

The Boeing Suspension: Has Increased Consolidation Tied the Department of Defense's Hands?

Major Jennifer S. Zucker¹

Introduction

For the federal government to continue to do business with a private company that has a documented record of defrauding the government and abusing taxpayer money is unconscionable.

-Congressman Bob Barr (R-GA), 23 August 2001

Perhaps the greatest threat to a government contractor following the discovery of an employee's bad act or omission is the possibility of the company's suspension or debarment. The prospect of being barred from future work or the rescission of current contracts is a serious one. When a contractor is suspended or debarred, society often perceives the contractor as corrupt and the consequence as punishment. But suspension and debarment are not imposed for purposes of punishment. Instead, they are administrative remedies that permit agencies to exclude contractors from federal procurements and nonprocurement programs when necessary to protect the government's interest and to ensure compliance with statutory goals.² The goal is to maintain the integrity of the procurement system, to spend taxpayers' dollars wisely, and to ensure that contractors act properly.

To these ends, the *Federal Acquisition Regulation (FAR)* requires contracting officers to make an affirmative determination of responsibility before any federal purchase or award.³ Responsibility spans a number of factors including the contractor's record of performance, integrity, and business ethics.⁴ Suspension and debarment decisions are merely "the final straw in the examination of responsibility issues,"⁵ and focus on whether the contractor acted responsibly and whether it is presently responsible.⁶ Such decisions frequently require an agency debarring official to examine such factors as contractor integrity and honesty; the quality and reliability of the items supplied; the risk of harm to the soldier or citizen; the impact of exclusion from future procurements; and other contract-performance related issues. Debarring officials must also determine whether the conduct of a contractor's employee or subcontractor should be imputed to the contractor. Finally, even if a contractor is suspended or debarred, those exclusions may be waived when compelling reasons exist, such as a lack of alternate sources, meeting urgent needs, or national defense requirements.⁷

In July 2003, the Air Force (AF) suspended three of Boeing's Integrated Defense System business units⁸ and three of its former employees.⁹ The suspensions were based on an AF investigation which concluded that Boeing committed serious violations of the law.¹⁰ According to a Department of Justice

1. Judge Advocate, U.S. Army. Presently assigned as a Trial Attorney, Contract Appeals Division, U.S. Army Legal Services Agency, Arlington, Virginia. This article was submitted to partially satisfy the requirements of an LL.M. degree at The George Washington University Law School. The opinions and conclusions represented in this article are solely those of the author, and do not necessarily represent the views of the Department of Defense, the Department of the Army, the Army Judge Advocate General, or any governmental agency.

2. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 9.402 (July 2003), available at <http://www.arnet.gov/far/> [hereinafter FAR] (noting that the on-line version includes amendments from Federal Acquisition Circular (FAC) 19 (Jan. 1, 2004) and FAC 18 (Jan. 12, 2004)).

3. *Id.* at 9.103.

4. *Id.* at 9.104-1.

5. Steven L. Schooner, *The Paper Tiger Stirs: Rethinking Suspension and Debarment*, Paper Prepared for Delivery Before the George Washington Law School Government Procurement Law Program and the Federal Acquisition Institute Colloquium on Suspension and Debarment: Emerging Issues (Nov. 20, 2003) in L. & POL'Y, Nov. 20, 2003, at 3.

6. See generally FAR, *supra* note 2, at 9.4.

7. See U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 209.405(a)(i)-(iv) (July 2002); see also FAR, *supra* note 2, at 9.405, 9.405-1, 9.405-1(b), 9.405-2, 9.406-1(c), 9.407-1(d), 23.506(e) (noting that FAR 9.405-1(b) was amended on 12 Jan. 2004, to require the agency head to make a written determination of compelling reasons before placing orders under existing contracts with contractors that have been debarred, suspended, or proposed for debarment.); see also National Aeronautics and Space Administration; Debarment and Suspension—Order Placement and Option Exercise, 67 Fed. Reg. 67,282 (proposed Nov. 4, 2002) (to be codified at 48 C.F.R. pt. 9) (stating that the deletion "of" "or a designee" from the phrase "agency head or designee" does not signify a change in policy, but implements the FAR convention at FAR 1.108(b) that each authority is delegable unless specifically stated otherwise").

8. Press Release, U.S. AF, U.S. AF Announces Boeing EELV Inquiry Results (July 25, 2003), available at <http://www.af.mil/stories/story.asp?storyID=123005322> [hereinafter AF Press Release, U.S. Air Force Announces Boeing EELV Inquiry Results]. The suspended units were The Boeing Company, Launch Systems; The Boeing Company, Boeing Launch Service; and The Boeing Company, Delta Programs. *Id.*

(DOJ) press release issued in connection with its criminal case: (1) Boeing possessed an extraordinary amount of rival Lockheed Martin Corporation's (Lockheed Martin) proprietary data during the 1998 Evolved Expendable Launch Vehicle (EELV)¹¹ competition; (2) the data was capable of providing great insight into Lockheed Martin's cost and pricing; and (3) Boeing failed to disclose to the AF the full extent of the data in its possession for approximately four years.¹²

The Boeing suspension sent a message throughout the procurement community that large defense contractors are not immune from suspension or debarment; previously, interest groups had argued that such companies, were in practice, immune.¹³ When Boeing's suspension was twice lifted to allow it to receive awards,¹⁴ interest groups then argued that such action seriously eroded any deterrent effect of the AF's suspension.¹⁵ This conclusion is understandable but it is mistaken. The drastic consolidation of the defense industry over the last decade makes it difficult, but not impossible, to impose a suspension or debarment on mega-defense contractors, like Boeing, Lockheed Martin, or Raytheon.¹⁶ When considering such action, agencies must consider not only the traditional mitigating factors,¹⁷ but also the harsh reality that the exclusion may ultimately be waived, by necessity, if there are no other viable sources.

Continued consolidation of the defense industry poses difficult problems for suspension and debarment officials. This article sets forth the basis and procedural requirements for imposing a suspension or debarment, and the factual basis for the AF's suspension of Boeing. Next, this article examines the problem of using the traditional suspension and debarment remedies to exclude large defense contractors, and then discusses a new approach for crafting remedies aimed at developing alternative sources, when agencies foresee continued business dealings with mega-defense contractors.

Suspension and Debarment

Background

Overview of Procurement Regulations

Federal Acquisition Regulation 9.103 requires contracting officers to make a determination of responsibility before making any purchase or award.¹⁸ Some of the standards listed for consideration are unique to the needs of a particular procurement, such as having the necessary production equipment or meeting a required delivery schedule.¹⁹ Other standards apply to all contracts like having "a satisfactory record of integrity and business ethics."²⁰ When a contracting officer determines that a contractor is "nonresponsible" that determination applies

9. Matt Kelley, *Air Force Retracts \$1B Boeing Deal on Federal Law Violations*, TECHNEWS.COM, July 24, 2003 (reporting that those individuals are Kenneth Branch, William Erskine, and Larry Satchell).

