NOTE

Is "Protection" Always in the Best Interests of the Government?: An Argument to Narrow the Scope of Suspension and Debarment

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ABSTRACT

The federal government spent over $550 billion procuring goods, services, and construction from the private sector last year. To keep these taxpayer dollars from going to inscrutable contractors, the government uses the remedies of suspension and debarment to ensure that only "responsible" parties perform government contracts. The current regulations, however, are too broad and permit agencies to suspend and debar individuals and companies that do not have an established connection to government contracting. In the face of political pressures to increase suspension and debarment actions, these overbroad regulations invite misuse. Not only do actions against such individuals and companies violate the purposes of the suspension and debarment regulations—protecting the government and acting in the public interest—they are inefficient and waste valuable taxpayer resources. Narrowing the scope of suspension and debarment regulations so that agencies may take actions only against those individuals and companies that currently contract, or have previously contracted, with the government ensures suspension and debarment programs are efficiently employing their limited resources with an aim toward protecting the government, not generally policing contractor behavior.

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TABLE OF CONTENTS

INTRODUCTION

The federal government is a sophisticated consumer with many needs. In fiscal year 2012, it awarded over $415 billion[1] to 143,775 contractors[2] to meet these needs. It awarded $537.2 billion[3] to 172,165 contractors[4] in the previous fiscal year. Not surprisingly given the number of contracts the government awards, not all recipients of contract dollars perform their contractual obligations honestly and ethically.[5] The remedies of suspension and debarment are two of the tools that agencies have to protect themselves from unethical, fraudulent, illegally acting, and chronically poor-performing contractors.[6] Agencies are expected to suspend or debar as many as 1000 contractors this year.[7]

With these tools, the government protects its—and the public's—interests by awarding contracts to "responsible contractors only."[8]

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1 *Prime Award Spending Data by Agency—FY 2012*, USASPENDING.GOV, http://www.usaspending.gov/index.php?q=Node%2F3&fiscal_year=2012&tab=By+Agency (last visited Jan. 26, 2013).

2 *Prime Award Spending Data by Prime Awardee—FY 2012*, USASPENDING.GOV, http://www.usaspending.gov/index.php?q=node%2F3&carryfilters=on&trendreport=top_cont&fiscal_year=2012&tab=BY+Prime+Awardee (last visited Jan. 26, 2013).

3 *Prime Award Spending Data by Agency—FY 2011*, USASPENDING.GOV, http://www.usaspending.gov/index.php?q=node%2F3&fiscal_year_=2010&carryfilters=on&Submit=Go&fiscal_year=2011&tab=By+Agency (last visited Jan. 26, 2013).

4 *Prime Award Spending Data by Prime Awardee—FY 2011*, USASPENDING.GOV, http://www.usaspending.gov/index.php?q=node%2F3&carryfilters=on&trendreport=top_cont&fiscal_year=2011&tab=By+Prime+Awardee (last visited Jan. 26, 2013).

5 For example, the Air Force suspended the rocket division of Boeing after discovering that the division improperly obtained a competitor's proprietary documents and trade secrets. Leslie Wayne, *Air Force Ends Suspension of Boeing Unit*, N.Y. TIMES, Mar. 5, 2005, at C2. The Air Force lifted the suspension after Boeing took "serious corrective actions." *Id.*

6 *See Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions? Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations & Procurement Reform of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 4 (2011) (statement of Rep. James Lankford, Chairman, Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform).

7 Kathleen Miller, *US Agencies Want 1,000-plus Contractors Barred*, BOS. GLOBE, Dec. 28, 2011, http://www.bostonglobe.com/news/nation/2011/12/28/agencies-want-plus-contractors-barred/2CCeByffbPdDVAf0ynxxvI/story.html?camp=pm. This goal would result in a significant increase in suspension and debarment actions. Between 2006 and 2010, total suspension and debarment actions for government contractors totaled 2418. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-739, SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED 10–11 (2011).

8 *See* FAR 9.402(a)–(b) (2011). The Federal Acquisition Regulation ("FAR") is located in chapter 1 of Title 48 of the Code of Federal Regulations. Grantees and other recipients of nonprocurement funds (i.e., funds not paid as a result of a contractual relationship) are subject to the Nonprocurement Common Rule ("NCR"), OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement), 2 C.F.R. §§ 180.5–.1020 (2012), in-

Nonresponsible contractors are contractors that have engaged in conduct indicating they lack present responsibility, meaning they lack the capability, business ethics, and performance record to perform the contract, or otherwise pose an unacceptable risk of dishonest or unethical behavior.[9] Suspension and debarment serve different purposes. Suspension is a preliminary measure taken to immediately protect the government, usually during an investigation or legal proceeding for misconduct.[10] Debarment results in a longer exclusion, generally three years,[11] and occurs only after the contractor is given appropriate due process, including hearings with witnesses and presentation of evidence.[12] Contractors suspended, debarred, or proposed for debarment are ineligible to attempt to obtain or obtain contract awards for the duration of the suspension or debarment.[13]

"More is better" is the perceived mantra of the political discourse surrounding suspension and debarment.[14] Congress has held hearings on Capitol Hill in which it encouraged agencies to increase suspension and debarment actions[15] and has passed legislation mandating suspen-

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stead of the FAR. Although the FAR and NCR share similarities, the NCR is outside the scope of this Note. For more information on the NCR, see Interagency Suspension and Debarment Comm., *Regulations*, EPA.GOV, http://www.epa.gov/isdc/reg.htm (last visited Aug. 12, 2012).

9 *See* FAR 9.104-1, .406-1. The proper inquiry is whether a contractor has taken steps to ensure wrongful acts will not occur, not only whether wrongful acts have occurred in the past. *See* Robinson v. Cheney, 876 F.2d 152, 160 (D.C. Cir. 1989).

10 FAR 9.407-1(b)(1); *see also Weeding Out Bad Contractors: Does the Government Have the Right Tools? Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 39–43 (2011) [hereinafter *Weeding Out Bad Contractors*] (testimony of the Hon. Daniel I. Gordon, Administrator, Office of Fed. Procurement Policy, Office of Mgmt. and Budget) (explaining the role of suspension and debarment in contracting).

11 FAR 9.406-4(a)(1).

12 *See Weeding Out Bad Contractors*, *supra* note 10, at 39–40 (testimony of the Hon. Daniel I. Gordon, Administrator, Office of Fed. Procurement Policy, Office of Mgmt. & Budget); *infra* notes 101–05 and accompanying text.

13 *See* FAR 9.405(a); *infra* Part I.

14 *See, e.g.*, COMM'N ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 156 (Aug. 2011), http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf; INSPECTOR GEN. OF THE U.S. DEP'T OF DEF., REP. NO. D-2011-083, ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DOD SUSPENSION AND DEBARMENT PROCESS i (July 14, 2011), http://www.dodig.mil/audit/reports/fy11/11-083.pdf; Charles S. Clark, *Lawmakers, OMB Push to Ban More 'Bad-Actor' Contractors*, GOV'T EXECUTIVE (Nov. 26, 2011), http://www.govexec.com/dailyfed/1111/111611cc1.htm. *But see* Ralph C. Nash, *Suspension and Debarment: Is More Desirable?*, 26 NASH & CIBINIC REP. ¶ 4 (2012) (concluding more sanctions are not better unless "good guys" are somehow prevented from being "caught in the web").

15 *See, e.g., Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions?*, *supra* note 6, at 2.

sion and debarment provisions.[16] One senator recently proposed mandatory debarment for any contractor convicted of certain criminal activity.[17] Further, agencies have released reports encouraging increased suspension and debarment activity.[18]

The "more is better" maxim, however, does not ring true. Although advocating for robust and active debarment programs may be politically appealing—as are most calls to combat fraud and misuse of taxpayer funds—an increase in suspension and debarment activity will not necessarily benefit the government. That is to say, the likelihood that the individual in question will obtain a contract and mismanage it to the detriment of the government does not outweigh the amount of resources necessary to complete the debarment or suspension action.

The goals of suspension and debarment are to advance the public interest for the protection of the government,[19] but only when it is in the government's interests.[20] This Note argues that protection is not always in the government's interest. The government should attempt to protect itself from nonresponsible contractors; however, such attempts should not produce a misguided emphasis on protecting itself from all nonresponsible individuals who merely have the potential to *become* contractors. Such a broad approach to protection results in agencies wasting taxpayer dollars by suspending and debarring parties that have never taken steps to compete for a government contract and thus do not pose an immediate threat to the government's contracting *interests*.[21]

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16 *E.g.*, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 831, 124 Stat 4137, 4273–75. For a comprehensive list of statutes enacted by the 111th Congress pertaining to debarment, see KATE M. MANUEL, CONG. RESEARCH SERV., RL 34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 3–4 (2011). The most recent legislation, Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, §§ 8124–8125, 125 Stat 786, 837 (2011), prohibits award of appropriated funds to corporations with unpaid tax liabilities or felony criminal convictions in the prior two years.

17 Comprehensive Contingency Contracting Reform Act of 2012, S. 2139, 112th Cong. § 113.

18 *E.g.*, INSPECTOR GEN. OF THE U.S. DEP'T OF DEF., REP. NO. D-2011-083, ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DOD SUSPENSION AND DEBARMENT PROCESS (July 14, 2011), http://www.dodig.mil/audit/reports/fy11/11-083.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-245T, SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011) (testimony before the Committee on Homeland Security and Governmental Affairs, U.S. Senate).

19 FAR 9.402(b) (2011).

20 *Id.* 9.406-1(a).

21 Although the goal of protecting the waste of taxpayer dollars is noble, overprotection results in an ineffective use of taxpayers' dollars. *See infra* Part III.B.3. Given the budgetary crisis with which the Federal government—as well as the rest of the country and world—is deal-

The large scope of individuals presently eligible for suspension or debarment as "government contractors,"[22] coupled with the range of bases for suspension or debarment, invite unnecessary debarment actions that come at a cost to the government.[23] Such unnecessary actions against individuals can be curtailed by narrowing the definition of contractor. The current definition in the Federal Acquisition Regulations ("FAR")[24] should be revised to include only (1) those parties who have previously attempted, or are currently attempting, to obtain a government contract or (2) key personnel or principals of government contracting firms who are directly involved in the procurement process.[25] This revision will ensure suspension and debarment programs are efficiently employing their limited resources with an aim toward protecting the government, not generally policing contractor behavior.

