



# Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments

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## Summary

Debarment and suspension are among the techniques agencies use to ensure that they deal only with vendors who are “responsible” in fulfilling their legal and contractual obligations. Debarment generally removes contractors’ eligibility for federal contracts for a fixed period of time, while suspension removes their eligibility for the duration of an investigation or litigation. Persons may be debarred or suspended from federal contracting on procurement or nonprocurement grounds. Nonprocurement debarments are discussed in a separate report, CRS Report R40993, *Debarment and Suspension Provisions Applicable to Federal Grant Programs*. However, all persons excluded on any grounds are listed in the Excluded Parties List System (EPLS), which contracting officers must check before awarding a contract.

Some statutes require or allow agency officials to exclude contractors that have engaged in conduct prohibited under the statute. Such statutory debarments and suspensions are federal-government-wide; they are often mandatory, or at least beyond agency heads’ discretion; and they are punishments. Statutes prescribe the debarments’ duration, and agency heads generally cannot waive the exclusion.

The Federal Acquisition Regulation (FAR) also authorizes debarment and suspension of contractors. Such administrative debarments can result when contractors are convicted of, found civilly liable for, or found by agency officials to have committed certain offenses, or when other causes affect contractor responsibility. Administrative suspensions can similarly result when contractors are suspected of or indicted for certain offenses, or when other causes affect contractor responsibility. Administratively debarred or suspended contractors are excluded from contracts with executive branch agencies. Administrative exclusions are discretionary and can be imposed only to protect government interests. Agencies may use administrative agreements instead of debarment and may continue the current contracts of debarred contractors. The seriousness of a debarment’s cause determines its length, which generally cannot exceed three years, but agency heads may waive administrative exclusions for compelling reasons.

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 commonly known as *de facto* debarment. Conduct that results in *de facto* debarment could also result in contractors’ being deprived of protected liberty interests in prospective government contracts. Additionally, agencies could be found to have violated the Administrative Procedure Act 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.

Debarment and suspension have recently been of significant interest to Congress because of the magnitude of federal spending on contracts and reports that agencies awarded contracts to vendors who previously allegedly engaged in misconduct. In 2011, agencies’ practices in excluding contractors under existing legal authorities were examined in hearings by House and Senate committees and the Commission on Wartime Contracting, as well as in reports by the Government Accountability Office and others. The first session of the 112<sup>th</sup> Congress also enacted or considered several measures that would augment agencies’ authority to debar or suspend contractors, among other things (e.g., P.L. 112-74; P.L. 112-81; H.R. 674; H.R. 1905; H.R. 2838; H.R. 3184; H.R. 3338; H.R. 3588; H.R. 3638; S. 914; S. 1196; S. 1258; S. 1363; S. 1472).

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**A**s a general rule, government agencies contract with the lowest-priced (or best-value) qualified responsible bidder or offeror. Debarment and suspension are among the techniques that government agencies use to ensure that they contract with only “responsible” bidders or offerors.<sup>1</sup> Debarred contractors are ineligible for government contracts for a fixed period of time, which can vary depending upon the authority under which the contractor is debarred and the seriousness of the conduct underlying the debarment; while suspended contractors are ineligible for the duration of any investigation into or litigation involving their conduct. Persons may be debarred or suspended (i.e., excluded) from federal contracting on procurement or nonprocurement grounds.

This report focuses upon exclusions on procurement grounds.<sup>2</sup> It surveys the authorities requiring or allowing federal agencies to debar or suspend contractors, due process and other protections for contractors, and recently enacted and proposed amendments to the laws governing exclusion.

## **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.<sup>3</sup> There is only one explicit overlap between the causes of debarment and suspension under statute and those under the FAR, involving debarments and suspensions for violations of the Drug-Free Workplace Act of 1988.<sup>4</sup> However, the “catch-all” provisions of the FAR—which allow (1) debarment for “any ... offense indicating a lack of business integrity or business honesty” and (2) debarment or suspension for “any other cause of [a] serious or compelling nature”<sup>5</sup>—could potentially make the same conduct grounds for debarment or suspension under statute and under the FAR.

## **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

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<sup>1</sup> 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 Kate M. Manuel. 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, *The Proposed “Defund ACORN Act,” the Continuing Resolution, and the Consolidated Appropriations Act: Are They Bills of Attainder?*, by Kenneth R. Thomas.

<sup>2</sup> Nonprocurement debarments are discussed in a separate report, CRS Report R40993, *Debarment and Suspension Provisions Applicable to Federal Grant Programs*.

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> 48 C.F.R. §9.406-2(a)(5) & (c); 48 C.F.R. §9.407-2(c).

with the federal government.<sup>6</sup> Because they are designed to provide additional inducement for contractors’ compliance with the statutes, such statutory debarments and suspensions are also known as inducement debarments and suspensions. The terms “statutory debarment” and “statutory suspension” are also used in reference to exclusions that result under executive orders,<sup>7</sup> even though executive orders are not statutes, as a way of grouping exclusions that result from executive orders with other inducement-based exclusions and contrasting them with administrative or procurement exclusions.

