



A Brief History of the Debarment Remedy

There are essentially two types of debarments and suspensions: discretionary and statutory. Discretionary debarment is a remedy that arises from the inherent authority of the Government acting in its capacity as a purchaser and consumer of goods and services. Essentially, the remedy functions as a tool to address potential business risks and requires the assessment of evidence of past misconduct, indicating a lack of business honesty or integrity, or of serious poor performance on the part of an individual or business that is or may reasonably be expected to be a Federal contractor or award participant. Discretionary actions require agency action to initiate. Statutory debarment provisions on the other hand are created by Congress principally to further statutory socio-economic compliance or enforcement schemes. Such award ineligibility provisions are often automatic upon the determination of statutory violation, such as award ineligibility imposed on a violating facility as a collateral consequence of a criminal conviction under the Clean Water Act and Clean Air Act

As early as the Revolutionary War and the founding of the United States, the Government was concerned about examples of contractors providing shoddy goods, performing poorly, and fraudulent overcharging. Examples abound in our history continuing into the present. In the late 19th Century, Congress enacted the Act of July 5, 1884, Ch. 217, 23 Stat.109. This law first required the Executive Branch to award contracts only to the lowest “responsible” bidder. As early as 1928, the Comptroller General considered debarment as a means to preclude contract award to non-responsible businesses seeking Federal work. The Comptroller General held debarment to be an acceptable measure to ensure awards go only to entities willing to properly perform them,

...provided the length of time of such debarment is definitely stated and not unreasonable, and the reasons for debarment, with a statement of the specific instances of the bidder’s dereliction, are made of record and a copy thereof furnished the bidder....

7 Comp. Gen. 547-548 (1928).

Consistent with the Government’s inherent authority to suspend and debar, in 1933, Congress enacted the Buy America Act, 42 U.S.C. § 10, which became the first statute containing an express debarment provision. The Act provided for a three-year debarment from participating in public building construction contracts, for a contractor’s failure to use American-produced building materials on federally funded projects.

Over the years, other statutory debarments schemes followed, such as the Davis-Bacon Act, 40 U.S.C. §§ 276a-277a-5 (1994), the Walsh-Healey Public Contracts Act of 1936, 41 U.S.C. §§ 35-45 (1994 and Supp. IV 1999), and the Service Contract Act of 1965, 41 U.S.C. § 351-358 (1994).

Under regulations adopted pursuant to the Reorganization Act of 1949, the Secretary of Labor issued rules including a three-year debarment scheme for willful or aggravated violations of various labor laws. The general, fixed three-year debarment period established under prior laws indicated that from the beginning debarment was perceived as a remedy - “a cooling off period” that should ordinarily entail a limited rather than indefinite time period.

Pursuant to the Armed Services Procurement Act of 1947, originally enacted at 63 Stat. 393, and the Federal Property Administrative Services Act of 1949, originally enacted at 62 Stat. 21, the Armed Services Procurement Regulation and the Federal Procurement Regulation, the predecessors of the Federal Acquisition Regulation, were issued. Both the military and the civilian regulations contained debarment procedures.

The exponential growth of Government contracting in the mid-20th century stimulated growing concerns about the fairness and use of the suspension and debarment remedy. The Administrative Conference of the United States (ACUS) undertook an extensive evaluation in 1962. The ACUS noted the presence of serious process deficiencies: the absence of procedural due process safeguards, including written notice and the opportunity to contest disputed facts before an impartial official; inadequate identification of causes for and scope of debarment; absence of uniformity for suspension periods; lack of provisions for lifting debarment upon a demonstration of present responsibility; and the combination of prosecutorial and judicial functions into the role of the same decision makers.

The present day discretionary debarment regulations evolved driven, at least in part, by the ACUS review and three seminal rulings of the United States Court of Appeals for the District of Columbia. That Court in *Gonzales v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964), held that a suspension and debarment process must provide for at least minimal due process safeguards of fair and uniform treatment.

The Court in *Horne Brothers v. Laird*, 463 F. 2d 1268 (D.C. Cir. 1972), handed down guidance on the use of suspensions. The Court examined U.S. Department of Defense regulations which, at that time, authorized imposition of a suspension, upon adequate evidence, for a period of up to eighteen months without the opportunity to challenge the basis for an agency’s action. The Court held that suspension cannot be for a protracted period without affording an opportunity to contest. The Court noted that the regulations should allow for the Government to withhold information regarding cause, where the release of such information could jeopardize a criminal prosecution. This ultimately led to the suspension provision which states that an indictment constitutes cause for action as a matter of regulation, and also led, in the case of a pre-indictment suspension, to a regulation which authorizes the denial of fact-finding upon the written

advice of the U.S. Department of Justice, or other prosecuting authority, in cases where parallel proceedings could otherwise be jeopardized.