Part I of this Note reviews how the relationship between individual agencies that may suspend or debar and government contracting has changed through the evolution of suspension and debarment regulations. Part II outlines the current suspension and debarment regulations and provides an example of one agency's implementation of the regulations. Part III examines who is being suspended and debarred

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ing, fiscal responsibility is of paramount importance. Faced with trillions of dollars in debt, *see* Mark Knoller, *National Debt Tops $14 Trillion*, CBS NEWS (Jan. 3, 2011), http://www.cbsnews.com/8301-503544_162-20027090-503544.html, and the failure of the "super committee," introducing the consequent specter of sequestration, Jennifer Steinhauer, Helene Cooper & Robert Pear, *With Collapse of Panel's Work, Battleground Shifts to the Automatic Cuts*, N.Y. TIMES, Nov. 22, 2011, at A18, taxpayers expect to see their taxpayer dollars spent wisely.

22 The definition of a contractor includes individuals who "reasonably may be expected to conduct business[ ] with the Government as an agent or representative of another contractor," even if the individual in question has never worked for a government contractor or works in a nonacquisition role for a government contractor. FAR 9.403; *see infra* Part II.A.

23 Costs are incurred as a result of the significant personnel resources consumed by suspension and debarment programs. *See infra* notes 101–02 and accompanying text. Unnecessary debarment actions may also greatly affect the persons debarred. Because all debarred individuals are listed on the publicly searchable Excluded Parties List System—recently migrated to the System for Award Management ("SAM"), *see* SYS. FOR AWARD MGMT., https://www.sam.gov/portal/public/SAM/ (last visited Feb. 3, 2013)—unnecessary debarment may result in increased stigmatization, loss of employment opportunities unrelated to government contracts, and other serious, arguably punitive, consequences. However, this Paper is concerned only with the effect unnecessary debarments have on the federal government.

24 FAR 9.403.

25 Key personnel are "[c]ontractor personnel that are evaluated in the source selection process." RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT 345 (3d ed. 2007). Principal means "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions)." FAR 2.101.

by federal agencies, compares the dual goals of suspension and debarment, and describes how the current suspension and debarment regimes are at times incongruous with these two goals. Part IV proposes specific language to narrow the existing regulations.

I. THE EVOLUTION OF THE DEFINITION OF CONTRACTOR AND THE BASES FOR SUSPENSION AND DEBARMENT

This Section discusses procurement suspensions and debarments, i.e., actions authorized by FAR subpart 9.4 and left to the discretion of the procuring agencies.[26] The government has significantly revised its suspension and debarment regulations since it originally introduced the concepts. These revisions demonstrate how the regulations' scope has continuously broadened and, consequently, become susceptible to agency misuse. Although the purpose of suspension and debarment has remained constant—to ensure contracts are awarded to responsible bidders—the required nexus between an individual or firm and government contracting has consistently waned in importance.

A. The Christening of Suspension and Debarment

The authority to suspend and debar contractors is predicated on statutory requirements that agencies award contracts only to "responsible" parties.[27] To be responsible, a contractor must have adequate

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26 *See* JOHN CIBINIC, JR. ET AL., FORMATION OF GOVERNMENT CONTRACTS 457 (4th ed. 2011). There are two other types of debarments that are outside of the scope of this note: statutory debarments and de facto debarment. Statutory debarments are no misnomer; they are debarment actions mandated by statute. *See, e.g.*, Buy American Act, Pub. L. No. 72-428, Title III, § 3, 47 Stat. 1489, 1520–21 (1933) (codified as amended at 41 U.S.C. § 8303(c) (2006)) (failure to use American produced materials for construction, alteration, or repair of any public building or public work results in debarment from federal construction contracts for three years). Statutory debarments include facility debarments following criminal convictions under the Clean Air Act, 42 U.S.C. § 7606 (2006), and the Clean Water Act, 33 U.S.C. § 1368 (2006). There are no statutory suspensions, just debarments. COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, DON'T LET THE TOOLBOX RUST: OBSERVATIONS ON SUSPENSION AND DEBARMENT, DEBUNKING MYTHS, AND SUGGESTED PRACTICES FOR OFFICES OF INSPECTORS GENERAL 2 (2011). De facto debarment occurs when an agency uses a nonresponsibility determination with the intent to exclude a contractor instead of following the debarment procedures in FAR 9.4. *See* Quality Trust, Inc., B-289445, 2002 CPD ¶ 41 (Comp. Gen. Feb. 14, 2002); CIBINIC, JR. ET AL., *supra* note 26, at 496–98. De facto debarments are not permitted under the FAR and thus are inapplicable to this Note. All uses of suspension and debarment in this Note refer to procurement suspension and debarments unless otherwise indicated.

27 *See* Schlesinger v. Gates, 249 F.2d 111, 112 n.2 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 939 (1958) (citing Armed Services Procurement Act of 1947, Pub. L. No. 80-413, §3(b), 62 Stat. 21, 23 (1948)) (finding debarment is permitted under statute that provides contract awards are to be made to "responsible bidders."); Paul H. Gantt & Irving R. M. Panzer, *Debarment and Suspension of Bidders on Government Contracts and the Administrative Conference of the United*

financial resources; be able to comply with delivery schedules; have a satisfactory performance record; have a satisfactory record of business integrity and business ethics; have necessary experience, organization, and equipment; and be otherwise qualified under applicable laws and regulations.[28]

Congress has required contracts to be awarded to responsible bidders as far back as 1884.[29] Early debarment authority did not focus on the business integrity of contractors.[30] Rather, debarment was a rarely-used tool applicable in special circumstances to protect against poor performance.[31] The government relied on bonds accompanying bids for protection from losses due to contractor failure or default instead of debarment action.[32] From these original, limited applications, suspension and debarment have consistently expanded in scope to the point that their current largesse is susceptible to misuse.

B. Anchoring Suspension and Debarment to Contractual Actions

In the late 1940s, debarment procedures, soon after followed by suspension procedures, became more robust and began to resemble the current suspension and debarment regime. In 1946, the War Department regulations prohibited agencies from placing contracts with persons or firms who had been statutorily debarred under the Walsh-Healey Act[33] and the Davis-Bacon Act.[34] In 1947, Navy regulations

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States, 5 B.C. INDUST. & COM. L. REV. 89, 92–93 (1963) (noting that authority to debar contractors outside of explicit statutory provisions is "generally implied from statutory provisions (applicable to the bulk of government contracts) that contract awards are to be made to 'responsible' bidders").

28 Act of Jan. 4, 2011, Pub. L. No. 111-350, § 113, 124 Stat. 3677, 3681 (to be codified at 41 U.S.C. § 113).

29 Act of July 5, 1884, ch. 217, 23 Stat. 107, 109 ("The award in every case shall be made to the lowest responsible bidder for the best and most suitable article . . . .").

30 Agencies could not suspend contractors until 1953. *See infra* note 51 and accompanying text.

31 *See* Advertising—Debarment of Bidders, 7 COMP. GEN. 547, 547–48 (1928) (stating that "as a general rule there is no authority for the debarment of bidders," but when the interests of the United States require the debarment of a bidder, no question will be raised as long as the reasons for and length of the debarment are definitely stated and furnished to the bidder).

32 *Id.* at 547.

33 Walsh-Healey Public Contracts Act, Pub. L. No. 74-846, § 3, 49 Stat. 2036, 2037–38 (1936) (codified as amended at 41 U.S.C. §§ 6501–6511). This statute applies to contracts for supplies or manufacturing over $10,000 and requires a contractor to certify that it is the manufacturer or regular dealer in the goods to be supplied and that it will comply with relevant labor laws. *Id.* A contractor's failure to comply results in a three-year debarment. *Id.*

34 Act of Aug. 21, 2002, Pub. L. No. 107-217, § 3142, 116 Stat. 1062, 1150–51 (codified at 40 U.S.C. § 3144); *see also* General Procurement Policies and Procedures, 11 Fed. Reg. 11,447, 11,447 (Oct. 5, 1946). This statute requires construction contractors performing government

introduced a "List of Ineligible Contractors," which was comprised of ineligible persons and firms, the reason for the ineligibility determination, and the extent of ineligibility.[35] Importantly, individuals or firms could be determined ineligible not just for statutory bases, but also for defaulting on a contract, violating security provisions of a contract, or committing fraud against the government.[36] These initial expansions of debarment led to the regulations that eventually gave rise to the current regime.

Congress laid the foundation for the current suspension and debarment regime with the passage of two statutes: the Armed Services Procurement Act of 1947[37] and the Federal Property and Administrative Services Act of 1949.[38] Both statutes[39] applied the responsible contractor requirement on executive agencies in sealed bidding[40] and competitive negotiations,[41] and authorized the promulgation of regulations that executive agencies had to follow. The defense agencies followed the Armed Services Procurement Regulation ("ASPR")[42] and the civilian agencies followed the Federal Procurement Regulation ("FPR").[43]

The ASPR, which became effective on May 19, 1948, instructed each department to maintain a list of ineligible and disqualified bidders that contained the same information required under the 1947

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contracts to pay at least prevailing wage rates. A contractor's failure to comply results in a three-year debarment. § 3142, 116 Stat. at 1150–51.

35 34 C.F.R. § 31.133 (1947).

36 *Id.*

37 Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21 (1948).

38 Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377.

39 Both statutes have been amended subsequently by the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended at 41 U.S.C. § 3301 (Supp. IV 2011)), and the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified as amended in scattered sections of 26 U.S.C.), but still require awards to be made to responsible parties.

40 In sealed bidding, an agency issues an invitation for bids to contractors, opens submitted bids publicly, and awards the contract to the lowest priced bid that matches the material requirements of the contract. *See* CIBINIC, JR. ET AL., *supra* note 26, at 501–672.

41 Negotiation refers to procurements made using other than sealed bidding that permits the government to use more discretion when awarding the contract. *See id.* at 673.

