

USALSA Report
U.S. Army Legal Services Agency

Contract Appeals Division

Administrative Compliance Agreements: An Effective Tool in the Suspension and Debarment Process

Major Jennifer S. Zucker
Trial Attorney, Contract Appeals Division

Captain Joseph Fratarcangeli
Trial Attorney, Contract Appeals Division

Introduction

Many in the government contracting community question the effectiveness of administrative remedies such as suspension and debarment for ensuring a competitive and nondiscriminatory contracting environment. Such criticism may be well-founded, but the primary intent of these provisions is to protect the government and the taxpayer. One problem in ensuring effectiveness has been the lack of a mechanism for periodic review of contractor responsibility following an adverse administrative decision. Suspension and debarment, frequently viewed as an all or nothing remedy, generally function to disqualify the non-responsible contractor from receiving new government contracts for a specified period of time. In many cases, this is unobjectionable. In some cases, however, the government may have an interest in rehabilitating the contractor through the use of corrective and remedial administrative measures.

To this end, the Army has expanded the use of administrative compliance agreements.¹ Compliance agreements provide continuing assurance that the interests of the government will be sufficiently protected without resorting to a suspension or debarment.² Moreover, administrative compliance agreements provide redress for the apparent inequities of the suspension and debarment process with respect to small and large businesses. Every case, however, does not warrant the application of an agreement, as it requires considerable time and expense.³ Factors for the government to consider before entering into an administrative compliance agreement include: the contractor's otherwise satisfactory performance; its response to the wrongdoing; its willingness to cooperate; its willing to make restitution; and its willingness to implement or strengthen an ethics program.⁴

This article briefly outlines suspension and debarment procedures and then discusses administrative compliance agreements as an effective option. The discussion also includes the application of an administrative compliance agreement to large and small businesses, as well as the measures taken by Boeing following the Air Force's recent suspension.

Background

Federal Acquisition Regulation (FAR) Part 9 encompasses procedures pertaining to contractor responsibility, as well as suspension and debarment.⁵ A contracting officer shall make an affirmative determination of responsibility preceding all

¹ See Robert Kittel, *Not Just a Punishment: Debarment Can Be Tool to Improve Acquisition System*, FEDERALTIMES.COM, at <http://federaltimes.com/index.php?S=324697> (last visited Jan. 31, 2004). Compliance agreements are also referred to as administrative agreements. The Army includes the word compliance in the title because the primary focus is, and should be, contractor compliance. See Interview with Colonel Karl M. Ellcessor, Chief, U.S. Army Contract Appeals Division, U.S. Army Legal Services Agency, in Arlington, Va. (Sept. 13, 2004).

² See *id.*

³ The complexity of compliance agreements necessitate cooperation between the Procurement Fraud Branch attorneys and the suspension and debarment official, who is involved in every phase of the agreement.

⁴ Not surprisingly, these factors mirror those considered by the debarring official prior to making a debarment decision. See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 9.406-1 (July 1, 2004), available at <http://www.arnet.gov/far/> [hereinafter FAR] (noting that the on-line version includes amendments from *Federal Acquisition Circular* (FAC) 19 (Jan. 1, 2004) and FAC 18 (Jan. 12, 2004)). The FAC publishes revisions, amendments, and updates to the FAR. See RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT 233 (1998).

⁵ See FAR, *supra* note 4, at 9.402.

government contract awards.⁶ In making that determination, the contracting officer must assess such factors as the adequacy of the contractor's financial resources, its ability to satisfy the contract requirements, and whether the contractor has "a satisfactory record of integrity and business ethics."⁷ This analysis ensures that federal agencies only contract with responsible contractors. Furthermore, the analysis only applies on a contract-by-contract basis.

On the other hand, suspension and debarments render contractors ineligible from receiving any new federal government contracts.⁸ Suspension is action taken by the suspension official under *FAR 9.407* to temporarily disqualify a contractor.⁹ Debarment is action taken by the debarring official under *FAR 9.406* to exclude a contractor for a reasonable, specified period.¹⁰ *FAR 9.407-2* and *FAR 9.406-2* lists causes for suspension and debarment.¹¹

Are Administrative Compliance Agreements a Viable Alternative to Suspension and Debarment?