In *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980), the Court examined the Air Force's repeated refusal to award contracts to Old Dominion Dairy, based on a determination that the company was not responsible because it lacked a satisfactory record of integrity. The Court held that, while there is no property right to the award of a Government contract, the stigma of the award denial based on a lack of integrity, combined with the contract loss, was sufficient to trigger a liberty interest under the Constitution's Due Process Clause. The Court concluded that due process requires prompt notice and an opportunity to contest.

Legislative and Executive Branch actions followed these seminal court rulings of the D.C. Circuit. In 1969, the Commission on Government Procurement, established by Congress, urged Executive agencies to revise debarment processes to enhance uniformity. Ensuing interagency task forces focused on due process requirements and uniform procedures. In 1981, the Senate Subcommittee on the Oversight of Government Management conducted hearings on suspension and debarment, which culminated in a recommendation that the Federal Government issue a Government-wide procurement debarment rule.

Congress, through the Defense Authorization Act of 1982, 95 Stat. 1124, required Government-wide reciprocity of effect for procurement suspensions and debarments. In June 1982, the Office of Federal Procurement Policy issued guidelines for uniform Government-wide procurement provisions for suspensions and debarments under the Defense Acquisition Regulation and the Federal Procurement Regulation. This led to the promulgation of suspension and debarment regulations in the Federal Acquisition Regulation (FAR) at 48 C.F.R. Subpart 9.4, on September 19, 1983. Department and agency specific procedures are found in the Defense Federal Acquisition Regulation Supplement (DFARS) and FAR supplemental regulations. DOI's regulation, which supplements 48 C.F.R. Subpart 9.4, is located at Part 1409 of the DOI Acquisition Regulation.

In the 1980's, increased Government reliance on Federal assistance program activities led to increased concern about the need for oversight and a concomitant focus on the application of the suspension and debarment remedy to "non-procurement" transactions. Executive Order (E.O.) No. 12549, issued February 18, 1986 (3 CFR Comp. p. 189), directed the establishment of a system for non-procurement suspensions and debarments. E.O. 12549 also led to the creation of the Interagency Suspension and Debarment Committee (ISDC) as an informal advisory and coordinating body. The Office of Management and Budget (OMB) implemented the E.O. with the issuance of "Guidelines for Nonprocurement Debarment and Suspension on May 29, 1987". Twenty-Eight Executive Branch departments and agencies published a Government-wide common rule for nonprocurement actions, similar in most respects to the FAR suspension

and debarment process, establishing a uniform system for nonprocurement actions on May 26, 1986 (53 FR 19160).

On August 16, 1989, President George. H.W. Bush issued E.O. No. 12689, directing that nonprocurement suspension and debarment actions be accorded Government-wide reciprocal effect and instructing that technical differences between the procurement and nonprocurement debarment rules be reconciled.

Subsequently, Congress enacted the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, 108 Stat. 3327, which, among other provisions, mandated reciprocity of effect between the procurement and nonprocurement debarment systems.

On April 12, 1999, OMB directed the ISDC to revisit the nonprocurement common rule, and revise and republish the rule in a plain English format, and to propose technical changes to eliminate unnecessary differences between the nonprocurement rule and the FAR debarment rule. The Plain English Rule was proposed on January 23, 2002 (15 FR 3266) and promulgated as a final rule on November 26, 2003 (68 FR 6653). On August 31, 2005, as a part of a process consolidating provisions applicable to grants into Title 2 of the Code of Federal Regulations (C.F.R.), OMB reissued the nonprocurement debarment rule as an OMB Guideline at 2 C.F.R Subpart 180, to be adopted by individual agencies' implementing regulations.

Executive Branch departments and agencies were instructed to adopt the Guideline essentially in total. Agencies were allowed only to vary the extent of covered transactions and non-covered transactions to conform to agency specific program needs, and the extent to which an agency would flow down its debarment program provisions at the sub-tier award level. The department and agency implementing regulations appear immediately following 2 C.F.R. Part 180. DOI's implementation rule for the OMB nonprocurement guidelines is located at 2 C.F.R Part 1400.