42 Armed Services Procurement Regulation, 14 Fed. Reg. 522 (Feb. 8, 1949) (to be codified at 32 C.F.R. pt. 400). Sections I–VI of the ASPR were originally published in 10 C.F.R. pts. 851–56 and 13 Fed. Reg. 3074 (June 9, 1948), but were republished in 32 C.F.R. pts. 400–06 (1951).

43 Federal Procurement Regulation, 24 Fed. Reg. 1933 (Mar. 17, 1959).

Navy regulations.[44] The ASPR also instructed the Departments to exchange these lists.[45]

The ASPR provisions relating to debarment were significantly revised in 1953.[46] The causes for debarment were expanded, but the enumerated causes still required a firm's or individual's culpable behavior to be directly connected with a contract.[47] For example, an agency could debar an individual who was convicted of fraud in obtaining a contract, willful failure to deliver in accordance with contract specifications, or a history of unsatisfactory performance.[48] Unlike the current regulations, the ASPR did not provide a definition for "contractor."[49] An explicit definition for "contractor," however, was likely unnecessary because a debarred individual or firm was required to have a direct connection with the contract at issue.[50]

The 1953 revisions to the ASPR were the first regulations to authorize the suspension of a contractor, but they did not include any guidance on issuing suspensions.[51] Three months later, guidance on suspensions was released in ASPR section 400.605, which permitted suspension upon suspicion of a firm or individual having committed fraud or a criminal offense in connection with a contract.[52]

The FPR was promulgated over ten years after the ASPR.[53] It contained definitions for various potential contractors.[54] To meet the definition of one of these contractors, an individual or firm had to meet the requirements for a specific contract.[55] The FPR authorized each executive agency to "debar in the public interest a firm or indi-

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44 Armed Services Procurement Regulation, 14 Fed. Reg. at 525.

45 *Id.*

46 Miscellaneous Amendments to Armed Services Procurement Regulation, 18 Fed. Reg. 2583, 2584 (May 2, 1953).

47 *Id.*

48 *Id.*

49 *See id.*

50 *See id.* This connection is still sufficient in the current regulations. However, it is no longer necessary in the current regulations given the flexibility in officials' discretion. This flexibility, in part, has enabled agencies to misuse suspension and debarment. *See infra* Part II.B.

51 Miscellaneous Amendments to Armed Services Procurement Regulation, 18 Fed. Reg. at 2584.

52 Miscellaneous Amendments to Armed Services Procurement Regulation, 18 Fed. Reg. 5031, 5032 (Aug. 22, 1953). The suspicion had to be based on adequate evidence rather than "mere accusation." *Id.*

53 Federal Procurement Regulations, 24 Fed. Reg. 1933 (Mar. 17, 1959).

54 *Id.* at 1936 (defining manufacturers, regular dealers, construction contractors, and service contractors).

55 *Id.* For example, a manufacturer of chairs would not be considered a contractor under the FPR unless the manufacturer was competing for a chair contract.

vidual" for a variety of causes, including convictions of crimes in the performance of or attempt to obtain a contract, violations of antitrust laws in connection to submitting bids for contracts, violations of contract terms, or a debarment by another agency.[56] At this point in suspension and debarment's history, there was very little flexibility explicitly provided to the agencies: in order to be subject to the regulations, one had to first be involved with a contract.

The ASPR and the FPR provisions discussed above provided the foundation for the current regime. They have, however, undergone various revisions over the past seventy years, with the first notable instance of revision at the Administrative Conference of the United States ("Conference") in 1962.[57]

C. *Securing the Suspension and Debarment Anchor to Contractual Actions*

The ASPR and FPR provisions authorizing suspension and debarment were not without flaws, both in construction and application. In 1962, the Conference, an executive-created entity, convened to help improve existing administrative procedures.[58] The Committee on Adjudication of Claims investigated debarment procedures of all government agencies related to procurement and found, inter alia, that the grounds for actions were "a chaotic situation."[59] In particular, the Committee found that "[s]ome regulations were so vague that 'generalized criteria have led to debarments on questionable grounds, *not reasonably related to government contracting* . . . .'"[60]

As a remedy, the Conference recommended that all grounds for suspension and debarment be explicitly set forth in published agency regulations, specifying two grounds for sanction: fraud in connection with a government contract and "any other conduct showing a serious and present lack of business integrity or business honesty on government contracts."[61] Some agencies protested the Conference's recommendations, alleging that more robust procedures could inhibit the exclusion of the dishonest, irresponsible, or untrustworthy from the

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56 *Id.* at 1944–45.

57 *See* Gantt & Panzer, *supra* note 27, at 90–91.

58 *See id.*

59 *See id.* at 92–93 (noting that most actions were taken without providing the contractor an opportunity to be heard or informed of the reason for the action).

60 *See id.* at 94 (emphasis added).

61 *See id.* at 100 (noting however that the grounds "would not be limited to those matters.").

privilege of government contracting.[62] Regardless, many of the recommendations were eventually adopted.[63]

Though proposing an expansion of the enumerated bases of suspension and debarment, the Conference's recommendation maintained the requirement that a contractor's suspension and debarment be tied directly to a government contract.[64] Unfortunately, this required connection was not to last.

D. Lifting the Anchor on the Explicitly Required Contracts Connection

Although the Conference's recommendations identified needed changes to suspension and debarment, they were never fully implemented. The second edition of the FPR was published in the Federal Register on July 24, 1964.[65] It included significant changes to the debarment provisions that mirrored some of the recommendations of the Conference.[66] Under the new regulations, agencies could debar or suspend individuals and firms for the causes previously included in the FPR, but also for the catchall cause of "[a]ny other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the head of the agency to warrant debarment."[67] The same provision was added to the ASPR a year later.[68]

Though this catchall phrase was limited to conduct affecting the responsibility of a government contractor, the regulations did not make clear who or what constituted a "contractor." The revised FPR compounded the problem by removing the definitions of potential contractors previously included.[69] The revised FPR also omitted the nexus to government contracting included in the Conference's recommendation.[70] The FPR's move away from the strict government con-

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62 *See id.* at 96.

63 *See id.*

64 *Compare id.* at 100 (recommending grounds for debarment and suspension based on conduct related to government contracts), *with* FAR 9.406-2(c), 9.407-1(a), 9.407-2(c) (2011) (permitting debarment and suspension of contractors for lack of business integrity affecting its present responsibility).

65 Federal Procurement Regulations: Revision of FPR, 29 Fed. Reg. 10,102 (July 24, 1964).

66 *Id.*

67 *Id.* at 10,120.

68 Miscellaneous Amendments to Armed Services Procurement Regulation, 30 Fed. Reg. 5959, 5964 (Apr. 29, 1965).

69 *Compare* Federal Procurement Regulations: Revision of FPR, 29 Fed. Reg. at 10,107, *with* Federal Procurement Regulations, 24 Fed. Reg. 1933, 1936 (Mar. 17, 1959).

70 *See supra* notes 60–61 and accompanying text.

tract connection required for suspension and debarment was soon broadened with the introduction of the FAR.

E. Sailing Away from a Government Contract Connection

The FAR superseded the FPR and ASPR in 1984 and further expanded the explicit bases for suspension and debarment.[71] It permitted agencies to debar or suspend contractors for the contract misconduct and catchall reasons found in the ASPR and FPR, but also for "[c]ommission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property" or "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor."[72]

Further, it was the first regulation to include a definition of "contractor." Under the FAR, a contractor is an individual or legal entity that "submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract . . . or a subcontract under a Government contract; or conducts business . . . with the Government as an agent or representative of another contractor."[73] The language "reasonably may be expected" introduced the authority to suspend or debar individuals or firms that have not actually attempted to obtain or perform a government contract and is the root of the misplaced focus of some agencies today. These original provisions of the FAR remain virtually identical to the current regulations.[74]

The trend to expand the scope of suspension and debarment actions has permitted agencies to cast a wider net and thus, in theory, provide greater protection for the government, while significantly diminishing the once requisite connection between a "contractor" and government contracting.

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71 *See* Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42,102, 42,102 (Sept. 19, 1983) (effective date Apr. 1, 1984).

72 FAR 9.406-2 (2011).

73 FAR 9.403.

74 *See* FAR 9.401–.409. One key difference is the effect of an agency's debarment action. In 1989, President George H.W. Bush issued Executive Order 12,689, which made suspension and debarment under the FAR or the NCR by one agency apply "government-wide." *See* Exec. Order No. 12,689, 3 C.F.R. 235–36 (1989). This means if one agency suspends or debars a contractor, that contractor is ineligible for contracts awarded by any other agency in the government. *Id.* Government-wide suspension and debarment is now incorporated in FAR 9.401. *See* FAR 9.401.

II. PRESCRIBED PROCEDURES FOR SUSPENSION AND DEBARMENT

Suspension and debarment are lengthy and generally laborious processes. The FAR provides the basic procedures agencies are required to follow when suspending or debarring a presently nonresponsible contractor. Each agency supplements these procedures through its own regulations, one of which—the General Services Administration ("GSA")—will be discussed.

A. A Walk Through FAR Subpart 9.4's Provisions and Procedures

FAR subpart 9.4's provisions guide all procurement-related agency suspension and debarment programs.[75] The central figures in these programs are the Suspending and Debarring Officials ("SDO"). SDOs are the agency officials who decide whether to take suspension or debarment action against an individual or company.[76] Every agency with a suspension and debarment program has an SDO.[77] The SDO must decide whether the individual or firm is a "contractor" and, if so, whether a cause for suspension or debarment exists.

Entities eligible for suspension and debarment include both traditional conceptions of contractors—those who submit offers for government contracts or otherwise do business with the government—as well as those who "reasonably may be expected" to be contractors.[78] This phrase—"reasonably may be expected"—permits SDOs to cast a wide net in their suspension and debarment actions. For example, government employees and production-level employees may be considered contractors.[79]

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75 FAR 9.400. As noted above, the FAR does not cover nonprocurement-related suspensions and debarments, such as grants and loans. *See supra* note 8.

