



Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures

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Summary

This report discusses the standards and procedures that federal agencies use in making responsibility determinations under the Federal Acquisition Regulation (FAR). As a general rule, government agencies contract with the lowest qualified responsible bidder or offeror.

Responsibility is an attribute of the contractor, while price and qualifications are attributes of the bid or offer. Under the FAR, “[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”

To be determined responsible, prospective contractors must meet general standards, which include so-called “collateral requirements.” These standards apply to all procurement contracts, even if they are not incorporated into the solicitation. They include the following seven criteria related to contractors’ capabilities and conduct: (1) adequate financial resources; (2) ability to comply with the delivery or performance schedule; (3) satisfactory performance record; (4) satisfactory record of integrity and business ethics; (5) necessary organization and experience; (6) necessary equipment and facilities; and (7) otherwise qualified and eligible. The seventh criterion encompasses collateral requirements, or other provisions of law specifying when contractors are disqualified from or ineligible for awards. Under current collateral requirements, contractors must be found nonresponsible when, among other things, they (1) do not comply with federal equal employment opportunity requirements; (2) fail to agree to an acceptable plan for subcontracting with small businesses; (3) are known government employees; (4) are quasi-military armed forces; or (5) have unavoidable and unmitigated organizational conflicts of interest. Unlike performance standards, which assess whether prospective contractors can be expected to complete the contract work in a timely and satisfactory manner, collateral requirements ensure that the government’s dealings with contractors promote socioeconomic goals.

In addition to the general standards, contractors may have to meet special standards, also known as “definitive criteria,” which apply only to specific acquisitions. Special standards must be expressly included in agencies’ solicitations. They are used when unusual expertise, special facilities, or specific experience or equipment are necessary to ensure that the government’s needs are satisfied.

Contracting officers determine prospective contractors’ responsibility prior to each contract award by considering information submitted by the contractor or otherwise acquired by the agency. When they lack sufficient information to determine that the contractor is responsible, they must make a determination of nonresponsibility. Contractors are generally not entitled to due process when contracting officers make a responsibility determination, meaning that they typically do not get notice of nonresponsibility determinations or an opportunity to present evidence regarding their responsibility. Contracting officers have substantial discretion in making determinations. Protesters have standing to challenge contracting officers’ determinations before the Government Accountability Office or federal courts only in limited circumstances.

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Introduction

Like private contracting parties, the federal government generally “enjoys the unrestricted power ... to determine those with whom it will deal[] and fix the terms and conditions upon which it will make needed purchases.”¹ In exercising this power, the government typically awards contracts to the lowest qualified responsible bidder or offeror, with responsibility being an attribute of the contractor and price and qualifications being attributes of the bid or offer.² The awardee must possess all three attributes. If a prospective contractor is not responsible, for example, it is ineligible for the proposed contract even if it is qualified to perform the work and its bid is the lowest, or its offer represents the best value for the government.³ This focus upon contractors’ responsibility, in particular, exists because:

The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is a subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer.⁴

Currently, the Federal Acquisition Regulation (FAR) specifies that “[n]o purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”⁵ Contracting officers make responsibility determinations after considering whether prospective contractors meet certain legal standards specified in the FAR. They make these determinations using procedures also specified in the FAR.

This report provides an overview of the legal standards and procedures currently used in making responsibility determinations. It discusses (1) how responsibility determinations relate to other mechanisms that the government relies upon to ensure that contractors are responsible and otherwise eligible for federal contracts; (2) the performance-related and collateral standards used in making responsibility determinations; (3) the procedures for making responsibility determinations; and (4) recently enacted or proposed amendments to the standards or procedures for responsibility determinations.

¹ Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

² This has been the federal government’s policy since its earliest days. *See, e.g.*, James F. Nagle, *History of Government Contracting* 50 (2d ed. 1999) (describing how Robert Morris used awards to the lowest qualified responsible bidder in contracting for the U.S. Army during the Revolutionary War).

³ Under the Competition in Contracting Act (CICA), federal agencies may award procurement contracts only to “responsible bidders” or “responsible sources.” 10 U.S.C. § 2305(b)(3) & 41 U.S.C. § 253b(4) (“responsible bidders” in sealed bidding); 10 U.S.C. § 2305(b)(4)(C) & 41 U.S.C. § 253b(d)(2) (“responsible sources” in negotiated procurements). Citations to CICA’s codification generally reference two titles of the United States Code: Title 10 governing procurements by defense agencies, NASA, and the Coast Guard, and Title 41 governing procurements by civilian agencies. When the lowest priced bid or best-value offer is from a nonresponsible contractor, the award is made to the next lowest bidder, or the next best-value offeror, who is responsible.

⁴ 48 C.F.R. § 9.103(c).

⁵ 48 C.F.R. § 9.103(b).

Mechanisms for Ensuring Contractor Responsibility

In considering whether contractors are sufficiently “responsible” to perform federal contracts, agencies consider whether prospective contractors (1) can be expected to complete contract work on time and in a satisfactory manner; (2) are organized in such a way that doing business with them promotes socioeconomic goals; and (3) meet statutory or regulatory requirements for eligibility.⁶ Currently, under the FAR, the government relies upon two primary mechanisms for avoiding nonresponsible contractors: responsibility determinations and exclusion (i.e., debarment and suspension).⁷ This section provides a basic overview of the differences between responsibility determinations and exclusion. The remainder of the report then explores how responsibility determinations help ensure that federal contractors are responsible. A separate report, CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by Kate M. Manuel, describes the role of debarment and suspension in excluding nonresponsible contractors.

Responsibility determinations are sometimes confused with responsiveness determinations;⁸ evaluation of past performance in negotiated procurements;⁹ and qualification requirements.¹⁰ However, all of these focus upon contractors’ bids, not the contractors themselves, and are thus beyond the scope of this report.

⁶ The government had a practice of avoiding awards to nonresponsible contractors prior to CICA. *See, e.g., O’Brien v. Carney*, 6 F. Supp. 761 (D.C. Mass. 1934); 7 Comp. Gen. 547 (1928). However, the concept of responsibility was not included in federal procurement statutes until 1947-1949, when the Armed Services Procurement Act and the Federal Property and Administrative Services Act were enacted, requiring awards to responsible bidders. *See* 10 U.S.C. § 2305(c) (1948) & 41 U.S.C. § 253 (1950).

⁷ *See* 48 C.F.R. §§ 9.000-9.107 (nonresponsibility determinations); 48 C.F.R. §§ 9.400-9.409 (exclusion).

⁸ Responsiveness determinations focus upon whether bids conform in all material respects to agencies’ invitations for bids. 48 C.F.R. § 14.404-2(a) (“Any bid that fails to conform to the essential requirements of the invitation for bids shall be rejected.”). While responsibility is determined when the contract is awarded, responsiveness is determined when the bid is opened. This difference in timing means that a contractor that was not responsible at the time of bid opening could become so prior to the time of contract award. *See, e.g., LORS Med. Corp., Comp. Gen. B-259829.2* (April 25, 1995) (contractor responsible by the time of award because it had adequate financial resources after forming a joint venture subsequent to bid opening). The same is not true with responsiveness: a bid that is not responsive at the time when bids are opened cannot later become so.

