Procurement Debarment and Suspension of Government Contractors: Legal Overview

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Summary

Debarment and suspension (collectively known as "exclusion") are of perennial interest to Congress because exclusion is one of the primary techniques that federal agencies use to avoid dealings with vendors who have failed, or are deemed likely to fail, to meet their obligations under federal law or government contracts. Debarred contractors are generally ineligible for new federal contracts for a fixed period of time, while suspended contractors are generally ineligible for the duration of any investigation or litigation involving their conduct. Federal law specifies various grounds for exclusion, only some of which expressly relate to procurement. The grounds and procedures for nonprocurement exclusions are outside the scope of this report. However, all persons excluded on procurement or other grounds are listed in the System for Award Management (SAM), which contracting officers must check prior to awarding a contract.

Procurement-related exclusions can be broadly characterized as being either statutory or administrative. Statutory exclusions are required or authorized by congressional enactments that bar persons who have engaged in conduct prohibited under the statute from at least certain government contracts. Such exclusions are often mandatory, or at least beyond the discretion of the heads of procuring agencies, and are intended as punishments. The statute often prescribes the duration of the exclusion, and procuring agencies generally cannot waive the exclusion.

Administrative exclusions, in contrast, are authorized by the Federal Acquisition Regulation (FAR). The FAR authorizes the debarment of contractors who are convicted of, found civilly liable for, or found by agency officials to have committed specified offenses, or when other causes affect contractor responsibility. It similarly authorizes suspension when contractors are suspected of or indicted for specified offenses, or when there are other causes that affect contractor responsibility. The FAR does not require the exclusion of a contractor, even when grounds for exclusion are present. Instead, agency officials retain discretion as to whether to exclude particular contractors, and they may enter into administrative agreements circumscribing the conduct of contractors in lieu of exclusion. Exclusion under the FAR is also intended to protect the government's interests, not for purposes of punishment. The length of the exclusion can vary depending upon the seriousness of the conduct in question and the duration of any investigation, among other things. However, agency heads could waive administrative exclusions.

Excluded parties are generally ineligible for new government contracts and, in the case of administrative exclusions, are also expressly said to be ineligible to (1) receive new work or an option under an existing contract; (2) serve as a subcontractor on certain contracts; or (3) serve as an individual surety. However, existing contracts of the excluded contractor generally remain in effect unless they are terminated for default or convenience by the government.

Because they are dealing with the federal government, contractors are entitled to due process before being excluded from government contracts, although the nature of the process due to them varies for debarments and suspensions. Agencies are generally prohibited from using means other than debarment or suspension proceedings to effectively exclude contractors. Such conduct is sometimes described as "*de facto* debarment." Conduct that results in *de facto* debarment could also result in contractors being deprived of constitutionally protected liberty interests in prospective government contracts. Additionally, agencies could be found to have violated the Administrative Procedure Act (APA) by acting arbitrarily and capriciously if they exclude a contractor based upon circumstances that the agency was aware of when it previously found the contractor sufficiently "responsible" to be awarded a federal contract.

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Debarment and suspension (collectively known as "exclusion") are of perennial interest to Congress because exclusion is one of the primary techniques that federal agencies use to avoid dealings with vendors who have failed, or are deemed likely to fail, to meet their obligations under federal law or government contracts.[1] Debarred contractors are generally ineligible for new federal contracts for a fixed period of time, while suspended contractors are generally ineligible for the duration of any investigation or litigation involving their conduct. Federal law specifies various grounds for exclusion, only some of which expressly relate to procurement. The grounds and procedures for nonprocurement exclusions are outside the scope of this report. However, all persons excluded on procurement or other grounds are listed in the System for Award Management (SAM) (previously the Excluded Parties List System (EPLS)). Contracting officers are generally barred from soliciting offers from, awarding contracts to, or consenting to subcontracts with contractors who are listed as excluded in SAM.[2]

This report discusses grounds and procedures for procurement-related exclusions.[3] In particular, it surveys the authorities requiring or allowing federal agencies to debar or suspend contractors, as well as the due process and other protections for contractors in exclusion proceedings.

Authorities Requiring or Allowing Exclusion

Contractors can currently be debarred or suspended under federal statutes or under the Federal Acquisition Regulation (FAR), an administrative rule governing contracting by executive branch agencies.[4] There are only two explicit overlaps between the causes of debarment and suspension under statute and those under the FAR, involving debarments and suspensions for violations of (1) the Drug-Free Workplace Act of 1988[5] and (2) various statutes proscribing intentionally affixing a "Made in America" label to an ineligible product sold in or shipped to the United States.[6] However, the FAR includes certain "catch-all" provisions that could potentially make the

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[1] Agencies also use responsibility determinations for this purpose. Prior to awarding a federal contract, the contracting officer must determine that the contractor is sufficiently "responsible" to perform that contract. *See generally* 48 C.F.R. §§9.100-9.108-5; CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by (name redacted). Statutory prohibitions upon contracting with specific entities can similarly be used for this purpose, although they could potentially be found to constitute unconstitutional bills of attainder in some cases. *See, e.g.*, CRS Report R40826, *Bills of Attainder: The Constitutional Implications of Congress Legislating Narrowly*, by (name redacted).

[2] *See generally* 48 C.F.R. §9.404(c)(7).

[3] Nonprocurement debarments are discussed in a separate report, archived CRS Report R40993, *Debarment and Suspension Provisions Applicable to Federal Grant Programs*, by (name redacted). Questions about this report may be referred to CRS Legislative Attorney (name redacted).

[4] The FAR is promulgated by the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA) under the authority of the Office of Federal Procurement Policy Act of 1974. *See* Office of Federal Procurement Policy Act of 1974, P.L. 93-400, 88 Stat. 796 (August 30, 1974) DOD, GSA & NASA, Establishing the Federal Acquisition Regulation: Final Rule, 48 *Federal Register* 42,102, 42,142 (September 19, 1983). For more on the FAR, see generally CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by (name redacted) et al.

[5] The Drug-Free Workplace Act of 1988, P.L. 100-690, §§5151-5160, 102 Stat. 4181 (codified at 41 U.S.C. §§8101-8106), is mentioned in FAR 9.406-2(b)(1)(ii) and 9.407-2(a)(4), which corresponds to 48 C.F.R. §9.406-2(b)(1)(ii) and 9.407-2(a)(4).

