

A Mechanic's View of the Government's Procurement Suspension and Debarment System: Time for a Major Overhaul or a Little Tune-Up?

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*Reprehensible examples of abuses by disreputable contractors and the failure to exclude these already known bad actors from getting new Federal contracts is a call for reform.*¹

I. Introduction

The government's suspension and debarment (S&D) system has come under scrutiny by Congress and government watchdog groups over recent years.² A few reasons for this attention include the rising national debt,³ the significant amount of money wasted on contracts during the wars in Iraq and Afghanistan,⁴ the substantial amount of taxpayers' dollars the government spends on contracts annually,⁵ and government contractors who violate the law but continue to receive federal contracts.⁶ There have been

numerous audits, studies, and reports conducted on various federal agencies' S&D systems.⁷ Congress has taken note and has proposed legislation to deal with their concerns about S&Ds.⁸

Federal agencies are under greater pressure to suspend or debar contractors who violate the law or perform poorly.⁹ Not only is pressure coming from Congress and watchdog groups, but President Obama's administration is also placing a greater emphasis on utilizing the S&D system.¹⁰ Some want federal agencies to use the S&D system as a way to punish contractors even though the Federal Acquisition Regulation (FAR) clearly states that punishment is not a purpose of S&D.¹¹ Although the government's S&D system

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¹ *How Convicts and Con Artists Receive New Federal Contracts: Hearing Before the H. Comm. on Oversight and Gov. Reform*, 111th Cong. 56 (2009) [hereinafter *How Convicts and Con Artists Receive New Federal Contracts Hearing*] (statement of Rep. Darrell E. Issa, Ranking Minority Member).

² See *Weeding Out Bad Contractors: Does the Government Have the Right Tools?: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. (2011) [hereinafter *Weeding Out Bad Contractors Hearing*]; *Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions?: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov. Reform*, 112th Cong. (2011) [hereinafter *Protecting Taxpayer Dollars Hearing*]; *Rewarding Bad Actors: Why Do Poor Performing Contractors Continue to Get Government Business?: Hearing Before the H. Comm. on Oversight and Gov. Reform*, 111th Cong. (2010) [hereinafter *Rewarding Bad Actors Hearing*]; *How Convicts and Con Artists Receive New Federal Contracts Hearing*, *supra* note 1; Scott Amey, *Is the Federal Suspension and Debarment System Broken?*, PROJECT ON GOVERNMENT OVERSIGHT (Nov. 17, 2011), <http://pogoblog.typepad.com/pogo/2011/11/is-the-federal-suspension-and-debarment-system-broken.html>.

³ The national debt as of 26 October 2012, was over \$16 trillion. Information on the national debt is available at <http://www.treasurydirect.gov/NP/BPDLogin?application=np>.

⁴ The Commission on Wartime Contracting in Iraq and Afghanistan (CWC) found that at least \$31 billion, and possibly as much as \$60 billion, was lost to contract waste and fraud during the wars in Iraq and Afghanistan. See COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS (2011), http://wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf [hereinafter CWC FINAL REPORT].

⁵ The U.S. government spent \$514 billion on contracts for goods and services in fiscal year 2012, \$537.5 billion in fiscal year 2011, and \$538.8 billion in fiscal year 2010. Information on government contract spending is available at <http://www.usaspending.gov/>.

⁶ See Sen. Bernie Sanders, Summary of the Final Report on Contracting Fraud (Oct. 20, 2011), <http://www.sanders.senate.gov/imo/media/doc/>

Summary_of_Contracting_Fraud.pdf. See also U.S. DEP'T OF DEF., UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH., AND LOGISTICS, REPORT TO CONGRESS ON CONTRACTING FRAUD (Oct. 2011).

⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-012-932, SUSPENSION AND DEBARMENT: DOD HAS ACTIVE REFERRAL PROCESSES, BUT ACTION NEEDED TO PROMOTE TRANSPARENCY (2012), <http://gao.gov/assets/650/648577.pdf> [hereinafter GAO-012-932]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-011-739, SUSPENSION AND DEBARMENT: SOME AGENCY PROGRAMS NEED GREATER ATTENTION, AND GOVERNMENTWIDE OVERSIGHT COULD BE IMPROVED (2011), <http://www.gao.gov/new.items/d11739.pdf> [hereinafter GAO-011-739]; see also *infra* note 37.

⁸ See Overseas Contractor Reform Act, H.R. 3588, 112th Cong. (1st Sess. 2011) [hereinafter H.R. 3588]; Contracting and Tax Accountability Act of 2013, H.R. 882, 113th Cong. (1st Sess. 2013) [hereinafter H.R. 882].

⁹ See Jason Miller, *Push for More Suspension, Debarments Receive Mixed Reactions*, FED. NEWS RADIO (Nov. 18, 2011), <http://federalnewsradio.com/index.php?nid=851&sid=2638305> ("The push by Congress and the administration for agencies to be more aggressive in suspending and debarment contractors . . ."); Jared Serbu, *Suspension and Debarments Rise Amid Pressure from Congress*, FED. NEWS RADIO (Jun. 14, 2012), <http://federalnewsradio.com/index.php?nid=851&sid=2903240> ("For years, Congress has pressed federal agencies to employ suspension and debarment process more often to weed out irresponsible contractors.").

¹⁰ On 15 November 2011, Jacob Lew, Director of the Office of Management and Budget (OMB), issued a memo to the heads of the executive departments and agencies discussing the importance of the suspension and debarment (S&D) system. Mr. Lew directed the departments and agencies to take numerous actions to improve their S&D programs. Memorandum from Jacob J. Lew, Dir., Office of Mgmt. & Budget, Office of the President, to Heads of Executive Dep'ts and Agencies, subject: Suspension and Debarment of Federal Contractors and Grantees (Nov. 15, 2011), <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-02.pdf>.

¹¹ See Alexina Jackson, Government Contracts Legal Forum, *Rehabilitation or Punishment? The Evolution of Suspension and Debarment* (9:51 AM May 15, 2012), <http://www.governmentcontractslegalforum.com/2012/05/articles/suspension-debarment/rehabilitation-or-punishment-the-evolution-of-suspension-and-debarment/>; see also FAR 9.402(b) (Jan. 2013) (stating

is garnering attention recently, the foundation and fundamentals of the system are solid and sound; the system just needs to be used consistently and correctly by all federal agencies equally.

In order to illustrate this point, this article examines the S&D system as it now exists. It explores whether there are problems in the current system, whether Congress should mandate more automatic S&Ds, and whether agency suspension and debarment officials (SDOs) have too much discretion in the system. In order to answer these questions, the article reviews the findings and recommendations of some of the recent audits, studies, and reports on agencies' S&D systems as well as some of the recently proposed pieces of congressional legislation dealing with S&Ds. The article concludes by making recommendations for a little tune-up, not a major overhaul, and argues the government's current S&D system just needs to be executed properly.

II. Background of the Suspension and Debarment System¹²

A. The Basics

The main purpose of the S&D system is to protect the taxpayers and the government from contracting with contractors who are not trustworthy and "responsible."¹³ Part 9 of the FAR discusses contractor qualifications and requires the government to deal only with "responsible" contractors.¹⁴ There are numerous requirements a contractor must meet to be considered responsible.¹⁵ One such requirement is the contractor must "have a satisfactory record of integrity and business ethics."¹⁶ If a contractor is determined to not be "presently responsible" and it is in the government's best interest to do so, the government can suspend, propose for debarment, or debar the contractor.

