



Government Contracts Advisory

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FAR Present Responsibility Factors and Due Process Eroded by House Bills Mandating Debarment for Contractors Convicted for Federal Criminal Violations or for Unpaid Tax Debts

Of major concern to the government contracts industry are two recent House bills, HR 2219 (Sections 8129 and 8130), the Department of Defense Appropriations Act for FY 2012, which passed the House by a vote of 336-87 on July 8, 2011; and HR 2055 (Section 414), the Military Construction and Veterans Affairs and Related Agencies Appropriation Act for FY 2012, which was passed by the House by a vote of 411-5 on June 14, 2011. The cited provisions of these bills would in effect debar contractors automatically by prohibiting covered agencies from contracting with such contractors who (1) have been convicted of federal criminal violations, or (2) have unpaid tax debts. HR 2055 would extend the debarment further to contractors who have also been convicted of a felony under state laws. Many in the industry believe these provisions would essentially erode the present offeror responsibility reviews and determinations that the contracting agency must make under FAR 9.100 prior to award, and in making responsibility determinations during contract performance under FAR 9.400.

As a backdrop to this proposed legislation, it has long been established by the FAR that an offeror or contractor can be deemed ineligible for award or can be debarred for any of the myriad bases listed in FAR 9.406-2, 9.104 and 9.104-5. The certifications for responsibility are provided in FAR Clauses 52.209-5 and 52.209-7. Both sets of FAR provisions include debarment for, among other violations, conviction of, or civil judgment for, the commission of fraud or criminal offenses and federal tax delinquency in amounts exceeding \$3,000.

Under FAR 9.406-3, agencies are directed to establish procedures on the debarment decision-making process that are as informal as is practicable, consistent with the principles of fundamental fairness, and which shall afford the contractor an opportunity to submit information and argument in opposition to a proposed debarment. The process must provide for a Notice of Proposed Debarment outlining the reason for the proposed action, with a 30-day window to respond. With respect to eligibility of offerors, FAR 9.104-5 provides that the Contracting Officer, upon receipt of a mandated offeror's certification of responsibility, may request such additional information from the offeror deemed necessary in order to demonstrate the

offeror's responsibility. If the offeror indicates the existence of indictment, charge, conviction or civil judgment, or federal tax delinquency, the Contracting Officer must notify the agency debarment official. Offerors who do not furnish the required certificate, or such information on the matter as may be requested by the Contracting Officer, are given an opportunity to remedy the deficiency. The purpose and policy of these FAR provisions is to consider the "present responsibility" of the contractor or offeror, taking into account the serious nature of any debarment contemplated. Debarment is to be imposed only in the public interest and not for the purpose of punishment. FAR 9.402(b). Accordingly, FAR 9.406-1(a) outlines 10 mitigating factors to be considered by the debarment official in making his or her decision, all of which would be eroded if the provisions in the House bills are ultimately enacted into law.

None of the House provisions provides for a show cause opportunity so that a contractor or offeror may demonstrate present responsibility. Rather, Section 8129 of HR 2219 directs that "None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that has any unpaid federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability." Section 8130 provides that "None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months." While slightly different, Section 414 of HR 2055 provides that "None of the funds made available under this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, or to make a grant to any corporation that was convicted of a felony criminal violation under any Federal or State law within the preceding 24 months." This section would include state felony convictions as an additional basis for debarment.

Were these sections enacted into law, Contracting Officers would likely be required to mandatorily debar offerors or contractors, without consideration of the many mitigating factors that could well support a determination of present responsibility. Such mitigating factors include whether effective standards of conduct and internal control systems have been put in place; whether the contractor brought the activity in question to the attention of the appropriate agency; whether the contractor fully investigated the circumstances surrounding a cause for exclusion/debarment; whether the contractor cooperated fully with the government; whether the contractor has paid all criminal, civil, or administrative liability for the improper activities; whether the contractor took disciplinary action against the responsible parties; whether the contractor has implemented or agreed to institute remedial measures identified by the government; whether it instituted new or revised control procedures and ethics training; whether there has been adequate time to eliminate the circumstances giving rise to the improper conduct; and whether the contractor's management recognizes and understands the seriousness of the conduct and has implemented programs to prevent recurrence. FAR 9.406-1(a).

Contractors, government procurement officials, and industry as a whole already take seriously the FAR policy of fairness and due process associated with the suspension and debarment regulations. It is unfortunate that some in Congress take such a cynical view of the procurement process that they would impose a punitive purpose on remedial measures that are not intended to be punitive but only to protect the government's interest. Prudent contractors concerned about the defacto denial of due process that the House provisions would result in should consider contacting relevant members of Congress in both Houses, particularly those that serve on the Senate Appropriations Committee, in an effort to preclude their enactment.

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