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Debarment and Suspension

If the regulations are focused on present responsibility, why then are records of inactive and therefore past exclusions available for public view in perpetuity on the SAM.gov website?

A Scarlet Letter: Do the Exclusion Archives on SAM.gov Violate Contractors' Liberty Interests?



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In recent years, the legislative branch has repeatedly criticized the government's procurement databases, which one subcommittee chair described as ''shockingly old'' and ''clunky.''[1] Even if these databases are not especially user-friendly, they do contain substantial information that is valuable to contracting officers as they make award decisions. This was, after all, the statutory and regulatory purpose behind the creation of these databases. But use of the databases is not limited to contracting officers. The information is publicly available, including the archives of expired suspensions and debarments — exclusions from government contracting based on facts demonstrated by extremely low burdens of proof which would never be enough to convict anyone in court — within the System for Award Management (SAM). This historical exclusion data, which was not originally available or used outside of the government, can harm government contractors by stigmatizing them as ''bad actors'' even after suspensions have ended or proposed debarments have terminated without debarment action occurring. Accordingly, the time may be ripe for the judicial branch to weigh in on the due process violations caused by the publicly available nature of the exclusion archives.

Federal Acquisition Regulation (FAR) Subpart 9.4 contains the regulatory procedures concerning the suspension and debarment of contractors. Suspensions and debarments are administrative remedies that prevent contractors from receiving new contracts if they are not ''presently responsible.'' Present responsibility is not defined in the regulation but can be referred to as the government's ability to trust the contractor's ability to deal fairly and honestly with the government while performing their contracts. Suspension and debarment do not exist to punish contractors for past misdeeds;[2] rather, the government must assess the contractor's current internal controls, ethics and operational norms to determine if the contractor can be trusted in the fu-

[1] Christian Davenport, *McCaskill: Reviews of Government Contractors Often Fail to Note Failings*, WASH. POST, Mar. 6, 2014.

[2] FAR 9.402(b).

ture. But if the regulations are focused on *present* responsibility, why then are records of *inactive* and therefore *past* exclusions available for public view in perpetuity on the SAM.gov website? This article explores the history of the list of suspended and debarred contractors and its operations, and examines the collateral consequences of being excluded. This article then discusses how a contractor could potentially bring a due process challenge against the archiving of inactive exclusions because the continued publication of this information violates a contractor's constitutional liberty interests.

Evolution of the Excluded Parties List

Prior to awarding contracts, contracting officers are required to confirm that a vendor is not suspended or debarred.[3] And in part because suspending and debarring officials (the officials that effect suspensions and debarments) have insisted that contractors not engage subcontractors that are suspended and debarred as elements of prime contractor present responsibility,[4] many contractors will check SAM to ensure that potential subcontractors are not excluded.

The form and substance of the list of suspended and debarred companies and individuals has evolved over time as the government has adopted new technologies. Previously, the Government Printing Office (GPO) published in hard copy on a monthly basis, with a weekly supplement, a list of all the companies with active exclusions. This hard copy format with frequent updates had the practical effect of restricting use to primarily government users. Information about inactive exclusions became publicly available when the General Services Administration (GSA) launched the Excluded Parties List System (EPLS) website in January 2007. Within EPLS, users could view both current suspensions and debarments, and users could search for past exclusions dating back to 1988. Five years later, the GSA rolled out SAM.gov, a website that consolidated four existing procurement databases, including EPLS. The active and inactive exclusion information from EPLS migrated to SAM. In short, what started as a monthly hard copy listing of active exclusions circulated for government use became the online repository that we have today and includes inactive exclusions dating back to 1988.

According to FAR subpart 9.405(a), a contractor that is debarred, suspended or proposed for debarment is excluded from receiving contracts. Suspensions can be issued — before a contractor has had an opportunity to be heard — if a Suspension and Debarment Official (SDO) finds that there is adequate evidence to do so. There is no specific threshold provided for issuance of a Notice of Proposed Debarment, which also can be issued before a contractor had had an opportunity to be heard, but the minimum threshold for such an action is the low, ''adequate evidence'' standard. Adequate evidence is defined as ''information sufficient to support the reasonable belief that a particular act or omission has occurred.''[5] This low standard of evidence makes the stigmatization of appearing on the excluded party list especially troubling because the exclusion will become part of the contractor's permanent record — with far-reaching consequences — even in cases where the government is flatly incorrect in its allegations.