A contractor can be suspended or debarred from receiving government contracts either administratively under FAR Subpart 9.4¹⁷ or statutorily.¹⁸ A suspension or

the "serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for the purposes of punishment").

¹² Suspensions & Debarments occur in the procurement and nonprocurement setting. This article will not focus on the nonprocurement setting, which includes grants, awards, loans, etc. See Exec. Order No. 12,549, 3 C.F.R., 1986 Comp. 189; Nonprocurement Common Rule, 2 C.F.R. pt. 180 (2008).

¹³ See FAR 9.402.

¹⁴ See *id.* 9.103(a); *id.* 9.402(a).

¹⁵ See *id.* 9.104-1.

¹⁶ See *id.* 9.104-1(d).

¹⁷ See *infra* Part II.B.

¹⁸ See *infra* Part II.C.

debarment generally has government-wide effect¹⁹ and applies to all future contracts unless an agency head or authorized person determines there is a compelling reason to waive the suspension or debarment.²⁰ Once a contractor is suspended, debarred, or proposed for debarment, the agency is required to list the contractor in the General Services Administration's (GSA) System for Award Management (SAM)²¹—which consolidates several procurement databases, including the Excluded Parties List System (EPLS)²²—for the public, and more importantly, contracting officers to see.²³ While the effects of being suspended or debarred may be the same, how the suspension or debarment comes about, either administratively or statutorily, is very different.

B. Administrative Suspension and Debarment

Federal Acquisition Regulation Subpart 9.4 contains the regulations which control how federal agencies can administratively suspend or debar. Administrative S&Ds are discretionary actions of the federal agencies' SDOs.²⁴ Suspension is "a serious action to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Government's interest."²⁵ A suspension is for a temporary period, usually no longer than twelve months unless an extension has been requested by an Assistant Attorney General and then no longer than eighteen months unless legal proceedings have been initiated in that period.²⁶

¹⁹ See, e.g., FAR 9.401; Exec. Order No. 12,689, 3 C.F.R., 1989 Comp. 235.

²⁰ See FAR 9.405; *id.* 9.405-1; *id.* 9.406-1(c); *id.* 9.407-1(d).

²¹ The General Services Administration's (GSA) System for Award Management (SAM) combines several federal procurement systems and the Catalog of Federal Domestic Assistance into one new system. The consolidation is being done in phases. The SAM currently includes the functionality from the Central Contractor Registry (CCR), Federal Agency Registration (Fedreg), Online Representations and Certifications Applications (ORCA), and Excluded Parties List System (EPLS). The benefits of SAM include streamlined and integrated processes, elimination of data redundancies, and reduced costs while providing improved capabilities. The SAM is available at <https://www.sam.gov/portal/public/SAM/>.

²² The Excluded Parties List System (EPLS) was an electronic database maintained by the GSA that contained certain information about all parties suspended, proposed for debarment, debarred, or otherwise disqualified from government contracts, awards, or grants. Even though the EPLS was retired on 21 November 2012, the requirements of Federal Acquisition Regulation (FAR) 9.404 regarding the EPLS are still applicable to SAM.

²³ See FAR 9.404.

²⁴ See *id.* 9.402(a); see also *infra* Part V (providing further discussion on suspension and debarment official (SDO) discretion).

²⁵ FAR 9.407-1(b)(1).

²⁶ *Id.* 9.407-4.

Debarment is a final action and it is for a definite period of time, depending on the seriousness of the cause but generally not to exceed three years.²⁷ Causes for debarment fall into four different categories: (1) when a contractor is convicted of or found civilly liable for certain offenses;²⁸ (2) when the SDO finds, by a preponderance of the evidence, that a contractor committed certain offenses;²⁹ (3) when the Secretary of Homeland Security or the Attorney General of the United States determines that a contractor is not in compliance with Immigration and Nationality Act employment provisions;³⁰ or (4) when the SDO finds, by a preponderance of the evidence, that “any other cause of so serious or compelling a nature” exists “that it affects the present responsibility of the contractor or subcontractor.”³¹ Causes for suspension are very similar to causes for debarment except the standard of proof is adequate evidence—as opposed to preponderance of the evidence—for debarment.³² While administrative S&Ds are discretionary actions of SDOs, statutory S&Ds are more strict and rigid and do not allow for much discretion.

C. Statutory Suspension and Debarment

A contractor can be suspended or debarred because a federal statute requires it. Some statutes prohibit certain conduct and contain provisions stating a contractor who

violates the statute shall be debarred from contracting with the federal government in the future.³³ Sometimes these statutes limit the suspension or debarment to contracts with certain agencies³⁴ or to certain facilities where the violation occurred.³⁵ Statutory S&Ds do not allow for SDO discretion like administrative S&Ds. While administrative and statutory S&Ds are in place to protect the government from contracting with nonresponsible parties, is the current system meeting its objective or have recent audits and congressional inquiries exposed some faults in the system?

III. Are There Problems With the Current Suspension and Debarment System?

A. Recent Audits, Studies, and Reports

Over the years, the Government Accountability Office (GAO) has conducted studies and provided reports regarding the government’s S&D system as a whole and with respect to some of its parts.³⁶ What may have spurred the GAO to study and examine the S&D system were the numerous federal agencies’ inspectors general’s (IG) audits, studies, and reports regarding their S&D programs, which showed minimal or uneven application of S&Ds by the various agencies.³⁷

²⁷ *Id.* 9.406-4.

²⁸ The certain offenses are (1) commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract; (2) violations of federal or state antitrust statutes relating to the submission of offers; (3) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property; (4) intentionally affixing a “Made in America” label inappropriately; and (5) commission of any other offense indicating a lack of business integrity or honesty that seriously and directly affects the present responsibility of the contractor or subcontractor. *See id.* 9.406-2(a)(1)-(5).

²⁹ These offenses are (1) serious violations of terms of a government contractor or subcontract, such as (a) willful failure to perform the terms in one or more contracts or (b) a history of failure to perform or unsatisfactory performance of one or more contracts; (2) certain violations of the Drug-Free Workplace Act of 1988; (3) intentionally affixing a “Made in America” label inappropriately; (4) commission of an unfair trade practice as defined in FAR 9.403; (5) delinquent federal taxes exceeding \$3,000; (6) knowing failure by a principal, until three years after final payment on any government contract awarded to the contractor, to timely disclose to the government, in connection with the award, performance, or closeout of the contract or subcontract thereunder, credible evidence of (a) violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found under Title 18 of the United States Code, (b) violation of the civil False Claims Act, or (c) significant overpayments on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001. *See id.* 9.406-2(b)(1)(i)-(vi) (Jan. 2013).

³⁰ *Id.* 9.406-2(b)(2).

³¹ *Id.* 9.406-2(c).

³² *See id.* 9.407-2 (Jan. 2013).

³³ *See* Davis-Bacon Act, 40 U.S.C. § 3144 (2006) (debarment for not paying certain wages); Buy American Act, 41 U.S.C. § 8303 (2006) (debarment for not using American materials in construction project in the United States).

³⁴ *See* 10 U.S.C. § 2408 (2006) (prohibitions on persons convicted of Department of Defense (DoD) contract related felonies and debarment from Department of Defense contracts).

³⁵ *See* Clean Air Act, 42 U.S.C. § 7606 (2006), and Clean Water Act, 33 U.S.C. § 1368 (2006) (limiting suspension to facility where violation occurred).

³⁶ *See* GAO-012-932, *supra* note 7; GAO-011-739, *supra* note 7; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-174, EXCLUDED PARTIES LIST SYSTEM: SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS (2009), <http://www.gao.gov/assets/290/286493.pdf> [hereinafter GAO-09-174].

