SECTION 6

ETHICS

A. INTRODUCTION

The federal government provides financial assistance to state or local governments by engaging the recipient[1] in either a direct procurement contract[2] or a nonprocurement program.[3] While an agency such as the Department of Defense (DOD) typically engages in procurement contracts to acquire property or services for its direct benefit, the FTA generally participates in nonprocurement programs by providing financial assistance to state and local governmental institutions (such as local transit providers)[4] through a grant[5] or a cooperative agreement.[6] Thus, in order to ensure that the recipient, its board members, managers, employees, and any third party contractors who have been awarded a contract or purchase order by the recipient adhere to an acceptable ethical standard, a recipient must comply with legal requirements pertaining to ethics that are set forth in the FTA MA.[7]

The ethics section of the FTA MA provides that a recipient receiving FTA assistance agrees to (1) maintain a written code of ethics, (2) comply with lobbying restrictions, (3) abide by the provisions of the Hatch Act, (4) adhere to the Program Fraud Civil Remedies Act of 1986 and U.S. DOT regulations, "Program Fraud Civil Remedies," and (5) act in accordance with government-wide debarment and suspension regulations.[8] Further, in accordance with the FTA MA, the recipient also agrees to comply with FTA Circular 4220.1F, "Third Party Contracting Requirements,"[9] which in turn encourages the grantee to utilize the technical assistance and guidance set forth in the FTA Best Practices Procurement Manual.[10]

In addition to being contractually bound by the FTA ethics policy, a recipient has a primary responsibility to comply with federal statutes, federal regulations, and Executive Orders.[11] The prudent transit lawyer should understand the general "flow down" of FTA regulations and of the FTA MA framework: (i) a statute is enacted by Congress; (ii) regulations promulgated by DOT implement the statute; and (iii) a contractual provision appears in the FTA MA. FTA includes the provision in the FTA MA in some instances because Congress requires federal agencies such as FTA to include the provision in their grant agreements; in other instances, Congress further requires that the grantee include the provision in its third party contracts. Finally, FTA includes such provisions in its MA so that it could potentially enforce the provision contractually. In addition to the statute passed by Congress, the regulations promulgated by DOT or FTA and the provision in the FTA MA, FTA may issue Circulars, "Dear Colleague" letters, or other publications providing technical information relevant to FTA grant programs.

Sections within Title 49 of the Code of Federal Regulations (C.F.R.),[12] "Transportation," which is issued by DOT, summarize the ethical regulations a grantee must

[1] The term "recipient" means the entity that receives federal assistance directly from FTA to accomplish the project, and includes each FTA "grantee" and each FTA recipient of a cooperative agreement. FTA Master Agreement (MA) § 1. The FTA's model master agreement is Master Agreement for Federal Transit Administration Agreements, authorized by 49 U.S.C. Chapter 53, Title 23, United States Code (Highways), the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, as amended by the SAFETEA-LU Technical Corrections Act, 2008; the Transportation Equity Act for the 21st Century, as amended; the National Capital Transportation Act of 1969, as amended; the American Recovery and Reinvestment Act of 2009, Pub. No. L. 111-5, Feb. 17, 2009, or other federal laws that FTA administers. It is published at http://www.fta.dot.gov/documents/17-Master.pdf, http://fta.dot.gov/documents/Attachment_4_Master_Agreement.pdf, http://www.fta.dot.gov/funding/apply/grants_financing_5835.html, and www.fta.dot.gov/documents/12-Master.doc.

[2] A procurement contract refers to the existence of a legal relationship between the federal government and a state or local government or other recipient where the purpose is to acquire property or services for the federal government's direct benefit. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT iv (2d ed. 1996).

[3] The term "nonprocurement program" refers to any federal assistance program including grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. 48 C.F.R. § 9.403.

[4] Local government includes a public transit authority as well as a county, municipality, city, town, township, special district, or council of governments. FTA MA § 1.

[5] A grant agreement is an instrument by which FTA awards federal assistance to a recipient to support a project in which FTA does not take an active role or retain substantial control.

[6] A cooperative agreement is an instrument by which FTA awards federal assistance to a recipient to support a project in which the FTA takes an active role or retains substantial control.

[7] The specific requirements of the FTA MA are incorporated into the grant agreement or cooperative agreement executed by the recipient. As a condition of receiving funds, federal requirements must be met by the recipient as well as the subrecipients and contractors. FTA MA.

[8] FTA MA § 3.

[9] The FTA Circular 4220.1F outlines the requirements a grantee must adhere to in the solicitation, award, and administration of its third party contracts.

[10] The FTA *Best Practices Procurement Manual* outlines grantee practices that have proven to be successful in order to assist grantees in conducting third party procurements. These procedures are not mandatory unless identified, and are meant to be informative and helpful to the grantee community.

[11] FTA MA § 2.

[12] 49 C.F.R. pt. 18. The C.F.R. codifies the permanent rules published in the federal register by the executive departments and agencies of the federal government. The code is divided into 50 titles representing broad areas of federal regulation. Each title is divided into volumes that are identified by the name of the issuing agency. Title 49 is composed of seven volumes. The first volume (parts 1-99) contains current regulations issued under the Office of the Secretary of Transportation.

follow.[13] However, many of the DOT regulations found in Title 49 do not impose any further ethical burden on the recipient. More specifically, the regulations pertaining to (1) the maintenance of a written code of ethics,[14] (2) lobbying restrictions,[15] (3) the Program Fraud Civil Remedies Act of 1986,[16] and (4) government-wide debarment and suspension in nonprocurement activities are the same as those outlined in the MA.[17]

A recipient should also consult the ethics regulations set forth under Title 48 of the C.F.R., the "Federal Acquisition Regulations System" (FAR).[18] The language from Part 3 of the FAR, "Improper business practices and personal conflicts of interest," and Part 9 of the FAR, "Contractor qualifications," provides model contract language for DOT and other federal agencies.[19] Therefore, since the ethics regulations outlined by DOT in Title 49 generally parallel those set forth in the FTA MA and FTA Circular 4220.1F, and are based on the FAR, the sections in this chapter discuss the ethical regulations promulgated by DOT as well as variations arising under the FAR.[20]

However, when consulting FAR provisions, the prudent transit lawyer should keep in mind that the FAR governs direct federal procurements and acquisitions and, thus, differs from the DOT and OMB regulations.[21] Accordingly, the FAR does not apply to recipient procurement programs; most grantees use their own third party procurement program or that of the local government with FTA requirements and certain FAR provisions blended in.[22] FAR ethical requirements and standards are reflected, but not incorporated by reference, into the FTA MA, and so therefore decisions by the Comptroller General and the courts construing FAR can provide important guidance to recipients as to issues arising under the ethical provisions of the FTA MA.

In addition, many states have adopted statutes and regulations that impose ethical obligations upon grantees, and many local governments have followed suit. It is not uncommon for a grantee to be subject to a state "Little Hatch Act," a local ordinance governing conflicts of interest, opinions of the state Attorney General as to improper business practices by public officials and employees, and state debarment and suspension of contractors. Most state procedures providing for reciprocal debarment are based on a debarment in another jurisdiction—state or federal.[23]

There are also a number of ethical requirements imposed upon lawyers, as lawyers, by their state and local bar associations and the courts before which they practice. Given that lawyers generally should be familiar

---

[13] 49 C.F.R..

[14] 49 C.F.R. § 18.36(b)(3).

[15] 49 C.F.R. § 20. Section 3 of the FTA MA provides that the recipient must comply with DOT regulations, "New Restrictions on Lobbying," as set forth in 49 C.F.R. § 20. Specifically, the MA provides "Section 3 ETHICS. d. Lobbying Restrictions. The Recipient agrees that:

> (1) In compliance with 31 U.S.C. § 1352(a), it will not use Federal assistance to pay the costs of influencing any officer or employee of a Federal agency, Member of Congress, officer of Congress or employee of a member of Congress, in connection with making or extending the Grant Agreement or Cooperative Agreement;
>
> (2) In addition, it will comply with other applicable Federal laws and regulations prohibiting the use of Federal assistance for activities designed to influence Congress or a State legislature with respect to legislation or appropriations, except through proper, official channels; and
>
> (3) It will comply, and will assure the compliance of each subrecipient, lessee, third party contractor, or other participant at any tier of the Project with U.S. DOT regulations, "New Restrictions on Lobbying," 49 C.F.R. Part 20, modified as necessary by 31 U.S.C. § 1352, as amended.

[16] The Program Fraud Civil Remedies Act of 1986 is implemented at 49 C.F.R. § 31. The provisions of this Act may also be found within Section 3 of the FTA MA. It provides:

> f. False or Fraudulent Statements or Claims. The Recipient acknowledges and agrees that:
>
> (1) Civil Fraud. The Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. §§ 3801 et seq., and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to the Recipient's activities in connection with the Project. By executing the Grant Agreement or Cooperative Agreement for the Project, the Recipient certifies or affirms the truthfulness and accuracy of each statement it has made, it makes, or it may make in connection with the Project. In addition to other penalties that may apply, the Recipient also acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, certification, assurance, or representation to the Federal Government, the Federal Government reserves the right to impose on the Recipient the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, to the extent the Federal Government deems appropriate.
>
> (2) Criminal Fraud. If the Recipient makes a false, fictitious, or fraudulent claim, statement, submission, certification, assurance, or representation to the Federal Government or includes a false, fictitious, or fraudulent statement or representation in any agreement with the Federal Government in connection with a Project authorized under 49 U.S.C. chapter 53 or any other Federal law, the Federal Government reserves the right to impose on the Recipient the penalties of 49 U.S.C. § 5323(l), 18 U.S.C. § 1001, or other applicable Federal law to the extent the Federal Government deems appropriate.

[17] The FTA MA regulations parallel Title 49 of the C.F.R.

[18] 48 C.F.R. The FAR contains the rules and procedures the federal government has established for the acquisition of supplies and services.

[19] 48 C.F.R. The FAR and other requirements are implemented by DOT in parts 1 to 69 of 48 C.F.R.

[20] The subtle variations that exist among the procurement (FAR) and nonprocurement (DOT) regulations will be identified when necessary.

[21] 2 C.F.R. pts. 180 and 1200.

[22] In making procurements funded by a federal grant, grantees and subgrantees must use their own procurement procedures that reflect applicable state and local laws and regulations, provided that the procurements are consistent with applicable federal law. 49 C.F.R. § 18.36(b)(1).

[23] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 37. At the federal level, Executive Order 12689 requires agencies to establish regulations for reciprocal government-wide debarment and suspension.

with these requirements,[24] and most states require ethics credits as part of their Continuing Legal Education obligations, these nontransit specific requirements upon the profession are not addressed in this section.

B. CODE OF ETHICS FOR THIRD-PARTY PROCUREMENTS

Where a third party contract[25] is involved, DOT regulations and the FTA MA require that the grantee[26] maintain a "written code of standards of conduct" governing the performance of its employees engaged in the award and administration of contracts.[27] Such a code must prohibit a grantee's employees, officers, agents, immediate family members, partners, and board members from participating in the selection, award, or administration of a third party contract or sub-agreement supported by FTA funds if a conflict of interest, real or apparent, would be involved.[28] The written code should guard against a personal conflict of interest by prohibiting the recipient's employees, officers, agents, immediate family members, partners, and board members, who have a financial or other interest in the entity selected for award, from participating in all phases of the third party contract.[29]

FTA issued the following examples of personal conflict of interest situations that typically occur, along with the corresponding suggested means for avoiding future conflict:[30]

1. A transit agency employee in the construction program office is assigned responsibility to administer a contract for A & E services that has been awarded to her husband's firm. This creates a personal conflict of interest for the employee. *Means for Avoiding Future Conflict*: Employees should be required to file an annual disclosure statement with their agency concerning their financial and employment status and that of immediate family members. Agency employees and their managers must be sensitive to avoid personal conflict of interest situations, and if they arise, employees must remove themselves from the assignment.

2. An agency employee involved with administering an agency contract is invited by an official of the contractor to attend a sporting event free of charge. If the agency employee accepts the free tickets, he or she creates a personal conflict of interest. *Means for Avoiding Future Conflict*: When a contractor offers gifts to an agency employee, the employee should notify his or her supervisor, and an agency manager should then notify the contractor that such gifts are not permitted by agency rules.

3. An agency's contractor was assigned to participate on an evaluation panel to evaluate competitive propos-

---

[24] *See, e.g.,* AMERICAN BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT, AND MODEL RULES OF PROFESSIONAL RESPONSIBILITY (1990).