10. AF Press Release, U.S. Air Force Announces Boeing EELV Inquiry Results, *supra* note 8.

11. The EELV is not a government-owned weapon system. Under the EELV Program, discussed below, the AF procured developmental contracts for commercially owned rocket systems including launch capabilities, and then awarded separate launch service contracts—the Buy I and Buy II—to send government satellites into space. See generally The U.S. Air Force Evolved Expendable Vehicle Launch System Program Office Homepage, *Introduction to EELV Brief*, available at http://www.losangeles.af.mil/smc/mv/intro_files/public/eelv_intro_brief.pdf (last visited Mar. 30, 2004) [hereinafter *EELV Brief*].

12. Press Release, DOJ, Two Former Boeing Managers Charged in Plot to Steal Trade Secrets from Lockheed Martin (June 25, 2003), available at <http://www.usdoj.gov/criminal/cybercrime/branchCharge.htm> [hereinafter DOJ Press Release].

13. Danielle Brian, *Contractor Debarment and Suspension: A Broken System*, Address Prepared for Delivery Before the George Washington Law School Government Procurement Law Program and the Federal Acquisition Institute Colloquium on Suspension and Debarment: Emerging Issues (Nov. 20, 2003) in L. & POL'Y (submitted on Nov. 20, 2003), available at <http://www.pogo.org/p/contracts/ct-031101-debarment.html> (criticizing the government's system for debarment and suspending large contractors).

14. *Id.*; see Renae Merle, *Boeing Gets Waiver From Air Force*, WASH. POST, Aug. 30, 2003, at E1 [hereinafter Merle, *Boeing Gets Waiver From Air Force*] (reporting on the AF waiver and award to The Boeing Co. of a \$56.7 million contract to deploy a Delta II rocket carrying the Global Positioning Satellite (GPS-IIR-10) system); see also Renae Merle, *Suspension Doesn't Stop Boeing: The Contract to Build a Spy Satellite Comes After Boeing Was Punished for Breaking Federal Laws in 1998*, WASH. POST, Oct. 1, 2003 [hereinafter Merle, *Suspension Doesn't Stop Boeing*] (reporting on second waiver and award to Boeing of a contract for the launch of a spy satellite).

15. Brian, *supra* note 13.

16. GEN. ACCT. OFF., REP. NO. GAO/NSIAD-98-141, *Defense Industry: Consolidation and Options for Preserving Competition* (Apr. 1, 1998), available at <http://www.fas.org/man/gao/nsiad98141.htm> [hereinafter GAO REP. NO. GAO/NSIAD-98-141] (reporting that as of 1998, these three large firms "receive a substantial portion of what DOD spends annually to acquire its major weapons and other products").

17. See FAR, *supra* note 2, at 9.406-1 (discussed below).

18. *Id.* at 9.103.

19. *Id.* at 9.104-1.

only to that particular award.²¹ In such cases, the contractor is free to compete for other awards.

By contrast, the sanctions imposed under *FAR Subpart 9.4* that govern suspension, debarment, and ineligibility, exclude the contractor from all federal procurement and nonprocurement programs unless the agency head determines that there is a compelling reason for such action.²² The *FAR* grants agency heads broad discretion in pursuing their mandate.²³ If more than one agency has an interest in the suspension or debarment decision, the *FAR* recommends that one agency be designated as the lead agency.²⁴

In many respects, suspensions are similar to debarments.²⁵ The main differences between the two lie not in the causes, but in the (1) procedures (suspensions may be imposed without prior notification to the contractor); (2) burden of proof (suspensions may be based on an indictment for criminal or civil violations or on adequate evidence²⁶ of the same); and (3) period of exclusion (suspensions are temporary, whereas debarments are for fixed periods, generally not to exceed three years).²⁷

Causes and Procedures

The *FAR* requires each agency to establish procedures “for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for that official’s consideration.”²⁸ But the mere existence of a cause for debarment “does not necessarily require that the contractor be debarred; the seriousness of the contractor’s acts or omissions and any remedial measures or mitigating factors should be considered in making

the debarment decision.”²⁹ Debarring officials must first consider the following mitigating factors:

- (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any [g]overnment investigation of the activity cited as a cause for debarment.
- (2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate [g]overnment agency in a timely manner.
- (3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
- (4) Whether the contractor cooperated fully with [g]overnment agencies during the investigation and any court or administrative action.
- (5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the [g]overnment, and has made or agreed to make full restitution.

20. *Id.*

21. *See generally id.* at 9.103; *see also id.* 9.104-3(d) (“If a small business concern’s offer that would otherwise be accepted is to be rejected because of a determination of nonresponsibility, the contracting officer shall refer the matter to the Small Business Administration which will decide whether or not to issue a Certificate of Competency.”).

22. When suspended or debarred, “agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless an agency head determines that there is a compelling reason for such action.” *Id.* at 9.405. Agency means “any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.” *Id.* Examples include the DOD, GSA, Social Security Administration, and the Internal Revenue Service. *Id.* at 9.403.

23. *Id.* at 9.402.

24. *Id.*

25. *Id.* at 9.407-2.

26. Adequate evidence means “information sufficient to support the reasonable belief that a particular act or omission has occurred.” *Id.* at 2.101; *see also id.* at 9.403 (stating that an “information or other filing by competent authority charging a criminal offense is given the same effort as an indictment”).

27. *Id.* at 9.407-4, 9.406-4. Since the same basic principles apply to both remedies, the discussion below generally refers only to debarments unless further distinction is necessary.

28. *Id.* at 9.406-3(a); *see also id.* at 9.407-3 (requiring agencies to establish procedures for the prompt reporting, investigation, and referral of appropriate matters to the suspending official); *see, e.g.,* U.S. DEP’T OF ARMY, REG. 27-40, LITIGATION ch. 8 (19 Sept. 1994) (effective date 19 Oct. 1994).

29. *See FAR, supra* note 2, at 9.406-1(a); *see also id.* at 9.407-1(b)(2) (containing a similar provision governing suspensions).

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the [g]overnment.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.³⁰

Officials should also consider these factors (but are not required to) when weighing a possible suspension.³¹

The General Services Administration (GSA) compiles, maintains, and distributes a "List of Parties Excluded from Fed-

eral Procurement and Nonprocurement Programs."³² The list contains the names, addresses, and identities of parties debarred, suspended, proposed for debarment, or declared ineligible by executive agencies (e.g., the Army) or the General Accounting Office (GAO).³³

Debarment officials may predicate a debarment on criminal convictions or civil judgments for (1) fraud or a criminal offense related to the procurement or performance of a public contract;³⁴ (2) violations of federal or state antitrust laws;³⁵ (3) embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax evasion, or receiving stolen property;³⁶ (4) improperly affixing "Made in America" labels to foreign goods;³⁷ or (5) offenses indicating a lack of business integrity.³⁸ Debarment may also be grounded on a serious violation of contract terms or "any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor."³⁹ To act on the latter, however, the "serious violation" or "other evidence" must be established by a preponderance of the evidence.⁴⁰ Further bases for debarment include unfair trade practices, violations of the Immigration and Nationality Act employment provisions, repeated unsatisfactory performance,⁴¹ and violations of the Drug-Free Workplace Act of 1988.⁴²

When proposing a debarment, agencies are required to notify contractors, and any specifically-named affiliates, of its reasons.⁴³ The contractor is then given thirty days to submit, in person, in writing, or through a representative, information and argument in opposition to the debarment.⁴⁴ If the action is not based on a criminal conviction or civil judgment, and the con-

30. See FAR, *supra* note 2, at 9.406-1.

31. *Id.* at 9.407-1(b)(2) provides in part:

The existence of a cause for suspension does not necessarily require that the contractor be suspended. The suspending official should consider the seriousness of the contractor's acts or omissions and may, but it is not required to, consider remedial measures or mitigating factors, such as those set forth in 9.406-1(a). A contractor has the burden of promptly presenting to the suspending official evidence of remedial measures or mitigating factors when it has reason to know that a cause for suspension exists.

