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Chairman Issa, Congressman Cummings and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the current federal suspension and debarment process from the legal practitioner's perspective. I commend the Committee for taking a hard look at transparency and fairness in the system. Federal suspension and debarment officials exercise a powerful and highly discretionary authority that directly affects the credibility of our entire procurement system.

As the chair of Crowell & Moring's government contracts group, a significant portion of my practice involves the representation of companies and individuals in suspension and debarment proceedings before federal agencies ranging from the Department of the Air Force to the Federal Communications Commission. Over the past four decades, Crowell's 55 government contract lawyers have represented clients in suspension and debarment proceedings before virtually every federal agency. Through these representations, we have gained a unique perspective on the multitude of processes, procedures, standards of review and remedies, both written and unwritten.

While the Federal Acquisition Regulation ("FAR") and the non-procurement rules establish a high-level framework, much of the system operates using unwritten practices and tools. From Show Cause letters to administrative agreements, innovative civil servants have created valuable tools for making the suspension and debarment process fair and flexible. A problem, however, is that the unwritten processes lack transparency and consistency across agencies. With many civilian agencies bolstering suspension and debarment programs in response to congressional oversight, it is hard to be confident that the current written processes ensure (1) fairness (that all companies and individuals facing debarment are given a similar opportunity to properly present their case) and (2) the correct result is obtained.

It is important, however, to separate the process from the people. We have been extraordinarily fortunate over the years to have dedicated, objective and fair-minded civil servants running the suspension and debarment processes across the Department of Defense ("DoD"), the General Services Administration ("GSA"), and the Environmental Protection Agency ("EPA"). The creativity and openness of the Suspension and Debarment Officials ("SDOs") at these three agencies have for many, many years facilitated fairness and objectivity. I have great confidence in the abilities, objectivity and fairness of SDOs working in these three agencies. I am less confident, however, that the agencies new to suspension and debarment can ensure fairness and consistency without some modifications to the current system. For the long

term, the system cannot be sustained on the objectivity and fairness of individual SDOs alone. Across the government, the processes, procedures, standards of review, remedies, and tools must be consistent and transparent. The certainty created by transparency and consistency will only serve to bolster confidence in the process and the procurement system as a whole. In this regard, I applaud the Committee for proposing draft legislation to address transparency and consistency in the civilian agencies. From the practitioner's side, we have noticed a greater attentiveness to fair process, consistency, and timeliness since consideration of the legislation was announced in February.

The Suspension and Debarment Process

The actual process of suspension and debarment varies widely across federal agencies. In some agencies, like the Department of the Army or the Environmental Protection Agency, the SDO acts as a hearing officer that determines the outcome after a presentation of facts by lawyers within the agency assigned to the case. Other SDOs, such as the Department of the Air Force and the General Services Administration, prepare and consider the suspension and debarment cases themselves. Still others, like the Department of the Interior, have the Office of the Inspector General prepare the case and make recommendations directly to the SDO. Unfortunately, the actual roles and processes are not well articulated in regulation, making it virtually impossible to know or understand how the suspension or debarment process is intended to work or will work in practice. Indeed, for many of the civilian agencies, it appears that the processes are entirely *ad hoc*, even where more specific written procedures exist.

For some agencies, it is a struggle for even the most seasoned suspension and debarment lawyer to discern even the name and contact information of the agency's SDO, much less the process they would use to consider a suspension or debarment matter. This is particularly frustrating when a contractor wants to proactively contact an agency SDO to discuss a legal, ethics or compliance issue of concern to the agency. While the Committee on Interagency Suspension and Debarment ("ISDC") maintains a list of agency contacts for agencies that participate on the Committee, the list does not identify the SDO and only appears to be updated a few times a year (http://www.epa.gov/isdc/member.htm). There have been a number of occasions where I have had clients that want to proactively contact an SDO, only to spend hours determining the correct official and days trying to contact the individual. For many companies, the system at most civilian agencies remains impenetrable.

This lack of access and transparency is certainly an impediment for companies that are working to improve ethics and compliance programs and systems. When problems do arise at companies, and they do arise with even the most responsible of contractors, the companies and the agency need to be able to work in partnership towards continual improvements. DoD, EPA and GSA learned long ago that by having an open door for contractors to discuss compliance and ethics concerns both parties could agree on expectations and appropriate changes to contractor programs. This can't happen when it takes days to find and contact an SDO, much less when the process for consideration is *ad hoc* or difficult to discern. Even where an agency has promulgated specific information regarding process or procedures, it could take a cryptologist to interpret. One of my favorites is the Department of Health and Human Services ("HHS") Acquisition Regulation:

> When an apparent cause for debarment becomes known, the initiating official shall prepare a report containing the information required by 309.470-2, along with a written recommendation, and forward it through appropriate acquisition channels, including the HCA, to the Associate DAS for Acquisition in accordance with 309.470-1. The debarring official shall initiate an investigation. . . .The ASFR/OGAPA/DA shall promptly send a copy of the determination through appropriate acquisition channels to the initiating official and the Contracting Officer. If the debarring official determines that debarment procedures shall commence, the debarring official shall consult with OGC-GLD and then notify the contractor in accordance with FAR 9.406-3(c). . . . The OGC-GLD shall represent HHS at any fact-finding hearing and may present witnesses for HHS and question any witnesses presented by the contractor.