[6] *Compare* 48 C.F.R. §9.406-2(a)(4) (grounds for debarment) *and* 48 C.F.R. §9.407-2(a)(5) (grounds for suspension) *with, e.g.*, 33 U.S.C. §569f (conviction of intentionally affixing a "Made in America" label to an ineligible product sold in or shipped to the United States that was used in an Army Corps of Engineers civil works project).

same conduct grounds for debarment or suspension under statute and under the FAR. One of these provisions authorizes debarment for "any ... offense indicating a lack of business integrity or business honesty."[7] The other authorizes debarment or suspension for "any other cause of [a] serious or compelling nature."[8]

Statutes Requiring or Allowing Exclusion

Some federal statutes include provisions specifying that contractors who engage in certain conduct prohibited under the statute shall or may be debarred or suspended from future contracts with the federal government.[9] Such debarments or suspensions are often referred to as "statutory debarments" or "statutory suspensions" because they are expressly provided for in statute. They are sometimes also described as "inducement debarments" or "inducement suspensions" because they are designed to provide additional inducement for contractors' compliance with the statutes.[10]

Statutes providing for debarment and suspension often require that the excluded party be convicted of wrongdoing under the statute, but at other times, findings of wrongdoing by agency heads suffice for exclusion.[11] Sometimes the exclusion applies only to certain types of contractors, or dealings with specified agencies (e.g., institutions of higher education who contract with the government, contracts with the Department of Defense).[12] Most of the time, however, the exclusion applies more broadly to all types of contractors dealing with all federal agencies.[13] Persons identified by statute—often the head of the agency administering the statute requiring or allowing exclusion—make the determination to debar or suspend contractors.[14] Debarments last for a fixed period specified by statute, while suspensions last until a designated official finds that the contractor has ceased the conduct that constituted its violation of the statute.[15] Generally, statutory exclusions can only be waived by a few officials under narrow circumstances.[16] Heads of procuring agencies generally cannot waive exclusions to allow debarred or suspended contractors to contract with their agency. **Table 1** surveys the

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[7] 48 C.F.R. §9.406-2(a)(5)

[8] 48 C.F.R. §9.406-2(c); 48 C.F.R. §9.407-2(c).

[9] *See, e.g.*, 21 U.S.C. §862 (authorizing debarment for violations of federal or state controlled substance laws).

[10] Exclusions required or authorized by executive orders are often listed with statutory debarments because they are similarly intended as inducements to particular behavior. *See, e.g.*, Executive Order 11246, as amended (authorizing the Secretary of Labor to debar contractors who fail to comply with equal employment opportunity and affirmative action requirements until such time as they comply); Executive Order 12989, as amended by Executive Order 13286, authorizing the heads of contracting agencies to debar contractors (or organizational units thereof) that the Secretary of Homeland Security has determined are not incompliance with the employment provisions of the Immigration and Nationality Act).

[11] *Compare* 42 U.S.C. §7606 (debarment based on conviction) *with* 41 U.S.C. §8303(c) (debarment based on agency head's findings).

[12] *See, e.g.*, 10 U.S.C. §983 (debarment for institutions of higher education only); 48 C.F.R. §§209.470-1-209.470-4 (same); 10 U.S.C. §2408 (debarment from Department of Defense contracts only).

[13] *See, e.g.*, 40 U.S.C. §3144 (government-wide debarment for failure to pay wages under the Davis-Bacon Act).

[14] *See, e.g.*, 42 U.S.C. §7606 (Administrator of the Environmental Protection Agency to debar contractors for certain violations of the Clean Air Act).

[15] *Compare* 41 U.S.C. §8102(b)(3) (providing for debarment for up to five years) *with* 33 U.S.C. §1368 (suspensions for certain violations of the Clean Water Act end with the violation).

[16] *Compare* 33 U.S.C. §1368 (allowing the President to waive a debarment "in the paramount interests of the United States" with notice to Congress) *with* 40 U.S.C. §3144 (making no provisions for waiver).

procurement-related statutory exclusions presently in effect. It attempts to be comprehensive, listing all such exclusions codified in the *United States Code* (including as notes). It does not list any un-codified provisions that may exist.

Table 1. Procurement-Related Statutory Exclusions

Statute	Cause of Debarment	Mandatory or Discretionary[a]	Decisionmaker	Duration & Scope	Waiver of Debarment
American Technology Preeminence Act of 1991 (15 U.S.C. §1536)	Determination by a court or federal agency that a person has intentionally affixed a "Made in America" or similar label to an ineligible product sold in or shipped to the United States	Mandatory	Secretary of Commerce	No time period prescribed; exclusion only applies to Department of Commerce contracts and subcontracts	Not provided for in statute; but exclusion effectuated pursuant to FAR procedures
Buy American Act (41 U.S.C. §8303(c))	Violations of the Buy American Act in constructing, altering, or repairing any public building or work in the United States using appropriated funds	Mandatory	Head of the agency that awarded the contract under which the violation occurred	Three years; government-wide	Not provided for in statute
Clean Air Act (42 U.S.C. §7606)	Conviction for violating 42 U.S.C. §7413(c)	Mandatory	EPA Administrator	Lasts until EPA Administrator certifies the condition is corrected; government-wide *but* limited to the facility giving rise to the conviction	Waiver by President when he or she determines it is in the paramount interests of the United States and notifies Congress
Clean Water Act (33 U.S.C. §1368)	Conviction for violating 33 U.S.C. §1319(c)	Mandatory	EPA Administrator	Lasts until EPA Administrator certifies the condition is corrected; government-wide *but* limited to the facility giving rise to the conviction	Waiver by President when he or she determines it is in the paramount interests of the United States and notifies Congress

Statute	Cause of Debarment	Mandatory or Discretionary[a]	Decisionmaker	Duration & Scope	Waiver of Debarment
Davis-Bacon Act (40 U.S.C. §3144)[b]	Failure to pay prescribed wages for laborers and mechanics	Mandatory	Secretary of Labor[c]	Three years; government-wide	Not provided for in statute
Disaster Mitigation Act (42 U.S.C. §5206)	Conviction of intentionally affixing a "Made in America" label to an ineligible product sold in or shipped to the United States	Discretionary (determination must be made within 90 days of determining that a person was convicted)	Administrator of the Federal Emergency Management Agency	No time period prescribed; exclusion applies only to contracts under the Stafford Act	Not provided for in statute
Drug-Free Workplace Act of 1988 (41 U.S.C. §8102(b))	Specified violations of the act (e.g., failure to publish a statement notifying employees that the unlawful use of controlled substances in the workplace is prohibited); or having so many employees convicted of criminal drug violations occurring in the workplace as to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace	Discretionary	Head of the contracting agency	Up to five years; government-wide	Not provided for in statute
Foreign Relations Authorization Act (22 U.S.C. §2679b)	Final determination by a court or federal agency that a person intentionally affixed a "Made in America" or similar label to an ineligible product sold in or shipped to the United States	Mandatory	Secretary of State	No time period prescribed; exclusion only applies to Department of State contracts and subcontracts	Not provided for in statute, but exclusion effectuated pursuant to FAR procedures
John Warner National Defense Authorization	Knowing or willful noncompliance with general	Discretionary	Secretary of Defense	Exclusion lasts until the vendor has effectively	Not provided for in statute