Under the regulations, a suspension is meant to be a ''temporary'' exclusion used only when the government needs ''immediate'' protection.[6] But as noted in a 2015 court decision, the effects of being suspended are anything but temporary. In *AUI Management, LLC et al v. USDA et al*, a contractor and its president sued the Department of Agriculture, for a judgment declaring that the suspension of the company and the president be set aside *ab initio*.[7] The government moved to dismiss for lack of jurisdiction and standing because the suspensions had expired. In analyzing whether the plaintiff could establish standing by showing an injury in fact, the court considered the impact of being listed in the public archives:

> The suspension, while nominally ''temporary,'' was essentially a permanent death blow to most of the business of Plaintiffs, effectively rendering them ''pariahs'' with respect to other contracting possibilities. Although the suspension expired on May 18, 2012, AUI and Callahan are now listed in the public archives of the federal Excluded Parties List System (''EPLS'') as previously having been suspended from government contracting for ''cause''. . .

Consequently, the court found plaintiffs' allegations to be reasonably definite to sustain standing, and the court denied the government's motion to dismiss. But this proved to be a pyrrhic victory for the contractor. Several months later, counsel for the contractor withdrew from the case before the complaint was addressed on the merits. Although not specified in the briefing, it appears that the contractor was unable to pay the legal fees. Indeed, the court's opinion on the motion to dismiss indicated that the contractor had been forced to shut down and the president had filed Chapter 11 bankruptcy. As described in the following section, such financial devastation is hardly atypical in the face of an exclusion from government contracting.

The Stigmatization of Excluded Parties

Suspension and debarment have been described as a corporate death sentence for government contractors.[8] Not only are listed parties prohibited from receiving new contract awards, they also face devastating collateral consequences. In part because of the concern of

[3] FAR 9.405(d) (''Immediately prior to award, the contracting officer shall again review SAM Exclusions to ensure that no award is made to a listed contractor.'').

[4] *See e.g.*, Administrative Agreement between Chip 1 Exchange USA, Inc. and the United States Department of the Air Force (Mar. 15, 2016) (''Chip 1 shall not knowingly form a contract with, purchase from, or enter into any business relationship with any individual or business entity that is listed by a Federal Agency as debarred, suspended, or proposed for debarment on SAM.gov. To effectuate this policy, Chip 1 shall make reasonable inquiry into the status of any potential business partner, to include, at a minimum, review of SAM.gov.'')

[5] FAR 2.101(b)(2).

[6] FAR 9.407-1(a).

[7] M.D. Tenn; No. 2 :11-cv-0121 (Motion to dismiss denied March 23, 2015).

[8] Ralph C. Nash and John Cibinic, Suspension of Contractors: The Nuclear Sanction, 3 Nash & Cibinic Rep. ¶ 24, March 1989, at 44.

  FCR ISSN 0014-9063

SDOs, and in part because of the availability of SAM data, commercial customers can and sometimes do refuse to do business with a contractor that has been suspended or debarred. When an exclusion is posted on SAM.gov, companies specializing in corporate diligence have a practice of ''grabbing'' the list electronically and downloading it into a database. Companies of any size can also do this on their own. As a result, many of the companies that are excluded experience a decline in both government *and* commercial business.[9]

Contractors that appear on the excluded party list may also experience the loss of government security clearances or face tougher terms and conditions by financial lenders. For publicly traded companies, a suspension or debarment will likely affect the company's stock price. For example, the stock price of one company dropped 10 percent the day after it was proposed for debarment.[10] Some loan covenants on revolving credit facilities permit banks to call loans if a debtor appears on the excluded party list. A company that is listed as an excluded party on SAM will also have a difficult time selling to state and local governments because these customers are sometimes prohibited from contracting with companies that have been excluded by the federal government.

