled amount was over \$35,000.

Aggravating Factors

- 3 months later, on August 21, 2015, the OIG submits supplemental information to the SDO in support of their issuance of a proposed suspension.
- The OIG uncovers evidence suggesting Doe provided false information to the Government in order to obtain a contract.
- In one example, she submits an application to receive a contract that required proof of past performance.
- Doe submitted past performance which never occurred, claiming to have been a subcontractor on a contract where they invoiced nearly \$200,000.
- They provided these invoices, but the OIG investigators contacted the company, and a representative there said Doe and ACC had never performed work for the company.

Based on the Aggravating Factors Presented, Who Do You Think
Should Have Been Referred, and Why?

- ACC?
- Doe?

Final Outcome (with Panel Discussion For the Reasons Why Each Decision Was Made)

- Jane Doe debarred for 3 years
 - Why? 48 CFR 9.406-2(c) – SDO may debar a contractor or subcontractor based on any cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.
 - Doe double billing and overbilling, which constitutes fraud in connection with the performance of a public contract under § 9.407-2(a)(1).
 - Doe committing other offenses indicating a lack of business integrity or business honesty under § 9.407-2(a)(9)).
- ACC debarred for 3 years
 - Why? Same reasons as Doe, plus the harm associated with submitting false past performance information indicates that ACC didn't possess the requisite skills to operate proficiently as a Federal contractor.
- Lessons learned – could this have been prevented? What were the fraud indicators?

Case 2 – Acme Electronics

- Acme Electronics was a subcontractor to Neon Network.
- Acme Electronics received a \$30 million grant to enhance a state's economy by deploying a broadband internet infrastructure, improving internet service as well as stimulating economic growth and job creation.
- Acme Electronics had to ensure, under a Special Award Condition of the grant, that each subcontractor/sub-recipient complied with all Federal, state, and local laws and regulations.

Case 2 - Continued

- Acme Electronics was awarded a subcontract by Neon Network to construct fiber optic cable and mount hardware. Between March 2011 and December 2012 they receive in excess of \$1.7 million from Neon Network over 21 payments.
- In November 2012 a lawsuit (Qui Tam Complaint) is filed in U.S. District court by a former employee of Acme Electronics against three parties.
- The three parties are Acme Electronics, and employees by the names of John Doe 1 and John Doe 2.
- John Doe 1 is the former owner and President of Acme Electronics, but no longer holds his positions since the company was acquired by Aspire Technologies in January 2012.
- John Doe 2 is a former marketing and operations manager with Acme Electronics. One of his responsibilities involved acquiring business clients for the company, including the subcontract with Neon Network. He, too, had left Acme Electronics by January of 2012, apparently for personal reasons, after Aspire Technologies acquired them.
- Neither John Doe 1 nor 2 were found to have received any other Federal assistance or grants outside of Acme Electronics.

Case 2 - Continued

- In the Qui Tam Complaint, the relator claimed that Acme Electronics, John Doe 1 and John Doe 2 knowingly submitted fake payroll records and false statements under the contract.
- These false records and statements included the deliberate underpayment of certain workers by \$10 per hour.
- This involved submitting fictitious payroll records disclosing the workers receipt of approximately \$10 an hour for training and uniforms which were never provided.
- A joint DOC/DOL OIG investigation indicated that the evidence pointed to the respondents using their positions and authority to underpay individuals who worked on the project – in particular the electricians.
- Neon Network requested supporting documentation from Acme Electronics to verify the company was in compliance with all laws and regulations under the subcontract, and John Doe 1 and 2 did not comply.

Case 2 - Continued

- Based upon the results of the OIG investigation, settlement agreements for Acme Electronics, John Doe 1 and 2 were initiated in December 2013 and by June 2014 all parties agreed to settle the allegations in the case.
- A total of \$780,000 were paid for the claims made against them.
- No determination of liability was made by any party, yet Acme Electronics and John Doe 1 paid a combined \$750,000 in restitution to the U.S. Government and John Doe 2 paid \$30,000.

Initial Thoughts

- Who do you think the OIG referred for debarment, and why?
- John Doe 1?
- John Doe 2?
- Acme Electronics?
- Neon Network?
- Aspire Technologies?

Aggravating Factors

- According to John Doe 2 (interviewed by DOL OIG), John Doe 1 and 2 attended a pre-bid meeting with Neon Network officials, in which requirements were discussed. This included proper hourly rates to be paid on Federal contracts.
- Acme Electronics also acknowledged wage laws and regulations.
- The lawsuit said that the respondents still deliberately underpaid certain workers in order to increase their own profit margins, along with submitting fictitious payroll records to conceal the underpayments.
- John Doe 2 says the employees were underpaid around \$9 an hour and John Doe 1 told him to “bury it in training.”
- Between May 2011 and March 2012, Acme Electronics submitted approximately 99 false payroll certifications.

Mitigating Factors

- The respondents settled the claims in the civil lawsuit and that involved no determination of liability.
- John Doe 2 no longer works for John Doe 1 or Acme Electronics – and his settlement was significantly lower than the other two respondents.
- John Doe 2 also consented to be interviewed by the government (no criminal prosecution in exchange for his cooperation).
- Acme Electronics has been sold to Aspire Technologies.
- Aspire Technologies proves that John Doe 1 and 2 are no longer associated with Acme Electronics or their company.

Based on the Mitigating Factors Presented, Who Do You Think Should Have Been Referred, and Why?

- John Doe 1?
- John Doe 2?
- Acme Electronics?
- Neon Network?
- Aspire Technologies?
- If you feel someone should be debarred, then for how long?

Final Outcome (with Panel Discussion For the Reasons Why Each Decision Was Made)

- Neon Network not considered for debarment
 - Why not? Neon was not falsifying records or underpaying the employees – this was the doing of Acme.
 - Neon had attended the pre-bid meeting, and was well aware of Davis-Bacon requirements. As a result, they requested notifications in their RFPs that subcontractors/subrecipients were aware of the need to comply with Davis-Bacon.
- Acme Electronics not considered for debarment
 - Why not? Acme's actions subsequent to discovery of the wrongdoing under the grant show that it has, in fact, acted responsibly.
 - They took steps to ensure that the individuals engaging in poor behavior were removed from the company.
- Aspire Technologies not considered for debarment
 - Why not? By the time Aspire had acquired Acme, John Doe 1 and 2 had been removed from the company.
- John Doe 2 debarred for 2 years
 - Why? Failure to comply with Davis-Bacon wage laws (40 U.S.C. § 3141)
 - Violation of False Claims Act (31 U.S.C. § § 3729-3733)
 - 2 CFR § 180.800(b)(3) – willful violation of a statutory provision or requirement applicable to a public agreement or transaction
 - 2 CFR § 180.800(d) – a cause so serious or compelling in nature that it affects your present responsibility
- John Doe 1 debarred for 3 years
 - Why? Same reasons as John Doe 2 – Doe 1 got an additional year because didn't cooperate with the OIG.
Lessons learned – could this have been prevented?
- Were there any fraud indicators? If so, what were they?