Administrative compliance agreements offer an option to agencies considering suspension and debarment. Although waivers permit the federal government to conduct business with a contractor that is suspended or debarred, such action is criticized because the contractor continues to receive business without addressing the misconduct. Administrative compliance agreements ensure that the government (and more importantly, the suspension and debarment official (SDO)), through internal and external audits, has confidence that the contractor will act responsibly. Although no industry template for administrative compliance agreements exists, the following elements draw from and expand upon those listed in *Defense Federal Acquisition Regulation Supplement 203.7001*.¹²

1. Recognition of Malfeasance: Contractor recognition of malfeasance and adequate assurance that it will not repeat the misconduct.

2. Removal: Removal of the wrongdoers within the firm, as appropriate. This may be difficult depending on the size of the company and/or the position held by the offender.

3. Satisfactory Performance: Overall contractor performance shall be otherwise satisfactory. The contractor's performance must be in strict compliance with the terms of current contracts.

4. Appointment of an Ombudsman: The Ombudsman's function is to assess the corporate ethical climate and act as the eyes and ears of the agency. This position is critical to any successful compliance agreement and generally refers to an independent attorney, certified public accountant, or other expert knowledgeable in the area of government contracts. While employed by the contractor, the Ombudsman will not be under its direct control. The Ombudsman will certify on an annual basis that he or she has no financial conflicts of interest. Responsibilities include: assisting in the implementation of the Agreement; serving as the first point of contact for all questions regarding the Agreement, conducting internal audits; and, investigating instances of alleged improprieties.

5. Contractor Responsibility Program (CRP): In order to ensure responsibility, the contractor must be willing to institute a CRP involving all employees. The program shall be designed to ensure that the contractor maintains the high standard of business integrity and honesty required of government contractors. At a minimum, the program shall include the following features:

a. Notification and dissemination of information to the contractor's employees regarding the existence of the compliance agreement;

⁶ See *id.* at 9.103(b).

⁷ See *id.* at 9.104-1(d).

⁸ Pursuant to *FAR 9.405-1(a)*, "[A]gencies may continue contracts or subcontracts in existence at the time that the contractor was debarred, suspended, or proposed for debarment unless the agency head [] directs otherwise." Unless the agency head issues a written waiver for a suspended or debarred contractor, agencies may not: "(1) Place orders exceeding the guaranteed minimum under indefinite quantity contracts; (2) Place orders under optional use Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements; or (3) Add new work, exercise options, or otherwise extend the duration of current contracts or orders." See *id.* at 9.405-1(b)(1)-(3).

⁹ See *id.* at 2.101.

¹⁰ See *id.* at 9.406.

¹¹ See generally *id.* at 9.406-2, 9.407-2.

¹² U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 203.7001 (July 2002).

b. Adoption of a written Code of Business Ethics and Conduct (Code). The Code should be tailored for different levels of employees in the corporate hierarchy (reflecting their different duties, responsibilities, and core ethical values),¹³ and the company should ensure all employees have access to, understand, and certify its Code;¹⁴

c. Publication of a Government Contracting and Procedures Manual (Manual) to regulate the performance of government contracts. The Manual shall describe, in detail, the contractor's method for competing for and administering government contracts and the positions responsible for performing, approving, and reviewing these tasks. Moreover, it will address the procedural safeguards the contractor has implemented to ensure that the misconduct does not reoccur;

d. Implementation of a training program in business ethics, government contracts, and applicable rules and regulations appropriate to correcting the misconduct. The Code and Manual described above should be provided to all employees and shall form the basis of the training. Training should be conducted at least annually and employees should be required to certify their attendance. Contractors should ensure that newly hired employees satisfy the aforementioned requirements as part of their orientation.

e. Appointment of an Ethics Program Director. This position refers to a company employee who will be the first point of contact for all ethics questions.

f. Installation of a mechanism, such as a hotline, for employees or other interested parties to report suspected instances of misconduct.

6. Compliance Visits: Because the Army has a vested interest in the contractor's responsibility, it will conduct on-site compliance visits. These visits permit the agency or its designee to examine and reproduce the contractor's books, records, documents, and supporting materials related to any report, allegation or complaint of suspected misconduct. They will be conducted on a periodic basis following reasonable notice.

7. Restitution: The contractor shall make restitution, when appropriate. For example, if the misconduct involves the falsification of invoices, the contractor should compensate the Government for the overcharge.

