

## THE OVERVIEW

The Government has now made the E-Verify system mandatory for all federal government contractors beginning January 15, 2009, with some exceptions. E-Verify is an internet-based system that contractors use to verify the employment eligibility for new contractor employees based on information from the I-9 immigration form. Previously, E-Verify was only voluntary.

You've just lost a competition that you thought you would win. How could that have happened? Can you file a protest? If you protest, will you ever get another contract from this customer? This article discusses some of the options for protesting without antagonizing your client. A bid protest does not have to be a declaration of war on your customer.

Finally, suspension and debarment – no one wants to think about this possibility. But, exactly what is it? How can it happen to you? What actions can you take to avoid having it happen to you? We've explained suspension and debarment and provide some recommendations for a proactive approach to protect your company.

We hope that this edition of The Government Contracts Counselor is informative and helps your company successfully handle your Government Contract.

## E-Verify Becomes Mandatory: New Requirements for Federal Contractors


**O**n November 14, 2008, the Bush Administration finalized a rule amending Executive Order 12989 requiring federal contractors to use E-Verify to verify the employment eligibility of all contractor new hires. E-Verify is a no-cost Internet-based system operated by the Department of Homeland Security ("DHS") that allows employers to check employment eligibility of their employees based on their immigration status. Prior to the amendment, E-Verify was only voluntary. The rule will go into effect on January 15, 2009.

This new rule requires all federal contractors performing work in the United States to enroll in E-Verify within 30 days of being awarded a contract. Once enrolled, the contractor has 90 days to verify the employment eligibility of all employees assigned to the federal contract. E-Verify must then be used for all new hires and all currently-employed employees who are subsequently assigned to work on the contract. The verification process must be completed by the contractor within 30 days. The rule also requires prime contractors to apply the same requirements to all subcontracts over \$3,000. Additionally, the E-Verify system will apply to indefinite-delivery/indefinite-quantity contracts modified after January 15th to include the E-Verify clause for future orders. This mandatory E-Verify requirement applies to all contracts over \$100,000, except those lasting less than 120 days or for commercial off-the-shelf items.

It should be emphasized that the E-Verify system cannot be used by employers to screen potential employees. The earliest point at which an employer can seek to verify the employment eligibility is after an employee has accepted a position and completed an I-9 Form. Employers must also notify their

employees and any applicants of their enrollment in the E-Verify program.

Employers enrolling in E-Verify must register online and then enter into a Memorandum of Understanding (MOU) with the Government. This MOU includes the following provisions:

- If an employee receives a notice of mismatch (also known as a "tentative non-confirmation"), the employer must promptly provide the employee with a written notice generated by the E-Verify system, explaining how to challenge the finding;
- Employers are prohibited from taking adverse action against the employee for contesting the tentative non-confirmation; and
- The employee must be given up to eight federal government work days to contact the appropriate agency to challenge the tentative non-confirmation.
- If the employee fails to challenge the finding of non-confirmation or the non-confirmation becomes final, the employee must be removed from performance on any federal government contract and may be terminated. 

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## General info

General Counsel, P.C. provides full service legal representation to businesses and non-profit organizations throughout Washington, D.C., Maryland and Virginia. To best serve our clients, we have the following practice groups: Government Contracts; Labor/Employment Law; Corporate; Litigation; Intellectual Property; Estate and Business Succession; Probate and Estate Administration; and Non-Profit Organizations.

Our Government Contracts Practice Group is pleased to provide you with this edition of The Government Contract Counselor. Led by William T. Welch with J. Patrick McMahon, General Counsel's Government Contracts Group has over fifty years of combined government contract law experience (both as in-house and outside legal counsel), helping clients solve their government contract problems relating to the award or performance of a federal government contract, including bid protests, contract claims, small business concerns, and teaming and subcontractor relations.

The articles in this edition of The Government Contracts Counselor reflect issues of concern for our clients. For assistance related to any of the legal matters discussed herein, or any other legal matter, please contact us at (703) 556-0411 or via email at [info@generalcounselaw.com](mailto:info@generalcounselaw.com).

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# Bid Protests:

## Protesting an award decision without antagonizing your government customer

**I**n my sixteen years of practicing Federal Government Contract Law, I have often been asked whether a bid protest will antagonize the Government Customer and hurt the client's chances for other Federal Government Contracts. My answer is always: it depends. It depends on the individual Contracting Officer or Contracting Officer's representative and their level of business sophistication and professionalism. The more savvy and professional Government representatives understand that bid protests are part of the Federal Government Contracting procedures. These are remedies that Congress has provided to aggrieved contractors by law. Contracting Officials usually understand that a contract loss could be a major blow to a Government Contractor. They also understand that professional people acting in good faith can disagree. The important thing to remember is to keep your protests on a professional level – raising only well grounded protests made in good faith. It is also important to consider what and where you are protesting.

