



# **DoDIG FRAUD PREVENTION CONFERENCE OVERVIEW OF SUSPENSION & DEBARMENT**

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# KEY CONCEPT

- Agencies may only contract with responsible contractors.
- Debarments and suspensions are discretionary measures to effectuate this policy.
- The test for whether debarment is warranted is the present responsibility of the contractor and it may only be imposed to protect the Government, not to punish the contractor.



# RESPONSIBILITY AS A CONTRACTOR QUALIFICATION

- Far 9.103(b) “No . . . Award shall be made unless the contracting officer makes an affirmative determination of responsibility.”
- FAR 9.104-1 “To be determined responsible, a prospective contractor must – (d) have a satisfactory record of integrity and business ethics.”



# PURPOSE

- SUSPENSION AND DEBARMENT ARE ADMINISTRATIVE REMEDIES AVAILABLE TO AN AGENCY TO PROTECT ITSELF FROM CONTRACTORS WHO HAVE BEEN DETERMINED NOT TO BE “PRESENTLY RESPONSIBLE” BY EXCLUDING THEM FROM FUTURE CONTRACTING FOR A SPECIFIC PERIOD OF TIME.



# SUSPENSION

- THE ACTION TAKEN BY AN SDO UNDER THE FAR TO DISQUALIFY A CONTRACTOR **TEMPORARILY** FROM GOVERNMENT CONTRACTING AND GOVERNMENT-APPROVED SUBCONTRACTING.
- MAY BE FOR AN INDICTMENT, FOR COMPLETION OF AN INVESTIGATION, OR FOR A SAFETY REASON.



# TECNICO

- Alleged product substitution in ship repair services contract on USS Kennedy in Mayport.
- Tecnico allegedly substituted spec bolts with non-spec bolts and leap-frogged SERMC inspector to install same spec bolt in next steam valve station.
- SERMC referred to AIO and AIO's NCIS liaison opened investigation to allegations of product substitution.
- AIO suspended Tecnico on 4/7/06 pending completion of investigation and because of safety hazards to crew.
- By 4/25/06, Tecnico told SDO it had lost \$15.9M on work that was awarded to competitors and \$58.9M on work awaiting award.
- SDO terminated the suspension, except for Tecnico's Mayport operations, on 5/5/06 with negotiation of AA.
- Mayport operation suspension terminated 6/16/06 when NCIS investigation concluded Tecnico corporate management not involved in product substitution.



# HERLEY INDUSTRIES

- Herley and its CEO investigated by DCIS for cost mischarging and TINA violations and indicted on 6/6/06 in E.D. Pa on 35 counts of wire fraud, false statements, etc.
  - Alleged fraud related to the formation, pricing, and billing for one Air Force and two Navy contracts.
- AIO suspended Herley and its CEO on 6/9/06.
- Herley submitted proposed AA on 6/26/06.
- SDO finally executed AA on 10/12/06.
- Herley in plea negotiations to enter a guilty plea to obstruction of a Federal audit in violation of 18 U.S.C. 1516 and pay a criminal fine of \$3,500,000.
- Herley negotiating settlement of Civil FCA investigation with liability payment of \$6,000,000.



# HERLEY II

- While under AA, Herley notified by Boeing on 5/29/07 of “discrepancies” in test data for a component of test kits for Air Force’s CALCM.
- Herley conducted internal investigation and, pursuant to AA with AIO, notified AIO on 6/11/07 that its employees may have falsified test data.
- By 6/18/07, two test technicians confessed to manually modifying “fail” results to indicate a “pass” result with supervisor’s knowledge.
- All three of the employees had been through the Herley ethics training required by the AA with AIO twice.
- SDO suspended Herley on 6/26/07 pending completion of its internal investigation and development of additional internal controls to preclude such conduct in future.
- SDO reinstated AA on 8/15/07 following amendment to incorporate additional provisions on internal controls and training.



# PROPOSED DEBARMENT

- The SDO must notify a contractor that it is being “proposed for debarment” before debarment may be imposed.
- The contractor must be afforded an opportunity to submit “Matters in Opposition” to the proposed debarment and to appear before the SDO to make a presentation on why it should not be debarred.