⁹ Responsibility determinations are themselves based, in part, on consideration of contractors’ past performance, or factual information and qualitative judgments about contractors’ performance history. *See* 48 C.F.R. § 9.105-1(c) (stating that when evaluating whether contractors have a satisfactory performance record, contracting officers must consider relevant past performance information). Past performance is, however, also an evaluation factor used in determining to whom to award contracts in negotiated procurements above the simplified acquisition threshold (generally \$150,000). *See generally* CRS Report R41562, *Evaluating the “Past Performance” of Federal Contractors: Legal Requirements and Issues*, by Kate M. Manuel.

¹⁰ Qualification requirements are “requirement[s] for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.” 41 U.S.C. § 253c(a). CICA allows federal agencies to consider only contractors that have already met testing or quality-assurance requirements when certain conditions are satisfied. *See* 10 U.S.C. § 2319 & 41 U.S.C. § 253c. Chief among these conditions is that the agency head prepares a written justification (1) stating the need for the qualification requirement, as well as why the requirement must be demonstrated before contract award; (2) estimating contractors’ likely costs for testing and evaluation; and (3) specifying all requirements a potential offeror or product must satisfy to become qualified. 48 C.F.R. § 9.202(a)(1)(i)-(iii). Qualification requirements increase the likelihood that government contractors will perform successfully by limiting the pool of eligible contractors to those that have already demonstrated specific capabilities.

Responsibility Determinations

Contracting officers make responsibility determinations after considering seven factors, discussed in more detail below, related to contractors' resources and conduct.¹¹ Because no purchase or award may be made “unless the contracting officer makes an affirmative determination of responsibility,” a nonresponsible contractor is ineligible for the proposed contract.¹²

Determinations of nonresponsibility are, however, award-specific, and contractors who are determined nonresponsible for the award of one contract could become responsible prior to the award of another contract.¹³ New, current, and former government contractors are equally subject to the requirement for responsibility determinations. Contractors are generally not guaranteed due process when contracting officers make responsibility determinations.¹⁴ These determinations are largely committed to the contracting officer's discretion.¹⁵ Protesters have standing to challenge responsibility determinations before the Government Accountability Office (GAO) or the federal courts only in limited circumstances.¹⁶ Even when protesters can demonstrate standing, judicial and administrative tribunals generally decline to overturn contracting officers' responsibility determinations unless the protester can show that the determination was clearly unreasonable given the record before the contracting officer.¹⁷

Exclusion Determinations

Agencies also use exclusion—as debarment and suspension are collectively known—to avoid dealing with nonresponsible contractors.¹⁸ Decisions to exclude are made by agency heads or their designees (above the contracting officer's level) based upon evidence that contractors have committed certain integrity offenses, including any “offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor.”¹⁹ Contractors

¹¹ 48 C.F.R. § 9.104-1.

¹² 48 C.F.R. § 9.103(b).

¹³ See, e.g., LORS Med. Corp., Comp. Gen. B-259829.2 (April 25, 1995) (contractor responsible by the time of award because it had adequate financial resources after forming a joint venture subsequent to bid opening).

¹⁴ But see *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953 (D.C. Cir. 1980) (holding that contractors must receive due process when nonresponsibility determinations are based on alleged lack of integrity because of contractors' liberty interest in being able to challenge allegations about their integrity that could deprive them of their livelihood).

¹⁵ See, e.g., *Molded Insulation Co.*, Comp. Gen. B-151834 (November 29, 1963) (“In view of the discretion vested in the contracting agency with respect to such matters we must conclude that there is no basis upon which we may question the legality of the award made pursuant to the invitation.”).

¹⁶ See, e.g., GAO, Office of General Counsel, *Bid Protests at GAO: A Descriptive Guide* 51 (8th ed. 2006), available at <http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf> (granting the protester standing only when the protest alleges that definitive responsibility criteria were not met or “identif[ies] evidence raising serious concerns that ... the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.”).

¹⁷ See, e.g., *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334-35 (2001). Because the record upon which contracting officers made their determinations is not part of the file when contractors are determined to be responsible, courts may permit limited depositions of contracting officers in order “to plac[e] on the record the basis for [their] responsibility determination.” *Id.* at 1339. There is generally no parallel need to depose contracting officers when they determine a contractor is nonresponsible because their files must contain documents stating the basis for the nonresponsibility determination, among other things. See 48 C.F.R. § 9.105-2(a)(1).

¹⁸ See 48 C.F.R. § 9.406 (debarment) & 48 C.F.R. § 9.407 (suspension).

¹⁹ See 48 C.F.R. § 9.406-1 (debarment official); 48 C.F.R. § 9.407-1 (suspending official); 48 C.F.R. § 9.403 (definitions of debarment official and suspending official). Grounds for debarment include, among other things, convictions or civil (continued...)

are considered for exclusion only when specific conduct occurs, not as a routine matter. Exclusion is government-wide and not contract-specific.²⁰ Excluded contractors are barred from receiving future government contracts, among other things, for as long as the exclusion lasts.²¹ Debarment lasts for a “period commensurate with the seriousness of the cause(s),” generally not exceeding three years, while suspension lasts as long as any agency investigation of the underlying conduct or ensuing legal proceeding.²² Only current government contractors are typically debarred or suspended, although contracting officers may refer prospective contractors to agency debarring or suspending officials for consideration for exclusion based upon information submitted in bids or offers.²³ Contractors proposed for debarment or suspension are guaranteed due process, and decisions to exclude are not committed to debarring or suspending officials’ discretion in the same way that responsibility determinations are.²⁴ While exclusion determinations are not generally protestable, at least not with the GAO,²⁵ they may be reversed on appeal to the federal courts when they are improperly punitive, or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.²⁶

Table I. Comparison of Nonresponsibility Determinations and Debarment

	Nonresponsibility	Debarment
Decision maker	Contracting officer	Debarring official (not the contracting officer)
Criteria	Adequate financial resources	Fraud or criminal offenses in obtaining or performing a public contract or subcontract
	Ability to comply with delivery and performance schedule	Violations of federal or state antitrust laws
	Satisfactory performance record	Embezzlement, theft, forgery, bribery, etc.

(...continued)

judgments involving fraud or criminal offenses in connection with obtaining or performing a government contract; violations of federal or state antitrust laws relating to the submission of offers; embezzlement, theft, forgery, or similar offenses; and intentional misuse of the “Made in America” designation. 48 C.F.R. § 9.406-2(a)(1)-(5).

²⁰ 48 C.F.R. § 9.405(a) (“[A]gencies shall not solicit offers from, award contracts to, or consent to subcontracts with [debarred] contractors.”).

