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Contractor Accountability

Pitfalls to Avoid: Common Mistakes in SDO Presentations

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In my previous legal capacity as an Associate General Counsel working under a Department of Defense (DOD) Suspension and Debarment Official (SDO), I observed a vast spectrum of styles and approaches in SDO meetings where contractors attempted to prove they were presently responsible and that debarment action was not necessary to protect the government's interest.[1] My notes on mistakes by contractors became repetitive. The surprising part to me were the mistakes in both approach and substance regardless of the contractor (entity or individual), and counsel (experienced or not). I therefore offer this analysis as a guide on how to approach a meeting with an agency SDO, and hopefully shape the scope of the meeting prior to the relevant issue even showing up on the SDO's radar. To that end, the following are six key points and their corresponding pitfalls to avoid in preparing for and meeting with an agency SDO.

[1] The views expressed in this article are solely those of the author and do not represent those of the Department of Defense or the United States government.

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I. A CONTRACTOR RESPONSIBILITY ANALYSIS IS A BUSINESS DECISION *Pitfall to Avoid: Misunderstanding the expansive nature of the SDO's business decision to ensure the government only conducts business with responsible contractors*

A. Business-Based Contractor Responsibility Analyses are Extensive. The most often overlooked and misunderstood point of a contractor responsibility analysis is that it is a business decision. The existence of a cause for debarment does not necessarily require the contractor to be debarred. Consequently, a debarment official will evaluate the seriousness of the contractors acts, omissions, remedial measures and mitigation factors under the Federal Acquisition Regulation (FAR) 9.406-1(a) to make a business decision that determines whether the contractor is presently responsible and therefore debarment is not necessary or that the contractor has not met its burden of demonstrating its present responsibility and that debarment is in the interest of government.

A contractor responsibility analysis is different than the process and legal analysis that is used in other legal forums. This is especially true when compared to contract dispute litigation or civil and criminal litigation forums. While most counsel probably appreciate the difference, they still have a tendency to resort to an overly adversarial litigation style. I understand that it is easy to transition to this mentality from my experience sitting on both sides of the courtroom. However, for the reasons provided below, it is generally more effective to approach a meeting with an SDO armed with an under-

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standing of the business decision the SDO must make. Successful presentations stress (and objectively show) that the contractor understood the seriousness of the underlying facts, took action to mitigate and remediate them so the situation will not be repeated, and is therefore a presently responsible government contractor.

The SDO is charged with protecting the government's interests by ensuring the government only does business with *responsible* contractors.[2] This is a big responsibility.[3] The SDO's action or inaction will not only have an impact on the contractor, but impacts the government as well. The SDO's analysis includes issues that do not necessarily rise to the level of a violation of a law. Indeed, most suspensions and debarments are ''fact based'' and not triggered by an indictment or conviction. This is a departure from years past, and is due in large part to government agency efforts to grow their suspension and debarment programs and become more proactive in lieu of relying on indictments and convictions as the primary basis for administrative actions to protect the government's interests.[4]

B. Most Administrative Actions are Fact-Based. A common basis for fact-based suspension and debarment actions is the FAR ''catch all'' provision that authorizes suspension or debarment actions based on ''any . . . cause of so serious or compelling a nature that it affects the present responsibility of the contractor . . .''[5] When this basis is used, the SDO's actions and analysis will cast a broader net than, for example, that of a prosecutor analyzing whether the contractor's actions meet the elements of a particular statute. This leads to a wide range of individual and entity actions that may catch contractors off-guard. It is important to keep in mind that the government is not obligated to do business with the contractor; the government's obligation is to ensure it does business with only responsible contractors.[6] Thus, administrative remedies are often based on actions that may not reach the level of violations of law, but may raise questions about whether the government should be conducting business with the contractor. In short, the SDO must make a business decision about whether the contractor should be eligible to receive government contracts.