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.<sup>8</sup> 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).<sup>9</sup> Most of the time, however, the exclusion applies more broadly to all types of contractors dealing with all federal agencies.<sup>10</sup> Persons identified by statute—often the head of the agency administering the statute requiring or allowing exclusion—make the determinations to debar or suspend contractors.<sup>11</sup> 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.<sup>12</sup> Generally, statutory exclusions can only be waived by a few officials under narrow circumstances.<sup>13</sup> Agency heads generally cannot waive exclusions to allow debarred or suspended contractors to contract with their agency. **Table 1** surveys the main statutory debarment and suspension provisions presently in effect.

**Table 1. Major Statutory Debarments and Suspensions**

| Statute                               | Cause of Debarment   | Mandatory or Discretionary | Decision Maker  | Duration & Scope             | Waiver of Debarment |
|---------------------------------------|--|----------------------------|---|------------------------------|---------------------|
| 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 | Mandatory                  | Head of the agency that awarded the contract under which the violation occurred | Three years; government-wide | Not provided for    |

<sup>6</sup> See, e.g., 21 U.S.C. §862 (authorizing debarment for violations of federal or state controlled substance laws).

<sup>7</sup> See, e.g., Executive Order 11246, as amended (providing for suspension of contractors who fail to comply with equal employment opportunity and affirmative action requirements).

<sup>8</sup> Compare 21 U.S.C. §862 (debarment based on conviction) with 41 U.S.C. §8303(c) (debarment based on agency head’s findings).

<sup>9</sup> See, e.g., 10 U.S.C. §983 (debarment for institutions of higher education only); 48 C.F.R. Part 209.470 (same); 10 U.S.C. §2408 (debarment from Department of Defense contracts only).

<sup>10</sup> See, e.g., 40 U.S.C. §3144 (government-wide debarment for failure to pay wages under the Davis-Bacon Act).

<sup>11</sup> 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).

<sup>12</sup> 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).

<sup>13</sup> 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).

| Statute  | Cause of Debarment   | Mandatory or Discretionary | Decision Maker                        | Duration & Scope   | Waiver of Debarment   |
|--|--|----------------------------|---------------------------------------|--|---|
|  | funds  |                            |                                       |  |   |
| 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 <i>but</i> 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 <i>but</i> 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 |
| Davis-Bacon Act (40 U.S.C. §3144) <sup>a</sup>                     | Failure to pay prescribed wages for laborers and mechanics   | Mandatory                  | Secretary of Labor                    | Three years; government-wide   | Not provided for  |
| Drug-Free Workplace Act of 1988 (41 U.S.C. §8102(b))               | Violations of the act as shown by repeated failures to comply with its requirements, or employing numerous individuals convicted of criminal drug violations | Mandatory                  | Head of the contracting agency        | Up to five years; government-wide  | Waiver under FAR procedures   |
| Executive Order 11246, as amended                                  | Failure to comply with equal employment opportunity and affirmative action requirements  | Discretionary              | Secretary of Labor                    | Lasts until the contractor complies with the EEO and affirmative action requirements; government-wide  | Not provided for  |
| Military Recruiting on Campus (10 U.S.C. §983; 48 C.F.R. §209.470) | Policy or practice prohibiting 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  |
| Service Contract Act (41 U.S.C. §351)                              | Failure to pay compensation due to employees under   | Mandatory                  | Secretary of Labor or the head of any | Three years; government-wide   | Waiver by the Secretary of Labor because of unusual   |

| Statute  | Cause of Debarment  | Mandatory or Discretionary | Decision Maker                   | Duration & Scope             | Waiver of Debarment  |
|--|---|----------------------------|----------------------------------|------------------------------|--|
| §6706)   | the act   |                            | agency                           |                              | circumstances  |
| 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 |
| Sudan Accountability and Divestment Act (P.L. 110-174) | 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   |

**Source:** Congressional Research Service.

**Notes:** The term “statutory” is used here, as is customary, to contrast all types of inducement exclusions—whatever their legal basis—with those exclusions under the FAR that are designed to protect the government’s interests in the procurement process.

There are two other statutory provisions discussing debarment that are not included in this table because they provide for personal debarment. 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 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. 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).

## Exclusion Under the FAR

As a matter of policy, the federal government seeks to “prevent improper dissipation of public funds”<sup>14</sup> in its contracting activities by dealing only with responsible contractors.<sup>15</sup> 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.<sup>16</sup> However, because exclusions under the FAR are designed to protect the government’s interests, they may not be imposed solely to punish prior contractor

<sup>14</sup> *United States v. Bizzell*, 921 F.2d 263, 267 (10<sup>th</sup> 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).

