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"GRAYLISTING" OF FEDERAL CONTRACTORS:

TRANSCO SECURITY, INC. OF OHIO V.

FREEMAN AND PROCEDURAL

DUE PROCESS UNDER

SUSPENSION PROCEDURES

The federal government is the nation's largest single purchaser of goods and services. In fiscal year 1982, federal agencies will spend approximately $90 billion to procure services, build weapons systems, and fund research and development efforts in the military, scientific, and social science fields.1 The vast majority of the government's needs are fulfilled by contracting with the private sector. Many firms in turn depend on federal contracts for a significant portion of their business.2

A complex system of statutory and regulatory safeguards has evolved over the years to assure that federal procurement dollars are well spent and that the government receives the best possible product for the lowest possible price.3 In addition, the government must be assured that the contractor from which it is purchasing goods or services is competent or "responsible"4 and that it has had a satisfactory performance record under previous

1. Although overall figures are difficult to ascertain, fiscal 1982 budget projections reflect defense procurement funding of $40.1 billion, NASA funding of $7.6 billion, and approximately $41.7 billion in research and development funding agency-wide. Budget of the United States Government, Fiscal Year 1982, Executive Office of the President, Office of Management and Budget.


3. For instance, in 1962 Congress enacted Pub. L. No. 87-563, 76 Stat. 528 (1962) (codified as amended at 10 U.S.C. § 2304(g) (1976)), which requires proposals under negotiated procurements to be solicited from the maximum number of qualified sources and requires specified contractors to certify as to the accuracy and completeness of their cost and pricing data before an award is made.

4. The Armed Services Procurement Act, Pub. L. No. 84-1028, 70A Stat. 127 (1956) (codified as amended at 10 U.S.C. § 2301-14 (1976)), requires that contract awards be made to the "responsible bidder whose bid . . . will be the most advantageous to the United States, price and other factors considered." Responsibility has been construed to extend beyond financial stability to factors of "judgment, skill, ability, capacity and integrity." O'Brien v. Carney, 6 F. Supp. 761, 762 (D. Mass. 1934). The statutory requirement is reflected in the procurement regulations. See 32 C.F.R. § 1-900 to 1-907 (1981) and 41 C.F.R. § 1-1.1203 (1981) which basically require that a prospective contractor have adequate financial resources, be able to meet the proposed delivery schedule, have a satisfactory performance record on prior government contracts, have satisfactory record of integrity and
federal contracts.

The government's ultimate protections against contractors who have committed willful misconduct or performed inadequately under past contracts are debarment and suspension. A debarred contractor is precluded from receiving federal contract awards for a specified period of time, not to exceed three years. The grounds for debarment are both statutory and administrative, reflecting the dual nature of the government's contractual role. The federal government frequently uses its procurement purse-strings to promote various socio-economic policies that are otherwise unrelated to the acquisition of goods and services. On the other hand, when the government enters the marketplace, it must deal on the same terms as all other businessmen. In so doing, it seeks to get the best buy for its dollar and to assure that its contractors possess skill, the capacity to perform, and business integrity. Therefore, contractors may be administratively debarred based on clear and convincing evidence of fraud or related misconduct.

The lesser sanction of suspension is generally imposed as a preliminary

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6. See 41 C.F.R. § 1-1.603 (1981); 32 C.F.R. § 1-604.2 (1981). Continued performance of existing contracts is permissible; however, funds due or to become due under such contracts may be withheld to protect the government's interest. 32 C.F.R. § 1-603(b) (1981).


10. The procurement statutes require that federal contracts be awarded only after the broadest competition available is secured. See, e.g., 10 U.S.C. § 2304(a) (1976). Regardless of whether the award results from formal advertising or competitive negotiations, however, the procuring agency must ascertain that the proposed awardee is responsive to the request for proposals or invitation for bids and that he is responsible. Responsibility involves a determination that the contractor has the capacity to perform the contract based on past experience, credit, integrity, perseverance, and tenacity. See supra note 4.

step to debarment. This sanction is governed exclusively by regulation because it is designed to protect the government pending an investigation of contractor misconduct. Contractors may be suspended temporarily up to eighteen months upon adequate evidence of fraud, criminal conduct or other serious cause that calls into question a contractor's ability to perform a contract adequately.

In view of the drastic nature of both debarment and suspension, and in response to a series of decisions by the United States Court of Appeals for

12. A suspension—though admittedly a less drastic sanction than debarment—has a number of onerous direct and collateral consequences. In addition to preventing a contractor from doing business with the government for a period of up to 18 months, 41 C.F.R. § 1-1.605-2(a) (1981), see Park Poly-bag Corp., GSBCA. Nos. 5744-S, 5756-S, 80-2 BCA ¶ 14,600, contracts entered into by the suspending agency with the contractor are void ab initio; therefore the administrative boards of contract appeals lack jurisdiction to consider appeals from default terminations of such contracts. See, e.g., City Window Cleaners, IBCA No. 1218-10-18, 79-2 BCA ¶ 13,901. But see Paisner v. United States, 150 F. Supp. 835 (Ct. Cl. 1957), cert. denied, 355 U.S. 941 (1958) (allowing recovery of the contract price, less profit, for that portion of the contract which had been performed).