48 C.F.R. § 309.406-3. Who is the "initiating official," the "appropriate acquisition channel," the "Associate DAS for Acquisition," the "ASFR/OGAPA/DA," or the "OGC-GLD"? If you are a responsible contractor that wants to discuss a compliance or ethics issue with the HHS SDO, you have already given up.

Of greatest concern is when the differences in processes and the lack of transparency create issues of fairness. I have seen this most specifically in five areas where the processes vary significantly across agencies and are not transparent to all parties:

* Show Cause Letters
* Access to the Administrative Record
* Public Release of Information
* Administrative Agreements
* Lead Agency Determinations

<u>Show Cause Letters/Requests for Information</u>

When an agency receives negative information regarding a company or individual, the current FAR provides only two options: (1) suspend or (2) propose for debarment. Either action results in the public listing of the exclusion on the System for Award Management ("SAM") and a prohibition on receiving additional federal awards and new work under existing awards. In addition, suspension or debarment can trigger the loss of security clearances, the termination of key licenses, and the loss of state, local, and commercial business. The options are unquestionably draconian when the cause for suspension or debarment is not based on a criminal or civil judgment. The reputational and economic damage occurs before the company or individual has an opportunity to present any evidence or mitigating factors. The FAR is also inconsistent with the non-procurement rule which allows an SDO to propose an entity or individual for debarment without posting the exclusion on SAM or prohibiting additional awards while the matter is under review.

Because the FAR options of suspension or proposed debarment are particularly harsh, several agencies have instituted the use of "Show Cause Letters." In lieu of invoking the official

FAR debarment or suspension process, many SDOs issue a Show Cause Letter as a first step in the suspension and debarment process. The Show Cause Letter initiates an informal process through which the SDO and the company exchange information regarding the issue of concern, hold meetings, and attempt to reach resolution. The process allows companies a fair opportunity to present explanatory and exculpatory information. Where Show Cause Letters are used (primarily the Department of Defense and the General Services Administration), the SDO reaches a full understanding of the facts and remedial measures that have been taken to prevent recurrence, thus significantly informing the appropriate remedy.

Unfortunately, Show Cause Letters are not found in the FAR or any other regulation. As a result, the process is not known, understood, or used on a government-wide basis. Many civilian agencies believe that when presented with negative, but unproven, facts regarding a contractor, the only available actions are suspension or debarment, with little flexibility to avoid draconian and public exclusion from federal awards. Given the clear need for a process that, like the non-procurement rule, allows an entity or individual to defend against unproven facts before implementing a public exclusion, the Show Cause Letter process should be made available on a consistent government-wide basis through promulgation in the FAR.

Access to the Administrative Record

Most agencies, prior to issuing a Show Cause Letter, a suspension, or a proposed debarment, develop an administrative record to support the proposed action. However, when a company or individual receives notification of the proposed action from the SDO, the notification rarely, if ever, advises the company or individual that a more complete administrative record supporting the proposed actions exists. Only if a company or contractor hires an attorney familiar with the suspension and debarment process will they know to ask for a copy of the administrative record to assist in the preparation of a response.

To ensure that all parties are treated fairly in this process, the requirement for and availability of an administrative record should be articulated clearly in the FAR. Notably, however, I have never once been denied access to an administrative record to support a proposed action, even where the action was simply a Show Cause Letter.

Public Release of Information

Another area of significant uncertainty in the suspension and debarment process is the varying agency practices related to the public release of information. Some agencies, like the EPA, believe most records created in the process are subject to release under the Freedom of Information Act ("FOIA"). Other agencies are significantly more protective of information, concluding that their processes fall under FOIA law enforcement exemption seven. While contractors are able to protect trade secrets and confidential commercial or financial information supplied during this process under FOIA exemption 4, the possibility of information being released to the public significantly impedes the open exchange of information between the contractor and the SDO. In particular, when a contractor proactively approaches an SDO to discuss a potential compliance or ethics issue, the protection of information from public release would significantly enhance the exchange of meaningful information.

We have also recently noted a significant and disturbing trend where agencies release information related to ongoing suspension and debarment proceedings directly to legislative staff on congressional committees. The information is then subsequently released to the press. This trend appears to be a highly inappropriate end-run around the FOIA process. For the suspension and debarment process to work and for responsible contractors to feel comfortable interacting with agency SDOs, confidential information can and should be protected.