Moreover, a suspension or debarment can affect an entire corporate family because corporate affiliates can be affected by an exclusion regardless of whether they were involved in any wrongdoing.[11] Improper conduct can also be imputed from the company to individual officers, directors and employees if the individual either participated in, had knowledge of, or had reason to know of the company's improper conduct.[12] As a result, a contractor facing an exclusion may lose key employees or board members who do not want to be tainted by the stain of exclusion.

Sentence First, Verdict Afterwards

The importance of due process when excluding companies from federal contracting has been recognized by courts for decades: ''[O]ur system of laws does not operate on the principle of the Queen in *Alice in Wonderland* — 'Sentence first — verdict afterwards.' '' *Art-Metal USA, Inc. v. Solomon*, 473 F. Supp. 1, 8 (D.D.C. 1978). Despite the recognized importance of due process, many contractors suffer the consequences of being excluded before they have had a chance to respond because an agency's issuance of a suspension or a notice of proposed debarment will automatically trigger a contractor's inclusion on the excluded parties list.[13]

Consider the following hypothetical: Company A receives a notice of proposed debarment informing it of an agency's concerns and offering the company a brief period to respond. Pursuant to FAR 9.407-1, the notice of proposed debarment was based on ''adequate evidence.'' By the time Company A receives the notice, it has already been listed on SAM as an excluded party. Two weeks later, Company A meets with the agency's SDO and establishes that the agency's concerns were based on a misunderstanding of fact. Company A's leadership demonstrates that the contractor is presently responsible, and the agency lifts the exclusion soon after the meeting. But Company A still faces the same question that was posed by former Secretary of Labor Raymond Donovan when he was exonerated after a criminal trial in 1987: ''Which office do I go to get my reputation back?''[14]

Company A will have a hard time restoring its reputation because its name will forever appear in the ''inactive exclusion'' section of SAM accompanied by the following explanation for the exclusion: ''Preliminary ineligible based upon *adequate evidence of conduct indicating a lack of business honesty or integrity*.'' Even though the exclusion has been lifted, the publication of this information in the archives will continue to have a stigmatizing effect. If Company A is able to show that the stigmatization has caused a tangible loss, it may be able to bring a due process challenge because it had no opportunity to be heard before it was added to SAM as an excluded party.

Right to Be Free of Official Stigmatization

The Fifth and 14th Amendments require the provision of due process when an interest in one's ''life, liberty or property'' is threatened.[15] Because of the devastating impact of a suspension or debarment, a number of contractors have challenged their suspension or debarment on due process grounds. One upshot of this all litigation is a well-developed body of law. According to the case law, the suspension or debarment of a government contractor does not deprive the contractor of its *property* interests because a contractor does not have a right to do business with the government.[16] However,

[9] Although not within the scope of this article, we note that the decline in commercial business that results from suspensions and debarments also weakens one of the government's central defenses to due process challenges of any type of suspension or debarment. Specifically, the government argues that only the government side of a contractor's business is limited and the contractor is free to pursue commercial business. *Bank of Jackson County v. Cherry*, 980 F.2d 1362, 1368 (11th Cir. 1993) (finding that the ability to pursue business opportunities with individuals or groups other than the Farmers Home Administration has not been affected). But in this era of ''big data'' and ubiquitous availability of suspension and debarment data, that is less and less true.

[10] *Why W&T Offshore, Inc.'s Shares Dropped*, The Motley Fool, Nov. 29, 2013.

[11] 48 C.F.R. § 9.406-1(b). For example, in *Agility Defense & Government Services v. U.S. Department of Defense*, an Alabama-based contractor was suspended from government contracting because its indirect parent company based in Kuwait was indicted on fraud charges. 739 F.3d 586 (11th Cir. 2013). The Eleventh Circuit held that an indictment against a parent company could result in an indefinite suspension of its affiliates, even when those affiliates have not been implicated in any wrongdoing.

[12] 48 C.F.R. § 9.406-5.

[13] *See* Angela Styles, Peter Eyre, Richard Arnholt, and Jason Crawford, *How Proposed Debarment Became Equal To Suspension*, Law360 (Feb. 2, 2015).

[14] Selwyn Raab, *Donovan Cleared Of Fraud Charges By Jury In Bronx*, N.Y. TIMES, May 26, 1987.