[25] A "third party contract" refers to any purchase order or contract awarded by a grantee to a vendor or contractor using federal financial assistance awarded by the FTA. FTA Circular 4220.1F § I-6.

[26] A "grantee" is the public or private entity to which a grant or cooperative agreement is awarded by FTA. The grantee is the entire legal entity even if only a particular component of the entity is designated in the assistance award document. FTA Circular 4220.1F § I-5.

[27] 49 C.F.R. § 18.36(b)(3); FTA MA § 3(c). *See also* FTA Circular 4220.1F (Nov. 1, 2008), Rev. 1; Apr. 14, 2009, Rev. 2; July 1, 2010, Rev. 3, Feb. 15, 2011. The requirements for establishing a written code of standards of conduct are based on the common grant rules, federal statutes, executive orders and their implementing regulations, and FTA policy. The FTA Circular 4220.1F, which may be found within the FTA's *Best Practices Procurement Manual*, applies to all FTA grantees and subgrantees that contract with outside sources under FTA assistance programs. If a grantee accepts operating assistance, the requirements of Circular 4220.1F apply to all transit-related third party purchase orders and contracts. It provides:

> 1. Written Standards of Conduct. The Common Grant Rules require each recipient to maintain written standards of conduct governing the performance of its employees that are engaged in or otherwise involved in the award or administration of third party contracts.
>
> a. Personal Conflicts of Interest. As provided in the Common Grant Rules and in the Federal Transit Administration (FTA) Master Agreement, no employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing individuals may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those individuals previously listed has a financial or other interest in the firm selected for award.
>
> b. Gifts. The recipient's officers, employees, agents, or board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subcontracts. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.
>
> c. Violations. To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient's officers, employees, agents, board members, or by contractors, subcontractors, or subrecipients or their agents."

FTA Circular 4220.1F § III-1.

[28] 49 C.F.R. § 18.36(b)(3); FTA MA § 3(c); FTA Circular 4220.1F §§ III-1, IV-5, VI-5.

[29] 49 C.F.R. § 18.36(b)(3); FTA MA § 3(c); FTA Circular 4220.1F §§ III-1, IV-5, VI-5. The Master Agreement provides:

> Section 3 ETHICS. (1) Personal Conflicts of Interest. The Recipient agrees that its code of conduct or standards of conduct shall prohibit the Recipient's employees, officers, board members, or agents from participating in the selection, award, or administration of any subagreement, lease, third party contract, or other arrangement at any tier, supported by Federal assistance if a real or apparent conflict of interest would be involved. Such a conflict would arise when an employee, officer, board member, or agent, including any member of his or her immediate family, partner, or organization that employs, or intends to employ, any of the parties listed herein has a financial interest in the entity selected for award.

[30] *See, e.g.*, FTA Third Party Procurement FAQ, Conflict of Interest, available at http://www.fta.dot.gov/13057_6100.html (last visited July 2014).

als. The contractor's employee assigned to the panel had a 401(k) retirement plan with one of the bidders. This represented a personal conflict of interest. *Means for Avoiding Future Conflict*: Agencies should not use consultants as voting members of evaluation panels for competitive contract awards. Consultants should only be used as advisors, and they should sign financial disclosure statements.

The code of standards of conduct must also provide measures for recognizing and avoiding organizational conflicts of interest.[31] An organizational conflict of interest exists where because of other activities, relationships or contracts, (1) a contractor is unable to provide impartial assistance or advice to the grantee, (2) a contractor's objectivity in performing the contract is impaired, or (3) a contractor has an unfair competitive advantage.[32] Examples of organizational conflict of interest situations and the suggested means for avoiding future conflict, as identified by FTA, are outlined below:[33]

1. A contractor was performing project management services for an agency, and these services included an oversight role of the agency's construction contractors. In the course of time this project management contractor decided to acquire a company that was performing a design-build contract for the same agency. In addition to performing project management services, the contractor was assigned to oversee the design-build contract for the agency. This acquisition created an organizational conflict of interest in that the project manager could no longer be objective in its oversight role with respect to the design-build contract. *Means for Avoiding Future Conflict*: This agency made a decision, with the contractor's cooperation, to remove the contractor from one of its roles.

2. A company is hired by an agency to make recommendations concerning alternative choices for a river crossing (the alternative choices are to build a bridge or to use ferries). However, this company has an organizational conflict of interest because it owns a subsidiary whose major line of business is designing and building bridges. *Means for Avoiding Future Conflict*: Agencies must be aware of potential conflict of interest situations when they contract with a consultant to advise them about competing alternatives. Agencies must take necessary steps to preclude contractors from doing studies when the contractor has a financial interest in the outcome of the study.[34] Accordingly, the soliciting proposal should require offerors to identify any financial or organizational interests in the technology field to be studied.

3. A company doing preliminary engineering work as a subcontractor on an agency contract was asked to prepare a budget for the permanent project management services contract that would eventually be assigned. This subcontractor subsequently bid on the project management contract, and the individual who was assigned the job of developing the project budget on the subcontract was also the company's person who prepared the company's price proposal when the project was bid. This company won the contract award, and the determining factor between the competing proposals in winning the award was price, not relative technical strengths. Here, the company gained an unfair competitive advantage by virtue of its work that gave it access to important information that was not publicly available. *Means for Avoiding Future Conflict*: The agency eventually terminated the project management services contract. The agency could have taken steps early to "wall off" the subcontractor employee who had access to the budget data (i.e., prevented the employee from passing nonpublic information to his company). In this case this individual should have signed a nondisclosure statement so that he could not participate in his company's later proposal effort. Alternatively, this sensitive task could have been assigned to a contractor that was not likely to bid on the defined work.

FTA further requires that a grantee code of conduct provide that "the grantee's officers, employees, agents, or Board members will neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements."[35] The grantee may set minimum rules

---

[31] FTA MA § 3(a)(2). The MA provides:

> Section 3 Ethics, (2) Organizational Conflicts of Interest. The Recipient agrees that its code of conduct or standards of conduct shall include procedures for identifying and preventing real and apparent organizational conflicts of interest. An organizational conflict of interest exists when the nature of the work to be performed under a proposed subagreement, lease, third party contract, or other arrangement at any tier may, without some restrictions on future activities, result in an unfair competitive advantage to the subrecipient, lessee, third party contractor, or other participant at any tier of the Project or impair its objectivity in performing the contract work.

[32] FTA MA § 3(a)(2). Federal transit law requires contracts to be awarded by free and open competition. Organizational conflicts of interest that cause an unfair competitive advantage are an impediment to free and open competition and are thus considered "restrictive of competition" by FTA Circular 4220.1F (revised Feb. 15, 2011), at IV-4, VI-3.

[33] A complete listing of the organizational conflict of interest scenarios compiled by FTA may be found at this Web site.

[34] *See, e.g.*, Colorado Rail Passenger Ass'n v. FTA, 843 F. Supp. 2d 1150 (D. Colo. 2011).

[35] 49 C.F.R. § 18.36(b)(3); FTA MA § 3(c); FTA Circular 4220.1F § III-1. The MA provides:

> Section 3. Ethics.
>
> a. Code of Conduct/Standards of Conduct. The Recipient agrees to maintain a written code of conduct or standards of conduct that shall govern the actions of its officers, employees, board members, or agents engaged in the award or administration of subagreements, leases, third party contracts, or other arrangements supported with Federal assistance. The Recipient agrees that its code of conduct or standards of conduct shall specify that its officers, employees, board members, or agents may neither solicit nor accept gratuities, favors, or anything of monetary value from any present or potential subrecipient, lessee, third party contractor, or other participant at any tier of the

where the financial interest is not substantial or the gift is an unsolicited item of nominal value.[36] As permitted by state or local law, such standards of conduct must include penalties, sanctions, or other disciplinary actions for violations of the standards of conduct by the grantee's and subgrantee's officers, employees, or agents, or by the contractors or their agents.[37]

The FTA *Best Practices Procurement Manual* recommends that every agency employee involved in the award or administration of contracts be given a copy of the agency's (or state's) written standards of conduct and be required to sign a statement that they understand and accept the standards.[38] Agency employees should be instructed on the types of activities that may be inconsistent with their agency responsibilities.[39] To facilitate this instruction, grantee procurement and technical personnel are encouraged to work closely with their legal counsel to review all situations that appear to have the potential for an organizational conflict of interest.[40] FTA also recommends that agencies conduct training sessions for employees who are directly involved in the procurement process.[41]

C. DISCLOSURE OF CONFLICTS OF INTEREST

An offeror's contract proposal must include a statement describing past, present, or planned organizational, financial, contractual or other interest(s) with an organization regulated by DOT, or with an organization whose interests may be substantially affected by DOT activities.[42] The statement should describe the interest(s) of the offeror, its affiliates, proposed consultants, proposed contractors, and key personnel of any of the above.[43] Where a potential conflict arises, the offeror must describe why he or she believes the proposed contract can be performed objectively.[44] Conversely, where no potential conflict of interest exists, the offeror must certify in its proposal that no affiliation exists that would create a conflict of interest.[45] Ultimately, if a conflict of interest is found to exist, the contracting officer may (1) disqualify the offeror, or (2) award the contract while taking necessary steps to mitigate or avoid the conflict.[46]

D. FALSE OR FRAUDULENT STATEMENTS OR CLAIMS

The FTA MA imposes two significant requirements concerning false or fraudulent statements or claims on grant recipients:

1. The Recipient acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986 and DOT regulations, "Program Fraud Civil Remedies,"[47] apply to its actions pertaining to this Project. Upon execution of the underlying grant or cooperative agreement

Project, or agent thereof. Such a conflict would arise when an employee, officer, board member, or agent, including any member of his or her immediate family, partner, or organization that employs, or intends to employ, any of the parties identified herein has a financial interest in the entity selected for award. The Recipient may set de minimis rules where the financial interest is not substantial, or the gift is an unsolicited item of nominal intrinsic value. The Recipient agrees that its code of conduct or standards of conduct shall also prohibit its officers, employees, board members, or agents from using their respective positions in a manner that presents a real or apparent personal or organizational conflict of interest or personal gain. As permitted by State or local law or regulations, the Recipient agrees that its code of conduct or standards of conduct shall include penalties, sanctions, or other disciplinary actions for violations of its code or standards by its officers, employees, board members, or their agents, or the Recipient's subrecipients, lessees, third party contractors, other participants, or their agents.

[36] These are known as "de minimus" gifts. For FTA and other federal employees, the level is set at $20 per occasion with a maximum of $50 per calendar year from the same source (including affiliates). In many cases, however, the best response to a gift being offered is a simple "thank you but no thank you."

[37] 49 C.F.R. § 18.36(b)(3); FTA MA § 3(c); FTA Circular 4220.1F § III-1.

[38] FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL (3d ed. 1998). The *Best Practices Procurement Manual* consists of 11 chapters and appendices as follows:

1. Purpose and Scope.
2. Procurement Planning and Organization.
3. Specifications.
4. Methods of Solicitation and Selection.
5. Award of Contracts.
6. Procurement Object Types: Special Considerations.
7. Disadvantaged Business Enterprise.
8. Contract Clauses.
9. Contract Administration.
10. Close Out.
11. Disputes.

Appendix A: Governing Documents.

Appendix B: Examples.

Appendix C: Reserved.

Appendix D: Annotated.

[39] FED. TRANSIT ADMIN., *supra* note 38.

[40] FED. TRANSIT ADMIN., *supra* note 38. The prudent transit attorney should be available to prepare restrictive contracting clauses and inform grantees when involvement by FTA regional counsel would be appropriate.

[41] FED. TRANSIT ADMIN., *supra* note 38. Employees may then be forewarned that firms bidding on government contracts have, in the past, attempted to secure awards by offering to employ procurement personnel in return for contract awards.

[42] FED. TRANSIT ADMIN., *supra* note 38, at App. B. 10. The prudent transit attorney must keep in mind that the offeror may not know of this obligation unless the recipient includes notice of the obligation in the Request for Proposals or Invitation for Bids.

[43] *Id*.

[44] *Id*.

[45] *Id.*

[46] *Id*.