Probably the most important first step, is to get as much information from the Agency as possible. If your contract was awarded under FAR Part 15, Negotiated Procurement, you are entitled to a debriefing, if you ask for one. FAR § 15.506. You have only three days to ask for one, so stay on top of it. Once you schedule your debriefing, take the time to prepare. The FAR explains what information you will get and what information you can't get, so don't waste your questions on what you know the contracting officer can't tell you. But, write down your concerns and questions before you go in. If these aren't covered in your debriefing, be sure to ask. Listen to what the CO says and take good notes. But, keep it on a professional level, and don't go in looking for a fight. The CO will really appreciate that.

Based on what you learn in the debriefing, you may feel that the Government has made a mistake in its award decision. What options do you have for protesting? There are ways to protest without directly challenging the judgment of your Government Customer, who has made an award to your competitor. Not all protests are equal in that respect. For example, on procurements set aside for small businesses, 8(a) contractors, HUBZone contractors, or Service-Disabled, Veteran Owned Contractors, you can protest a prospective awardee's eligibility or qualifying status for these set asides without involving the Contracting Officer, except to the extent that the Contracting Officer is the designated recipient of the protest. For example, if you do not believe that the prospective awardee qualifies as a small business, you may protest that company's size status. These "size protests" by an interested contractor must go to the Contracting Officer, but the Contracting Officer does not decide the protest and does not have to defend the award or the awardee. Upon receipt of a size protest, the Contracting Officer must forward the protest to the SBA Regional Office with jurisdiction over the awardee for an initial written decision. 13 C.F.R. § 121.1006 (2008). At that point, the awardee has to defend itself before the designated SBA Regional Office without the assistance or involvement of the Contracting Officer or other contracting representatives.

On procurements set aside for 8(a) contractors, an interested party may protest the small disadvantaged business ("SDB") status of an 8(a) contractor who has been selected for award. These protests are rare because the SBA will not consider such protests unless they relate to changed circumstances after the SBA's initial certification of the contractor's 8(a) status. 13 C.F.R. § 124.1018 (2008). The SBA will not consider, for example, a protest alleging false or misleading information in the 8(a) contractor's SDB application. The SBA will

consider, for example, a protest alleging that the designated minority member no longer qualifies because the member's net worth now exceeds the maximum of \$750,000 allowed under 13 C.F.R. § 124.104(c)(2) or that the minority member no longer has unconditional ownership of the 8(a) company in violation of 13 C.F.R. § 124.105 (2008). Like size protests, SDB protests are filed with the Contracting Officer, but the Contracting Officer immediately forwards the SDB protest to the Division Chief for Small Disadvantaged Business Certification and Eligibility (DC/SDBCE) in Washington, D.C. 13 C.F.R. § 124.1020 (2008). Like size protests, SDB protests do not challenge any Contracting Officer's decisions and do not involve the contracting officials in any meaningful way.

On procurements set aside for HUBZone contractors, an interested party may protest the HUBZone status of a prospective awardee. Like size protests and SDB protests, the Contracting Officer is merely the designated recipient of the protest, and must immediately forward a HUBZone status protest to the SBA Director, Office of HUBZone, Washington, DC. 13 C.F.R. § 126.8901(e) (2008).

On procurements set aside for Service Disabled, Veteran-Owned ("SDVO") contractors, an interested party may protest the SDVO status of a prospective awardee. 13 C.F.R. § 125.24 (2008). Like size protests, SDB protests, and HUBZone status protests, SDVO protests are served on the Contracting Officer, but the Contracting Officer does not participate in deciding the protest. The Contracting Officer forwards an SDVO protest to the Director, Office of Government Contracting, Washington, D.C. 13 C.F.R. § 125.25(e) (2008).

Each of these SBA "status" protests do not challenge any direct decisions made by the Contracting Officer or other Source Selection Official, and therefore are likely to be less antagonistic to your Government customer.


There are other ways to challenge an unfavorable award decision more directly, without incurring the wrath of a thin-skinned Contracting Officer. For example, you may protest directly to the Contracting Officer – referred to in the regulations as an "agency protest." FAR § 33.103 (2008). The Federal Acquisition Regulations (FAR) encourages all interested parties to try to resolve their concerns "at the Contracting Officer level through open and frank discussions." But, if you cannot convince your Contracting Officer through discussions, you may still keep your protest "in-house" by filing an "agency protest." FAR § 33.103(d) (2008). Each federal agency has their own internal procedures for handling agency level protests. Most are very informal and may involve only the Contracting Officer and usually the Contracting Officer's legal counsel. Some agencies, such as the Army Materiel Command ("AMC"), pride themselves on having an objective, independent, and formal review procedure. See <http://www.amc.army.mil/pa/COMMANDCOUNSEL.asp>. AMC offers this procedure as an "alternative dispute resolution forum, rather than filing a protest with the Government Accountability Office or other external forum." Even if an agency does not offer such an objective procedure for resolving agency protests, the protester always has the right to insist upon "an independent review of their [agency] protest at a level above the Contracting Officer." FAR § 33.103(d)(4). While it does offer a possible face-saving way for a Contracting Officer to correct an open or obvious error in the award decision, an agency-level protest, in my experience, is almost always denied. While an agency-level protest does not foreclose the possibility of protesting to the Government Accountability Office ("GAO"), an agency-level