On the government side, I heard a number of common complaints from defense counsel: ''why is (Agency X) doing this?''; ''my client did not violate any laws!''; ''where is this investigation going?''; ''we could have obtained the information (that my client data mined for) through a Freedom of Information Act (FOIA) request anyway.''[7] All of these complaints have one thing in common: they miss the point of the contractor responsibility analysis and waste time and energy focusing on the disagreement with the SDO's decision to initiate administrative action rather than focusing on why the contractor is presently responsible. It is far more productive to concentrate on the way forward in responding to the SDO's concerns.

There are numerous examples of cases in which the conduct at issue was never presented or briefed to a criminal or civil prosecutor yet was ripe for administrative action. One example involved several employees of an Advisory and Assistance (A&AS) contractor utilizing government ''For Official Use Only'' (FOUO) information in an unsolicited proposal. The contractor employees removed the FOUO information from government documents to which they had access because of their status as A&AS contractor employees. They did this despite being subject to confidentiality agreements in which they had expressly agreed not to utilize government information for their personal or employer's financial gain, including the submission of an unsolicited proposal. The SDO's concern, was whether the individuals could be trusted and therefore remain eligible to be government contractors, especially in light of the fact that they would be embedded with government contract teams as A&AS employees? This is the key issue that had to be addressed. The take away from this example is that when the facts presented to the SDO objectively demonstrate that individuals have engaged in unethical or improper behavior, the SDO will need to decide whether the individuals are presently responsible and can continue to be trusted to have access to government information, irrespective of whether the individuals' behavior rose to the level of a civil or criminal offense.

II. TAKE A PROACTIVE APPROACH

Pitfall to Avoid: Failing to take a proactive approach with the SDO, thereby starting out on the defensive with the burden to prove responsibility

A. Being Proactive May Prevent Issuance of a Suspension or Notice of Debarment. An SDO can receive factual information for possible suspension and debarment action from many sources, including but not limited to: investigators, auditors, contracting officers, senior government officials, competitors and news media. When this factual information provides sufficient basis, an SDO may suspend the contractor or issue a notice of proposed debarment, both of which will bar the contractor from being awarded federal contracts or subcontracts, while the contractor is responding to the SDO and presenting its opposition to the suspension or proposed debarment. However such actions are far less

[2] 48 C.F.R. § 9.402 Policy, subpart (a).

[3] *See* 48 C.F.R. § 9.401 Applicability (suspension and debarment actions shall be recognized by all Executive Branch agencies).

[4] The FY 2012 and FY 2013 ISDC Report to Congress includes analysis and raw data of the number of suspensions, proposed debarments, and debarments from 2009 through 2013. During this time period, suspensions more than doubled, proposed debarments nearly tripled, as did the number of actual debarments. *See* FY 2012 and 2013 ISDC report, Figures 1 - 3. The ISDC report is accessible at https://isdc.sites.usa.gov/files/2014/03/873-Report-Consol_FY12-and-FY13_color.pdf (last accessed August 6, 2014). According to a 2013 Council of the Inspectors General on Integrity and Efficiency (CIGIE) report, *Looking Inside the Accountability Toolbox: An Update from the CIGIE Suspension and Debarment Working Group*, fact-based suspension referrals increased nearly 20% from 2010 to 2012, and fact-based debarment referrals rose nearly 30% from 2010 to 2012, resulting in fact-based referrals becoming the majority in 2012. The report can be found at http://www.ignet.gov/randp/rpts1.html. (last accessed August 6, 2014).

[5] 48 C.F.R. § 9.406-2(c). *See also* 48 C.F.R. § 9.407-2(a)(9) (Suspensions may be based on commission of *any* offense indicating a lack of business integrity or honesty that directly affects the present responsibility of the contractor).

[6] *See* 48 C.F.R. 9.402, *supra*.

[7] *See* Section IV, *infra*, for a discussion on how to tactfully dispute a factual basis.

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likely when a contractor has already brought the matter to the attention of the appropriate SDO and initiated the process of demonstrating to the SDO that it is a responsible contractor. Stated differently, contractors need to give serious consideration to bringing all fact patterns involving contractor responsibility, and not just those with criminal and/or civil prosecutor interest, to the applicable SDO's attention. The best path for a contractor to travel is to bring issues concerning responsibility to the lead agency SDO[8] early and engage in an open dialogue.