Statute	Cause of Debarment	Mandatory or Discretionary[a]	Decisionmaker	Duration & Scope	Waiver of Debarment
Act for FY2007 (10 U.S.C. §2533b)	prohibition upon the use of specialty metals not melted or produced in the United States in certain defense products			addressed the issues that lead to noncompliance	
Military Recruiting on Campus (10 U.S.C. §983; 48 C.F.R. §209.470 *et seq.*)	Policy or practice prohibiting Reserve Officers' Training Corps (ROTC) access or military recruiting on campus	Mandatory	Secretary of Defense	Lasts so long as the policy or practice triggering the suspension; limited to Department of Defense Contracts	Not provided for in statute
National Defense Authorization Act for FY1993 (10 U.S.C. §2410f)	Conviction of intentionally affixing a "Made in America" or similar label to any ineligible product sold in or shipped to the United States	Discretionary (determination must be made within 90 days of determining that a person was convicted)	Secretary of Defense	Not prescribed by statute; exclusion only applies to Department of Defense contracts	Not provided for in statute
Service Contract Act (41 U.S.C. §6706)	Failure to pay compensation due to employees under the act	Mandatory	Secretary of Labor	Three years; government-wide	Waiver by the Secretary of Labor because of "unusual circumstances"
Small Business Act (15 U.S.C. §645)	Misrepresentation of size or status (e.g., woman-owned) in order to obtain certain small business contracting preferences	Mandatory	Administrator of Small Business	Not prescribed by statute; government-wide	Not provided for in statute, but exclusion effectuated pursuant to FAR procedures
Sudan Accountability and Divestment Act (50 U.S.C. §1701 note)	Falsely certifying that the contractor does not "conduct business operations" in the Sudan	Discretionary	Any executive-branch agency head	Three years; government-wide	Not provided for in statute
Veterans Benefits Act (38 U.S.C. §8127)	Willful and intentional misrepresentation of status as a small business owned and controlled by veterans or	Mandatory	Secretary of Veterans Affairs (VA)	Not less than 5 years; exclusion from VA contracts only	Not provided for in statute

Statute	Cause of Debarment	Mandatory or Discretionary[a]	Decisionmaker	Duration & Scope	Waiver of Debarment
	service-disabled veterans for purposes of the Veterans First Contracting program				
Walsh-Healey Act (41 U.S.C. §6504)	Failure to pay the minimum wage, requiring mandatory and uncompensated overtime, use of child labor, or maintenance of hazardous working conditions	Mandatory	Secretary of Labor	Three years; government-wide	Waiver by the Secretary of Labor; no criteria for waiver specified
Water Resources Development Act (33 U.S.C. §569f)	Conviction of intentionally affixing a "Made in America" label to an ineligible product sold in or shipped to the United States that was used in an Army Corps of Engineers civil works project	Mandatory	Secretary of the Army	Not less than three years and not more than five years; government-wide	Not provided for in statute

Source: Congressional Research Service, based on various sources cited in **Table 1**.

Notes: There are two other statutory provisions discussing debarment that are not included in this table because they are specific to individual persons and would not apply to corporations. Section 862 of Title 21 of the *United States Code* allows the court sentencing an individual for violating federal or state laws on the distribution of controlled substances to debar that individual for up to one year, in the case of first-time offenders, or for up to five years, in the case of repeat offenders. Section 2408 of Title 10 of the *United States Code* similarly prohibits persons who have been convicted of fraud or any other felony arising out of a contract with the Department of Defense (DOD) from working in management or supervisory capacities on any DOD contract, or engaging in similar activities. Contractors who knowingly employ such "prohibited persons" are themselves subject to criminal penalties.

a. An exclusion is said to be "mandatory" for purposes of **Table 1** if the statute governing the exclusion uses the word "shall." Under general principles of statutory interpretation, the term "shall" is construed as imperative or mandatory. *See* 1A *Sutherland Statutes and Statutory Construction* §25:4 (Norman J. Singer ed., 2002) ("Unless the context otherwise indicates the use of the word 'shall' ... indicates a mandatory intent."). However, because these exclusions are punitive, an argument could potentially be made that the determination as to whether to exclude a particular person is within the agency's prosecutorial discretion. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974) (citing the *Confiscation Cases*, 7 Wall. 454 (1869) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case…")); Heckler v. Cheney, 470 U.S. 821, 832 (1985) (noting that an agency decision to initiate an enforcement action in the administrative context "shares to some extent the characteristics of the decision of a prosecutor in the executive branch").

b. The statutory debarment provided for in the Davis-Bacon Act is better known under its former location within the *United States Code*, 40 U.S.C. §276a-2(a).

c. Section 3144(b)(1) of Title 40 of the *United States Code* expressly provides that the "Comptroller General shall distribute to all departments of the Federal Government a list of the names of persons whom the *Comptroller General* has found to have disregarded their obligations to employees and subcontractors" (emphasis added). However, federal regulations provide for the Department of Labor to "transmit ... the names of ... contractors and subcontractors and their responsible officers" found to have violated the Davis-Bacon Act to the Comptroller General for listing. *See* 29 C.F.R. §5.12(a)(2).

Exclusion Under the FAR

As a matter of policy, the federal government seeks to "prevent improper dissipation of public funds"[17] in its contracting activities by dealing only with responsible contractors.[18] Debarment and suspension promote this policy by precluding agencies from entering into new contracts with contractors whose prior violations of federal or state law, or failure to perform under contract, suggest they are nonresponsible.[19] However, because exclusions under the FAR are designed to protect the government's interests, they may not be imposed solely to punish prior contractor misconduct.[20] Federal courts could overrule challenged agency decisions to debar contractors when agency officials seek to punish the contractor—rather than protect the government—in making their exclusion determinations.[21]

Where grounds for debarment or suspension exist, as discussed below, any agency may act to exclude the contractor, potentially including one that does not currently have a contract with the contractor or is not the contractor's "primary" business partner.[22] In practice, though, exclusions are most commonly initiated by the agency under or in regard to whose contract or proposed contract the alleged misconduct occurred.

Debarment

The FAR authorizes agency officials to debar contractors from future contracts under three circumstances. First, debarment may be imposed when a contractor is convicted of or found civilly liable for any so-called "integrity offense." Integrity offenses include

- fraud or criminal offenses in connection with obtaining, attempting to obtain, or performing a government contract or subcontract;

[17] United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) ("It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition.") (internal citations omitted).

[18] 48 C.F.R. §9.402(a) (directing agency contracting officers to "solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only").

[19] *See id*. ("Debarment and suspension are discretionary actions that ... are appropriate means to effectuate [the] policy [of dealing only with responsible contractors].").

[20] 48 C.F.R. §9.402(b) ("The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment.").

[21] *See, e.g.*, IMCO, Inc. v. United States, 97 F.3d 1422, 1427 (Fed. Cir. 1996) (upholding an agency's debarment determination but noting that the outcome could have been different had the debarment been imposed for purposes of punishment).

[22] *See, e.g.*, Deborah Billings, EPA Lifts Temporary Suspension of IBM for Misconduct on Agency Contract Bid, 89 *Fed. Cont. Rep.* 371 (April 4, 2008). In this case, the EPA suspended IBM because of IBM's alleged misconduct when bidding on an EPA contract. At the time, IBM had contracts with numerous other federal agencies, most notably the General Services Administration (GSA).