8. Payment of Costs: Contractors shall pay the costs associated with negotiating and administering the Agreement, to include costs associated with agency site visits to the contractor and any of its divisions or its subsidiaries. The money shall then be deposited in the United States Treasury pursuant to the Miscellaneous Receipts Statute.¹⁵

These components form the framework of an effective compliance agreement. The particular circumstances of each case will dictate which factors apply. For instance, the elements for a small business with ten employees will differ from those applicable to a large business. The following two case studies are situations in which the government reached effective compliance agreements—one with a small business, the other with a large business.

Applying Compliance Agreements to Government Contractors

The Case of Small Business X

In 2004, the Army SDO notified *Small Business X (SBX)*¹⁶ that it was suspended based upon a criminal information filed in a U.S. District Court. The Army also suspended Jane Doe, *SBX*'s owner and president; John Doe, *SBX*'s vice-president and Jane Doe's husband; and their daughter, Janet Doe, an *SBX* employee. The criminal information charged *SBX* with intentionally attempting to export and cause the export of military hardware without obtaining the proper licenses and approvals in violation of the Arms Export Control Act.¹⁷ The criminal information also charged Janet Doe with obstruction

¹³ Core values are quintessential to the moral and ethical fiber of any organization. For example, the Army values (loyalty, dignity, respect, selfless-service, honesty, integrity, and personal courage) represent a code of personal conduct and a moral ethos for all its Soldiers and civilian personnel.

¹⁴ See Joe Murphy & Win Swenson, *20 Questions To Ask About Your Code of Conduct*, ΕΤΗΚΟΣ, July/Aug. 2003, available at <http://www.ethikosjournal.com/html/20questions.html> (posing questions for contractors to consider when measuring the effectiveness of their code of conduct).

¹⁵ 31 U.S.C. § 3302(b) (LEXIS 2004); see generally Major Timothy D. Matheny, *Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW., Sept. 1997, at 41-42 (advocating an exception to the Miscellaneous Receipts Statute for the recovery of procurement fraud funds).

¹⁶ *Small Business X* is a fictional company; however, this hypothetical is based upon a recent Army administrative compliance agreement.

¹⁷ See 22 U.S.C. § 2778 (2000).

of justice by knowingly and intentionally impeding and obstructing officers of the United States in the execution of a search warrant. Ultimately, *SBX* and Janet Doe pled guilty to the charges contained in the criminal information and were placed on probation for five years and fined a substantial amount.

Earlier, *SBX* advised the Army that the company and Janet Doe were under investigation, and the investigation was likely to result in criminal charges. *SBX* learned that the government was investigating the company for suspected violations of the arms export control laws when agents of the U.S. Department of Homeland Security and the Department of Defense Inspector General searched *SBX*'s business premises pursuant to a warrant. *SBX* then retained criminal counsel to conduct an internal inquiry regarding the alleged misconduct. *SBX* subsequently provided a copy of the report of that inquiry to the Army.

Following suspension, *SBX*'s counsel approached the Army Procurement Fraud Branch requesting that the Army terminate the suspensions pursuant to an administrative compliance agreement. Since most of *SBX*'s business consisted of government contracts, the viability of the firm and its fifty to sixty otherwise innocent employees were at risk. *SBX* informed the government of specific corrective and remedial measures undertaken to establish its responsibility. As a condition of entering into an agreement, however, the SDO required *SBX* to insulate the company and the government from future dealings with the Doe family, who would remain suspended despite the agreement. *SBX* agreed that the dismissed individuals would have no involvement with or responsibility for the operation of or conduct of *SBX*'s affairs. In addition to the forced resignations, the wrongdoer's voting stock shares were put in a blind trust under the direct control of a government-approved trustee.¹⁸ Here, the Doe family acts as a silent partner and their communications must be routed through the ombudsman. Because the terms of the agreement favored the government, the SDO terminated *SBX*'s suspension.¹⁹

A suspension and debarment could signal the end of a small business specializing in government contracts. Oftentimes, innocent employees lose their jobs and their hard work is discredited by the misconduct of a few individuals. Administrative compliance agreements offer an alternative means to balancing these inequities.