32. Excluded Parties Listing System, *Excluded Parties Lists Report*, available at <http://epls.arnet.gov> (last visited Apr. 5, 2004) [hereinafter *Lists Report*]; see FAR, *supra* note 2, at 9.404.

33. *Lists Report*, *supra* note 32.

34. See FAR, *supra* note 2, at 9.406-2(a)(1); see also *Serv. Scaffold, Inc.*, Brian Ingber, EPA Case Nos. 86-0096-00, 86-0096-01, 1989 EPADEBAR LEXIS 7 (June 6, 1989) (finding fraudulent acts and conflicts of interest in violation of the Racketeer Influenced Corrupt Organizations Act).

35. See FAR, *supra* note 2, at 9.406-2(a)(2); see also *Carlton Bartula*, Case No. 91-0109-01, 1992 EPADEBAR LEXIS 66 (June 3, 1992) (finding bid-rigging and mail fraud in violation of the Sherman Anti-Trust Act).

36. See FAR, *supra* note 2, at 9.406-2(a)(3); see also *John E. Signorelli*, Docket No. 94-C-0054-DB, 1995 HUD BCA LEXIS 8, 9 (Sept. 20, 1995) (reviewing debarment based on contractor's conviction for mail fraud and denying challenge of debarment order); *DiCola v. FDA*, 77 F.3d 504, 505 (D.C. Cir. 1996).

37. See FAR, *supra* note 2, at 9.406-2(a)(4).

38. See *id.* at 9.406-2(a)(5); see also *Bae v. Shalala*, 44 F.3d 489, 491 (7th Cir. 1995) (debaring petitioner based on a felony conviction for providing "an FDA official with an unlawful gratuity in exchange for official acts performed and to be performed by the FDA official"); *Melvin Smith, Jet-It Sys., Inc.*, HUDBCA No. 90-5320-D81, 1992 HUD BCA LEXIS 12, 8 (Oct. 20, 1992) (finding illegal distribution of a controlled substance and failure to disclose knowledge of a kickback scheme).

39. See FAR, *supra* note 2, at 9.406-2(c).

tractor's submission raises a genuine question of material fact, the official must "[a]fford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses, and confront any person the agency presents."⁴⁵ Otherwise, the decision may be based on all the information in the administrative record, including contractor submissions.⁴⁶

A Case Study: The Boeing Suspension

Background of the EELV Program

Our nation depends on routine, affordable, and reliable access to space.

-1997 U.S. AF Issues Book, EELV Space Launch Capability⁴⁷

Over the years, the Department of Defense (DOD) has used a number of medium to heavy-lift expendable launch vehicles (e.g., Atlas, Delta, and Titan rockets) to transport satellites into

space.⁴⁸ In the late 1980s and early 1990s, several attempts were made to reduce the cost of space launch without jeopardizing operability, but those programs proved unsuccessful.⁴⁹ Therefore, in 1993, Congress directed the Secretary of Defense to develop a Space Launch Modernization Plan (SLMP) to remedy space launch deficiencies and to reduce program costs.⁵⁰ Subsequently, AF Lieutenant General Moorman led the Space Launch Modernization Study (SLMS) with participants from the military, civil, commercial, and intelligence communities.⁵¹ The SLMS produced four viable SLMP options: (1) sustain existing launch systems; (2) evolve current expendable launch systems; (3) develop a new expendable launch system; and (4) develop a new reusable launch system.⁵²

On 5 August 1994, President Clinton signed the National Transportation Policy, which designated the DOD as the lead agency for improving and evolving existing launch vehicles, and tasked the DOD with developing an Implementation Plan.⁵³ Shortly thereafter, Congress appropriated \$40 million for the SLMP, and the AF announced its support for Option 2—evolv-

40. *Id.* at 9.406-3(d)(3). Preponderance of the evidence means "proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not." *Id.* at 2.101. Debarments based on a preponderance of the evidence have been upheld in numerous instances. See Austen v. Office of Pers. Mgmt., 2000 U.S. App. LEXIS 493 (Fed. Cir. 2000) (making false statements); Sameena Inc. v. United States Air Force, 147 F.3d 1148, 1151 (9th Cir. 1998) (finding false submissions regarding the contractor's experience and certification regarding debarment); Wellham v. Cheney, 934 F.2d 305, 309 (11th Cir. 1991) (supplying non-conforming goods or materials and submitting fraudulent test reports and certificates of conformance); Titan Constr. Co. v. Weinberger, Civ. No. 85-5533, slip. op. (D. N.J., Feb. 14, 1986), *aff'd per curiam*, 802 F.2d 448 (3rd Cir. 1986) (submitting false invoices to obtain progress payments; using foreign construction materials in violation of the Buy American Act); Robinson v. Cheney, 876 F.2d 152, 155 (D.C. Cir. 1989); Glazer Constr. Co., Inc. v. United States, 52 Fed. Cl. 513 (Fed. Cl. 2002) (violating the Davis-Bacon Act); Western Am., Inc., d/b/a Western Adhesives and Theodore A. Newman, Nos. 7655D, 7656D, 1985 GSBGA LEXIS 570 (July 22, 1985) (submitting false certification results); Andreas Boehm Malergrossbetrieb, No. 44017, 2001 ASBCA LEXIS 44, *14 (Mar. 15, 2001) (offering bribes to government officials in violation of the Gratuities Clause); Donald M. DeFranceaux and DRG Funding Group, 1994 HUDBCA LEXIS 2 (Apr. 7, 1994) (breaching fiduciary obligations to shareholders).

41. FAR, *supra* note 2, at 9.406-3(b)(1)(i)(B); see IMCO, Inc. v. United States, 33 Fed. Cl. 312, 318 (1995) (finding failure to perform on nine purchase orders); see also Immigration and Nationality Act, 8 U.S.C. § 1151 (2000).

42. FAR, *supra* note 2, at 9.406-2(b)(1), (2); see Drug-Free Workplace Act of 1988, 41 U.S.C. § 701.

43. *Id.* at 9.406-3.

44. *Id.*

45. *Id.*

46. *Id.*

47. EELV Space Launch Capability, 1997 U.S. Air Force Issues Book, available at http://www.af.mil/lib/afissues/1997/app_b_20.html (last visited Mar. 30, 2004) [hereinafter 1997 U.S. Air Force Issues Book].