²¹ *Id.* Debarred contractors are also generally precluded from (1) receiving new work or an option under an existing contract; (2) receiving orders in excess of the guaranteed minimum under an indefinite-delivery/indefinite-quantity contract; (3) serving as a subcontractor on certain contracts with executive branch agencies; or (4) serving as an individual surety. *See* 48 C.F.R. § 9.405(a)-(c); 48 C.F.R. § 9.405-1(b)(1); § 9.405-2(a)-(b). However, any current contracts or subcontracts of debarred or suspended contractors continue unless the agency head directs otherwise. 48 C.F.R. § 9.405-1(a).

²² 48 C.F.R. § 9.406-4(a)(1) (debarment) & 48 C.F.R. § 9.407-4(a) (suspension). Debarments are limited to one year for violations of the Immigration and Nationality Act, but can last up to five years for violations of the Drug-Free Workplace Act. 48 C.F.R. § 9.406-4(a)(1)(i)-(ii). Suspensions may not exceed 18 months unless legal proceedings are initiated within that period. 48 C.F.R. § 9.407-4(a).

²³ 48 C.F.R. § 9.104-5(a)(2).

²⁴ 48 C.F.R. § 9.406-3. When debarment is based on a conviction, the hearing that the contractor received prior to the conviction suffices for due process in the debarment proceeding. The due process protections with suspension are not as extensive as those with debarment because suspension is “less serious” than debarment. 48 C.F.R. § 9.407-3(a)-(d).

²⁵ 4 C.F.R. § 21.59(i).

²⁶ *See, e.g.,* Frequency Elecs., Inc. v. U.S. Dep’t of the Air Force, 1998 U.S. App. LEXIS 14888 (4th Cir. 1998) (noting that, unless an agency’s exclusion determination is punitive, a court cannot disturb it unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law); *IMCO, Inc. v. United States*, 97 F.3d 1422, 1427 (Fed. Cir. 1996) (upholding an agency’s debarment determination but noting that the outcome would have been different had the debarment been imposed for purposes of punishment).

	Nonresponsibility	Debarment
	Satisfactory record of integrity and business ethics	Intentionally misusing “Made in America” designation
	Necessary organization and experience	Other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor
	Necessary equipment and facilities	
	Otherwise qualified and eligible	
Duration	Single contract award	Fixed time proportionate to the offense (generally not more than three years)
Application	Applies to companies that have not previously had government contracts, as well as current and prior government contractors	Generally applied to current government contractors, although potentially applicable to prospective or prior contractors
Due Process	Generally not	Yes
Review of Agency Determinations	Contracting officers have substantial discretion; protesters have standing to challenge the determinations only under limited circumstances (e.g., definitive criteria allegedly not met)	Debarment officials do not have substantial discretion; their decisions are generally not protestable, at least not with GAO

Source: Congressional Research Service.

Performance Standards & Collateral Requirements

When determining whether prospective contractors are responsible, agencies consider both general standards that apply to all contracts, regardless of whether they are incorporated into the solicitation, and special standards, also known as “definitive criteria,” that apply only if included in the solicitation. These standards—whether general or special—are largely performance standards. They assess whether prospective contractors can be expected to complete the contract work on time and in a satisfactory manner. One of the general standards introduces so-called “collateral requirements,” however, by specifying that contractors must be “otherwise qualified and eligible” in order to be found responsible.²⁷ Collateral requirements are other provisions of law disqualifying some prospective contractors or declaring them ineligible for awards. Collateral requirements are not performance standards. Rather, they ensure that the government’s dealings with contractors promote socioeconomic goals such as equal employment opportunity (EEO) or subcontracting with small businesses.²⁸

General standards, as well as any special standards, apply to all prospective contractors located in the United States and its outlying areas or elsewhere, unless application of the standards “would be inconsistent with the laws or customs where the contractor is located.”²⁹ They do not apply to contracts with foreign, state, or local governments; other U.S. government agencies or their instrumentalities; or “agencies for the blind or other severely handicapped.”³⁰ While

²⁷ 48 C.F.R. § 9.104-1(g).

²⁸ See, e.g., 48 C.F.R. § 22.802(b) (compliance with EEO requirements); 15 USC § 637(d)(4)(C) (subcontracting with small businesses); 15 USC § 637(d)(5)(B) (same).

²⁹ 48 C.F.R. § 9.102(a)(1)-(2).

³⁰ 48 C.F.R. § 9.102(b)(1)-(3). When nonprofit agencies serving the blind or persons with severe disabilities are involved, the focus is on capability, not responsibility. See 48 C.F.R. § 9.107.

responsibility determinations generally focus upon agencies' prospective prime contractors, contracting officers may inquire into the responsibility of prospective subcontractors in making their determinations.³¹ However, contracting officers are not required to independently investigate the responsibility of each proposed subcontractor.³² Rather, once they determine that a contractor is responsible, they may generally presume that the contractor has ascertained that its subcontractors are responsible.³³

General Standards

For prospective contractors to be determined responsible, they must satisfy seven criteria, each of which is discussed in more detail below.³⁴ These criteria require contractors to:

1. ***Have adequate financial resources to perform the contract, or the ability to obtain them.***³⁵ In assessing this criterion, contracting officers consider the factors generally used to assess businesses' financial health: ratio of assets to liabilities, working capital, cash flow projections, credit ratings, profitability, and liquidity of assets.³⁶ A contractor's filing for bankruptcy does not, in itself, mean that the contractor lacks adequate financial resources.³⁷ Contractors may demonstrate their financial capacity by offering performance bonds.³⁸
2. ***Be able to comply with the required or proposed delivery or performance schedule.*** Any circumstances suggesting that a contractor might not comply with the contract's schedule for delivery or performance could form the basis for an unfavorable finding on this criterion. Such circumstances may include recent relocation; labor disputes; delivery problems under prior contracts; and inability to demonstrate that suppliers or subcontractors are committed to delivering necessary items or equipment.³⁹
3. ***Have a satisfactory performance record.*** Under the FAR, "a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action."⁴⁰ Serious deficiencies in

³¹ See, e.g., Linde Construction, Comp. Gen. B-206442 (March 17, 1983).

³² *Id.*

³³ See, e.g., FHC Options, Inc., Comp. Gen. B-246793.3 (April 14, 1992).

³⁴ 48 C.F.R. § 9.104-1(a)-(g).

³⁵ When contractors are required to have certain resources or the ability to obtain them (e.g., adequate financial resources), contractors may demonstrate responsibility by showing a commitment or explicit agreement to rent, purchase, or otherwise acquire the resources. 48 C.F.R. § 9.104-3(a).

³⁶ See, e.g., Costec Assocs., Comp. Gen. B-215827 (December 5, 1984) (working capital); Tomco, Inc., Comp. Gen. B-210023.2 (February 15, 1984) (type of credit obtained by the contractor); Lear & Scout, Comp. Gen. B-143208 (June 29, 1960) (net worth, operating losses, cash flow).

³⁷ See, e.g., Hunter Outdoor Prods., Inc., Comp. Gen. B-179922 (October 16, 1974).

³⁸ 33 Comp. Gen. Dec. 549 (May 12, 1954).

³⁹ See, e.g., Sys. Dev. Corp., Comp. Gen. B-212624 (December 5, 1983) (inability to demonstrate that suppliers or subcontractors are committed to delivering necessary items or equipment); X-tyal Int'l Corp., Comp. Gen. B-190101 (March 30, 1978) (relocation, labor strike, delivery problems under other government contracts).