The Case of Large Business Y

In 2004, the Army SDO notified *Large Business Y (LBY)* and Mr. James Smith, a *LBY* managing director, that they were suspended based upon indictments issued by a U.S. District Court. The indictments charged *LBY* and Mr. Smith each with conspiracy to restrain trade in violation of the Sherman Act, and conspiracy to defraud the United States. One month later, *LBY* entered into a plea agreement in which it agreed to waive indictment and further agreed to conditionally plead guilty to the two-count criminal information. The court accepted the plea agreement.

Large Business Y's counsel requested that the SDO terminate the suspension, and that for purposes of the compliance agreement, *LBY* and Mr. Smith be treated as having been convicted of felony violations of conspiracy to restrain trade in violation of the Sherman Act and conspiracy to defraud the United States. Although *LBY* believed it acted in good faith, it accepted the Army's contention that its conduct of engaging in price-fixing and collusion with other businesses reflected a lack of business integrity and business honesty. This behavior seriously impacted *LBY*'s responsibility. Before the parties could implement a compliance agreement however, the SDO insisted upon specific terms and conditions.

First, Mr. Smith could not hold any position as an officer, director, or active employee of *LBY* or serve in such capacity unofficially and/or free of charge. Second, *LBY* had to make restitution to the government for the loss suffered from *LBY* and Mr. Smith's price-fixing and anti-competition activities. Finally, in addition to the general provisions included in compliance agreements, *LBY* had to agree that if it establishes new companies or subsidiaries, merges with another company, or transfers the entire company or major assets to new owners, the agreement would survive and bind the parties and their respective successors and assignees unless the new owners request and demonstrate grounds for nullification of the compliance agreement.

The cases of *SBX* and *LBY* exemplify the appropriate application of administrative compliance agreements.

¹⁸ In the case of *SBX*, the Doe family controlled the voting stock, which made it difficult to prohibit all contact between the family and the company. In the instance where the wrongdoer owns only a share of the company, it may be preferable to require the wrongdoer to divest ownership.

¹⁹ The compliance agreement contains the same or similar components as discussed above. The terms were also coordinated with investigators and the assistant U.S. attorney, who all concurred with the conditions of the agreement.

Applying the Facts to the Recent Boeing Suspension

Boeing's actions (and reactions) following the Air Force's recent suspension, reflect many of the terms and conditions included in a compliance agreement.

The Boeing Case

In July 2003, the Air Force suspended three of Boeing's business units²⁰ and three of its former employees.²¹ The Air Force based the suspensions on its own investigation, which concluded that Boeing committed serious violations of the law.²² The Department of Justice's (DOJs) press release, issued in connection with its criminal case, stated that:

- (1) Boeing possessed an extraordinary amount of rival Lockheed Martin Corporation's proprietary data during an Air Force procurement;
- (2) the data was capable of providing great insight into Lockheed Martin's cost and pricing; and
- (3) Boeing failed to disclose to the Air Force the full extent of the data in its possession for approximately four years.²³

The Air Force twice waived Boeing's suspension upon a determination that compelling reasons existed for the award of new government contracts. The Air Force issued both waivers, because Boeing was the only contractor capable of launching the Global Positioning Satellite and the National Reconnaissance Office Satellite.²⁴ Absent Boeing's otherwise satisfactory performance and its corrective and remedial measures, it is doubtful that the waivers would have been approved or justified.

Boeing's Actions Constitute a De Facto Compliance Agreement

Before the suspension, Boeing admitted that it violated acceptable standards of business integrity and honesty and terminated the employees who engaged in the improper conduct.²⁵ Boeing also retained former Senator Warren B. Rudman, a partner in a D.C. law firm, to conduct an independent review of the company's ethics program and the handling of competitive information.²⁶ Senator Rudman, in effect, functioned as an ombudsman. To reinforce its commitment to the government, Boeing suspended work to ensure that all 78,000 employees of the affected business unit underwent ethics and procurement integrity training.²⁷ Employees were also briefed on the events that led to the Air Force suspension.²⁸

Boeing then created a Contractor Responsibility Program, through its newly created Office of Internal Governance, and its head officer reported directly to the chairman and chief executive officer.²⁹ The "Ethics Program Director" has

²⁰ See Press Release, U.S. Air Force, AF Announces Boeing Inquiry Results (July 25, 2003), available at <http://www.af.mil/stories/story.asp?storyID=123005322> (noting that the suspensions were based upon an internal U.S. Air Force investigation finding that Boeing violated federal procurement laws during the 1998 evolved expendable launch vehicle source selection) [hereinafter AF Press Release].