B. Do Not Assume You Are Being Proactive With the SDO Simply by Submitting a Mandatory Disclosure. A common question is whether the proactive approach is satisfied simply by submitting a mandatory disclosure.[9] The answer is maybe. Opinions vary on this issue among the government and industry. The main point is that mandatory disclosures are limited to credible evidence of a violation of federal criminal laws or the civil False Claims Act in connection with the award, performance or close out of a government contract. Therefore, there are situations where the particular fact pattern will raise responsibility concerns but is not covered by a mandatory disclosure. Even if a mandatory disclosure is submitted to the agency Inspector General and contracting officer as required, it is prudent to also engage the applicable SDO office. This provides a gateway to engage in an early dialogue with the SDO and exhibits the start of not only cooperation with the agency investigators, but also a present responsibility analysis. Waiting to see if the investigators or contracting officer will bring the matter to the attention of the SDO misses an opportunity for the contractor to put its best foot forward.

C. Shape the Discussion by Being Proactive. Bringing a particular fact pattern to the SDO's attention, whether through a mandatory disclosure or otherwise, allows the contractor to shape the discussion. In other words, the contractor and counsel are gaining the head start, and not the other way around. Once facts that raise responsibility concerns are brought to the attention of senior management, the contractor, hopefully with the assistance of counsel, should ensure that it immediately begins considering mitigation and remediation measures with an eye toward present responsibility. In fact, some of the better approaches, in my opinion, involve providing initial notification to the SDO that identifies the issues and set up a timeline in which a supplemental response will be submitted followed by a meeting. Through contact with the SDO's counsel and in-person meetings with the SDO, the contractor can identify issues on which the SDO is particularly focused. This may lead to more coordination and a continuing dialogue with the SDO's office, in addition to further investigation regarding the issues of concern, but at least the contractor will be ''out in front'' of the issue in a transparent manner.

D. Delaying the Initiation of a Dialogue with the SDO Can Bring Unnecessary Negative Attention. Some of the most difficult situations (for both the SDO and the contractor) involve the opposite of a proactive approach. An example would include a multi-year overt criminal investigation, which the contractor participated in, yet failed to notify the applicable agency SDO.[10] Then, one day, four years down the road, the SDO finds out about the investigation through reading a media report, or worse yet because the agency secretary or general counsel has asked the SDO about the matter! This is perhaps the worst way to start a dialogue with the SDO. First, it brings additional, higher ranking players, with unique questions and concerns into the equation. An inquiry would go along these lines: Secretary of Agency X asks General Counsel of Agency X, who in turn asks the SDO of Agency X what the SDO plans to do about the situation that just made national headlines. This handcuffs the analysis of the SDO and speeds up the timeline for a meeting that would otherwise have been set up mutually between the contractor and the SDO. The concern of the Agency at this point is understandable: ''how many contracts has (the agency) awarded and dollars spent with this contractor since the start of this situation without conducting a present responsibility analysis and has this exposed the government to additional problems?'' In this situation, the contractor will be expected to have more detailed answers to questions concerning the debarment factors discussed below, due to the length of the ongoing investigation.

III. DEBARMENT CONSIDERATION FACTORS *Pitfall to Avoid: Neglecting or providing insufficient detail to the FAR 9.406-1 mitigation factors*

A. Taking a Proactive Approach Satisfies Several of the Mitigation Factors. As the FAR highlights, the existence of a cause for debarment does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.[11] Taking a proactive approach arguably satisfies several of these remedial measures and mitigating factors. A contractor alerting the SDO of the situation at the earliest possible stage will generally receive favorable consideration because the contractor brought it to attention of the appropriate government agency in a timely manner, is cooperating, or indicates that it will cooperate with any government investigation, and provides an opportunity to show that

[8] A ''lead agency'' analysis is a subject that can form the basis of its own article. In sum, it can be, but is not always established by agency dollars spent on the contractor in the prior or recent fiscal years. USASpending is a valuable tool in identifying lead agency in terms of dollars spent. See USASpending, http://usaspending.gov/ (last visited Aug. 4, 2014). A tight fiscal spending analysis, or multi-agency interest may be resolved by the Interagency Suspension and Debarment Committee. *See* ISDC homepage, http://isdc.sites.usa.gov/ (last visited Aug. 4, 2014).