48. GEN. ACCT. OFF., REP. NO. GAO-03-835R, *Military Space Operations: Common Problems and Their Effects on Satellite and Related Acquisitions* 31 (June 2, 2003) [hereinafter GAO REP. NO. 03-835R].

49. *Id.* Those programs included the "Advanced Launch System (1987-1990), the National Launch System program (1991-1992), and the Spacelifter program (1993)." Lieutenant Colonel Sidney Kimhan III et al., *EELV Program-An Acquisition Reform Success Story, Program Provides a Key to Future Military Success*, PROGRAM MANAGER 86, May/June 1999.

50. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 213, 107 Stat. 1600 (1993).

51. Kimhan, *supra* note 49, at 86; see also *EELV Brief* *supra* note 11, at 7.

52. *Id.*

53. Presidential Decision Directive/National Science and Technology Council-4 (PDD/NSTC-4), available at <http://www.fas.org/spp/military/docops/national/launchst.htm> (last visited Mar. 30, 2004).

ing current expendable launch systems.⁵⁴ The AF chose this option as the best route for ensuring that “satellites reach their target on time, on budget, fully operational, and at twenty-five to fifty percent less cost than current rocket systems.”⁵⁵

Acquisition Strategy

The AF employed a “rolling down-select” acquisition strategy which consisted of three phases: Low Cost Concept Validation (LCCV)—four contractors would compete to validate the low-cost concept; Pre-Engineering Manufacturing and Development (Pre-EMD)—two of the four contractors would be selected to compete for the Engineering and Manufacturing Development (EMD) contract; and EMD—one contractor would receive the award.⁵⁶ In addition to the EMD contracts, Initial Launch Services (ILS) contracts, known as Buy I, would be awarded in the final phase to the successful contractor for launching government satellites into space between the years 2002-2006.⁵⁷

Because the government was only procuring launch services, and not the associated launch pads, processing facilities, and other control systems, there was a potential for the successful contractor to reap substantial economic benefits by using the EELV to launch commercial satellites into space.⁵⁸ Therefore, in November 1997, the EELV program office revamped its acquisition strategy to leverage the rapidly growing commercial launch satellite market.⁵⁹ Under the revised strategy, two contractors would be awarded EMD and ILS contracts rather than down-selecting to one, contractors would share the cost of

developing a national launch capability, and competition would be maintained throughout the life of the program.⁶⁰ The demand for commercial satellite launches has not yet materialized.⁶¹

In May 1995, Alliant Techsystems, Boeing Defense and Space Group, Lockheed Martin Astronautics, and McDonnell Douglas Aerospace, were each awarded \$30 million LCCV contracts and took their proposals through Tailored Preliminary Design Review, which lasted fifteen months.⁶² Of the four, Lockheed Martin Astronautics and McDonnell Douglas Aerospace (now a wholly owned subsidiary of Boeing) were selected to continue and were each awarded \$60 million Pre-EMD contracts and took their designs through Downselect Design Review, which lasted seventeen months.⁶³ Based on the revised acquisition strategy, simultaneous awards of \$500 million EMD contracts were awarded to Lockheed Martin and Boeing on 16 October 1998. Both agreed to pay any additional developmental costs.⁶⁴

Also on 16 October 1998, the AF announced the breakdown of the twenty-eight ILS Buy I awards—Boeing received nineteen Buy I launches, worth \$1.38 billion, and Lockheed Martin received nine, worth \$650 million.⁶⁵ The name of Boeing’s launch vehicle is Delta IV and Lockheed Martin’s is Atlas V.⁶⁶ Since Lockheed Martin only received two West Coast Buy I launches, it asked the AF to re-allocate those launches to Boeing, as it was too costly for Lockheed Martin to upgrade its current facility at Vandenberg AF Base (AFB) for only two launches.⁶⁷ Currently, Boeing and Lockheed Martin are the

54. *EELV Brief*, *supra* note 11, at 8; Kimhan, *supra* note 49, at 86.

55. Kimhan, *supra* note 49, at 86; *see also* 1997 U.S. Air Force Issues Book, *supra* note 47.

56. Kimhan, *supra* note 49, at 87; *see also* *EELV Brief*, *supra* note 11, at 8-9.

57. *EELV Brief*, *supra* note 11, at 8-9.

58. GAO REP. NO. 03-835R, *supra* note 48, at 32; *see also* Kimhan, *supra* note 49, at 86-87.

59. Kimhan, *supra* note 49, at 87.

60. *Id.*

61. *Id.*; *see also* GAO REP. NO. 03-835R, *supra* note 48, at 32; Andrea Shalal-Esa, *Lockheed Invests in West Coast Rocket Launch Site*, FORBES.COM, Oct. 28, 2003, available at <http://www.forbes.com/markets/newswire/2003/10/28/trr1126280.html> [hereinafter Shalal-Esa, *Lockheed Invests in West Coast Rocket Launch Site*] (blaming telecommunications industry collapse for the failure of the commercial satellite market industry); Plunkett Research, Ltd., *Overview of the Telecommunications Industry*, at http://www.plunkettresearch.com/telecommunications/telecom_trends.htm (last visited Mar. 30, 2004) (providing a detailed overview of the telecommunications industry, trends, and statistics).

62. Plunkett Research, Ltd., *supra* note 61; Press Release, Boeing, U.S. Air Force Procures Boeing Delta IV Launches for EELV Program (Oct. 16, 1998), available at http://boeing.com/news/release/1998/news_release_981016a.html.

63. *Id.*; *see also* *EELV Brief*, *supra* note 11.

64. *Id.*

65. *Id.*; *see also* DOJ Press Release, *supra* note 12, at 12 (citing Boeing’s lower price and lower risk as largely responsible for Boeing getting the bulk of the launches).

66. *EELV Brief*, *supra* note 11; *see also* DOJ Press Release, *supra* note 12.

only domestic contractors capable of performing launch services.⁶⁸

The Boeing Suspension

On 24 July 2003, the AF suspended three of Boeing's space units and three of its former employees.⁶⁹ The suspension followed the indictment of Boeing's former employees for conspiracy, possession of trade secrets, and Procurement Integrity Act violations.⁷⁰ The alleged misconduct of Boeing's employees was further aggravated by Boeing's subsequent failure to promptly report its findings to the government.⁷¹

According to an affidavit submitted in support of the criminal complaint, the misconduct started when William Erskine, a Boeing EELV engineer, recruited and hired Kenneth Branch, a Lockheed Martin EELV scientist and engineer, for the purpose of obtaining the Lockheed Martin EELV proposal.⁷² In exchange for delivering the proposal, Branch began working at Boeing in January 1997 "as a senior engineer/scientist earning \$77,000 a year, not including overtime."⁷³

At the time of Branch's hiring, the AF had not yet announced its revised dual-procurement EMD acquisition strategy, and the atmosphere at Boeing was tense:

By spring of 1997, the pressure inside Boeing to win the rocket contract was ratcheted up significantly. On March 3, Frank Slazer, director of EELV business development, sent a memo to Larry Satchell, the manager in charge of strategic analysis and marketing at Huntington Beach, calling for "an improved

Lockheed Martin EELV competitive assessment." In particular, he encouraged Mr. Satchell and others to "seek out" former Lockheed employees to get "their thoughts and impressions." The memo cautioned nonetheless that "under no circumstances should any proprietary documentation be utilized in your assessment activity."⁷⁴

In mid-June 1999 (approximately seven months after Boeing received the bulk of the Buy I launches), Erskine told another Boeing employee about the "Branch deal."⁷⁵ According to Erskine's affidavit, Erskine hired Branch because Branch, "while still working at Lockheed Martin, came to [Erskine] with an 'under-the-table' offer to hand over the entire Lockheed Martin EELV proposal presentation to aid in Erskine's proposal in exchange for a position at Boeing."⁷⁶

Boeing's legal department subsequently commenced an internal investigation on 18 June 1999.⁷⁷ Mr. Steve Griffin, a project specialist on the Delta IV rocket program, told Boeing investigators that when he confronted Erskine about the "Branch deal," Erskine replied, "I was hired to win . . . and I was going to do whatever it took to do it."⁷⁸ Branch and Erskine were also questioned by a Boeing attorney in 1999 and their offices were searched.⁷⁹

According to an affidavit filed in connection with the criminal case, a variety of documents marked "Lockheed Martin/Competition Sensitive" were found in Branch and Erskine's offices.⁸⁰ Shortly after Boeing's internal investigation, it notified Lockheed Martin⁸¹ and the AF⁸² that it had proprietary Lockheed Martin documents in its possession; however, Boeing allegedly failed to disclose the quantity and importance of

67. See Justin Ray, *Pentagon Strips 7 Launches From Boeing Delta 4 Rocket*, SPACEFLIGHT NOW, July 24, 2003, available at <http://spaceflightnow.com/news/n0307/24eelv/>.

68. See generally *EELV Brief*, *supra* note 11.

69. AF Press Release, U.S. Air Force Announces Boeing EELV Inquiry Results, *supra* note 8.

70. *Id.*

71. *Id.* (reporting that in June 1999, "Boeing first notified Air Force it has two documents, but says they're not critical").

72. *Id.*

73. Anne Marie Squeo & Andy Pasztor, *U.S. Probes Whether Boeing Misused a Rival's Documents at Issue in Investigations: The Hiring of a Rocket Scientist from Lockheed*, WALL ST. J., May 5, 2003, reprinted in NAT'L LEGAL AND POL'Y CTR., available at <http://www.nlpc.org/cip/030505bg.html> (last visited Apr. 22, 2004).

74. *Id.*

75. See DOJ Press Release, *supra* note 12.

76. *Id.*

77. Squeo & Pasztor, *supra* note 73.

78. *Id.*

79. See DOJ Press Release, *supra* note 12.

these documents.⁸³ Boeing terminated Branch and Erskine for cause in August 1999.⁸⁴

Boeing's next reported disclosure did not come until March 2002 when it notified the AF that it had a significant number of additional Lockheed Martin documents in its possession. Rather than forwarding the documents, Boeing requested permission to more thoroughly investigate the matter.⁸⁵ In April, Boeing notified the AF that it located another two boxes of Lockheed Martin documents, and in July 2002, the AF referred the matter to the DOD Inspector General.⁸⁶ In October, Boeing launched the first Delta IV into space.⁸⁷

In March 2003, the AF suspension and debarment official sent a letter to Boeing requesting an explanation for why it had Lockheed Martin's proprietary documents in its possession and also demanded the full disclosure of *all* remaining proprietary documents.⁸⁸ In April 2003, approximately four years after the first disclosure, Boeing admitted to having another ten boxes of Lockheed Martin's documents in its possession.⁸⁹ According to the DOJ's press release, the following documents were found in the offices of Erskine and Branch in 1999:

[1] 141 documents, consisting of more than 3,800 pages, which appeared to belong to Lockheed Martin were recovered from the work spaces of Branch and Erskine in June 1999;

[2] 36 of the documents were labeled "Lockheed Martin Proprietary or Competition Sensitive;"

[3] 16 of the documents appeared to be related to the manufacturing cost of Lockheed Martin's EELV and, in the opinion of the USAF EELV staff, possession of these proprietary documents by a competitor could have had a "medium" or moderate chance of affecting the outcome of a competitive bid; and

[4] Seven of the documents appeared to be related to the manufacturing costs of the Lockheed Martin EELV and, in the opinion of the USAF EELV staff, possession of these proprietary documents by a competitor could have had a "high" or significant chance of affecting the outcome of a competitive bid.⁹⁰

On 25 June 2003, the government criminally charged Erskine and Branch with conspiracy, theft of trade secrets, and violating the Procurement Integrity Act.⁹¹ During a 24 July 2003 press conference, Undersecretary of the AF Peter B. Teets, who also serves as Director of the National Reconnaissance Office (NRO), announced that the AF had suspended three of Boeing's space units and reallocated the launches under its existing EELV contract.⁹² He further stated that the government "does not tolerate breaches of procurement integrity and [that it will] hold industry accountable for the actions of their employees."⁹³

In addition to the suspension, the AF announced its intent to reallocate Buy I launches.⁹⁴ Under the reallocation, Boeing's total number of Buy I launches were reduced from nineteen to twelve, and the seven reallocated launches were transferred to

80. *Id.*; see also Squeo & Pasztor, *supra* note 73.

81. Caroline Daniel, *Boeing Probe Gets to Grips With Ethics—The Group Hopes It Can Regain the Confidence of the U.S. Air Force*, LONDON FIN. TIMES, Aug. 25, 2003, available at <http://www.ibe.org.uk/archivesaugust.htm>.

82. Ray, *supra* note 67.

83. *Id.* (reporting that in June 1999, "Boeing first notified Air Force it has two documents, but says they're not critical").

84. See DOJ Press Release, *supra* note 12.

85. See Ray, *supra* note 67.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*; see also William Matthews, *Industrial Espionage "High Level" Boeing Leaders Knew of Spying, U.S. Says*, DEFENSE NEWS, July 21, 2003, at 8 (stating that "Boeing admitted to having more than 37,000 pages of Lockheed documents").

90. See DOJ Press Release, *supra* note 12.

91. *Id.*; see Procurement Integrity Act, 41 U.S.C. § 423 (2000).