[15] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1982). The Fifth Amendment restricts only the federal government. The 14th Amendment, ratified in 1868, extended the due process clause to the states.

[16] *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964); *see also Sutton v. U.S. Dept. of Housing & Urban Devel.*, 885 F.2d 471, 474 (8th Cir. 1989) (individual had no constitutionally protected property interest in membership on panel of

the Supreme Court has held that the notion of ''liberty'' includes the right to be free of official stigmatization and has found that such threatened stigmatization could require due process.[17] Accordingly, the suspension and debarment remedies implicate a contractor's *liberty* interests because these remedies stigmatize the contractor as a bad actor, which entitles the contractor to the procedural guarantees of the due process clause.[18]

The Supreme Court defined the liberty interest in one's reputation in a series of cases decided in the 1970s. First, in *Board of Regents of State Colleges v. Roth*, the Court held that a state university's refusal to renew the contract of a nontenured professor did not deprive the professor of a liberty interest, because the state made no charges against the professor ''that might seriously *damage his standing and associations in his community*.''[19] The Court reasoned that the state did not impose upon the plaintiff ''a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.''[20] Then, in *Bishop v. Wood*, the Court held that termination of a police officer for alleged misconduct did not infringe upon the officer's liberty, because the city did not *publicly disclose* the allegations of misconduct.[21] And finally, in *Paul v. Davis*, the Court held that the state's widespread defamation of the plaintiff, whom the police named an ''active shoplifter,'' did not deprive him of liberty, because the damage to reputation was not accompanied by any *tangible loss*.[22] From these cases, the Supreme Court established the ''stigma-plus'' test to determine when government action has deprived the plaintiff of a liberty interest in reputation.

The 'Stigma-Plus' Test

To prevail on a claim that government action deprived the plaintiff of a liberty interest in reputation, the plaintiff must show:

1. a stigmatizing allegation;[23]
2. dissemination or publication of that allegation;[24] and
3. loss of some tangible interest due to publication of the stigmatizing allegation.[25]

By applying the ''stigma-plus'' test, a government contractor may be able to claim that the government's public ''blacklisting'' of individuals and businesses in the SAM archives violates a liberty interest.

A Stigmatizing Allegation: It is well-recognized that the suspension and debarment remedies can stigmatize contractors.[26] An agency's ability to stigmatize a contractor is especially pronounced in ''fact-based'' actions which occur in the absence of a court decision finding that the contractor is responsible for a violation of law or regulation. In these circumstances, the stigma flows not from an existing indictment or a conviction,[27] but from the questions about the contractor's business integrity that the agency has raised on its own, on the basis of a very low standard of evidence, in the notice of suspension or proposed debarment. These allegations about fraud or misconduct in a notice of suspension or proposed debarment can impugn the contractor's reputation even if the concerns are subsequently addressed and the exclusion is lifted.

Dissemination or Publication: The inactive exclusion archives on SAM meet the dissemination or publication prong of the stigma-plus test because the inactive exclusions are available to the general public — not just the government — in perpetuity. As described above in our hypothetical, Company A will forever be haunted by the publication of the agency's allegation that it found ''adequate evidence of conduct indicating a lack of business honesty or integrity.'' This allegation will remain publicly available even after the agency has determined that Company A is presently responsible.

Loss of a Tangible Interest: To prevail on a due process challenge to the inactive exclusions archives, a contractor would need to demonstrate a loss of some tangible interest.[28] Namely, the contractor would need to show that it suffered from the deleterious effects of the publication of an inactive exclusion. In light of the growing list of collateral consequences, that argument is increasingly easy to make.

A similar argument was successful in *Valmonte v. Bane*, where an educator challenged her presence on the New York State Office of Children and Family Services' State Central Register as a deprivation of her abil-

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government approved property appraisers); *ATL, Inc. v. United States*, 736 F.2d 677, 683 (Fed. Cir. 1984) (suspended contractor has no property interest in government contracts); *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981) (right to bid on government contracts is not a property interest).