protest will usually foreclose the possibility of achieving an automatic stay of performance of the awarded contract upon the filing of a GAO protest. 4 C.F.R. § 21.2(a)(3) (2008).

Even a direct protest to the GAO can and should be handled in a professional and objectively fair manner that should not antagonize your Government Customer. GAO rules require that the basis of a protest be stated in a "detailed" manner, and GAO does not tolerate unfounded speculation or fishing expeditions to look for protest grounds. 4 C.F.R. § 21.1(c) (2008). Most importantly, GAO will not accept a protest founded solely "upon information and belief." Siebe Environmental Controls, B-275999.2, Feb 12, 2997, 97-1 CPD ¶ 70. Using the words, "upon information and belief" will usually flag your protest ground for immediate dismissal, often on GAO's own motion. If you have a reasonable basis for alleging a violation of procurement statutes or regulations, you should be able to state it objectively and clearly. If the allegation has merit, the Contracting Officer, in consultation with agency legal counsel, has the option to take corrective action to fix the problem. Often, corrective action will involve reopening the competition and giving the protester a new chance at the award. If the protester's allegations are stated clearly and in as much detail as possible, the Agency counsel has the option of responding to the allegations in an Agency Report. 4 C.F.R. § 21.3(c) (2008). Since the Agency did the evaluation, the Agency usually has the most knowledge about the protest issue and can provide GAO with a complete factual basis to resolve the dispute in an objective and professional manner. Based on the GAO's own rules, the attorney's rules of professional responsibility, and good business judgment, a bid protest to the GAO should never antagonize your Government Customer.

The final option for protesting an award decision is the one that is most likely to cause rancor with your Government Customer. Any interested party has the right to take a bid protest to the U.S. Court of Federal Claims ("CoFC"), even a protest that has been fully adjudicated on the merits in another forum. 28 U.S.C. § 1491(b)(1) (2008). The CoFC will consider, de novo, a bid protest that has been previously denied by either the Agency or the GAO. There are several legitimate

and respectable reasons to take a protest to the Court of Federal Claims, which we cannot go into here. Probably the best known reason is that there are no timeliness requirements for a post-award bid protest at the CoFC, whereas GAO has a strict 10-day requirement to file a protest ground. But, taking a previously denied bid protest to the Court of Federal Claims is often considered an escalation of the battle with your Government Customer. At the CoFC, you are now in "federal court" against your customer, whereas a GAO protest or an Agency protest is more like an alternative dispute resolution or administrative proceeding. At the CoFC, the Government must be represented solely by lawyers from U.S. Department of Justice, so the Government Customer and Agency counsel must now work through a new set of non-Agency lawyers who are not familiar with the Agency's procedures or its procurement actions. The Agency has to convince their new attorneys first, who then must present the Agency position to a CoFC judge. If you are concerned about maintaining a relationship with your customer, it is difficult to do so when making a bid protest to the Court of Federal Claims. However, sometimes it is worth it; the Court of Federal Claims can and does sustain protests that have been previously denied by the GAO or the Agency.

At each protest level, protesting should be a carefully considered business decision. If the merits are strong, it can be presented in an objective and professional way that can be respected by all professional parties in any available forum. If the protest grounds are speculative or based on conjecture or innuendo, it is better to move on to the next procurement rather than to waste resources on litigation that will not gain your company anything but the enmity of your customer. 

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## Suspension and Debarment:

### Two words no Government Contractor wants to hear

**A** business that performs work under a government contract can be devastated if the Government suspends or debar the business from participation in future contracts. From the Government's perspective, suspension and debarment allows the Government to ensure that it does business only with "responsible" contractors and subcontractors. From the business's perspective, the threat of suspension and debarment encourages preventive measures—avoidance of actions that may be construed as unethical—and a strong response to any questionable behavior brought to the business's attention.

#### Purpose of Suspension or Debarment

Under the Federal Acquisition Regulations ("FAR"), the purpose of suspension and debarment is not to punish the contractor—that is the role of civil and criminal penalties, including those available under the False Claims Act. Suspension and debarment exist to protect the Government from unscrupulous prospective contractors. For this reason, a contractor can often avoid suspension or debarment if it demonstrates to the Government's satisfaction that any wrongdoing was an isolated instance and is unlikely to occur again.