92. DOJ Press Release, *supra* note 12.

93. AF Press Release, U.S. Air Force Announces Boeing EELV Inquiry Results, *supra* note 8.

Lockheed Martin.⁹⁵ Further, because the reallocation required Lockheed Martin to have a West Coast launch capability, the AF permitted it to develop its existing facility at Vandenberg AFB.⁹⁶ Finally, the AF announced the results of its EELV Buy II decision—it disqualified Boeing from the award of three Buy II launches, and announced its intent to award Lockheed Martin three Buy II launches.⁹⁷ The total estimated loss to Boeing was \$1 billion in potential revenue.⁹⁸

The Waivers

When Undersecretary Teets first announced the suspension, he also stated that exceptions could be made based on “compelling need[s] in the national interest.”⁹⁹ Accordingly, on 29 August 2003, the AF waived its suspension and awarded Boeing a \$56.7 million cost-plus-award-fee contract to deploy a Delta II rocket carrying the Global Positioning Satellite (GPS) system.¹⁰⁰ The waiver was necessary because Boeing was the only contractor capable of “carrying out the third phase and actually launching the GPS satellite” into space.¹⁰¹ This was because Boeing already held the Delta II rocket and spacecraft integration contracts.¹⁰²

On 30 September 2003, the AF again waived its suspension of Boeing’s space units.¹⁰³ This time it justified the waiver on national defense requirements and awarded a single Buy II EELV launch to Boeing for the launch of a NRO satellite; the satellite needed to be launched from Vandenberg AFB and

Lockheed Martin had not yet completed upgrading its launch facility.¹⁰⁴ Undersecretary Teets stated, “This is a critical national security mission and since Boeing is the only launch provider that can currently meet the requirements of this mission, we believe it is in the best interest of the country to award Boeing this launch.”¹⁰⁵ He was also quoted as saying, “it is my sincere hope that The Boeing Company moves quickly to take meaningful corrective actions so that suspension could be lifted and Boeing could be allowed to compete in future launch competitions.”¹⁰⁶

The AF Suspension: Proper or Not?

Under the *FAR* standard, the AF’s suspension of Boeing’s space units was proper if the alleged misconduct of Boeing’s employees “occurred in connection with the individual’s performance of duties . . . or with the contractor’s knowledge, approval, or acquiescence.”¹⁰⁷ Presently, many of the facts are still not publically available regarding the initial discovery of Lockheed Martin’s documents; Boeing’s response; and the AF’s rationale for its suspension. Therefore, it is difficult to fully analyze the AF’s imputation decision. Such an analysis, however, is not important for the purposes of this article. What is important is examining the role of the suspension and debarment officials and how their actions may impact current and future acquisition policy.

94. *Id.*

95. *Id.*

96. *Id.* (providing that since the AF used the word “permit” in its press release, it is likely that the some type of monetary assistance was envisioned, such as a lease-back program or through launches); see also Shalal-Esa, *Lockheed Invests in West Coast Rocket Launch Site*, *supra* note 61 (reporting that Lockheed Martin will spend about \$200 million to upgrade its existing launch facility).

97. *Id.*

98. Merle, *Boeing Gets Waiver From Air Force*, *supra* note 14.

99. *Id.*; see also Andrea Shalal-Esa, *U.S. Military Gives \$1 Billion in Boeing Work to Lockheed*, July 24, 2003, at <http://www.cndyorks.gn.apc.org/yspace/articles/boeingsuspended.htm> (noting that Mr. Teets also stated that he worked at Lockheed Martin “until October or November 1999, but was unaware of this case, which first came to light in June 1999”).

100. *Suspension and Debarment: Air Force Waives Boeing’s Suspension, Awards \$57 Million Rocket Launch Contract*, BNA’S FED. CONTRACTS REP., Sept. 9, 2003, at 1.

101. *Id.*

102. *Id.*

103. Merle, *Suspension Doesn’t Stop Boeing*, *supra* note 14.

104. Lockheed’s West Coast launch pad was not yet complete. See Shalal-Esa, *Lockheed Invests in West Coast Rocket Launch Site*, *supra* note 61.

105. Press Release, U.S. Air Force, Boeing’s Delta 4 Rocket Wins NRO Launch Order (Sept. 30, 2003), available at <http://spaceflightnow.com/news/n0309/30delta4/>.

106. See Ray, *supra* note 67.

107. *FAR*, *supra* note 2, at 9.406-5.

Ultimately, the AF's suspension could have driven Boeing out of the launch business, reducing the number of prime contractors in this key defense market to one.¹⁰⁸ This demonstrates that competition will not displace procurement integrity. It also demonstrates that in the consolidated defense industry, suspension, debarment, and waiver decisions go beyond traditional issues of responsibility. They require a careful balancing of procurement integrity, protection of citizens and soldiers, maintaining alternate sources, meeting urgent needs, and national defense requirements.

Suspension—Limited to Embroiled Units

Once the AF decided to suspend Boeing, it had to resolve the problem of how to suspend Boeing without disrupting the military's ability to obtain its critical needs. The answer was a narrowly tailored suspension which excluded only the embroiled units, with little or no impact to Boeing's other military programs. Obviously Boeing does not just supply the military with launch services.¹⁰⁹ "From fighter jets and transport planes to helicopters, satellites, satellite-guided bombs, system integration and satellite launches [Boeing's products and services] are woven into the daily fabric of every service branch."¹¹⁰ Some would argue that the DOD's dependence on mega-contractors, like Boeing, places them largely beyond the reach of administrative remedies.¹¹¹

In 1997, Congress directed the GAO to report on options for preserving competition in the defense industry.¹¹² The follow-on report dated 4 March 1998, questioned whether consolidation had gone too far and concluded that many of the defense industry transactions were too recent to study.¹¹³ Nevertheless, the report opined that the "DOD's ability to address the potential adverse effects of consolidation will depend upon its ability to identify problem areas and devise alternative ways to maintain competitive pressures in its acquisition programs."¹¹⁴

Fast forward to 2004 and the Boeing EELV episode—consolidation continues to challenge the DOD and its procurement officials. Specifically, officials are faced with the dilemma of what to do when a primary supplier, like Boeing, falls under legal and ethical clouds. The wholesale exclusion of Boeing from federal procurements is not an option,¹¹⁵ at least not until alternative sources are developed. Oversight appears to be a viable option for the short term—but how much oversight is the government willing to conduct and how much is industry willing to take? The reality is that mega-contractors typically have numerous units spread across various locations, which makes it difficult if not impossible to monitor every aspect of their operation. The good news is that the recent suspension appears to have had a sobering effect on Boeing.

Even before the suspensions were announced, Boeing retained former Senator Warren B. Rudman (R-NH) to conduct a review of Boeing's ethics programs and the handling of competitive information.¹¹⁶ The week following the imposition of

108. Warren Fester & Jeremy Singer, *U.S. Air Force Lowers Boom on Boeing Delta Program*, SPACE.COM, at http://www.space.com/missionlaunches/boeing_eelv_030724.html (last visited Mar. 30, 2004).

109. For instance, Boeing Air Force Systems provides such products and services as fighters, bombers, tankers and unmanned aircraft, military satellites and space launch systems, whereas Boeing Army systems provides such products and systems as combat helicopters, heavy-lift helicopters, air-to-ground missiles, and the Joint Tactical Radio System. See Boeing, *Integrated Defense Systems*, available at <http://boeing.com/ids/ids-back/index.html> (last visited Mar. 30, 2004) ("Boeing Integrated Defense Systems (IDS) combines weapons and aircraft capabilities, intelligence and surveillance systems, communications architectures and extensive large-scale integration expertise across its eight customer-facing business units.").

