

Contractors need to fully address False Claims Act allegations during suspension or debarment proceedings

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Companies involved in False Claims Act suits filed by qui tam relators often find themselves facing potential suspension or debarment from federal contracting. A recent decision out of the United States District Court for the District of Columbia highlights the intersection between allegations made by whistleblowers and the suspension and debarment process.

Although companies may be quick to cast aside relator allegations as unproven charges by disgruntled former employees or competitors, successful navigation of the suspension and debarment process requires contractors to prepare a fulsome defense to the allegations and proactively submit all relevant facts to the suspension and debarment official (SDO).

The case, *International Exports, Inc. et al. v. Mattis*, No. 14-2064, 2017 WL 3025837 (D.D.C. July 17, 2017), came on the heels of the Defense Logistics Agency's (DLA) decision to impose a fifteen-year term of debarment on International Exports, its principal, and a related individual.

International Exports was formed by Suzanne Itani after her husband, Samir Itani, principal of American Grocers, Inc., came under criminal investigation for submitting false invoices to the government. Samir Itani was found guilty and sentenced to 24 months imprisonment.

Concurrent with the criminal investigation, a former employee of American Grocers filed a qui tam complaint against the Itanis. The suit alleged that the Itanis had engaged in a scheme to modify the expiration dates on food to be delivered to troops stationed overseas to make it appear as though the food products had longer shelf lives.

The Itanis entered into a settlement agreement with the Department of Justice in which they disclaimed any liability for the allegations but agreed to pay \$15 million.

Following the settlement, DLA's Suspension and Debarment Official (SDO) issued a notice of proposed debarment to Suzanne Itani and International Exports based on their status as "affiliates" of American Grocers and Samir Itani. See FAR 9.406-2(c).

The SDO's debarment decision was based on the affiliation but the imposition of a fifteen — as opposed to a three year — term of debarment was informed in large part by the allegations from the qui tam complaint and information contained in presentations prepared by the qui tam relator. The Itanis then filed suit to challenge the SDO's decision.

The court found that the imposition of an extended period of debarment based upon the "unproven allegations in the qui tam complaint — which the plaintiffs challenged as unproven and untested" without the SDO having made formal findings of fact rendered the decision arbitrary and capricious under the Administrative Procedure Act.

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The decision stands for the proposition that debarments based on qui tam allegations alone may require additional inquiry and fact-finding by the SDO.

The decision is also notable for its discussion of the information presented to the SDO in response to the relator's allegations and the possibility of a missed opportunity to aggressively defend the company during the early stages of the debarment process.

Debarment from federal contracting is intended to be protective in nature — functioning as a mechanism to prevent non-responsible contractors from receiving future contracts. It is not intended to be punitive. The period of debarment is required to "commensurate with the seriousness of the cause(s)" but generally should not exceed three years. FAR 9.406-4(a)(1).

Upon receiving notice of proposed debarment, contractors are entitled to oppose the proposed debarment. FAR 9.406-3(c)(4). This is typically done through a written and/or oral submission

by counsel to the SDO with an eye towards addressing the factors for debarment under FAR 9.406-1.

If the contractor's submission raises no genuine disputes of fact material to the debarment decision, and assuming the debarment is not based upon a criminal conviction or civil judgment, the SDO may make a determination based on the administrative record and the contractor's submission. FAR 9.406-3(d).

As this case demonstrates, however, contractors may (and should) submit any information that raises a genuine dispute as to material fact as part of their initial opposition. That triggers an obligation by the agency to discern whether there are disputes as to the facts material to the proposed debarment.

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If there are, the SDO must allow the contractor to appear with counsel to submit documentary evidence, present witnesses, and confront any witnesses called by the agency. FAR 9.406-3(b)(2).

Any decision to debar must be based upon the preponderance of the evidence after the SDO makes findings of fact relative to the disputed facts. FAR 9.406-3(d). Subsequent challenges to the sufficiency of the SDO's decision will be limited to the information contained in the record before the agency.

In the *International Exports* case, when responding to the proposed debarment, Itani and International Exports argued that the agency should ignore the relator's allegations as unproven.

They submitted declarations and crafted responses that the court categorized as raising general objections to any reliance upon the unproven allegations in the qui tam materials, but apparently failed to provide all relevant facts in their defense.

The court noted that their "responses [did] not delve into the level of detail provided in the plaintiffs' summary judgment-related filings."

Because the specific defenses to the relator's allegations were not raised before the Agency, the court refused to consider them further as part of the APA suit.

The court's finding illustrates that contractors facing debarment should be proactive during the debarment process, quickly bringing forth any defenses and pointing out factual inconsistencies in the relator's allegations.

In many cases, such information has been developed previously by counsel for the company as part of the company's primary defense to the qui tam action before the Department of Justice or in litigation.

If the company has not fully evaluated whether there is evidence contrary to the allegations, it is well worth the company's investment to do so before responding to the proposed debarment.

Specific details supporting the company's side of the story may go a long way toward mitigating the consequences of debarment or the conditions imposed by an administrative agreement.

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