³⁷ *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REP. No. 12-01, AUDIT OF ADMINISTRATIVE SUSPENSION, DEBARMENT, AND OTHER INTERNAL REMEDIES WITHIN THE DEP’T OF JUSTICE (2011), <http://www.justice.gov/oig/reports/2011/a1201.pdf> (finding that during fiscal years 2005-2010, 77 contracts and modifications totaling approximately \$15.6 million were made to six separate suspended or debarred parties by DOJ components and fourteen of these awards were made because the awarding official failed to review EPLS; seventeen referrals for S&D were made involving thirty-five individuals or firms resulting in thirteen debarment actions and DOJ did not promptly or accurately input its debarment decisions to EPLS); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF DEF, REPORT No. D-2011-03, ADDITIONAL ACTIONS CAN FURTHER IMPROVE THE DOD SUSPENSION AND DEBARMENT PROCESS (2011), <http://www.dodig.mil/audit/reports/fy11/11-083.pdf> (finding that during fiscal years 2007-2009, the DLA SDO suspended or debarred many more contractors based on poor performance than the Services’ SDOs and seventeen contract actions totaling about \$600,000 were awarded to eight suspended or debarred contractors who were listed in the EPLS); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF AGRIC., AUDIT REP. No. 50601-14-AT, EFFECTIVENESS AND ENFORCEMENT OF

In February 2009, the GAO issued a report finding contractors that had been suspended or debarred for serious offenses ranging from national security violations to tax fraud continued to receive federal contracts.³⁸ The GAO determined most of the improper contracts awarded could be attributed to ineffective management of the EPLS database³⁹ or to control weaknesses at both excluding and procuring agencies.⁴⁰ With respect to ineffective management of the EPLS database, the GAO found no single agency is proactively monitoring the content or function of the

database, the database contains incomplete information,⁴¹ its search functions are inadequate,⁴² and agency points of contact information are incorrect.⁴³ With respect to control weaknesses at both the excluding and procuring agency, the GAO found excluding agencies did not always enter a Data Universal Numbering System (DUNS) number,⁴⁴ excluding agencies did not enter exclusions in a timely manner, contracting officers did not check EPLS, automated purchasing systems may not interface with EPLS, and excluded parties remain listed on the GSA schedule.⁴⁵

SUSPENSION AND DEBARMENT REGULATIONS IN THE U.S. DEPARTMENT OF AGRICULTURE (2010), <http://www.usda.gov/oig/webdocs/50601-14-AT.pdf> (finding that USDA has not fully implemented a S&D program—it assigned only one inexperienced staff official to handle procurement S&D cases as one of a number of the official’s collateral duties; it did not train agency contracting officials on S&D procedures so officials did not always check EPLS and four contracts were awarded to excluded parties; and from 2004–2007, USDA had only two debarment cases); OFFICE OF THE INSPECTOR GEN., DEP’T OF HOMELAND SEC., REP. NO. 10-50, DHS’ USE OF SUSPENSION AND DEBARMENT ACTIONS FOR POORLY PERFORMING CONTRACTORS (2010), http://www.oig.dhs.gov/assets/Mgmt/OIG_10-50_Feb10.pdf (finding that the department is reluctant to apply its S&D policies and procedures against poorly-performing contractors—twenty-three instances where contractors were terminated for default or cause but were not reviewed to determine whether a S&D referral was warranted and twenty-one instances where the contractor was terminated for default but the reasons were not recorded in the government-wide databases); OFFICE OF THE INSPECTOR GEN., U.S. AGENCY FOR INT’L DEVELOPMENT, AUDIT REPORT NO. 9-000-10-001-P, AUDIT OF USAID’S PROCESS FOR SUSPENSION AND DEBARMENT (2009), <http://oig.usaid.gov/sites/default/files/audit-reports/9-000-10-001-p.pdf> (finding U.S. Agency for International Development’s (USAID) S&D processes did not adequately protect the public interest for a number of reasons including too few S&D actions (two procurement and seven nonprocurement actions during fiscal years 2003–2007), untimely or complete failure to enter S&D information into EPLS, and poor documentation for the actions it took; the SDO and the Evaluation Division cannot devote enough attention to S&D because they are burdened with too many responsibilities); OFFICE OF THE INSPECTOR GEN., DEP’T OF TRANSP., REP. NO. ZA-2010-034, DOT’S SUSPENSION AND DEBARMENT PROGRAM DOES NOT SAFEGUARD AGAINST AWARDS TO IMPROPER PARTIES (2010), http://www.oig.dot.gov/sites/dot/files/Suspension_and_Debarment_1.7.10_0.pdf (finding DOT’s Operating Administrations’ (OAs) (Federal Highway Administration, Federal Aviation Administration, and Federal Transit Administrations) S&D decisions and reporting were significantly delayed because they failed to assign sufficient priority to their S&D workload, as staff usually performed this work as a collateral duty and OAs did not always enter accurate or complete information in EPLS).

³⁸ See GAO-09-174, *supra* note 36, at 3.

³⁹ This is not the first Government Accountability Office (GAO) report criticizing the EPLS database. In July 2005, the GAO found that the information in the EPLS database may be insufficient to enable contracting officers to determine with confidence that a prospective contractor is not currently suspended, debarred, or proposed for debarment. While FAR 9.404 requires agencies to enter numerous pieces of information in the EPLS database, including contractors’ Data Universal Numbering System (DUNS) numbers—a unique nine digit identification number assigned by Dun & Bradstreet, Inc., to identify business entities—GAO found that the DUNS numbers were routinely omitted. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-479, FEDERAL PROCUREMENT: ADDITIONAL DATA REPORTING COULD IMPROVE THE SUSPENSION AND DEBARMENT PROCESS (2005), <http://www.gao.gov/new.items/d05479.pdf> [hereinafter GAO-05-479].

⁴⁰ See GAO-09-174, *supra* note 36, at 4, 16.

In August 2011, the GAO released another study wherein it examined a couple of different aspects of the government’s S&D system.⁴⁶ The GAO analyzed the relationship, if any, between practices at ten selected federal agencies⁴⁷ and the level of S&Ds under the FAR as well as government-wide efforts to oversee and coordinate the use of S&Ds across federal agencies.⁴⁸ The GAO found the four agencies⁴⁹ with the most procurement-related S&Ds shared common characteristics that the other six agencies did not.⁵⁰ While every agency’s S&D system is unique, the common characteristics between the four agencies were “a dedicated suspension and debarment program with full-time staff, detailed policies and procedures, and practices that encourage an active referral process.”⁵¹ The other six agencies had few or no procurement-related suspensions or debarments, regardless of the agency’s volume of contracting activity.⁵²

⁴¹ This same issue was highlighted by GAO in its July 2005 report. See GAO-05-479, *supra* note 39, at 14–16.

⁴² This same finding was highlighted by GAO in its July 2005 report. See *id.*

⁴³ See GAO-09-174, *supra* note 36, at 17–18.

⁴⁴ The GAO highlighted this same issue in its July 2005 report wherein it recommended that GSA modify the EPLS database to require contractor identification numbers for all actions entered into the EPLS database. See GAO-05-479, *supra* note 39, at 14, 18.

⁴⁵ See GAO-09-174, *supra* note 36, at 18–19.

⁴⁶ See GAO-011-739, *supra* note 7.