13. Suspensions are not required in the statutory debarment area because there is no need to take interim action upon a mere suspicion that a statute is being violated. Steadman, supra note 2, at 808.

14. 41 C.F.R. § 1-1.605-1(a)(2) (1981) provides that a contractor may be suspended upon adequate evidence of “other cause of such serious and compelling nature, affecting responsibility as a Government contractor, as may be determined by the agency to warrant suspension.” An identical catch-all category is provided in the Defense Acquisition Regulation (DAR). See 31 C.F.R. § 1-605.1(ii) (1981). Agency officials have broad discretion—within the limits of due process—in deciding whether there is a “reasonable basis for suspicion” of fraud. See Lahendro, supra note 8, at 45. Based on interviews with a number of agency officials responsible for debarment and suspension, Lahendro concludes that they do not generally concern themselves with precise evidentiary standards, rather “the actual standard appears to be that they are certain in their own minds that the offense occurred.” Id. The breadth of agency discretion in determining whether to debar or suspend potentially results in uneven treatment of contractors because the agencies are often unwilling, as a practical matter, to suspend or debar a contractor whose product is essential. Illustrative is Kahn's Bakery, B-185025, 76-2 CPD ¶ 106, in which the Comptroller General upheld an agency's responsibility determination, notwithstanding the contractor's violation of the anti-trust laws because Kahn was the sole source of supply in that geographic area. The substantial discretion vested in agency officials is reflected in the broad language in 41 C.F.R. § 1-605 (1981) authorizing suspension for “other cause[s] of serious and compelling nature affecting responsibility.” The regulations thus permit an agency to suspend a contractor who has previously been determined to be nonresponsible. E.g., Drexel Industries, Inc., B-189344, 77-2 CPD ¶ 433 (causes for suspension set forth in 41 C.F.R. § 1-605.1 (1981) may be used to determine “integrity” pursuant to responsibility determinations). Conversely, debarment or suspension by one agency may result in a nonresponsibility determination by another agency. If this occurs, a contractor has few avenues of relief available because the Comptroller General will not, in most instances, review affirmative agency determinations of contractor responsibility. Building Maintenance Specialists, Inc., 54 COMP. GEN. 703, 75-1 CPD ¶ 122.
the District of Columbia,\textsuperscript{15} agency regulations currently provide some procedural safeguards for bidders prior to either suspension or debarment in order to protect contractors' "liberty" interest in doing business with the government.\textsuperscript{16} These protections include notice and an opportunity to rebut charges of wrongdoing.\textsuperscript{17} An administrative hearing following suspension may be refused, however, if the Department of Justice advises the agency that a hearing would prejudice prosecutorial action against the contractor.\textsuperscript{18}

Such was the case in \textit{Transco Security, Inc. of Ohio v. Freeman}.\textsuperscript{19} Transco Security, Inc. of Ohio (Transco-Ohio), the successor corporation of Transco Security, Inc. of Delaware (Transco-Delaware) was engaged in the business of supplying guard services to the government.\textsuperscript{20} Since its formation in September 1978, Transco dealt exclusively with federal agencies, and as of February 1, 1980, it was performing ten small business set-aside guard service contracts at various General Services Administration (GSA) installations throughout the country.\textsuperscript{21}

\begin{itemize}
  \item[17.] \textit{Id}.
  \item[18.] \textit{Id}., § 1-1.605-4(e) (1981).
  \item[20.] A number of the contracts being performed by Transco-Ohio at the time of the suspension originally had been awarded to Transco-Delaware, a small business concern wholly-owned by plaintiff Frank Gaviglia and his wife prior to the formation of Transco-Ohio. Transco-Delaware had been certified as a small business by the Small Business Administration Size Appeals Board on March 30, 1977. Brief for Respondents in Opposition at 4-5, \textit{Transco Security, Inc. v. Freeman}, 639 F.2d 318 (6th Cir. 1981). Under 41 C.F.R. § 1-1.703-2 (1981), any bidder may challenge the small business status of any other bidder or offeror by delivering a written protest to the contracting officer, who in turn, submits the protest to the appropriate regional SBA office for a determination of the bidder's eligibility. An adverse determination by an SBA Regional Office may be appealed to the SBA Size Appeals Board pursuant to 41 C.F.R. § 1-1.703-2(f) (1981). Financial reversals which plagued Transco-Delaware prompted Gaviglia to abandon it as a going concern in September 1978. Following the Delaware corporation's demise, a separate and distinct entity—Transco-Ohio—was formed. The new corporation, which was also certified as a small business, assumed the existing GSA security contracts as well as the withholding tax liability of the Delaware corporation. See Petitioner's Brief for Certiorari, at 2, \textit{Transco Security, Inc. v. Freeman}, 639 F.2d 318 (6th Cir. 1981).
  \item[21.] Congress initially set forth its policy of assisting and protecting small businesses through enactment of the Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232 (1953) (codified as amended at 15 U.S.C. §§ 631-47 (1976)). The statute provides direct and indirect loans and management advice to small business concerns. In addition, the Act provides assistance keyed to a variety of government procurement programs. For instance, section 8(a) of the statute, 15 U.S.C. § 644 (1976), authorizes the Small Business Administration to enter into prime contracts directly with the procuring agencies, and to subcontract the work
\end{itemize}
Transco continued to perform its GSA service contracts until January 28, 1980, when it was suspended from receiving further contracts based upon alleged fraudulent conduct in obtaining and performing its existing contracts. The January 28 notice did not state the grounds for the suspension. The notice was supplemented, however, on February 15, 1980 when Fred Gaviglia, Transco-Ohio's president, was informed that the GSA Inspector General's evidence included "billing irregularities" and "misrepresentations by the corporation regarding its eligibility for public contracts." Gaviglia was suspended because he was an officer of both Transco-Delaware and Transco-Ohio. Transco was never advised of the nature of the alleged billing irregularities, or that GSA suspected the company of misrepresenting the caliber of its employees.