# MATTERS IN OPPOSITION

- Contractors may submit facts and argument that rebut a “fact-based” proposed debarment.
- If proposed debarment is based on a conviction, contractor will generally submit evidence of remedial measures taken to correct the situation that lead to the cause for debarment.



# NNSY GRATUITIES CASES

- Two freight forwarding firms were providing illegal gratuities to Navy employees and contractor support personnel in return for GBL awards to haul DON freight at Norfolk Naval Shipyard and SPAWAR Norfolk.
- Firms' local Norfolk representatives were convicted and proposed for debarment, along with the corporate HQ of the two firms on an "imputation" theory.
  - DOJ did not prosecute the corporate HQs because of lack of evidence Mgt knew of the criminal misconduct of its local representatives.



# NNSY GRATUITIES CASES

- Both HQ firms presented MIO that established, to the SDO's satisfaction, that the local representatives were not employees under their control, but were independent brokers who paid for certain services and to use the corporate name of the HQ.
- SDO executed AAs with both firms, terminated the proposed debarments, and removed them from EPLS.



# DEBARMENT

- An action taken by an SDO under the FAR (or the Nonprocurement Common Rule) to exclude a contractor from Government contracting and Government-approved subcontracting for a **reasonable and specified** period of time.
  - FAR says period of debarment is generally not to exceed three years, but that is discretionary.
  - May be based upon a conviction, the entry of a guilty plea, or a civil judgment per FAR 9.406-2(a).
  - May be fact-based if a preponderance of the evidence establishes any cause listed at FAR 9.406-2(b) or (c).



## ELECTROLIZING CORPORATION OF OHIO (ECO)

- ECO was second tier subcontractor for nickel-plating of parts incorporated into the Control Drive Mechanism, which controls the nuclear reaction within the reactor for NAVSEA's Naval Nuclear Propulsion Program.
- Former ECO employee informed NCIS that ECO's plant manager falsified the results of "bend tests" required on parts by bending the parts prior to plating instead of after the plating process had been completed.
- NCIS investigation revealed that ECO's quality manager was aware of the plant manager's actions and knowingly conspired with him to deliver defective parts with false test certifications.



# ECO CRIMINAL PROCEEDINGS

- Plant manager entered guilty plea on 7/29/04 to conspiracy to defraud the U.S.
- Quality manager indicted on four counts on 9/22/04, entered “not guilty” plea, and requested several continuances.
- After a 2 ½ week trial, the quality manager was convicted by the jury on 1/12/06 on all four counts in the original indictment.
- On 3/27/06, the plant manager was sentenced to 366 days of imprisonment, three years probation, and restitution of \$1.3M to NAVSEA.
- Quality manager died of cancer before he was sentenced.



## ECO ADMINISTRATIVE PROCEEDINGS

- ECO submitted “present responsibility” packages to AIO on 2/4/05 and 2/2/06 and met with AIO on 2/11/05 and in a conference call on 1/20/06.
- On 1/12/07, ECO and Todd Noble, the owner who directed the criminal conduct by the plant manager and quality manager, settled the Civil FCA investigation for \$1,489,671 in restitution.
  - DOJ elected not to prosecute Noble for lack of evidence.
- SDO executed an AA with ECO on 7/26/07.
- Todd Noble proposed for a “fact-based” debarment on 7/3/07 and debarred for ten years on 11/28/07.



# ADMINISTRATIVE AGREEMENTS

- It is an agreement between an agency and a contractor which documents the existence of mitigating factors and other representations to the SDO and states the company's agreement to take certain actions for an agreed period to satisfy the agency of its "present responsibility."
- Entered into by SDO because the company has taken the steps outlined in DFARS 203.7000 to demonstrate responsibility.
- National Security concerns.
- Sole Source concerns.



# AA FACTORS

- Removal or isolation of wrongdoer.
- Ethics and Compliance Program.
- Implementation of remedial measures such as enhanced internal controls.
  - DFARS 203.7001 System of Management Controls List.
- Reports and monitoring.



# EPLS

- The “EPLS” is GSA’s “Excluded Parties List System” maintained by each agency entering data onto the web-based EPLS.
- Found at <http://epls.gov>.
- Lists all contractors currently suspended, proposed for debarment, or debarred from government contracting.
  - Also contains an archive of past listings.
- Listing has governmentwide effect.
- PCOs are required to check the EPLS before awarding any contract or first tier subcontract over \$30K.