[47] The Program Fraud Civil Remedies Act of 1986 is amended at 31 U.S.C. §§ 3801 *et seq*. and implemented at 49 C.F.R. pt. 31.

the Recipient certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, or it may make in connection with the project covered by the grant agreement or cooperative agreement. In addition to other penalties that may be applicable, the Recipient further acknowledges that if it makes a false, fictitious, or fraudulent claim, statement, submission, or certification to the federal government, the federal government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986, as amended, on the Recipient to the extent the federal government deems appropriate.[48]

2. If the Recipient makes a false, fictitious, or fraudulent claim, statement, submission, or certification to the federal government in connection with an urbanized area formula project financed with federal assistance originally awarded by FTA under the authority of 49 U.S.C. § 5307, the government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1)[49] on the Recipient, to the extent the Federal Government deems appropriate.[50]

As a result of the language contained within the MA, which repeatedly reads "the Recipient," the inclusion of this clause verbatim in a third party contract might lead third party contractors to believe that only recipients must adhere to this FTA requirement. In order to avoid such an erroneous assumption, the prudent transit attorney should pass the obligation through to the third party contractor, by including the phrase "the Contractor" in place of "the Recipient."

E. LOBBYING RESTRICTIONS

Pursuant to DOT regulations, "New Restrictions on Lobbying,"[51] each contractor who bids for an award of a federal contract, grant, or cooperative agreement exceeding $100,000 or an award of a federal loan exceeding $150,000 must certify,[52] to the best of his or her knowledge and belief, that:

1. No federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement; and

2. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with [any application to FTA for federal assistance, the applicant for FTA funds must] complete and submit Standard Form-LLL, "Disclosure form to Report Lobbying."[53]

3. The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts; subgrants; and contracts under grants, loans, and cooperative agreements), and that all subrecipients shall certify and disclose accordingly.[54]

Grantees are required to include the lobbying clause in agreements, contracts, and subcontracts exceeding $100,000.[55] Signed certifications must be obtained by a grantee from subgrantees and contractors; the contractors are to retain the subcontractors' certifications.[56]

---

[48] For each false claim, the recipient is subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000. 31 U.S.C. § 3802 (1994). *See also* 49 C.F.R. § 31.3. Contractor is subject to a civil penalty of not more than $5,500 for each false claim.

[49] Under Section 5307(n)(1) of Title 49, the Secretary may end a grant and seek reimbursement when a false or fraudulent statement or related act within the meaning of 18 U.S.C. § 1001 is made in connection with a certification or submission. *See also* S.T. Grand, Inc. v. City of New York, 344 N.Y.S.2d 938, 942 (1973). The court of appeals made the following determinations: (1) the vendor who procured a public contract in violation of competitive bidding requirements was not entitled to any payment; (2) if the vendor was paid, the public entity is entitled to recover all sums paid on the contract; and (3) if the vendor has not been paid, he or she is not entitled to recover either on the contract or in quasi-contract. The decision stipulated that policy considerations mandate that harsh forfeiture is essential to deter violation of competitive bidding.

[50] FTA MA 3(f).

[51] 49 C.F.R. § 20.110; FTA MA § 3(d). The regulations are based on 31 U.S.C. § 1352 and 49 U.S.C. § 322 (2002).

[52] 49 C.F.R. pt. 20, App. A. Language in the Lobbying Certification is mandated by 49 C.F.R. pt. 19, App. A, § 7, which provides that contractors file the certification required by 49 C.F.R. pt. 20, App. A. *See also* 49 C.F.R. § 20.110.

[53] Standard Form-LLL is set forth in App. B of 49 C.F.R. pt. 20, as amended by "Government-wide Guidance for New Restrictions on Lobbying," 61 Fed. Reg. 1413 (1/19/96), and is mandated by 49 C.F.R. pt. 20, App. A. Updates to Standard Form-LLL are required for each calendar quarter in which any event occurs that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by the entity. Those amounts may include a cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a "covered federal action"; a change in the person(s) attempting to influence such action; or a change in the officer(s), employee(s), or member(s) contacted to influence such action. Grants Management Workbook (2001). *See also* 2 C.F.R. § 1200.220.

[54] 49 C.F.R. pt. 19, App. A.

[55] FTA Grants Management Workbook § 10 (2003).

[56] *Id*. § 10.

F. EMPLOYEE POLITICAL ACTIVITY

The FTA MA specifies that a recipient must agree to comply with the Hatch Act.[57] The Hatch Act limits the political activities of state and local agencies and their officers and employees whose principal employment activities are financed in whole or in part with federal funds,[58] including a federal loan, grant, or cooperative agreement.[59] Hatch Act violations are handled by the Office of Special Counsel, which has jurisdiction. A state or local officer or employee may not:

1. Use his or her official authority or influence to interfere with or affect the result of an election or a nomination for office;
2. Directly or indirectly coerce, attempt to coerce, command, or advise a state or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
3. Be a candidate for elective office.[60]

Determining whether employee suspension or removal is an appropriate penalty for an employee violating the Hatch Act is dependent upon the seriousness of the violation and an account of the following mitigating factors: (1) nature of the offense and the extent of the employee's participation; (2) employee's motive and intent; (3) whether the employee received advice of counsel regarding the activities at issue;[61] (4) whether the employee ceased the activities once the violation was discovered; (5) employee's past employment record; and (6) political coloring of the employee's activities.[62] However, the Hatch Act does not apply to nonsupervisory personnel of a transit system (or of any other agency or entity performing related functions), who are otherwise covered solely by virtue of the receipt of operating assistance.[63]

The purpose of the Hatch Act is to preserve the notion that employment and advancement in a government position is not dependent upon political preference, so that government employees are free from pressure to vote for a candidate or contribute to a political campaign of their choice without fear of retribution.[64] Therefore, it is important for the employee to understand what types of political activities constitute direct or indirect coercion of an employee. The Merit Systems Protection Board (MSPB) in *Special Counsel v. Gallagher* was presented with this issue.[65] In this case, the director of administration and finance for a federally-financed transportation authority who asked an employee to "get a table of 10 together" for a fashion show sponsored by the Democratic Party and subsequently provided the employee with 10 unsold tickets, was found to have coerced that employee in violation of the Hatch Act.[66] The Chief Administrative Law Judge (CALJ) upheld the long-established rule that a "person in authority violates the Hatch Act if he willfully permits his official influence to be a factor in inducing a subordinate to make a political contribution."[67]

Although an understanding of how the Hatch Act limits the political activities of employees of state and local agencies facilitates compliance with the FTA MA, a knowing and willful violation is not required to violate the Hatch Act. For example, in *Alexander v. Merit Systems Protection Board*, the employee's uncertainty whether he was an employee under the Hatch Act did not prevent his removal for violating the Act.[68] Although the employee made an effort to determine if his employment status was covered by the Act, his blatant disregard of the unequivocal warnings, and his willingness "to take a chance on an unclear situation," justified his removal.[69]

G. SPECIAL GRANT OR SUBGRANT CONDITIONS FOR "HIGH-RISK" GRANTEES

In accordance with the federal government's policy to protect the public interest, DOT may only conduct busi-

---

[57] FTA MA 3(e). The Hatch Act is codified at 5 U.S.C. §§ 1501–1508 and §§ 7324–7326 (1994), and implemented by 5 C.F.R. § 151 (2001).

[58] The question of whether federal funds have been received by a state agency is irrelevant to the determination of whether the agency is a part of the state government and, thus, bound by the Hatch Act. *See* 5 U.S.C. § 1501(2).

[59] FTA MA § 3(e). Federal funds awarded by a state highway department to be exclusively used for highway construction and maintenance projects were "loans" and "grants" within the Hatch Act. Engelhardt v. U.S. Civil Service Comm., 197 F. Supp. 806, 810 (M.D. Ala. 1961).

[60] 5 U.S.C. § 1502. Candidacy exceptions do exist. A state or local officer or employee may be a candidate for (1) the Governor or Lieutenant Governor of a state; (2) the Mayor of a city; (3) a duly elected head of an executive department of a state; (4) an individual holding elective office; (5) an activity in connection with a nonpartisan election; or (6) an officer of a political party, delegate to a political party or convention, member of a National, State, or local committee of a political party, or any similar position.

[61] However, the prudent transit attorney should convey to his or her client that in most cases, the lawyer for the agency is not the lawyer for the agency's individual employees.

[62] 5 U.S.C. § 1505.

[63] 23 U.S.C. § 142(g).

[64] United States v. National Treasury Employees Union, 513 U.S. 454, 470 (1995).

[65] Special Counsel v. Gallagher, 44 M.S.P.R. 57 (1990).

[66] *Id*. at 66.

[67] *Id*. at 68. The director's contention that he "asked, rather than told" his subordinates to help was unpersuasive to the CALJ. The director violated the Hatch Act despite a lack of evidence that he made threats or promises in conversations with the employees.

[68] Alexander v. Merit Systems Protection Bd., 165 F.3d 474, 481 (6th Cir. 1999).

[69] *Id*. at 481. The MSPB's determination that the employee did not act reasonably in deciding to disregard the Office of Special Counsel official's warning that he was covered by the Act justified the removal of the employee.

ness with responsible persons.[70] Thus, DOT has implemented special grant and subgrant conditions for "high-risk" grantees.[71] DOT regulations state that a grantee or subgrantee may be deemed high-risk if he or she: (1) has a history of unsatisfactory performance, (2) is not financially stable, (3) has an unsatisfactory management system, (4) has not conformed to terms and conditions of previous awards, or (5) is otherwise not responsible.[72]

DOT regulations also specify that grantees and subgrantees may only work with responsible third party contractors who possess the ability to perform successfully under the terms and conditions of a proposed procurement.[73] When assessing a contractor's responsibility status, a grantee or subgrantee must consider the contractor's integrity, compliance with public policy (which includes compliance with applicable government regulatory requirements), record of past performance, and financial and technical resources.[74]

Upon a determination that a grantee is high-risk, the awarding agency may refuse to provide federal financial assistance.[75] However, in the event the awarding agency elects to provide federal assistance to a high-risk grantee, the grantee's actions with regard to the use of such assistance will be closely monitored by that agency and special conditions and/or restrictions may govern the award.[76] Potential special conditions or restrictions include: (1) payment on a reimbursement basis; (2) additional project monitoring; (3) requiring additional, more detailed financial reports; (4) requiring the grantee or subgrantee to obtain technical or management assistance; or (5) establishing additional prior approvals.[77] Such agency scrutiny obliges the high-risk grantee to proceed cautiously, thus causing grant approval and project implementation to each take longer.[78] Furthermore, discretionary funds are less likely to be awarded to high-risk grantees.

[70] A discussion of the meaning of the term "responsible" may be found in § 6.073.

[71] 49 C.F.R. § 18.12(a).

[72] *Id*.

[73] 49 C.F.R. § 18.36(b)(8).

[74] *Id*.

[75] 49 C.F.R. § 18.12(a)(5).

[76] *Id*.

[77] *Id*.

[78] The annual list of certifications and assurances required of FTA grantees is compiled in a single record published annually in conjunction with the publication of FTA's annual apportionment notice. A grant applicant must certify once each year to all certifications and assurances that can be expected to apply to any grant the applicant will request within the fiscal year. The notice includes a signature page that must be signed by the grant applicant's authorized official and its attorney, and submitted electronically via FTA's Transportation Electronic Award Management (TEAM) system or sent to the appropriate regional office. Accordingly, this process is slower for "high-risk" grantees. *See* FTA Grants Management Workbook, available at http://www.fta.dot.gov/3909_ENG_HTML.htm.

H. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION

1. Overview

Not intended as punishment, debarment and suspension procedures are intended to prevent waste, fraud, and abuse in federal procurement and nonprocurement actions. These procedures attempt to ensure that federally funded projects are conducted by legally responsible persons.[79]

Executive Order No. 12549 provides that, to the extent permitted by law, executive departments and agencies shall participate in a government-wide system for nonprocurement debarment and suspension.[80] Agencies may impose debarment[81] or suspension[82] for any of

[79] Debarment and Suspension (Nonprocurement), 2 C.F.R. pt. 1200, provides rules for debarment and suspension with respect to nonprocurement transactions; the Federal Acquisition Regulation (FAR) pt. 9.4, Debarment, Suspension, and Ineligibility, provides rules for procurement actions. The General Services Administration (GSA) maintains the list of parties that are debarred, suspended, or excluded from doing business with the government.

[80] Debarment and suspension are actions that, taken in accordance with Executive Order 12,549, Suspension and Debarment' (Feb. 18, 1986), and DOT regulations, help protect the public interest by ensuring that the federal government conducts business with responsible persons. Section 6 of Executive Order 12549 authorized OMB to issue guidance to federal agencies on nonprocurement suspension and debarment. *See* 2 C.F.R. pts. 180 and 1200.