Transco requested a hearing on its suspension, but its request was denied after the Justice Department informed GSA that release of any information to Transco would prejudice its criminal investigation. Transco to small business concerns. The SBA subsequently established the "8(a) set-aside program" through which these subcontracts are awarded to qualifying firms on a noncompetitive sole-source basis. The 1978 amendments to the Act (Pub. L. No. 95-507, 92 Stat. 1757), strengthened the § 8(a) program by mandating an automatic set-aside of all contracts under $10,000. The requirement has been implemented in the agency procurement regulations. See 41 C.F.R. § 1-1.701-8 (1981); 32 C.F.R. § 3-603.1(g) (1981).

22. 639 F.2d at 320. The suspension by GSA Commissioner Marshall resulted from an investigation of selected building, guard and janitorial service contracts begun in 1979 by the GSA's Office of Inspector General. The agency spends approximately $120 million annually on about 300 guard and janitorial service contracts. Based on its investigation, the Inspector General's Office concluded that Transco had billed the agency for nonexistent services, falsified the qualifications of its employees, and provided false statements to the Small Business Administration in order to obtain a small business certification. These findings prompted GSA's Inspector General to refer the matter to the Department of Justice for criminal prosecution. Government-Wide Debarment and Suspension Procedures: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. 25-26 (1981) (statement of Howard Cox, Attorney, Office of Special Projects, Office of Inspector General, General Services Administration) [hereinafter cited as Hearings].


24. 639 F.2d at 320.

25. Id.

26. The hearing was requested pursuant to 41 C.F.R. § 1-1.605-4 (1981), which provides that "[a] hearing may be requested upon receipt of the notice of suspension unless the basis for suspension is an outstanding indictment against the firm or individual."

27. The Chief of the Special Prosecutions Division, United States Attorney's Office for the Northern District of Illinois informed GSA that:

We are advised that Transco Security has requested access to substantial information with regard to allegations that they engaged in fraudulent conduct relating to their contract with GSA. Please be advised that we have initiated a criminal investigation of those allegations. To release such information as witness statements,
also filed a motion for a preliminary injunction in federal district court requesting the court to set aside the suspension.\textsuperscript{28}

The district court denied injunctive relief, ruling that the plaintiffs had failed to "demonstrate a substantial likelihood that they [would] eventually prevail on the merits,"\textsuperscript{29} and that GSA had "adequate evidence" to suspend the firm in accordance with the applicable regulations.\textsuperscript{30} The court went on to hold that the plaintiffs had not been, and were not likely to be denied due process because even if an administrative hearing were refused, they would still have the opportunity to present information or arguments in opposition to the suspension in person, in writing or through representation.\textsuperscript{31}

On appeal, Judge Cornelia Kennedy of the United States Court of Appeals for the Sixth Circuit held that the notice given Transco was constitutionally defective because it did not advise the company which bills were irregular or how the caliber of its employees had been misrepresented.\textsuperscript{32} The court reversed and remanded the case to the district court to determine whether the opportunity to provide rebuttal evidence authorized under the suspension regulations would have cured the inadequate notice and provided the plaintiffs with a meaningful opportunity to present information in opposition to the suspension. The court refused, however, to hold that GSA's suspension procedures violated due process as a matter of law, holding that an adversarial suspension hearing is not constitutionally required.\textsuperscript{33}

\begin{thebibliography}{33}
\bibitem{28} Brief for the Respondents in Opposition, at 6-7, Transco Security Inc. v. Freeman, 639 F.2d 318 (6th Cir. 1981).
\bibitem{29} Petitioner's Brief for Certiorari, at app. B, Transco Security Inc. v. Freeman, 639 F.2d 318 (6th Cir. 1981).
\bibitem{31} Id. at 4.
\bibitem{32} Id. at 6. See 41 C.F.R. § 1-1.605-4(c) (1981).
\bibitem{33} Id. at 322-3. The court reasoned that under most circumstances, the opportunity to provide information in rebuttal will prevent suspension based on "mere suspicion, unfounded allegation, or error." Id.
\end{thebibliography}
Transco petitioned the United States Supreme Court for certiorari on the ground that an eighteen month suspension without a hearing violated its “liberty interest” guaranteed by the fifth amendment. The Supreme Court denied Transco’s petition for certiorari on October 5, 1981.