76 *See* FAR 9.406-1 ("It is the debarring official's responsibility to determine whether debarment is in the Government's interest."); FAR 9.407-1 ("The suspending official may, in the public interest, suspend a contractor . . . ."). FAR 9.403 provides definitions for both "debarring official" (official authorized to impose debarment) and "suspending official" (official authorized to impose suspension). However, the roles are generally shared by the same individual, who is referred to as the Suspension and Debarment Official. *See, e.g.*, 48 C.F.R. § 509.403 (2011); *Weeding Out Bad Contractors*, *supra* note 10, at 1 (testimony of Mr. Steven Shaw, Air Force Suspending and Debarring Official).

77 *See* FAR 9.406-3(a) ("Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official's consideration."); *id.* 9.407-3(a) ("Agencies shall establish procedures . . . to the suspending official . . . .").

78 *Id.* 9.403.

79 See *infra* Part III.B.3 for examples of who can be caught in this net.

The FAR provides multiple bases for debarment.[80] These include a contractor's conviction or civil judgment for fraud in connection with a government contract,[81] violation of various statutes,[82] being delinquent in federal taxes,[83] or commission of any offense "indicating a lack of business integrity . . . that seriously and directly affects the [contractor's] present responsibility."[84] The causes for suspension are effectively the same.[85] However, instead of requiring a conviction or judgment, as debarment decisions generally do, the SDO may impose suspension based on "adequate evidence," which can be established by an indictment.[86]

The SDO is not required to suspend or debar a contractor whenever a reason for doing so exists; the decision is discretionary.[87] Along with the seriousness of the misconduct, the SDO should consider remedial measures or mitigating factors when making a debarment decision.[88] The FAR provides a nonexclusive list of potential mitigating factors, but the majority of these factors appear to apply only to companies and not individuals.[89]

If the SDO determines that a contractor is presently nonresponsible, the agency has two choices. First, if there is an immediate risk to the government, or an ongoing investigation of the contractor for the same misconduct that gave rise to the nonresponsibility determination, the agency may suspend the contractor, thereby immediately

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80 FAR 9.406-2. Other agencies have regulations that supplement the FAR, which may also include additional bases for debarment. *See, e.g.*, Defense Acquisition Regulations System, DoD, 48 C.F.R. § 209.403 (2011).

81 FAR 9.406-2(a)(1).

82 *Id.* 9.406-2(a)(2)–(3) (violation of antitrust statutes relating to submission of offers and embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, criminal tax laws, or receiving stolen property); *id.* 9.406-2(b)(1)(iii)–(iv) (fraudulently affixing "Made in America" labels or engaging in unfair trade practices in violation of the Defense Production Act); *id.* 9.406-2(b)(1)(ii) (violating the Drug-Free Workplace Act of 1988).

83 *Id.* 9.406-2(b)(1)(v).

84 *Id.* 9.406-2(a)(5).

85 *Compare id.* 9.406-2 ("Causes for debarment"), *with id.* 9.407-2 ("Causes for suspension").

86 *Id.* 9.407-2(a)–(b).

87 *Id.* 9.402(a), 9.406-1; 9.407-1.

88 *Id.* 9.406-1(a).

89 *See id.* 9.406-1(a)(1)–(10) (listing, e.g., whether contractor took disciplinary actions against culpable individuals or instituted control procedures and training programs). Mitigating factors applicable to individuals include whether the individual brought the misconduct to the agency's attention and whether the individual cooperated fully with the investigation. *See id.* 9.406-1(a)(2), (4).

making it ineligible for new contracts.[90] Within thirty days of a contractor's suspension, the agency must give the contractor, if requested, an opportunity to submit an argument in opposition and an opportunity to be heard if the argument presents a genuine issue of material fact.[91] Suspensions last up to a year, or, in the event of legal proceedings against the contractor, until the proceedings have completed.[92]

Second, the agency may propose the contractor for debarment.[93] The agency must provide notice to the contractor of the bases for debarment and, within thirty days of notice, afford the contractor an opportunity to submit information and argument in opposition to the proposed action.[94] If the contractor does not show it is presently responsible and the SDO finds debarment is in the interests of the government,[95] the contractor is debarred for a period of time determined by the SDO generally not exceeding three years.[96]

When a contractor is suspended, proposed for debarment, or debarred, it is excluded from receiving contracts, and is listed on the Excluded Parties List System ("EPLS"), a publicly searchable database.[97]

B. An Agency's Supplemental Procedures: GSA

Each agency is responsible for establishing the appropriate procedures to implement these policies.[98] For example, the GSA outlines

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90 *Id.* 9.407-1(b)(1).

91 *Id.* 9.407-3(c).

92 *Id.* 9.407-4.

93 *Id.* 9.406-2.

94 *Id.* 9.406-3(b)–(c). This requirement stems from *Gonzales v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964), in which the court required agencies to provide "notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses" prior to debarring a contractor. This due process requirement is provided before a contractor is debarred. *See* FAR 9.406-3(c) (requiring agencies to issue notice to individuals of proposed debarment before proceedings have begun). Conversely, in suspensions, the SDO may first suspend a contractor without any due process, but must provide the contractor with the opportunity to present argument after imposition of the suspension if there is a genuine dispute of material fact. *Id.* 9.407-3(b).

95 FAR 9.406-1(a).

96 *Id.* 9.406-4.

97 *Id.* 9.404–.405; *see also* SYS. FOR AWARD MGMT., *supra* note 23. Because EPLS is publicly searchable, a listing can have ramifications beyond a bar to federal contracting. Employers, landlords, and creditors can all search the database when considering applications. State, local, and foreign governments are able to search EPLS if a contractor attempts to obtain public contracts from those sources. Although a contractors' debarment or suspension will eventually end, the other adverse consequences of a listing may persist indefinitely because the EPLS archive is publicly searchable. These concerns regarding EPLS, however, are not within the scope of this Note.

98 *See* FAR 9.402(c).

its procedures in the GSA Acquisition Manual ("GSAM").[99] The GSA debarment procedures contemplate referrals to the SDO for contract performance deficiencies or to the Office of the Inspector General ("OIG") for criminal or fraudulent behavior.[100] The SDO must review the case and, after coordinating with legal counsel, make a recommendation for action.[101] The SDO has a staff to assist him with his responsibilities; currently, there are four full-time staff members and a division director in GSA's suspension and debarment division.[102]

If the SDO proposes a contractor for debarment, he must provide notice to that contractor.[103] The contractor may request the administrative record and an opportunity to present information and argument in the presence of the SDO.[104] The SDO designates a "fact-finding official" to initiate a fact-finding process if there is a genuine dispute of material fact, which includes hearings with witnesses and presentation of evidence.[105] The fact-finding official must submit written findings of fact to the SDO within twenty days of the culmination of the fact-finding proceeding.[106] If the contractor does not respond to

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99 48 C.F.R. pt. 501 (2011). GAO recently identified GSA as having one of the more active suspension and debarment programs. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 11–12. It is discussed here only to provide an example of agency procedures at an agency with a robust program and is not intended to imply GSA's procedures should be followed by other agencies. Although the procedures work well for GSA, each agency must determine for itself the procedures that complement its mission and organizational structure. *Id.* at 23. It should be noted that debarment procedures and programs are not static; they are constantly being improved. Some program changes are prompted by agencies themselves. For example, GSA's suspension and debarment program was unstaffed from January to June 2006, U.S. GEN. SERVS. ADMIN. OFFICE OF INSPECTOR GEN., REP. NO. A070105/O/A/F08004, REVIEW OF GSA'S SUSPENSION AND DEBARMENT PROGRAM 4 (Dec. 20, 2007), but by 2011 had a full time staff, most of whom had law degrees, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 13. Other changes are advocated by outside agencies. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 23. It is important to note the FAR provisions are also constantly being updated. *See, e.g.*, Federal Acquisition Regulation; FAR Case 2008-028, Role of Interagency Committee on Debarment and Suspension, 74 Fed. Reg. 31,564, 31,564–65 (July 1, 2009) (to be codified at 48 C.F.R. pt. 9) (defining committee's role in debarment and suspension proceedings).

100 GSAM 509.406-3(a) (2011).

101 *Id.* 509.406-3(b). Possible actions include (1) initiate debarment action (propose contractor for debarment); (2) decline debarment action (issue no-action letter); (3) request additional information (issue request for more information letter); or (4) refer matter to OIG for further investigation. *Id.*

102 U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 13.

103 GSAM 509.406-3(d)(1).

104 *Id.* 509.406-3(d)(2).

105 *Id.* 509.406-3(d)(3).

106 *Id.*

the proposal for debarment within thirty days, the debarment becomes final.[107]

The GSA's procedures for suspensions closely mirror debarment procedures.[108] The two procedures diverge if the contractor's suspension is not based on an indictment. In such a case, the SDO must coordinate with the prosecutorial authority and determine whether fact finding would impair the substantial interests of the government.[109] No similar distinction exists for debarments based on something other than an indictment.

As outlined above, suspension and debarment processes can consume significant agency resources. At the GSA, the OIG or other individuals investigate potential cases and refer them to GSA suspension and debarment staff; agency staff reviews, investigates further, and analyzes the investigations; the SDO reviews the evaluation and coordinates with legal counsel in making his decision; and the agency must evaluate any materials provided in response to an action and provide the opportunity for hearings.[110] It is thus important to ensure that these resources are not being wasted on unnecessary suspensions and debarment, but are employed only in furtherance of the regulations' stated purpose: to protect the government and act in its best interests.[111]

C. *Protection of and Acting in the Government's Best Interests*

The most important of the FAR's debarment provisions is the stated policy for such actions: the mandate that agencies not impose debarment on a contractor unless doing so is in the public interest for the government's protection and not for the purposes of punish-

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107 *Id.* 509.406-3(d)(2).

108 *Id.* 509.407-3.

109 *Id.* 509.407-3(b)(2).

110 *See* U.S. GEN. SERVS. ADMIN. OFFICE OF INSPECTOR GEN., *supra* note 99, at 1; GSAM subpt. 509.4. A recent bill proposed mandating full-time SDOs whose only responsibilities involve suspension and debarment in various agencies, requiring "adequate" staff and resources, and implementing policies on training and uniform practices. *See* Comprehensive Contingency Contracting Reform Act of 2012, S. 2139, 112th Cong. § 112. This Note encourages such developments but is mindful of the costs involved.