[81] 2 C.F.R. § 180.925. Debarment is defined as "an action taken by a debarring official under Subpart H of this part to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 C.F.R. chapter 1). A person so excluded is debarred." Debarment excludes a person from participating in covered transactions. A debarring official is either: (1) The agency head, or (2) An official designated by the agency head. For DOT, the designated official is the head of a Departmental operating administration, who may delegate any of his or her functions and authorize successive delegations. 2 C.F.R. § 180.930. "A debarment may be based on convictions, civil judgments or fact based cases involving transportation crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, non-performance or false statements as well as other causes." U.S. Department of Transportation, Suspension and Debarment Web site, http://www.dot.gov/assistant-secretary-administration/procurement/suspension-and-debarment (last visited 2014).

[82] 2 C.F.R. § 180.1015. Suspension is defined as "action taken by a suspending official under subpart G of this part that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 C.F.R. chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended." A suspension immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation, whereby legal, debarment, or Program Fraud Civil Remedies Act proceedings may ensue. Rules for designating a suspending

the causes set forth in the debarment and suspension regulations.[83] The regulations broadly apply to all persons who have participated, are currently participating, or may reasonably be expected to participate in covered transactions under federal nonprocurement programs.[84] A person[85] who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities.[86] Debarment or suspension of a participant[87] in a program by one agency shall have government-wide effect; that is, no agency may enter into a covered transaction with the excluded person for the specified period of debarment or suspension, or the period of proposed debarment under 48 C.F.R. Part 9, Subpart 9.4, unless DOT grants an exception.[88] For example, a corporation debarred by FHWA is likewise unable to enter into a primary covered transaction or a lower tier transaction with an FTA recipient.

Pursuant to the FTA MA, the recipient of DOT financial assistance agrees to comply with Executive Orders 12549 and 12689, "Debarment and Suspension,"[89] and OMB and DOT debarment and suspension regulations on nonprocurement under 2 C.F.R. Parts 180 and 1200, respectively.[90] FTA grantees not only are required to certify that they are not excluded from federally assisted transactions, but also must ensure that none of the grantee's "principals,"[91] subrecipients, and third party contractors and subcontractors is debarred, suspended, ineligible, or voluntarily excluded from participation in federally assisted transactions.[92] Further, a person who is debarred or suspended shall be excluded from federal financial and nonfinancial assistance programs and placed on a listing of debarred and suspended participants, participants declared ineligible, and participants who have voluntarily excluded themselves from participation in covered transactions."[93]

Suspension and debarment functions in DOT are decentralized, so that each administration within DOT is responsible for its own suspension and debarment ac-

official and a debarring official are identical. "A suspension may be based on indictments, information or adequate evidence involving transportation crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements. A suspension is a temporary action which may last up to one year and is effective immediately." U.S. Department of Transportation, Suspension and Debarment Web site, http://www.dot.gov/assistant-secretary-administration/procurement/suspension-and-debarment (last visited July 2014).

[83] 2 C.F.R. pt 180. The causes for suspension and debarment and the accompanying procedures are set forth in pt. 180.

[84] 2 C.F.R. § 1200.332. A covered transaction is a primary covered transaction or a lower tier covered transaction. A "primary covered transaction" is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a federal agency and a person. A "lower tier covered transaction" is: (1) any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction; (2) any procurement contract for goods or services between a participant and a person at any tier, regardless of type, expected to equal or exceed the federal procurement small purchase threshold (currently $25,000) under a primary covered transaction; (3) any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have critical influence on or substantive control over that covered transaction. *See* 2 C.F.R. § 1200.220.

[85] 2 C.F.R. § 180.985. A "person" is "any individual, corporation, partnership, association, unit of government, or legal entity, however organized."

[86] 2 C.F.R. § 180.155. In light of the serious nature of these sanctions, debarment or suspension of a participant is a discretionary act that is to be imposed only in the public interest for the government's protections and not for purposes of punishment. 2 C.F.R. § 180.125.

[87] 2 C.F.R. § 180.980. A participant is defined as "any person who submits a proposal for or who enters into a covered transaction, including an agent or representative of a participant."

[88] 2 C.F.R. § 1200.137. DOT may grant an exception allowing a debarred, suspended, or voluntarily excluded person, or a person proposed for debarment under the FAR, to take part in a particular covered transaction.

[89] The parameters and effect of the Executive Orders are discussed in the following section.

[90] FTA MA § (3)(b). The MA provides

> Section 3 Ethics. b. Debarment and Suspension. The Recipient agrees to comply with applicable provisions of Executive Orders Nos. 12549 and 12689, "Debarment and Suspension," 31 U.S.C. § 6101 note, and U.S. DOT regulations, "Nonprocurement Suspension and Debarment," 2 C.F.R. Part 1200, which adopt and supplement the provisions of U.S. Office of Management and Budget (U.S. OMB),"Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," 2 C.F.R. Part 180. To the extent required by these U.S. DOT regulations and U.S. OMB guidance, the Recipient agrees to review the "Excluded Parties Listing System" at http://epls.gov/ and to include a similar term or condition in each lower tier covered transaction, assuring that, to the extent required by the U.S. DOT regulations and U.S. OMB guidance, each subrecipient, lessee, third party contractor, and other participant at a lower tier of the Project, will review the "Excluded Parties Listing System" at http://epls.gov/, and will include a similar term or condition in each of its lower tier covered transactions.

See 2 C.F.R. § 1200.332.

[91] 2 C.F.R. § 180.995. A principal is an officer, director, owner, partner, key employee, or a person who has critical influence on or substantive control over a covered transaction.

[92] FTA Grants Management Workbook § 9 (2003). DOT regulations also provide that grantees and subgrantees may not make any award or permit any award (subgrant or contract) at any tier to any party that is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12,549, "Debarment and Suspension." 49 C.F.R. § 18.35.

[93] 2 C.F.R. §§ 180.110, 180.115, 180.140, 180.145. For example, in March 2002, the GSA suspended Enron Corporation and Arthur Andersen, LLP, from government contracting. Regional offices are notified of such suspensions with Dear Colleague letters.

tions. In addition to DOT, more than 50 federal agencies maintain debarment and suspension officials.[94]

Existing debarment and suspension practices are also regulated by the FAR. However, while DOT debarment and suspension regulations govern recipients involved in nonprocurement programs, the FAR prescribes policies and procedures governing the debarment and suspension of contractors engaging in direct procurement contracts with government agencies.[95] Policy language within the FAR provides that government agencies, such as DOT, establish methods and procedures for coordinating their debarment or suspension actions so as to implement the policies and procedures under the FAR.[96] As a result, government debarment and suspension regulations implemented by DOT appear within Title 49.[97]

On November 15, 2006, OMB published final guidelines to agencies on government-wide debarment and suspension.[98] Until 2008, 49 C.F.R. Part 29, Debarment and Suspension (Nonprocurement), provided rules for DOT-wide debarment and suspension under nonprocurement transactions. That year, the DOT moved its regulations on nonprocurement suspension and debarment from their location in Title 49 of the C.F.R. to Title 2 of the C.F.R., and more specifically, 2 C.F.R. Part 1200.[99] They follow the OMB rules on debarment and suspension in 2 C.F.R. Part 180.

2. The Executive Orders

Prior to the 1980s, no government-wide regulation comparable to the FAR subpart 9.4 existed for nonprocurement suspension and debarment.[100] Although various agencies had debarment and suspension programs in effect for nonprocurement programs (particularly HUD), these programs only excluded participation in a particular agency and not throughout the government.[101] However, in 1986 President Reagan issued Executive Order No. 12549 directing executive agencies to participate in a system for debarment and suspension from procurement and nonprocurement programs and activities.[102] The Executive Order states that "debarment or suspension of a participant in a program by one agency shall have government-wide effect," whereby Executive departments and agencies must "follow government-wide criteria and government-wide minimum due process procedures when they act to debar or suspend participants."[103] Accordingly, after the Office of Management and Budget implemented the Executive Order in May 1987, 34 agencies published a final Common Rule[104] that established a "uniform system of nonprocurement debarment and suspension."[105] DOT joined this uniform approach to debarment and suspension in 2008.[106]

In 1989, Executive Order No. 12689[107] addressed the issue of unifying the procurement and nonprocurement debarment and suspension systems so that debarment or suspension of a participant under either the FAR or the Common Rule would have government-wide effect.[108] After an Interagency Committee on Debarment and Suspension and the Federal Acquisition Streamlining Act of 1994 addressed the concept of reciprocity, an amended Common Rule and FAR were published on June 26, 1995.[109] Both bodies of regulation established

---

[94] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at Tab E.

[95] 48 C.F.R. § 9.4.

[96] 48 C.F.R. § 9.402(b).

[97] 2 C.F.R. pt. 1200.

[98] Guidance for Governmentwide Debarment and Suspension (Nonprocurement), 71 Fed. Reg. 66,431 (Nov. 15, 2006); 2 C.F.R. pt. 180.

[99] "These changes are non-substantive in nature and constitute an administrative simplification that would make no substantive change in Department policy or procedures for nonprocurement suspension and debarment." Department of Transportation Implementation of OMB Guidance on Nonprocurement Suspension and Debarment, 73 Fed. Reg. 24139 (May 2, 2008). The regulation "adopts the Office of Management and Budget (OMB) guidance in subparts A through I of 2 CFR part 180, as supplemented by this part, as the Department of Transportation policies and procedures for nonprocurement suspension and debarment." 2 C.F.R. § 1200.10.

[100] Exec. Order No. 12,689, 3 C.F.R. 235 (1989). "Nonprocurement" activities refer to all programs and activities involving federal financial and nonfinancial assistance and benefits, as covered by Executive Order No. 12,549.

[101] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 35.

[102] Exec. Order No. 12,549, 3 C.F.R. 189 (1986). This Executive Order was intended to "curb fraud, waste, and abuse in Federal Programs, increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs."

[103] Exec. Order No. 12,549, 3 C.F.R. 189 (1986).

[104] 48 C.F.R. § 9.403. The nonprocurement common rule refers to the procedures used by federal agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order No. 12,549. Examples include grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

[105] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 36.

[106] Department of Transportation Implementation of OMB Guidance on Nonprocurement Suspension and Debarment, 73 Fed. Reg. 24,139 (May 2, 2008).

[107] Exec. Order No. 12,689, 3 C.F.R. 235 (1989). This Executive Order was issued by President Bush on August 16, 1989, and was intended to "protect the interest of the Federal Government, to deal only with responsible persons, and to insure proper management and integrity in Federal activities." The Executive Order stipulated that "no agency shall allow a party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded…that party from participation in a procurement or nonprocurement activity."

[108] *Id*.

[109] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 36.

that procurement and nonprocurement debarments and suspensions initiated on or after August 25, 1995, and proposed debarments under the FAR initiated on or after that date had government-wide effect.[110]

3. Determination of Responsible Grantees

Federal assistance will be given to *responsible* persons only. However, the term is not adequately defined by either DOT or FTA. Thus, consulting Subpart 9.1 of the FAR, "Responsible Prospective Contractors," is useful.[111] To be determined responsible under the FAR, a prospective contractor must: (1) have adequate financial resources to perform the contract or the ability to obtain them;[112] (2) be able to comply with the proposed delivery or performance schedule; (3) have a satisfactory performance record; [113] (4) have a satisfactory record of integrity and business ethics;[114] (5) have the necessary organizational experience, accounting and operational controls, and technical skills, or the ability to obtain them; (6) have the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and (7) be qualified and eligible to receive an award under applicable laws and regulations.

The bidder, rather than the government, bears the burden of affirmatively establishing its responsibility, and when necessary, must establish the responsibility of its proposed subcontractors as well.[115] If the prospective contractor fails to provide information clearly indicating that he or she is responsible, the contracting officer must withhold the contract award.[116]

In *Glazer Construction Co. Inc. v. United States*,[117] a federal district court held that a contractor who exhibited an unsatisfactory performance record was presently irresponsible under the FAR. In this case, the government contractor violated the contract's Buy America Act clause by using a nondomestic Canadian-made wall base as a material for construction.[118] The irresponsibility determination resulted from the contractor's false and misleading statements following the federal agency's initial inquiry into the origin of the wall base.[119] Instead of examining the wall base, the contractor made false representations that were "ignorant at best" and "intended to mislead at worst."[120] Ultimately, the contractor's "disdain" for its contractual obligations and its failure to answer directly to the agency's notice of proposed debarment, which stated that the contractor had made "false statements," warranted an irresponsible determination.[121]

When making a determination of present responsibility that is based on a legal violation, the debarring official is compelled to assess the relationship between the prior conviction and the contractor's business integrity.[122] While a satisfactory legal record is indicative of an honest and trustworthy contractor, a single violation of the law will not normally give rise to a determination of nonresponsibility.[123] Accordingly, contracting officers should give the greatest weight to violations of law that have been adjudicated within the 3 years preceding the offer, and to violations that are repeated, pervasive, or significant.[124] Moreover, a contracting officer should give consideration in situations where the contractor has made an effort to correct for past violations.[125]

Although a "nonresponsible" determination may lead to debarment, debarment is an entirely separate administrative process. A potential contractor can be determined nonresponsible, for instance, because of the nonresponsible actions of a subcontractor that could not be cured, and yet not be subjected to debarment. In most cases where a participant has acted in a nonresponsible manner, he or she may contact the agency to discuss settlement possibilities.[126]

I. AGENCY ACTIONS THAT RESULT IN EXCLUSION

Pursuant to DOT regulations, a participant shall not knowingly do business under a covered transaction with

---

[110] *Id.* at 36.