[9] *See* 48 C.F.R. § 52.203.13, Contractor Code of Business Ethics and Conduct, subsection (3)(i) (Contractors shall timely disclose to the agency Inspector General and Contracting Officer, whenever the contractor has credible evidence that the contractor has committed a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations under Title 18 of the U.S.C., or a violation of the civil False Claims Act (31 U.S.C. § 3729-3733)).

[10] Do not assume that simply because a particular agency IG is investigating, that the applicable SDO knows about the investigation.

[11] 48 C.F.R. § 9.406-1 Debarment. Subsection (a) contains ten factors, which require the SDO to consider whether the contractor has adequately mitigated and remediated the existence of the subject fact pattern.

the contractor's management recognizes and understands the seriousness of the actual or potential misconduct that may give rise to the cause for debarment.[12] Of course, it may also be possible for the contractor to demonstrate how it has met and addressed other mitigating factors depending on the time that it has had to fully investigate and eliminate the circumstances within its organization that led to the particular problem, discipline those responsible, and institute, revise or renew its control procedures and compliance programs. At the very least, early engagement with the SDO will allow a self-initiated timeline for the contractor to address all of the factors, and keep the SDO abreast of developments as the contractor is able to fully investigate, similar to a ''rolling production'' in responding to a subpoena.

B. Addressing the Mitigation Factors Will Answer Many of the SDO's Questions. Neglecting or providing insufficient detail to address mitigating factors are frequent miss-steps in contractor submissions and presentations. Similar to an attorney formulating a sentencing argument to address sentencing guidelines, counsel for a contractor involved in a responsibility determination should address the debarment factors in detail. Even if it has not formed the outline of a contractor's written or verbal presentation, an SDO will be conducting an analysis of these factors. Ergo, why not answer the questions before they are asked? Similar to making it easy for the judge in a courtroom, counsel's goal is to make the SDO's analysis as easy as possible. Not forcing the SDO to ask questions and dig out the extent to which the contractor has met any mitigation factors is a great step forward to a smooth, non-adversarial dialogue with the SDO.

C. Substantively Analyzing the Mitigation Factors Will Help the Contractor Meet its Burden to Show it is Presently Responsible. A key point in considering the usefulness of the debarment factors is that once a basis for debarment or suspension exists, the burden shifts to the contractor to demonstrate that it is presently responsible.[13] This departure from criminal and civil litigation where the burden of proof is on the government or plaintiff is a critical factor in a SDO presentation. Once a contractor receives the notice of proposed debarment or suspension, the SDO has already determined that a basis for debarment or suspension exists, and the burden to show present responsibility has already been placed on the contractor.[14] At this point, the SDO is waiting on the contractor response. This is the contractor's opportunity to add to the record, address mitigation factors and raise disputes over material facts. Failing to address these critical mitigation factors creates a significant risk of adverse action. Absent a response, the contractor will, in all likelihood be debarred, or the suspension will continue because the administrative record is the same as it was at the time of the SDO's decision to propose debarment or initiate suspension.

IV. THE SDO OFFICE IS NOT A LITIGATION FORUM *Pitfall to Avoid: Being overly adversarial with the SDO*

A. The SDO Office Should Not Be Treated Like a Litigation Forum. The bottom line up front is that the SDO's office is not an adversarial proceeding. Rather, it is an opportunity to show the SDO that the government should continue to do business with the contractor because the contractor has affirmatively met the debarment factors outlined in FAR 9.406-1 and demonstrated its present responsibility. If there is already an active exclusion in place because of a proposed debarment or suspension, counsel for the contractor is not doing his or her client any favors by slowing down the process due to being adversarial. If you are questioning whether the SDO action is arbitrary, capricious, and looks like punishment, those points can be made by demonstrating that the contractor is presently responsible. Of course, if the action is *truly* arbitrary and capricious and appears to be punishment, then it may be challenged by litigation down the road, but the SDO office should not be treated like a litigation forum.