- violations of federal or state antitrust laws relating to the submission of offers;
- embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receipt of stolen property;
- intentionally affixing a "Made in America" label, or similar inscription, on ineligible products; and
- other offenses indicating a lack of business integrity or honesty that seriously and directly affect the present responsibility of a contractor or subcontractor.[23]

Second, in the absence of convictions or civil judgments, debarment may be imposed when government officials find, by a preponderance of the evidence, that the contractor committed certain offenses. These offenses include

- serious violations of the terms of a government contract or subcontract;[24]
- violations of the Drug-Free Workplace Act of 1988;[25]
- intentionally affixing a "Made in America" label, or similar inscription, on ineligible products;
- commission of an unfair trade practice as defined in Section 201[26] of the Defense Production Act;
- delinquent federal taxes in an amount exceeding $3,000;[27] and
- knowing failure by a principal to timely disclose to the government credible evidence of (1) violations of federal criminal laws involving fraud, conflict of interest, bribery, or gratuity offenses covered by Title 18 of the United States Code; (2) violations of the civil False Claims Act; or (3) significant overpayments on the contract[28] that occurred in connection with the award,

[23] 48 C.F.R. §9.406-2(a)(1)-(5).

[24] For purposes of the FAR, serious violations of the terms of a government contract or subcontract include (1) willful failure to perform in accordance with a term of the contract or (2) a history of failure to perform or unsatisfactory performance under contract. 48 C.F.R. §9.406-2(b)(1)(i)(A)-(B).

[25] Such violations include (1) failure to comply with the requirements in Section 52.223-6 of the FAR or (2) employment of so many persons who have been convicted of violating criminal drug statutes in the workplace as to indicate that the contractor failed to make good faith efforts to provide a drug-free workplace. 48 C.F.R. §9.406-2(b)(1)(ii)(A)-(B). FAR 52.223-6 requires that contractors (1) publish a statement notifying employees that the manufacture, distribution, possession, or use of controlled substances in the workplace is prohibited and specifying actions to be taken in response to employee violations; (2) establish drug-free awareness programs to inform employees of the policy; (3) provide employees with a written copy of the policy; (4) notify employees that their continued employment is contingent upon their compliance with the policy; (5) notify agency contracting officials of employee convictions for violations of controlled substance laws; and (6) take steps to terminate or ensure treatment of employees convicted of violating controlled substance laws.

[26] Section 201 covers (1) violations of Section 337 of the Tariff Act of 1930; (2) violations of agreements under the Export Administration Act of 1979 or similar bilateral or multilateral export control agreements; or (3) knowingly false statements regarding material elements of certifications concerning the content of an item.

[27] Federal taxes are considered delinquent, for purposes of this provision, when (1) tax liability is finally determined and (2) the taxpayer is delinquent in making payment. *See* 48 C.F.R. §9.406-2(b)(v)(A)(1)-(2).

[28] Overpayments resulting from contract financing payments, as defined under 48 C.F.R. §32.001, are excluded here. *See* 48 C.F.R. §9.406-2(b)(vi)(C).

performance or closeout of a federal contract or subcontract and were discovered within three years of final payment.[29]

Debarment can also result, under this provision of the FAR, when the Secretary of Homeland Security or the Attorney General finds, by a preponderance of the evidence, that a contractor has not complied with the employment provisions of the Immigration and Nationality Act.[30]

Third, and finally, debarment may be imposed whenever there exists "any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor."[31]

Debarments last for a "period commensurate with the seriousness of the cause(s)," generally not exceeding three years.[32] As discussed below, due process generally requires that contractors receive written notice of and the opportunity for a hearing regarding any debarment.[33] Debarment-worthy conduct by a contractor's officers, directors, shareholders, partners, employees, or other associates can be imputed to the contractor, and vice versa.[34]

Suspension

The FAR also allows agency officials to suspend government contractors when they suspect, upon adequate evidence, any of the following offenses, or when contractors are indicted for these offenses:

- fraud or criminal offenses in connection with obtaining, attempting to obtain, or performing a public contract;
- violation of federal or state antitrust laws relating to the submission of offers;
- embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violations of federal criminal tax laws, or receipt of stolen property;

[29] 48 C.F.R. §9.406-2(b)(1)(i)-(vi). The final ground for debarment (i.e., failure to timely disclose specified offenses) was added to the FAR by the Close the Contractor Fraud Loophole Act, §§6101-6103 of the Supplemental Appropriations Act of 2008 (P.L. 110-252), which also amended the FAR to require that contractors timely notify agency officials of overpayments or federal crimes connected with the award of a "covered contract or subcontract." *See* 48 C.F.R. §§3.1000-3.1004. Covered contracts and subcontracts are those that are greater than $5 million in amount and more than 120 days in duration, regardless of whether they are performed outside the United States or include commercial items. P.L. 110-252, §§6101-03, 122 Stat. 2323 (June 30, 2008). Previously, under FAR §§9.405 and 52.209-5(a) (2006), contractors with awards worth more than $30,000 had to disclose the existence of indictments, charges, convictions, or civil judgments against them. However, disclosure of the existence of legal proceedings is different from disclosure of grounds on which future legal proceedings could potentially be initiated.

[30] 48 C.F.R. §9.406-2(b)(2).

[31] 48 C.F.R. §9.406-2(c).

[32] 48 C.F.R. §9.406-4(a)(1). Debarments are generally limited to one year for violations of the Immigration and Nationality Act, but can last up to five years for violations of the Drug-Free Workplace Act. 48 C.F.R. §9.406-4(a)(1)(i)-(ii). The FAR allows debarring officials to extend the debarment for an additional period if they determine that an extension is necessary to protect the government's interests. 48 C.F.R. §9.406-4(b). Extension cannot be based solely upon the facts and circumstances upon which the initial debarment was based, however. *Id*.

[33] 48 C.F.R. §9.406-3. When debarment is based on a conviction, the hearing that the contractor received prior to the conviction suffices for due process in the debarment proceeding.

[34] 48 C.F.R. §9.406-5(a)-(b).

- violations of the Drug-Free Workplace Act of 1988;[35]
- intentional misuse of the "Made in America" designation;
- unfair trade practices, as defined in Section 201 of the Defense Production Act;[36]
- delinquent federal taxes in an amount exceeding $3,000;[37]
- knowing failure by a principal to timely disclose to the government credible evidence of (1) violations of federal criminal laws involving fraud, conflict of interest, bribery, or gratuity offenses covered by Title 18 of the United States Code; (2) violations of the civil False Claims Act; or (3) significant overpayments on the contract[38] that occurred in connection with the award, performance or closeout of a federal contract or subcontract and were discovered within three years of final payment;[39] and
- other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor.[40]

Agency officials may also suspend a contractor when they suspect, upon adequate evidence, that there exists "any other cause of so serious or compelling a nature that it affects the present responsibility of a ... contractor or subcontractor."[41]

A suspension generally lasts only as long as an agency's investigation of the conduct for which the contractor was suspended, or any ensuing legal proceedings.[42] It generally may not exceed 12-18 months unless legal proceedings have been initiated within that period.[43] As discussed below, certain due process protections apply with suspensions, as with debarment.[44] Suspension-worthy conduct can be imputed, as can debarment-worthy conduct.[45]

Exclusion for Conduct Imputed to the Contractor

The FAR expressly authorizes agencies to extend debarment or suspension decisions to "affiliates" of the contractor if the affiliates are specifically named, and are given written notice

[35] *See supra* note 25 for a description of what conduct violates the Drug-Free Workplace Act.

[36] *See supra* note 26 for a listing of unfair trade practices under Section 201 of the Defense Production Act.

[37] *See supra* note 27 for a discussion of what makes federal taxes delinquent for purposes of this provision of the FAR.