<sup>15</sup> 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”).

<sup>16</sup> *See id.* (“Debarment and suspension are discretionary actions that ... are appropriate means to effectuate [the] policy [of dealing only with responsible contractors].”).

misconduct.<sup>17</sup> Federal courts may 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.<sup>18</sup>

Where grounds for debarment or suspension exist, as discussed below, any agency may act to exclude the contractor, although exclusions are most commonly initiated by the agency under or in regards to whose contract or proposed contract the alleged misconduct occurred.<sup>19</sup>

## **Debarment**

The FAR allows agency officials to debar contractors from future executive branch contracts under three circumstances. First, debarment may be imposed when a contractor is convicted of or found civilly liable for any integrity offense. Integrity offenses include the following:

- fraud or criminal offenses in connection with obtaining, attempting to obtain, or performing a public contract or subcontract;
- 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;
- intentional misuse of the “Made in America” designation; and
- other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor.<sup>20</sup>

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 the following:

- serious violations of the terms of a government contract or subcontract;<sup>21</sup>
- violations of the Drug-Free Workplace Act of 1988;<sup>22</sup>

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<sup>17</sup> 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.”).

<sup>18</sup> *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 would have been different had the debarment been imposed for purposes of punishment).

<sup>19</sup> *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.

<sup>20</sup> 48 C.F.R. §9.406-2(a)(1)-(5).

<sup>21</sup> 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).

<sup>22</sup> 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 (continued...)



- intentionally affixing a “Made in America” label, or similar inscription, on ineligible products;
- commission of an unfair trade practice as defined in Section 201<sup>23</sup> of the Defense Production Act;
- delinquent federal taxes in an amount exceeding \$3,000;<sup>24</sup> 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<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup>

Third, and finally, debarment may be imposed whenever an agency official finds, by a preponderance of the evidence, that there exists “any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor.”<sup>28</sup>

Debarments last for a “period commensurate with the seriousness of the cause(s),” generally not exceeding three years.<sup>29</sup> As discussed below, due process generally requires that contractors

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(...continued)

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.

<sup>23</sup> 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 foreign content of an item.

<sup>24</sup> 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).

<sup>25</sup> 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).

<sup>26</sup> 48 C.F.R. §9.406-2(b)(1)(i)-(vi). This ground for debarment 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), 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.

<sup>27</sup> 48 C.F.R. §9.406-2(b)(2).

<sup>28</sup> 48 C.F.R. §9.406-2(c).

<sup>29</sup> 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- (continued...)

receive written notice of and the opportunity for a hearing regarding proposed debarments.<sup>30</sup> Debarment-worthy conduct by a contractor's officers, directors, shareholders, partners, employees, or other associates can be imputed to the contractor, and vice versa.<sup>31</sup>

## 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 any of the following 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;
- violations of the Drug-Free Workplace Act of 1988;<sup>32</sup>
- intentional misuse of the "Made in America" designation;
- unfair trade practices, as defined in Section 201 of the Defense Production Act;<sup>33</sup>
- delinquent federal taxes in an amount exceeding \$3,000;<sup>34</sup>
- 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<sup>35</sup> 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;<sup>36</sup> and
- other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor.<sup>37</sup>

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(...continued)

4(a)(1)(i)-(ii). The FAR allows debarment 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.*

<sup>30</sup> 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.

<sup>31</sup> 48 C.F.R. §9.406-5(a)-(c).

<sup>32</sup> See *supra* note 22 for a description of what conduct violates the Drug-Free Workplace Act.

<sup>33</sup> See *supra* note 23 for a listing of unfair trade practices under Section 201 of the Defense Production Act.

<sup>34</sup> See *supra* note 24 for a discussion of what makes federal taxes delinquent for purposes of this provision of the FAR.

<sup>35</sup> See *supra* note 25 for more on qualifying overpayments.

<sup>36</sup> See *supra* note 26 for more on the history of this provision.

<sup>37</sup> 48 C.F.R. §9.407-2(a)(1)-(9) (suspicion on adequate evidence) & 48 C.F.R. §9.407-2(b) (indictment).

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.”<sup>38</sup>

A suspension lasts only as long as an agency’s investigation of the conduct for which the contractor was suspended, or any ensuing legal proceedings. It may not exceed 18 months unless legal proceedings have been initiated within that period.<sup>39</sup> As discussed below, certain due process protections apply with suspensions,<sup>40</sup> and suspension-worthy conduct can be imputed, just like debarment-worthy conduct.<sup>41</sup>

### **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 of the exclusion and an opportunity to respond.<sup>42</sup> 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,<sup>43</sup> and vice versa.<sup>44</sup> 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.”<sup>45</sup> However, while these regulations could be characterized as “administrative devices to protect the public welfare and to impose on government contractors a higher standard of care,”<sup>46</sup> they do not necessarily allow agencies to exclude persons simply based on their job titles or other nominal indicia of control.<sup>47</sup> Similarly, agency exclusion determinations could potentially be vulnerable to challenge on the grounds that

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<sup>38</sup> 48 C.F.R. §9.407-2(c).

