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CASE LAW COMPENDIUM
DEBARMENT AND SUSPENSION

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SIGNIFICANT DEBARMENT AND SUSPENSION CASES

A. DUE PROCESS.

- An agency may not simply refuse to contract with a person out of "public relations concern" that to do otherwise "wouldn't look very good" and without evidence. A contractor, although not entitled to award of a specific contract, is entitled to not be suspended or debarred without due process. Due process requires specific procedural safeguards of notice of the charges, opportunity to contest, and under most circumstances, a hearing. *Art-Metal, USA, Inc., v. Solomon*, 473 F. Supp. 1. (D.D.C. 1978).

- Administrative due process requires certain minimum procedural safeguards to ensure principles of fundamental fairness, including notice, the opportunity to contest, and a determination on the record. (exclusion from government contracting on integrity grounds triggers constitutional due process liberty interest). *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964); *Horne Bros., Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972); and *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980).

- Minimum due process requirements include "a neutral and detached hearing body". Practice where case investigator also case decision maker held inconsistent with procedural due process. *ATL, Inc. v. United States*, 736 F.2d 677 (Fed.Cir. 1984).

- Due process requires suspension notice to contain enough information regarding the alleged misconduct, such as the time, place, contract number(s), and nature of the alleged misconduct, to enable the contractor to "get his ducks in a row" in order to make a meaningful opposition. *ATL, Inc. v. United States*, 736 F.2d 677, 686 (Fed. Cir. 1984).

- Suspension based on criminal indictment does not violate Constitution's presumption of innocence; it would be irresponsible not to suspend contractor indicted for procurement fraud. *James A. Merritt and Sons, Inc. v. Marsh*, 791 F.2d 328 (4th Cir. 1986).

- Debarment vacated and case remanded due to failure to conduct fact-finding hearing. *Sterlingware of Boston, Inc. v. United States*, 11 Cl. Ct. 879 (1987). See also, 10 Ct. Cl. 644 (1986) and 11 Ct. Cl. 517 (1987). Court of Claims jurisdiction and equitable powers are discussed in a series of Sterlingware decisions.

- Procedural due process does not require that an administrative law judge preside at a debarment hearing. Suspension and debarment proceedings are not required by statute to be decided on the record, and thus are not governed by formal adjudication provisions of 5 U.S.C. § 554. But hearing must be before impartial trier of facts. *Girrard v. Klopfenstein*, 930 F.2d 738 (9th Cir. 1991), cert. denied 112 S.Ct. 173 (1991).

- Challenge to agency debarring official independence and admission of hearsay evidence in administrative debarment proceeding rejected. *Leitman v. McAusland*, 934 F.2d 46 (4th Cir. 1991).

- Principles of fundamental fairness do not require the location of a debarment hearing location to be convenient to a respondent, so long as the location selected is not arbitrary. The contractor sought a hearing where he was located and where the misconduct occurred citing financial inability to both travel and pay for his attorneys to appear. The Agency held the hearing at the debarring official and hearing official's location and flew in the two government witnesses. Financial constraints prevented the contractor from attending personally but he was represented by two attorneys and also could testify by telephone and introduce evidence on his own behalf. The Court appeared to be influenced by the particular case facts that the hearing could not be rescheduled as one of the government's witnesses was going out of the country on extended duty, that the respondent's attorneys were present and the respondent could participate by phone, and that on the facts presented it was not clear that the ability to evaluate the respondent's credibility in person made a substantial difference to the outcome. *Textor v. Cheney*, 757 Fed. Supp. 51 (D.D.C. 1991).

- Party subject to debarment under FAR § 9.4 must be given opportunity to rebut evidence in administrative record. *Corsini v. Department of Defense*, Civ. No. 90-0047 (D.D.C. June 19, 1990). Court ordered deposition of debarring official staff that had *ex parte* communication with AUSA. Three year debarment subsequently sustained. *Corsini v. Department of Defense*, Civ. No. 90-0047-LFO (D.D.C. September 30, 1991).

- Suspension may not be imposed without providing due process core requirements of adequate notice and a meaningful hearing. *Leon Sloan, Sr., v. Department of Housing and Urban Development*, 231 F.3d 10 (D.C. Cir. 2000).

- A respondent is not entitled to an evidentiary hearing with confrontation of witnesses absent determination by the Suspending Official that the respondent's submission in opposition raises a genuine dispute of material fact. *Lion Raisins, Inc., v. United States* 51 Fed. Cl. 238 (2001).

- HUD three-year debarment vacated and the case remanded due to failure to determine whether a genuine dispute of material fact existed and hold an evidentiary hearing. Presented with a record clearly showing disputed material facts, the Debarring Official failed to determine whether the submissions of HUD and the respondent created a genuine dispute. HUD held an informal presentation in opposition but did not hold a fact-finding hearing. Nevertheless, the Debarring Official's debarment determination made written findings of fact, thus implicitly determining that a genuine issue of fact existed. The Court held that even if, as argued by HUD, the Debarring Official "implicitly" determined a dispute of facts existed, the debarment decision was irrational. The moment the debarring official finds a genuine issue of fact exists, the respondent must be afforded the right to a fact-finding hearing. *Eugene Burger Management Corporation v. Department of Housing and Urban Development*, Civ. Act. No. 01-1701 (HHK/JMF), (D.D.C. 2002), 2002 U.S. Dist. LEXIS 8442.

- Constitutional due process requires service of notice be reasonably calculated under all circumstances to advise a party of the pendency of an action and afford an opportunity to present objections. The 9th Circuit affirmed district court authorized service of process by e-mail effectively met FRCP 4(f) (3) service requirements for individuals in foreign jurisdictions. The Appeal Court observed courts cannot be blind to communications technology advances, particularly ones like e-mail that are zealously embraced by the business community. The Court found the defendant operated exclusively over the internet and conventional attempts at service were unsuccessful. The Court also noted a December 2001 amendment of FRCP 5(b)(2)(D) and 5(b)(3) to permit court authorized service of process by e-mail in certain circumstances with service by electronic means complete on transmission. Notwithstanding endorsement, the Court expressed reservations as to the limitations of e-mail: absence of receipt confirmation; electronic signature authenticity; questions of receipt posed by system compatibility problems; and limits of imprecise imaging technology. *Rio Properties, Inc., v. RIO International Interlink*, 9th Cir., No. 01-15446 (March 20, 2002).

- Landlord excluded from participation in HUD housing voucher program designed to provide benefits for a third party, held to have no protected property interest in future contracts or due process interest in continued participation. A valid liberty interest arises

where an individual's good name, reputation, honor or integrity is questioned in a way that virtually precludes employment in a chosen field. The 4th Amendment secures the liberty to pursue a calling or occupation rather than the right to a particular job. *Khan v. Bland*, 630 F.3d 519 (7th Cir. 2010).

- Joinder of Corps of Engineers Debarring Official in individual capacity dismissed. Court held that while there is a protected liberty interest in not being barred from government contracts on the basis of allegations of fraud or dishonesty, the Agency rather than the individual person debars the entity. No constitutionally protected liberty or property interest in reputation. *Highview Engineering, Inc., v. U.S. Army Corps of Engineers*, Slip Opinion, (W.D. Ky), 2010 WL 2106664.

- Three year debarment of Lasmer Industries and individual owners and six month extension sustained. To determine whether fact finding required in debarment action not based on conviction, the court considers the causes for debarment and the nature of the argument and evidence presented to the Debarring Official. Where undisputed facts exist that reasonably support debarment, the Debarring Official's decision will be upheld even if a factual dispute exists on other issues. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

- Consideration of an email by the Debarring Official not provided to the Respondents held not prejudicial where the Debarring Official could easily have reached the same evaluative conclusions contained in the email based upon other information in the record which was provided to Respondents. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

- Contractor's liberty interest is impacted when denied the opportunity to bid on government contracts based on charges of fraud or dishonesty. *Highview Engineering, Inc., v. Corps of Engineers*, 864 F. Supp.2d 645 (2012).

