

# Understanding Government Debarment Proceedings

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Federal and state government agencies use the debarment process to exclude vendors from bidding government work. The key to understanding and avoiding debarment is that its purpose is not to punish the contractor, but to protect the government from dishonest vendors.

Debarment is remedial, not punitive. Although debarment often carries a greater "sting" than punishment, it is not punishment for double jeopardy purposes. A contractor can conclude administrative or criminal proceedings for violating the law, and be subject to debarment proceedings for the same activity. The biggest mistake is to treat the proposed debarment as if it is punishment to the contractor and not protection of the public. Although the contractor may feel like a victim in debarment proceedings, the government does not want to hear about the contractor's plight. It is important for the contractor to consult with an attorney who understands the nature of debarment and can counsel the client in the proper approach to the debarring official and necessary action for escaping debarment.

The following events create a presumption in favor of debarment:

- A conviction (including a plea agreement) or civil judgment for fraud or criminal offense concerning a public contract.
- Violation of antitrust laws.
- Embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax evasion, receiving stolen property, or knowingly employing an illegal alien.
- Commission of any offense indicating a lack of business integrity or business honesty that affects a contractor's present responsibility as a government vendor.
- Willful or continuing failure to perform a government contract.
- Failing to comply with drug-free workplace laws.
- Labeling a product "Made in America" when it is not.
- Any other serious or compelling causes.\*

There is no way to escape the presumption upon the occurrence of one of the above events. To avoid debarment, the contractor must undertake instantaneous and radical efforts required to prevent a repeat performance. Convincing the government that the subject of the debarment proceeding is a "presently responsible contractor," from whom the government does not require protection, the contractor escapes debarment and continues performing government contracts.

The debarring official considers the following mitigating factors:

- Whether the contractor had effective standards and internal control systems in place.
- Whether the contractor brought the activity in question to the attention of the debarring authority.
- Whether the contractor has fully investigated the circumstances surrounding the activity and shared the results with the appropriate government agency.
- Whether the contractor cooperated during the investigation and any court or administrative proceeding.
- Whether the contractor has made restitution.
- Whether the contractor has taken disciplinary action against the individuals involved in the activity that constitutes grounds for debarment.
- Whether the contractor has agreed to or implemented remedial measures, including those suggested by the government.
- Whether the contractor has had adequate time to eliminate circumstances in the organization leading to the cause for debarment.

- Whether management understands the import of the misconduct and has taken steps to prevent a reoccurrence.\*\*

The burden is on the contractor to come forward and demonstrate the existence of mitigating factors. While none of the factors is necessarily determinative of the issue of debarment, the debarring official must be convinced that the steps taken are sufficient to make the contractor presently responsible to work for the government.

Following the occurrence of an activity that can be the basis for debarment, counsel for the contractor should inform the appropriate federal and/or state authorities of the event. Full investigation by the contractor and his consultants will show how the illegal activity occurred. Termination of involved employees is usually required, along with the retention of an expert in ethics programs. The debarring official may agree to withhold a determination pending completion of remedial measures provided the contractor agrees not to bid new work during the period of delay.

The debarment period depends upon the severity of the event that caused it, but is typically for a period of three (3) years. Debarment in any venue can seriously effect a contractor's ability to perform public work in other sectors. Bids to government entities always require a certification that the contractor has not been found guilty of a crime against a public entity. Bids are rejected on this basis.

Debarment of the entity that performed the act may not be sufficient. Debarment proceedings usually extend to "affiliates" of a debarred contractor. These include entities with common ownership, management, assets, or familial ties. Individuals can also be subject to debarment along with any entity owned or controlled by an individual.

Contractors dealing with the public sector should be vigilant in keeping their companies free from activity that could prevent them from doing business with the government. Debarment is usually devastating to the government contractor, its management, owners, and employees. If illegal activity is present or suspected, conduct a full investigation and notify interested agencies. Obtain competent counsel that understands that debarment is remedial and not punitive and be prepared to clean house to retain your privilege of doing business with the government.

\* 48 Code of Federal Regulations Sec. 9.40602.

\*\* 48 Code of Federal Regulations Sec. 9.406-1.