⁴⁰ 48 C.F.R. § 9.104-3(b).

performance may include delinquent performance; delivery of nonconforming items; failure to adhere to contract specifications; late deliveries; poor management or technical judgment; failure to correct production problems; failure to perform safely; and inadequate supervision of subcontractors.⁴¹ Contracting officers must consider the circumstances surrounding any deficient performance when making determinations,⁴² and poor performance or default on one or several prior contracts is not, per se, sufficient ground for disqualification.⁴³

4. ***Have a satisfactory record of integrity and business ethics.*** In evaluating this criterion, contracting officers may consider convictions or indictments of corporate officers; integrity offenses constituting grounds for suspension under the FAR; repeated violations of state law; or pending debarments.⁴⁴ A lack of integrity on the part of entities with which the contractor has close relationships may also be considered.⁴⁵ Due process is required when a nonresponsibility determination is based on concerns about the contractor's integrity because contractors have a liberty interest in being able to challenge allegations about their integrity that could deprive them of their livelihood, as discussed below.⁴⁶
5. ***Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them.*** Contracting officers considering this criterion focus on prior work experiences, as well as the present organization of corporations.⁴⁷ Inability to implement necessary programs or procedures (e.g., for quality assurance), unsatisfactory experience, or lack of experience may be grounds for nonresponsibility determinations.⁴⁸ Agencies may

⁴¹ See, e.g., Campbell Indus., Comp. Gen. B-238871 (July 3, 1990) (poor management and technical judgment); Ford Motor Co., Comp. Gen. B-207179 (January 20, 1983) (late deliveries); United Power & Control Sys., Inc., Comp. Gen. B-184662 (December 27, 1978) (nonconforming items); Bill Ward Painting & Decorating, Comp. Gen. B-184612 (January 28, 1976) (unsafe performance; inadequate supervision of subcontractors); Marine Eng'rs Beneficial Ass'n, Comp. Gen. B-181265 (November 27, 1974) (failure to take corrective action); Kennedy Van & Storage Co., Inc., Comp. Gen. B-180973 (June 19, 1974) (failure to adhere to specifications); Land-Air, Inc., Comp. Gen. B-166969 (September 2, 1969) (delinquent performance).

⁴² See, e.g., Marine Eng'rs Beneficial Ass'n, Comp. Gen. B-181265 (November 27, 1974).

⁴³ See, e.g., *id.*

⁴⁴ See, e.g., Traffic Moving Sys., Comp. Gen. B-248572 (September 3, 1992) (officers' criminal convictions); Standard Tank Cleaning Corp., Comp. Gen. B-245364 (January 2, 1992) (repeated violations of state law); Drexel Indus., Inc., Comp. Gen. B-189344 (December 6, 1977) (integrity offenses that are grounds for suspension under the FAR); Greenwood's Transfer & Storage Co., Inc., Comp. Gen. B-186438 (August 17, 1976) (pending debarment).

⁴⁵ See, e.g., Speco Corp., Comp. Gen. B-211353 (April 26, 1983) (upholding a nonresponsibility determination where a contractor repeatedly allowed another business with an unsatisfactory record of integrity and business ethics to do business under its name).

⁴⁶ See *Old Dominion Dairy Prods.*, 631 F.2d at 963.

⁴⁷ See, e.g., Certified Testing Corp., Comp. Gen. B-212242 (November 8, 1983) (present organization); Otis Elevator Corp., Comp. Gen. B-140481 (September 8, 1959) (prior experience).

⁴⁸ See, e.g., Omneco, Inc., Comp. Gen. B-218343 (June 10, 1985) (unable to implement quality assurance program); Columbus Jack Corp., Comp. Gen. B-211829 (September 20, 1983) (unsatisfactory experience); CEA Indus., Inc., Comp. Gen. B-169160 (May 4, 1970) (lack of experience). Lack of experience is treated differently than lack of performance history. Lack of experience can count against prospective contractors when contracting officers consider whether contractors have the necessary organization and experience. Lack of performance history, however, cannot count against prospective contractors when contracting officers either (1) consider whether contractors have a satisfactory performance record or (2) evaluate past performance. See 41 U.S.C. § 405(j)(2); 48 C.F.R. § 9.104-1(c); 48 C.F.R. § 15.305(a)(2)(iv).

consider the experience of (1) predecessor firms, when the contractor retains key personnel; (2) parent firms, when their resources would be committed to performing the contract; and (3) principal officers or key employees.⁴⁹

6. ***Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them.*** Contractors may be found nonresponsible based on this criterion when they do not presently possess necessary equipment or facilities, or cannot prove ability to access them in the future.⁵⁰ Contracting officers may also evaluate the safety or capacity of equipment or facilities.⁵¹
7. ***Be otherwise qualified and eligible to receive an award under applicable laws and regulations.*** Contracting officers evaluating this criterion consider whether contractors are disqualified from or ineligible for a proposed award because of collateral requirements, or other provisions of law specifying when contractors are disqualified from or ineligible for awards. **Table 2** lists major collateral requirements presently in effect government-wide.⁵² Contracting officers may also consider whether contractors have or can acquire any necessary federal licenses or permits.⁵³

Table 2. Major Collateral Requirements

Requirement	Application
Equal Employment Opportunity (EEO) (48 C.F.R. § 22.802(b); Exec. Order No. 11246, 30 Fed. Reg. 12319 (September 24, 1965))	<ul style="list-style-type: none"> • Contractors ineligible if they do not comply with the EEO requirements in Executive Order 11246, which requires, among other things, that contractors “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.” • Contractors cannot receive an award whose expected value is \$10 million or higher (excluding construction contracts) unless the Office of Federal Contract Compliance Programs at the Department of Labor determines in writing that the contractor is compliant with Executive Order 11246.
Small Business	<ul style="list-style-type: none"> • Contractors ineligible if they fail to agree to an acceptable plan for subcontracting with small businesses under the contract. Section 637(d) of the Small Business Act

⁴⁹ See, e.g., Tri-Star Indus., Inc., Comp. Gen. B-254767.2 (January 18, 1994) (parent corporation); J.D. Miles & Sons, Inc., Comp. Gen. B-251533 (April 7, 1993) (key employees); Sun Elec. Corp., Comp. Gen. B-202325 (August 10, 1981) (predecessor firm); Nello T. Leer Co., Comp. Gen. B-130910 (March 26, 1957) (principal officers). However, contracting officers are not *obligated* to consider the experience of the parent of a newly formed subsidiary. See, e.g., Med. Servs. Consultants, Inc., Comp. Gen. B-203998 (May 25, 1982).

⁵⁰ See, e.g., McLaughlin Res. Corp., Comp. Gen. B-247118 (May 5, 1992) (agreement showing ability to use warehouse in the future).

⁵¹ See, e.g., GSE Dynamics, Inc., Comp. Gen. B-175545 (August 17, 1972).

