

Suspension, Administrative Agreements and Recovery
Presented by: Adelle Elia and Paige Shannon

Biographies

- ▶ Adelle Elia
 - Director, Ethics and Compliance
US Investigations Services
Formerly Ethics Officer, GTSI
 - Certified Compliance and Ethics Professional (CCEP)
 - 20 Yrs. experience in audit, financial and professional services, cyber security, process development, compliance and ethics

Biographies

- ▶ Paige Shannon
 - Federal Services Counsel/Compliance Officer,
Kforce Inc./Kforce Government Solutions, Inc. (KGS)
 - MBA, George Mason University; Juris Doctorate, The Catholic University of America, Columbus School of Law; licensed Washington DC, Maryland and Virginia
 - Certified Compliance and Ethics Professional (CCEP)
 - 25 Yrs. experience in litigation, corporate, federal and commercial contracts, compliance and ethics

How it All Began....

- ▶ GTSI...
 - In 2010 the Small Business Administration (SBA) suspended GTSI based upon allegations of misconduct related to small business regulations. The SBA alleged that GTSI's performance as a subcontractor on the DHS FirstSource contract would have made the prime contractor ineligible for the award as the prime contractor had little to no involvement in the performance of the contracts.
 - To resolve the suspension GTSI and the SBA entered into an Administrative Agreement.
 - The Administrative Agreement is scheduled to terminate on or about October 19, 2013.

How it All Began....

- ▶ Kforce Government Solutions, Inc. (KGS)...
 - In 2009 the Department of Interior suspended and proposed debarment of KGS based upon the actions of a Sr. Vice President who prepared a statement of work which became the basis for a competitively sourced task order. The total value of the task order was \$78,892.32
 - The suspension was predicated upon KGS performing work which was not within the scope of their contract and violation of 48 C.F.R. 9.505-2(a)(1) (FAR 9.505-2(b)(1))-Preparing Specifications or Work Statements.
 - To resolve the suspension KGS and the Department of Interior entered into an Administrative Agreement.
 - The Administrative Agreement terminated on September 30, 2013.

You are Suspended, Now What?

- ▶ What a suspension/debarment means to a business:
 - Contracting Officers are not permitted to solicit offers from, award contracts to, or consent to subcontracts with suspended or debarred contractors.
 - Existing contracts and task orders may continue but the Government customer may not exercise options, issue new task orders, issue modifications (in some instances)
 - In the event the suspended/debarred entity is a subcontractor, prime contract holders will be unable to subcontract for services/products

Responding Step 1

- ▶ Don't go it alone:
 - Contact Counsel
 - Agencies, especially Civilian, vary SIGNIFICANTLY in how they approach these matters
 - Retain an attorney with experience in **both** the type of proceeding and with the suspending Agency.
 - Communicate with Counsel regarding your goals

Responding Step 2

- ▶ Reach Out Soon:
 - Contact the Suspension and Debarment Official (SDO)
 - LISTEN!!!!!!
 - Why did the Agency suspend and or propose debarment?
 - From the agency's perspective, what "warnings" were given, or not?
 - What does the Agency think are the supporting facts?
 - What does the Agency expect from the Contractor?

Responding Step 3

- ▶ Establish your Resolution Strategy:
 - Identify resolution options--
 - Litigation
 - Administrative Agreement (may also be called a Compliance Agreement, Non-Prosecution Agreement or Deferred Prosecution Agreement, Settlement Agreement)

Let's Assume Administrative Agreement

- ▶ What's probably proposed
 - Remediation/mitigation of the issue which is the subject of the suspension
 - Audit and Reporting Requirements
 - New or Beefed Up Compliance and Ethics program
 - Requirement for Monitor (varies by agency/subject) and regular Monitor reports to agency
- ▶ What you should seek
 - As much clarity and detail as possible—ambiguity is NOT a good thing (e.g. who is an "employee")
 - Dispute Resolution/Breach Provisions
 - Automatic visibility into Monitor's reports

Finding a Suitable Monitor

- ▶ Get References:
 - Speak to your peers and industry experts
 - Speak to others who have worked with Monitors (particularly those who have worked with Monitors you are considering)
- ▶ DO YOUR DUE DILIGENCE
 - Treat the selection of the Monitor as though you are hiring a senior level executive who will serve your company for several years
 - Solicit multiple proposals
 - Consider the Monitor's experience in the specific areas in which the alleged misconduct occurred e.g. False Claims, Conflict of Interest, Accounting, Small Business Regulations
 - Consider the Monitor's experience with compliance and ethics programs—does the Monitor understand the characteristics of an effective program; do they have certifications in compliance and ethics related areas (e.g. CCEP); are they familiar with the effective compliance program practices in the USSG

Independent Monitor's Work Plan

- ▶ As part of a proposal, ask the Monitor to include a Work Plan to help assess:
 - How deeply does the Monitor intend to get involved in company operations?
 - What is the orientation/mindset of the Monitor?
 - Does the Monitor see him/herself as an investigator/auditor looking to find failures to comply with the terms of the Administrative Agreement?
 - Does the Monitor see his/her role as observing the company as it fixes problems – a participant in the process by which the company will comply?
 - Does the Monitor lay out phases of the engagement?
 - Phase 1– Period of high intensity effort by the Monitor to establish themselves and learn about the company.
 - Phase 2– Period of ad hoc and changing requirements based upon what the Monitor has learned about the company, the Agency's feedback, and the company's progress
 - Phase 3–Maintenance period (usually begins at about 12–18 months into the term of the Agreement.

Independent Monitor's Agreement

- ▶ Will include:
 - Relevant Administrative Agreement terms
- ▶ Should also include:
 - Dispute Resolution (between Company and Monitor)
 - Definition of the Monitor's role/responsibilities
 - Agreed-upon baseline Work Plan
 - Fee Schedule with variable rate structure (ideally for different tasks, but at least for different skill levels)
 - Designated point of contact for the Monitor (e.g. Compliance Officer, General Counsel, CEO) through which requests by the Monitor are addressed

Working with an Independent Monitor

- ▶ Must Dos:
 - COMMUNICATE
 - Set a tone of **reasonable cooperation and transparency**
 - **Not** "anything, instantly, without question"
 - **Not** "only what I have to give you, and only when you ask"
 - Discuss:
 - Work plans
 - Document Requests
 - Access to records and personnel
 - Workspace at your site(s)
 - If/when they will bring in consultants/SMEs and associated costs

The Company-Wide Impact

- ▶ All business units are affected by the alleged actions of one unit
- ▶ Cultural change will not occur instantly, especially in units which consider themselves "remote" from the allegation
- ▶ Need for cross-company coordination and cooperation which may be new
- ▶ Need a single internal POC with day-to-day responsibility for dealing with the agency and the monitor
- ▶ Need for the entire company to be open and transparent with the agency/monitor

Takeaway: how to prepare

- ▶ Expect the agency to ask for evidence of your compliance program
- ▶ Could you produce these within 24 hours? Would they show a robust program?
 - Compliance Officer job description, adhering to FAR/USSG principles
 - Compliance Program Charter
 - Up to date Code of Conduct and Policies/Employee Handbook, covering topics relevant to your business and government contracting
 - Current employee roster and Training and Certification records; historical rosters and records for at least two years
 - Training Materials in printable format
 - Anonymous Helpline information/poster and locations displayed; investigation protocol; summary report on volume, nature of reports, timeliness of investigation
 - Documentation on incentive programs, performance appraisal elements, other rewards
 - Documentation of employee on-boarding, training, and other compliance processes