111 FAR 9.402(b) (2011).

ment.[112] This provision is further qualified: the debarring official must determine that debarment is "in the [g]overnment's interest."[113]

"Public interest" and "government's interest" are not defined in the FAR. The absence of a definition for the former term was noted in 1987 by Donna Duvall, three years after the FAR was first promulgated.[114] Following an analysis of the policy bases for suspensions, Duvall concluded that the public interest included a plethora of considerations, including the effect on competition, the availability of other protective measures, and "the effect of suspension on the contractor's employees."[115] A necessary addition to Duvall's list is protection of the public fisc.[116] When considering stewardship of the public fisc, agencies should evaluate whether the protection achieved justifies the cost to taxpayers.

The focus of the suspension and debarment provisions is the protection of the government from entities that pose a business risk to the government.[117] Debarment is not intended to supplement or replace criminal or civil actions taken against a suspended or debarred entity. The purpose is to ensure that contractors that cannot responsibly perform government contracts and deliver the goods or services that the government needs will not be awarded contracts.[118]

The suspension and debarment regulations, on their face, do not appear objectionable. They provide the SDO necessary discretion to

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112 *Id.* It is difficult for a contractor to protest debarment on the grounds that it constitutes impermissible punishment. *Compare* Lion Raisins, Inc. v. United States, 51 Fed. Cl. 238, 249 (2001) (finding suspension was punishment because agency found contractor "both responsible and non-responsible for the same time period and based on the same evidence"), *with* Hudson v. United States, 522 U.S. 93, 104 (1997) ("We have long recognized that 'revocation of a privilege voluntarily granted,' such as a debarment, 'is characteristically free of the punitive criminal element."), *and* United States v. Glymph, 96 F.3d 722, 724–25 (4th Cir. 1996) (citing United States v. Bizzell, 921 F.2d 263, 265 (10th Cir. 1990)) (finding debarment does not impose punishment because its intent is remedial by definition, even though debarred persons might interpret debarment as punitive).

113 FAR 9.406-1(a).

114 *See* Donna Morris Duvall, Comment, *Moving Toward a Better-Defined Standard of Public Interest in Administrative Decisions to Suspend Government Contractors*, 36 AM. U. L. REV. 693, 694 (1987).

115 *Id.* at 706.

116 *See* Brock v. Pierce Cnty., 476 U.S. 253, 262 (1986) (noting "the protection of the public fisc is a matter that is of interest to every citizen"). In a slightly different context, the Court of Appeals of New York found that the public interest included protection of the public fisc by ensuring that procurements resulted in the best work at the lowest price. N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth., 666 N.E.2d 185, 190 (N.Y. 1996).

117 *See Suspension and Debarment Program*, U.S. ENVTL. PROT. AGENCY (last updated Dec. 11, 2012), http://www.epa.gov/ogd/sdd/debarment.htm.

118 *Id.*

consider the government's interests when proposing appropriate action. Still, the broad definition of "contractor" and the expansive causes for suspension or debarment combined with recent political pressure to increase suspension and debarment actions[119] have resulted in a misdirected application of these regulations.

III. MISAPPLICATION OF SUSPENSION AND DEBARMENT

Agencies are using the regulations described above to suspend and debar many more individuals than firms. Although there are individuals who warrant suspensions or debarments, a number of these actions are not in accord with the two policy objectives of suspension and debarment. This disparity demonstrates that suspension and debarment regulations are overly broad and enable agencies to waste resources by taking unnecessary actions against various parties.

A. An Empirical Look at Who Is Being Suspended and Debarred

The FAR permits agencies to debar, propose for debarment, or suspend individuals and firms. The EPLS database contains all entities excluded from contracting with the government, which includes entities excluded for reasons other than the procurement-based suspensions and debarments at issue in this Note.[120] The data below illustrating the number of entities listed for agency suspensions, proposals for debarments, and debarments was obtained from a series of searches of the EPLS database in late October 2011.[121] The listings include every entity then ineligible,[122] which generally means entities debarred within the past three years.[123] Because suspensions are valid for up to a year prior to the initiation of legal proceedings and last until any legal proceedings are finished,[124] it is difficult to provide a time frame for suspension listings.

FAR-based suspensions, debarments, and proposals for debarment composed a relatively small number—between five and six per-

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119 *See supra* notes 14–17 and accompanying text.

120 *See SAM Agency Information: Exclusion Type*, SYS. FOR AWARD MGMT., https://www.sam.gov/portal/public/SAM/ (follow "Help" hyperlink; then follow "Exclusions Informoation" hyperlink; then follow "Exclusion Types" hyperlink) (last visited Feb. 3, 2013). EPLS used almost seventy-five codes to classify a listing, but SAM replaced the "legacy codes" for EPLS listing with four exclusion types. *See id.*

121 *EPLS Advanced Search*, https://www.epls.gov/epls/search.do (last visited Oct. 26, 2012). EPLS is regularly updated by agencies, thus, these numbers are out of date. However, the snapshot of the data reveals the general state of the database.

122 FAR 9.404(b) (2011).

123 *Id.* 9.406-4.

124 *Id.*

cent—of current listings on EPLS.[125] For FAR-based actions, slightly over sixty percent of the listings were for individuals while thirty-eight percent were for firms.[126] Of the total 2638 listed individuals, 1634 were debarred under FAR regulations, 548 were proposed for debarment, and 456 were suspended pending completion of an investigation or legal proceeding pursuant to the FAR regulations.[127] Firm suspensions are essentially the same as individual suspensions, but debarred individuals outnumber debarred firms by approximately two to one, and about sixty-five percent more individuals than firms are proposed for debarment.[128]

This disparity between listed individuals and firms is not a new phenomenon. In 2004, Professor Steven Schooner noted that some critics of the debarment regime saw it as a "paper tiger"—a regime that lacked a credible bite—that was "used heavily against small firms and individuals."[129] Professor Schooner's review of parties listed on EPLS illuminates three noteworthy characteristics. First, there was an absence of well-known firms on the list.[130] Second, the "lion's share" of listings were individuals.[131] Lastly, of the firms listed, many were affiliates,[132] meaning these firms were listed as a result of their relationship with a controlling firm that was suspended or debarred.

As Professor Schooner pointed out, many of the EPLS listings are crosslisted with one or more other firms or individuals as a result of the same culpable behavior.[133] For example, Zenith Enterprises

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125 In October 2011, there were 4372 procurement-related listings as compared to 80,553 total EPLS listings. *See EPLS Search, supra* note 121. These numbers do not include listings for violations of the Drug-Free Workplace Act of 1988. See *id.* for the list of causes for the other EPLS listings. In 2011, the Government Accountability Office noted that approximately 4600 EPLS listings from 2006–2010 were from FAR and NCR discretionary suspensions and debarments, representing sixteen percent of listings. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 8. The largest source of EPLS listings for other exclusions was violations of "health care regulations." *Id.* at 9.

126 *EPLS Advanced Search, supra* note 121. The other two percent are entities and vessels listed by the Department of Treasury's Office of Foreign Assets Control.

127 *Id.*

128 There are 890 debarred firms, 330 proposed for debarment, and 442 currently suspended. *Id.*

129 Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, 13 PUB. PROCUREMENT L. REV. 211, 214–15 (2004).

130 *Id.* at 215–16. It is unclear whether Professor Schooner's search was confined to the "procurement list" or the "reciprocal list." All actions taken after August 25, 1995 are excluded under the "reciprocal list."

131 *Id.*

132 *Id.* Affiliates of a business are business concerns, organizations, or individuals over which the principal has the power of control. *See* FAR 9.403 (2011).

133 *See* Schooner, *supra* note 129, at 216.

Ltd., a Kuwaiti company, had twenty-five crosslistings in October 2011.[134] Ted Battista, a Boeing employee recently arrested in a drug raid,[135] is crosslisted with thirty-six other individuals.[136] It is therefore unclear how many independent debarment actions are reflected on EPLS, but nevertheless, more individuals are subjected to suspension and debarment actions than firms.

B. When Debarring Individuals Is Not in the Government's Best Interest

The disparity between the number of debarred individuals and debarred firms is an important consideration when assessing whether debarment actions are fulfilling the regulations' stated goals. It begs two questions: (1) is it in the best interests of the government to debar so many individuals, and (2) does the protection afforded to the government outweigh the administrative costs incurred by agencies in debarring such a high number of individuals?

1. Distinguishing "Protection" from the "Government's Interest"

Protection of the government and acting in the best interest of the government are not synonymous. Take, as an illustration, the "too big to debar" argument.[137] Critics of the debarment regime emphasize that large and established government contractors are often spared from debarment actions despite the SDO having a valid basis to debar them.[138] The Project on Government Oversight ("POGO") maintains a Federal Contractor Misconduct Database, which provides many examples of this fact.[139] This database shows that Lockheed Martin, a firm that received $34,367,400,000 in government contracts as of fiscal year 2010, has fifty-eight instances of misconduct since 1995 and, as a result, has paid $606,000,000 in fines, penalties, and settlements.[140]

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134 *See EPLS Advanced Search*, *supra* note 121.

135 Peter Loftus, *Drug Raid at Factory Nabs Boeing Workers*, WALL ST. J., Sept. 30, 2011, at A4; Vince Sullivan, *37 Boeing Workers Charged with Selling, Possessing Prescription Drugs*, MAINLINE MEDIA NEWS (Sept. 30, 2011), http://www.mainlinemedianews.com/articles/2011/09/30/main_line_suburban_life/news/doc4e84ddd118cd9993693161.txt

136 *See EPLS Advanced Search*, *supra* note 121.

137 *See, e.g.*, Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 809–10 (2011).

138 *See, e.g.*, Schooner, *supra* note 129, at 214–15; Stevenson & Wagoner, *supra* note 137, at 809–10.

139 *Federal Contractor Misconduct Database*, PROJECT ON GOV'T OVERSIGHT, www.contractormisconduct.org (last visited Mar. 30, 2012).