This Note will examine Transco Security and the impact of the Sixth Circuit’s decision on government-wide debarment and suspension regulations proposed by the Office of Federal Procurement Policy. It will demonstrate that in upholding the constitutionality of GSA’s suspension regulations, the court has implicitly approved the new OFPP regulations which reduce the judicially-mandated safeguards public contract bidders currently enjoy. The final sections of the Note will address recent congressional hearings on debarment and suspension and proposed legislation that would accord a presumption of validity to individual agency debarments and suspensions on a government-wide basis.

I. THE EVOLUTION OF DUE PROCESS RIGHTS FOR GOVERNMENT CONTRACTORS

A. An Historical Perspective

Although the government has been using the sanctions of administrative debarment and suspension for many years, historically, the due process safeguards accompanying these sanctions have been minimal. In fact, debarments usually occurred without an adversary hearing and when the basis for the debarment was alleged criminal conduct, contractors were not even notified of the reasons for the government’s action. Similarly, prior


35. Petitioner’s Brief for Certiorari, at 18, Transco Security Inc. v. Freeman, 639 F.2d 318 (6th Cir. 1981). Transco argued that the opportunity to present evidence in opposition to the suspension did not provide a meaningful opportunity to be heard, especially when the information is considered by the same administrative official who refused to provide adequate notice without judicial intervention. Id. at 14-15. Moreover, the “stigma” attached to publication in and distribution of the suspension to other agencies through GSA’s Consolidated List of Current Administrative Debarments warranted an adversarial hearing to satisfy due process. Id. at 9. See 41 C.F.R. § 1-1.607(a) (1981). GSA is required to maintain a consolidated list of debarred bidders, including the basis of the action, to be distributed to all agencies on a semi-annual basis. Suspensions are also included routinely on the list but the regulations do not require their inclusion.


39. Gantt & Panzer, Debarment and Suspension of Bidders on Government Contracts and
to July 1956, the Armed Services Procurement Regulation (ASPR)\textsuperscript{40} did not require contractors to be notified of suspension actions, much less the grounds for the suspension.\textsuperscript{41} Thus, contractors faced exclusion from further contracting, termination of existing contracts, and withholding of funds due under existing contracts without being apprised of the basis for these sanctions.\textsuperscript{42}

I. The Efforts of the Administrative Conference of the United States

In recognition of the potentially disastrous impact that debarment and suspension may have on those who do business with the federal government,\textsuperscript{43} the Administrative Conference of the United States (Conference), undertook a comprehensive review of the existing debarment and suspension system in the early 1960's.\textsuperscript{44} The committee on adjudication of claims submitted a series of nine recommendations, all of which were adopted by the full Conference.\textsuperscript{45} The committee's recommendations addressed its basic conclusion that "[e]xcept for a small percentage, this Governmental action [of debarment or suspension] is taken without opportunity for an adversary hearing and if based on suspected criminal conduct is generally without being officially notified or informed of meaningful reasons, or opportunity to learn why."\textsuperscript{46}

The Administrative Conference of the United States submitted its find-

\textsuperscript{40} The Armed Services Procurement Regulation was redesignated the Defense Acquisition Regulation in March 1978 as part of the government's efforts to give equal weight to program management and contract administration, including budgeting, planning, and managing agency's needs. See Department of Defense Directive 5000.35, Proposed Regulations, Interim Amendments, Gov't Cont. Rep. (CCH) ¶ 79,072 (March 8, 1978).

\textsuperscript{41} See Gantt & Panzer, supra note 37, at 200 n.81.


\textsuperscript{43} The regulations expressly recognize the serious consequences of debarment and suspension: "Suspension is a drastic action and, as such, shall not be based upon an unsupported accusation." 41 C.F.R. § 1-1.605 (1981). It has also been recognized by the courts and the Attorney General. See Horne Bros. Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972). The Attorney General's Committee on Administrative Procedure reported that "the penalty of blacklisting is so severe that its imposition may destroy a going business." Gantt & Panzer, supra note 37, at 176 n.7.

\textsuperscript{44} Steadman, supra note 2, at 803 n.36.

\textsuperscript{45} Id. The full Conference report, developed under the leadership of the then Department of Defense General Counsel Cyrus R. Vance, is reprinted in Senate Subcomm. on Administrative Practice and Procedure, Selected Reports of the Administrative Conference of the United States, S. Doc. No. 24, 88th Cong., 1st Sess., 265-95 (1963).