- The notice and contest procedures for "affiliate suspensions at FAR Subpart 9.407-3(c) provide adequate constitutional due process for multi-year suspensions. *Agility Defense and Government Services, Inc., v. Department of Defense,* citing to *Home Bros., Inc. v. Laird*, 463F.2d 1268, 1271 (D.D.Cir.1972). Slip Opinion (11th Cir. 2013).

B. EXHAUSTION OF REMEDIES.

- Initial determination of government interest best left to discretion of an administrator. Courts should not interfere with administrative process before record is fully developed. *Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983).

- Contractor suspended by DOT on basis of state court contract fraud indictment sought injunctive relief immediately following receipt of the notice, and alleged, in part that the doctrines of res judicata and collateral estoppel barred the suspension. The Court held that the claim was a defense, by its nature, to be properly asserted to DOT in the administrative challenge to suspension and that as the contractor had failed to do that, the exhaustion of administrative remedies rule barred judicial review of the res judicata and collateral estoppel claims. *Mainelli v. United States*, 611 F. Supp. 606 (D.R.I. 1985).

- Contractor motion to enjoin suspension issued on existence of a civil Complaint as "adequate evidence" dismissed for failure to exhaust remedies; Court unwilling to decide legal question of agency action validity before record fully developed. *RSI, Inc. v. United States*, 772 F. Supp. 956 (W.D. Tex. 1991).

- Supreme Court overruled *Darby v. Kemp*, 957 F.2d 145 (4th Cir. 1992), in a unanimous remedy exhaustion decision in *Darby v. Cisneros*, 509 U.S. 137 (1993): Federal courts do not have the authority to require a plaintiff to exhaust available administrative remedies before seeking judicial review under the [Administrative Procedure Act] where neither the relevant statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review. The language of § 10(c) of the APA is explicit that an appeal to a "superior agency authority" is a prerequisite to judicial review only when "expressly required by statute" or when the agency requires an appeal "by rule or otherwise and provides that the [administrative] action is ... inoperative" pending that review. 113 S. Ct. at 540. *Darby v. Cisneros* turned on APA judicial review provisions at 5 U.S.C. § 704: Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review of the final agency action. Except as otherwise expressly provided by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, or any form of reconsideration, or unless the agency otherwise by rule provides that the action is meanwhile operative for an appeal to superior agency authority. While not addressing suspension, the Court's rationale by implication, raises the question whether a suspension notice, having immediate effect, may be challenged in court prior to completion of administrative hearing and issuance of a written determination by the suspending official.

- Administrative process not interrupted to enjoin Army contractor suspension, following *Kiewit* and exhaustion factors in *Abbot Laboratories v. Gardner*, 387 U.S. 136 (1967); *Conspec Marketing and Manufacturing Co., Inc. v. Gray*, 1992 U.S. Dist. LEXIS 2845 (D. Kan. 1992).

- Court declined to hear argument that statute of limitations, 28 U.S.C. § 2462, precluded issuance of debarment notice five years after events underlying notice, where issue not raised in administrative proceedings for consideration by Debarring Official. *Paul M. Burke v. United States Environmental Protection Agency*, 127 F. Supp. 2d 235 (D.D.C. 2001).

- Issuance of a notice of proposed debarment, even where under the FAR it results in immediate effect, is not a final agency action subject to APA judicial review. The debarment action is a four step process which will not be bypassed by premature litigation: written notice issuance, opportunity to contest, to have an oral presentation, and receive a final written determination. Regulatory emphasis on remedial measures and mitigating factors provides the opportunity to avoid finalization of debarment. *Popal, et. al, v. Fiori, et. al.* Civ. Action No. 11-801 (JEB), 2011 WL 6826176 (D.D.C. 2011).

- Contractor sought declaratory judgment and injunctive relief from Navy issuance of a proposed debarment notice. The Court granted Navy's motion to dismiss holding that a Notice of Proposed Debarment, which invited the contractor to provide information and argument in opposition to the proposed debarment, is not a final agency action subject to judicial review under the Administrative Procedures Act. All preliminary and procedural rulings in an administrative action are insulated from judicial review where the final agency determination is not adverse to the contractor. *Tudor v. Department of the Navy,* (N.D. Cal No. C 11-5362 CW, 2013 WL 366434 (N.D. Cal.).

C. STANDARD OF REVIEW.

- Courts apply arbitrary and capricious review standard. *Robinson v. Cheney*, 876 F.2d 152 (D.C.Cir. 1989), citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

- If debarring official provides reasonable explanation for exercise of discretion, reviewing court cannot substitute its judgment for that of agency. *Shane Meat Company v. U.S. Department of Defense*, 800 F.2d 334 (3rd Cir. 1986).

- Debarring official decisions not supported by evidence in administrative record will be reversed under arbitrary and capricious standard. Although agency entitled to deference in decision to exercise discretion, no deference given in interpretation of FAR § 9.4 since regulation joint product of DOD, NASA and GSA. *Novicki v. Cook*, 946 F.2d 938 (D.C. Cir. 1991); *Caiola v. Carroll*, 851 F.2d 395 (D.C. Cir. 1988).

- Agency interpretation of its own regulations is entitled to great deference. Such deference is not due, however, in the case of government-wide debarment rules written and promulgated by multiple agencies. In that case, an individual agency's interpretation is accorded "a modicum of respect" but not dispositive weight. *Caiola v. Carol*, 851 F.2d 395 (D.C. Cir. 1988).

- Fact that contractor has credible argument does not warrant reversal under arbitrary and capricious standard. *Wellham v. Cheney*, 934 F. 2d 305 (11th Cir. 1991).

- In review on the record, the court examines the rationale articulated by the Debarring Official's determination and may not accept agency post hoc rationalization for agency action. *Facchiano Construction Company, Inc., Michael Facchiano, Sr., and John Facchiano v. United States Department of Labor, et al.*, 987 F.2d. 206 (1993).

- Arbitrary and capricious review standard does not permit substitution of court's judgment for reasonable agency decision not to credit aggravating circumstances demonstrating high degree of relative culpability. Contractor failure to accept responsibility for misconduct of corporate officers provides reasonable basis to conclude lack of present responsibility. *Space Air Supply, Inc. v. U.S. Department of Defense*, No. C 93-2687 (N.D.Cal. 1994).

- Courts apply a narrow "highly deferential" standard of review to agency suspension determinations resting on resolution of disputed facts. *Frequency Electronics, Inc. v. United States*, Civ Action No. 97-230A (E.D. Va. 1997), *aff'd*, 151 F.3d 1029 (4th Cir. 1998).

- Review is on the administrative record. Suspended party is not entitled to discovery of the Agency's decision making process. *Commercial Drapery Contractors, Inc., and Milford Acquisition Corp., d/b/a Draperies Plus v. United States of America, et al.*, 133 F.3d 1 (D.C. Cir. 1998).

- Arbitrary and capricious review standard equated with the substantial evidence standard by the D.C. Circuit. *Albert Gonzales v. United States Department of Housing and Urban Development*, Civ. Act. 00-WM-495, 2000 U.S. Dist. LEXIS 18935 (December 1, 2000).

- The administrative record may be supplemented by declaration of an agency official to the extent it assists the court in understanding the events sequence preceding a decision to suspend, but the Court will not consider a declaration where it offers a new and alternative rationale for the decision to suspend. *Lion Raisins, Inc., v. United States* 51 Fed. Ct. 238 (2001).

- Where debarring official relied on multiple grounds for decision, some of which are invalid, the court will sustain the decision only if it concludes the agency would clearly have acted upon a valid ground even if the invalid ground were unavailable. *Alf v. Donley,* 666 F. Supp. 2d 60 (D.D.C. 2009).