⁴⁷ *Id.* The ten agencies GAO analyzed were GSA; the Departments of State (DOS); Justice (DOJ); Commerce; Health and Human Services; the Defense Logistics Agency (DLA); the Department of the Navy; the Department of Homeland Security’s (DHS) U.S. Immigration and Customs Enforcement (ICE); and Federal Emergency Management Agency (FEMA); and the U.S. Treasury. Each of these ten agencies had more than \$1 billion in contract obligations in fiscal year 2009. *Id.* at 3.

⁴⁸ *Id.* at 2.

⁴⁹ The four agencies were the Navy, DLA, GSA, and ICE. *Id.* at 12.

⁵⁰ *Id.* at 11–12.

⁵¹ *Id.* at 12.

⁵² GAO-011-739, *supra* note 7, at 11. “Officials at the agencies with few or no procurement-related suspensions or debarments, acknowledged that their agencies need to place greater emphasis on suspension and debarment as a

Another significant finding from this August 2011 GAO report was that government-wide efforts to oversee S&Ds faced challenges and could be improved.⁵³ In 1986, the Office of Management and Budget (OMB) assigned responsibility for government-wide S&D oversight and coordination to the Interagency Suspension and Debarment Committee (ISDC).⁵⁴ The ISDC provides support to assist agencies in implementing their S&D programs as well as serving as a forum for agencies to share ideas and help in coordinating S&D actions among agencies.⁵⁵

However, in order to accomplish its mission, the ISDC relies on voluntary agency participation in its processes and its member agencies' limited resources.⁵⁶ The GAO recommended improving all agencies' S&D programs and enhancing government-wide oversight; thus, Administrator of Federal Procurement Policy, which falls under OMB, should issue government-wide guidance that describes the elements of an active S&D program and emphasizes the importance of cooperating with the ISDC.⁵⁷ To that end, in 2008, Congress passed legislation to strengthen the role of the ISDC.⁵⁸ While this legislation has helped increase the effectiveness of the ISDC, it did not provide the ISDC with any of its own resources, personnel, or enforcement capabilities to truly effect those changes successfully.

The GAO and federal agencies' reports brought potential issues with the S&D system to light. Most of the highlighted issues involved the inconsistent and improper use of EPLS as well as the uneven application of S&Ds by the various agencies. These reports piqued Congress's interest in the area and prompted hearings to look into the S&D system for any flaws.

tool to ensure that the government only does business with responsible contractors." *Id.* at 18.

⁵³ *Id.* at 19.

⁵⁴ *Id.* at 20. The Interagency Suspension and Debarment Committee (ISDC) was established by Executive Order 12,549 on 18 February 1986. The ISDC's standing members include each of the twenty-four agencies covered by the Chief Financial Officers Act as well as participation from nine independent agencies and government corporations. *See id.* n.13, at 5.

⁵⁵ *Id.* at 5–6.

⁵⁶ *Id.* at 19.

⁵⁷ *Id.* at 23.

⁵⁸ The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 873, 122 Stat. 457 (2008), strengthened the ISDC's role by specifying certain functions it was to perform, including (1) resolve lead agency responsibility and coordinate actions among interested agencies with respect to suspension or debarment proceedings; (2) report to Congress annually on agency suspension and debarment actions and accomplishments as well as agency participation in ISDC's work; (3) recommend to OMB ISDC approved changes to the government S&D system and its rules; and (4) encourage and assist agencies in cooperating to achieve operational efficiency in the government-wide S&D system. GAO-011-739, *supra* note 7, at 20.

B. Congressional and Commission Oversight

The audits, studies, and reports from the previous section provided Congress with good reason to question the government's S&D system and to hold hearings to inquire into the system's utility. On 26 February 2009, just one day after the GAO released Report 09-174 criticizing EPLS and finding that suspended or debarred contractors continued to receive federal contracts,⁵⁹ the House of Representatives' Committee on Oversight and Government Reform held a hearing entitled "How Convicts and Con Artists Receive New Federal Contracts."⁶⁰ The hearing focused on GAO's report, EPLS's deficiencies, and how those deficiencies impact the S&D system.⁶¹ The committee heard testimony from representatives of GSA, which was responsible for the management of EPLS, who tried to defend EPLS and discuss what actions GSA was taking to cure some of the issues raised by the GAO report.⁶² On 18 March 2010, the same House Committee held another hearing regarding why poorly performing contractors continue to receive government business.⁶³ The committee heard testimony from representatives of the Department of Transportation (DOT), U.S. Agency for International Development (USAID), and Department of Homeland Security (DHS) regarding the weaknesses of their S&D programs and steps they were taking to improve them.⁶⁴

On 6 October 2011, a House procurement reform subcommittee held its own hearing on the use of S&D actions.⁶⁵ This hearing focused on the findings of GAO Report 11-739, which found six of the ten federal agencies studied had few or no procurement-related suspensions or debarments over a five-year period.⁶⁶ The committee heard testimony from GAO discussing its report as well as from representatives from federal agencies with active and non-active S&D programs.⁶⁷ The representatives from agencies with non-active programs averred they would heed GAO's

⁵⁹ *See* GAO-09-174, *supra* note 36.

⁶⁰ *See How Convicts and Con Artists Receive New Federal Contracts Hearing*, *supra* note 1.

⁶¹ *Id.*

⁶² *See id.* at 71–76 (statement of James Williams, Commissioner, Federal Acquisition Service, GSA); *id.* at 77–83 (statement of David Drabkin, Acting Chief Acquisition Officer & Senior Procurement Executive, GSA).

⁶³ *See Rewarding Bad Actors Hearing*, *supra* note 2.

⁶⁴ *See id.* at 47–52 (statement of Gregory Woods, Deputy Gen. Counsel, Dep't of Transp.); *id.* at 60–68 (statement of Drew W. Luten, Senior Deputy Assistant Admin'r for Mgmt., U.S. Agency for Int'l Dev.); *id.* at 53–59 (statement of Elaine C. Duke, Under Sec'y for Mgmt., Dep't of Homeland Sec.).

⁶⁵ *See Protecting Taxpayer Dollars Hearing*, *supra* note 2.

⁶⁶ *See* GAO-011-739, *supra* note 7.

⁶⁷ *See Protecting Taxpayer Dollars Hearing*, *supra* note 2.

recommendations and take the steps necessary to upgrade their programs.⁶⁸

Not only has Congress held hearings on the government's S&D system but the Commission on Wartime Contracting in Iraq and Afghanistan (CWC)⁶⁹ has as well. On 28 February 2011, the CWC held a hearing entitled "Ensuring Contractor Accountability: Past Performance and Suspension & Debarment," which examined some of the issues and obstacles facing federal agencies' S&D programs during contingency operations.⁷⁰ The hearing highlighted a lack of acquisition workforce needed to run S&D programs and questioned the role, power, and utility of the ISDC.⁷¹

Over the last few years, the GAO reports, federal agencies' IGs' reports, and congressional hearings and oversight brought much attention to and focus on the S&D system. With all this new attention directed at the S&D system, federal agencies had to look at their own programs and evaluate if they were truly doing enough.

C. Has Increased Attention Caused an Increase in Suspension and Debarment Actions?

Over the last few years, many in Congress thought that S&Ds were not being utilized enough.⁷² For some reason, possibly due to the various reports and audits, the numerous congressional hearings, or the push by OMB,⁷³ the number of S&D actions has increased significantly.⁷⁴ According to

the ISDC, in fiscal year 2011, there were 5,838 combined S&D actions.⁷⁵ In fiscal year 2010, there were 4,208 combined S&D actions (1,630 fewer than in the following year), while in fiscal year 2009, there were only 2,668 combined S&D actions (fewer than half that were to take place a mere two years later).⁷⁶ This begs the questions, was the substantial increase in actions justified or just a knee-jerk reaction to the new attention? Was the increase in S&D actions used to punish contractors and if so, is that a legitimate reason for the actions?

