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Federal Contractors Required to Ensure Subcontractors Are Not Suspended or Debarred

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On July 5, 2011, DoD, GSA, and NASA issued a final rule changing several clauses in Parts 9 and 52 of the Federal Acquisition Regulation (the "FAR") so as to make Federal contractors responsible for ensuring that subcontractors at all tiers (with a few exceptions noted below) are not on the Excluded Parties System List (the "EPSL"), e.g., they are not suspended or debarred. Failure to complete thorough vetting of subcontractors to make sure they are not debarred, suspended, or proposed for debarment, and to provide notice where appropriate to the contracting officer, could result in a violation of the False Statements Act,[1] subjecting the contractor to criminal and civil liability, as well as suspension and debarment. Accordingly, all contractors and subcontractors should ensure that their internal controls adequately address this requirement.

The history, principal substantive changes, and impact on contractors are discussed below.

BRIEF HISTORY

Prior to passage of the National Defense Authorization Act for Fiscal Year 2010 (PL 111-84) (the "2010 NDAA"), the protections against the Federal Government doing business with debarred or suspended contractors only extended to first-tier subcontractors. Intending to protect the "Federal Government and the taxpayers from unscrupulous contractors,"[2] the House included Section 815 in the 2010 NDAA, to change the definition of "procurement activities" in the Federal Acquisition Streamlining Act of 1994 (the "FASA") so as to include subcontracts at any tier (subject to exceptions for commercial items and for commercially available off-the-shelf ("COTS") items).[3]

While the House bill contained a provision clarifying the applicability of a suspension or debarment decision to the award of subcontract, the Senate amendment did not. However, on October 22, 2009, the Senate agreed with the final amendment including subcontracts at any level other than (i) subcontracts for commercially available off-the-shelf items; and (ii) subcontracts (other than first-tier subcontracts) under contracts for commercial items.

Just over a year later, on December 13, 2010, an interim rule was published in the Federal Register at 75 FR 77739 providing for changes to the FAR to effect the Section 815 change to the FASA. Only a small number of public comments were received and the final rule was published on July 5, 2011, to be effective August 4, 2011.

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[1] 18 U.S.C. § 1001.

[2] Committee Report 8 of 50, House Report 111-288.

[3] In particular, the language in Section 815 stated: Section 2455(c)(1) of the Federal Acquisition Streamlining Act of 1994 (31 U.S.C. 6101 note) is amended by adding at the end the following: 'Such term includes subcontracts at any tier, other than subcontracts for commercially available off-the-shelf items (as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))), except that in the case of a contract for commercial items, such term includes only first-tier subcontracts.'

THE INTERIM AND FINAL RULE CHANGES

Three changes have been made to the FAR. The first change finalizes without further edits the interim rule language in FAR 52.209-6 – Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended or Proposed for Debarment (DEC 2010) and made a minor edit to the interim rule language in FAR 9.405-2 – Restrictions on Subcontracting. The interim rule language in FAR 52.209-6 floweddown the requirement for the contractor or higher-tier subcontractor to check whether the downstream subcontractors are on the EPSL. The interim rule language in FAR 9.405-2 excluded COTS items from the restriction against doing business with contractors that are on the EPSL. The aforementioned minor change to FAR 9.405-2(b) clarifies that the notification requirement does not apply to subcontracts under $30,000.

The second change is to FAR 52.212-5 – Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items. FAR 52.212-5(b) lists the FAR clauses that the Contracting Officer has to or can select for incorporation by reference in order to implement statutory or executive order requirements. The interim rule added FAR 52.209-6 as a new item (6), but had included the following two qualifying parentheticals:

- Applies to contracts over $30,000
- Not applicable to subcontracts for the acquisition of commercially available off-the-shelf items

The FAR Council decided these points were sufficiently covered by the language of FAR 9.405-2 and FAR 52.209-6, and so the final rule deleted these parentheticals.

The third change is to FAR 52.213-4 – Terms and Conditions-Simplified Acquisitions (Other than Commercial Items). This clause sets forth the clauses with which Contractors must comply for Contracts at or below the Simplified Acquisitions Threshold, which currently is $150,000. The interim rule added FAR 52.209-6 as a new item 52.213-4(b)(2)(i) with the same two qualifying parentheticals as were added to FAR 52.212-5. However, unlike with FAR 52.212-5, the FAR Council decided to remain consistent with the construction of the items listed in 52.213-4(b)(2), all of which included a parenthetical qualifying applicability to the prime contractor. Accordingly, "Applies to contracts over $30,000" has been retained and the reference to non-applicability to subcontracts for COTS items has been deleted.

WHAT DOES THIS MEAN?

Contractors and subcontractors now will play a significant role in protecting the Government against contracting with contractors that have been suspended or debarred. Before these changes, the analysis of the status of the subcontractors stopped at the first tier and it was possible that a contractor on the EPSL could be awarded subcontract work without the Government knowing. These changes close what some in Congress believed was a loophole. Contractors and subcontractors at all levels will have to ask every subcontractor if it has been debarred, suspended or proposed for debarment and must notify the contracting officer in writing before entering into a subcontract with somebody on the EPSL. The notice has to provide the compelling reasons for doing business with a subcontractor on the EPSL and outline the systems and procedures the contractor has established to ensure that it is fully protecting the Government's interest.

Note that these requirements do not apply to acquisitions of COTS items or to subcontracts less than or equal to $30,000, and do not apply to subcontracts of commercial items below the first tier.

From a practical standpoint, this means that some or all of the recommended changes in standard practices may need to be implemented to prevent inadvertent violation of the FAR:

- Contractors and subcontractors need to ensure that their subcontracting policies and procedures include adequate internal controls for obtaining appropriate representations and certifications from prospective subcontractors regarding their status as to suspension and debarment, and document verification against the EPSL;
- Contractors with automated systems for determining FAR clause flow-downs should adjust the program so that FAR 52.209-6 is included in all subcontracts over $30,000 and that are not for COTS or commercial projects; and
- Form purchase orders and subcontracts should be modified to include FAR 52.209-6 among the selections of possible applicable FAR clauses and should select this clause as applicable even if the Government does not if the acquisition is non-commercial, exceeds $30,000, and does not involve COTS items.

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