B. Do Not Spend a Majority of Your Time Arguing One Factual Basis in a Fact-Based Action if Multiple Basis Support the Action. A common ''litigation mentality'' pitfall in my experience is to spend significant time arguing one factual basis in a fact based debarment involving multiple basis for the action. Even if counsel is successful negating that one particular factual basis, there are others that need to be addressed. Make no mistake; I am not advocating that counsel should not dispute facts where the evidence in response will support the contractor. However, the best way to handle that particular situation would be to emphasize the facts in opposition in the written submission prior to the SDO meeting. A well-written submission that draws the SDO's attention to facts the government may not have been privy to prior to the contractor's response should be enough for the SDO to focus on the remaining bases which support the administrative action. That way, the in-person meeting will be more productive, as counsel and the contractor can focus on how the contractor mitigated and remediated the remaining basis.

Keep in mind that SDOs have limited schedules and your presentation is going to be limited to approximately two hours, except in unusual circumstances. I have witnessed half of the allotted time of an SDO meeting spent on adversarial argument. This has often included, counsel arguing the plain meaning of contract provisions. Needless to say, this approach does not get the present responsibility analysis moving forward which ultimately hurts the contractor. My thought is that every minute spent on an active exclusion list is money that the contractor is losing. Therefore, make every minute count!

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[12] 48 C.F.R. § 9.406-1(a)(2), (4), and (10).

[13] 48 C.F.R. § 9.406-1. ''If a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary.'' *See also* 48 C.F.R. § 9.407-1. (''A contractor has the burden of promptly presenting to the suspending official evidence of remedial measures or mitigating factors when it has reason to know that a cause for suspension exists.'')

[14] *See* 48 C.F.R. § 9.406-3 Procedures. (Within 30 days after receipt of the notice, the contractor may submit information and argument in opposition to the proposed debarment including any specific information that raises a genuine dispute over the material facts. The debarring official's decision will be made on the basis of the administrative record, including any submission made by the contractor). *See* also, 48 C.F.R. § 9.407-3 Procedures (containing similar provisions for suspensions).

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C. Do Not Attempt to Re-litigate a Previous Conviction. Similarly, do not attempt to re-litigate a previous conviction. The SDO is not going to step in the shoes of a judge and overturn a conviction. Most SDOs will probably shut the meeting down if the discussion turns to a theme along the lines of, ''the judge (or jury) got it wrong.'' If the case is on appeal, or soon will be, it is fair to state that, but do not expect the SDO to give credit to even the most persuasive arguments insinuating that the judicial process was wrong. Rather, counsel would be best served going back to the FAR 9.406-1 factors to show how the contractor took remedial measures in response to the underlying facts supporting a conviction, has learned its lesson as a result of the conviction, and is therefore presently responsible.

V. SDOs WANT TO HEAR FROM CONTRACTORS, NOT ATTORNEYS *Pitfall to Avoid: Keeping the spotlight on the attorneys*

A. The Contractor or its Senior Management Should Address the SDO. The biggest pitfall counsel make in SDO presentations is to completely take the meeting over, to the detriment of their client. Even if counsel is not taking an adversarial approach, not allowing the contractor to speak directly to the SDO does not allow the SDO sufficient opportunity to analyze the contractor's responsibility. Perhaps the worst mistake made by counsel is to show up to the meeting without their client. Not being able to speak to the contractor will limit the SDOs analysis. After all, it is the contractor whom the government will be doing business with, not the attorney.