\textsuperscript{46} Steadman, supra, note 2, at 803.
ings and recommendations to the President in 1962. The centerpiece, and most controversial, of the Conference's recommendations was that debarment actions should be preceded by a "trial type hearing" before an impartial agency board or hearing examiner. 47 The hearing should be modeled after section 7 of the Administrative Procedure Act. 48 The Conference also recommended that suspensions be limited to eighteen months and that they be accompanied by a finding of substantial grounds for non-responsibility determinations as well as high-level review. 49

The Conference's recommendations were well received by the Administration. President Kennedy's directive to federal agencies to implement the Conference's proposals was implemented by a Bureau of the Budget Bulletin. 50

2. The Commission on Government Procurement

The federal debarment and suspension process received renewed scrutiny in the early 1970's as part of the Commission on Government Procurement's (COGP) monumental study of the federal procurement process. 51 The COGP report addressed both statutorily-mandated 52 and administrative debarments and suspensions. With respect to administrative sanctions, it urged that uniform regulations be adopted that would guarantee fair and expeditious resolution of these matters. 53

Interagency task groups were subsequently formed to review the COGP

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47. Id. at 804.
49. See Steadman, supra note 2, at 804 n.41. As discussed supra note 4, a finding of contractor "responsibility" is a prerequisite to a contract award. The current regulations define responsible contractors as those who: (1) have adequate financial resources to perform the contract; (2) the ability to meet the contract delivery schedule; (3) a satisfactory record of performance on prior federal contracts; and (4) a satisfactory record of integrity. 32 C.F.R. § 1-903.1 (1981), 41 C.F.R. § 1-1203-1 (1981).
50. Steadman, supra note 2, at 804 n.42.
52. For a discussion of the types of statutory debarments, see supra note 8 and accompanying text.
53. See 1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 4, 68 (1972) [hereinafter cited as the COGP REPORT].
proposals and recommend implementation strategies for the Executive Branch agencies.\textsuperscript{54} However, before the task group dealing with suspension and debarment could complete its review, the United States Court of Appeals for the District of Columbia handed down its decision in \textit{Horne Brothers, Inc. v. Laird}.\textsuperscript{55}

The Navy had suspended Horne Brothers based on an indictment returned against the company alleging unlawful actions in connection with prior government contracts.\textsuperscript{56} Following the suspension, Horne brought an action in district court, seeking injunctive relief and a declaration that the Navy had violated the law in issuing the suspension and refusing to award a ship contract to Horne, the apparent low bidder.

The district court issued a preliminary injunction,\textsuperscript{57} but the United States Court of Appeals for the District of Columbia reversed.\textsuperscript{58} The court held that the Navy was justified in precluding Horne from bidding on the repair contract prior to a hearing on the suspension charges since the bid was rejected within one month of the contractor's suspension. In the course of its opinion, the court addressed the types of procedures which must accompany suspension actions in order to comply with due process. It indicated that, while a temporary suspension for a "short period, not to exceed one month" may be permitted without a hearing, more protracted suspensions "require the Government to insure fundamental fairness to the contractor whose economic life may depend on his ability to bid on government contracts."\textsuperscript{59} In the court's view, fundamental fairness re-

\textsuperscript{54} Steadman, \textit{supra} note 2, at 806 n.49.
\textsuperscript{55} 463 F.2d 1268 (D.C. Cir. 1972). The \textit{Horne Brothers} case will be discussed more fully \textit{infra} in section B(2).
\textsuperscript{56} The Navy's suspension was based on allegations that Horne had been giving gratuities to Navy contract administrators and inspection personnel. Horne Bros., Inc. v. Laird, 342 F. Supp. 703, 705 (D.D.C.), \textit{rev'd}, 463 F.2d 1268 (D.C. Cir. 1972).
\textsuperscript{57} Horne Brothers, Inc. v. Laird, 342 F. Supp. 703 (D.D.C.), \textit{rev'd}, 463 F.2d 1268 (D.C. Cir. 1972). The district court ordered the government to stop performance on the ship repair contract, but the court of appeals stayed the injunction pending its disposition of the case. 463 F.2d at 1269. Judge Aubrey C. Robinson concluded that the suspension was illegal because it was not based on "adequate evidence" of improper behavior, and because the regulations did not expressly prohibit gratuities. 342 F. Supp. at 707. The court further concluded that the regulations violated the fifth amendment's due process requirements both as written and as applied insofar as they purported to deny Horne Brothers the opportunity to bid on government contracts without benefit of notice or a hearing. The court criticized the Armed Services Procurement Regulation (ASPR) procedures as inadequate because they did not require specific notice of the charges or provide an opportunity to present evidence and cross-examine adverse witnesses. \textit{id.} at 708.
\textsuperscript{58} 463 F.2d at 1273. The appellate court concluded that Horne was unlikely to prevail on the merits. \textit{id.}
\textsuperscript{59} \textit{id.} at 1270-71. The financial ramifications of a suspension action may extend beyond the inability to compete for federal contracts during the suspension period. In this
quired that the contractor be given specific notice of its alleged misconduct and, in most cases, an opportunity to rebut those charges.\textsuperscript{60} However, the court recognized that national security considerations or possible prejudice to a prosecutorial action might justify withholding evidence from the contractor.\textsuperscript{61}

In response to the \textit{Horne Brothers} decision, the ASPR and the Federal Procurement Regulations (FPR) were revised in mid-1974\textsuperscript{62} to require specific notice and an opportunity for a hearing provided the suspension was not based on an outstanding indictment, and that a hearing would not adversely affect ongoing Justice Department investigations.\textsuperscript{63}

One year later, the COGP debarment and suspension task group issued its findings.\textsuperscript{64} Although the task group made a number of recommendations for improving the debarment procedures, it concluded that the 1974 amendments to the suspension procedures satisfied due process requirements.\textsuperscript{65}

\section*{B. What Process is Due?: The Judicial Response}

\textit{1. Perkins v. Lukens Steel Co. and The Demise of the Privilege/Right Distinction}

The federal agencies have promulgated suspension and debarment regu-
lations pursuant to their statutory mandate to award contracts to the lowest bidder capable of meeting the contract requirements within the set delivery schedule,\(^6\) and their judically recognized\(^7\) power to consider bidders' reputations in determining responsibility.