[38] *See supra* note 28 for more on qualifying overpayments.

[39] *See supra* note 29 for more on the history of this provision.

[40] 48 C.F.R. §9.407-2(a)(1)-(9) (suspicion on adequate evidence) & 48 C.F.R. §9.407-2(b) (indictment).

[41] 48 C.F.R. §9.407-2(c).

[42] However, an affiliate of a suspended contractor could potentially be suspended for the duration of the investigation of the principal contractor, or litigation involving the principal, without themselves being the subjects of independent investigations or litigation. *See generally* Agility Defense & Gov't Servs., Inc. v. U.S. Dep't of Defense, 739 F.3d 586 (11th Cir. 2013), *rev'g*, 2012 U.S. Dist. LEXIS 91236 (June 26, 2012). For further discussion of the *Agility* decision, see generally CRS Legal Sidebar WSLG826, Update: 11th Circuit Finds That Agencies Have Broad Discretion to Suspend Affiliates of Federal Contractors, But Additional Challenges Are Pending in Other Jurisdictions, by (name redacted).

[43] 48 C.F.R. §9.407-4(a).

[44] 48 C.F.R. §9.407-3(a)-(d). The due process protections with suspension are not as extensive as those with debarment because suspension is seen as "less serious" than debarment because of its shorter duration. *See infra* notes 87-91 and accompanying text.

[45] 48 C.F.R. §9.407-5.

of the exclusion and an opportunity to respond.[46] The FAR also provides that the "fraudulent, criminal, or other seriously improper conduct" of an officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor in certain circumstances,[47] and vice versa.[48] In addition, the conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other contractors if "the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors."[49] However, while these regulations have been described by one court as "administrative devices to protect the public welfare and to impose on government contractors a higher standard of care,"[50] they do not necessarily allow agencies to exclude persons simply based on their job titles or other nominal indicia of control.[51] Similarly, agency exclusion determinations could potentially be vulnerable to challenge on the grounds that they are unreasonable if the agency makes "inconsistent" decisions when determining whether to exclude particular affiliates of a contractor.[52]

Agency Discretion, Administrative Agreements, Continuation of Current Contracts, and Waivers

Not all contractors who engage in conduct that constitutes potential grounds for debarment or suspension under the FAR are excluded from contracting with executive branch agencies. Nor does the debarment or suspension of a contractor guarantee that agencies do not presently have contracts with that contractor, or will not contract with that contractor before the exclusion period ends. Several aspects of the exclusion process under the FAR explain why this is so.

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[46] 48 C.F.R. §9.406-1(b) (debarment); 48 C.F.R. §9.407-1(c) (suspension). For purposes of Subpart 9.4 of the FAR, "[b]usiness concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (1) either one controls or has the power to control the other, or (2) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contract or that was debarred, suspended, or proposed for debarment." 48 C.F.R. §9.403.

[47] 48 C.F.R. §9.406-5(a). Such conduct may be imputed to the contractor when "the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence," and the contractor's acceptance of benefits derived from the conduct constitutes evidence of knowledge, approval, or acquiescence. *Id*.

[48] 48 C.F.R. §9.406-5(b). For the contractor's conduct to be imputed to an officer, director, shareholder, partner, employee or other individual, that individual must have participated in and known of, or had reason to know of, the contractor's conduct. *Id*.

[49] 48 C.F.R. §9.406-5(c).

[50] Caiola v. Carroll, 851 F.2d 395, 399 (1988).

[51] *Id*. at 401 ("Although it may be proper to presume or infer control from one's title as an officer or director of a closely held corporation, the presumption or inference of control must yield to the evidence of the particular case. On the record presented in this case, a presumption or inference of control would be unwarranted as to [the plaintiffs]. Therefore, it was unreasonable to extend or impute [the company's] criminal conduct to [them].").

[52] *Id*. at 400 (finding that the exclusion of the president and secretary of an excluded company was unreasonable given that its treasurer was not excluded, and "[i]f a strict liability standard was to be applied, fairness and equal treatment required that it be applied to all officers"). *But see* Kisser v. Cisneros, 14 F.3d 615, 619 (D.C. Cir. 1994) (construing *Caiola* to mean only that an agency, having made an affirmative decision to debar several corporate officers, may not make inconsistent decisions regarding their culpability). The plaintiff in *Kisser* had suggested that *Caiola* instead be construed to mean that an agency must establish a "reasoned explanation" for why it excludes some, but not all, members of a corporation who are potentially subject to debarment under the FAR.

First, under the FAR, debarment or suspension of contractors is discretionary.[53] The FAR says that agencies "may debar" or "may suspend" a contractor when grounds for exclusion exist,[54] but it does not require them to do so.[55] Rather, the FAR advises agency officials to focus upon the public interest when making debarment determinations.[56] Because the public interest can be seen to encompass *both* safeguarding public funds by excluding contractors who may be nonresponsible *and* not excluding contractors who are fundamentally responsible and could otherwise compete for government contracts,[57] agency officials could find that contractors who engaged in exclusion-worthy conduct should not be excluded, particularly if they appear unlikely to engage in similar conduct in the future.[58] Any circumstance suggesting that a contractor is unlikely to repeat past misconduct—such as changes in personnel or procedures, restitution, or cooperation in a government investigation—can potentially incline an agency's decision against debarment.[59] Moreover, exclusion can be limited to particular "divisions, organizational elements, or commodities" of a company if agency officials find that only segments of a business engaged in wrongdoing.[60] Other contractors generally cannot challenge agency decisions not to debar a contractor who is alleged or could be said to have engaged in debarment-worthy conduct.[61] They generally can only contest an agency's determination of a contractor's present responsibility,[62] which is required prior to a contract award.[63]

Second, agencies can use administrative agreements as alternatives to debarment.[64] In these agreements, the contractor generally admits its wrongful conduct and agrees to restitution; separation of employees from management or programs; implementation or extension of compliance programs; employee training; outside auditing; agency access to contractor records;

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[53] 48 C.F.R. §9.402(a) ("Debarment and suspension are discretionary actions.... ").

[54] 48 C.F.R. §§9.406-2(a), 9.407-1(a).

[55] *See, e.g.*, 48 C.F.R. §9.406-1(a) ("The existence of a cause for debarment ... does not necessarily require that the contractor be debarred.... ").

[56] *Id*. Suspensions under the FAR are based on the standard of the "government's interests." 48 C.F.R. §9.407-1(b)(1). This is broadly similar, but not identical, to the "public interest," which is why the focus of this paragraph is limited to debarments.

[57] *See, e.g.*, Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 14-15 (D.C. Cir. 1998) ("Suspending a contractor is a serious matter. Disqualification from contracting 'directs the power and prestige of government' at a single entity and may cause economic injury.").

[58] *See, e.g.*, 48 C.F.R. §9.406-1(a); Roemer v. Hoffman, 419 F. Supp. 130, 132 (D.D.C. 1976) (stating that the proper focus, in debarment determinations, is upon whether the contractor is presently responsible notwithstanding the past misconduct).

[59] 48 C.F.R. §9.406-1(a)(1)-(10).