Attorneys should advocate on behalf of their client during an SDO meeting. However, the meeting should include the contractor, or the executives of the contractor, who have the ability to affect change within their organization. Counsel's role should be more limited than it would be at a defense counsel table in a courtroom. That is not to say that counsel should be silent at the meeting. Indeed, it is often wise for counsel to set the tone of the meeting by conducting the introduction, going over the case chronology, the applicable players, and then turning the floor over to their client(s). The SDO's decision is probably not going to be swayed by even the most convincing advocate. Rather, the SDO needs to be confident that the leadership of the organization understands there was a reason for the administrative action, and have implemented remedial measures such as those identified in FAR 9.406-1, or is ready, willing, and able to do so. The same holds true for an individual who is before the SDO. However, the SDO's analysis of an individual is distinct from that of an entity.[15]

B. Counsel's Heavy Lifting Should be Prior to the Meeting. Counsel's primary benefit to their client comes prior to the SDO meeting, and not the SDO meeting itself. Similar to a professional sports team winning the game before it is played through quality practice, the attorney for the contractor must prepare their client prior to the meeting. That is not to say that counsel should put words in the mouth of their client, however the contractor needs to understand and be prepared to respond to the key issues the SDO is going to address. That way, there are no surprises in the meeting. Nothing will negatively impact the flow of a meeting worse than an attorney advising their client, ''(D)on't answer that.'' An SDO is not going to ask a client to waive attorney client privilege, but absent that, if the contractor is not ready to answer pointed questions from the SDO, then the contractor is not ready to meet with the SDO.

The attorney should conduct the heavy lifting prior to the meeting. Counsel will need to identify and acquire all key documents with which to respond to the SDO correspondence.[16] The key to remember is that the decision will ultimately be based on an administrative record, not on the verbal presentations, unless the meeting is transcribed and inserted into the record. Therefore, all relevant documents should be submitted prior to the SDO meeting. Keep in mind the SDO's office will need sufficient time to review the materials submitted, so avoid submitting them the day prior to the meeting. Moreover, providing sufficient time for the SDO and his or her staff to review the materials will enable counsel to have a discussion with the SDO office prior to the meeting in an effort to zone in on any outstanding questions the SDO may have to effectively prepare the contractor for the meeting.

The documents submitted to the SDO to demonstrate present responsibility should be comprehensive. The documents need to establish a baseline of where the contractor's internal programs and policies were during the time of the conduct at issue, and show the transition through present responsibility. For example, in an action based on conduct from 2012, a key exhibit would be the contractor's 2012 ethics and compliance programs vis-a-vi its 2014 programs. This will establish a baseline to enable the SDO to see the contractor's transition into present responsibility. In other words, it will demonstrate to the SDO that the contractor recognized the problem, and remediated it with changes, or by establishing new programs.

A key problem I witnessed in this area is where counsel are reluctant to submit any written materials because of an ongoing criminal investigation. Perhaps they are making ongoing verbal presentations to the Department of Justice (DOJ), and not submitting written presentations. Whatever the case may be, if the client is not ready to submit a detailed written response in the administrative record, then an SDO meeting is probably not appropriate at that particular point in time. In fact, it could back-fire for the contractor because the SDO will be left with unanswered questions that the contractor is not ready or willing to answer. An

[15] Without getting sidetracked with the distinctions between and individual entity responsibility analysis, they should be approached differently by counsel. It is arguably more difficult to objectively exhibit remedial measures from an individual perspective. The individual must show that he or she internalized why the particular actions were wrong, and has set up remedial measures to avoid recurrence. This proves to be a more difficult task than that of a business entity because the business can make changes in leadership, ethics and compliance plans, training, and policy. The individual, however, must show his or her actions where an isolated incident, and is capable to be trusted by the government that the situation at hand will not be repeated. That being said, I have witnessed success from individuals in terminating administrative actions by setting up individual business plans tailored specifically for them, similar to a business entity.

[16] The SDO correspondence may include a proposed debarment, a notice of suspension, or something short of an administrative action such as a Show Cause Letter, or Request for Information. *See* Section V, *infra*.

SDO will not be able to conclude that the contractor has demonstrated it is presently responsible under those circumstances.