<sup>39</sup> 48 C.F.R. §9.407-4(a).

<sup>40</sup> 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 “less serious” than debarment.

<sup>41</sup> 48 C.F.R. §9.407-5.

<sup>42</sup> 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.

<sup>43</sup> 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.*

<sup>44</sup> 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.*

<sup>45</sup> 48 C.F.R. §9.406-5(c).

<sup>46</sup> *Caiola v. Carroll*, 851 F.2d 395, 399 (1988).

<sup>47</sup> *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].”).

they are unreasonable if the agency makes “inconsistent” decisions when determining whether to exclude particular affiliates of a contractor.<sup>48</sup>

### **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.

First, under the FAR, debarment or suspension of contractors is discretionary.<sup>49</sup> The FAR says that agencies “may debar” or “may suspend” a contractor when grounds for exclusion exist,<sup>50</sup> but it does not require them to do so.<sup>51</sup> Rather, the FAR advises agency officials to focus upon the public interest when making debarment determinations.<sup>52</sup> Because the public interest encompasses *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,<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> Other contractors generally cannot challenge agency decisions not to propose a

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<sup>48</sup> *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.

<sup>49</sup> 48 C.F.R. §9.402(a) (“Debarment and suspension are discretionary actions.”).

<sup>50</sup> 48 C.F.R. §9.406-2(a), 9.407-1(a).

<sup>51</sup> 48 C.F.R. §9.406-1(a) (“The existence of a cause for debarment ... does not necessarily require that the contractor be debarred.”).

<sup>52</sup> *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.

<sup>53</sup> *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.”).

<sup>54</sup> 48 C.F.R. §9.406-1(a). *See, e.g., 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).

<sup>55</sup> 48 C.F.R. §9.406-1(a)(1)-(10).

<sup>56</sup> *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* (continued...)

contractor for debarment or not to exclude a contractor proposed for debarment.<sup>57</sup> They generally can only contest an agency's determination of a contractor's present responsibility,<sup>58</sup> which is required prior to a contract award.<sup>59</sup>

Second, agencies can use administrative agreements as alternatives to debarment.<sup>60</sup> 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; or other remedial measures.<sup>61</sup> 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.<sup>62</sup> Such agreements are not explicitly provided for within the FAR, but are within agencies' general authority to determine with whom and on what terms they contract.<sup>63</sup> 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 Excluded Party List System. Called the Federal Awardee Performance Integrity Information System (FAPIS), this database contains brief descriptions of all administrative agreements relating to federal contracts within the past five years (along with all terminations for default and nonresponsibility determinations and all civil, criminal, and administrative proceedings involving federal contracts that resulted in a conviction or finding of fault) for all persons holding a federal contract or grant worth \$500,000 or more.<sup>64</sup>

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Suspension of Boeing from Eligibility for Federal Contracts, 83 *Fed. Cont. Rep.* 226 (March 8, 2005).

<sup>57</sup> See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (holding that agency refusal to act is generally not judicially reviewable).

<sup>58</sup> 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).

<sup>59</sup> 48 C.F.R. §9.103(b) ("No purchase or award shall be made unless the contracting official makes an affirmative determination of responsibility.").

<sup>60</sup> Office of Management and Budget, *Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations*, August 31, 2006, available at <http://www.whitehouse.gov/omb/memoranda/fy2006/m06-26.pdf> ("Agencies can sometimes enter into administrative agreements ... as an alternative to suspension or debarment.").

<sup>61</sup> Alan M. Grayson, *Suspension and Debarment* 37-38 (1991).

<sup>62</sup> 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](http://www.contractormisconduct.org/ass/contractors/26/cases/108/528/general-dynamics-4_ca.pdf).

<sup>63</sup> 48 C.F.R. §1.601(a) ("Unless specifically prohibited by another provision of law, authority and responsibility to contract ... are vested in the agency head.").

<sup>64</sup> 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."). The Federal Acquisition Regulation councils issued the final rule implementing this section on July 1, 2009. See Dep't of Def., Gen. Servs. Admin., & Nat'l Aeronautics & Space Admin., FAR Case 2008-028: Role of Interagency Committee on Debarment and Suspension, 74 (continued...)