[60] *Id*. at (b). For example, in 2003, the Air Force suspended three units of Boeing Integrated Defense System in response to allegations that several former Boeing employees conspired to steal trade secrets from rival Lockheed Martin Corp. during a competition for the 1998 Evolved Expendable Launch Vehicle contract. *See, e.g.*, Air Force Lifts Suspension of Boeing from Eligibility for Federal Contracts, 83 *Fed. Cont. Rep.* 226 (March 8, 2005).

[61] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding that agency refusal to act is generally not judicially reviewable).

[62] *See, e.g.*, Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334-39 (Fed. Cir. 2001) (upholding a challenged agency responsibility determination).

[63] 48 C.F.R. §9.103(b) ("No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.").

[64] *See, e.g.*, Office of Management and Budget, *Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations*, August 31, 2006 (copy on file with the author) ("Agencies can sometimes enter into administrative agreements ... as an alternative to suspension or debarment.").

or other remedial measures.[65] The agency, for its part, reserves the right to impose additional sanctions, including debarment, if the contractor fails to abide by the agreement or engages in further misconduct.[66] The FAR notes such agreements as a possible alternative to debarment,[67] and their formation has historically been seen to be within agencies' general authority to determine with whom and on what terms they contract.[68] Only the agency signing the agreement is a party to it, and other agencies would not necessarily have been aware of the agreement's existence prior to enactment of the Duncan Hunter National Defense Authorization Act for FY2009. Commonly known as the Clean Contracting Act, Sections 871-873 of this act required the General Services Administration to establish a database that includes information related to contractor misconduct beyond that contained in the former Excluded Party List System (EPLS), subsequently incorporated within the System for Award Management (SAM). Called the Federal Awardee Performance Integrity Information System (FAPIIS), the database established by the Clean Contracting Act is required to contain brief descriptions of administrative agreements relating to federal contracts within the past five years (along with terminations for default and nonresponsibility determinations and civil, criminal, and administrative proceedings involving federal contracts that resulted in a conviction or finding of fault) for persons holding a federal contract or grant worth $500,000 or more.[69]

Third, even when a contractor is debarred, suspended, or proposed for debarment under the FAR, an agency may generally allow the contractor to continue performance under any current contracts or subcontracts unless the agency head directs otherwise.[70] The debarment or suspension generally serves only to preclude an excluded contractor from (1) receiving new contracts or orders from executive branch agencies;[71] (2) receiving new work or an option under an existing contract; (3) serving as a subcontractor on certain contracts with executive branch agencies;[72] or (4) serving as an individual surety for the duration of the debarment or

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[65] Alan M. Grayson, *Suspension and Debarment* 37-38 (1991).

[66] *See, e.g.*, United States Department of State, Bureau of Political Military Affairs, In the Matter of General Motors Corporation & General Dynamics Corporation, October 22, 2004, *available at* http://www.contractormisconduct.org/ass/contractors/26/cases/108/528/general-dynamics-4_ca.pdf.

[67] 48 C.F.R. §9.406-3(f)(1) (requiring agency officials to take certain steps "[i]f the contractor enters into an administrative agreement with the Government in order to resolve a debarment proceeding").

[68] *See, e.g.*, Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886) (government has the inherent authority to enter into binding contracts in the execution of its duties).

[69] P.L. 110-417, §§871-73, 122 Stat. 4555-558 (October 14, 2008). The act also calls for Interagency Committee on Debarment and Suspension to resolve which of multiple agencies wishing to exclude a contractor should be the lead agency in bringing exclusion proceedings and coordinate exclusion actions among agencies. *Id*. at §873(a)(1)-(2). The involvement of the Interagency Committee is potentially significant, because although the FAR previously encouraged agencies to coordinate their exclusion efforts, it provided no requirement or mechanism for them to do so. *See* 48 C.F.R. §9.402(c) (2008) ("When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods or procedures for coordinating their actions.").

[70] 48 C.F.R. §9.405-1(a). However, when the existing contracts or subcontracts are "indefinite quantity" contracts, an agency may not place orders exceeding the guaranteed minimum. 48 C.F.R. §9.405-1(b)(1). Similarly, an agency may not (1) place orders under optional use Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements with excluded contractors or (2) add new work, exercise options, or otherwise extend the duration of current contracts or orders. 48 C.F.R. §9.405-1(b)(2)-(3).

[71] 48 C.F.R. §9.405(a). Contractors under indefinite-quantity contracts may, however, generally receive additional orders so long as the total orders placed with the contractor does not exceed the minimum order under the contract. *See* 48 C.F.R. §9.405-1(b)(1).

[72] With subcontracts that are subject to agency consent, there can be no consent unless the agency head states in writing the "compelling reasons" for the subcontract. 48 C.F.R. §9.405-2(a). The rules as to subcontracts that are not subject to (continued...)

suspension.[73] Any contracts that the excluded contractor presently has remain in effect unless they are terminated for default or for convenience under separate provisions of the FAR.[74]

Finally, the FAR authorizes agencies to waive a contractor's exclusion and enter into new contracts with a debarred or suspended contractor.[75] For an exclusion to be waived, an agency head must "determine[] that there is a compelling reason for such action."[76] Some agencies have regulations defining what constitutes a "compelling reason," while others do not.[77] Waivers are agency-specific and are not regularly communicated to other agencies, a situation which a 2005 Government Accountability Office (GAO) report suggested remedying.[78] Agency determinations about the existence of compelling reasons are not, *per se*, reviewable by the courts; however, other contractors can challenge awards to formerly excluded contractors through customary bid protest processes.[79] Moreover, even when an agency does not waive a contractor's exclusion, it can reduce the period or extent of debarment if the contractor shows (1) newly discovered material evidence; (2) reversal of the conviction or civil judgment on which the debarment was based; (3) bona fide changes in ownership or management; (4) elimination of other causes for which the debarment was imposed; or (5) other appropriate reasons.[80]

Table 2. Comparison of Statutory and Administrative Debarments

Characteristic	Statutory Debarments	Administrative Debarments
Authority for debarments	Various statutes	FAR (Part 9); Office of Federal Procurement Policy Act
Basis for debarments	Specified violations of statutes (e.g., violations of federal or state controlled substance laws; certain violations of the Buy American Act, Clean Air Act, Clean Water Act; etc.)	(1) Contractors convicted of or found civilly liable for specified offenses; (2) agency officials find contractors engaged in specified conduct; or (3) other causes affect present responsibility
Debarring official	Generally head of the agency administering the statute	Head of the contracting agency or a designee
Purpose	Often mandatory, occasionally discretionary	Always discretionary
Scope	Punitive	Preventive; cannot be punitive

(...continued)

agency consent are somewhat different. *See* 48 C.F.R. §9.405-2(b).

[73] 48 C.F.R. §9.405(a)-(c); §9.405-2(a)-(b).

[74] *See generally* 48 C.F.R. §§49.000-49.607.

[75] 48 C.F.R. §9.405(a).

[76] *Id*.

[77] For purposes of the Department of Defense, for example, compelling reasons exist when (1) only the debarred or suspended contractor can provide the supplies or services; (2) "urgency requires" contracting with the debarred or suspended contractor; (3) the contractor and the agency have an agreement covering the same events that resulted in the debarment or suspension, and the agreement includes the agency decision not to debar or suspend the contractor; or (4) national defense requires continued business dealings with the debarred or suspended contractor. 48 C.F.R. §209.405(a)(i)-(iv).