- The administrative record is defined as all material complied by the agency that was before the debarring official at the time the decision was made. Defense Logistics Agency initially debarred Plaintiffs for three years based on poor performance. Seventeen days before the expiration date, the Agency extended the debarment for an additional six months based upon evidence plaintiff engaged in new business with the government while debarred. Plaintiffs in District Court challenge sought to supplement the record based upon an assertion that the debarring official improperly excluded documents. Plaintiffs' motion was denied by the Court. Plaintiffs failed to show the record was not properly designated, in order to overcome presumption of regularity to which the Government is entitled. Plaintiffs additional motion to expand the record through discovery was also denied upon a failure to demonstrate that: 1. Certain documents were deliberately or negligently excluded from the record; 2. The court requires certain background information in order to determine whether the agency considered all relevant factors in decision making; or 3. There is a strong showing of bad faith. *Hickey v. Chadick*, 649 F.Supp.2d 770 (2009).

- Three-year debarment of Lasmer Industries and individual owners and six month extension by Defense Logistics Agency sustained. Rational basis supported by the Debarring Official's careful analysis contained in the decision of the ten mitigating factors and remedial measures found at 48 CFR 9.406-1(a). *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

- Disappointed bidder that severed interest with a suspended business concern but in its contest of suspension did not raise the argument and seek a determination on its "affiliate" status was thereafter precluded from arguing in Court of Claims challenge that it was not an affiliate. *FAS Support Services, L.L.C., v. U.S.*, 93 Fed.Cl. 687 (2010).

D. FORUM.

- Where a contractor filed a bid protest asserting its suspension, and therefore, consequently the subsequent award denial, was improper, the General Accounting Agency held the suspending and debarring agency is the appropriate forum for challenges to suspensions and debarments. GAO will no longer entertain bid protests based on a claim that an agency improperly suspended or debarred a contractor. *Shinwha Electronics*, B-290603 et al., September 3, 2002; See also, *SDA, Inc.,* B-253355, et al., August 24, 1993, 93-2 CPD ¶ 132.

- Court of Claims exercised jurisdiction over issue pertaining to debarment in context of a bid protest where plaintiff as low bidder had standing as it would win the contract if it could prove allegations. Contractor OSG Product Tankers, LLC (Product Tankers), contended that agency contracting officer precluded from making a non-responsibility finding where a debarment proceeding against Overseas Shipping Group (OSG), the parent company of Product Tankers, had resolved through an administrative agreement under which the parent company remained award eligible. The Court distinguished between the debarment analysis performed by the debarring official that can exclude a contractor from all Executive Branch awards and the individual award based "responsibility" finding made by the contracting officer. The Court also observed that the debarment proceedings focused on OSG and did not evaluate Product Tankers, as Product Tankers was not a party to the debarment proceeding. The Court held that a decision by a separate government agency for debarment purposes should not bind the contracting officer or limit his or her discretion. The Court examined the fact specific decision rationale of the contracting officer and concluded it was a reasonable one. *OSG Product Tankers, LLC v. United States*, Ct. Cl. No. 07-561C (June 19, 2008).

- While Federal District Court is the proper forum for a direct challenge to a suspension, divorced from any pending procurement, the Court of Claims properly exercised implied contract jurisdiction to resolve allegations of error in suspension action affecting particular procurement. *FAS Support Services, L.L.C.*, v. U.S., 93 Fed. Cl. 687 (2010).

- Contractor suspended by Small Business Administration subsequent to initiation of pre-award bid protest litigation in Court of Claims sought to add challenge to suspension to its protest litigation bases. The contractor had not submitted any bid that might form the basis of an implied-in-fact contract. The Claims Court held it lacked subject matter jurisdiction as to the suspension. Claims Court jurisdiction to review suspensions or debarment arises from its jurisdiction over implied-in-fact contracts where a contractor has submitted a responsive bid under a solicitation which would ordinarily support award but the award is denied because of improper administrative conduct by the Government. *Med Trends, Inc. v. The United States,* 101 Fed. Cl. 638, 2011 U.S. Claims LEXIS 2212.

E. DEBARMENT.

- Proper for agency not to consider mitigating arguments inconsistent with debarred party's guilty plea. *Agan v. Pierce,* 576 F. Supp. 257 (N.D. Ga. 1983).

- Debarment is a discretionary measure taken to protect the public interest and to promote the policy of doing business only with responsible persons. *Paul M. Burke v. United States Environmental Protection Agency*, 127 F. Supp. 2d 235 (D.D.C. 2001); *Caiola v. Carol*, 851 F.2d 395 (D.C. Cir. 1988).

- Presence of mitigating factors or remedial measures does not preclude debarment if debarring official considers identified mitigating factors or remedial measures and articulates reasonable basis for debarment. *Shane Meat Company v. U.S. Department of Defense*, 800 F.2d 334 (3rd Cir. 1986); *Robinson v. Chaney,* 876 F.2d 152 (D.C. Cir. 1989).

- Debarment periods are imposed at an Agency's discretion consistent with circumstances and mitigating factors of record. A court reviews only to ensure discretion is exercised non-arbitrarily and is supported by the record. *Paul M. Burke v. United States Environmental Protection Agency*, 127 F. Supp. 2d 235 (D.D.C. 2001). See also, *Textor v. Cheney*, 757 Fed. Supp. 51 (D.D.C. 1991).

- Three year debarment arbitrary and capricious where debarring official did not adequately consider relevant mitigating factor of contractor's explanation for misdemeanor guilty plea. Determination of lack of present responsibility also questioned as agency continued to award contracts over a six year period after events leading to misdemeanor conviction. *Silverman v. U.S. Department of Defense*, 817 F. Supp. 846 (S.D. Cal. 1993).

- Fact-based debarment sustained by district court, but reversed and remanded on appeal where court concluded Debarring Official, in the face of conflicting evidence, found there was no genuine disputed material fact and denied fact-finding on whether an individual was a "principal" of the company. Suit against debarring personnel in individual capacity denied where Federal defendants' jobs required them to assess the integrity of government contractors and to recommend and effect debarment. "Thus, even if the defendants' debarment decisions were based upon improper motives, the debarment was plainly within the scope of the defendants' employment." *Sameena, Inc., d.b.a. Samtech Research; Sameena Ali; Mirza Ali v. United States Air Force et al*, 147 Fed. 3rd 1148 (9th Cir. 1998); and *Mirza Ali v. Health and Human Services, et al.*, No. 97-15264 (9th Cir. 1998) LEXIS 15346.

- Three year debarment based, in part, on factual finding of "willful violation" sustained. Agency decision reviewed against "arbitrary, capricious, or abuse of discretion" standard. Court will not substitute judgment for that of debarring official, nor reweigh conflicting evidence or make own credibility findings. *George F. Marshall, et al., v. Andrew Cuomo, et al.,* 192 F.3d 473 (1999).

- HUD debarment of individuals based on apparent "principals" interest in contractor that defaulted on HUD contracts vacated. The Court in remanding for further administrative proceedings, ruled that although HUD held an informal "information and argument" presentation, HUD, when presented with unequivocal sworn testimony, violated its debarment rules by failing to determine genuine issues of disputed material fact existed and then by failing to hold an evidentiary hearing. "The Debarring Official could not

ignore legitimate evidence which raised a genuine dispute of material fact. To disregard unequivocal sworn testimony was arbitrary and capricious." *Albert Gonzales v. United States Department of Housing and Urban Development*, Civ. Act. 00-WM-495, 2000 U.S. Dist. LEXIS 18935 (December 1, 2000).

- Misdemeanor conviction for negligent discharge under the Clean Water Act held to properly fall within (a) (4) offense based cause for debarment provision, as record contained substantial evidence to support conclusion nexus existed between criminal conviction and individual's business integrity. *Paul M. Burke v. United States Environmental Protection Agency*, 127 F. Supp. 2d 235 (D.D.C. 2001).