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.<sup>65</sup> The debarment or suspension generally serves only to preclude an excluded contractor from (1) receiving new contracts or orders from executive branch agencies;<sup>66</sup> (2) receiving new work or an option under an existing contract; (3) serving as a subcontractor on certain contracts with executive branch agencies;<sup>67</sup> or (4) serving as an individual surety for the duration of the debarment or suspension.<sup>68</sup> 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.<sup>69</sup>

Finally, the FAR authorizes agencies to waive a contractor's exclusion and enter into new contracts with a debarred or suspended contractor.<sup>70</sup> For an exclusion to be waived, an agency head must "determine, in writing, that there is a compelling reason to do so."<sup>71</sup> Some agencies have regulations defining what constitutes a "compelling reason," while others do not.<sup>72</sup> Waivers are agency-specific and are not regularly communicated to other agencies, a situation which the Government Accountability Office has suggested remedying.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup>

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*Federal Register* 31,564 (July 1, 2009).

<sup>65</sup> 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).

<sup>66</sup> 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. 48 C.F.R. §9.405-1(b)(1).

<sup>67</sup> With subcontracts that are subject to agency consent, there can be no consent unless the agency head provides compelling reasons for the subcontract. 48 C.F.R. §9.405-2(a). With subcontracts that are not subject to agency consent, there must be compelling reasons for the subcontract only when its amount exceeds \$30,000. 48 C.F.R. §9.405-2(b).

<sup>68</sup> 48 C.F.R. §9.405(a)-(c); §9.405-2(a)-(b).

<sup>69</sup> See 48 C.F.R. §49.000-607.

<sup>70</sup> 48 C.F.R. §9.405(a).

<sup>71</sup> *Id.*

<sup>72</sup> For purposes of the Department of Defense, for example, compelling reasons exist when (1) goods or services are available only from the excluded contractor; (2) an urgent need dictates dealing with the excluded contractor; (3) the excluded contractor and the agency have entered an agreement not to debar the contractor that covers the events upon which the debarment is based; or (4) reasons relating to national security require dealings with the excluded contractor. 48 C.F.R. §209.405(a)(i)-(iv).

<sup>73</sup> 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>.

<sup>74</sup> 48 C.F.R. §§33.103 & 104. See CRS Report R40228, *GAO Bid Protests: An Overview of Time Frames and Procedures*, by Kate M. Manuel and Moshe Schwartz for more information on bid protests generally.

<sup>75</sup> 48 C.F.R. §9.406-4(c)(1)-(5).

**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 found 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  | Preventative; cannot be punitive  |
| Duration                 | Prescribed by statute   | Commensurate with the offense, generally not over 3 years   |
| Extent                   | Government-wide   | Executive branch agencies   |
| 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,<sup>76</sup> and courts held that persons were entitled to due process only when deprived of rights.<sup>77</sup> However, this changed in 1964, with the decision by the U.S. Court of Appeals for the D.C. Circuit in *Gonzalez v. Freeman*.<sup>78</sup> 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*

<sup>76</sup> 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.”).

<sup>77</sup> 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.*

<sup>78</sup> 334 F.2d 570 (D.C. Cir. 1964).

*contracts*.”<sup>79</sup> 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<sup>80</sup> 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.”<sup>81</sup> 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,<sup>82</sup> although the court distinguished between suspensions of shorter and longer duration in finding that a contractor is entitled to pre-exclusion notice and an opportunity to be heard in suspensions of five months but not of three weeks.<sup>83</sup> Because of these and subsequent decisions,<sup>84</sup> the FAR currently provides that contractors must generally receive notice and an opportunity for a hearing before being debarred,<sup>85</sup> 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.<sup>86</sup>

The judicially developed doctrine of *de facto* debarment can also serve to protect contractors from improper exclusion in certain circumstances. 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,<sup>87</sup> the *de facto* debarment analysis focuses primarily upon conduct

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<sup>79</sup> *Id.* at 574 (emphasis added).

<sup>80</sup> *Id.* at 574.

<sup>81</sup> *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.

<sup>82</sup> 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.”).

<sup>83</sup> *Id.* at 1272-73.

<sup>84</sup> *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 (6<sup>th</sup> 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.’”).

<sup>85</sup> 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.

<sup>86</sup> 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, including any additional specific information that raises a genuine dispute over the material facts; and [t]hat additional proceedings to determine disputed material facts will be conducted unless—(i) [t]he action is based on an indictment; or (ii) [a] determination is made, on the basis of Department of Justice advice, that the substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

*Id.* at §9.407(c)(5)-(6). 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).

<sup>87</sup> *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, (continued...))



outside the debarment and suspension process that effectively excludes contractors.<sup>88</sup> 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 one contract because of an audit report showing three irregularities in billing statements.<sup>89</sup> The Air Force never informed the contractor of these allegations, in part, because contractors do not routinely receive notice of nonresponsibility determinations concerning them.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> Later judicial and administrative tribunals have similarly found that an agency improperly *de facto* debarred a contractor based upon repeated nonresponsibility determinations based on the same information,<sup>93</sup> as well as through words or conduct evidencing an intent to exclude the contractor from government contracts.<sup>94</sup>

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constituted *de facto* debarment and deprived the contractor of due process); Nathanael Causey, Past Performance Information, *De facto* Debarments, and Due Process: Debunking the Myth of Pandora's Box, 29 *Pub. Cont. L.J.* 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).