[111] 48 C.F.R. § 9.104. General standards for contractor responsibility are found in this section.

[112] A commitment or arrangement that is in existence when the contract is awarded to acquire the needed resources, equipment, or personnel satisfies this requirement. § 9.104-3.

[113] 48 C.F.R. § 9.104-3(b) (2001). A contractor that is or recently has been "seriously deficient in contract performance," has failed to "apply sufficient tenacity and perseverance," or has failed to "meet the quality requirements of the contract," does not meet the requirement of a "satisfactory performance record" under the FAR and, thus, is presumed to be nonresponsible.

[114] A prospective contractor's record of integrity and business ethics may be assessed by examining his or her compliance with the law. § 9.104-3(c).

[115] 48 C.F.R. § 9.103(d) (2001).

[116] 48 C.F.R. § 9.103(b) (2001).

[117] *Glazer Construction Co., Inc*., 50 F. Supp. 2d 85, 96 (D. Mass. 1999).

[118] *Id*. at 91.

[119] *Id*. at 96.

[120] *Id*. at 95.

[121] *Id*. at 96. Furthermore, the contractor failed his burden of demonstrating, to the satisfaction of the debarring official, his present responsibility.

[122] 48 C.F.R. § 9.104-3(b). The Burke court examined the "totality of the circumstances"—the contractor's criminal conviction for negligent violation of the Clean Water Act and the fact that the contractor was president and sole owner of the violating company, which pled guilty to a criminal conspiracy. The court held that the contractor's criminal conviction showed "a serious lack of business responsibility" and that debarment was proper. Burke v. EPA, 127 F. Supp. 2d 235, 239 (D. D.C. 2001).

[123] 48 C.F.R. § 9.104-3(b).

[124] 48 C.F.R. § 9.104-3(c).

[125] 48 C.F.R. § 9.104-3(c).

[126] Settlement agreements are discussed in Section 6.I.2C.

a person who is (1) debarred or suspended,[127] (2) proposed for debarment under 48 C.F.R. Part 9, subpart 9.4,[128] or (3) ineligible for or voluntarily excluded from the covered transaction.[129] Characteristics of these actions are discussed below.

1. Suspension

Suspension is an action taken by a suspending official to disqualify a person from participating in covered transactions for a temporary period, pending completion of an investigation and any legal debarment or Program Fraud Civil Remedies Act proceedings that may ensue.[130] Suspension is a serious action to be imposed only when there is "adequate evidence"[131] of a wrongful act and it has been determined that immediate action is necessary to protect the government's interest.[132] Information pertaining to the existence of a cause for suspension from any source should be promptly reported, investigated, and referred to the suspending official. The suspending official must give written notice of the suspension and indicate whether it is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities.[133] A notice must also inform the respondent that suspension shall be for a temporary period pending the completion of an investigation or Program Fraud Civil Remedies Act proceeding.[134] In addition to enforcing the notice requirement, DOT protects suspended participants by allowing them an opportunity to contest the suspension.[135]

Indictments, information, or adequate evidence involving transportation crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements may constitute grounds for suspension. A suspension may last up to 1 year.

a. Causes for Suspension

Although the causes for suspension are similar to those set forth for a debarment, several important differences exist.[136] Most notably, while a cause for debarment must be established by a "preponderance of the evidence" standard, a cause for suspension requires a lesser "adequate evidence" standard.[137] Therefore, suspension may be imposed where adequate evidence[138] allows the suspending officer to "suspect" any of the following: (a) the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction; (b) violating federal or state antitrust statutes; (c) commission of embezzlement, theft, forgery, bribery, falsifying or destroying records, making false statements, tax evasion, or receiving stolen property; and (d) commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.[139]

For example, in *Commercial Drapery Contractors, Inc., v. United States*, the D.C. Circuit Court held that a grand jury indictment alleging Commercial's involvement in a scheme to defraud the government gave the government the authority to suspend the plaintiff-contractor.[140] The opinion noted that suspensions are *temporary* measures available to the government so

[127] Agencies may debar or suspend a contractor "only in the public interest for the Government's protection and not for purposes of punishment," and then only for the causes and under the procedures established under 48 C.F.R. pt. 9. 48 C.F.R. § 9.402.

[128] In the procurement area, proposal for debarment disqualifies the respondent from contracting pending a decision regarding debarment. In contrast, there is no exclusion upon proposal to debar in the nonprocurement area; DOT provides for exclusion only upon suspension, debarment, or voluntary exclusion. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2.

[129] 2 C.F.R. § 1200.332. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals have not been excluded under the applicable regulations, unless it knows the certification is erroneous. The agency bears the burden of proof in showing that a participant knowingly conducted business with a person that filed an erroneous certification.

[130] 2 C.F.R. §§ 180.915, 180.965. If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or a United States Attorney requests its extension in writing, in which case it may be extended for an additional 6 months. 2 C.F.R. 180.760. *See* 31 U.S.C.§ 3801.

[131] The term "adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred. 2 C.F.R. § 180.900.

[132] 2 C.F.R. § 180.700. The suspending agency may suspend a person for any of the causes outlined in the "Causes for Suspension" section outlined below.

[133] 2 C.F.R. § 180.715. The terms of the notice must be descriptive enough to place the contractor on notice without disclosing the government's evidence.

[134] 2 C.F.R. § 180.915. If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless the Assistant Attorney General requests an extension. Suspension may not extend beyond 18 months, unless such proceedings have been initiated within that period. 2 C.F.R. § 180.760.

[135] 2 C.F.R. §§ 180.720, 180.735. A discussion of suspension and debarment proceedings follows in Section 6.09.

[136] Cause for Debarment is discussed in Section 6.082 below.

[137] 2 C.F.R. § 180.700. In assessing the adequacy of the evidence, the agency should consider how much information is available and how credible it is given the circumstances. The agency should also assess basic documents such as grants, cooperative agreements, loan authorizations, and contracts. 2 C.F.R. § 180.705.

[138] Indictment shall constitute adequate evidence for purposes of suspension actions. 2 C.F.R. § 180.700. In contrast, a conviction or civil judgment, rather than a mere indictment, is necessary to establish a sufficient evidentiary basis for a debarment.

[139] 2 C.F.R. § 180.800.

[140] 133 F.3d 1, 4 (D.C. Cir. 1998).

that it may protect itself from suspected contractors.[141] Although regulations do not require defendants to suspend indicted contractors, they also do not require agencies to give suspended contractors a second chance.[142]

If the proposed suspension is not based on a civil judgment or conviction, DOT regulations stipulate that a participant *may* be suspended if any of the following causes "may" exist: (a) a serious violation of the terms of a public agreement or transaction; (b) a history of unsatisfactory performance on one or more public agreements or transactions; (c) a willful failure to perform in accordance with the terms of one or more public agreements or transactions; (d) a violation of the Drug-Free Workplace Act of 1988,[143] or (e) any other cause of so serious a nature that it affects the present responsibility of a person.[144] A participant may also be suspended for any of the following causes: (1) a nonprocurement suspension by any federal agency before October 1, 1988 (the effective date of Title 49 regulations), or a procurement suspension by any federal agency taken pursuant to the FAR subpart 9.4; or (2) knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person in connection with a covered transaction.[145]

2. Debarment

Debarment is an action taken by a debarring official[146] to exclude a person from participating in covered transactions.[147] Debarment may have devastating consequences for FTA grantees dependent on receiving financial assistance from DOT; the practical consequence of debarment is that the participant is excluded from receiving federal financial and nonfinancial assistance and benefits under federal programs and activities.[148] A debarred FHWA subcontractor, for example, cannot contract with an FTA grantee, and likewise cannot contract with the National Aeronautics and Space Administration (NASA), the Department of Agriculture, or any other federal agency.

When considering debarment, a debarring official must determine whether debarment is warranted and, if so, the appropriate period of debarment.[149] Pursuant to the regulations, information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred to the debarring official for consideration.[150] However, if a debarring official determines debarment is necessary, he or she may *not* immediately debar a participant and instead must issue a "notice of proposed debarment."[151] Such notice must specify the reasons for the proposed debarment and the cause(s) relied upon, so that the participant understands the conduct or transaction(s) upon which the proposed debarment is based.[152] Upon proposal for debarment, the participant's name is added to the Excluded Parties List System as a participant proposed for debarment.[153]

The prudent transit lawyer should keep in mind that all participants of covered transactions are potentially subject to these proceedings.[154] More specifically, any grantee receiving a grant or cooperative agreement, or who is involved in any other nonprocurement transaction, is eligible for debarment.[155] Likewise, any of the grantee's principals, subrecipients, and third party contractors involved in a procurement contract for goods and services must also be aware of debarment regulations.[156]

Convictions, civil judgments, transportation crimes, contract fraud, embezzlement, theft, forgery, bribery, poor performance, nonperformance, or false statements may result in debarment.

a. Causes for Debarment

The debarring official may debar a participant for a conviction of or civil judgment for the: (a) commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction; (b) violation of federal or state antitrust statutes; (c) commission of embezzle-

---

[141] *Id*. at 5.

[142] *Id*. at 5.

[143] Pub. L. No. 100-690, 102 Stat. 4181.

[144] 2 C.F.R. § 180.800.

[145] 2 C.F.R. § 180.800.

[146] For DOT, the designated official is the head of the Departmental operating administration.

[147] 2 C.F.R. § 180.925.

[148] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 1. In some instances, the threat of suspension or debarment causes greater concern than either a criminal prosecution or civil action, because a participant might be disqualified *immediately* from interacting with DOT and would not have the ability to continue working while the criminal or civil matter is being resolved.

[149] 2 C.F.R. § 180.860. Debarment shall be for a period proportionate with the seriousness of the cause(s). If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period. Where the debarment is for violation of Subpart F relating to providing a drug-free workplace, the period of debarment must not exceed 5 years. However, in all cases, the debarring official may extend the debarment period for an additional period, if that official determines that an extension is necessary to protect the public interest. As a general rule, debarment should not exceed 3 years. 2 C.F.R. §§ 180.860, 180.865.

[150] 2 C.F.R. § 180.860.

[151] 2 C.F.R. § 180.615.

[152] 2 C.F.R. § 180.615. As with suspension proceedings, the respondent may within 30 days contest the proposed debarment. 2 C.F.R. § 180.820.

[153] 2 C.F.R. § 180.515. The GSA compiles and maintains a current list of all parties debarred, suspended, proposed for debarment, or declared ineligible by agencies or by the General Accounting Office.

[154] 2 C.F.R. § 180.200.

[155] 2 C.F.R. § 180.970.