[17] *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

[18] *Trifax Corp. v. Dist. of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003) (relying on *Greene v. McElroy*, 360 U.S. 474, 492 (1950)); *Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1505 (D.C. Cir. 1995); *Kartseva v. Dep't of State*, 37 F.3d 1524, 1529 (D.C. Cir. 1994) (relying on *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895–96 (1961)); *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962-63, 966 (D.C. Cir. 1980) (holding that a finding of contractor nonresponsibility gives rise to a stigmatization against the contractor because the government injured a cognizable liberty interest).

[19] 408 U.S. at 573 (emphasis added.)

[20] *Id.*

[21] 426 U.S. 341, 348 (1976).

[22] 424 U.S. at 701.

[23] *Roth*, 408 U.S. at 573.

[24] *Bishop*, 426 U.S. at 348; *Roth*, 408 U.S. at 573–74.

[25] *Paul*, 424 U.S. at 701; *Roth*, 408 U.S. at 573–74.

[26] *See e.g.*, *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993).

[27] *Coleman Am. MovingServ., Inc. v. Weinberger*, 716 F. Supp. 1405, 1414 (M.D. Ala. 1989).

[28] Not only is a tangible loss needed to satisfy the stigma-plus test but such a tangible loss is also necessary to establish the injury-in-fact required for standing in federal court to challenge an expired exclusion. *See e.g.*, *Hickey v. Chadwick*, 649 F. Supp.2d 770 (S.D. Ohio 2009) (holding that plaintiff's allegations were reasonably definite to sustain standing because past debarments would be directly related to plaintiff's ability to be awarded future contracts because contracting officers are required to consider contractors' performance records when assessing present responsibility); *O'gilvie v. Corporation for National Community Service,* 802 F. Supp.2d 77 (D.D.C. 2011) (holding plaintiff lacked standing to assert injury to his reputation resulting from debarment action because the debarment expired before suit was filed and his claims about injury were conclusory).

  FCR ISSN 0014-9063

ity to seek employment.[29] The Central Register was a list of all parents suspected of abusing or neglecting their children. The U.S. Court of Appeals for the Second Circuit noted that although her presence in the central register was not disclosed to the public, it was disclosed to any employer *required* by law to consult the register before hiring her.[30] As someone looking for work in education, her status would automatically be disclosed to any potential employer.[31] Thus, the Second Circuit held that the central register placed a tangible burden on her employment prospects.[32]

In *Valmonte*, the central register was available only to potential employers in the education field. Here, the publication of the exclusion archives is far broader and therefore even more damaging. Not only is SAM available to contracting officers — who are required to review it — but the archives are available to the public at large. As described above, local and state governments are often required to consult SAM before awarding a contract, and contractors will often review the information before awarding subcontracts. In addition, the commercial world relies heavily on the exclusion information from SAM to assess business opportunities and risk. The excluded parties list was created to protect the government from awarding contracts to parties that are not presently responsible, but the list is now used for far wider purposes. As such, the archived exclusions can place a significant burden on companies trying to win business — not just from the government — but also from state, local, and commercial customers.

Procedural Due Process

If the SAM archives implicate a contractor's liberty interest, the contractor must then show that the procedural safeguards are insufficient to prevail on a due process challenge. In *Mathews v. Eldridge*,[33] which involved the termination of disability benefits, the Supreme Court set forth a balancing test to be applied to government actions adversely affecting due process rights. Namely, the Court held that due process required the consideration of the following three factors:

1. The private interest threatened by the official action;

2. The risk of error and the effect of additional procedural safeguards; and

3. The governmental interest.

Applying the standard articulated in *Mathews v. Eldridge* to the suspension and debarment context, courts have sought to balance the government's need to protect itself from nonresponsible contractors against a contractor's liberty interests in protecting its reputation. Historically, courts have found that — given the significant governmental interests at stake — the process set forth in the FAR generally provides a contractor with a constitutionally sufficient opportunity to clear its name.[34] But this balancing test looks different when applied in the context of the SAM archives of inactive exclusions.

First, the contractor has a strong argument that its private interests are at stake because the archiving of the expired and therefore inactive exclusion makes it more difficult to obtain future work from state, local and commercial customers that will see on SAM that the federal government at one point determined that there was adequate evidence of conduct indicating a lack of business honesty or integrity (whether or not that determination was correctly made).