<sup>88</sup> *See Causey, supra* note 87, 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.”).

<sup>89</sup> *Old Dominion*, 631 F.3d at 960.

<sup>90</sup> *See* CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, *supra* note 1, at 12.

<sup>91</sup> *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”).

<sup>92</sup> *Id.* at 968.

<sup>93</sup> *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).

<sup>94</sup> *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

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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."<sup>95</sup> 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 "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.<sup>96</sup>

While the decision in *Lion Raisins* has been strongly criticized by some commentators<sup>97</sup> and distinguished by some courts,<sup>98</sup> it has been followed or cited approvingly by others<sup>99</sup> and could

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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).

<sup>95</sup> 51 Fed. Cl. 238 (2001).

<sup>96</sup> *Id.* at 247-48 (internal citations omitted).

<sup>97</sup> 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.").

<sup>98</sup> 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 decision maker in the instant case was not inconsistent with the documentation of his decision, unlike in *Lion Raisins*).

<sup>99</sup> 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).

potentially be read to preclude agencies from debarring or suspending contractors under the FAR based on “stale” allegations of wrongdoing.<sup>100</sup>

## Recently Enacted and Proposed Amendments

Debarment and suspension have recently been of significant interest to Congress, given the magnitude of federal spending on contracts<sup>101</sup> and reports that agencies awarded contracts to vendors who previously allegedly engaged in misconduct.<sup>102</sup> In 2011, agencies’ practices in excluding contractors under existing legal authorities were examined in hearings by House and Senate committees and the Commission on Wartime Contracting,<sup>103</sup> as well as in reports by the Government Accountability Office (GAO) and others. One of these reports, by the Interagency Suspension and Debarment Committee, suggests that agencies are more actively pursuing exclusion of contractors, since the number of suspensions, proposed debarments, and debarments increased between FY2009 and FY2010, and only 10%-20% of the potential debarment and suspension cases referred to agency suspension and debarment officials were not pursued.<sup>104</sup> However, other studies found that the vast majority of debarments are statutory ones, based on violations of laws and regulations like those listed in **Table 1**, and not administrative ones, based on the causes established in the FAR.<sup>105</sup> These reports also indicate that agencies structure and

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<sup>100</sup> See Davidson, *supra* note 97, at 503 (suggesting that *Lion Raisins* gave agencies “greater incentive to act quicker” when determining whether to exclude a contractor). However, an argument could perhaps be made that this applies only to debarments or suspensions under the FAR’s “catch-all” provisions, i.e., those due to “lack of business integrity or business honesty or imposed for “any other cause of [a] serious or compelling nature.” See 48 C.F.R. §9.406-2(a)(5) & (c) (debarment); 48 C.F.R. §9.407-2(c) (suspension).

<sup>101</sup> Prime Award Spending Data: By Agency, USASpending.gov, available at <http://www.usaspending.gov/index.php>, (last accessed: Dec. 29, 2011) (reporting that executive branch agencies spent \$495.7 billion on procurement contracts in FY2011).

<sup>102</sup> See, e.g., Alice Lipowicz, Group Updates Federal Contractor Misconduct Database, *Wash. Tech.*, April 21, 2009, available at <http://www.washingtontechnology.com/Articles/2009/04/21/Watchdog-group-updates-federal-contractor-misconduct-database.aspx> (“The top 100 federal contractors have accumulated 673 cases of admitted or alleged misconduct and paid \$26 million in penalties related to those cases since 1995.”); Robert Brodsky, Tax Delinquency No Impediment to Contracts with IRS, *Gov’t Exec.*, March 14, 2011, available at <http://www.govexec.com/dailyfed/0311/031141RB2.htm>; U.K.-Based Defense Contractor to Pay \$400 Million Fine over Bribes to Officials, 93 *Fed. Cont. Rep.* 185 (March 9, 2010); Charles S. Clark, Agencies Blasted for Ignoring Contractor Role in Human Trafficking, *Gov’t Exec.*, November 3, 2011, available at <http://www.govexec.com/dailyfed/1111/110311cc1.htm>; Kimberly Hefling, KBR Gets \$35 Million Contract Despite Electrocutions, *Army Times*, February 7, 2009, available at [http://www.armytimes.com/news/2009/02/ap\\_kbr\\_contract\\_020709](http://www.armytimes.com/news/2009/02/ap_kbr_contract_020709).