140 *Id.*

Lockheed Martin is not listed on EPLS.[141] Nor, in the author's opinion, will it ever be.[142] This is, in part, because of the difference between protecting the government and acting in its best interest.[143] Debarring a contractor like Lockheed Martin very well could protect the government from contract fraud, contractor kickbacks, defective pricing, and various other unscrupulous behaviors. It is in the government's interest, however, to have access to the goods this company produces, such as military aircraft.[144] Perhaps if the pool of firms able to provide these goods and services expands, protecting the government and acting in its best interests will produce the same result. But, as this one example demonstrates, that is not always the case. This is not the only situation in which the difference between these two concepts is consequential.

The potential divergence between protection and the government's interest is not applicable only to behemoth government contractors; it applies to suspension and debarment actions taken against individuals as well. SDOs, unfortunately, do not always consider both the protection of the government and the government's interests independently when taking suspension and debarment actions. Because data on the details of why agencies debar parties are, regrettably, not readily available,[145] this Note reviews two actual debarment actions,

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141 *Search Results*, SYS. FOR AWARD MGMT., https://www.sam.gov/portal/public/SAM/ (follow "Search Records" hyperlink; then search "Lockheed Martin"; note there are no "active exclusions" listed) (last visited Feb. 3, 2013). Lockheed Martin is also not listed on the Federal Awardee Performance and Integrity Information System, which "contains specific information on the integrity and performance" of government contractors. *Search FAPIIS Records*, FED. AWARDEE PERFORMANCE & INTEGRITY INFO. SYS., http://www.fapiis.gov/ (last visited Feb. 3, 2013).

142 This does not suggest that agencies will not enter into administrative agreements or take other action to prevent misconduct by large government contractors.

143 Other reasons likely include hesitation to impute the wrongful actions of a few employees to an entire company and the quality of legal representation in debarment actions.

144 *See Prime Award Spending Data by Prime Awardee—FY 2012, Contractor: Lockheed Martin Corporation*, http://www.usaspending.gov/?q=explore&tab=By%2BPrime%2BAwardee&fromfiscal=yes&typeofview=eetailsummary&contractorid=834951691&contractorname=LOCKHEED+MARTIN+CORPORATION&fiscal_year=2012 (last visited Jan. 7, 2013) (listing contracts Lockheed Martin performs).

145 *See, e.g.*, Letter from Richard P. Levi, Counsel to the Inspector Gen., U.S. GSA, Office of Inspector Gen. (Jan. 21, 2010) (response to FOIA Request from governmentattic.org), http://www.governmentattic.org/3docs/GSA-OIG-InvClosed_2008-2010.pdf. *But see*, *List of Recent Debarments*, DEP'T AIR FORCE GEN. COUNSEL, http://www.safgc.hq.af.mil/organizations/gcr/listofrecentdebarments/index.asp (last visited Oct. 21, 2011). EPA makes its decisions available through LexisNexis and Westlaw, but the published decisions do not discuss the underlying facts. EPLS allows agencies to provide the details of the debarment when listing an entity. The author believes increased transparency in the debarment process by publicly disclosing the rationale for

followed by two illustrative hypothetical examples of potential bases for debarment, and analyzes how these cases satisfy the FAR's criteria for suspension or debarment. Although technically permissible under the FAR, these actions do not satisfy the protective and public interest criteria.

2. *Illustrative Cases*

Case A: An agency in the Department of Defense reprimands a military officer for failing to account for a conflict of interest in awarding a contract. No government agency trained her as an acquisition professional. She is nearing retirement and has no plans of pursuing employment with a government contractor after she leaves her agency. She is debarred.[146]

Case B: Three dozen employees of a major government contractor are arrested for illegally buying or selling prescription drugs on the job.[147] The employees work in the production section of the contractor's plant, where they are building military aircraft.[148] The company did not identify them as personnel to be evaluated in the source selection process when the contractor negotiated the contract.[149] They are all suspended pending culmination of legal action against them.[150]

Case C: Lower level employees of a large corporation that contracts with the government are found guilty of recruiting undocumented workers, which allowed the corporation to offer lower prices than its competitors. They have no knowledge of how to compete for a contract, nor do they have a role in bid pricing. They are debarred; the corporation is not.

Case D: A janitor working at a government agency pleads guilty to and is convicted of stealing government property worth over $100,000. The employee has never worked for a government contrac-

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debarment actions would only help improve the perception of agency suspension and debarment divisions.

146 *See* Memorandum in Support of the Debarment of Doris Wong from Steven A. Shaw, Deputy Gen. Counsel (Contractor Responsibility), Dep't of the Air Force Office of the Deputy Gen. Counsel (imposing debarment for a period of three months and ten days after finding that the likelihood of repeat misconduct was slim); David Robbins, *Impact of PK, Investigator, and Other Stakeholders on the Suspension and Debarment Process*, FRAUD FACTS, Fall 2010, at 6.

147 *See* Loftus, *supra* note 135.

148 *See id.*

149 That is to say the employees were not "key personnel." Source selection is the process of choosing a contractor through negotiations. *See* NASH, JR. ET AL., *supra* note 25, at 345, 535.

150 *See* Loftus, *supra* note 135 and accompanying text.

tor, nor does she know anything about government procurement. The janitor is debarred.[151]

To be debarred, each of the above individuals first must be considered contractors[152] and then satisfy a cause for debarment.[153] Although none of the individuals are government contractors in their own right, meaning none of them directly submitted bids or proposals for federal procurements, they may fit the definition of a contractor because they may "reasonably" be expected to use their experience and nexus with the government or a contractor to become agents of a contractor and do business with the government.

They all have committed offenses that may warrant debarment. Case A's failure to account for a serious conflict of interest can be considered a cause so "serious or compelling . . . that it affects [her] present responsibility . . . ."[154] Case B concerns convictions for illegal behavior indicating a lack of business integrity that affects the individuals' present responsibility.[155] Case C involves convictions of a criminal offense that was technically connected to the performance of a government contract.[156] Case D's conviction for theft is also sufficient for debarment.[157]

A basis for debarment, however, does not make debarment appropriate. Will debarring these individuals protect the government and be in its interest?

3. *Failing to Satisfy the Public Interest or Protection Criteria*

Debarment in the examples above fails to satisfy the dual goals of suspension and debarment. These actions are not in the best interests of the government because they are unnecessary, constitute a waste of resources, and are "protecting" the government's contracts from a nonthreat. The individuals in these cases do not pose a risk to the government of obtaining and performing contracts because they lack

151 *See Hyde Park Man Charged with Theft from National Park Service*, U.S. ATTORNEY'S OFFICE, DISTRICT OF MASS. (Nov. 4, 2010), http://www.justice.gov/usao/ma/news/2010/November/AllenAlphonisoPR.html. Alphoniso Allen, a former government-employed mechanic, was charged with theft for using government credit cards to make unauthorized fuel purchases for his personal vehicles. He was debarred and is now listed on SAM. *Exclusion Summary*, SYS. FOR AWARD MGMT., https://www.sam.gov/portal/public/SAM/ (follow "Search Records" hyperlink; then search "Alphoniso Allen"; then follow "View Details" hyperlink) (last visited Feb. 3, 2013).

152 *See supra* note 78 and accompanying text.

153 *See supra* notes 80–84 and accompanying text.

154 *See* FAR 9.406-2(c) (2011).

155 *See id.* 9.406-2(a)(5).

156 *See id.* 9.406-2(a)(1)(iii).

157 *See id.* 9.406-2(a)(3).

knowledge of contracting. Although their behavior is clearly wrongful and demonstrates a lack of present responsibility, they pose very little risk of ever contracting with the government or being a key component in a company's attempt to obtain a government contract. Legal prosecution of these individuals for the underlying crimes or offenses is adequate. Debarring them is overprotective, punitive, or merely symbolic—none of which is in the government's best interest.

Overprotection is not in the best interest of the government because unnecessary actions waste valuable taxpayer resources. Debarment actions require the time of multiple government employees—special agents to investigate potential cases, the SDO to review the case, staff to analyze and summarize the case, attorneys to ensure the analysis is legally sufficient—which results in a substantial cost to the government.[158] Debarment actions should be viewed from a cost-benefit position: if the costs incurred in pursuing debarment action against an individual can reasonably be anticipated to exceed the direct benefit to the government in reducing its business risk in contracting, debarment action is improper.[159]

Using suspension and debarment simply to punish culpable individuals is improper. The regulations are unambiguous; agencies are not to use suspension and debarment as a means to punish contractors.[160] This clear message is sometimes ignored. For example, Senator Claire McCaskill, in a recent hearing, referenced suspension and debarment as "leverage to get better behavior out of contractors," the "ultimate penalt[ies]" that should be mandatory for contractors convicted of criminal activity associated with contracting, and tools "to go after" contractor misconduct.[161] Punitive applications of suspension and debarment flatly violate the regulations and likely exceed statutory authority.[162]

Rather than being mechanisms to correct culpable behavior, suspension and debarment are means for carrying out the requirement

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158 *See, e.g., supra* note 110 and accompanying text.

159 One can argue that this provision exists in FAR 9.403 by limiting contractors to those who "reasonably may be expected" to compete for contracts or conduct business with the government. However, this language is not sufficient. Anticipating that a contractor will do business with the government in the future does not implicate an analysis comparing potential harm to the costs incurred by the government.

160 FAR 9.402(b).

161 *See Weeding Out Bad Contractors: Does the Government Have the Right Tools, supra* note 10, at 18–19 (opening statement of Sen. Claire McCaskill).

162 FAR 9.402(b); *see also supra* note 112 and accompanying text.

that contracts are awarded to responsible bidders.[163] When determining responsibility, the government asks whether a contractor can perform the contract, not whether it deserves to be punished for culpable behavior.[164] Congress is free to amend the statutory basis for suspension and debarment to make it another enforcement mechanism.[165] Absent such action, agencies cannot use the suspension and debarment regulations for punishment without violating the regulations and the purpose of the underlying statutory authority.

