

## Suspension and Debarment Program

A Powerful Tool to Promote Contractor Accountability in Contingency Environments

By Acting Inspector General Steven Trent and Brian Persico

Procurement fraud and lack of contract oversight have been identified as major threats to the U.S. reconstruction effort in Afghanistan. The stakes are high and carry national security implications. Failure of systems, shoddy performance and diversion of resources meant for reconstruction can create advantages for the insurgency, while putting U.S. troops, contractors and their employees at risk.

The best-known remedies for fraud or significant misconduct are criminal prosecution or civil litigation. However, there is a third, lesser-known option – suspension and debarment – and it can be a powerful tool in a contingency environment such as Afghanistan. The Office of Special Inspector General for Afghanistan Reconstruction recognizes the potential of this tool, and is making suspension and debarment actions a major core activity.

SIGAR's action is aligned with the view of the Council of Inspectors General on Integrity and Efficiency that suspension and debarment can help detect contractor fraud in its early stages. In addition, it is responsive to the concerns of many members of Congress, who are calling for strong accountability measures that can be implemented in a timely manner to aggressively tackle contractor oversight.

### OVERVIEW

The stated purpose of including suspension and debarment in the Federal Acquisition Regulation is to ensure that government contracts are awarded only to responsible contractors. Use of these remedies is a discretionary function intended for the government's protection and is not considered punishment.<sup>1</sup> Debarment of a contractor may occur on a finding of a "preponderance of the evidence" that a contractor has engaged in misconduct in connection with a public contract or subcontract, violated antitrust statutes relating to the submission of offers, violated one or more terms of a government contract, or engaged in conduct so serious or compelling that it adversely affects the present responsibility of the contractor or subcontractor.<sup>2</sup> The secretary of each executive branch department and agency has delegated to a suspension and debarment official, the authority to take action to suspend and debar non-responsible contractors.<sup>3</sup> A "preponderance of evidence" is evidence that, as a whole, shows that the fact sought

1) See 48 C.F.R. § 9.402(b); See *Caiola v. Carroll*, 851 F.2d 395, 398-399 Vol. 271, U.S.App.D.C. 140, 143-144 (D.C. Cir. 1988).

2) See 48 C.F.R. § 9.406-2(b).

3) See 48 C.F.R. § 9.403.

to be proven is more likely true than not.<sup>4</sup> Debarment is more serious than suspension. The period of debarment, under the FAR, should generally not exceed three years. However, three years is not a limit and periods of debarment may be extended or reduced. Suspension is a temporary measure designed to exclude contractors from contracting with the government during ongoing legal proceedings or in instances where exigent circumstances require the exclusion of a contractor immediately. To facilitate contractor suspensions in such circumstances, the agency need only show “adequate evidence” of wrongdoing to support an exclusion from government contracting.<sup>5</sup>

The primary issue that the SDO considers in imposing debarment is whether the contractor is “presently responsible.”<sup>6</sup> Present responsibility requires, among other things, that a contractor have the ability to perform contracts in accordance with their requirements, have “a satisfactory record of business integrity and ethics,” and possess or be able to obtain the accounting and operational controls necessary to perform government contracts.<sup>7</sup> It is the contractor’s burden to demonstrate present responsibility.<sup>8</sup> Debarred contractors are excluded from receiving government contracts unless the agency head, or his or her designee, determines that a compelling reason exists to do so. In addition, offers may not be solicited from debarred contractors, who are also banned from being awarded subcontracts exceeding \$30,000. It is important to note, however, that current contracts are not affected because suspension and debarment is a forward-looking remedy. It can prevent an organization from being considered for future contracts, but

does not terminate a current contract. The U.S. government may place an order with debarred contractors for the guaranteed minimum quantity under indefinite-quantity, indefinite-delivery contracts. However, options may not be exercised or other steps taken, to extend the duration of a current contract.<sup>9</sup>

## DEVELOPMENT OF THE PROGRAM

Until recently, the suspension and debarment remedy of Section 9.4 of the FAR,<sup>10</sup> or the government-wide debarment and suspension regulations utilized for non-procurement transactions,<sup>11</sup> has been used to address individuals, organizations and companies operating in traditional support and development roles. In particular, the remedy was used to address criminal activity or performance issues associated with systems acquisition, facilities support contracts, academic grants and similar functions performed on behalf of the government as part of predictable programs and agency requirements.

Since 9/11, however, “contingency” government contracting – to support deployed U.S. forces, the governments of Iraq and Afghanistan and the reconstruction of both countries – has grown steadily, both in absolute dollar value and as a share of overall government contracting spending. According to the final report of the Commission on Wartime Contracting in Iraq and Afghanistan, a total of \$192.5 billion has been obligated for contracts and grants in Southwest Asia from fiscal year 2002 through 2011. Of that total, \$187.2 billion went to contracts awarded for reconstruction projects, operational support needs and other requirements that were met by contractors in theater.<sup>12</sup>

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4 ) See Caiola at 399; Robinson v. Cheney, 876 F.2d 152, 154, 277 U.S.App.D.C. 393, 396 (D.C. Cir., 1989) (discussing the preponderance of evidence standard).

