

My Company Just Got a Notice of Proposed Debarment. Now What?

Article By:

Dominique L. Casimir

Receiving a Notice of Proposed Debarment from a federal agency Suspending and Debarring Official (“SDO”) is an alarming moment for any government contractor. It means the government believes there is a basis to question whether the entity is “presently responsible.” Debarment is sometimes referred to colloquially as the “death penalty” for government contractors because of its many, potentially devastating effects. A debarred entity is ineligible to receive new government contracts from *any* executive agency, not just the agency that imposes the debarment. Additionally, any existing federal contracts cannot be augmented or extended and may even be terminated.

Debarment can also seriously disrupt numerous areas of an entity’s business, including prime-sub relationships, teaming arrangements, and the normal function of the supply chain, because companies involved in government contracts ordinarily avoid partnering with debarred entities, and even entities proposed for debarment. Moreover, there are significant reputational impacts associated with debarment and these can affect everything from workplace morale to customer goodwill and even commercial relationships. And finally, debarment casts a long shadow, because even after the debarment ends, an entity will almost certainly be required to disclose the prior debarment as it pursues future government work.

For these reasons, it is critical to respond effectively to a Notice of Proposed Debarment. This blog post offers suggestions to federal contractors who have been proposed for debarment and are wondering what to do next.

Take the Notice Seriously, but Don’t Despair

An SDO issues a Notice of Proposed Debarment because the Federal Acquisition Regulation (“FAR”) requires giving the entity an opportunity to be heard prior to imposition of debarment. An entity that fails to respond or that submits a late or otherwise ineffective response will come across as a risky business partner to the United States. Remember, the purpose of debarment is not to punish contractors, but rather to protect the government from the business risk of partnering with non-responsible individuals and organizations. Meaningful engagement in the process shows that the contractor values its relationship with the government. Responding to the Notice of Proposed Debarment must be a top organizational priority.

Keep in mind that receiving a Notice of Proposed Debarment does not necessarily mean that the entity ultimately will be debarred. In most cases, debarment is discretionary, even if cause exists. There are other potential outcomes including declination, voluntary exclusion, and resolution by administrative agreement.

Understand Your Current Reality

It is important for the contractor's leadership to quickly understand the impact of a Notice of Proposed Debarment. Depending on the regulations under which the SDO issued the notice, the organization may be ineligible to receive new federal awards or contract extensions while it is proposed for debarment. The Notice may or may not include affiliated companies. The entity may need to update certain certifications and give notice to numerous types of contracting partners. Customers and employees will likely have questions about what this means for the company's operations going forward. It is important to have a centralized, coordinated strategy for managing the immediate situation, while developing the substantive plan for the Notice response.

Get the Right Kind of Help

Ideally, the contractor should retain experienced debarment counsel. Experienced counsel will know how best to negotiate with the SDO's office regarding submissions and the development of the administrative record. They will also understand how best to tell the contractor's story to the SDO. For instance, because the SDO's role is to protect the government, the SDO may not be moved by a contractor stating that debarment would put it out of business, and more moved by a contractor taking responsibility for what occurred and identifying the new internal controls in place to prevent a similar future occurrence. Debarment counsel can also help prepare the contractor's personnel for an in-person appearance with the SDO and help to negotiate a workable administrative agreement.

Remain Involved

Even when the contractor retains experienced debarment counsel, it is critical that the contractor's leadership remains actively engaged throughout the process. The mission in debarment proceedings is to demonstrate that, despite any prior misconduct, the contractor is now responsible and should be permitted to continue doing business with the government. The SDO will want to see evidence of a culture of integrity and that the contractor's leadership is committed to implementing needed and perhaps sweeping improvements or changes in the relevant areas of operations. A contractor responding to a Notice of Proposed Debarment should expect to undertake some kind of root cause analysis and to remain receptive and willing to consider a variety of new policies, procedures, and personnel changes in order to restore the government's trust.

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