Further, rendering suspension and debarment into punishment is not in the best interests of the government. There is no shortage of enforcement mechanisms to police culpable behavior, and there is an entire agency dedicated to these mechanisms.[166] Duplicative purposes are inefficient uses of taxpayer resources. Suspension and debarment programs should thus retain a focus on protecting the government's business interests and leave punitive actions to other agencies.

Actions taken against the individuals used in the examples above can be considered symbolic. A symbolic action is taken not primarily for protection, but for deterrence. Deterrence does, in theory, protect the government's business interests by preventing wrongful behavior. Deterrence, however, works only for individuals actually planning to compete for government contracts. A production employee working for a government contractor, for example, is not likely to be deterred from wrongful behavior because of the risk of being ineligible for future government contracts. She may be deterred because of the extraneous adverse consequences of debarment,[167] but this renders debarment into a threat of punishment. If debarment actions are primarily symbolic—an effort to *do something* against wrongful behavior—they are incongruent with the FAR and thus are not appropriate uses of taxpayer resources.[168]

Lastly, debarment of individuals risks being merely symbolic because of the efficacy of the action. When an agency suspends or de-

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163 *See supra* note 27 and accompanying text.

164 *See supra* note 27 and accompanying text.

165 *See* Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368, 372 (D.C. Cir. 1961) (quoting L.P. Steuart & Bros., Inc. v. Bowles, 322 U.S. 398, 404 (1944) ("[I]t is for Congress to prescribe the penalties for the laws which it writes."); *see also* Janik Paving & Constr., Inc. v. Brock, 828 F.2d 84, 91 (2d Cir. 1987).

166 *About DOJ*, U.S. DEP'T JUSTICE, (last updated Mar. 2012), www.justice.gov/about/about.html (stating the DOJ's mission "[t]o enforce the law and defend the interests of the United States according to the law" and "to seek just punishment for those guilty of unlawful behavior").

167 *See supra* note 23 and accompanying text.

168 *See supra* note 112 and accompanying text.

bars an individual, her name is listed on EPLS.[169] This listing is likely to have little effect in preventing the individual's participation in government contracting unless the individual is directly involved in procurement.[170] There is no explicit requirement that government contracting officers ensure private contractors do not employ listed individuals unless they are "agents or representatives."[171] Even if such a policy were favorable, requiring this type of search likely would be unproductive because contracting officers are not completing the searches currently required by regulations.[172]

Taking suspension or debarment action against individuals such as those in the examples above is thus highly unlikely to establish significant obstacles to the individuals working for firms that perform government contracts.[173] Absent procedures that prevent government contractors from hiring debarred individuals,[174] actions against individuals, especially against nonprocurement personnel, are merely symbolic and fail to provide meaningful protection beyond that of the stigma associated with unlawful behavior. Further, by not fulfilling debarment goals, such actions are not in the best interests of the government. They are accordingly a waste of taxpayer dollars and should not be pursued by agencies.

IV. A SIMPLE SOLUTION OF NARROWING THE SCOPE OF THE REGULATIONS

Suspension and debarment are important functions that can protect the government from contracting with nonresponsible parties. These functions, however, run the risk of overuse and misuse because of the overly broad definition of contractor. The drive to protect the

169 FAR 9.404(b)(1) (2011).

170 A contractor must represent that none of its principals are currently debarred, suspended, or proposed for debarment, but is not required to make representations about other employees. SYS. FOR AWARD MGMT., SYSTEM FOR AWARD MANAGEMENT USER GUIDE 158 (2012), https://www.sam.gov/sam/transcript/SAM_User_Guide_v_1.8.pdf.

171 *See* FAR 9.405(a) (prohibiting agencies from soliciting or awarding contracts to listed contractors and prohibiting listed contractors from "conducting business with the Government as agents or representatives of other contractors.").

172 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-174, EXCLUDED PARTIES LIST SYSTEM: SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS 16 (2009) (citing contracting officers' failures to check EPLS as one reason listed contractors obtain contracts).

173 It is more likely that the record of culpable behavior and any adjudication of guilt will have a more profound impact on an individual's attempt to obtain employment than an EPLS listing. Suspension or debarment would thus be inconsequential.

174 Such procedures would shift the onus to contractors to ensure the effectiveness of the majority of the government's debarment actions.

government from any individual who satisfies a cause for debarment and who may have a business nexus with the government is not in the best interest of the government. Due to the cost incurred by the government to evaluate a case, coordinate with legal counsel, and provide required due process in order to debar a potential contractor, it simply is not always worth the potential benefit of possibly preventing a party with questionable integrity from pursuing government contracts.[175]

The public and government interests, namely the interests of protecting the public fisc, are limitations explicitly included in the regulations; they have not, however, prevented the misapplication of the suspension and debarment remedies. A simple change to the FAR definition of contractor, thereby restricting the scope of entities eligible for suspension and debarment, would ensure agencies direct their resources only toward individuals and firms who have participated in, and thus pose the greatest risk of subsequent participation in, contracting activities.

A. Preventing Waste of Taxpayer Resources

As was the case at the time of the Conference, the suspension and debarment regulations are too flexible and have led to actions on questionable grounds not directly related to government contracts.[176] To remedy this flaw, the Defense Acquisition Regulations Council ("DARC") and the Civilian Agency Acquisition Council ("CAAC") should act to restrict the scope of "contractor" in the FAR.[177] Such an act will focus agency resources on individuals and firms with the highest probability of harming the government in future business dealings. This will eliminate the risk of overprotection and symbolic debarment actions while ensuring that all appropriate suspension and debarment actions are taken for protection.[178] The following proposed change will ensure that all provisions of the suspension and debarment regulations are followed. The proposed amended definition for FAR 9.403

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175 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 172, at 16 (stating that debarment results only in possible prevention because some debarred contractors still receive government contracts).

176 *See* Gantt & Panzer, *supra* note 27, at 94.

177 The DARC—composed of representatives of the military departments, the Defense Logistics Agency, and NASA—and the CAAC—composed of representatives of fifteen civilian executive agencies—are responsible for maintaining and revising the FAR. FAR 1.201-1(a)–(c) (2011). These two councils provide an interim or proposed rule to the FAR Secretariat for publication to enable public comment. *See id.* 1.202-1(e)(2), 1.501-2. After the councils consider public comments and finalize the rule, the FAR Secretariat publishes the final rule in the Federal Register. *Id.* 1.201-1(e)(6).

178 *See supra* Part III.B.3.

eliminates the overly flexible "reasonably may be expected to submit offers or conduct business" language and adds a specific provision aimed at contractor employees. It reads, with the proposed language underlined, as follows:

> "Contractor" means any individual or other legal entity that—
> (1) Directly or indirectly (e.g., through an affiliate), submits offers for or is awarded, or previously has submitted offers or has been awarded, ~~or reasonably may be expected to submit offers for or be awarded,~~ a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or
> (2) Conducts business, or has previously conducted business, ~~or reasonably may be expected to conduct business,~~ with the Government as an agent or representative of another contractor; or
> (3) Is employed by an entity satisfying paragraphs (1) or (2) of this provision as a principal, in a capacity in which the individual is evaluated as part of the source selection process of a contract, or in a capacity otherwise involved with the creation or submission of the entity's attempt to obtain a contract.[179]

This revision eliminates lower level employees and individuals indirectly or casually related to the government, such as federal employees like the janitor from example Case D,[180] from the definition of a contractor, placing them beyond the reach of debarment actions. By restricting debarment of individuals to those who have either already attempted to obtain or performed a government contract or those employed in a capacity in which they have direct influence, input, or control over a contractor's attempt to obtain a government contract, the efficacy of listings will increase.

B. Examples Revisited: The Revised Definition Applied

The effect of the proposed changes is most easily demonstrated by applying the modified definition to the four illustrative cases discussed previously.

Case A: A Department of Defense employee nearing retirement who was reprimanded for failing to account for a conflict of interest in awarding a contract. This government employee is the most problem-

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179 The crossed out language is currently in FAR 9.403 and should be eliminated; the underlined language is the author's proposed revision.

180 *See supra* Part III.B.2.

atic individual among the four examples, but she is not a contractor. Although her misconduct stemmed from awarding a government contract, she does not work for a firm or individual that does or has done business with the government. It is in the agency's discretion to terminate her employment, but should not be in its discretion to suspend or debar her.

Had this employee been a properly trained acquisition professional who knowingly awarded contracts in the face of conflicts of interest, would the analysis change?[181] No. Government employees should never be considered contractors unless and until they obtain employment with an actual contractor or otherwise conduct, or facilitate, business dealings with the government. At that point, the analysis becomes whether the individual is presently nonresponsible, not whether she committed wrongful acts in the past.[182]

Cases B and C: Production employees were arrested for illegally distributing prescription drugs on the job and nonmanagement employees were prosecuted for recruiting undocumented workers to work for a government contractor. Because their roles are limited to the production of goods or acquisition of labor, none of these individuals have a direct role in their respective companies' means of receiving government contracts. Suspending or debarring them does nothing to protect the government's business interests, and thus they should not be included in the definition of a contractor.

Rather than targeting the individual employees, targeting their respective employers—either through suspension, debarment, or a different remedy, such as an administrative agreement[183]—would be more appropriate to ensure such business practices do not happen again.[184] Under the proposed regime, the employees would be subject to civil and criminal penalties for their actions and potentially removed from their positions through administrative agreements, but not listed on EPLS.

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181 *See, e.g.*, Jerry Markon & Renae Merle, *Ex-Boeing CFO Pleads Guilty in Druyun Case*, WASH. POST, Nov. 16, 2004, at E01 (discussing government employee who inflated contract prices to "curry favor with her prospective employer").

182 *See supra* Part II.A, II.C. Nothing in this analysis precludes the government from prosecuting employees for any misconduct.

183 *See* MANUEL, *supra* note 16, at 9. Administrative agreements are agreements between the government and a contractor in which the contractor, in lieu of suspension or debarment, generally, among other things, admits wrongful conduct, separates affected employees from management, and implements compliance programs. *Id.*

184 As noted above, employee suspensions and debarments are often ineffective. *See supra* Part III.B.3.

Case D: A janitor working for the government is arrested for stealing government property. The analysis for the janitor is similar to the Department of Defense employee in Case A. Although theft by government employees should not be tolerated and should be prosecuted, such an act should not result in suspension or debarment. Of all of the illustrative cases, the janitor poses the lowest risk of ever conducting business with the government in a contracting capacity and thus should not be included in the definition of "contractor."