5 See 48 C.F.R. § 9.407-1(b).

6 48 C.F.R. 9.402(a); See Caiola at 398-99.

7 See 48 C.F.R. § 9.401-1; Frequency Electronics at 2.

8 See 48 C.F.R. § 9.103(c); OSG Product Tankers LLC v. United States, 82 Fed.Cl. 570, 576 (2008).

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9) See 48 C.F.R. §§ 9.405, 9.405-1 and 9.405-2.

10) See 48 C.F.R. § 9.400.

11) 68 F.R. 66534, 26 Nov 03.

12) Transforming Wartime Contracting: Controlling Costs, Reducing Risks, Commission on Wartime Contracting in Iraq and Afghanistan, 31 Aug 11, page 22.

While numerous specialized organizations and contracting funding sources have been developed to address these contracting needs, only limited changes have been made to the FAR and other regulations that provide contracting direction and guidance. Consequently, these organizations and sources of funding are guided by regulations developed for use in non-contingency environments. But the contingency environment brings with it rapidly-evolving operational needs, while many of the traditional organizations specializing in contracting lack the investigative and audit capabilities found in the offices of inspectors general or law enforcement agencies.

In contingency contracting cases, there are multiple layers of contacts between the agent or auditor developing information on a contractor, and the agency attorney responsible for assembling the case for review by the SDO. The end result is misunderstandings among the various stakeholders at the agency attorney, investigator and auditor levels and about how, when and why suspension and debarment may be applied in the contingency contracting environment.

In response to these challenges, SIGAR launched its Suspension and Debarment Program in June 2011 to operate in the Afghanistan contingency contracting environment. The program integrates SIGAR's audit and investigative functions with the administrative remedies of suspension and debarment. The result is a dramatic increase in the number of suspension and debarment referrals in SIGAR's cases: 47 individuals and seven companies referred for action to the Army and U.S. Agency for International Development since October 2010, with 24 referred since the inception of the SIGAR SDP. SIGAR developed its program after a review of the quality and quantity of referrals made to agency SDOs based on reconstruction-related fraud cases. We determined that a significant number of cases were not being acted upon due to a focus on criminal convictions and civil recoveries. As a

result, cases that failed to be accepted for criminal or civil action were being closed without referrals to SDOs, or were referred without the documentary evidence needed to meet the evidentiary standards for a successful suspension or debarment. This problem was especially acute for SIGAR because many cases that were opened and investigated involved local Afghan nationals or third-country nationals, or did not result in a direct loss to the government, resulting in lack of jurisdiction or a basis for sustaining a criminal or civil case in U.S. District Court. We also identified the need to have experienced legal counsel examine cases as they developed, to ensure that referrals for suspensions and debarments took place in a timely manner and not – as had often been the case – as afterthoughts to criminal and civil remedies. Furthermore, we found that while SIGAR's audit functions could detect and report contractor failure to perform, available remedies were limited to criminal action or civil cases brought under the Civil False Claims Act. These actions had the same limitations found in criminal investigations – with the added complication that they are primarily directed toward determining efficiency and project completion, not individual or corporate wrongdoing.

At approximately the same time SIGAR made the determination that suspension and debarment should be institutionalized as a core competency; the International Security and Assistance Force and U.S. Forces-Afghanistan were identifying and emphasizing contractor responsibility as a primary concern. As contracting in Afghanistan often involves multiple tiers of subcontractors to perform the requirements of a contract, there has been an upswing in reports of shoddy or incomplete performance by subcontractors who have not been vetted by the contracting officer, largely due to the lack of a direct legal relationship with the government. This gap in the contractor vetting process has also allowed criminal networks and insurgents to divert contract funds

from their intended purpose, frustrating the intent of many projects designed to improve the Afghan economy and the rule of law. In response to these concerns, Task Force 2010, an anti-corruption task force within ISAF, was established to oversee contractor vetting processes and contractor oversight functions. ISAF and USFOR-A also highlighted the need to suspend or debar contractors who engage in illicit activities – including smuggling and links to criminal networks – as the continued use of these contractors undermines efforts to support and promote the rule of law. This emphasis on contractor vetting provided the SIGAR Suspension and Debarment Program with guidance on how to meet the operational needs of ISAF and USFOR-A.

#### PROGRAM ELEMENTS

The SIGAR SDP is based on four main components, which include training, coordination, integration and deliverables. Each of these is discussed in detail within the SIGAR SDP instruction, which is a document based on best practices found in the suspension and debarment, investigative, audit and intelligence communities. Our goal is to implement a program that rapidly addresses operational and contracting needs found in the contingency contracting environment.