⁵² There are additional collateral requirements, often targeted or effectively applicable to specific agencies. For example, the Federal Protective Service Guard Contracting Reform Act of 2008 prohibits businesses that are owned, controlled, or operated by individuals convicted of “serious felonies” from participating in the contract security guard program of the Federal Protective Service, a component of the Department of Homeland Security (DHS). See P.L. 110-356, § 2, 122 Stat. 3996 (October 8, 2008). In November 2009, DHS promulgated a final rule implementing this act, identifying what constitutes a “serious felony,” among other things. Dep’t of Homeland Security, Prohibition on Federal Protective Service Guard Services Contracts With Business Concerns Owned, Controlled, or Operated by an Individual Convicted of a Felony, 74 Fed. Reg. 58851 (November 16, 2009).

⁵³ See, e.g., What-Mac Contractors, Inc., Comp. Gen. B-192188 (September 6, 1979). Any requirements for state or local licenses or permits included in a solicitation are special standards, discussed below, not general ones. See, e.g., GSE Dynamics, Inc., Comp. Gen. B-175545 (August 17, 1972).

Requirement	Application
Subcontracting Plans (15 USC § 637(d)(4)(C) (plans in negotiated procurements); 15 USC § 637 (d)(5)(B) (plans in sealed-bid procurements))	requires that all contracts whose expected value is over \$650,000 (\$1.5 million, in the case of construction contracts) include a “subcontracting plan” that provides the “maximum practicable opportunity” for various subcategories of small businesses to participate in performing the contract. Plans must include percentage goals for subcontracting with small businesses; veteran-owned and service-disabled veteran-owned small businesses; HUBZone small businesses; small disadvantaged businesses; and women-owned small businesses. Plans must also describe the steps that contractors will take to ensure that small businesses have an equitable opportunity to compete for subcontracts.
Government Employees (48 C.F.R. §§ 3.601-602)	<ul style="list-style-type: none"> • Agencies may not knowingly award contracts to government employees or entities owned, or substantially owned or controlled, by government employees. • Contracting with government employees is permitted under certain narrow exceptions, such as when the government’s needs cannot otherwise be met. • If a contracting officer unknowingly contracts with a government employee, the award generally will not be disturbed unless there appears to have been favoritism or other impropriety.
Quasi-military Armed Forces (5 U.S.C. § 3108; 48 C.F.R. § 37.109)	<ul style="list-style-type: none"> • Agencies may not contract with the Pinkerton Detective Agency or “similar organizations.” • Prohibition applies “only to contracts with organizations that offer quasi-military armed forces for hire, or with their employees, regardless of the contract’s character.” (48 C.F.R. § 37.109)
Organizational Conflicts of Interest (OCIs) (48 C.F.R. §§ 9.500-9.508)	<ul style="list-style-type: none"> • Agencies may not award contracts where there are OCIs that cannot be avoided or mitigated. Disqualifying OCIs could arise if a prospective contractor provided systems engineering and technical direction, prepared specifications or work statements, provided evaluation services, or obtained access to other contractors’ proprietary information while performing other government contracts. • Possibility of an OCI is not, in itself, grounds for disqualification. Rather, when contracting officers identify an OCI, they must notify the contractor and allow the contractor a reasonable opportunity to respond. • Contracting officers have substantial discretion in determining whether OCIs exist, and their determinations will generally be reversed, if protested, only when they are clearly unreasonable or directly contrary to statute or regulation.

Source: Congressional Research Service.

Special Standards

In addition to the general standards (including collateral requirements), which apply to all contracts unless waived,⁵⁴ there may be special standards, also known as definitive criteria, that contractors must meet in order to be determined responsible for specific acquisitions.⁵⁵ Contracting officers may incorporate such standards into solicitations when unusual expertise, special facilities, or specific experience or equipment are necessary to ensure that the government’s needs are satisfied.⁵⁶ Contracting officers may not waive any special standards

⁵⁴ Waiver of the general standards is possible under the authority of 48 C.F.R. § 1.403, which allows contracting officers to deviate from the requirements of the FAR on a contract-by-contract basis with the agency head’s authorization.

⁵⁵ 48 C.F.R. § 9.104-2(a).

⁵⁶ See, e.g., Breland Co., Comp. Gen. B-217552 (February 21, 1985) (unusual expertise); Aero Corp., Comp. Gen. B- (continued...)

when making awards.⁵⁷ However, they have some discretion in determining whether particular offerors meet the special standards, provided that their determinations are based upon adequate and objective evidence.⁵⁸ Contractors may rely upon the experience or facilities of their affiliates or subcontractors, or any fellow venturer in a joint venture.⁵⁹ Where experience is involved, they may also rely on employees' experiences while working for other companies.⁶⁰

Procedures: Making and Protesting Responsibility Determinations

Agency contracting officers must make an affirmative determination that a prospective contractor is responsible prior to awarding the contract.⁶¹ They do so after considering a range of information about the contractor:

In making the determination of responsibility, the contracting officer shall consider relevant past performance information. In addition, the contracting officer should use the following sources of information to support such determinations: (1) The Excluded Parties List System.... (2) Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices. (3) The prospective contractor[,], including bid or proposal information ..., questionnaire replies, financial data, information on production equipment, and personnel information. (4) Commercial sources of supplier information of a type offered to buyers in the private sector. (5) Preaward survey reports.⁶² (6) Other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations. (7) If the contract is for construction, the contracting officer may consider performance evaluation reports.⁶³

Contracting officers must obtain "information sufficient to be satisfied" that the prospective contractor meets all performance standards and collateral requirements.⁶⁴ However, until recently, contracting officers had almost unfettered discretion as to the nature and quantity of information considered.⁶⁵ Although they were encouraged to consider other information,⁶⁶ they were required

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201581 (June 23, 1981) (special facilities).

⁵⁷ See, e.g., *The Mary Kathleen Collins Trust*, Comp. Gen. B-261019.2 (September 29, 1995).

⁵⁸ See, e.g., *Reliance Elec. Co.*, Comp. Gen. B-184865 (May 3, 1976) (determining whether the offeror has equivalent experience). In granting a Certificate of Competence, discussed below, the Small Business Administration (SBA) must consider, but is not bound by, definitive criteria in the solicitation. See *Baxter & Sons Elevator Co., Inc.*, Comp. Gen. B-197595 (December 3, 1980).

⁵⁹ See, e.g., *Tutor Saliba Corp.*, Comp. Gen. B-255756 (March 29, 1994).

⁶⁰ See, e.g., *Tucson Mobilephone, Inc.*, Comp. Gen. B-258408.3 (June 5, 1995).

⁶¹ 48 C.F.R. § 9.103(b).

⁶² A preaward survey is "an evaluation of a prospective contractor's ability to perform a proposed contract." 48 C.F.R. § 2.101. Its procedures vary depending upon the size and complexity of the procurement, as well as the information presently available to contracting officers. However, it often involve visits by government teams to bidders' or offerors' places of business. 48 C.F.R. § 9.104-4(d).

⁶³ 48 C.F.R. § 9.105-1(c) (internal citations omitted).