IV. Should Congress Mandate More Suspensions and Debarments?

A. Recently Proposed Legislation Pushing for Mandatory Suspensions and Debarments

Administratively suspending or debaring a contractor just to punish the contractor clearly violates the FAR.⁷⁷ Due to stories of contractors committing crimes or poorly performing current contracts but continuing to receive new government contracts, some government watchdog groups and members of Congress want these contractors punished.⁷⁸ One way to punish these contractors is to automatically suspend or debar them by passing legislation mandating suspension or debarment for certain conduct.⁷⁹ While there are already statutory S&Ds in place,⁸⁰ there has been an increase in proposed legislation containing mandatory suspension or debarment language.

Recently proposed legislation that would create an automatic proposal for debarment⁸¹ are House of

⁶⁸ See *id.* at 43–48 (statement of Nick Nayak, Chief Procurement Officer, Dep't of Homeland Sec.); *id.* at 49–54 (statement of Nancy J. Gunderson, Deputy Assistant Sec'y, Office of Grants and Acquisition Pol'y and Accountability, Dep't of Health and Hum. Servs.).

⁶⁹ The CWC was an eight-member independent, bipartisan legislative commission established to study federal agency contracting for the reconstruction, logistical support of coalition forces, and the performance of security functions in Iraq and Afghanistan. It was created from Section 841 of the National Defense Authorization Act for Fiscal Year 2008. See <http://wartimecontracting.gov/> for more information on the CWC.

⁷⁰ See *Ensuring Contractor Accountability: Past Performance and Suspension & Debarment: Hearing Before Commission on Wartime Contracting In Iraq and Afghanistan* (2011) [hereinafter *CWC Hearing*].

⁷¹ *Id.*

⁷² See *Weeding Out Bad Contractors Hearing*, *supra* note 2, at 2 (statement of Sen. Joseph I. Lieberman, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs) ("[I]t is a tool that is used all too rarely . . ."); *id.* at 4 (statement of Sen. Susan M. Collins) ("The failure of agencies to use their suspension authority regrettably is not a new revelation."); *Rewarding Bad Actors Hearing*, *supra* note 2, at 1 (statement of Rep. Edolphus Towns, Chairman, H. Comm. on Oversight and Gov. Reform) ("Unfortunately . . . the suspension and debarment tools often go unused, quietly rusting away in the procurement toolbox.").

⁷³ See *supra* note 10.

⁷⁴ Kenneth B. Weckstein & Michael D. Maloney, *View from Brown Rudnick: Contractor Debarment and Suspension Numbers Go Up—What's Going On?*, 98 FED. CONTRACTS REP. 558 (Nov. 13, 2012); see also David

Hansen, *Increased Suspensions, Debarments Raises Legal Questions for Contractors*, 98 FED. CONTRACTS REP. 358 (Sept. 25, 2012).

⁷⁵ There were 928 suspensions, 2,512 proposed debarments, and 2,398 debarments. INTERAGENCY SUSPENSION AND DEBARMENT COMM., REPORT BY THE INTERAGENCY SUSPENSION AND DEBARMENT COMM. ON FEDERAL AGENCY SUSPENSION AND DEBARMENT ACTIVITIES (Sept. 18, 2012), http://www.epa.gov/isdc/pdf/isdc_section_873_fy_2011_report_to_congress_s_lieberman.pdf [hereinafter ISDC 2012 REPORT].

⁷⁶ In fiscal year 2010, there were 612 suspensions, 1,945 proposed debarments, and 1,651 debarments while in fiscal year 2009, there were only 417 suspensions, 750 proposed debarments, and 1,501 debarments. INTERAGENCY SUSPENSION AND DEBARMENT COMM., REPORT ON FEDERAL AGENCY SUSPENSION AND DEBARMENT ACTIVITIES (Jun. 15, 2011), <http://www.whitehouse.gov/sites/default/files/omb/procurement/reports/isdc-report-to-congress-61411.pdf>.

⁷⁷ See *supra* note 11.

⁷⁸ See *id.*

⁷⁹ See Jackson, *supra* note 11 ("Fiscal Year 2012 legislation and proposed legislation, however, suggest a punitive purpose for suspension and debarment, replacing discretion with mandatory outcomes.").

⁸⁰ See *supra* Part II.C.

⁸¹ Proposal for debarment is a notice issued by the SDO advising a contractor that debarment is being considered. The notice contains the

Representatives Bill 3588 (H.R. 3588), Overseas Contractor Reform Act,⁸² and House of Representatives Bill 882 (H.R. 882), Contracting and Tax Accountability Act of 2013.⁸³ House Bill 3588 requires that any person found to be in violation of the Foreign Corrupt Practices Act of 1977 must be proposed for debarment from any federal contract or grant within thirty days after judgment of a violation becomes final.⁸⁴ The bill also allows for the head of a federal agency to waive the proposal or to exempt the proposal if the person self-reported the violation.⁸⁵ House Bill 882 requires, absent a waiver, the head of an executive agency to propose a person for debarment after receiving an offer for a contract from such person if the person's offer contains a certification that such person has a seriously delinquent tax debt⁸⁶ or submitted false information regarding his federal tax debt.⁸⁷ These proposed pieces of legislation would erode the discretion of SDOs and preclude SDOs from utilizing the procedures in FAR 9.4 to decide whether a contractor needs to be suspended, proposed for debarment, or debarred on a case-by-case basis.

B. Proposed Automatic Suspensions Withdrawn After Hearings

1. *Commission on Wartime Contracting in Iraq and Afghanistan's Recommendations*

Recommendation 24 of the CWC's second interim report, which was released on 24 February 2011, calls for the increased use of S&Ds.⁸⁸ In particular, it recommends that suspension actions based on contract-related indictments be mandatory for a predetermined time and not subject to the discretion of SDOs.⁸⁹ On 28 February 2011, the CWC held a

reasons for the proposed debarment and informs the contractor that he may submit matters in opposition. The notice also contains the procedures governing the debarment decisionmaking procedures. A contractor who is proposed for debarment is barred from receiving new government contracts while the decision is being made. *See* FAR 9.406-3(c) (Jan. 2013).

⁸² *See* H.R. 3588, *supra* note 8.

⁸³ *See* H.R. 882, *supra* note 8.

⁸⁴ *See* H.R. 3588, *supra* note 8.

⁸⁵ *Id.*

⁸⁶ A "seriously delinquent tax debt" is defined in the bill as an outstanding debt under the Internal Revenue Code of 1986 for which a notice of lien has been filed in public records pursuant to section 6323 of such Code. *See* H.R. 882, *supra* note 8.

⁸⁷ *See id.*

⁸⁸ *See* COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, AT WHAT RISK? CORRECTING OVER-RELIANCE ON CONTRACTORS IN CONTINGENCY OPERATIONS 50-51 (2011) pdf, available at http://wartimecontracting.gov/docs/CWC_InterimReport2-lowres.pdf.