- Court upheld multiple extensions of an initial three year Air Force debarment based initial violation, and subsequent new information about additional violations of the Buy America Act and Davis Bacon Act, to ultimately impose twelve years debarment. The Court additionally found the statute of limitations applicable to Davis Bacon inapplicable because interpreted by Courts to apply only to actions brought in court and debarment is entirely administrative. *Glazer Construction Co., Inc., v. United States*, 52 Fed. Cl. 513 (2002).

- Although debarment is predicated upon the existence of past misconduct, the "present responsibility" of an assistance recipient does not refer to the recipient's current specific employment position. Rather it refers to whether exclusion is in the interest of the public. *Brodie v. U.S. Department of Health and Human Services,* 715 F. Supp. 2d 74 (2010), 2011 WL 2715057; see also, 796 F. Supp. 2d 145 (D.D.C. 2011).

F. SUSPENSION.

- In pre-indictment suspension action, denial of trial-type fact-finding hearing since it would interfere with criminal investigation does not violate Constitution. Definition of "adequate evidence" analogized to probable cause sufficient to support an arrest, search warrant or preliminary hearing. Adequate notice of charges particularly important in pre-indictment suspensions. Suspending agency must work with DOJ to "carve out" as much of evidence in administrative record as possible. *Transco Security, Inc. v. Freeman*, 639 F. 2d 318 (6th Cir. 1981), *cert. denied,* 454 U.S. 820 (1981); *ATL, Inc. v. United States*, 736 F. 2d 677, 686 (Fed. Cir. 1984).

- Suspended contractor cannot have "impossible dream" to cross-examine FBI agents investigating case. Suspended contractor is not entitled to discovery not otherwise accorded by criminal justice process. *Electro Methods Inc. v. United States*, 728 F.2d 1471 (Fed. Cir. 1984).

- Use of wiretap evidence to obtain indictment may give contractor right to agency hearing on motion to suppress evidence. Decision based on 18 U.S.C. § 2518(1)(a) statutory right to suppression hearing before department, officer, agency, regulatory body or other authority of United States. *Alamo Aircraft Supply v. Carlucci*, 698 F. Supp. 8 (D.D.C. 1988).

- Discovery denied in civil action challenging suspension, on grounds discovery could compromise criminal investigation. Contractor sought declaratory judgment that already terminated suspension was void *ab initio*, due to agency failure to include purported exculpatory document in administrative record. Depositions of agency officials involved in suspension granted only under unusual circumstances. *Capital Engineering and Manufacturing Company, Inc. v. Weinberger*, 695 F. Supp. 36 (D.D.C. 1988).

- Although "necessity for immediate action" is a requirement for suspension, a suspending official need not make a formal finding that immediate action is necessary to protect the Government's interest. The Suspending Official may base the conclusion on inferences readily drawn from the facts and circumstances of record. Bid rigging, for example, is implicitly contrary to the Government's interest. Courts will uphold the decision so long as the Agency's decision path is readily discernable. Necessity for the immediate action of suspension to protect Government may be inferred from bid rigging indictment since antitrust violations pose inherent risks to Government. The Court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Coleman American Moving Services Inc. v. Weinberger*, 716 F. Supp. 1405 (M.D. Ala. 1989), (citing to *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 291, 285-286).

- The D.C. Federal District Court, in an unpublished ruling, granted a preliminary injunction lifting EPA's suspension of contractor indicted for fraud on Agency contract, prior to administrative hearing and determination. The Court ruled the suspension arbitrary and capricious on fairness grounds - because the contractor came "knocking at the door" requesting a meeting prior to the suspension issuance and EPA program representatives declined to meet with them prior to notice issuance. *Resources Applications, Inc. v. Environmental Protection Agency*, Civ Action No. 93- 2525 (D.D.C. 1993). 61 Fed. Cont. Rep. 114 (BNA January 14, 1994).

- Suspension based upon civil judicial complaint upheld, where complaint sufficiently detailed in information to enable suspending official to conclude it reasonable that the United States Attorney had compiled evidence supporting or corroborating the allegations, hence providing "adequate evidence". The Court observed, however, that the allegations of a civil complaint will not in all cases constitute adequate evidence for suspension. *All Seasons Construction Inc., et al. v. The Secretary of the Air Force*, Civ. Action No. 05-1187 (W.D. La. 1995).

- As a matter of regulation, a criminal indictment for an offense of the kind set forth at 48 C.F.R. § 9.407(2) (b) satisfies the evidentiary standard for cause for suspension. *Commercial Drapery Contractors, Inc., and Milford Acquisition Corp., d/b/a Draperies Plus v. United States of America, et al.*, 133 F. 3d 1 (D.C. Cir. 1998). In at least one case, suspension based upon civil judicial complaint held to meet "adequate evidence" standard. *All Seasons Construction Inc., et al. v. The Secretary of the Air Force*, Civ. Action No. 05-1187 (W.D. La. 1995).

- Prior to indictment, the existence of a criminal investigation is a starting, rather than ending, point for cause for suspension. The suspension "decision must be based upon a review of the evidence underlying the investigation, and not the mere fact of the investigation", but, no de facto debarment given adequate post deprivation remedy. *Hellenic American Neighborhood Action Committee v., the City of New York, et al.*, 933 F. Supp. 286 (S.D. New York 1996), citing to *Transco, Inc., v., Freeman*, 639 F. 2d 318 (6th Cir. 1981), cert. denied, 102 S. Ct 101 (1981); reversed by *Hellenic American Neighborhood Action Committee v., the City of New York, et al.*, 101 F 3d 877 C.A. 2 (N.Y.) 1996.

- A fact-finding hearing will not be conducted in suspension actions based on a criminal indictment. Indictment for an offense of the kind set forth at 48 C.F.R. § 9.407(2)(b) meets the evidentiary standard for cause for suspension. *Commercial Drapery Contractors, Inc., and Milford Acquisition Corp., d/b/a Draperies Plus v. United States of America, et al.*, 967 F. Supp. 1 (D.D.C. 1997), *aff'd,* 133 F.3d 1 (D.C. Cir. 1998).

- The Suspending Official properly relied upon the fact of indictment for cause and there was no due process violation in denying Respondent opportunity to present live witnesses and cross examination to exonerate on criminal allegations. "We think that an obvious purpose of the regulation deeming an indictment 'adequate evidence' for suspension is to prevent a parallel inquiry that might prejudice the government, the contractor, or both". *Frequency Electronics, Inc. v. United States*, Civ Action No. 97-230A (E.D. Va. 1997), *aff'd*, 151 F. 3d 1029 (4th Cir. 1998).

- Suspension is a temporary measure and may not substitute for debarment. But, upon initiation of "legal proceedings" suspension is indefinite until proceedings complete. Suspension exceeding three years upheld. Suspension is "purely a prophylactic measure designed to keep the government from suffering any harm at the hands of a contractor that has been accused of wrongdoing by a credible source, namely a grand jury". Mere passage of time does not render suspension punishment. *Frequency Electronics, Inc. v. United States*, Civ Action No. 97-230A (E.D. Va. 1997), *aff'd*, 151 F.3d 1029 (4th Cir. 1998).

- "Adequate evidence" likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing, i.e., less than must be shown in a trial but more than mere uncorroborated suspicion or accusation. *Leon Sloan, Sr., v. Department of Housing and Urban Development*, 231 F.3d 10 (D.D. Cir. 2000).

- HUD decision not to void suspension ab initio, following fact-finding determination showing initial finding of adequate evidence to support suspension had been "flimsy at best riding on the heels of a hastily conducted and technically flawed audit", held arbitrary and capricious. Agency could not square refusal with its regulations and articulate a satisfactory explanation for action including a rational connection between facts found and agency action. *Leon Sloan, Sr., v. Department of Housing and Urban Development*, 231 F.3d 10 (D.D. Cir. 2000).