⁶⁴ 48 C.F.R. § 9.105-1(a).

⁶⁵ See, e.g., *John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999) ("[T]he contracting officer is the arbiter of what, and how much, information he needs."). An affirmative determination is improper if not based on (continued...)

to consider only “relevant past performance information.”⁶⁷ The Clean Contracting Act of 2008 (P.L. 110-417, §§ 871-873) effectively changed this by requiring contracting officers to consult a new database, the Federal Awardee Performance and Integrity Information System (FAPIS), whose creation is required under the act, when making responsibility determinations for contracts in excess of the simplified acquisition threshold (generally \$150,000).⁶⁸ FAPIS contains brief descriptions of all civil, criminal, and administrative proceedings involving federal contracts that result in a conviction or finding of fault, as well as all terminations for default, administrative agreements, and nonresponsibility determinations relating to federal contracts, within the past five years for all entities holding a federal contract or grant worth \$500,000 or more.⁶⁹ Contracting officers are, thus, required to review this information when making responsibility determinations. However, what other information, if any, contracting officers consider remains within their discretion, and they are not bound by any recommendations contained in the information that they consider.⁷⁰

A contractor’s failure to provide necessary information could result in a nonresponsibility determination because contracting officers must determine that contractors are nonresponsible when they lack information “clearly indicating that the prospective contractor is responsible.”⁷¹ The only exception to this rule involves small businesses. Prior to determining that a small business is nonresponsible due to lack of information, or upon any other basis, contracting officers must consult the Small Business Administration (SBA), which may—but is not required to—issue a Certificate of Competence declaring the contractor eligible for the award.⁷² When the SBA issues a Certificate of Competence, contracting officers may accept the factors covered by the certificate without further inquiry.⁷³

While the contracting officer’s signature on the contract indicates his or her determination that the contractor is responsible for purposes of the contract, a determination that the contractor is nonresponsible was recorded only in the contracting officer’s files until recently.⁷⁴ However, the Clean Contracting Act also requires that nonresponsibility determinations be included in FAPIS.⁷⁵

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sufficient information. 48 C.F.R. § 9.105-1(a). However, the amount of information needed depends upon the conclusions that can be drawn from it. *See, e.g.,* John F. Small & Co., Inc., Comp. Gen. B-207681.2 (December 6, 1982). Determinations must also be supported by the record and based on the most current information available. *See, e.g.,* 48 C.F.R. § 9.105-1(b)(1); Gary Aircraft Corp., Comp. Gen. B-174455 (July 6, 1972).

⁶⁶ 48 C.F.R. § 9.105-1(c)(1)-(7) (“In addition, the contracting officer *should* use the following sources of information ...”) (emphasis added).

⁶⁷ 48 C.F.R. § 9.105-1(c).

⁶⁸ P.L. 110-417, § 872(b)(1) & (c), 122 Stat. 4356 (October 14, 2008).

⁶⁹ P.L. 110-417, at § 872(b)(1) & (c).

⁷⁰ *See, e.g.,* Carl Weissman & Sons, Inc., Comp. Gen. B-190304 (February 17, 1978).

⁷¹ 48 C.F.R. § 9.103(b); Sec. Assistance Forces & Equip. Int’l, Inc., Comp. Gen. B-194876 (November 19, 1980).

⁷² 48 C.F.R. § 9.103(b); 48 C.F.R. § 19.6.

⁷³ 48 C.F.R. § 9.105-2(a)(2).

⁷⁴ *See* 48 C.F.R. § 9.105-2(a)(1) (2008) (“The contracting officer’s signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. When an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the contracting officer shall make, sign, and place in the contract file a determination of nonresponsibility, [stating] the basis for the determination.”).

⁷⁵ P.L. 110-417, §§ 871-73. Contracting officers could potentially engage in *de facto* debarment, discussed below, if (continued...)

Contractors do not routinely receive notice of nonresponsibility determinations concerning them,⁷⁶ and they are generally not entitled to due process when contracting officers make responsibility determinations. Due process, where it applies, requires that parties get some sort of notice and opportunity to be heard before the government takes actions involving their life, liberty, or property.⁷⁷ Because contractors do not have property interests in prospective government contracts, they are generally not entitled to notice or a hearing before contracting officers determine they are nonresponsible.⁷⁸ However, when nonresponsibility determinations are based upon concerns about contractors' integrity, contractors *are* entitled to due process because courts recognize contractors' liberty interest in being able to challenge allegations about their integrity that could deprive them of their livelihood:

[W]hen a determination is made that a contractor lacks integrity and the Government has not acted to invoke formal suspension and debarment procedures, notice of the charges must be given to the contractor as soon as possible so that the contractor may utilize whatever opportunities are available to present its side of the story before adverse action is taken.⁷⁹

Contractors could potentially also be entitled to due process if repeated nonresponsibility determinations were made on the same basis—even when that basis is not integrity-related—if the determinations constitute *de facto* debarment, as discussed below.⁸⁰

Contracting officers also have substantial discretion in their determinations,⁸¹ with administrative or judicial tribunals hearing protests concerning responsibility determinations only under limited circumstances. Tribunals that hear protests of contract awards do not routinely review contracting officers' responsibility determinations because such determinations are “practical, ... not legal determination[s]”⁸² and “are not readily susceptible to judicial review.”⁸³ The GAO hears protests regarding responsibility determinations only when the protester alleges that definitive responsibility criteria were not met or “identif[ies] evidence raising serious concerns that ... the

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they based a nonresponsibility determination for a prospective contractor solely on the fact that a contractor had previously been determined nonresponsible. For more on *de facto* debarment generally, see CRS Report RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, by Kate M. Manuel.

⁷⁶ Contractors are, however, entitled to written notice of nonresponsibility determinations, as well as the basis for such determinations, when making bids or offers to the General Service Administration (GSA). See *GSA Acquisition Manual* § 509.105-2(a). Notice is intended to allow prospective contractors to correct problems for future solicitations.

⁷⁷ See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 64 (1972) (holding that people must have recourse to procedures for determining the fairness of how the government has treated them when life, liberty, or property is involved).

⁷⁸ See, e.g., *Old Dominion Dairy Prods.*, 631 F.2d at 961 (contractor cannot claim a property interest in a prospective contract).

⁷⁹ *Id.* at 955-56. See also *Conset Corp. v. Cmty. Servs. Admin.*, 655 F.2d 1291 (D.C. Cir. 1981) (circulation of a memorandum alleging that a grant recipient had a conflict of interest, coupled with a subsequent refusal to approve the firm for a grant, violated due process); *Related Indus., Inc. v. United States*, 2 Cl. Ct. 517 (1983) (contractor denied due process when a contracting officer stated that “under no circumstances will he award any contract” to the contractor).

⁸⁰ See, e.g., *Shermco Indus., Inc. v. Sec’y of the Air Force*, 584 F. Supp. 76 (N.D. Tex. 1984) (holding that when successive determinations of nonresponsibility are made on the same basis, *de facto* debarment may have occurred).

⁸¹ *Molded Insulation Co., Comp. Gen. B-151834* (November 29, 1963).