[156] 2 C.F.R. § 180.320.

ment, theft, forgery, bribery, falsifying or destroying records, making false statements, receiving stolen property, making false claims,[157] or obstruction of justice; or (d) commission of any other offense indicating a lack of business integrity or honesty that seriously and directly affects the present responsibility of the person.[158] Anti-corruption legislation is widespread. For example, Section 1 of the Copeland "Anti-Kickback" Act[159] prohibits anyone from inducing, by any means, any person employed on the construction, prosecution, completion, or repair of a federally assisted building or work to surrender any part of his or her compensation to which he or she is otherwise entitled. Section 2 of that Act,[160] at 40 U.S.C. Section 3145, as amended, and implementing regulations of the U.S. Department of Labor[161] impose a record-keeping requirement on all third-party contracts for construction, alteration, or repair exceeding $2,000.[162] However, while commission of a crime may lead to debarment, the mere existence of such a cause does not require debarment.[163]

If the proposed debarment is not based on a civil judgment or conviction, a participant may be debarred for: (a) serious violation of the terms of a public agreement or transaction; (b) a history of unsatisfactory performance on one or more public agreements or transactions; (c) a willful failure to perform in accordance with the terms of one or more public agreements or transactions;[164] (d) violating the Drug-Free Workplace Act of 1988;[165] or (e) any other cause of so serious a nature that it affects the present responsibility of a person.[166] A participant may also be debarred for any of the following causes: (1) a nonprocurement debarment by any federal agency before October 1, 1988 (the effective date of Title 49 regulations), or a procurement debarment by any federal agency taken pursuant to the FAR subpart 9.4; or (2) knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person in connection with a covered transaction.[167]

b. Consideration of Mitigating Factors

A government agency is not required to debar a contractor merely because a cause for debarment or suspension exists. The regulations provide that the seriousness of a person's acts or omissions and any mitigating factors should be considered in making any debarment decision.[168] For example, in *Silverman v. United States*, the consideration of mitigating evidence was paramount to the federal district court's decision to terminate the government's debarment of the contractor.[169] In this case, the court held that the agency should have considered the contractor's motivation for pleading guilty to a misdemeanor charge of conversion

---

[157] A participant is particularly vulnerable to debarment for making false claims. Under the False Claims Act (FCA), the government may bring a civil suit to recover funds lost through fraudulent transactions. Additionally, private individuals with personal knowledge of fraud against the government may bring *qui tam* civil actions on behalf of the government against persons who have defrauded the government (§ 6.12). The civil False Claims Act provides:

> (a) Liability for certain acts. Any person who --
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> ...
>
> is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3729(a)(1)-(2). Allegations that Bombardier Transportation violated the Federal FCA, 31 U.S.C. § 3729(a)(1) and (2), because it presented disadvantaged business enterprise (DBE) reports to BART with overstatements of the amount of work awarded to JRL and amounts paid to a DBE for its work on the rehabilitation of rail car motors survived a motion for summary judgment in United States *ex rel*. Laymon v. Bombardier Transp. (Holdings) USA Inc., 2009 U.S. Dist. LEXIS 24403 (W.D. Pa. 2009).

[158] 2 C.F.R. § 180.800.

[159] 18 U.S.C. § 874.

[160] 41 U.S.C. § 3145.

[161] Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States, 29 C.F.R. pt. 3.

[162] Ch. IV. ¶ 2.i(6) of FTA Circular 4220.1F §§ IV-28, IV-29, has been amended to emphasize that Section 1 of the Copeland "Anti-Kickback" Act, 18 U.S.C. § 874, applies to all construction contracts, and Section 2 of the Copeland "Anti-Kickback" Act, 40 U.S.C. § 3145, and implementing U.S. Department of Labor regulations apply to construction contracts exceeding $2,000. FTA Circular 4220.1F. The Common Grant Rules also require provisions for compliance with the Copeland "Anti-Kickback" Act, as amended, as well as corresponding DOL regulations.

[163] 2 C.F.R. § 180.860. The seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision. 2 C.F.R. § 180.860(g).

[164] 2 C.F.R. § 180.800(b)(1). *See also* Marshall v. Cuomo, 192 F.3d 473, 478 (4th Cir. 1999). The contractor's failure to maintain the HUD property in a "decent, safe, and sanitary" condition constituted a willful failure to perform in accordance with the terms of the contract. *See also* Glazer Construction Co., Inc. v. United States, 50 F. Supp. 2d 85, 87 (D. Mass. 1999). A preponderance of the evidence established that Glazer's violation of the contract's Buy America Act clause constituted a willful violation of the contract.

[165] Pub. L. No. 100-690, 102 Stat. 4181.

[166] 48 C.F.R. § 9.406-2; 2 C.F.R. § 180.800. In cases where debarment is not based on a civil judgment or conviction, the cause for debarment must be established by a preponderance of the evidence standard, which is defined as "proof by information that, compared with that opposing it, leads to a conclusion that the fact at issue is more probably true than not." 48 C.F.R. § 9.403.

[167] 2 C.F.R. § 180.800.

[168] 2 C.F.R. § 180.860.

[169] 817 F. Supp. 846, 848 (S.D. Cal. 1993).

of government property prior to making a debarment decision.[170]

The regulations include a specific listing of mitigating factors;[171]

(a) The actual or potential harm or impact that results or may result from the wrongdoing.

(b) The frequency of incidents and/or duration of the wrongdoing.

(c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.

(d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.

(e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this part.

(f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.

(g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.

(h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.

(j) Whether the wrongdoing was pervasive within your organization.

(k) The kind of positions held by the individuals involved in the wrongdoing.

(l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(m) Whether your principals tolerated the offense.

(n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.

(r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.

(s) Other factors that are appropriate to the circumstances of a particular case.[172]

The FAR also specifically instructs a debarring official to consider whether the contractor:

1. Had effective standards of conduct and internal control systems in place at the time the activity that constitutes a cause for debarment took place or had adopted such procedures prior to any government investigation of the cited activity;
2. Brought the activity cited as a cause for debarment to the attention of the appropriate government agency in a timely manner;
3. Investigated the circumstances surrounding the cause for debarment;
4. Cooperated with government agencies during the investigation and any court or administrative action;
5. Has paid or has agreed to pay to the government all criminal, civil, and administrative damages and investigative costs;
6. Has taken appropriate disciplinary action against the individuals responsible for the activity;
7. Has implemented or agreed to implement remedial measures, including those identified by the government;
8. Has instituted or agreed to institute new or revised review and control procedures and ethics training programs;
9. Has had adequate time to eliminate the circumstances within his or her organization that led to the cause for debarment; and
10. Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment.[173]

However, the existence or nonexistence of any of these mitigating factors or remedial measures does not necessarily determine a contractor's present responsibility.[174] Therefore, if a cause for debarment exists, the contractor has the burden of demonstrating, to the de-

[170] *Id*. at 848.

[171] 2 C.F.R. § 180.860.

[172] 2 C.F.R. § 180.860.

[173] 48 C.F.R. § 9.406-1(a)(i).

[174] 48 C.F.R. § 9.406-1(a).

barring official's satisfaction, his or her present responsibility and that the debarment is not needed.[175]

c. Settlement and Voluntary Exclusion

When in the best interest of the government, the agency may, at any time, settle a debarment or suspension action.[176] In accordance with such a settlement, a participant typically agrees to implement an ethics code, a compliance program, or an internal control system designed to prevent a repeat of the imprudent behavior, and agrees to continuing monitoring by the agency.[177] In addition, a participant may agree to a status of nonparticipation or limited participation in covered transactions under what is termed, "voluntary exclusion."[178] However, if the participant and the agency agree to a voluntary exclusion, the action is entered in the nonprocurement section of the GSA Lists, under the "voluntary exclusion" label.[179]

3. Scope of Suspension and Debarment

Although a cause for suspension[180] or debarment often results from actions committed by individual participants, actions of individuals may reflect adversely upon the organization and its officials.[181] Accordingly, the suspension or debarment of a person typically embodies the suspension or debarment of all its divisions or organizational components of all covered transactions, unless the debarment decision is limited by its terms to particular individuals or divisions, or to specific types of transactions.[182]

An employee's actions may lead to the suspension or debarment of his or her company from further government contracting. Fraudulent, criminal, or improper conduct of an officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of him or her.[183] The purpose of this provision is to minimize the availability of a participant being able to avoid debarment by turning a blind eye to the actions of its officials and personnel. Accordingly, the conduct will be imputed to the participant regardless of whether the participant knew or approved of the conduct. Furthermore, conduct that did not occur in connection with an individual's performance of duties may also be imputed to him or her if it took place with the "participant's knowledge, approval, or acquiescence."[184] The participant's "acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence."[185] Similarly, improper conduct of one participant in a joint venture (or similar arrangement) may be imputed to other participants if the conduct occurred: (1) for or on behalf of the joint venture, or (2) with the knowledge, approval, or acquiescence of the contractors.[186]

Conversely, improper conduct by a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who shared in, knew of, or had reason to know of the participant's conduct.[187] Therefore, an employee who lacks actual knowledge of improper conduct, but had reason to know of such conduct, may be debarred. However, the courts have not interpreted the phrase "reason to know" as it pertains to an employee, to mean "should have known."[188] In *Novicki v. Cook*, for example, the U.S. Court of Appeals for the District of Columbia Circuit applied the Restatement[189] definition of "reason to know," which imposes no duty of inquiry and merely requires that an individual draw reasonable inferences from information already known to him or her.[190] Here, since the government contractor's president and chief executive officer did not have "reason to know" of the contractor's misconduct, debarment by the Defense Logistics Agency was unjustified.[191]

---

[175] *Id*.

[176] 2 C.F.R. § 180.635.

[177] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 67.

[178] 2 C.F.R. § 180.640.

[179] 2 C.F.R. §§ 180.645, 180.1020. In practice, this voluntary exclusion process is rarely used. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 67.

[180] The scope of suspension is the same as the scope of a debarment. 2 C.F.R. § 180.625.

[181] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 67.

[182] 2 C.F.R. § 180.625. For the DOT, the debarring or suspending official is the head of the Departmental operating administration, who may delegate any of his or her functions.

[183] 2 C.F.R. § 180.630.

[184] 2 C.F.R. § 180.630(a).

[185] *Id*.

[186] 2 C.F.R. § 180.630(c). Again, acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

[187] 2 C.F.R. § 180.630(a).

[188] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 70. In Caiola v. Carroll, 851 F.2d 395 (D.C. Cir. 1988), the court reversed the district court's holding that the criminal conduct of the corporation should be extended to its president and secretary on grounds that these two officers had reason to know of the contractor's criminal conduct. While the United States Court of Appeals recognized that company officers with reason to know of criminal conduct could be debarred, such a cause for debarment must be established by a preponderance of the evidence. *See* 48 C.F.R. § 9.406-3(d)(3).

[189] *Restatement (Second) of Agency* § 9 cmt. d (1958); *see also Restatement (Second) of Torts* § 12(1) (1965).

[190] 946 F.2d 938, 942 (D.C. Cir. 1991).

[191] *Id*. at 942. Although the president (Mr. Novicki) stated he became "generally aware" of some customer complaints after 4 years of alleged misconduct, there is no evidence that he was informed of "the number" of complaints, their "similarity," or their "continuing nature." Further, Novicki claimed he was told that the complaints concerned problems the contractor had no obligation to report to the government.

The debarring official may extend the suspension and debarment decision to include any affiliates of the participant. Business concerns, organizations, or individuals are affiliates of each other if (1) either one controls or has the power to control the other, or (2) a third party controls or has the power to control both.[192] The control requirement may be satisfied where there is interlocking management or ownership, identity of interests among family members, shared facilities and equipment, or common use of employees.[193] The issue of control becomes particularly important when an individual or company attempts to continue business in the form of a business entity that has been organized after a participant was debarred, proposed for debarment, or suspended. In such an instance, a participant that has the same or similar management, ownership, or principal employees as the participant that was debarred or suspended would be considered an affiliate.[194]

J. SUSPENSION AND DEBARMENT PROCEEDINGS

Federal agencies are required to establish procedures governing the suspension and debarment decision-making process that are informal, practicable, and "consistent with principles of fundamental fairness."[195] The process begins with the issuance of either a written notice of debarment or suspension to the respondent.[196] In the case of debarment, the written notice must advise the respondent (1) that debarment is being considered, (2) of the reasons for the proposed debarment, (3) of the cause(s) relied upon for proposing debarment, and (4) of the potential effect of a debarment.[197] Notice must also be given when a respondent is suspended so that he or she understands (1) that suspension has been imposed, (2) that the suspension is based on indictment, conviction, or other adequate evidence that the respondent has committed irregularities,[198] (3) the causes relied upon by DOT for imposing suspension, or (4) that the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings.[199]

1. Opportunity to Contest Proposed Debarment or Suspension

Within 30 days after receipt of the notice of proposed debarment or suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed suspension or debarment.[200] This initial proceeding is available to all participants. In actions not based on a conviction or civil judgment, if the suspending or debarring official[201] finds that the respondent's submission in opposition raises a genuine dispute over facts material to the *proposed* debarment or suspension, respondents may appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.[202] However, in actions based on a conviction[203] or civil judgment,[204] or in which there is no genuine dispute over material facts, the suspending or debarring official shall consider all of the information available and make a decision within 45 days.[205]

2. Settlement: Administrative Agreement

In many instances, an administrative agreement between the agency and the respondent leads to a resolution of the matter without suspension or debarment, or with limited suspension or debarment.[206] In general, the ability to settle an ethical violation by means of an administrative agreement depends on the following:[207]

1. Removal of Wrongdoer. If the ethical violation resulted from the conduct of one individual and did not permeate the organization, a settlement can usually take place if the organization is willing to remove the wrongdoer(s). As a practical matter, settlement is more feasible with larger companies; if a wrongdoer is a key player in a small company, removal from the company has the same affect as suspension or debarment.