Due to the lack of pertinent statutory law, the federal courts have developed due process safeguards for government contractors involved in administrative suspension actions.\(^8\) This evolution has been slow, largely due to the Supreme Court's denial of standing to government contract bidders in its 1940 decision in\(^9\) Perkins v. Lukens Steel Co.

In Lukens Steel, several producers of iron and steel sought to enjoin the Secretary of Labor and various federal agencies from implementing a wage determination made pursuant to the Walsh-Healey Public Contracts Act.\(^7\) The manufacturers alleged that the Secretary had improperly construed the statute in a manner which would cause them irreparable harm.\(^7\) Because the statute contained no express provision authorizing judicial review, the manufacturers' challenge was based on an alleged violation of their right to bid on federal contracts and to be free from illegal interference when negotiating with the government.\(^7\)

The United States Court of Appeals for the District of Columbia agreed that the Secretary of Labor had erroneously construed the statute,\(^7\) and enjoined the Labor Secretary and other procurement agencies from giving effect to the wage determination for the iron and steel industry. On appeal the Supreme Court reversed.\(^7\)

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8. See Miller, supra note 41, at 802.

9. 310 U.S. 113 (1940).

10. 41 U.S.C. §§ 35-45 (1976). The Act applies to all government contracts in excess of $10,000 for the manufacture or supply of materials, articles, or equipment. It requires the contractor to certify that he will pay his workers minimum wages as determined by the Secretary of Labor, and that no employee shall work in excess of 8 hours a day, 40 hours a week in the absence of an agreement to the contrary between the contractor and the employee. Any such agreement is subject to approval by the Secretary of Labor.

11. 310 U.S. at 124.

12. Id. at 115.


14. 310 U.S. 113 (1940). As a result, the statute was suspended for more than a year pending completion of the litigation. Id. at 117.
Writing for the Court, Justice Black held that the contractors lacked standing to challenge the validity of the Secretary's action, because the statute was enacted solely for the government's benefit, and it conferred no enforceable rights on government bidders. He reasoned that the Government has the unrestricted right to do business with whomever it pleases and under whatever terms and conditions it chooses. The Court concluded that, absent congressional authorization, judicial review of the government's purchasing power would be improper.

The Court's decision in Lukens Steel was based on the now discredited distinction between rights and privileges for identifying entitlement to due process safeguards. Following the demise of the right-privilege doctrine, the lower courts became increasingly willing to entertain challenges by disappointed bidders based on their economic interest in doing business with the government. In essence, courts began to conclude that the government's power to dictate contractual terms carried with it a corollary duty to exercise this power in accordance with concepts of fundamental fairness.

Some forty years later the United States Court of Appeals for the District of Columbia took the lead in distinguishing the Supreme Court's Lukens Steel decision in a line of debarment-suspension cases beginning with Copper Plumbing & Heating Co. v. Campbell. In Copper Plumbing, the

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75. The plaintiffs were not permitted to invoke "mere possible injury to the public" as grounds for challenging the Navy's allegedly unlawful procurement practices. 310 U.S. at 132.

76. Justice Black stated that "[like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal and to fix the terms and conditions upon which it will make needed purchases." Id. at 127.

77. Id.

78. See Miller, supra note 41, at 802. See also Note, Doing Business With Government: Are Prospective Suppliers Entitled To Procedural Due Process?, 55 Chi.-Kent L. Rev. 497, 499-504 (1979). During the first part of the 20th century, the Supreme Court's due process decisions differentiated between rights and privileges, reasoning that the state's power to grant a privilege carried a corollary right to withhold or condition it. E.g., Packard v. Bantan, 264 U.S. 140, 145 (1924). Gradually, the Court began to recognize due process interests in matters that had previously been thought to be merely privileges. Goldberg v. Kelly, 397 U.S. 254 (1970). And in Graham v. Richardson, 403 U.S. 365, 374 (1971), the Supreme Court expressly rejected the right-privilege dichotomy.


80. See, e.g., Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964).

81. 290 F.2d 368 (D.C. Cir. 1961). The majority of procurement-related suits are brought in the District of Columbia federal courts because of the accessibility of data and the agency heads within the District of Columbia. Steadman, supra note 2, at 806 n.50.
plaintiffs challenged a Department of Labor regulation which barred them from receiving federal contracts for three years based on violations of the Eight Hour Laws and resulted in its placement on the Comptroller General's debarred bidders list. The district court denied the plaintiffs' motion for injunctive relief, holding that they lacked standing to challenge the debarment action. The court of appeals concluded that the company had standing to challenge the regulation, but held that the debarment was valid.