⁸² *Peter Kiewit Sons’ Co. v. U.S. Army Corps of Eng’r*, 714 F.2d 163, 167 n.18 (D.C. Cir. 1983).

⁸³ *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 394 (1993). These tribunals also take the view that federal agencies “bear the burden of difficulties experienced in obtaining the required performance.” See, e.g., *News Printing Co. v. United States*, 46 Fed. Cl. 740, 746 (2000).

contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.”⁸⁴ The federal courts similarly consider the merits of protested responsibility determinations only when the protester’s allegations that the agency’s determination was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law can survive a preliminary motion to dismiss.⁸⁵ Moreover, judicial and administrative tribunals decline to overturn contracting officers’ responsibility determinations in many of the protests that they do hear. They generally overturn a determination only when the protester can show that the determination was clearly unreasonable given the record before the contracting officer.⁸⁶ The GAO and the courts have held that a contracting officer’s determination is not unreasonable merely because another contracting officer made a different determination after considering the same information.⁸⁷

Recently Enacted and Proposed Amendments

The magnitude of federal spending on contracts, coupled with recent high-profile examples of contractor misconduct, has heightened congressional interest in the legal standards and procedures used in responsibility determinations.⁸⁸ As the largest purchaser of goods and services in the world, the federal government spent more than \$535.3 billion on government contracts in FY2010 alone.⁸⁹ Some of this spending was with contractors who reportedly received contract awards despite having previously engaged in serious misconduct, such as failing to pay taxes, bribing foreign officials, falsifying records submitted to the government, and performing contractual work so poorly that fatalities resulted.⁹⁰

⁸⁴ See, e.g., *Bid Protests at GAO*, *supra* note 16, at 51. Prior to 2003, the GAO exercised more limited jurisdiction over protested responsibility determinations, hearing only protests alleging “bad faith” by agency officials or failure to meet definitive criteria. However, the GAO changed its policy in response to the decision by the U.S. Court of Appeals for the Federal Circuit in *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001).

⁸⁵ *Watts-Healy Tibbitts v. United States*, 84 Fed. Cl. 253 (2008). Claims that agency actions are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law derive from the Administrative Procedure Act (APA), which allows persons “suffering legal wrong because of agency action” to seek judicial review of that action. See 5 U.S.C. § 702 (right of review); 5 U.S.C. § 706 (2)(A) (arbitrary and capricious standard).

⁸⁶ See, e.g., *Impresa Construzioni*, 238 F.3d at 1334-35. Because the record upon which contracting officers made their determinations is not part of the files when they find contractors responsible, courts may permit limited depositions of contracting officers in order “to plac[e] on the record the basis for [their] responsibility determination.” *Id.* at 1339. There is usually no parallel need to depose contracting officers when they determine a contractor is nonresponsible because their files must contain documents stating the basis of the nonresponsibility determination, among other things. See 48 C.F.R. § 9.105-2(a)(1).

⁸⁷ See, e.g., *MCI Constructors*, Comp. Gen. B-240655 (November 27, 1990); *S.A.F.E. Exp. Corp.*, Comp. Gen. B-151834 (April 22, 1983).

⁸⁸ See, e.g., S. 526, 111th Cong., § 2 (finding that a foreign contractor’s failure to appear to defend against litigation in U.S. federal court was not the action of a “responsible party”); H.R. 2349, 111th Cong., § 2 (same). S. 526 was reintroduced as S. 2782, 111th Cong., without this language.

⁸⁹ Prime Award Spending Data: By Agency, [USASpending.gov](http://www.usaspending.gov/index.php), available at <http://www.usaspending.gov/index.php>, Jan. 13, 2011.

⁹⁰ See, e.g., Alice Lipowicz, Group Updates Federal Contractor Misconduct Database, *Wash. Tech.*, April 21, 2009, available at <http://www.washingtontechnology.com/Articles/2009/04/21/Watchdog-group-updates-federal-contractor-misconduct-database.aspx> (“The top 100 federal contractors have accumulated 673 cases of admitted or alleged misconduct and paid \$26 million in penalties related to those cases since 1995.”); Kathleen Day, Medicare Contractors Owe Taxes, *GAO Says*, *Wash. Post*, March 20, 2007, at D1 (delinquent tax debts); Contract Fraud Loophole Exempts Overseas Work, *Grand Rapids Press*, March 2, 2008, at A9 (bribery of foreign officials); Ron Nixon & Scott Shane, Panel to Discuss Concerns on Contractors, *New York Times*, July 18, 2007, at A15 (falsifying records); Terry Kivlan, (continued...)

111th Congress

Given this context, the 111th Congress enacted legislation that would augment the existing responsibility standards, particularly the collateral requirements. This legislation would:

- make the Association of Community Organizations for Reform Now (ACORN) and its affiliates, subsidiaries, and allied organizations ineligible for contracts funded under particular appropriations acts (e.g., P.L. 111-68, § 163; P.L. 111-117, § 418);⁹¹
- make corporations that require their employees or independent contractors, as a condition of employment, resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment ineligible for any contract in excess of \$1 million and lasting more than 60 days funded under the Department of Defense Appropriations Act, 2010 (P.L. 111-118, § 8116);⁹² and
- require that all information contained in the FAPIIS database other than contractor performance evaluations be posted on a “publicly available Internet website.”⁹³

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Shoddy Standards Blamed for Troop Electrocutions in Iraq, *National Journal's Congress Daily*, PM Edition, July 11, 2008 (substandard performance).

⁹¹ A district court initially found that the prohibition on contracting with or otherwise providing federal funds to ACORN and its affiliates, subsidiaries, and allied organizations contained in the Legislative Branch Appropriations Act, 2010, (P.L. 111-68) constituted an unconstitutional bill of attainder for reasons outside the scope of this report. *See generally* CRS Report R40826, *The Proposed “Defund ACORN Act,” the Continuing Resolution, and the Consolidated Appropriations Act: Are They Bills of Attainder?*, by Kenneth R. Thomas. However, this decision was subsequently reversed on appeal. *See ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010). Even without the Second Circuit’s decision reversing the district court, however, the non-ACORN collateral requirements described below were unlikely to be found to constitute bills of attainder, in part, because they do not target specific entities in the same way that the ACORN-related legislation does. The Supreme Court has held that legislation meets the criteria of specificity, so as to potentially constitute a bill of attainder, if it either specifically identifies a person, a group of people, or readily ascertainable members of a group, or identifies such a person or group by past conduct. *See, e.g., United States v. Lovett*, 328 U.S. 303, 315 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866).