Second, there is a risk of error under the FAR suspension regulations because the ''adequate evidence'' standard results in parties being placed on the list who do not belong. Similarly, in *Valmonte*, the Second Circuit found that the operation of the central register was unconstitutional because of the low level of evidence required to place a name on the register and the lack of a hearing. As the court explained, ''[t]he crux of the problem with the procedures is that the 'some credible evidence' standard results in many individuals being placed on the list who do not belong there.''[35] The excluded parties that are listed on SAM receive a post-exclusion opportunity to present their side of their story, but even if the exclusion is lifted, they will never get the chance to fully clear their name because the exclusion will forever be part of the SAM archives. There is also risk of error because the FAR suspension and debarment procedures are focused on present responsibility and the ability to deal fairly with the government in the future. These archives of past actions, no longer in effect, offer no evidence whatsoever of the present status of the contractor's internal controls and therefore there is risk of drawing erroneous conclusions based on the past exclusions.

Third, there is not a compelling governmental interest in maintaining a publicly available archive of past exclusions because FAR Subpart 9.4 is focused entirely on present responsibility. There are undeniably good reasons for *active* exclusions to be publicly available —*i.e.*, contracting officers are required to determine if a potential awardee is currently excluded, and contractors need to confirm if prospective subcontractors are currently suspended or debarred. The public may want access to the information out of personal interest, or because of the (generally false) notion that past exclusions are indicia of a greater risk of nonresponsibility,[36] but the value of this information is greatly outweighed by the official stigmatization that it causes to the contractor's reputation.

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[29] 18 F.3d 992 (2d Cir. 1994).
[30] *Id.* at 998.
[31] *Id.*
[32] *Id.* at 1001.
[33] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
[34] *Textor v. Cheney*, 757 F. Supp. 51, 59 (D. D.C. 1991); *James A. Merritt and Sons v. Marsh*, 791 F.2d 328 (4th Cir. 1986).
[35] 18 F.3d 992 at 1004.
[36] It is extremely rare for contractors that have been suspended or debarred to engage in repeat misconduct sufficient to cause a second suspension or debarment. Indeed, the contractors that have gone through the painful exclusion process and emerged after their time away from government contracting have a heightened awareness of their ethical obligations and compliance responsibilities so that they never again need to be excluded. In short, the process is an education for contractors with many rapidly bringing their ethics and compliance programs up to industry standard and conducting robust remedial training to ensure responsible business practices in the future.

In sum, contractors have a right to be free of official stigmatization, and a contractor's post-exclusion hearing and opportunity to be heard is not sufficient to satisfy due process because once a contractor has been excluded, it will remain in the archives and the contractor has lost its ability to fully clear its name.

Conclusion

It is well established that suspension and debarment remedies are not meant to be used as a punishment for past wrongdoing.[37] The D.C. Circuit has made clear that government contractors must be afforded a meaningful ''opportunity to overcome a blemished past'' to ensure that an agency ''will impose debarment only in order to protect the government's proprietary interest and not for the purpose of punishment.''[38] But parties who have been excluded lack a meaningful opportunity to overcome a blemished past because of the permanent, and publicly available nature of the SAM archives. Even if a party resolves a matter with an SDO or the government acted based on incorrect information, the contractor's exclusion will forever be publicized in the SAM archives.

The archiving of past exclusions appears to be less about protecting the government's interests and more about using the record of a past exclusion as a scarlet letter to stigmatize a contractor that had been, in its past, suspended, debarred or even proposed for debarment by certain agencies. Moreover, the widespread dissemination of the exclusion information — both active and inactive — has amplified the collateral harm of appearing on the list. As the reputational harm and burden of this scarlet letter continues to increase, it may only be a matter of time before a contractor brings a successful due process challenge to the SAM archives.

The authors also thank W. Stanfield Johnson, Senior Counsel, Crowell & Moring, LLP, for his review, feedback and comments on this article.

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[37] *Robinson v. Cheney*, 876 F.2d 152 (D.C. Cir. 1989); FAR 9.402(b) (''suspension and debarment are to be imposed only in the public interest for the [g]overnment's protection and not for purposes of punishment.'')

[38] Id. at 159-160.

  FCR ISSN 0014-9063