This solution moves away from a "shoot first and ask questions later" approach, in which the government proactively acts against individuals who have not directly conducted business with the government, to a more sensible "wait and see" approach, in which the government takes suspension or debarment action only when the individual has acted improperly in regards to business she conducts with the government. The temptation to allocate agency resources to suspend or debar the low-hanging fruit of individuals indicted for a "cause of so serious or compelling a nature" that it "affects [their] present responsibility" is removed. Instead, agencies are required to focus all of their suspension and debarment actions on entities directly involved in the contracting business.

C. The Revised Definition Does Not Sacrifice Protection

The government is not left exposed to misbehaving individuals excluded from the narrowed scope of "contractor." First, the definition merely prevents the government from taking proactive actions against individuals "reasonably believed" to do business with the government. In other words, it does not allow suspension or debarment actions against individuals who have not directly or through an agent or affiliate conducted business with the government. Agencies would simply be prohibited from suspending and debarring government employees, lower-level contractor employees, or individuals with a tenuous nexus to either the government or a contractor. These individuals present very low risks to government interests.

If any of these individuals attempt to obtain a government contract, become a key employee in a government contractor's proposal or a principal of a contracting firm, or is *directly* involved in doing business with the government, the risk of them causing harm to the government can be addressed by the contracting officer's determination of present responsibility. An example: A company submits a proposal to the government to attempt to obtain a contract for developing a vehicle that runs on carbon dioxide. The company re-

cruits various individuals in the relevant field to design the vehicle. The company lists these individuals in its proposal to support the viability of its approach. These individuals are "key personnel" and are properly eligible for suspension or debarment actions in the event an agency discovers a proper basis for the actions.

Protection from these individuals is easily achieved through other means. Agencies could require disclosure of key personnel's past wrongful behavior or the contracting officer could independently check key personnel and other contractors' civil and criminal backgrounds. If past wrongful behavior leads to a determination of present nonresponsibility, the contracting officer should then recommend the individual for debarment and the SDO may take appropriate action.[185] The difference is in the timing. For individuals who have not had a direct role in attempting to obtain government contracts, such as a government employee or a laborer of a government contractor, any debarment action is properly deferred until they become so involved.

There are also safeguards in place that protect the government from unscrupulous individuals who may form their own businesses to compete for a contract, but have not previously done so. Competitors for government contracts must register on the System for Award Management ("SAM") (formerly the Central Contractor Registration) database, which requires disclosure of detailed company information.[186] Knowingly providing false or misleading information in the required disclosures can bring criminal penalties.[187] Registration on SAM also requires the completion of "Representations and Certifications," through which a prospective contractor must disclose certain criminal history, suspensions or debarments of key personnel, and indictments, as well as certify its ability to compete for contracts.[188] The Representations and Certifications must be updated at least annually and failure to accurately complete them can result in liability for making false statements.[189] Prospective contractors must therefore dis-

185 *See, e.g.*, Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 960 (D.C. Cir. 1980). This process would eliminate the risk of de facto debarment, where a contractor is excluded from government contracts despite no formal debarment proceedings. *Id.* at 960–61.

186 SYS. FOR AWARD MGMT., *supra* note 170, at 71–91.

187 18 U.S.C. § 1001(a)(2) (2006) ("[W]hoever . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined . . ., imprisoned . . ., or both.").

188 *See* SYS. FOR AWARD MGMT., *supra* note 170, at 157–74; *accord* FAR 4.12 (2011).

189 *See* SYS. FOR AWARD MGMT., *supra* note 170, at 98; Susan C. Levy, Daniel J. Winters & John R. Richards, *The Implied Certification Theory: When Should the False Claims Act Reach Statements Never Spoken or Communicated, but Only Implied?*, 38 PUB. CONT. L.J. 131, 132

close certain behaviors potentially affecting their responsibility or face penalties.

The government thus has various levels of protection from individuals who commit offenses that could lead to debarment but have never attempted to obtain a contract. Postponing any action until a culpable individual takes affirmative steps toward contracting with the government, i.e., submitting a proposal for a contract, affords adequate protection while saving taxpayer dollars.

D. Some Costs Are Too High for "Protection" from Potential Contractor Misconduct

Advocates of increased use of suspension and debarment may disagree that suspending and debarring individuals who are unlikely to compete for or perform a contract is improper because they believe no cost is too high to combat potential contractor misconduct where so much federal money is at stake.[190] This position misses the underlying purpose of suspension and debarment.

Suspension and debarment serve very specific purposes: to protect the government's business interests from nonresponsible contractors when doing so is in the public's and government's interest.[191] Failing to consider the economic cost of actions, i.e., whether the administrative cost outweighs the likely benefit obtained from the action, and instead pursuing suspension and debarment actions simply because a cause exists ignores these regulatory purposes.

Further, although a culpable individual may not deserve to have the privilege of contracting with the government, it does not follow that she should be suspended or debarred. Although an individual does not have an immutable right to do business with the government,[192] the government should not expend resources to proactively prevent unscrupulous individuals from bidding on contracts. Proactive action is unnecessary since contracting officers must make affirmative determinations of responsibility before awarding any contract.[193]

(2008) (noting a typical false claims act case arises when an entity enters into a contract and makes false certifications to receive payment from the government).

190 *See, e.g.*, *Federal Contractor Misconduct Database*, *supra* note 139 (listing instances of contractor misconduct).

191 *See supra* Part III.B.3.

192 Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964) ("It is . . . correct, broadly speaking, to say that no citizen has a 'right,' in the sense of a legal right, to do business with the government.").

193 FAR 9.103(b) (2011).

If any of the individuals in the above examples attempted to conduct business with the government, the contracting officer would have to find information "clearly indicating [the individual] is responsible" before that individual could be awarded a contract.[194] In this situation, the contracting officer could find an individual with a history of prior misconduct nonresponsible and at that time refer her to the agency's suspension and debarment program for a proper evaluation. Addressing potential suspension and debarment action prior to the individual becoming directly involved in a contracting activity is another example of this Note's constant refrain—a waste of taxpayer resources.

Finally, diverting agency resources away from unnecessary suspension and debarments will free up resources for agencies to reach out to industry and educate contractors about avoiding suspension and debarment.[195] This use of resources is much more effective than suspending and debarring high numbers of individuals because it raises awareness of suspension and debarment and creates a dialogue with contractors about what leads to suspension and debarment and how to mitigate risks that lead to such actions. Increased education is yet another tool for protecting the government's contracting interests.

CONCLUSION

Suspension and debarment regulations have slowly evolved and expanded over time. At some point in their progression, the mandatory connection to government contracting was severed. Agencies have since been authorized to expend taxpayer dollars on suspension or debarment actions against individuals who have never done business with the government, but, according to the agency, "reasonably may be expected" to at some point in the future. This practice must stop.

Narrowing the scope of debarment actions would free up agency resources to focus on more serious and complex cases of contractor misconduct, permit agencies to emphasize contractor integrity through compliance programs or administrative agreements, and ensure agencies take debarment actions only for the protection of the

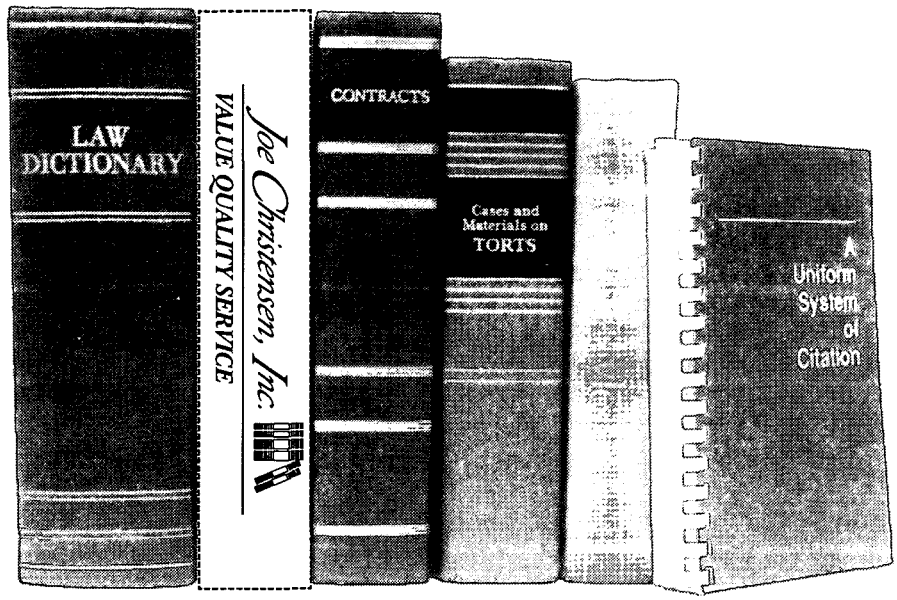
194 *Id.*

195 For example, GSA and Air Force jointly held a conference titled "Suspension & Debarment: What Industry Needs to Know" to discuss the suspension and debarment process and ethical behavior that can mitigate the risk of suspension or debarment. *Suspension & Debarment Conference: What Industry Needs to Know*, FED. BUS. OPPORTUNITIES (Mar. 23, 2012), https://www.fbo.gov/index?s=opportunity&mode=form&id=46afb8f75070b33af1e07843221c7806&tab=core&_cview=0.

government and when it is in the government's best interests.[196] This revised scope would not leave the government vulnerable to culpable contractors because they are still subject to criminal laws, self certifications, and responsibility determinations.

In short, narrowing the scope of debarment actions would ensure debarment programs focus solely on achieving the goals stated in the FAR rather than also allowing such programs to generally police the misconduct of all individuals with any connection to the government or government contractors.

196 This Note does not intend to suggest that agencies currently are not taking debarment actions that meet all of these criteria, merely that narrowing the scope will require agencies to exclusively focus on the proper (and most warranted) actions.



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