110. Matthews, *supra* note 89, at 8.

111. See generally Brian, *supra* note 13.

112. GEN. ACCT. OFF., REP. NO. GAO/NSIAD-98-141, *supra* note 16, at 3; see also National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 804, 111 Stat. 1629.

113. GEN. ACCT. OFF., REP. NO. GAO/NSIAD-98-141, *supra* note 16, at 4-5. The GAO recommended that the DOD:

[1] encourage new companies to enter the defense market through the use of science and technology investment funds; [2] fund alternative technologies to meet the warfighters' needs; [3] devise strategies to compete various approaches and missions, for example, using a missile rather than an aircraft; [4] require major defense contractors to use open-system architectures in designing weapon programs; [5] make subtler competition a specific source-selection criterion and contract requirement; and [6] explore opportunities to meet military needs through greater cooperative efforts with international partners.

Id.

114. *Id.*

115. Schooner, *supra* note 5, at 4 (likening such action to cutting one's nose off to spite one's face).

116. Press Release, Boeing, Boeing Responds to U.S. Air Force Announcement (July 24, 2003), available at http://www.boeing.com/news/releases/2003/q3/nr_030724s.html.

its sanctions, Boeing suspended work to ensure that all 78,000 employees in its Integrated Defense Systems business units—from its Chief Executive Officer (CEO) to its clerks, underwent a four-hour ethics refresher course.¹¹⁷ Additionally, it created an Office of Internal Governance, with its head officer reporting directly to the chairman and CEO.¹¹⁸

But Boeing continues to have relapses. Another procurement integrity-related controversy was uncovered in November 2003—this related to a politically contentious refueling tanker project. Consequently, in late November 2003, Boeing announced that it terminated Executive Vice President and Chief Financial Officer, Mike Sears, for recruiting and hiring Darleen Druyun, a high-ranking U.S. AF procurement official, while Druyun was negotiating the tanker deal.¹¹⁹ Druyun, who had recently left the AF for a position at Boeing as Vice President and Deputy General Manager of Missile Defense Systems, was also terminated for cause and ultimately pleaded guilty to conspiracy.¹²⁰ Following the Sears/Druyan incident, Boeing asked Senator Rudman to extend his review to an examination of Boeing's procedures and practices for hiring former government employees.¹²¹ The impact of that relapse did not stop there; a week later Boeing's CEO Philip Condit resigned, citing

his early retirement as a way for Boeing to move past its ethical lapses, and to focus on current and future performance.¹²²

Boeing is not out of the woods yet—its space units still bear the black mark of suspension; Boeing remains without the \$1 billion from the loss of its launch services contract;¹²³ and it continues to receive negative press over the troubled tanker deal, which has an estimated worth of \$17 billion.¹²⁴ Recent events cause some to declare that “few companies have paid a higher price for ethical misconduct than Boeing.”¹²⁵ Just days before this article went to publication, however, the *Wall Street Journal* reported that the AF is about to lift Boeing's suspension.¹²⁶

Mega-Contractors, New Realities, and Different Considerations

The military currently needs mega-defense contractors just as much as these contractors need the military. The relationship in the Boeing context has been likened to a “long-married couple keen to save their union, if only for the sake of their children.”¹²⁷ And the analogy is fitting because it demonstrates just how tenuous the relationship has become.

117. Press Release, Boeing, Boeing Halts Work, Conducts Business Unit-Wide Ethics Training (July 30, 2003), available at http://www.boeing.com/news/releases/2003/q3/nr_030730s.html.

118. Press Release, Boeing, Boeing Creates New Office of Internal Governance (Nov. 11, 2003), available at http://www.boeing.com/news/releases/2003/q4/nr_031111a.html.

119. Press Release, Boeing, Boeing Dismisses Two Executives for Unethical Conduct (Nov. 24, 2003), available at http://www.boeing.com/news/releases/2003/q4/nr_031124a.html.

120. *Id.*; Press Release, Ex-Air Force, Boeing Aide Pleads Guilty (Apr. 20, 2004), available at <http://www.reuters.com/newsArticle.jhtml?type=businessNews&storyID=4881380§ion=news> (“Former U.S. Air Force acquisitions official on Tuesday pleaded guilty to conspiracy for discussing a job with Boeing Co . . . while still overseeing its business dealings with the Air Force.”).

121. *Id.*

122. Press Release, Boeing, Boeing Announces Resignation of Phil Condit; Lew Platt Named Non-Executive Chairman, Harry Stonecipher Named President and CEO (Dec. 1, 2003), available at http://www.boeing.com/news/releases/2003/q4/nr_031201a.html.

123. Brian Gregory, *Boeings Profits Plummet* (Oct. 29, 2003), available at <http://komotv.com/boeing/story.asp?ID=28011>; see also Steven Pearlstein, *Boeing's Fall From Industry Grace*, WASH. POST, Nov. 30, 2003, reprinted in [philly.com](http://www.philly.com/mld/inquirer/news/special_packages/sundayreview/7375874.htm), available at http://www.philly.com/mld/inquirer/news/special_packages/sundayreview/7375874.htm.

124. James Wallace, *Ethics Scandal at Boeing Could Delay Vital Tanker Deal*, SEATTLE POST-INTELLIGENCER, Nov. 27, 2003, available at http://seattlepi.nwsourc.com/business/150185_boeing27.html.

125. Susan Chandler, Melissa Allison & Bruce Japsen, *A Stiff Cost for Boeing's Ethics Lesson*, CHI. TRIB., Dec. 7, 2003, available at <http://www.chicagotribune.com/business/chi-0312060348dec07,0,2949969.story?coll=chi-business-hed>.

126. Andy Pasztor, *Boeing Will Soon Be Free to Bid for Rocket Work*, WALL ST. J., Apr. 5, 2004, at A3; see also FAR, *supra* note 2, at 9.407-4(b). The FAR provides:

If legal proceedings are not initiated within 12 months after the date of the suspension notice, the suspension will be terminated unless an Assistant Attorney General requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period.

FAR, *supra* note 2, at 9.407-4(b).