<sup>103</sup> See, e.g., Senate Committee on Homeland Security and Governmental Affairs, Ad Hoc Subcommittee on Contracting Oversight, Weeding Out Bad Contractors: Does the Government Have the Right Tools? November 16, 2011, available at [http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=a0a289b6-0643-43d9-961f-9c3096577817](http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=a0a289b6-0643-43d9-961f-9c3096577817); House Committee on Oversight and Government Reform, Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment? October 6, 2011, available at [http://oversight.house.gov/index.php?option=com\\_content&view=article&id=1463%3A10-6-2011-qprotecting-taxpayer-dollars-are-federal-agencies-making-full-use-of-suspension-and-debarment-sanctionsq&catid=14&Itemid=22](http://oversight.house.gov/index.php?option=com_content&view=article&id=1463%3A10-6-2011-qprotecting-taxpayer-dollars-are-federal-agencies-making-full-use-of-suspension-and-debarment-sanctionsq&catid=14&Itemid=22); Commission on Wartime Contracting, Ensuing Contractor Accountability: Past Performance and Suspensions and Debarment, February 28, 2011, available at <http://www.wartimecontracting.gov/index.php/hearings/commission/179-hearing2011-02-28>.

<sup>104</sup> Interagency Suspension and Debarment Committee, Report on Federal Agency Suspension and Debarment Activities, June 15, 2011, available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/reports/isdc-report-to-congress-61411.pdf>.

<sup>105</sup> Gov’t Accountability Office, Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved, August 2011, available at <http://www.gao.gov/new.items/d11739.pdf> (reporting that 84% of exclusions in FY2006-FY2010 were statutory debarments, while only 16% were debarments or (continued...))

perform their exclusion functions in very different ways, and that certain of these differences—most notably, the existence of full-time suspension and debarment officials—correlate with significant differences in the degree to which agencies exclude contractors.<sup>106</sup> Yet other studies reported a “general lack of awareness about suspension and debarment, including limited knowledge about the procedures/criteria associated with these actions, as well as concerns about the potential impact suspension or debarment proceedings might have on contemporaneous civil or criminal proceedings” among inspector general personnel.<sup>107</sup> Partially in response to these hearings and reports, the Obama Administration recently directed agencies to appoint a “senior accountable official,” who will be responsible for assessing the agency’s suspension and debarment program, among other things; review internal policies and procedures to ensure the agency is “effectively using” suspension and debarment; ensure that contracting officers review ELPS before awarding contracts; and take prompt corrective action when the agency determines that it has awarded a contract to an excluded entity.<sup>108</sup>

Members of the 112<sup>th</sup> Congress have also enacted or proposed several measures that augment agencies’ authority to debar or suspend contractors, among other things. The enacted measures require the Secretary of Defense to issue or revise guidance on remedial actions to be taken in the case of suppliers who have “repeatedly failed to detect and avoid counterfeit electronic parts,” including consideration of whether to suspend or debar the supplier until it has “effectively addressed” the issues that lead to such failures,<sup>109</sup> as well as require the Secretary to determine whether entities convicted of intentionally affixing a “Made in America” inscription to ineligible products should be debarred from contracting with the Department of Defense.<sup>110</sup> Agencies are also barred from using certain appropriated funds to enter contracts with corporations that have been convicted of a felony under federal law within the preceding 24 months, or that have certain unpaid federal tax liabilities, unless the agency has considered exclusion and determined that “this ... action is not necessary to protect the interest of the United States.”<sup>111</sup>

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suspensions under the Federal Acquisition Regulation (FAR) or the Nonprocurement Common Rule (NCR)). *See also* related testimony by GAO on November 16, 2011, *available at* <http://www.gao.gov/new.items/d12245t.pdf>.

<sup>106</sup> *Id.* *See also* Inspector General, U.S. Department of Defense, *Additional Actions Can Further Improve the DoD Suspension and Debarment Process*, Report No. D-2011-083, July 14, 2011, *available at* <http://www.dodig.mil/audit/reports/fy11/11-083.pdf> (finding that suspending and debarring officials of the military departments did not exclude contractors as often as those of the Defense Logistics Agency).

<sup>107</sup> Council of the Inspectors General on Integrity and Efficiency, *Don’t Let the Toolbox Rust: Observations on Suspension and Debarment, Debunking Myths, and Suggested Practices for Offices of Inspectors General*, September 20, 2011, *available at* <http://www.ignet.gov/randp/sandwgrpt092011.pdf>.

<sup>108</sup> Executive Office of the President, Office of Management and Budget, *Suspension and Debarment of Federal Contractors and Grantees*, November 15, 2011, *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf>.

<sup>109</sup> National Defense Authorization Act for FY2012, P.L. 112-81, §818,—Stat.—(Dec. 31, 2011).

<sup>110</sup> Consolidated Appropriations Act, P.L. 112-74, §8035,—Stat.—(Dec. 23, 2011). *See also* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012, H.R. 2112, §507 (requiring the exclusion of persons adjudged to have affixed the “Made in America” inscription to ineligible products); Affordable Communities Employment Act of 2011, H.R. 3254, §507 (same); American Steel First Act of 2011, H.R. 1703 (requiring debarment for a period of six years of persons who intentionally affix a “Made in America” inscription to ineligible products or falsely represent that any product was produced in the United States).