- USDA suspension reversed. USDA suspended the contractor based on an investigative report indicating falsification of information on USDA certificates. But between completion of the investigation report and suspension issuance over a year and half later, USDA also awarded five interim contracts to the contractor (each upon a contracting officer's finding of present responsibility). The Court found USDA arbitrary and capricious in suspending, where it deemed the contractor both responsible and non-responsible for the same time period. Suspension appeared as punishment rather than response to need for immediate action. *Lion Raisins, Inc., v. United States* 51 Fed. Ct. 238 (2001).

G. AFFILIATION.

- Mere figurehead officer has insufficient control to be debarred as affiliate of convicted contractor. Although the Debarring Official for purposes of affiliation may draw inference or presumption of corporate control from an individual's title as officer or director, the presumption must yield to the evidence of record in the particular case. *Caiola v. Carol*, 851 F.2d 395 (D.C. Cir. 1988).

- The FAR § 9.406-1(b) allows debarring official to extend debarment to ***any*** affiliates of a contractor engaging in misconduct that establishes a cause for debarment. There is no requirement that affiliate itself be involved in misconduct. *Coleman American Moving Services Inc. v. Weinberger*, 716 F. Supp. 1405, 1412 (M.D. Ala. 1989).

- Control exists where a trust or receivership failed to eliminate a person's "direct and substantial" interest in a business. *Robinson v. Cheney,* 876 F.2d. 155 (D.C. Circ. 1989).

- Three year debarment of Lasmer Industries and individual owners and six month extension sustained. Debarment of individuals as affiliates not arbitrary or capricious where record contains indices of ownership and control. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

- FAR Subpart 9.407-4(b) properly permits suspension of "affiliate" of a suspended contractor to exceed 18 months where legal proceedings (indictment) initiated against the suspended parent contractor. Affiliate brought suit challenging Defense Logistics Agency suspension after 31 months exclusion and unsuccessful efforts to show preclusion of parent control over contracting activities. The indicted suspended parent company was charged with defrauding the government of over $6 billion on overseas subsistence vendor supply contracts. The District Court held that while the initial decision to suspend as an affiliate was a proper exercise of the power to "extend" a parent company's suspension to an affiliate based on "control" rather than culpability, continuance of the affiliate's suspension beyond 18 months was improper and enjoined continuance. The Court interpreted FAR Subpart 9.407-4(b) to preclude suspension continuance beyond 18 months absent initiation of legal proceedings against the affiliate itself, regardless of the basis for the initial decision to suspend the parent company." *Agility Defense and Government Services, Inc., v. Department of Defense*, 2012 WL 2480484 (N.D. Ala.). The District Court affirmed upon DLA's reconsideration petition. The 11th Circuit reversed on appeal, holding that DLA properly interpreted the suspension rule. Suspension or debarment of an affiliate derives exclusively from its status as an affiliate of an indicted and suspended contractor – no culpability showing is required. The term "legal proceedings" initiation as used at FAR Subpart 9.407-4(b) means initiation of legal proceedings against the primary (indicted) suspended contractor. *Agility Defense and Government Services, Inc., v. Department of Defense.* 11th Cir., No. 13-10757 (December 31, 2013).

H. IMPUTATION.

- Company's alleged bribery imputed to person authorized to sign contracts and suspension was sustained under "participated in, knew of, or had reason to know" standard. *TS Generabau GmbH*, Comp.Gen. No. B-246034, 92-1 CPD para. 189. GAO will entertain bid protests challenging sufficiency of evidence and adequacy of due process in suspension action during pendency of procurement, if contract award is denied due to suspension. Although GAO defers to agencies in debarment and suspension actions. *Id.; Far West Meats*, 68 Comp. Gen. 488 (1989).

- The FAR § 9.406-5(b) "reason to know" standard for imputation does not impose a duty of inquiry similar to the "should have known" standard. The determination must be based on information actually available to the individual. *Novicki v. Cook*, 946 F.2d 938, 940-942 (D.C. Cir. 1991).

- Corporate president held to have reason to know of improper product inspection scheme, where he participated in scheme for a short time 30 years earlier when starting at company and was concerned it was improper then, yet failed to assure himself that illegal conduct had ceased when he later became CEO. *Niethammer v. Janet Cook, et al.*, (D.D.C. E.D. Tenn. 1991).

- Debarment of individual officer for willful and aggravated violations reversed where agency based action solely on individual's status as corporate president. Remanded to Agency to determine whether individual had requisite knowledge for a "willful or aggravated" violation. *Facchiano Construction Company, Inc., Michael Facchiano, Sr., and John Facchiano v. United States Department of Labor, et al.,* 987 F.2d. 206 (1993).

- "Willful" defined, in context of Labor statutes, as conduct that is "voluntary", "deliberate" or "intentional" rather than mere negligence. *Facchiano Construction Company, Inc., Michael Facchiano, Sr., and John Facchiano v. United States Department of Labor, et al.,* 987 F.2d. 206 (1993).

- Debarring official cannot treat similarly situated officers differently for purposes of imputation. *Caiola v. Carroll*, 851 F.2d at 397, 400. *But See, Kisser v. Kemp*, 14 F. 3d 615 (1994).

- Preliminary Injunction granted where court found HUD debarring official in imputing improper conduct from a Housing Authority to individual board members, confused duties owed by the board members to the Housing Authority with the contractual obligations that the Authority owed to HUD, did not appear to apply the required standard for imputation, and otherwise failed to articulate a clear explanation for the decision. *Feinerman, et al., v. Bernardi*, 558 F. Supp.2d 36 (D.D.C. 2008).

- "Reason to know" merely requires that a person draw reasonable inferences from information already known. *Alf v. Donley,* 666 F. Supp. 2d 60 (D.D.C. 2009).

- Initial debarment of corporation and individual owners and six month extension sustained. Standard of "actual knowledge or reason to know" applied in debarring individuals based upon imputation to them of corporate misconduct. Reason to know standard imposes no duty of inquiry, rather it merely requires a person to draw reasonable inferences from known information. Reason to know will exist where the record shows factual circumstances leading up to the misconduct were sufficient to put the individual on notice that misconduct existed. For purposes of imputation, a Debarring Official need not identify specific actions which an officer could have taken to prevent the misconduct. It is sufficient that the factual record contains evidence that the officer had reason to know of the misconduct. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

- Reckless disregard construed as the equivalent of willful misconduct. A plain indifference state of mind is well recognized as a substitute for knowledge of a specific condition. *Brodie v. U.S. Department of Health and Human Services,* 796 F.Supp.2d 145 (2011), 2011 WL 2715057.

I. PERFORMANCE BASED DEBARMENT.

- Court sustained debarment under FAR § 9.406-2(b) (1) (ii), "history of failure to perform" cause. Contractor disputed validity of terminations for default, but debarring official not required to conduct fact-finding because material facts (numerous delinquent deliveries) not disputed. Court declined to apply *Fulford* doctrine challenging default decisions when excess re-procurement costs assessed to debarment proceedings; held proper procedure to challenge defaults is under Contracts Dispute Act. Court found debarring official considered contractor's arguments, did not uncritically adopt contracting official's decisions to terminate contracts, considered information and presented her analysis in decision memoranda. *Davies Precision Machining, Inc. v. Defense Logistics Agency*, 1:CV-93-0957(M.D. Pa. 1993).

- Purpose of a debarment action is not to afford relief on any claim the government may have against a contractor arising out of performance on a specific contract. Rather the issue is protection of the Government against entrance into future contracts with a poor or unsatisfactory performer. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

- Debarring Official's finding that serious poor performance exists to support cause for debarment under 9.406-2(b) (1) (i) (B), does not require a pre-existing unsatisfactory contractor performance determination by a contracting officer. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

J. REMEDIAL ACTIONS AND MITIGATING FACTORS.

- Failure to take remedial action is "important and reasonable element" of decision to debar. *Shane Meat Company v. U.S. Department of Defense*, 800 F. 2d 334, 338 (3rd Cir. 1986).