⁸⁹ *Id.*

hearing to discuss the contents of its second interim report and focused on contractor accountability by using past performance data and S&Ds.⁹⁰ The CWC heard testimony from federal agency acquisition executives and SDOs, some of whom testified regarding their concern about automatic suspensions.⁹¹

On 31 August 2011, the CWC issued its final report to Congress which included many recommendations.⁹² Recommendation 12 dealt with strengthening contract enforcement tools.⁹³ While part of Recommendation 12 discusses facilitating the increased use of S&Ds by revising regulations to lower procedural barriers, it does not include language requiring mandatory suspensions.⁹⁴ In fact, the CWC intentionally withdrew its previous recommendation for mandatory suspension after additional research and deliberation on the subject.⁹⁵

2. *The Comprehensive Contingency Contracting Reform Act of 2012*

The Comprehensive Contingency Contracting Reform Act of 2012 (CCRA) was first introduced as Senate Bill 2139 (S. 2139) on 29 February 2012 by Senator Claire McCaskill.⁹⁶ This proposed legislation was based on the findings and recommendations of the CWC.⁹⁷ Section 113 of Senate 2139 called for amending the FAR to add three additional bases for automatically suspending a contractor.⁹⁸

⁹⁰ *See* CWC Hearing, *supra* note 70.

⁹¹ *See id.* at 127 (statement of Daniel I. Gordon, Adm'r for Fed. Procurement Pol'y) ("I have concern when I hear people talk about automatic suspension . . ."); *id.* at 149 (statement of Willard D. Blalock, Chair of ISDC) ("I am strongly opposed to automatic exclusions because I believe the SDO needs to have discretion to judge each case on its own facts and circumstances.").

⁹² *See* CWC FINAL REPORT, *supra* note 4.

⁹³ *See id.* at 160.

⁹⁴ *See id.*

⁹⁵ *See id.* at note 4.

⁹⁶ The Comprehensive Contingency Contracting Reform Act (CCRA) of 2012, S. 2139 [hereinafter S. 2139].

⁹⁷ *See The Comprehensive Contingency Contracting Reform Act of 2012: Hearing on S. 2139 Before the Ad Hoc Subcomm. on Contracting Oversight of the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 7 (2012) [hereinafter *CCRA Hearing*] (statement of Sen. Claire McCaskill).

⁹⁸ The three additional bases were: (1) a charge by indictment or information of the contractor on a federal offense relating to the performance of a contract with DoD, DoS, or USAID in connection with an overseas contingency operation; (2) a final determination by the head of a contracting agency of DoD, DoS, or USAID that the contractor failed to pay or refund amounts due or owed to the federal government in connection with an overseas operation; and (3) a charge by the federal government in a civil or criminal proceeding alleging fraudulent actions on the part of the contractor, whether by an employee, affiliate, or subsidiary of the contractor

On 17 April 2012, the Senate's Ad Hoc Subcommittee on Contracting Oversight from the Committee on Homeland Security and Governmental Affairs held a hearing to discuss Senate Bill 2139.⁹⁹ The subcommittee heard testimony from representatives from DOS, DOD, and USAID who clearly opposed Section 113 and the new automatic suspension bases.¹⁰⁰

On 12 June 2012, Senator McCaskill sponsored a second version of CCCRA—which was Senate Bill 3286 (S. 3286).¹⁰¹ Unlike Section 113 of Senate Bill 2139, Section 113 of Senate Bill 3286 calls for revising the FAR to provide for automatic referral of a covered person¹⁰² to the appropriate SDO to make a suspension or debarment determination.¹⁰³ After hearing arguments opposing automatic suspensions, Senator McCaskill changed the automatic suspensions into automatic referrals which does achieve a more balanced approach by requiring federal agencies to really examine contractors whose integrity or business ethics may be in question, while still preserving the SDO's discretion and ability to handle these matters on a

or any business owned or controlled by the contractor, on any contract with the federal government whether or not in connection with an overseas contingency operation. See S. 2139, *supra* note 96, sec. 113.

⁹⁹ See CCCRA Hearing, *supra* note 97.

¹⁰⁰ See *id.* (prepared statement of Patrick Kennedy, Under Sec'y for Mgmt. for DoS) (“[W]e believe that the current, long-standing policy requiring a reasoned decision from the SDO based on a totality of information remains a sound approach, and would have concerns with a provision that imposes automatic suspension and debarment which will likely lead to due process challenges by the affected contractor community and potential court action that could delay necessary action in crisis situations.”); *id.* (prepared statement of Richard T. Ginman, Dir., Def. Procurement and Acquisition Pol’y) (“DoD opposes mandating automatic suspension because for the suspension and debarment process to have legitimacy and credibility, SDOs need independence, freedom of action, and discretion to exercise judgment regarding whether an exclusion is appropriate.”); *id.* (prepared statement of Angelique M. Crumbly, Acting Assistant to the Adm’r, Bureau for Mgmt. for USAID) (“We must take issue, however, with any mandate that removes the procedural protections for a case-by-case review of allegations, or reduces the discretionary authority of the SDO.”).

¹⁰¹ The Comprehensive Contingency Contracting Reform Act (CCCRA) of 2012, S. 3286 [hereinafter S. 3286].

¹⁰² A covered person is someone who: (1) has been charged with a federal criminal offense relating to the award or performance of a contract of a covered agency; (2) has been alleged, in a civil or criminal proceeding brought by the United States, to have engaged in fraudulent actions in connection with the award or performance of a contract of a covered agency; or (3) has been determined by the head of a contracting agency of a covered agency to have failed to pay or refund amounts due or owed to the federal government in connection with the performance of a contract of the covered agency. A covered agency includes DoD, DoS, and USAID. See *id.* sec. 113.

¹⁰³ Senate Bill 3254, National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013), Section 881A is very similar to Senate Bill 3286 Section 113 as it calls for revising the FAR to provide for the automatic referral of a covered person (dealing with a DoD contract) to the appropriate SDO for a suspension or debarment determination. This provision was not incorporated into House of Representatives Bill 4310 (H.R. 4310), the final signed NDAA 2013. See H.R. 4310 (NDAA 2013) [hereinafter H.R. 4310].

case-by-case basis. Ultimately, there is no need for more automatic S&Ds and they should not be used to punish contractors who violate the law as there is a criminal justice and civil legal system for that purpose.

V. Do Suspension and Debarment Officials Have Too Much Discretion?

People who criticize the awarding of new contracts to contractors who may have transgressed in the past sometimes fail to understand the purpose of the S&D system.¹⁰⁴ The main purpose of the system is to protect the government's interests by not contracting with people who are untrustworthy and irresponsible; it is not to punish.¹⁰⁵ In order to accomplish this purpose, the FAR specifically states “debarment and suspension are discretionary actions”¹⁰⁶ and it is the SDO's “responsibility to determine whether debarment is in the Government's interest.”¹⁰⁷

The existence of a cause for debarment or suspension listed in FAR 9.406-2 and 9.407-2 does not necessarily require the contractor to be debarred or suspended. Before arriving at any debarment or suspension decision, the SDO should consider the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors.¹⁰⁸ Federal Acquisition Regulation 9.406-1(a) also lists ten specific factors¹⁰⁹ the SDO should consider before

¹⁰⁴ See Acquisition Reform Working Group 2012 Legislative Recommendations 29–33 (Apr. 10, 2012) (“It is important for policy makers to understand that debarment or suspension is not intended to be punishment; rather it is a prophylactic measure to protect the government from doing business with a person or business that is not presently responsible.”); see also Jessica Tillipman, The FCPA Blog, *Suspension and Debarment Part II: ‘Seriously, S&D May Not be Used to Punish Contractors’* (6:28 AM June 18, 2012) (“One of the most fundamentally (and frequently) misunderstood aspects of the FAR 9.4 Suspension and Debarment (S&D) regime is that S&D are only to be used for the purpose of protecting the Government, not to punish contractors for their past misconduct.”), <http://www.fcpcbog.com/blog/2012/6/18/suspension-debarment-part-ii-seriously-sd-may-not-be-used-to.html>.