VI. ENGAGING WITH THE SDO IN RESPONSE TO SHOW CAUSE LETTERS & REQUESTS FOR INFORMATION IS IMPORTANT *Pitfall to Avoid: Not treating SCLs and RFIs with the same importance as other administrative actions*

A. When SCLs and RFIs may be Issued. There are multiple ways that an SDO may initiate the dialogue with the contractor. Two ways are Show Cause Letters (SCL)and Requests for Information (RFI).[17] A SCL is a term of art coined by many SDOs.[18] A SCL usually results when the SDO has enough information to create an administrative record supporting a suspension or proposed debarment, but is allowing the contractor to respond and add to the administrative record prior to issuing a suspension or proposed debarment decision. In other words, the contractor should ''show cause'' as to why the SDO should not initiate administrative action. This is most often the case on fact patterns which are very close to meeting the preponderance of evidence standard for a proposed debarment, or where there may not be an active criminal investigation to support additional fact-finding.[19] An RFI, by contrast is usually issued when the SDO discovers a significant event through alternative sources, such as a media headline. An RFI provides the contractor an opportunity to do just what the title entails - provide information on the relevant topic to alleviate the SDO's concern that there may be a significant contractor responsibility analysis that needs to be initiated.

B. Take Advantage of the Opportunity to Submit a Response to a SCL or RFI. Take advantage of these opportunities. They do not rise to the level of creating an active exclusion for the contractor, but are tremendously important to both the SDO and the contractor. If the contractor receives one of these documents from an SDO, it should be treated with equal importance as an administrative action. In fact, neglecting to do so may well lead to an administrative action. Indeed, a lack of responsiveness can potentially rise to the level of lack of responsibility. After all, the SDO (and the government) need to be confident that the government is only spending taxpayer dollars with responsible contractors. Avoiding or side-stepping an issue that is already in the media is not going to provide the SDO great confidence in the responsibility of the contractor.

A common pitfall in this area is not treating the SCL or RFI with the same importance as an administrative action such as a proposed debarment, or a suspension. Specifically, problems with some responses are that they are not as detailed as a response to a suspension or proposed debarment. Some of the best responses, in my opinion, are those where the contractor comprehends the seriousness of an SDO inquiry, and treated it accordingly. In a rampant employee mischarging example, a SCL was issued to the contractor in an effort to receive information about the circumstances that led to a lapse in mid-level management accountability. The contractor, in turn, conducted a prompt and thorough internal investigation handled by outside counsel, and provided an un-redacted report to the SDO in response to the SCL.[20] This enabled the SDO to be confident that the contractor understood the seriousness of the situation, corrected it, and closed out the inquiry. Ultimately, the contractor's expeditious and complete response to the SCL saved time and money for the government and the contractor, as no further inquiry was needed to show the contractor was presently responsible. Thus, the SCL did not rise to the level of an active exclusion, the contractor did not loose out on any government contracts, and the government was assured that it would not be mischarged under similar circumstances, all because of the approach taken by the contractor and counsel.

VII. CONCLUSION

In conclusion, contractors and counsel should *always* be thinking about engaging with the applicable SDO at the earliest possible stage of any investigation or significant event that could potentially trigger a contractor responsibility analysis. The government's administrative remedies are often overlooked until far too late in the process of defending criminal or civil investigations. However, administrative remedies, because they actively exclude contractors from receiving new work, can have a larger negative impact on a contractor than a monetary settlement or conviction. The earlier a dialogue is initiated with an SDO, the sooner a contractor can put the responsibility analysis behind it and concentrate on acquiring new work!

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[17] *See* FY 2012 and FY 2013 ISDC Report to Congress, accessible at https://isdc.sites.usa.gov/files/2014/03/873-Report-Consol_FY12-and-FY13_color.pdf , for a good description of these tools as a way to enhance transparency and due process. (last visited August 6, 2014).

[18] A SCL in an administrative setting is different than the FAR-defined ''show cause notice'' in a contract termination setting. *See, e.g.,* 48 C.F.R. § 49.607 Delinquency Notices. (If the contractor has not delivered in accordance with the contract schedule, a show cause notice may be used to allow the contractor to present any excuses as for the delay).

[19] *See* 48 C.F.R. § 9.406-2(b)(1) Causes for debarment and 48 C.F.R. § 9.407-4 Period of Suspension, respectively.

[20] I am not suggesting that the attorney work product privilege be waived or that all submissions need to be un-redacted. I simply utilize this example to illustrate the tremendous positive impact it had for the contractor.

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