**Training:** All SIGAR investigative and audit staff, at headquarters and forward deployed locations, are receiving comprehensive training on suspension and debarment. This training will take the form of in-person training by SIGAR attorneys responsible for the implementation of the SDP, and reference materials that can be used on a day-to-day basis during the course of investigations and audits. Specific information about the materials to be gathered to support the suspension and debarment of individuals, organizations and contractors is provided, along with instruction on how suspension and debarment works. This training is institutionalizing these remedies in

SIGAR's processes. It also is raising awareness of the important role that suspension and debarment can play in reconstruction oversight, especially in holding contractors accountable.

**Coordination:** Throughout the development of suspension and debarment cases, it is critical to coordinate with the Department of Defense, Department of State, USAID, ISAF, USFOR-A and other organizations responsible for the award of contracts, task orders, purchase orders, grants and loans in Afghanistan. Suspension and debarment actions do not happen in a vacuum. The impact of excluding an individual, organization or company from contracting has wide-ranging direct and indirect consequences. Steps are taken at all stages, prior to the referral of any suspension or debarment of a contractor to the appropriate SDO, to evaluate the impact of exclusion. In addition, coordination with partner organizations helps to develop information regarding contractors. This information can be used to collaterally address contractor wrongdoing by recommending the exclusion of individuals or subsidiaries, as opposed to an entire organization or company, if appropriate. To this end, SIGAR regularly coordinates its actions with Task Force 2010, the U.S. Central Command Joint Theater Support Contracting Command, the Department of Justice and the International Contract Corruption Task Force. Coordination also takes place between SIGAR and the agency counsel responsible for reviewing suspension and debarment referrals, after a determination is made designating the lead agency for each suspension and debarment action. This process of coordination helps to ensure that the SIGAR Suspension and Debarment Program is responsive to the operational needs of the contracting community in Afghanistan. It also provides inputs that assist in the further development of the SIGAR's Suspension and Debarment Program.

**Integration:** As part of our Suspension and Debarment Program, SIGAR created the position of senior counsel for investigations to provide centralized oversight and control over how suspension and debarment actions are developed. This position, within the SIGAR Investigations Directorate, gives the SDP the ability to observe the development of cases and provide direction on the use of these remedies as part of our investigative and audit strategies. This integration into SIGAR's operations gives the senior counsel for investigations the ability to find, fix, track, target and engage individuals, organizations and companies accused of criminal activity or poor performance at an early stage, resulting in timely referrals to SDOs. The findings of investigators and auditors are supplemented by the ability of the senior counsel for investigations to call upon specialized analyst assistance available to the investigations directorate. Moreover, in cases where force protection is an issue, the senior counsel for investigations receives information from the intelligence community using SIGAR's capabilities to access classified materials. This integration also allows SIGAR to assess whether follow-up actions, using suspension and debarment remedies, is needed when additional affiliate individuals, companies and organizations that have had conduct imputed to them or other targets are identified during an investigation or audit. All criminal investigative cases that SIGAR participates in are referred to the senior counsel for investigations at the time of opening and closing. This ensures that suspension and debarment remedies are adequately addressed as part of the investigative process.

**Deliverables:** The primary mission of the SIGAR SDP is to provide comprehensive, documented and timely referrals of individuals, organizations and companies to SDOs. These referrals include information regarding the background of a contractor, the basis for the allegations supporting the suspension or

debarment referral, and the documentation necessary to establish an administrative record for use by the SDO. They are to be made at the earliest opportunity, taking into account the need to ensure that available criminal and civil remedies are addressed prior to undertaking any suspension or debarment action. To this end, the assistant inspector general for investigations reviews all referrals for suspension and/or debarment to ensure that such referrals do not impede or restrict the government's ability to pursue criminal or civil remedies against a contractor. In cases where a declination of criminal and/or civil remedies takes place, referrals are made following a determination by the senior counsel for investigations that the evidentiary standards for suspension or debarment have been met. During the course of an investigation or audit, the senior counsel for investigations also provides regular written input for the case file to document the need for materials to support a suspension or debarment. This ensures that – should these remedies become available – they can be utilized in a timely manner. Once a referral is made to the lead agency's SDO, additional supporting materials are provided to agency counsel upon request. In all cases, prior to the closing of an investigative file, the senior counsel for investigations provides a copy of any referral to a SDO or provides a written rationale outlining why a referral of a contractor for suspension or debarment was not made by SIGAR.

## CONCLUSION

Contract fraud has a corrosive impact wherever it occurs, but it is especially damaging in a contingency environment. Not only does it divert taxpayer dollars from their intended uses, but also it has the potential to divert U.S. resources to the insurgency and create additional hazards for our service members, contractors and their workforce. Suspension and debarment is a powerful tool that can complement the better-known legal remedies

of criminal prosecution and civil litigation. The robust use of suspension and debarment is endorsed by CIGIE and supported by leading members of Congress. SIGAR embraces this view, and believes that suspension and debarment has an important role to play in protecting the integrity of the acquisition process and safeguarding the U.S. taxpayers' investment in Afghanistan reconstruction from waste, fraud and abuse. ❧