2. Implementation of an Ethics Code of Compliance Program. An agency will likely insist on implementa-

---

[192] 2 C.F.R. § 180.905.

[193] *Id*.

[194] *Id*.

[195] 2 C.F.R. § 180.610. Information relating to the existence of a cause for suspension or debarment from any source shall be promptly recorded, investigated, and referred to the debarring official for consideration.

[196] 2 C.F.R. §§ 180.715, 180.805.

[197] 2 C.F.R. § 180.805.

[198] 2 C.F.R. § 180.915.

[199] 2 C.F.R. § 180.915.

[200] 2 C.F.R. §§ 180.130, 180.725.

[201] The suspending or debarring official is the agency head, or an official designated by the agency head.

[202] 2 C.F.R. §§ 180.720, 180.730, 180.735, 180.745. Presentations with a suspending and debarring official are common and often lead to the settlement of all or part of the matter. Further, a business or individual who learns of a pending indictment or other wrongful action that may lead to suspension or debarment is advised to contact the agency staff as early as possible. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 81.

[203] 2 C.F.R. § 180.920. A "conviction" is a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of *nolo contendere*.

[204] 2 C.F.R. § 180.915. A "civil judgment" is the disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988. 31 U.S.C. §§ 3801-3812.

[205] 2 C.F.R. § 180.755.

[206] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 81.

[207] *Id*. at 81.

tion of such a program as a prerequisite for signing an administrative agreement.[208]

3. Additional Internal Controls and Remedial Measures. As part of a settlement, an agency will generally insist that the grantee establish internal controls and remedial measures that are meant to prevent a repeat of the wrongdoing that gave rise to the suspension or debarment action.

4. Reports and Monitoring. An agreement generally obliges the grantee to submit reports to the agency and agree to continuous agency monitoring.

Most importantly, respondents are advised to immediately contact the agency to discuss settlement possibilities.[209]

3. Debarring Official's Decision

Upon receiving written materials in opposition to the suspension or proposed debarment, the agency official must then determine whether the respondent has raised a genuine dispute of material fact. In actions not based on a conviction or civil judgment, if the debarring or suspending official decides that a genuine dispute of material fact exists, he or she is required to allow the respondent(s) the opportunity to appear at a more formal proceeding.[210] Procedures are informal.[211] If fact-finding is conducted, the respondent may present witnesses and other evidence and confront opposing witnesses. The fact-finder will prepare written findings of fact, and a transcribed record of the proceedings will be made unless the respondent and the agency waive the requirement.[212] However, if the agency official concludes that there is no genuine dispute of material facts, he or she may make a decision to debar or suspend a participant based on all of the information in the administrative record, including any submission made by the participant.[213] Courts have held that when these procedures are properly applied, a contractor facing a possible debarment is not denied due process.[214]

When a debarring or suspending official concludes that there is no genuine dispute of material fact and denies a participant the opportunity to appear at a second hearing, the official's decision is a final agency decision for purposes of the Administrative Procedure Act (APA).[215] A court reviewing an agency decision may "set aside agency actions, findings, and conclusions that it finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[216] An agency decision is arbitrary and capricious, and reversible by court under the APA, where: (1) there was subjective bad faith on the part of the procuring officials; (2) it is clear the agency's determinations lacked a rational basis; and (3) the agency failed to consider the relevant factors or establish a reasonable connection between the facts and the decision.[217]

Local debarment actions may also be subject to state judicial review on similar grounds. For example, in *Stacy & Witbeck v. City and County of San Francisco,*[218] the court upheld the city public utility commission's debarment under its municipal code of a contractor of a light rail station on grounds of filing a false claim. The court found the city had ample authority to suspend a contractor's right to bid, that the opportunity to bid is not a property right, and the agency's quasi-judicial procedures were consonant with requirements of due process and administered in a fair and proper manner.[219]

4. Arbitrary and Capricious Determination

The arbitrary and capricious standard is highly deferential, and an agency action is presumed to be valid.[220] Therefore, a court cannot substitute its judgment for that of the agency in situations where reason-

---

[208] The FTA MA provides that grantees maintain a "written code of standards of conduct." *See* § 6.01.

[209] AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 81.

[210] 2 C.F.R. § 180.735(c).

[211] 2 C.F.R. §§ 180.740, 180.835. More formal proceedings are rare as the material facts are generally not in dispute. In a suspension action that is based on indictment, or in a proposed debarment action that is founded upon a conviction or civil judgment, no formal proceeding will be granted because another fact finder (a judge or a jury) has already found one of the bases for debarment beyond a reasonable doubt or by a preponderance of the evidence. AMERICAN BAR ASS'N, COMM. ON DEBARMENT & SUSPENSION, *supra* note 2, at 82.

[212] 2 C.F.R. §§ 180.745, 180.840.

[213] 2 C.F.R. §§ 180.830(a).

[214] Imco, Inc. v. United States, 97 F.3d 1422, 1427 (Fed. Cir. 1996).

[215] 2 C.F.R. §§ 180.735(a), 180.830(a). If the agency official decides to impose debarment or suspension, the respondent shall be given prompt notice advising that the debarment or suspension is effective for covered transactions throughout the executive branch of the Federal Government unless the agency head makes an exception. *See* 2 C.F.R. § 1200.137.

[216] 5 U.S.C. § 706(2)(A). Participants who have been suspended or proposed for debarment and who have also been denied a second hearing often allege that the agency official's decision was "arbitrary and capricious." However, participants rarely meet their heavy burden to demonstrate there was no rational basis for the agency's determinations.

[217] CRC Marine Services, Inc. v. United States, 41 Fed. Cl. 66, 83 (1998). *See also* Waterhouse v. United States, 874 F. Supp. 5 (D. D.C. 1994). When called upon to review a debarment decision, the Waterhouse court held that no disputed issues of material facts remained with respect to the contractor's claim that he did not have the intent necessary to accept an illegal gratuity from the supplier. The contractor's actions clearly showed that he intended to accept gratuities from the supplier and, thus, the agency's determination was not arbitrary and capricious.

[218] 36 Cal. App. 4th 1074, 44 Cal. Rptr. 2d 472 (1995).

[219] The purpose of the ordinance was "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public." *Id*. at 1094–96.

[220] *See* Kisser v. Cisneros, 14 F.3d 615, 618 (D.C. Cir. 1994).

able minds could have concluded differently.[221] For instance, the *Marshall v. Cuomo* court held that its function was not "to re-weigh conflicting evidence [or] to make credibility determinations."[222] Accordingly, the debarring official's decision to favor the Department of Housing and Urban Development's evidence as to the condition of the property over conflicting evidence presented by the government contractor was honored by the court and was not found to be arbitrary and capricious.[223]

Nevertheless, in cases where the debarment decision is not supported by the preponderance of the evidence, a court will reverse an agency's decision to debar a contractor.[224] In *Elaine's Cleaning Service, Inc. v. United States*, the U.S. district court held that the contractor's failure to pay benefits to its employees as required by the contract was a product of innocent negligence rather than culpable conduct.[225] In light of the "unusual circumstances" surrounding the missed payments, the government's interpretation of Elaine's conduct was unreasonable and unintelligible and, thus, the agency arbitrarily misapplied its own standards.[226]

K. CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION

To further ensure that government agencies conduct business with responsible participants, federal agencies require potential participants in primary covered transactions to submit certifications regarding their debarment and criminal history.[227] Accordingly, at the time a proposal is submitted in connection with a primary covered transaction, prospective primary participants, or their principals,[228] must certify whether they:

(a) Are presently excluded or disqualified;

(b) Have been convicted within the preceding three years of any of the offenses listed in § 180.800(a) or had a civil judgment rendered against you for one of those offenses within that time period;

(c) Are presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses listed in § 180.800(a); or

(d) Have had one or more public transactions (Federal, State, or local) terminated within the preceding three years for cause or default.[229]

The regulations emphasize that the submission of an accurate certification is paramount. If the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous, he or she must give immediate notice to the department or agency.[230] Thus, the prudent grantee includes in its third party contracts a provision requiring the participant to simultaneously give notice to the grantee.[231] Furthermore, a certification in which the participant answers in the affirmative to any of the above listed provisions, or the inability of a person to provide a certification, will not necessarily result in the withholding of an award.[232] However, should the agency learn that the participant has failed to provide the appropriate disclosure, it may terminate the transaction or pursue other available remedies, such as suspension and debarment.[233]

Each participant must require participants in lower tier covered transactions to include a similar certification.[234] By submitting the certification, the prospective lower tier participant certifies that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.[235] Further, such participant also agrees that should the proposed covered transaction be entered into, the participant shall not knowingly enter into any lower tier covered transaction with a person proposed for debarment under the FAR, debarred or suspended, declared ineligible, or voluntarily excluded from participation.[236] Lastly, each partici-

---

[221] *See* Burke v. EPA, 127 F. Supp. 2d 235, 237 (D. D.C. 2001).

[222] Marshall, 192 F.3d 473, 478 (4th Cir. 1999).

[223] *Id*. at 478.

[224] *See* Elaine's Cleaning Service, Inc. v. United States, 106 F.3d 726, 728 (6th Cir. 1997).

[225] *Id*. at 728.

[226] *Id*. at 728. *See also* Silverman v. United States, 817 F. Supp. 846, 848 (S.D. Cal. 1993). The government's refusal to consider mitigating evidence rendered the decision arbitrary, capricious, and an abuse of discretion. As a result, debarment was terminated.

[227] 2 C.F.R § 180.335. Certifications regarding debarment and suspension are required of principals of the grantee and all third-party contracts and subcontracts exceeding $100,000. The grantee's certification is part of the Annual List of Certifications and Assurances. FTA Grants Management Workbook § 9 (2001).

[228] "Principals" for the purposes of this certification means officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).

[229] 2 C.F.R. § 180.335.

[230] 2 C.F.R. § 180.350.

[231] Certification instructions for lower tier covered transactions are found at 2 C.F.R. §§ 180.355, 180.365. A participant may rely upon the certification of a participant in a lower tier covered transaction. Disclosure to FTA is required, if at any time a grantee or other covered entity learns that certification was erroneous when submitted or if circumstances have changed (new personnel, indictments, convictions, etc.). *See* 2 C.F.R. § 1200.332.

[232] 2 C.F.R. § 180.340. The submission of a false, fictitious, or fraudulent certification may subject the bidder to criminal prosecution. 48 C.F.R. § 52.209-5(a)(2).

[233] 2 C.F.R. § 180.345.

[234] 2 C.F.R. §§ 180.345, 180.355, 1200.332.

[235] 2 C.F.R. pt. 180, subpt. C

[236] *Id*.

pant must require participants in lower tier covered transactions to include the same certification.[237]

L. *QUI TAM* ACTIONS UNDER THE FALSE CLAIMS ACT

The False Claims Act (FCA), [238] sometimes called the "Lincoln Law,"[239] as it was promulgated during the Civil War to address fraudulent sales of war materials to the United States, was enacted to "encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward."[240]

Under the FCA, the government may bring a civil suit to recover funds lost through such fraudulent transactions.[241] Additionally, private individuals termed "relators," with personal knowledge of fraud against the government, may bring *qui tam*[242] civil actions on behalf of the government against persons who have defrauded the government.[243] *Qui tam* allows citizens with evidence of fraud against government contracts and programs to sue, on behalf of the government, in order to recover the stolen funds. As compensation, the citizen whistleblower or "relator" may be awarded a portion of the funds recovered—typically between 15 and 25 percent, but sometimes as high as 30 percent[244]—in addition to reasonable expenses, attorney's fees, and costs.[245] After Congress found that fraud permeated welfare, defense contracting, and Medicaid, the Act was amended in 1986 to provide enhanced penalties and a private right of action. The obvious intent of Congress was to apply criminal sanctions against grantees and those who commit fraud through grantee projects funded with federal financial assistance.

Pursuant to the FCA, one who knowingly submits, or causes another person or entity to submit, a false claim for payment of government funds is liable for the government's damages, trebled; civil penalties of $5,500 to $11,000 per false claim;[246] and attorney's fees and costs of a civil action brought to recover any such penalty and damages, if he or she makes any of the following false claims:[247]

1. Knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

2. Knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government;

3. Conspires to defraud the government by getting a false or fraudulent claim allowed or paid;

4. Has possession, custody, or control of property or money used, or to be used, by the government and, in-

---

[237] 2 C.F.R. §§ 180.300, 180.355

[238] 31 U.S.C. §§ 3729–3733. *See* http://www.taf.org/whyfca.htm. The FCA, as amended by the Fraud Enforcement and Recovery Act of 2009, Pub. Law No. 111-21 (S. 386), 123 Stat. 1617 (2009), proscribes:

> (1) presenting a false claim; (2) making or using a false record or statement material to a false claim; (3) possessing property or money of the U.S. and delivering less than all of it; (4) delivering a certified receipt with intent to defraud the U.S.; (5) buying public property from a federal officer or employee, who may not lawfully sell it; (6) using a false record or statement material to an obligation to pay or transmit money or property to the U.S., or concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the U.S.; (7) conspiring to commit any such offense.