Administrative Agreements

Over time, federal agencies with active suspension and debarment processes have created additional remedies beyond simple debarment. Recognizing that debarment can result in the loss of a valuable (and often difficult to replace) contractor and can reduce competitive options and increase prices, many SDOs have looked for alternatives to debarment where the government can also be assured it is doing business with an ethical contractor. Through the use of "Administrative Agreements" between SDOs and contractors, a contractor can avoid debarment by committing to specific changes to ethics and compliance programs, including at times monitors. These agreements allow SDOs to keep a closer eye on the implementation of remedial measures following an ethical or compliance lapse and instead of losing a valuable contractor through debarment, the SDOs effectuate significant enhancements to compliance and ethics programs. The required enhancements in Administrative Agreements go far beyond the creation of a simple ethics program, training, or compliance with the FAR. Through periodic reporting from the contractor or a monitor, the SDOs create more ethical partners.

Again, however, there are problems with consistency and transparency related to this very effective tool. First, "Administrative Agreements" are mentioned only in passing in the FAR, 48 C.F.R. §§ 9.406-3(f); 9.407-3(e);1409.407-3(d). With the exception of the Department of the Air Force, which notably posts all Administrative Agreements online, the terms and conditions for use in administrative agreements are difficult, if not impossible to find. *See* http://www.safgc.hq.af.mil/organizations/gcr/adminagreements/index.asp.

Second, the actual terms of an administrative agreement vary widely among and even within the same agency. Without explanation, the variances include: (1) independent monitoring agreements; (2) independent reviews of compliance and ethics programs, (3) payment of investigation costs; (4) removal of certain employees or offices; (5) preferred supplier programs; and (6) training requirements. It is unclear when or why particular terms or conditions are used or not used. Finally, not all agencies offer Administrative Agreements, leading to the distinct possibility that one agency would debar a company based upon the same set of facts that a different agency would resolve by entering into an Administrative Agreement.

Public information about standard terms and conditions and when they should be used would significantly facilitate the process for agencies and contractors.

Lead Agency Determinations

The FAR states that "[w]hen more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Committee on Debarment and Suspension, established under Executive Order 12549, and authorized by Section 873 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), shall resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency." 48 C.F.R. § 9.402. While it is a nice theoretical concept that the ISDC can resolve lead agency issues, there have been two significant problems in implementation. First, not all agencies believe they have any requirement to inform the ISDC before considering the suspension or debarment of a contractor. Second, the FAR provides no guidance on how lead agency determinations will be made.

We have confronted a number of problems for contractors under the current lead agency process. For a contractor that is proactively seeking to provide agency SDOs with information regarding a compliance or ethics issue, it is often quite difficult to determine the appropriate agency to approach. While the historical practice has been to approach the agency with the largest dollar value of contracts, that practice does not appear appropriate when the problem relates to a specific contract with a specific agency. As several of our clients have discovered, approaching the wrong agency can have dire consequences if the agency fails to "officially assert" lead agency with the ISDC. Without clear lead agency guidance, contractors can be lulled into believing a particular agency is considering the case while another agency takes a suspension or proposed debarment action without input from the approached agency or the contractor. This inappropriately places the burden on contractors to determine whether an SDO has taken appropriate steps to ensure it has lead agency and, in some cases, to educate SDOs about the lead agency process.

Miscellaneous Issues

There are two additional miscellaneous issues of note. First, the current system for suspension and debarment is not appropriately structured to deal with the suspension or debarment of individuals. As the pressure to debar has increased, many agencies have also increased the number of individual debarments. Unfortunately, however, under the current mitigating factors, there is very little opportunity to mitigate factors that might support an individual debarment. The standards, as written, are exclusively for the mitigation of corporate activity:

> It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision. Before arriving at any debarment decision, the debarring official should consider factors such as the following:

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

The existence or nonexistence of any mitigating factors or remedial measures such as set forth in this paragraph (a) is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary.

48 C.F.R. § 9.406-1. These factors leave little room for an individual to prove present responsibility to avoid debarment.

Second, the move from the Excluded Parties List System (www.epls.gov) to the System for Award Management (www.sam.gov) has been wrought with problems. Importantly, it appears to be taking days and even weeks for agencies to remove companies listed as suspended,

debarred, or proposed for debarment from SAM. In one instance, in spite of multiple efforts, it took one agency almost two weeks to remove a company from being listed on SAM. Considering the highly public natures of listings on SAM, failure to promptly remove a company can result in the loss of millions of dollars in revenue from public and private procurements. SAM clearly needs resources and proactive management of suspension and debarment information.

Conclusion

Again, it is an honor to be invited to testify here today. There is little question that some minor changes to the suspension and debarment system could add significantly to the consistency among agencies and transparency. While the consolidation of civilian agency SDO functions could serve that same purpose, I believe it could also be achieved through changes to the current FAR and non-procurement rules (including the consolidation of these two sets of rules) and significant training of the agencies with less experience using this powerful authority.

This concludes my prepared remarks. I am happy to answer any questions you may have.