¹⁰⁵ See FAR 9.402 (Jan. 2013); see also *supra* notes 11, 104.

¹⁰⁶ FAR 9.402(a).

¹⁰⁷ *Id.* 9.406-1(a).

¹⁰⁸ See *id.* 9.406-1(a); *id.* 9.407-1(b)(2).

¹⁰⁹ The ten factors are: (1) whether the contractor had effective standards of conduct and internal control systems in place; (2) whether the contractor reported the activity in a timely manner; (3) whether the contractor has fully investigated 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 or has made or agreed to make full restitution; (6) whether the contractor has taken appropriate disciplinary action against the responsible individuals; (7) whether the contractor has implemented or agreed to implement remedial measures; (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

making a debarment decision. These aspects of the FAR encourage the SDO to utilize his discretion.

The SDO has numerous ways to handle a contractor whose actions fall into one of the causes for debarment. The SDO can suspend, propose for debarment, debar, enter into an administrative agreement,¹¹⁰ or do nothing at all as long as whatever action is taken protects the government's interests.¹¹¹ The SDO requires as much discretion as possible when deciding how to handle a specific contractor because every case's facts and circumstances are different; this is why mandatory suspension or debarment is not appropriate.¹¹² The SDO must protect the government's interest by making sure the government is only contracting with responsible parties and these decisions are based on numerous factors and made on a case-by-case basis. Therefore, this paper argues SDO discretion is integral to a successful administrative S&D system.

VI. Recommendations to Improve the Suspension and Debarment System

A. Need More Acquisition Workforce

The congressional procurement reforms of the 1990s mandated a reduction in the acquisition workforce.¹¹³ The

circumstances within the contractor's organization that led to the cause for debarment; and (10) whether the contractor's management understands the seriousness of the misconduct and has implemented programs to prevent recurrence. *Id.* 9.406-1(a)(1)-(10).

¹¹⁰ An administrative agreement is a voluntary agreement between an SDO and a company who may be facing a potential suspension or debarment. While the terms will differ depending on the case, most will require the contractor to take certain verifiable actions, such as implementation of enhanced internal corporate governance practices and procedures, and adoption of compliance, ethics, and reporting programs. Some may also call for the use of independent third party monitors or the removal of individuals associated with a violation from positions of responsibility within the company. *See* ISDC 2012 REPORT, *supra* note 75, at 9. *See also* U.S. DEP'T OF DEF., DEFENSE FEDERAL ACQUISITION REG. SUPP. pt. 209.406-1 (Dec 2012).

¹¹¹ In order to make a debarment determination, the SDO will follow the agency's decision-making process which should be as informal as practicable but consistent with principles of fundamental fairness to the contractor. *See* FAR 9.406-3(b).

¹¹² *See Protecting Taxpayer Dollars Hearing*, *supra* note 2, at 62–63 (statement of Steven A. Shaw, Deputy Gen. Counsel for Contractor Responsibility, Dep't of the Air Force); *Protecting Taxpayer Dollars Hearing*, *supra* note 2, at 63 (statement of Richard A. Pelletier, SDO, U.S. Envtl. Protection Agency); *see also* Todd J. Canni & Steven A. Shaw, *Comments on the Wartime Commission's Recommendations on Suspension and Debarment*, SERV. CONTRACTOR, Sept. 2011, at 13–17, available at http://www.pscouncil.org/c/p/ServiceContractorMagazine/Service_ContractorMagazine/Service_Contractor_M.aspx.

¹¹³ *See* Matthew Weigelt, *Panel Finds Contracting Disarray*, FED. COMPUTER WEEK, Nov. 12, 2007, http://fcw.com/Articles/2007/11/08/Panel-finds-contracting-disarray.aspx?sc_lang=en&p=1 (“Congress legislated acquisition workforce cuts of 25 percent in the 1990s . . .”); *see also* Joseph J. Petrillo, *Wrong Lessons Learned*, FED. COMPUTER WK., Sept. 17,

“workforce shrunk from 460,516 in fiscal 1990 to 230,556 in fiscal 1999.”¹¹⁴ “The acquisition workforce has yet to recover from the earlier reductions. Since 2000 federal procurement spending rose 155 percent, while the acquisition workforce only increased by 10 percent.”¹¹⁵ The acquisition workforce must increase significantly in order to handle the increase in procurement spending.¹¹⁶ For the S&D system to work properly there needs to be an adequate acquisition workforce in place actually accomplishing all the requirements and tasks the FAR calls for, such as documenting and reporting contractors' past performance,¹¹⁷ making referrals for S&Ds, and making proper award fee determinations. Contracting officers, contracting specialists, and contracting officer representatives cannot be spread so thin and overworked that they are not fulfilling all their required duties under the FAR, such as use of EPLS (now SAM).¹¹⁸ Even with the large national debt in mind and trying to find ways to cut government spending, increasing the acquisition workforce is truly needed.¹¹⁹

B. Need More Suspension and Debarment Personnel

2007, <http://fcw.com/Articles/2007/09/16/Petrillo-Wrong-lessons-learned.aspx> (“[I]t was the procurement reforms of the 1990s that hallowed out government acquisition offices.”).

¹¹⁴ Steven L. Schooner, *Keeping Up with Procurement*, GOVEXEC.COM (July 1, 2006), <http://www.govexec.com/magazine-advice-and-dissent/magazine-advice-and-dissent-viewpoint/2006/07/keeping-up-with-procurement/22210/>.

¹¹⁵ Michael J. Davidson, *Creekmore Lecture, Where We Came from and Where We May Be Going*, 211 MIL. L. REV. 263, 274–75 (2012); *see also How Convicts and Con Artists Receive New Federal Contracts Hearing*, *supra* note 1, at 87 (statement of Edward M. Harrington, Deputy Assistant Sec'y of the Army (Procurement)) (“My concern is that the acquisition workforce . . . has declined significantly in the last decade while the number of dollars that we are executing from a contract perspective has more than doubled.”).

¹¹⁶ *See* Daniel I. Gordon, *The Twenty-Seventh Gilbert A. Cuneo Lecture in Government Contract Law*, 210 MIL. L. REV. 103, 105–06 (2011) (“We badly need to build up our acquisition workforce.”).

¹¹⁷ *See* Memorandum from Joseph G. Jordan, Adm'r, Office of Fed. Procurement Policy, Office of Mgmt. & Budget, Office of the President, to Chief Acquisition Officers and Senior Procurement Execs, subject: Improving the Collection and Use of Information about Contractor Performance and Integrity (Mar. 6, 2013), <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/improving-the-collection-and-use-of-information-about-contractor-performance-and-integrity.pdf>.

¹¹⁸ *See* GAO-09-174, *supra* note 36; *see also supra* note 37 (summarizing the federal agencies' reports.).

¹¹⁹ Congress realized this point with respect to DoD and in 2008 established the Defense Acquisition Workforce Development Fund (DAWDF). The DAWDF was established to ensure DoD's acquisition workforce was adequately sized, trained, and equipped to meet department needs. *See* NDAA for Fiscal Year 2008, Pub. L. No. 110–181, § 852, 122 Stat. 3 (2008) (codified at 10 U.S.C. § 1705).