⁹² Legislation was also introduced, but not enacted, that would have made entities that do not “elect” to participate in E-Verify ineligible for Department of Homeland Security contracts (H.R. 1555, § 5), as well as made “organizations” that (1) have been convicted of violating federal or state laws; (2) had their corporate charter revoked by a state or other issuing authority for failure to comply with federal or state laws; (3) filed, submitted, or transmitted a fraudulent claim with or to any federal or state agency authorized by law to promulgate regulations; (4) knowingly employed individuals who have been convicted of violating federal or state laws, hired such individuals as contractors, or extended any express, implied, or apparent authority to such individuals to act on behalf of the organization; or (5) are parents, subsidiaries, or subsidiaries of the parent company of, or any other company owning 50% or more of such organizations, ineligible for any federal contract (H.R. 4444, § 2). Section 3 of the Overseas Contractor Reform Act, which would have specified that “[i]t is the policy of the United States Government that no Government contracts or grants should be awarded to individuals or companies who violate the Foreign Corrupt Practices Act of 1977,” arguably would not constitute a collateral requirement because it does not prohibit awards to such persons. *Compare* H.R. 5366, § 3 with 5 U.S.C. § 3108 (“An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the government of the District of Columbia.”).

⁹³ Supplemental Appropriations Act, 2010, P.L. 111-212, § 3010, 124 Stat. 2340 (July 29, 2010). The legislation creating FAPIIS specified that access to the database was limited to “appropriate acquisition officials of Federal agencies, ... such other government officials as the Administrator [of the General Services Administration] determines appropriate, and, upon request, to the Chairman and Ranking Member of the committees of Congress having jurisdiction.” *See* Duncan Hunter National Defense Authorization Act for FY2009, § 872(e)(1), 122 Stat. 4557 (continued...)

Additional Legislative Options

The 112th Congress may consider similar legislation if concerns about contractors' responsibility persist. Additional legislative options, which are not currently under consideration but have been proposed in prior Congresses, could include (1) barring contractors from being found to have a satisfactory performance record (or record of integrity and business ethics), or from being determined responsible, if they engage in certain conduct;⁹⁴ (2) adding further criteria to the responsibility standards;⁹⁵ and (3) requiring contracting officers to consider certain information in making responsibility determinations, or document their rationales for finding contractors who engage in certain conduct responsible.⁹⁶ Such approaches would arguably be equally likely to result in nonresponsibility determinations regardless of whether the proposed legislation bars contractors who engage in certain conduct from being found to have a satisfactory performance record or record of integrity and business ethics; bars contractors who engage in certain conduct from being determined responsible; or adds further criteria to the responsibility standards. However, there may be cases where legislation precluding contractors who engage in certain conduct from being determined responsible could potentially result in an impermissible "*de facto* debarment."⁹⁷ *De facto* debarment can occur when contractors are effectively debarred from awards because they are repeatedly found nonresponsible on the same basis.⁹⁸ Because due

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(October 14, 2008). Other legislation proposed, but not enacted, in the 111th Congress would have (1) consolidated the information contained in FAPIIS and related databases into a single database (H.R. 5726, § 5; S. 3323, § 5); (2) required the use of unique, persistent identifiers to identify contractors across the various databases (H.R. 4983, § 503); (3) required that contractors also disclose bribery of foreign officials in FAPIIS (H.R. 5136, § 837); (4) included administrative judgments and civil proceedings that do not contain an explicit finding or acknowledgment of fault in FAPIIS (H.R. 4983, § 504(c)); and (5) expanded FAPIIS's coverage so that it includes information about covered contractors from the past 10 years, instead of the past five years (H.R. 4983, § 504(b)).

⁹⁴ See, e.g., H.R. 3033, § 4(a), 110th Cong. ("[A] person shall be presumed nonresponsible with respect to award of a Federal contract or assistance if the person has rendered against the person twice within any 3-year period a judgment or conviction for the same offense, or similar offenses, if each conviction constitutes a cause for debarment under the Government-wide debarment system."); H.R. 3383, § 2(a), 110th Cong. (precluding a contractor from being determined responsible unless it has an ethics compliance program); S. 32, § 14(a), 110th Cong. (same); S. 2394, § 3, 110th Cong. (precluding a contractor with tax debts from being determined responsible).

⁹⁵ See, e.g., S. 680, § 307, 110th Cong. (authorizing contracting officers to consider whether contractors "pose a serious threat to national security" when making responsibility determinations).

⁹⁶ See, e.g., H.R. 3033, § 3(b), 110th Cong. (requiring contracting officers to document why contractors who have been convicted or subject to civil judgments for certain offenses on multiple occasions within the past three years have been determined responsible); S. 2904, § 3(b), 110th Cong. (same); S. 3139, § 201(b)(2), 110th Cong. (same); S. 3139, § 2305b, 110th Cong. (requiring contracting officers to consider certain information in determining whether contractors have a satisfactory record of integrity and business ethics when making responsibility determinations).

⁹⁷ This might happen if, for example, contractors were presumed nonresponsible on the basis of multiple occurrences of certain conduct, especially if the conduct did not result in convictions or similar judgments from judicial or administrative tribunals. When contractors are convicted, for example, they receive due process from the courts, and this due process suffices for any subsequent debarment proceeding. The same would not necessarily be true if contractors were presumed nonresponsible because they were the subjects of multiple reports or complaints alleging certain conduct. If there was no due process in the reporting or complaint process, then the agency would arguably need to provide due process when making responsibility determinations in order for the determinations to be constitutional.

⁹⁸ See, e.g., *Shermco Indus., Inc. v. Sec'y of the Air Force*, 584 F. Supp. 76, 93-94 (N.D. Tex. 1984) ("[A] procuring agency cannot make successive determinations of nonresponsibility on the same basis; rather it must initiate suspension or debarment procedures at the earliest practicable moment following the first determination of nonresponsibility."); 43 Comp. Gen. 140 (August 8, 1963) (finding that multiple determinations of nonresponsibility can be tantamount to debarment). However, multiple contemporaneous nonresponsibility determinations made on the same basis do not constitute *de facto* debarment, especially when the determinations are based on the most current information available. See, e.g., *Sermor Inc., Comp. Gen. B-219132.2* (October 23, 1985) (finding five consecutive nonresponsibility (continued...))

process is required in debarment decisions but not in responsibility determinations, *de facto* debarment can also unconstitutionally deprive contractors of due process by effectively using the responsibility determination process to debar contractors.⁹⁹

Otherwise, requiring contracting officers to consider specific information in making their determinations, or to document why contractors who have engaged in certain conduct are responsible, could potentially strengthen the responsibility determination process. Currently, contracting officers have wide discretion in determining what information and how much information they consider in making their determinations.¹⁰⁰ Moreover, they are presently not required to justify why any contractor is found responsible. Their signatures on a contract indicate that the contractor was found responsible, but no documentation currently indicates *why* the contractor was found responsible.¹⁰¹

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determinations did not constitute *de facto* debarment); Mexican Intermodal Equip., S.A. de C.V., Comp. Gen. B-270144 (January 31, 1996) (two responsibility determinations were not “part of a long-term disqualification,” but were “merely a reflection of the fact that the determinations were based on the same current information.”).

⁹⁹ See, e.g., *Shermco Indus., Inc.*, 584 F. Supp. at 89 (stating that *de facto* debarment unconstitutionally deprives contractors of notice and an opportunity to be heard).

¹⁰⁰ See *supra* note 66.

¹⁰¹ 48 C.F.R. § 9.105-2(a)(1).