Charles Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes* (Congressional Research Service, Aug. 6, 2009).

[239] The False Claims Act originated as the Act of March 2, 1863, 12 Stat. 696 (1863).

[240] United States *ex rel*. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992).

[241] 31 U.S.C. § 3730(a). The U.S. Attorney General is obligated to investigate a violation under Section 3729. If the Attorney General finds that a person has violated or is violating Section 3729, he or she may bring a civil action against the person. Although a private party may also bring such an action pursuant to, 31 U.S.C. § 3730(b), the government may elect to assume primary responsibility for the litigation from the outset. 31 U.S.C. § 3730(c)(1). If the government initially chooses not to do so, it may nevertheless intervene later in the proceedings upon a showing of cause. 31 U.S.C. § 3730(c)(3). The government may also move to dismiss or settle the litigation over the objections of the relator, so long as the relator is given an opportunity to be heard. 31 U.S.C. § 3730(c)(2)(A), (B). Doyle, *supra* note 238. The participation of the Justice Department in such actions is discussed at http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf.

[242] An action by a private party against a person violating the FCA is a *qui tam* proceeding. The phrase means "he who brings a case on behalf of our lord the King, as well as for himself."

[243] 31 U.S.C. § 3730(b)(i). A person may bring a civil action for a violation of Section 3729 for the person and for the United States Government, whereby the action shall be brought in the name of the government.

[244] U. S. Department of Justice, *The False Claims Act: A Primer*, http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf.

[245] United States v. Schimmels, 127 F.3d 875, 877 (9th Cir. 1997).

[246] However, if the person committing an FCA violation is found to have (1) furnished government officials responsible for investigating the false claims violations with all information known to such person about the violation within 30 days of obtaining the information, (2) cooperated with the investigation of the violation, and (3) at the time such person furnished the government with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, the court may assess not less than 2 times the amount of damages sustained by the government.

[247] 31 U.S.C. § 3729. The term "claim" includes any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient.

tending to defraud the government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

5. Authorizes to make or deliver a document certifying receipt of property used, or to be used, by the government and, intending to defraud the government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

6. Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

7. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government.[248]

When a relator brings a *qui tam* action, the government may choose to intervene, in which event the relator is entitled to a percentage share of any recovery.[249] However, if the government does not intervene and instead elects to "pursue its claim through any alternative remedy," the relator remains entitled to the same share of the recovery to which he or she would have been entitled had the government pursued its claim by intervening in the relator's *qui tam* action.[250] The statute of limitations under the FCA is 3 years from the date that the agency knew or should have known of the false claim, but in no event may 10 years pass after the date of the false claim.

The availability of FCA *qui tam* actions allows DOT to protect itself from grantees and third party contractors using federal assistance in a fraudulent manner.[251] For example, in *Lamers v. City of Green Bay*, the owner of a private bus company who had lost his contract to transport school children was allowed to bring a *qui tam* action against the city.[252] In this case, the relator alleged that the City of Green Bay, which owns and operates Green Bay Transit (GBT), made false statements and representations to FTA so that GBT could obtain annual FTA grant funds and so that it could avoid repayment of improperly received funds in violation of 31 U.S.C. § 3729(a)(2) and (7).[253] The United States District Court held that the relator could bring the *qui tam* action against GBT because he satisfied the "original source" requirement of the FCA.[254] Although the court found no evidence to support the inference that the City of Green Bay defrauded the federal government, and the relator's claims under § 3729(a)(7) were not actionable, the *qui tam* remedy remains a potentially viable check against government fraud.

The civil monetary penalty of $10,000 per claim gives *qui tam* actions particular bite; each line item in an itemized invoice can be the basis for a separate civil penalty. For example, the *United States v. Schimmels* court found 149 separate violations of the FCA following a *qui tam* action brought by employee-relators.[255] In this case, the Schimmels were held to have violated the FCA by knowingly and falsely certifying to the government that their employees had been paid in accordance with the Davis-Bacon Act.[256] Upon receiving federal funds for public works projects, the Schimmels completed a Davis-Bacon Act program form listing two employees as participants in an apprenticeship program.[257] However, evidence demonstrated that apprenticeship training was never actually provided for these employees and the apprenticeship program payment that was financed with federal funds was ultimately claimed by the Schimmels as "wages paid" to their employees.[258] Although the underlying amount was relatively small—10 cents per hour per employee—the U.S. District Court

[248] 31 U.S.C. § 3729. Under the FCA, the terms "knowing" and "knowingly" mean that a person, with respect to information: (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, whereby no proof of specific intent to defraud is required. *See* DOT Order 4200.5E (Mar. 15, 2010).

[249] 31 U.S.C. § 3730(b)(2). The government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. If the government does not intervene, successful false claims' plaintiffs can recover up to 30 percent of the damages award. However, if the government proceeds with an action brought by a person, such person may receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person contributes to the prosecution of the action.

[250] 31 U.S.C. § 3730(c)(5).

[251] *See* 456 PLI/Lit 7, 15 (1993). Bid-rigging throughout state and federal government contracts will increasingly be a subject of *qui tam* suits. However, the *qui tam* system has been attacked as being unconstitutional since the amendments to the FCA were passed in 1986 and 1988. But in fact, *qui tam* has long been upheld by state courts as constitutional. *See, e.g.,* Sutton v. Phillips, 116 N.C. 502, 21 S.E. 968 (1895), and Drew v. Hilliker, 56 Vt. 641 (1884).

[252] United States *ex rel*. Lamers v. City of Green Bay, 168 F.3d 1013, 1016 (7th Cir. 1998).

[253] *Id*. According to the relator, GBT and City officials falsely represented the scope of the school bus transportation it provided in transporting students and school personnel.

[254] *Id*. at 981. Section 3730 stipulates that the relator must be an "original source" within the meaning of the FCA. The following two criteria must be met: (1) the relator must be an individual who has direct and independent knowledge (knowledge that does not derive from prior public disclosure) of the information on which the allegations are based, and (2) the relator must have voluntarily provided the information to the government before filing an action based on this information. 31 U.S.C. § 3730(e)(4)(B).

[255] United States v. Schimmels, 127 F.3d 875, 882 (9th Cir. 1997).

[256] *Id*. at 877.

[257] *Id*. at 877.

[258] *Id*. at 876.

imposed $15,000 in actual damages and civil penalties of $1,400,000.[259]

In summary, FCA liability extends to all participants involved in FTA grant projects; subcontractors, contractors, grantees, and the state may all be drawn into a *qui tam* action.[260] Such claims can be brought against a contractor or subcontractor without naming the grantee as a defendant. *Qui tam* actions can be filed directly against subcontractors and may be based on false or inflated invoices submitted by a contractor to a grantee for reimbursement. Even if the grantee has no direct contact with the subcontractor or if no damage is proven, a *qui tam* action lies if any federal funds are used to reimburse a submitted invoice. The only required nexus is that the subcontractor received federal financial assistance.

Arguably then, the grantee's greatest exposure under the FCA may be created when a grantee ignores or intentionally disregards false claims submitted by a contractor and forwards them to the government for reimbursement. Since the FCA is meant to expose grantees who fail to detect fraudulent contractors, the prudent grantee will develop a False Claims Integrity Program so that all personnel can learn to identify and report false claims. Such a program should also provide for training of third party contractors, and may be used by the grantee as a basis to disqualify a potential corrupt bidder or to reject a bid. In order to facilitate the implementation of such a program, a policy statement adopted by the grantee's board, or similar authority, should be adopted and distributed throughout the agency.[261]

M. THE WHISTLEBLOWER PROTECTION ACT

Government employees have their own protection under the Whistleblower Protection Act (WPA).[262] As an example, *Reid v. Merit Systems Protection Board*[263] involved an FTA employee who was asked by her supervisor to prepare documentation to sustain procurement for a managerial cost accounting project and to justify the award of a sole-source contract to a large business. She resisted, informing the Director of the Office of Policy Development that she believed a sole-source procurement would violate Federal Acquisition Regulations[264] relating to full and open competition, as well as requirements for awards to small DEBs. She filed an appeal with the Merit System Protection Board alleging that she had been subject to adverse personnel actions and that her conduct was protected under the Whistleblower Protection Act.[265] The board dismissed the appeal. The reviewing court held that the board erred in holding that a disclosure of an impending action never taken cannot qualify as a protected disclosure under the WPA. The WPA provides:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule, or regulation.[266]

The court held

> The language of the statute indicates Congress's intent to legislate in broad terms, and we conclude that, absent some exclusionary language, a cramped reading of the statute to exclude potential violations not carried out would be counter to that intent. A reasonable belief that a violation of law, rule, or regulation is imminent is thus sufficient to confer jurisdiction on the Board under the WPA. …The Board also erred in holding that alerting an innocent super-visor of an accused wrongdoer to a purported violation does not qualify as a protected disclosure.[267]

N. OFFICE OF INSPECTOR GENERAL

In addition to being ethically bound by FTA policy and Title 49 of the C.F.R., grantees must recognize that their use of DOT funds is subject to review and investigation by DOT's Office of Inspector General (OIG).[268] Serving as DOT's criminal investigative element, the OIG has made investigating contract and grant fraud a top priority.[269] Accordingly, OIG has designated a national contract and grant fraud coordinator, as well as regional "specialists" responsible for organizing fraud prevention, detection, and investigation efforts with DOT components such as the FHWA, FTA, and FAA.[270] The OIG stipulates that these specialists will manage

---

[259] *Id*. at 882. *Qui tam* also has been addressed by the US Supreme Court in 2011 in Schindler Elevator Corp. v. United States *ex rel*. Kirk, No. 10-188, 131 S.Ct. 1885, 179 L. Ed. 2d 825 (May 16, 2011).

[260] Additionally, individuals who prepare and submit a false claim for payment may also be joint and severally liable.

[261] Useful Web sites on this subject include www.justice.gov/usao/pae/Documents/fcaprocess2.pdf and www.fas.org/sgp/crs/misc/R40785.pdf.

[262] 5 U.S.C. § 2302(b)(8).

[263] 508 F.3d 674 (C.A. Fed. 2007).

[264] 48 C.F.R. pts. 6 and 19.

[265] 5 U.S.C. § 2302(b)(8).

[266] 5 U.S.C. § 2302(b)(8)(A)(i).

[267] Reid v. Merit Systems Protection Board, 508 F.3d 674 (C.A. Fed. 2007).

[268] OIG Web site, http://www.oig.dot.gov. The DOT Inspector General Web site contains audit reports, congressional testimonies, and semiannual reports to Congress dating back to 1997.

[269] OIG Criminal Investigations—Contract and Grant Fraud, http://www.oig.dot.gov/criminal-investigations-contract-and-grant-fraud (last visted July 2014).

[270] *OIG Special Report: A Guide to Grant Oversight and Best Practices for Combating Grant Fraud,* http://www.justice.gov/oig/special/s0902a/ (last visited July 2014).

efforts to combat contract and grant fraud with the state DOTs and grantees that manage transportation related funds.[271]

With the foregoing framework in hand, the Inspector General's office conducts audits to detect potential fraud within DOT programs.[272] While some audits are required by law, others are requested by the Secretary of Transportation, officials of the agencies that make up DOT, or by members of Congress.[273] In addition to conducting audits, the OIG may investigate grantees or contractors who have been referred by an agency within DOT or who have exhibited a pattern of criminal behavior.[274] Ultimately, results from Inspector General audits are submitted directly to the affected agency within DOT and to the appropriate congressional committees upon completion.[275] OIG then publishes semiannual reports summarizing the results of recent audits and investigations.[276]

---

[271] *Id.*

[272] *Id.* Most audits are public documents. Many of OIG's recent reports are available on its Web site.

[273] Office of Inspector Gen., U.S. Dep't of Transp., *Frequently Asked Questions*, http://www.oig.dot.gov/frequently-asked-questions-faq (last visited July 2014).

[274] OIG, *supra* note 270. An OIG hotline allows citizens and government workers to "blow the whistle" on waste, fraud, or abuse.

[275] *Id.* Summaries of completed investigative activities are posted to the Web site under investigative priority areas.

[276] *Id.*