Federal agencies' S&D systems are set up differently as each agency is unique in its composition and mission.¹²⁰ While the FAR allows for agencies to establish their S&D systems as they see fit in accordance with some guidelines,¹²¹ all agencies' systems should have adequate personnel and policies in place to accomplish the FAR's objective of contracting only with responsible parties. Government Accountability Office Report 11-739 clearly highlighted the fact that agencies with active S&D programs had certain characteristics and a dedicated program with full-time staff was one such characteristic.¹²² Management and resources devoted to S&D programs are widely inconsistent across agencies.¹²³ Congress is trying to force federal agencies to become more consistent in their S&D personnel, resources, and structure,¹²⁴ which can be a good thing as long as the requirements or limitations are not too restrictive considering every federal agency has its own mission and structure.¹²⁵ However it happens, federal agencies need to devote more personnel and resources solely to their S&D systems.

C. Need More Interagency Suspension and Debarment Committee Staff and Authority

As discussed earlier, the GAO found that the ISDC faced challenges and could be improved.¹²⁶ The fact that the

¹²⁰ See *CWC Hearing*, *supra* note 70, at 72 (statement of Willard D. Blalock, Chair of ISDC) ("Each executive-branch agency manages its responsibilities for suspension and debarment differently, based on its own statutory and functional responsibilities.").

¹²¹ See FAR 9.402(e) (Jan. 2013) ("Agencies shall establish appropriate procedures to implement the policies and procedures of this subpart.").

¹²² See GAO-011-739, *supra* note 7, at 13–14; see also *CWC Hearing*, *supra* note 70, at 73 (statement of Willard D. Blalock, Chair of ISDC) ("The system would undoubtedly be more effective if each agency had a dedicated full-time suspension/debarment staff to process cases.").

¹²³ See *CWC Hearing*, *supra* note 70 (written statement of Daniel I. Gordon, Adm'r for Fed. Procurement Pol'y).

¹²⁴ H.R. 4310 (NDAA 2013), Section 861 places requirements and limitations on SDOs in DoD, DoS, and USAID. It requires SDOs to be independent of acquisition officials and Inspector Generals, to document final decisions on formal referrals, and to establish written policies for the consideration of referrals. More importantly, the bill also requires SDOs to have adequate staff and resources. See H.R. 4310, *supra* note 103.

¹²⁵ On 7 February 2013, Representative Darrell Issa, Chairman of the House Committee on Oversight and Government Reform, released a discussion draft of a bill titled "Stop Unworthy Spending Act" or "SUSPEND Act." The draft bill would consolidate more than 41 civilian agency and government corporations' S&D offices and functions into one centralized board called the Board of Civilian Suspension and Debarment. The centralized board would be responsible for all the consolidated civilian agencies' S&Ds. The SUSPEND Act discussion draft can be found at http://oversight.house.gov/wp-content/uploads/2013/02/Draft_SUSPEND_Act_2-5.pdf.

¹²⁶ See *supra* Part III.A; GAO-011-739, *supra* note 7, at 19–21; see also *Protecting Taxpayer Dollars Hearing*, *supra* note 2, at 12 (statement of William T. Woods, Dir., Acquisition and Sourcing Mgmt. for GAO).

ISDC relies on voluntary agency participation and does not have its own dedicated staff or resources is troublesome. Even though Congress passed legislation in 2008 to strengthen the ISDC's role¹²⁷ and OMB issued a memo in November 2011 requiring agencies to participate regularly in the ISDC,¹²⁸ more must be done. The ISDC chairman's sole job should be to run the ISDC; not be an additional duty to his regular job.¹²⁹ The ISDC also needs dedicated staff to help carry out its mission of overseeing the government's S&D system. Since every agency's S&D program is unique, the ISDC's oversight duties are integral to a well functioning government S&D system and it must be resourced appropriately. Implementing these three recommended changes will provide the workforce greatly needed resources to properly run and execute the government's S&D system.

VII. Conclusion

While there has been much scrutiny of the government's S&D system, at its core, the system and its policies are sound but it must actually be followed to be effective.¹³⁰ The fact that there were many studies, audits, and reports which led to congressional hearings is a good thing since they shined a spotlight on a system that for some federal agencies had not seen the light of day in a while. With this renewed focus and emphasis on S&D programs, many federal agencies that did not have active programs are now realizing they must make significant changes to meet their obligation of protecting the taxpayers by contracting only with responsible parties.

¹²⁷ See *supra* note 58.

¹²⁸ See *supra* note 10; *Weeding Out Bad Contractors Hearing*, *supra* note 2, at 43 (statement of Daniel I. Gordon, Administrator for Federal Procurement Policy) ("[W]e are directing each CFO Act agency to actively participate in the ISDC.").

¹²⁹ The current ISDC chairman is David M. Sims who is also the Program Manager of S&Ds for the Department of Interior. The previous ISDC chairman was Mr. Willard D. Blalock who also worked for the Navy while he was chairman. When questioned by the CWC regarding why the ISDC's mandatory annual report to Congress was not submitted, Mr. Blalock stated "the fact of the matter is, let me cut to the chase. My responsibilities at the Navy have been increased by an order of magnitude, and I have simply not had the opportunity to finish the report." See *CWC Hearing*, *supra* note 70, at 87.

¹³⁰ See *Weeding Out Bad Contractors Hearing*, *supra* note 2, at 55–57 (statement of David M. Sims, Chair of ISDC) ("The basic Federal policies and procedures governing suspension and debarment . . . are sound . . . [T]he rules as currently stated provide agencies and departments with a highly effective tool kit . . . Those agencies with robust programs show that the tool kit is effective when used. The tool kit needs employment by more agencies and departments, rather than modification."); *CWC Hearing*, *supra* note 70 (written statement of Daniel I. Gordon, Adm'r for Fed. Procurement Policy) ("The FAR's basic policies and procedures remain sound . . ."). *Id.* (written statement of Willard D. Blalock, Chair of ISDC) ("The current suspension and debarment system is appropriate. What is required is the will to use it.").

Subpart 9.4 of the FAR provides the essential guidance and building blocks for a successful S&D program. Congress does not need to pass more legislation mandating suspensions or debarments in order for the system to be effective or to punish bad contractors, as that is what the criminal justice system and civil remedies, such as the False Claims Act, are for. An integral aspect of subpart 9.4 of the FAR's guidance is the discretion it provides SDOs when running their programs. Suspension and debarment officials require as much discretion as possible in order to ensure the government's interests are truly protected, and sometimes that discretion means SDOs enter into administrative agreements with contractors rather than suspending or debarring them. The government's interests are not always met by a shrinking pool of potential contractors but rather may be met when contractors are rehabilitated and there is a larger pool of potential offerors which in the end can promote competition and reduce the cost to the taxpayer.

The key to achieving a successful program is having the people in place with the resources, will, and drive to utilize the tools at their disposal. Federal agencies must foster and develop an adequate, well-trained acquisition workforce which fulfills all duties and responsibilities under the FAR, for example, inputting complete and accurate data in SAM

and also checking SAM when required. Federal agencies need SDOs with full-functioning staffs to discharge their duties and responsibilities. Suspension and debarment officials must emphasize open and frequent communication with the acquisition workforce and IG so all three are all in agreement about referrals for potential suspension or debarment actions. The ISDC should be properly staffed so it can fulfill its vital role as a liaison among the various agencies and to make sure less mature programs are taking the steps necessary to become fully operational and effective. The ISDC must ensure every federal agency's program has the characteristics the GAO listed in its 2011 report and if they do not, help the agency to achieve those characteristics.

While numbers are one indication of a robust program, it should not only be about how many S&D actions are taken. Rather, it should be more about the quality of an agency's program and what steps are being taken to ensure the government is only contracting with responsible parties. Because the system contains indicators of improvement and is headed toward more robustness, a major overhaul is not needed as the current regulations, policies, and procedures in place provide for a sound system when they are actually being used properly.