- Remedial measures must be adequate to convince debarring official that government's interests are not at risk; official has broad discretion to determine whether contractor has taken measures adequate to protect government's interests. Given misconduct establishing cause for debarment, *bona fide* changes in management or ownership that effectively remove individual who is source of threat to government's interests, are particularly important. *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C.Cir. 1989).

- It is reasonable to impose debarment when party whose misconduct establishes cause for debarment occupies same position with a contractor. *Delta Rocky Mountain Petroleum Inc. v. U.S. Department of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

- Company's argument against suspension that knowledge and ability of indicted individual remaining with company is essential rejected by Court. "Knowledge is not honesty, and ability is not virtue. [Defendant's]...indictment provides the government with a sufficient reason to protect itself from dealings with him and the government may choose to avoid business with him to the extent the public interest permits." *Frequency Electronics, Inc. v. United States*, Civ Action No. 97-230A (E.D. Va. 1997), *aff'd*, 151 F.3d 1029 (4th Cir. 1998).

- In indictment-based suspension action the Court found the proper "factual focus" is on remedial/mitigation measures.... "factual issues relating to present responsibility": (1. indicted individual remained in key role; and 2. failure to implement effective internal ethics program). *Frequency Electronics, Inc. v. United States*, Civ Action No. 97-230A (E.D. Va. 1997), *aff'd*, 151 F.3d 1029 (4th Cir. 1998).

- Company bears the burden of persuasively demonstrating remedial measures to lift suspension. Company undertook internal audit program but chose, apparently as part of litigation strategy in light of pending criminal proceedings, to refuse to agree to terms of debarment authority's request to conduct audit. "FEI has the burden of demonstrating its present responsibility. If it will not, even for sound reasons, the legal effect is the same as if it cannot establish its present responsibility." *Frequency Electronics, Inc. v. United States*, Civ Action No. 97-230A (E.D. Va. 1997), *aff'd*, 151 F.3d 1029 (4th Cir. 1998).

- Debarment set aside where notice facially incorrect and the decision official failed to explain the consideration of the FAR mitigating factors at 9.406-1 presented by a Respondent or otherwise fails to articulate a rational basis between the record presented and the decision to impose debarment. *Canales v. Paulson*, 2007 WL 2071709 (D.D.C. 2007).

K. PERIOD OF DEBARMENT.

- Debarring official has broad discretion to determine debarment period. If debarment cause established, Court cannot substitute judgment for debarring official to reduce debarment period. *Shane Meat Company v. U.S. Department of Defense*, 800 F.2d 334, 338 (3rd Cir. 1986).

- A means to take into account mitigating factors, is to debar for less than the three years authorized by FAR § 9.406-4(a). *Joseph Construction Co. v. Veterans Administration*, 595 F. Supp. 448 (N.D. Ill. 1984). *Titan Construction Co., Inc. v. Weinberger*, 1986 U.S. Dist. LEXIS 29232 (1986), *aff'd per curium*, 802 F. 2d 448 (3rd Cir. 1986).

- Statement by Secretary in reversing HUDBCA three month debarment, that a three year debarment would "send a strong message" of support for agency Inspector General deemed evidence of punitive motive. Court held Secretary incorrect as to whether administrative record established party cooperative, failed to give appropriate weight to mitigating factors; debarment reversed. *Sellers v. Kemp*, 749 F. Supp. 1001 (W.D. Mo. 1990).

- Court upheld extension of debarment period based on conviction for actions similar to those leading to fact based debarment. Conviction was "new fact or circumstance" *Wellham v. Cheney*, 934 F.2d 305, 309 (1991).

- Agency discretion to impose debarment period exceeding three years upheld; debarring official provided reasonable explanation of circumstances warranting additional protection of a fifteen year debarment. Debarment regulations at FAR § 9.406-4(a) do not limit debarment period to three years Coccia v. Defense Logistics Agency, 1992 U.S.Dist. LEXIS 17386 (E.D. Pa. 1992).

- Five year debarment measured from date of suspension upheld. *Paul M. Burke v. United States Environmental Protection Agency*, 127 F. Supp. 2d 235 (D.D.C. 2001).

- The Debarring Official reasonably concluded that a contractor's entrance into new contracts with the government while debarred, in the absence of a written compelling reasons determination by the contracting agency constitutes seriously improper conduct supporting cause for imposition of additional period of debarment beyond three years imposed by initial debarment. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

- The Debarring Official is not bound by a contracting officer's responsibility determination. While a contracting officer's signing of a contract constitutes a determination that a prospective contractor is "responsible" the Debarring Official has a broader responsibility to determine whether the public interest requires debarment governmentwide. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

L. DEBARMENT AND SUSPENSION RELATIVE TO THE CRIMINAL AND CIVIL JUSTICE SYSTEM.

- Double Jeopardy Clause is not a bar to a later criminal prosecution because debarment sanction is civil and remedial in nature. The mere presence of a deterrence element is insufficient to render a sanction criminal, as deterrence "may serve civil as well as

criminal goals." *Hudson et al., v. United States*, 118 S. Ct. 488 (1997) (rejecting test applied in *Halper* and reaffirming analysis applied in *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636 (1980)).

- Government not collaterally estopped from three-year debarment, since contractor's present responsibility not litigated, despite judge's sentencing remarks concerning circumstances of contractor's offense, history and characteristics, and corporation's "rehabilitation and present integrity." Issues decided in criminal conviction may have preclusive effect in administrative proceeding if collateral estoppel standards are satisfied. *Delta Rocky Mountain Petroleum Inc. v. U.S. Department of Defense*, 726 F. Supp.278, 281 (D.Colo. 1989) (citing *Chisolm v. Defense Logistics Agency*, 656 F.2d 42 (3rd Cir. 1981)).

- Reasonable to debar party making mitigation arguments inconsistent with its guilty plea. *Agan v. Pierce*, 576 F. Supp. 257 (N.D.Ga. 1983).

- When offense giving rise to cause for suspension occurred is not determinative since issue is corporate integrity. *Mikulec v. Department of the Air Force*, Civ. No.84-2248, 1985 U.S. Dist. LEXIS 18420 (1985).

- Failure to suspend contractor indicted for procurement fraud is highly irresponsible. *James A. Merritt and Sons, Inc. v. Marsh*, 791 F.2d 328, 331 (4th Cir. 1986).

- Debarment period "need not be proportional to the severity of a prior criminal sentence, for a criminal sentence is a statutory sanction quite distinct from a debarment." *Shane Meat Company v. U.S. Department of Defense*, 800 F. 2d 334, 338 (3rd Cir. 1986).

- Debarment serves different purposes than criminal justice process, no double jeopardy: It is the clear intent of debarment to purge Government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in [Government] programs is detrimental to public purposes is remedial by definition. (Citation omitted). While those persons may interpret debarment as punitive, and indeed feel as though they have been punished, debarment constitutes the 'rough remedial justice' permissible as prophylactic Governmental action. *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (citing *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989).

- Criminal acquittal does not preclude subsequent debarment action; evidentiary hearing testimony can be used to establish cause for debarment by preponderance of evidence. EPA administrative debarment procedures that incorporate separation of the hearing and advocacy functions satisfies requirements both of EPA's own regulations and of due process. *Baranowski v. EPA*, 699 F. Supp. 1119 (E.D. Pa. 1988), *aff'd,* 902 F.2d 1558 (3rd Cir. 1990).

- Absence of conviction or civil judgment did not preclude debarment based on bid rigging scheme. *Leitmen v. McAusland*, 934 F.2d 46, 50 (4th Cir. 1991).