[78] Gov't Accountability Office, Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process 14 (2005), *available at* http://www.gao.gov/highlights/d05479high.pdf.

[79] 48 C.F.R. §§33.103-33.105. *See* CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by (name redacted) and (name redacted) for more information on bid protests generally.

[80] 48 C.F.R. §9.406-4(c)(1)-(5).

Characteristic	Statutory Debarments	Administrative Debarments
Duration	Prescribed by statute	Commensurate with the offense, generally not over 3 years
Waiving official	Generally the head of the agency administering the statute	Head of the contracting agency

Source: Congressional Research Service.

Contractors' Rights in Exclusion Proceedings

Although agencies generally have broad discretion in determining whether contractors should be excluded for particular conduct, contractors enjoy several protections in the exclusion process. Perhaps the foremost among these is an entitlement to due process of the law under the Fifth Amendment to the U.S. Constitution. Early government contractors were generally held to lack due process protections because contracting with the government was viewed as a privilege, not a right,[81] and courts held that persons were entitled to due process only when deprived of rights.[82] However, this changed in 1964, with the decision by the U.S. Court of Appeals for the D.C. Circuit in *Gonzalez v. Freeman*.[83] Written by future Chief Justice Warren Burger, who was then a judge for the D.C. Circuit, *Gonzalez* held that while contractors may not have a right to government contracts, "that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that *such a person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts*."[84] For this reason, the court found that the Commodity Credit Corporation (CCC) had improperly debarred the Thos. P. Gonzalez Corporation, in part, because the CCC failed to provide written notice of the charges against the contractor[85] and did not give the contractor "the opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record."[86] A subsequent decision by the D.C. Circuit in *Horne Brothers, Inc. v. Laird* held that contractors are also entitled to due process in suspension determinations,[87] although the court distinguished between suspensions of shorter and longer duration in finding that a contractor is entitled to pre-exclusion notice and an

[81] *See, e.g.*, Perkins v. Lukens Steel Co., 310 U.S. 113, 129 (1940) (finding that "prospective bidders for contracts derive no enforceable rights against the agent [Secretary] for an erroneous interpretation of the principal's [Congress's] authorization."). *See also id*. at 127 ("Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.").

[82] *See, e.g.*, Ideal Uniform Cap Co., B-125183 (March 1, 1956) (rejecting a challenge to a debarment based, in part, on the contractor's reliance on the Fifth Amendment in refusing to produce business records subpoenaed by a Senate subcommittee). The debarring agency had failed to comply with its own regulations, which called for notice and an opportunity to respond prior to debarment, but the Government Accountability Office nonetheless denied the contractor's protest on the grounds that "contracting with the Government is a privilege, not a legal right." *Id*.

[83] 334 F.2d 570 (D.C. Cir. 1964).

[84] *Id*. at 574 (emphasis added).

[85] *Id*.

[86] *Id*. at 578. The court further found that the agency had violated the Administrative Procedure Act by debarring the contractor in the absence of regulations (1) authorizing debarment for the offenses in question and (2) establishing standards and procedures for the debarment process. *Id*. at 574-77.

[87] 463 F.2d 1268, 1271 (D.C. Cir. 1972) ("[A]n action that 'suspends' a contractor and contemplates that he may dangle in suspension for a period of one year or more, is such as to require the Government to insure fundamental fairness to the contractor whose economic life may depend on his ability to bid on government contracts.").

opportunity to be heard in suspensions of five months but not of three weeks.[88] Because of these and subsequent decisions,[89] the FAR currently provides that contractors must generally receive notice and an opportunity for a hearing before being debarred,[90] but can be suspended without prior notice or an opportunity to be heard so long as they are "immediately advised" of the suspension and allowed to offer information in opposition to the suspension within 30 days.[91]

The judicially developed doctrine of *de facto* debarment can also serve to protect contractors from improper exclusion in certain circumstances.[92] While the possibility of *de facto* debarment often arises in connection with agency conduct that also deprives the contractor of a protected liberty interest without due process,[93] the *de facto* debarment analysis focuses primarily upon conduct outside the debarment and suspension process that effectively excludes contractors.[94] For example, in its 1980 decision in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, the U.S. Court of Appeals for the D.C. Circuit found that the Air Force had improperly *de facto* debarred a contractor through repeated nonresponsibility determinations based on the same information. The Air Force had determined the contractor to be nonresponsible for the award of

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[88] *Id*. at 1272-73.

[89] *See, e.g.*, ATL, Inc. v. United States, 736 F.2d 677, 685 (Fed. Cir. 1984) ("[W]here the Navy is taking a flat-out position denying fact-finding," the suspended contractor is due a "prompt give-and-take, step-by-step cooperative process."); Transco Security, Inc. of Ohio v. Freeman, 639 F.3d 318, 323 (6th Cir. 1981) (finding that the General Services Administration failed to provide adequate notice when it indicated that a company was suspended for alleged billing irregularities, but did not "specify the contracts allegedly affected by, or the approximate date of, the 'misbillings.'").

[90] 48 C.F.R. §9.406-3(b)-(c). These procedures do not apply where the debarment is based upon convictions or civil judgments. In such cases, the process that the contractors received in their criminal or civil trial is deemed to constitute due process for purposes of debarment.

[91] 48 C.F.R. §9.407-3(b)-(c). Specifically, the notice of the suspension must state that the contractor may "submit, in person, in writing, or through a representative, information and argument in opposition to the suspension." *Id*. at §9.407-3(b)(1). Some commentators have, however, objected that the FAR's current provisions regarding suspension are inconsistent with the *Horne Brothers* decision and deprive the contractor of due process, in part, because they do not obligate the government to hold a hearing within 30 days of the suspension. *See, e.g.*, Todd J. Canni, Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments 38 *Pub. Cont. L.J.* 547, 603-605 (2008/2009).

[92] *See, e.g.*, Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 534 F. Supp. 1139 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 163 (D.C. Cir. 1983) (finding that a government directive to hold all awards to contractor "in abeyance" due to concerns about the contractor's integrity, without providing notice or an opportunity to be heard, constituted *de facto* debarment and deprived the contractor of due process).

[93] Nathanael Causey, Past Performance Information, *De facto* Debarments, and Due Process: Debunking the Myth of Pandora's Box, 29 *Pub. Cont. LJ.* 637, 676 (2000) (noting that *de facto* debarment and due process issues often arise in the same case). A court could, however, find an improper *de facto* debarment without finding a denial of due process. *See, e.g.*, Shermco Indus. v. Secretary of the Air Force, 584 F. Supp. 76 (N.D. Tex. 1984). In addition, one court recently found that *de facto* debarment need not be based on charges of lack of integrity to give rise to Fifth Amendment due process protections. *See* Phillips v. Mabus, 894 F. Supp. 2d 71 (D.D.C. 2012).