<sup>111</sup> P.L. 112-74, §§504-505,—Stat.—.

The proposed legislation would similarly

- require agencies to terminate the contracts of, or debar or suspend for no less than two years, persons who falsely certify that they do not engage in certain sanctioned activities involving Iran;<sup>112</sup>
- require agencies to debar for a period of no less than five years contractors who fraudulently misrepresent that they are small businesses as part of a bid for a “small business contract”;<sup>113</sup>
- require that persons found to have violated the Foreign Corrupt Practices Act be proposed for debarment within 30 days after the judgment finding that person in violation becomes final;<sup>114</sup>
- authorize the Secretary of the Coast Guard to “evaluate” whether certain contractors, whose projects fail to create or retain in the United States the number of jobs they estimated would be created or retained in their jobs impact statements, should be debarred;<sup>115</sup>
- require the Department of the Treasury to study the number of persons suspended or debarred because of delinquent tax debt over the past three years;<sup>116</sup>
- require GAO to periodically report on the number of contractors whose exclusion was waived or who were otherwise awarded federal contracts;<sup>117</sup>
- require that the Department of Veterans Affairs commence debarment proceedings against firms found to have misrepresented their status as veteran-owned businesses within 30 days after this determination, and complete the action within 90 days;<sup>118</sup>
- authorize the Secretary of Homeland Security to debar persons who are “repeat violators” of certain prohibitions upon employing unauthorized aliens;<sup>119</sup>

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<sup>112</sup> Iran Threat Reduction Act of 2011, H.R. 1905, §106; Stop Iran’s Nuclear Weapons Program Act of 2011, H.R. 1655, §501. *See also* Syria Sanctions Act of 2011, S. 1472 (requiring the termination of the contracts of, or the debarment or suspension for up to three years of, persons that falsely certify they do not engage in certain prohibited activities involving Syria); Syria Freedom Support Act, H.R. 2106, §206 (same).

<sup>113</sup> Act for the 99%, H.R. 3638, §1309. *See also* Fairness and Transparency in Contracting Act of 2011, H.R. 3184, §9.

<sup>114</sup> Overseas Contractor Reform Act, H.R. 3588, §2.

<sup>115</sup> Coast Guard and Maritime Transportation Act of 2011, H.R. 2838, §613. *See also* American Jobs Matter Act of 2011, S. 1363, §2 (same); Stop Outsourcing and Create American Jobs Act of 2011, H.R. 3338, §4 (requiring the debarment for two years of entities that falsely represent that they have not engaged in outsourcing during the fiscal year prior to the year in which the contract was awarded).

<sup>116</sup> An Act to Amend the Internal Revenue Code of 1986 to Repeal the Imposition of 3 Percent Withholding on Certain Payments Made to Vendors by Government Entities, H.R. 674, §302. *See also* Contracting and Tax Accountability Act of 2011, H.R. 829, §3 (requiring that persons with “seriously delinquent tax debt” be proposed for debarment).

<sup>117</sup> Transparency in Government Act of 2011, H.R. 2340, §506.

<sup>118</sup> Veterans Programs Improvements Act of 2011, S. 914, §703; An Act to Amend Title 38, United States Code, to Revise the Enforcement Penalties for Misrepresentation of a Business Concern as a Small Business Owned and Controlled by Veterans, S. 1184, §1. *See also* Small Business Contracting Fraud Prevention Act of 2011, S. 633, §4 (authorizing the Small Business Administration to debar firms found to have “knowingly and willfully misrepresented” that they are service-disabled veteran-owned small businesses).

<sup>119</sup> Legal Workforce Act, H.R. 2885, §8. *See also* Comprehensive Immigration Reform Act of 2011, S. 1258, §171 (providing for debarment for up to five years, in accordance with the FAR’s procedures, for “repeat violators”); (continued...)

- authorize debarment as a penalty for failure to comply with certain procedures regarding the substitution of subcontractors;<sup>120</sup> and
- authorize the debarment or suspension of foreign contractors that “evade” service of process or fail to appear in actions connected to federal contracts.<sup>121</sup>

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Accountability through Electronic Verification Act, S. 1196, §4.

<sup>120</sup> Construction Quality Assurance Act, H.R. 1778, §6. *See also* An Act to Require Contractors to Notify Small Business Concerns that Have Been Included in Offers Relating to Contracts Let by Federal Agencies, S. 370, §1 (requiring the debarment of contractors that repeatedly fail to notify small businesses that they have been identified as potential subcontractors in offers submitted in negotiated procurements).

<sup>121</sup> “Rocky” Baragona Justice for American Heroes Harmed by Contractors Act, S. 235, §2.