The court distinguished *Lukens Steel* on the ground that it had involved a challenge to the general application of a procurement statute which applied to all industry members nationwide, unlike the instant case where an individual injury had been alleged. The court recognized that while contractors do not have a right to dictate the terms on which they will do business with the government, they do have a right to receive equal treatment with other bidders under applicable procurement statutes. Deprivation of this right entitles contractors to judicial review under section 10 of the Administrative Procedure Act.

The principles enunciated in *Copper Plumbing* were extended to administrative suspensions in *Gonzales v. Freeman*. In this case, the plaintiffs

82. 37 Stat. 137 (1912), as amended, 40 U.S.C. §§ 324-326 (1958); 40 U.S.C. §§ 324-326 (1976). The current version of the statute is entitled the Contract Work Hours and Safety Standards Act. *Copper Plumbing*, 290 F.2d at 370. As a penalty for violation of the statute, the company paid the government $955 as required under the contract and reimbursed its employees for backpay as mandated by the statute. *Id.*

83. 290 F.2d at 370. The regulations provided:

that whenever a contractor or subcontractor is found by the Secretary or Agency Head to be in aggravated or willful violation of the overtime pay provisions of certain acts relating to federally financed and assisted construction, other than the Davis-Bacon Act, such contractor or subcontractor, or any firm, corporation, partnership, or association in which it has a substantial interest 'shall be ineligible for a period of three years (from the date of the publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts subject to the statutes listed in § 5.1,' which include the Eight Hour Laws. *Id.* at 371 (citations omitted).

84. *Id.* at 370.

85. *Id.*

86. *Id.* at 373.

87. 310 U.S. 113 (1940).

88. The court noted that the debarment sanction was in addition to the monetary penalties provided by the statute. At the time of the listing, the firm conducted approximately 70 percent of its business with the government. 290 F.2d at 370.

89. *Id.* at 370-71. The standard of review is very narrow; plaintiffs must show that the government's actions were arbitrary and capricious. *Keco Indus. Inc. v. United States*, 492 F.2d 1200 (Ct. Cl. 1974); *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947 (D.D.C. 1980).

90. 334 F.2d 570 (D.C. Cir. 1964).
challenged their temporary debarment by the Commodity Credit Corporation (CCC)\textsuperscript{91} for alleged misuse of official export inspection certificates, arguing that the CCC's action was not authorized by statute or regulation; that it was imposed without procedural rules specifying the grounds for the suspension; and that they were not given notice and a meaningful opportunity to refute the charges against them.\textsuperscript{92}

The district court granted the government's motion for summary judgment, but the court of appeals reversed, holding that a justiciable controversy existed and that the plaintiffs had standing to challenge the CCC's action. The court conceded that contractors have no legal right to contract with the government, but stated that contractors currently performing government contracts are in a different position from bidders who are merely seeking federal contracts.\textsuperscript{93} It pointed out that the interruption of such an existing relationship between the contractor and the government may have grave economic consequences for the contractor.\textsuperscript{94} The court held that the government may not exercise its procurement powers arbitrarily or preclude a contractor from challenging the evidence against him before he is officially barred from receiving government contracts.\textsuperscript{95} Accordingly, the court concluded that agencies must adopt and publish standards and procedures governing such actions to assure uniform minimum fairness to all parties.\textsuperscript{96} These procedures should include notice of specific charges against the contractor, an opportunity to cross-examine adverse witnesses and a decision supported by an administrative record.\textsuperscript{97} Despite its will-

\textsuperscript{91} The Commodity Credit Corporation Act, Act of June 29, 1948, 62 Stat. 1070 (1948) (codified as amended at 15 U.S.C. § 714 (1976)), created the Commodity Credit Corporation (CCC) within the Department of Agriculture for the purpose of stabilizing, supporting, and protecting farm income and prices and maintaining an adequate supply and orderly distribution of agricultural commodities.

\textsuperscript{92} 334 F.2d at 573. The plaintiffs had been summarily suspended for a period of two and one-half years pending a Department of Justice investigation, and later were formally suspended for a period of five years. The notice of suspension stated no grounds for the action. \textit{Id.} at 572 n.3. The plaintiffs further alleged that government contracting constituted a substantial portion of their business and that as a result of the suspension, they had lost more than $100,000 in profits. \textit{Id.} at 573. The government contended, inter alia, that doing business with the CCC was not a legally protectible right and that Congress had expressly precluded judicial review of CCC actions. \textit{Id.}

\textsuperscript{93} \textit{Id.} at 574.

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.} The court so concluded despite its recognition that the authority to debar or suspend "irresponsible, defaulting, or dishonest contractors . . . is inherent and necessarily incidental to the effective administration of the statutory scheme." \textit{Id.} at 576-77.

\textsuperscript{96} \textit{Id.} at 578-79. Since it concluded that the CCC's summary action was not authorized by applicable statutes or regulations, it found it unnecessary to reach the plaintiffs\textsuperscript{constitutional} due process claims. \textit{Id.} at 579-80.

