

Government Contracts Update

January 2014

Lessons from the *Agility Defense Case*, Part 2: Agencies' New Court-Appointed Muscle

AUTHORS

Dismas Locaria
Elizabeth A. Buehler

RELATED PRACTICES

Government Contracts

RELATED INDUSTRIES

Government Contractors

ARCHIVES

2014 2010 2006
2013 2009 2005
2012 2008 2004
2011 2007

On December 31, 2013, the U.S. Court of Appeals for the Eleventh Circuit reversed a lower court (Northern District of Alabama) decision regarding an agency's ability to indefinitely suspend the affiliates of an indicted government contractor. This is an update to a prior [Government Contracts Update](#) on the lower court's initial decision.

Background

In *Agility Def. and Gov't Servs., Inc., et al. v. U.S. Dep't of Def., et al.*, No. CV-11-S-4111-NE, 2012 WL 2480484 (N.D. Ala. Jun. 26, 2012), the U.S. District Court for the Northern District of Alabama confirmed that the government may suspend an entity based on its affiliation with another suspended government contractor. This holding was consistent with the Federal Acquisition Regulation (FAR), which provides the following [parameters regarding a period of a suspension](#):

If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period. (Emphasis added.)

However, the District Court held that without initiating legal proceedings against each affiliate, the government's suspension against the affiliate may last only 18 months.

Following the adverse decision of the District Court of the Northern District of Alabama, the Department of Defense appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit Decision

In *Agility Def. and Gov't Servs., Inc., et al. v. U.S. Dep't of Def., et al.*, No. 13-10757 (Dec. 31, 2013), the Eleventh Circuit reversed the lower court's holding and found that the term "**legal proceedings**" refers to "proceedings against the indicted government contractor." Accordingly, federal agencies may suspend affiliates of an indicted government contractor indefinitely without evidence of any wrongdoing on the part of the affiliate.

In arriving at its decision, the Court of Appeals made two holdings. First, as mentioned above, the court concluded that the term "legal proceedings" referred to proceedings against the indicted government contractor (as argued by the Department of Defense) as opposed to proceedings specifically brought against the suspended affiliates of the indicted government contractor (as posited by Agility). The Eleventh Circuit agreed with the agency based on its analysis of the term legal proceedings "in context with two [related provisions](#) in the regulation." According to the Court, such provisions made "clear that the suspension and debarment of an affiliate derive solely from its status as an affiliate," irrespective of whether there has been a showing of wrongdoing. Moreover, the court opined that "[i]t would be nonsensical to require the agency either to terminate the suspensions of the affiliates or to initiate separate legal proceedings against the affiliates, only to debar them if the legal proceedings against [the indicted government contractor] end[s] in a conviction." As such, an agency must satisfy only three requirements to suspend an affiliate: (1) establish that the affiliate has the power to control, or be controlled by, the indicted government contractor; (2) specifically name the affiliate; and (3) provide notice of the suspension and notice of an opportunity for the affiliate to respond.

Second, the court determined that the suspension of an affiliate for more than 18 months does not violate the affiliate's right of due process under the Fifth Amendment. In reaching this conclusion, the

Eleventh Circuit explained that “[i]t is unlikely that the regulation infringes on the liberty interests of the affiliates given that their suspensions were predicated solely on their status as affiliates of [the indicted government contractor] and the agency did not make any allegations of wrongdoing against them.” Notwithstanding the fact that such suspension has a real-world impact, the Court further opined that even if a suspension deprived an affiliate of its liberty, “the regulation does not violate the Due Process Clause because it contains constitutionally adequate procedures[,]” specifically notice and an opportunity to respond in writing (albeit after the imposition of the suspension).

Implications for Government Contractors

The Eleventh Circuit’s decision in *Agility* is problematic for government contractors for several reasons, including:

- . It provides justification for an agency’s decision to impose indefinite suspensions (that could extend for many years) against an affiliate based on legal proceedings against an offending government contractor;
- . It purports to hold that agencies may indefinitely suspend or debar affiliates solely on the basis of affiliation without any nexus between the offending government contractor’s wrongdoing and the affiliate; and
- . It holds that a suspension, in and of itself, does not deprive a government contractor of its liberty.

In light of this decision, government contractors and their affiliates must be mindful of each other’s conduct. Moreover, affiliates may have a heightened interest in their sister organization’s compliance standards, protocol, and audit/reporting functions. Further, given the nature of self-preservation, where this decision may create discord between affiliates, particularly loosely-related affiliates, where one affiliate is indicted as the unindicted affiliates try to distance themselves from offending conduct by any means possible.

If you have any questions concerning this alert, please contact **Dismas Locaria** at dlocaria@Venable.com, **Elizabeth Buehler** at eabuehler@Venable.com, or any member of our **Government Contracts Practice Group**.