127. Gopal Ratnam, *Fixing Boeing, Contrition, Better Execution Prescribed*, DEFENSE NEWS, Dec. 8, 2003, at 1.

To illustrate a point, the following chart demonstrates the reduction of prime contractors in the defense market between 1990 and 1998:¹²⁸

Prime Contractors in Defense Market Sectors (1990-98)			
Sector	Reduction in Contractors	1990 Contractors	1998 Contractors
Tactical missiles	13 to 4	Boeing Ford Aerospace General Dynamics Hughes Lockheed Loral LTV Martin Marietta McDonnell Douglas Northrop Raytheon Rockwell Texas Instruments	Boeing Lockheed Martin Northrop Grumman Raytheon
Fixed-wing aircraft	8 to 3	Boeing General Dynamics Grumman Lockheed LTV-Aircraft McDonnell Douglas Northrop Rockwell	Boeing Lockheed Martin Northrop Grumman
Expendable launch vehicles	6 to 2	Boeing General Electric Lockheed Loral Martin Marietta Rockwell	Boeing Lockheed Martin
Satellites	8 to 5	Boeing General Electric Hughes Lockheed Loral Martin Marietta TRW Rockwell	Boeing Lockheed Martin Hughes Loral Space Systems TRW
Surface ships	8 to 5	Avondale Industries Bath Iron Works Bethlehem Steel Ingalls Shipbuilding NASSCO Newport News Shipbuilding Tacoma Tampa	Avondale Industries General Dynamics (Bath Iron Works) Ingalls Shipbuilding NASSCO Newport News Shipbuilding
Tactical wheeled vehicles	6 to 4	AM General Harsco (BMY) GM Canada Oshkosh Stewart & Stevenson Teledyne Cont. Motors	AM General GM Canada Oshkosh Stewart & Stevenson
Tracked combat vehicles	3 to 2	FMC General Dynamics Harsco (BMY)	General Dynamics United Defense LP

128. GAO REP. NO. GAO/NSIAD-98-141, *supra* note 16, at 7-9.

Strategic missiles	3 to 2	Boeing Lockheed Martin Marietta	Boeing Lockheed Martin
Torpedoes	3 to 2	Alliant Tech Systems Hughes Westinghouse	Northrop Grumman Raytheon
Rotary wing aircraft	4 to 3	Bell Helicopters Boeing McDonnell Douglas Sikorsky	Bell Helicopters Boeing Sikorsky

Today, the number of defense contractors has been reduced even further, with essentially two prime contractors—Lockheed Martin and Boeing—receiving the largest shares of the DOD’s annual contract dollars.¹²⁹ The following DOD chart

shows the top ten defense contractors for fiscal year (FY) 2003 and the dollar value of the awards received in both FY 2003 and FY 2002.¹³⁰

Rank		Company Name	Awards (Billion \$)	
2003	2002		2003	2002
1	1	Lockheed Martin Corp.	21.9	17.0
2	2	The Boeing Co.	17.3	16.6
3	3	Northrop Grumman Corp.	11.1	8.7
4	5	General Dynamics Corp.	8.2	7.0
5	4	Raytheon Co.	7.9	7.0
6	6	United Technologies Corp.	4.5	3.6
7	37	Halliburton Co.	3.9	0.5
8	11	General Electric Co.	2.8	1.6
9	7	Science Applications International Corp.	2.6	2.1
10	21	Computer Sciences Corp.	2.5	0.8

In other words, the top five companies received the following percentage of the DOD’s prime contract awards: 49.8% of Research, Development, Test, and Evaluation, 40.6% of Supplies and Equipment, and 15.5% of Other Services and Construction.¹³¹ Even the temporary suspension of one of these giants would leave one, at best two, prime contractors capable of providing critical products and services to the DOD.

of products or services being procured (e.g., commercial items or major weapons systems) as factors for consideration, the Boeing suspension demonstrates that these factors are taken into account. By only suspending Boeing’s space units, numerous other government programs remain intact.¹³² This is because procurement officials cannot afford excluding a mega-contractor like Boeing from government contracts. Exclusion also would run counter to the government’s policy of preserving competition as the best way for the government to receive competitive products at competitive prices.¹³³

Although the suspension and debarment provisions do not list the size of the contractor (e.g., small, or large) or the types

129. Procurement Statistics, DOD, *Table 3, DOD Top 100 Companies and Category of Procurement for Fiscal Year 2003*, available at <http://www.dior.whs.mil/peidhome/procstat/P01/fy2003/P01FY03-Top100-table3.pdf> (last visited Apr. 21, 2004) [hereinafter Procurement Statistics].

130. Procurement Statistics, DOD, *100 Companies Receiving the Largest Dollar Volume of Prime Contract Awards - Fiscal Year 2003*, available at <http://www.dior.whs.mil/peidhome/procstat/P01/fy2003/top100.htm> (last visited Mar. 30, 2004).

131. Procurement Statistics, Table 3, *supra* note 129.

132. Boeing’s Integrated Defense Systems is responsible for the following government programs: Aerospace Support, Homeland Security and Services, Naval Systems, Air Force Systems, Army Systems, Missile Defense Systems, Space and Intelligence Systems, and NASA Systems. See Boeing, *Integrated Defense Systems*, available at <http://boeing.com/ids/ids-back/index.html> (last visited Mar. 30, 2004).

133. Matthews, *supra* note 89, at 8.

With that in mind, suspension and debarment officials must ensure that their remedies are not illusory. Since these officials are often high-level acquisition professionals, they can accomplish this by tapping into various agency resources once they become aware of facts that may warrant exclusion. One suggestion would be to establish an integrated acquisition team (IAT) comprised of senior-level acquisition officials, budget analysts, legal advisors, and other agency heads (when applicable), to study the impact of a proposed suspension or debarment. Although the time and expense of an IAT would only be warranted in very limited situations, such a team could be instrumental in crafting appropriate remedies and in shaping current and future acquisition policy. Once constituted, the IAT could consider the following:

- (1) Whether the contractor is the only source capable of providing the supplies or services and whether it is economically feasible to develop an alternative source;
- (2) Whether there is a subcontractor capable of manufacturing replacement products or performing similar-types services and whether that subcontractor has the capability (perhaps through subsidies) to become a prime contractor;
- (3) Making competition from the subcontractors a requirement for future procurements, or a bilateral modification on existing contracts;
- (4) Explore opportunities for the government to reverse-engineer products or to perform the service itself;
- (5) Explore opportunities to meet military needs through international agreements or by purchasing foreign technologies;¹³⁴

- (6) Explore the costs and benefits of subsidizing small and medium concerns with a view towards developing alternate technologies;

- (7) Determine whether the prime contractor can perform in an advisory role to a designated sub; and

- (8) Consider whether the government can assume a more active role in the administration of and/or perform the contract.

Without considering such factors, agency officials may find themselves reacting to events rather than defining them. Absent a rejuvenated growth in the number of defense contractors, the DOD will continue to face challenges, combining both economic and ethical issues, when contracting with mega-contractors.

Conclusion

The defense-industry oligopoly makes it difficult to suspend or debar mega-defense contractors. Boeing's recent missteps demonstrate that even if a mega-contractor is suspended, the DOD may have to override such decisions because there are no other alternate sources; not enough time to procure an alternative source; or reprocurement may not be economically feasible. The GAO cautioned the DOD in 1998 to devise a way to maintain competitive pressure in its acquisition programs; the Boeing suspension is, in effect, cautioning the DOD again. The government should capitalize on the lessons being learned from Boeing's lapses and reexamine the way it does business, while the focus on procurement integrity remains in the public eye. Until a long-term strategy is established, acquisition officials should take an active role, rather than a reactive one, by imposing remedies aimed at developing alternative resources when mega-contractors mis-act. Progress may be slow, but if the DOD fails to act, it may find itself boxed-in and forced to do business with unethical contractors. The time to act is now.

134. Consider exceptions to the Buy American Act when U.S. Providers are declared ineligible. See Buy American Act, 41 U.S.C. § 10a-d (2000).