[94] *See* Causey, *supra* note 93, at 681 ("The key distinction between *de facto* debarment and denial of due process is the element of stigma."). *De facto* debarment cases generally focus upon the contractor's liberty interests in being able to challenge allegations about their integrity that could deprive them of their livelihood. *See* Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 955-56 (D.C. Cir. 1980) ("[W]hen a determination is made that a contractor lacks integrity and the Government has not acted to invoke formal suspension and debarment procedures, notice of the charges must be given to the contractor as soon as possible so that the contractor may utilize whatever opportunities are available to present its side of the story before adverse action is taken."). Courts have recognized that contractors have such liberty interests, despite lacking property rights in prospective government contracts. *See, e.g.*, *Transco Sec.*, 639 F.2d at 321 ("[D]eprivation of the right to bid on government contracts is not a property interest.").

one contract because of an audit report showing three irregularities in billing statements.[95] The Air Force never informed the contractor of these allegations, in part, because contractors do not routinely receive notice of nonresponsibility determinations concerning them.[96] However, the contractor was later determined to be nonresponsible for the award of a second contract by another contracting officer, who had received news of the earlier determination and relied upon it to conclude that the contractor lacked integrity.[97] The court found that the second nonresponsibility determination constituted an improper *de facto* debarment because the contractor was excluded from government contracts without any notice of or opportunity to challenge the allegations against it.[98] Later judicial and administrative tribunals have similarly found that an agency improperly *de facto* debars a contractor based upon repeated nonresponsibility determinations based on the same information,[99] as well as through words or conduct evidencing an intent to exclude the contractor from government contracts.[100]

Additionally, in certain circumstances, agencies' determinations to debar or suspend a contractor could potentially be found to violate the Administrative Procedure Act (APA), particularly if the agency excludes the contractor based upon circumstances that the agency was aware of when it previously found that contractor sufficiently responsible to be awarded a federal contract. Such a situation arose in the 2001 case of *Lion Raisins, Inc. v. United States*, where the U.S. Court of Federal Claims found that the U.S. Department of Agriculture's (USDA's) suspension of a contractor for falsifying raisin certifications violated the APA, given that the USDA knew of the contractor's conduct when making five prior determinations that the contractor was "responsible."[101] According to the court,

> [e]ven assuming plaintiff's alleged conduct evidences "a lack of integrity or business honesty" so as to justify suspension, the court holds that [the suspending official] abused his discretion when he determined that the evidence of plaintiff's lack of integrity in April 1998, which was known to the agency as of May 1999, "seriously and directly" affected plaintiff's

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[95] *Old Dominion*, 631 F.3d at 960.

[96] *See* CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, *supra* note 1, at 12.

[97] *Old Dominion*, 631 F.3d at 966 n.24 (noting that "the determination that Old Dominion lacked integrity had already been communicated through Government channels and undoubtedly would have been recommunicated every time [it] bid on a subsequent contract").

[98] *Id*. at 968.

[99] *See, e.g.*, *Shermco Indus.*, 584 F. Supp. at 93-94 ("[A] procuring agency cannot make successive determinations of nonresponsibility on the same basis; rather it must initiate suspension or debarment procedures at the earliest practicable moment following the first determination of nonresponsibility."); 43 Comp. Gen. 140 (August 8, 1963) (finding that multiple determinations of nonresponsibility can be tantamount to debarment). However, multiple contemporaneous nonresponsibility determinations made on the same basis do not necessarily constitute *de facto* debarment, especially when the determinations are based on the most current information available. *See, e.g.*, Mexican Intermodal Equip., S.A. de C.V., Comp. Gen. B-270144 (January 31, 1996) (two responsibility determinations were not "part of a long-term disqualification," but were "merely a reflection of the fact that the determinations were based on the same current information."); Sermor Inc., Comp. Gen. B-219132.2 (October 23, 1985) (finding five consecutive nonresponsibility determinations did not constitute de facto debarment).

[100] *See, e.g.*, Peter Kiewit Sons' Co., 534 F. Supp. at 1139 et seq. (internal government directive to hold awards to the contractor "in abeyance" for an indefinite period); Conset Corp. v. Cmty. Servs. Admin., 655 F.2d 1291 (D.C. Cir. 1981) (circulation of a memorandum alleging that a grant recipient had a conflict of interest, coupled with a subsequent refusal to approve the firm for a grant); Related Indus., Inc. v. United States, 2 Cl. Ct. 517 (1983) (contracting officer stated that "under no circumstances will he award any contract" to the contractor); Leslie & Elliott Co. v. Garrett, 732 F. Supp. 191 (D.D.C. 1990) (statement that the contractor was an "administrative burden" that lacked integrity).

[101] 51 Fed. Cl. 238 (2001).

> "present responsibility" as a Government contractor in February of 2001. The USDA awarded plaintiff five contracts between the completion of its investigation in May 1999 and its decision to suspend plaintiff in January 2001. The USDA statutorily was obligated to make an affirmative finding of plaintiff's responsibility before awarding each of those contracts. In other words, five times between May 26, 1999, and February 1, 2001, the USDA itself affirmed that plaintiff's business practices met the standards for present responsibility. Significantly, by the USDA's own representations, it did so despite the possession of all the evidence that it would later use to suspend plaintiff. The court finds these facts dispositive of the issue of plaintiff's present responsibility. That [the suspending official] knew of the five interim contracts is demonstrated by their incorporation into the administrative record and by his reference to them in his final report and decision. That he nevertheless concluded that suspension was immediately necessary to protect government interests, without pointing to any event as to the issue of immediacy, was arbitrary and capricious.[102]

While the decision in *Lion Raisins* has been strongly criticized by some commentators[103] and distinguished by some courts,[104] it has been followed or cited approvingly by others[105] and could potentially be construed as precluding agencies from debarring or suspending contractors under the FAR based on "stale" allegations of wrongdoing.[106]

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[102] *Id*. at 247-48 (internal citations omitted).

[103] *See, e.g.*, Michael J. Davidson, Protest Challenges to Integrity-based Responsibility Determinations, 14 *Fed. Cir. Bar J.* 473, 499-500 (2004/2005) ("Contrary to the court's opinion, the contracting officer's affirmative responsibility determination is a decision by a single contracting officer, not that of the entire agency. The responsibility determination is limited to that specific contract and does not bind the agency on any responsibility determination beyond it. Moreover, while the lack of present responsibility determination by [a suspending or debarring official] binds the contracting officer and preempts the normal contracting officer responsibility determination, the converse is not true. To the extent the court decided otherwise, the case was wrongly decided.").

[104] *See* Kirkpatrick v. White, 351 F. Supp. 2d 1261 (N.D. Ala. 2004) (noting that the investigation underlying the suspension in the instant case was not completed until eight months after the suspension was imposed, unlike in *Lion Raisins*); Gulf Group, Inc. v. United States, 61 Fed. Cl. 338 (2004) (noting that the testimony of the decisionmaker in the instant case was not inconsistent with the documentation of his decision, unlike in *Lion Raisins*).

[105] *See, e.g.*, Todd Constr., L.P. v. United States, 88 Fed. Cl. 235 (2009); Arch Chems., Inc. v. United States, 64 Fed. Cl. 380 (2005); S.K.J. & Assocs. v. United States, 67 Fed. Cl. 218 (2005).

[106] *See* Davidson, *supra* note 103, at 503 (suggesting that *Lion Raisins* gave agencies "greater incentive to act quicker" when determining whether to exclude a contractor).

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