- Language in plea agreement construed to be waiver of debarment and suspension by Department of Justice. *United States v. Asil Gezen*, 1992 U.S.App. LEXIS 44 (4th Cir. 1992). [Note that DOJ advised Government Operations Committee that federal prosecutors are not authorized to waive debarment and suspension; argument successful at trial but not raised on appeal].

- Suspension and debarment is a business decision, "not only must the Government be a fair and rational shopper, it may also insist on capable, impeccably honest vendors and top quality goods and services....contracts shall be awarded to responsible prospective contractors only", 48 CFR 9.03(a). Responsibility requires "that a contractor must have the financial and logistical ability to perform the contract on schedule, the technical expertise to do so, and a satisfactory record of integrity and business ethics." 9.104-1(d);48 CFR 9.104-1(d) *Frequency Electronics, Inc. v. United States*, Civ Action No. 97-230A (E.D. Va. 1997), *aff'd*, 151 F.3d 1029 (4th Cir. 1998).

- Where a relator filed a qui tam action against a corporation, and the United States subsequently declined to intervene, but then initiated a debarment action against the corporation which ended in a settlement including millions of dollars worth of services and restitution to the Government, the relator sought a proceeds share. The appeals court held for the relator, finding that a debarment proceedings in some, albeit rare, circumstances, is "an alternate remedy" within the meaning of 31 U.S.C. § 3730(c)(5) for qui tam purposes giving rise to the relator's right to recover a share of the proceeds of the "alternate remedy" to the same degree as if the Government had intervened and prevailed in the qui tam action. *United States ex rel. Barajas v. United States v. Northrop Corporation*, 258 F. 3d 1004 (9th Cir. 2001).

- Challenge to HUD debarment mounted under the Federal Tort Claims Act, 28 U.S.C.S. §§ 1376, 2671 et seq., dismissed for lack of subject matter jurisdiction. Debarment is a discretionary governmental function, for which Congress has not waived sovereign immunity under the FTCA. The Court, citing *United States v. Gaubert,* 499 U.S. 315, 113 L. Ed. 2d 335, 11 S. Ct. 1267 (1991), rejected plaintiff's allegation that an agency action was precipitated by "willful misconduct", holding the subjective intent of an agent in exercising a discretionary function is irrelevant, the focus instead being on the nature of the action taken and whether the record shows a rational basis-"bare allegations of malice" should not suffice to "subject government officials to the either the costs of trial or to the burdens of broad reaching discovery". *Rogers v. United States*, 187 F. Supp. 2d 626 (D.N.D. Ms. 2001).

- Contractor sued HUD under the Federal Tort Claims Act (FTCA), challenging HUD suspension. HUD action based on concerns generated by an audit and investigation about whether lead based paint properly removed. Suit dismissed for lack of jurisdiction by district court. On appeal the D.C. Circuit affirmed, holding that the decision to suspend is a discretionary action and as such protected against challenge by the "discretionary function" exception of the FTCA; that the investigation and audit preceding the suspension was not sufficiently separable from the suspension decision to qualify as an action subject to the FTCA; and that even if severable, the investigation and audit were also discretionary acts exempt from challenge under the FTCA. Sloan v. U.S. Dept. of Housing and Urban Development, 236 F.3d 756, 344 U.S. App.D.C. 389 (2001).

- Although DOL's initial decision to issue a debarment notice alleging fact based violations of the Service Contract Act, was supportable, the Circuit Court found the debarring official's continued pursuit of debarment after an administrative law judge's fact-finding of no culpability was not substantially justified and the company was entitled to attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1) (A). *Dantran, Inc., v. United States Department of Labor*, 246 F. 3d 36 (1st Cir. 2001).

- No constitutionally protected liberty or property interest in reputation. Defamation, by itself, is a tort actionable under state law rather than a constitutional deprivation. To assert a due process cause of action against the debarring official as an individual, a plaintiff must allege deprivation of some liberty or property interest other than the ability to bid on contracts. *Highview Engineering, Inc., v. U.S. Army Corps of Engineers*, Slip Opinion, U.S. District Court, W.D. Kentucky, 2010 WL 2106664.

- Appropriation laws barring specific national advocacy organization and two affiliates from receiving federal funds held to not be bill of attainder where the direct consequences of the law not disproportionately severe or inappropriate so as to be punishment and legislative history revealed much concern about protection of public funds against fraud, waste and abuse. *ACORN v. U.S.*, 618 F.3d 125 (2nd Cir. 2010).

- Debarred molecular pathologist, debarred by HHS for seven years for research misconduct, again filed suit following two unsuccessful judicial challenges to debarment imposed by HHS arguing that HHS debarment decision invalid on grounds that failure to preserve and produce during the debarment proceedings a personal laptop seized during the investigation which led to the debarment action. The Plaintiff asserted, in part, that HHS' actions violated *Brady v. Maryland*, 373 83 (1963) [suppression by the prosecution of material evidence favorable to an accused person, irrespective of the good or bad faith of the prosecution, violates due process]. The Court while deciding the case on res judicata and collateral estoppel bases also ruled that *Brady* and its progeny do not apply in civil cases except in rare circumstances where a person's individual liberty is at stake. *Brodie v. Department of Health and Human Services*, Civ. Action No. 12-1136 (RMC) (D.D.C. 2013).

M. IMPERMISSIBLE IF PUNISHMENT.

- Debarment sanction is nonpunitive means of ensuring compliance with statutory goals. *Janek Paving and Construction v. Brock,* 828 F. 2d 84 (2d Cir. 1987), citing *Steuart & Bros., Inc. v. Bowles*, 322 U.S. 398 (1944).

- Adverse economic consequences of party's exclusion from contracting is not determinative, given weight of government's interest in protecting integrity of its acquisition system. *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 324 (6th Cir. 1981), *cert. denied,* 454 U.S. 820 (1981).

- Party that engages in misconduct establishing FAR § 9.4 cause for contracting exclusion bears responsibility for risk that business relations with government could be disrupted. *ATL, Inc. v. United States*, 736 F.2d 677, 684 n. 31 (Fed. Cir. 1984).

N. DE FACTO DEBARMENT.

- Small Business Administration statutory authority to determine responsibility of small businesses under COC program does not preclude debarment or suspension. *NKF Engineering, Inc. v. United States*, 805 F.2d 372 (Fed.Cir. 1986); *Electro Methods, Inc. v. United States*, 728 F.2d 1471, 1476; *IMCO, Inc. v. Morton*, 1990 U.S.Dist. LEXIS 14485 (N.D.Ala. 1990), *aff'd per curium*, 919 F.2d 744 (11th Cir. 1990), *cert. denied,* 499 U.S. 920 (1991); *Shermco Industries, Inc. v. Secretary of the Air Force*, 584 F. Supp. 76 (N.D. Texas 1984).

- Agency cannot simply refuse to contract with company; government contractor must be afforded procedural safeguards. *Art Metal-USA Inc. v. Solomon*, 473 F. Supp. 1 (D.D.C. 1978). Subsequent attempt to obtain monetary damages for *de facto* debarment denied. *Art Metal-USA Inc. v. United States*, 577 F. Supp. 182 (D.D.C. 1983); *aff'd, Art Metal-USA Inc. v. United States*, 753 F.2d 1151 (D.C.Cir. 1985).

- Denial of single contract based on failure of disappointed bidder's weapons to pass required tests is not *de facto* debarment and does not trigger a "liberty interest" giving rise to constitutional due process protection. *Smith and Wesson v. United States*, 782 F.2d 10074 (1st Cir. 1986).

- No damages awarded after GSBCA found illegal *de facto* debarment. *Chen v. United States*, 674 F. Supp. 1078 (1987); *aff'd* 854 F.2d 622 (2d Cir. 1988).

