

Case Study



Doing Better Law.

Client Challenge

Debarment

Many businesses nationwide live and die on their contracts with the federal government. Dunlap Bennett & Ludwig represents those businesses during their entire life cycle, from formation and securing their intellectual property (copyrights, trademarks, and patents), litigation disputes, and dissolution when businesses "close up shop".

When businesses or their employees involved in government contracting appear to engage in serious activity that causes the government to question their responsibility (i.e. their trustworthiness and reliability), the government might take steps to end the business's ability to contract with the government – known as **debarment** the company.

As one can imagine, such a drastic step requires that the government follow specific steps set forth in the applicable Federal Acquisition Regulations (FAR). The initial step in that process is to issue the business or individuals implicated with a Proposal of Debarment that sets out both the reasons for the proposal and a notice of key dates and contact persons.

Once a business or individual receives such a proposal, it is crucial for them to speak to an attorney who can advise them on next steps. Of critical importance is finding an attorney who is experienced in responding to proposed debarments.

Problem

Several businesses and individuals received proposed debarments related to contracts they were awarded to supply an overseas military base

The dispute centered around common issues arising in debarment situations – conflicting interpretation of government regulations and interpersonal conflict. The businesses in question bid on a government contract paying careful attention to the bid requirements posted. Their competitive price that secured the contract depended on procuring products from a country not approved by the WTO GPA (World Trade Organization Agreement of Government Procurement). The businesses were transparent about their sourcing in making their bid and believed WTO GPA requirements did not apply (in many contracts, end products can only be sourced from WTO GPA countries).

Only after being awarded the bid did the issue of sourcing arise. This is likely because at some point someone had simply missed the issue of sourcing when awarding the contract. The businesses and government disagreed on the precise regulations at issue, with the businesses and individuals increasingly upset at the prospect of losing a contract they had secured and prepared for in good faith. As both sides worked to see if there was any way for the contract to stay afloat, communication failed with brusque emails and unclear answers becoming more the rule than an exception.

What became critically important for the government was the fact that it appeared the businesses and individuals were so eager to keep the contract (despite receiving guidance about allowed sourcing), that they explored ways to disguise their non-WTO GPA country-sourced products as approved products. The Administrative Record (AR), the official record upon which a proposed debarment is based, was replete with condemning emails and examples of behavior that would appear to make any proposed debarment perfunctory.



Government Contracting

Related Industry: Commercial Litigation



Our Role

Attorney For Contracting Companies Facing Proposed Debarment

Our Approach

The key importance in dealing with any proposed government action is to understand the record and my clients' backstory better than those proposing the action, whether it be about debarment or other issues, such as security clearance, revocation, or disciplinary action. Taking the time to not only listen to but understand the client is the key to any eventual outcome.

There are two critical and often disliked parts of that process for clients. First, it is a process that cannot be automated or done quickly – not a lot of fun for clients facing legal bills. Second, it requires an attorney willing to question their clients and be as skeptical of answers as the government – not fun for clients who want a reassuring hand without tough questions. A debarment often means the end of businesses and tarnished reputations for individuals. Having an attorney who understands the gravity of the situation is crucial.

In the sourcing example, it was only by thoroughly (and repeatedly) going over the clients' accounts of their activities and then comparing those accounts with the Administrative Record did it appear clear that the government had rushed through the process, missing key clarifying points in documents that they had simply not seen to put into the record. Frankly, everything appeared so clear and so condemning that no one took the time to ask additional questions. The case seemed so open and shut that small items such as a typo regarding the date of a particular email were never caught.

In a normal dispute where everyone understands that there are questions to resolve (i.e. there are pitches on the corners that could be argued to be balls or strikes) there is an openness to some of the arguments from the outset. In a dispute where everyone seems to think everything is clear-cut, attorneys face the initial challenge of convincing the government there is a reason to take a closer look.

Result and Impact

By going through a long and arduous process for the clients, involving a hearing on the proposed debarment and requests for supplemental information, what had appeared to be a slam-dunk debarment instead became a complete vindication for all of the clients with the government 'terminating' the proposed debarments (basically withdrawing the proposals) for six businesses and individuals (one of which DBL didn't even represent).

Not only are all the individuals and businesses able to return to the world of contracting – an unforeseen result is that several clients are potentially able to use their expertise and sourcing to work with the government to acquire much needed personal protective equipment (PPE) for dealing with shortages in the fight against the novel coronavirus (COVID-19).

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