²¹ See Matt Kelley, *Air Force Bars Boeing from Future Rocket Work for Stealing Competitor's Documents*, available at <http://www.signonsandiego.com/news/military/20030724-1452-boeing-contract.html> (reporting that those individuals are Kenneth Branch, William Erskine, and Larry Satchell).

²² AF Press Release, *supra* note 20.

²³ See Press Release, DOJ, Two Former Boeing Managers Charged in Plot to Steal Trade Secrets from Lockheed Martin (June 25, 2003), available at <http://www.usdoj.gov/criminal/cybercrime/branchCharge.htm>.

²⁴ See *Suspension and Debarment: Air Force Waives Boeing's Suspension, Awards \$57 Million Rocket Launch Contract*, BNA'S FED. CONTRACTS REP., Sept. 9, 2003, at 1; Press Release, U.S. Air Force, Boeing's Delta 4 Rocket Wins NRO Launch Order (Sept. 30, 2003), available at <http://spaceflightnow.com/news/n0309/30delta4/>.

²⁵ See Press Release, Boeing, Boeing Responds to U.S. Air Force Announcement (July 24, 2003), available at http://www.boeing.com/news/releases/2003/q3/nr_030724s.html.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See Press Release, Boeing, Boeing Creates New Office of Internal Governance (Nov. 11, 2003), available at http://www.boeing.com/newreleases/2003/q4/nr_031111a.html.

responsibility for the following areas: “Internal Audit, Ethics, Import-Export Compliance, Foreign Sales Consultants, and Sarbanes-Oxley governance requirements.”³⁰ Despite these measures, Boeing continued to have integrity breaches, as evidenced by the now famous tanker deal.³¹ Under the tanker deal, the Air Force was scheduled to lease reconfigured 767 passenger planes (and use them as refueling tankers) and then buy the planes at the conclusion of the lease.³² Boeing’s defense contracts, however, came under heightened scrutiny last year when Boeing hired former Defense Department acquisition official Darleen Druyun.³³ Boeing attempted to correct this breach by terminating the employment of the executives involved in the misconduct.³⁴ While the suspension did little to restore public confidence in the company’s present responsibility, the compliance agreement-like measures that Boeing imposed *sua sponte* represented a tangible effort at improving its corporate culture.

Conclusion

Administrative compliance agreements offer a viable alternative to the perceived draconian suspension and debarment process. In addition to restoring the government’s confidence in the company’s present responsibility, these agreements provide the government an unprecedented opportunity to assess and influence a company’s corporate ethical climate. Because compliance agreements are fact-specific, they may be used for large and small businesses. The compliance agreement offers an effective vehicle for agencies confronted with contractor misconduct and permits continued business with otherwise satisfactory contractors. They also preserve competition and enhance the public trust in the procurement process. Although not appropriate for all cases involving non-responsible contractors, the administrative compliance agreement may answer the concerns of those who question the efficacy and fairness of the suspension and debarment process.

³⁰ *Id.*

³¹ See Renae Merle, *Boeing Deal Faces Justice Department Review: Potential Conflict of Interest Cited*, WASH. POST, Sept. 24, 2004, at A4.

³² See Renae Merle, *Boeing Loses Out on Air Force Tanker Deal: Congress Approves Measure to Ban Program Reconfiguring Jets as Refueling Planes*, WASH. POST, Oct. 10, 2004, at A4.

³³ See George Cahlink, *Ex-Pentagon Procurement Executive Gets Jail Time*, GOVEXEC.COM, Oct. 1, 2004, at <http://www.govexec.com/daily/1004/100104g1.htm>. Darleen Druyun pled guilty and was sentenced to nine months in prison for negotiating a position with Boeing while employed by the Air Force. In her guilty plea, she admitted to inflating the contract price for the proposed tanker lease as a “parting gift” to her future employer. Congress subsequently barred the Air Force from leasing tankers from Boeing. See *id.*

³⁴ See Press Release, Boeing, Boeing Dismisses Two Executives for Unethical Conduct (Nov. 24, 2003), available at http://www.boeing.com/news/releases/2003/q4/nr_031124a.html.