- Non-responsibility finding due to contractor intent to subcontract 100% work to debarred company sustained. *Medical Devices of Fall River, Inc. v. United States*, 19 Cl. Ct. 77 (1989).

- Agency conduct indicating refusal to award contract constituted *de facto* debarment. "Fair play" required agency to use debarment procedures rather than repeated findings of non-responsibility. *Leslie and Elliot Co. Inc. v. Garrett*, 732 F. Supp. 191 (D.D.C. 1990).

- Exclusion from a single award is insufficient to establish de facto debarment. *Dynamic Aviation v. Department of the Interior*, 898 F.Supp. 11 (D.D.C. 1995).

- City's repeated contract-by-contract ineligibility determinations based solely upon the fact of existence of a criminal investigation by U.S. Attorney's office not *de facto* debarment given presence of adequate post deprivation remedy. *Hellenic American Neighborhood Action Committee v., the City of New York, et al.*, 101 F. 3d 877 C.A. 2 (N.Y.) 1996.

- Where bidder denied contract after a prior debarment had expired, claim contract denied based upon fact of prior debarment and therefore *de facto* debarment, denied by Court. Where debarment ended a year and a half before the solicitation, fact of prior debarment served merely to explain lack of performance and financial history over five year period. Charge of vendetta by Government employees also raised in suit similarly held without merit by Court. "Government employees entitled to a presumption they are acting conscientiously...A finding of bad faith requires 'well-nigh irrefragable proof' in order for the court to abandon the presumption of good faith dealing....The necessary and almost irrefutable proof has been equated with evidence of a specific intent to injure the plaintiff". *CRC Marine Services, Inc. v. The United States*, No 98-128C (Ct. Claims 1998) LEXIS 109.

- Reasonably definite allegation of existence of actual present harm or a significant possibility of future harm held sufficient for standing to seek judicial review of retention of information about expired debarment in the public record. *Hickey v. Chadick*, 649 F.Supp. 2d 770 (S.D. Ohio 2009).

- Individual brought suit four months after expiration of debarment, seeking removal of information about the past debarment from the Excluded Parties List System Archives contending continuing damage to reputation as the archive is publically accessible. While noting that reputational harm is sufficient for standing, the Court granted the Government's motion to dismiss where plaintiff failed to allege any injury in fact. *O'Gilvie v. Corporation for Nat. Community Service*, 802 F.Supp. 2d 77, 2011 WL 3489118 (2011).

- Board Chairman of the debarred contractor challenged HUD debarment twenty years after 1990 imposition, claiming non-receipt of the notice notwithstanding repeated agency attempts at notification by certified mail sent to the last business address known to the government and signed for by agents or officers of the company. The district court

dismissal of the complaint as time barred was affirmed on appeal. Under 28 U.S.C. § 2401(a), civil actions against the government must be filed within 6 years of accrual of the right of action. The Court held that the time period commenced to run in 1990 when the contractor knew or should have known of the debarment. Equitable tolling is not available in actions involving "garden variety claim[s] of excusable neglect" or where a plaintiff fails to exercise due diligence to preserve legal rights. *B.B. Anderson v. Department of Housing and Urban Development*, 678 F. 3d 626 (8th Cir. 2012).

- Contractors are held to a high standard to show the existence of a de facto debarment: The contractor must demonstrate a systemic effort by the contracting agency to reject all of the contractor's contract bids. De facto debarment can be shown by either a statement by an agency that it will not award future contracts to the contractor; or by agency conduct demonstrating that intent. *Highview Engineering v. Corps of Engineers,* 864 F. Supp. 2d 645 (W.D. Kentucky 2012), citing to *TLT Const. Corp.,* 50 Fed.Cl. at 216.

- Contractor brought suit asserting de facto debarment by Navy alleging contracting officials stated contractor would not be permitted to work on any future contracts, and existing contracts ended. To show de facto debarment a plaintiff must show a systemic effort by the contracting authority to reject all bids by either an agency statement that it will not award the contractor future contracts, or conduct demonstrating that it will not award the contractor future contracts. The court in denying Navy's motion to dismiss observed that the plaintiff does not have to prove a 100% loss of work, rather it is sufficient to show the contracting official's actions were aimed at plaintiff's overall status as a contractor. The Court rejected Navy's claim that the contractor was not de facto debarred because the action was not based on charges of fraud, dishonesty, or lack of integrity, noting that there is a due process liberty interest in avoiding damage to reputation and business caused by the stigma of comprehensive exclusion from government awards. The Court also held that a plaintiff is not required to present factual evidence that it attempted to get new awards and was prevented from doing so. *Phillips, et. Al, v. Mabus et. al,* Civ. Action No. 11-2021 (EGS), 2012 WL 476539 (D.D.C.)

O. TIME DEADLINES.

- Mere use of the word "shall" in statutory time deadline provision for action, absent a specified consequence of failure to comply, is insufficient to remove the power to act after expiration of the deadline. *Brock v. Pierce County*, 476 U.S. 253. 255, 106 S. Ct. 1834 (1986).

- Failure to make "reasonable basis" determination as to INA violations within thirty days, where mandatory "shall" used in the requirement did not preclude Agency ability to act. *Cyberworld Enterprise Technologies, Inc., d/b/a Tekstrom, Inc., v. Napolitano,* 602 F. 3d 189 (3d Cir. 2010).

- The Debarring Official's failure to issue decision within 30 working days under the rules held not to be arbitrary or capricious where plaintiffs continued to submit documents to the Debarring Official after expiration of a submission date time extension, the decision issued within 14 days after the last submission, the voluminous and complex nature of the record would have supported good cause for a formal time extension, and Plaintiffs failed to demonstrate actual prejudice from the delay. *Hickey v. Chadick*, Case No. 2:08-CV-0824, Unpublished Order Granting Defense Logistics Motion for Summary Judgment, District Court (S.D. Ohio 2010).

- Contractor sought judicial relief from the filing of a notice of proposed debarment. Contractor filed suit approximately a year into the proceedings seeking an order enjoining debarment and compelling issuance of a final agency decision. Three months later the Agency issued a final decision in the debarment proceedings, terminating the action. In continuing litigation the contractor argued in part that a notice of proposed debarment, even if not a final agency action, should be ripe for judicial review under the APA unreasonable delay provision which allows a court to compel action withheld or unreasonably delayed. The Court rejected the contractor's argument, observing that it no longer had subject matter jurisdiction where the only final agency action was the action termination resolving the matter in the favor of the contractor. *Tudor v. Department of the Navy,* No. C 11-5362 CW. (N.D. Cal. 2013), 20133 WL 366434.

- Contractor consisting of an Afghan-American owned trucking services company and an American security services corporation brought a post award bid protest on an ARMY multiple award procurement competition for trucking services in Afghanistan. The contractor challenged a contracting officer's non-responsibility determination and exclusion which utilized a classified vendor vetting rating process list. The contractor argued, in part, that ARMY's reliance on a secret list constituted application of a de facto debarment. The Claims Court exercised jurisdiction as the contractor asserted de facto debarment as a bid protest grounds, noting that a disappointed bidder alleging de facto debarment must show evidence demonstrating that the government will not award the contractor future contracts. The Court found that the contracting officer non-responsibility determination was reasonable, apparently in light of unclassified performance history information of record. However, the Court sustained the utilization of what is essentially a secret blacklist. The Court, citing to *Old Dominion,* observed that due process ordinarily requires that a contractor be accorded notice and opportunity to contest allegations impugning business honesty and integrity. The Court then proceeded to articulate an exception. The Court stated that "the requirements of due process vary given the circumstances" and that in a war zone environment "when the required notice would necessarily disclose classified material and could compromise national security, normal due process requirements must give way to national security concerns." *MG Altus Apache Company v. The United States*, 111 Fed. Cl. 425; U.S. Claims LEXIS 719.