

## Government Contracts Update

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### The SUSPEND Act: Fixing What Isn't Broken in the Federal Government's Suspension and Debarment System

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The suspension and debarment system has faced increased scrutiny from the private and public sectors alike, which generally argue that the system is broken because the respective authorities are not following, or are inconsistently applying, the rules. In response to this criticism, Congress historically has reacted with a heavy hand, *i.e.* by proposing mandatory suspension or debarment for certain offenses. One of the more recently proposed examples of such Congressional action – House Oversight Chairman Rep. Darrell Issa's Stop Unworthy Spending Act, better known as the SUSPEND Act – departs from this trend of mandating suspension and debarment in limited, specific circumstances, but still fails to address the system's perceived weaknesses.

On June 12, 2013, the House Committee on Oversight and Government Reform conducted a hearing on the Act, and on July 12, 2013, Committee staff members participated in a panel discussion on the Act. Although the Act remains a draft bill that has yet to be introduced in Congress, it raises concerns with respect to the system's efficiency and productivity as the Act appears to be taking what has been, and arguably should be, a more flexible system and transforming it into a more rigid, quasi-judicial process overseen by a formal decision-making body.

#### Overview

On February 7, 2013, Rep. Issa released a **discussion draft** of the SUSPEND Act, as a means to protect taxpayers from "fraudsters, criminals, or tax cheats receiving taxpayer money through grants or contracts." To achieve this goal, the SUSPEND Act proposes consolidating, and thereby terminating, more than 41 civilian agency suspension and debarment offices and functions into one centralized board, the Board of Civilian Suspension and Debarment, which would be located within the General Services Administration (GSA). Department of Defense (DoD) agencies are exempt from this consolidation which, according to the Act, would improve the suspension and debarment system through (1) the transparent and efficient handling of cases; (2) the effective oversight of the database of federal awardee information; (3) the consistent and fair treatment of all persons and entities subject to suspension or debarment proceedings; and (4) active engagement with contracting officers.

The Board itself would be headed by a Chair (appointed by the GSA), and would review actions in a quasi-judicial capacity. Per the proposed draft, the Board also would be responsible for submitting annual reports to Congress summarizing its activities and accomplishments, and recommending improvements to the suspension and debarment system.

Aside from the aforementioned details, the draft bill provides scant information with respect to the Board, particularly in terms of composition and operations. Instead, the Act would require the Office of Management and Budget to establish the size, structure, and organization of the Board as well as issue guidance addressing the scope and operation of the Board including (1) procedures for transparent handling of all cases; (2) procedures to strengthen timely referral of cases by agency contracting and grant offices to the Board; (3) procedures to ensure consistent standards and that all alleged violators are fairly and expeditiously treated; (4) procedures to strengthen suspension and debarment by identifying contractors and grantees that repeatedly fail to perform; and (5) procedures for an expedited review process to handle contract or grant fraud in a non-traditional or time-sensitive environment, *e.g.* contingency operations.

The bill also would mandate the establishment of a single regulation for procurement and non-procurement programs. Among other things, this regulation would provide that the Board's determination with respect to a contractor, grantee, or other recipient of federal financial assistance is conclusive on a Government-wide basis; and that no agency could take a contrary action with respect to the same contractor.

To ensure the Board meets the Act's requirements, the Act proposes that GAO review and assess the Board's effectiveness and submit a report to Congress detailing its findings and recommendations within two years of the Board's establishment.

## **Concerns with the Act**

### *Inefficiencies and Delays*

Though well-intentioned, and arguably more tempered than other Congressional suspension and debarment proposals, the SUSPEND Act raises several concerns. To begin, the proposal to utilize a quasi-judicial decision-making body likely will increase, rather than minimize, the inefficiencies of the suspension and debarment system. First, in terms of pure statistics, with only one decision-making body handling the same or a greater number of cases previously administered and managed by numerous individuals, agencies and contractors are likely to encounter major delays (particularly within the first several months of the Board's creation). These delays, in turn, will probably be magnified by another consequence of using an inflexible and precedent-based quasi-judicial process – eliminating informal methods to dispose of cases before a full hearing such as informal meetings between a Suspension and Debarment Official (SDO) and a contractor.

### *Board Members May Not Have the Necessary Experience*

Further, because the Act does not enumerate qualifications for Board members, the possibility exists that such members will not possess the agency- or subject-matter-specific knowledge that is critical in certain matters. For instance, several environmental laws, such as the Clean Water and Clean Air Act, have mandatory debarments for certain violations, which can only be resolved through technical corrections to the cause that gave rise to the violation. Under the current system, because the SDO is part of EPA, the SDO is experienced in handling environmental matters and making appropriate decisions based upon the environmental considerations. Alternatively, under the SUSPEND Act, it is simply unknown whether the randomly assigned members would have any environmental experience.

### *No Guidance in Migrating the Current System to a Single-Regulation*

The Act also is problematic with respect to its suggestion of a single regulation for procurement and non-procurement programs for at least two reasons. First, while the idea of a single regulation generally is a good idea, the Act fails to provide details addressing two fundamental issues: whether the Federal Acquisition Regulations (FAR) or Nonprocurement Common Rule (NCR) will serve as the basis for the new rule, and who or what entity will determine the substance of the regulation. While the provisions of the NCR generally follow those of the FAR, enough significant differences exist that the Act should provide guidance to the decision-making body charged with reconciling the two programs. For example, while a proposed debarment under the FAR immediately renders a contractor ineligible to receive awards, a proposed debarment under the NCR does not. As mentioned above, the SUSPEND Act currently does not indicate which of these two very important rules should apply.

Second, the proposed single regulation essentially gives the Board a higher stature than the DoD. For instance, as currently drafted, the Act appoints the Board's Chair to also serve as the Chair of the Interagency Suspension and Debarment Committee (ISDC). The ISDC, among other things, resolves lead agency issues, which arise when more than one agency has an interest in reviewing the present responsibility of a contractor. As such, if a DoD agency and one or more civilian agencies have an interest in a contractor, the Board's chair is the ultimate decision-maker with respect to whether DoD will have jurisdiction over that particular contractor. Such authority over the DoD is particularly troubling given that DoD spends more than any other federal agency on contracts for goods and services and is the most active agency with respect to utilizing administrative actions like suspensions and debarments. The Act essentially asserts the Board's superiority over DoD's processes.

## **Conclusion**

Perhaps most troublesome is the fact that the Act appears to shift, and thereby undermine, the current focus of the suspension and debarment system: whether a contractor possesses the requisite integrity and business ethics to be entrusted with public funds (*i.e.*, is the contractor presently responsible). With the proposal to use a more formal quasi-judicial entity as the decision-maker, the Act essentially transforms a flexible, less formal administrative proceeding into a process that more closely resembles an adversarial civil or criminal hearing which could lead to certain evidentiary requirements and procedural issues that place form over substance.

## **What's Next?**

Venable's **Government Contracts Group** will continue to monitor the SUSPEND Act and other

legislation and regulations relating to suspension and/or debarment, and provide additional updates as they arise. If you have any questions concerning the implications of the proposed Act for your business, please contact **Dismas Locaria** or **Elizabeth Buehler**.