#### Effect and Duration of Suspension or Debarment

Suspension and debarment have different durations and effects. Suspension is a temporary and indefinite state which is generally followed by an investigation to determine whether debarment is recommended. Suspension can last up to twelve months, and the Department of Justice may even be able to extend the suspension an additional six months. On the other hand, debarment is for a fixed period of up to three years (or five for certain Drug-Free Workplace Act violations).

## SUSPENSION AND DEBARMENT (CONTINUED)

A contractor that is suspended or debarred cannot obtain any new government contracts and cannot participate in many federal benefit programs. The suspension or debarment will not affect a contractor's current contracts, but it does prevent the Government from renewing or extending those contracts.

The suspension or debarment applies broadly across the entire federal government. The Government may apply the suspension/debarment to all divisions of the contractor and may extend it to affiliates of the contractor. Moreover, because many state and local governments utilize the Excluded Parties List System ("EPLS"), a suspension or debarment can prevent access to state and local government business opportunities, too. Further, is it not easy for a suspended/debarred prime contractor to just attempt to maintain its government contracting income by shifting from a prime to a subcontractor. Any prime contractor that wants to award a subcontract to a debarred/suspended business must petition the contracting officer, noting "the compelling reason(s)" for using that subcontractor, and the agency head must give written approval.

### Grounds for Debarment

The Government may debar a contractor for a variety of reasons, including for any of the grounds enumerated in the FAR or for "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor." The specific grounds listed in the FAR include:

- conviction of, or civil judgment for, an "offense indicating a lack of business integrity or business honesty," including fraud or antitrust violations related to a government contract or a crime of moral turpitude (e.g., lying, stealing);
- serious violations of the terms of a government contract;
- violations of the Drug-Free Workplace Act of 1988;
- commission of an unfair trade practice;
- significant delinquent federal taxes; and
- failure to comply with immigration-related employment procedures.

This last ground—immigration-related employment procedures—is of particular current interest because the Department of Homeland Security has proposed regulations that will require all government contractors to affirmatively verify job applicants' employment eligibility using the E-verify system.

### Grounds for Suspension

The grounds for suspension are substantially similar to the grounds for debarment listed above, with two key differences. First, contract violations are not grounds for a suspension. Second, mere indictment for fraud and antitrust crimes is grounds for immediate suspension. Frighteningly, from the contractors' perspective, the Government has even suspended contractors during the investigation of such crimes, not waiting until indictment. For example, the much-publicized suspension of IBM in Spring 2008 was based on a grand jury investigation of the circumstances surrounding an IBM bid on a contract for the Environmental Protection Agency.

### Proactive Prevention


Obviously, a contractor can avoid suspension or debarment by avoiding misconduct that would be grounds for suspension or debarment. Further, the Government is less likely to suspend or debar a contractor for misconduct that the contractor itself brings to the Government's attention. Every contractor should create a corporate culture that encourages ethical behavior and should back up that culture with a strong ethics and whistleblower policy that will help the contractor's senior management identify wrongdoing.

### Ready Reaction

Although the FAR does not require advance notice, in practice, the suspension or debarment officer of the agency considering the action will informally discuss the potential sanction with the contractor and his counsel before formally entering the suspension or debarment. (But this is not a requirement; IBM's recent suspension occurred without warning.) However, even this informal discussion period can damage the contractor's ability to obtain government business. Thus, a contractor who receives notice of potential suspension or debarment should seek their lawyer's advice immediately. The contractor, with counsel, may then negotiate with the Suspension/Debarment Officer(s) and attempt to agree on actions that will demonstrate that the contractor is "presently responsible" (regardless of past misconduct). In this situation, the Government will typically require assurances that the contractor will not let the misconduct recur. Those assurances frequently come in the form of an enhanced ethics enforcement policy—yet another reason why every contractor should have a strong ethics policy in place from the beginning.

If the Government proceeds to an actual suspension or debarment, then the contractor will have an opportunity to dispute the suspension or debarment with the Suspension Officer or Debarment Officer of the government agency that issued the sanction. The contractor has 30 days to argue its case. The contractor can ultimately dispute the suspension/debarment in federal court, though the court will intervene only if the agency's action was "arbitrary or capricious."

### Conclusion

Suspension and debarment are extreme measures, taken by the Government only under extreme circumstances. All government contractors should be aware of the reasons the government may take these actions, and businesses should work proactively to avoid suspension and debarment. Most importantly, a contractor's senior management must recognize the critical importance of ethical behavior, and must implement procedures to prevent and combat unethical behavior. 

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