\textsuperscript{97} \textit{Id.} at 578.
ingness to recognize far-reaching procedural rights for contractors, the court also conceded that a “summary debarment” in the nature of a “temporary suspension” might be warranted for a reasonable period of time pending investigation.98

2. The Horne Brothers Watershed

Having established that the government must act reasonably and in accordance with principles of fundamental fairness when it curtails legitimate private (contractor) interests, the United States Court of Appeals for the District of Columbia Circuit considered the scope of procedural protections that must be accorded to debarred or suspended bidders in *Horne Brothers, Inc. v. Laird*.99

As previously discussed,100 the plaintiff in *Horne Brothers* sought to enjoin the performance of a contract by another contractor, after it had been temporarily suspended pending a Navy investigation of contract improprieties.101 District Court Judge Aubrey C. Robinson had granted Horne’s request for an injunction,102 but the court of appeals reversed and remanded, holding that the government must be allowed a “reasonable time” after notification of suspension to conduct a hearing proceeding.103

Despite its reversal, the appellate court agreed with the lower court’s conclusion that there were serious questions regarding the fairness of procedures utilized by the government in suspending contractors.104 The court conceded that a hearing might not be required prior to a “temporary suspension” not exceeding one month, however, lengthier suspensions should require a prior hearing to insure due process.105 The court also recognized that national security or potential prejudice to an ongoing prosecution might justify nondisclosure of the government’s “adequate evidence” to

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98. *Id.* at 579.
100. See supra notes 54-60 and accompanying text.
102. *Id.* at 708.
103. 463 F.2d at 1272.
104. *Id.* at 1269.
105. Relying on *Gonzales*, the court concluded that the government is required to give a contractor specific notice of at least some of the charges alleged against it and an opportunity to rebut those charges when the administrative procedures contemplate suspension for a period of a year or more. *Id.* at 1270-71. It should be noted that *Horne Brothers* directs only that an opportunity to be heard be provided to the suspended party. A waiver of this right may be either express, or inferred from the conduct of the parties, as for example, where the parties do not press for their right to a hearing and through negotiations with the government attempt to resolve the matter through nonadjudicatory channels. *Adamo Wrecking Co. v. Department of Hous. & Urban Dev.*, 414 F. Supp. 877, 879 (D.D.C. 1976).
even in these cases, however, the contractor must be provided protection through a formal determination by a government official that significant injury would result if a hearing were held. Furthermore, courts may assess the adequacy of the government's evidence in the event of a judicial challenge by an in camera inspection of at least a portion of the evidence held by the government.

In *Art-Metal-USA, Inc. v. Solomon*, the United States District Court for the District of Columbia assessed the specific procedural safeguards that must be followed before a contractor can be blacklisted by a federal agency. Unlike the court's prior decisions which had involved formal debarment or suspension proceedings, *Art-Metal* involved what has come to be known as "de facto" debarment. *Art-Metal*, the federal government's largest furniture supplier, alleged that it was being denied contracts under which it was the lowest bidder, because of a series of newspaper articles which charged the company with supplying inferior products and engaging in fraudulent dealings with the General Services Administration. GSA officials never formally accused the company of criminal or fraudulent acts and formal debarment or suspension proceedings were never instituted against the contractor.

The court held that the agency's finding of nonresponsibility coupled with suspension of *Art-Metal*'s contracts pending completion of an investigation was tantamount to suspension of the company without procedural due process. While recognizing that a contractor may be temporarily

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106. The court defined "adequate evidence" as similar to "probable cause" necessary for an arrest, a search warrant, or a preliminary hearing, i.e., more than uncorroborated suspicion or accusation. 463 F.2d at 1271.
107. *Id.* at 1272. A high level official, such as the assistant secretary of an agency, must be presumed, in the absence of contrary evidence, to act in the agency's best interests. 414 F. Supp. at 879.
108. 463 F.2d at 1272.
110. *Id.* at 4.
111. A constructive or de facto debarment may occur in the event of repeated rulings of nonresponsibility. *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252 (2d Cir. 1975). The Comptroller General has held that formal debarment or suspension procedures must be invoked as soon as practicable following a determination of nonresponsibility to preclude agencies from repeatedly disregarding otherwise low bids without giving the bidder an opportunity to be heard. 43 COMP. GEN. 140 (1963). See R. Nash, Jr. & J. Cibinic, Jr., *Federal Procurement Law* 192 (3d ed. 1977).
112. 473 F. Supp. at 3 nn.1-2. High level officials within GSA, including then GSA Administrator Jay Solomon, did admit, however, that their primary reason for not awarding contracts to the company involved "public relations" in the face of an ongoing investigation of GSA's procurement practices. *Id.* at 7.
113. *Id.* at 5.
114. *Id.* at 6.
suspended pending an investigation under "extreme situations such as those involving national security," it firmly rejected the government's argument that Art-Metal's rights be subordinated for public relations reasons in the face of GSA's attempt to curtail widespread corruption within the agency.

Although the courts had previously recognized that federal contractors possess a cognizable liberty interest in dealing with the government, the basis for this interest was not fully articulated until *Old Dominion Dairy Products, Inc. v. Secretary of Defense*. In this case, a Department of Defense (DOD) contractor was denied two government contracts based on the contracting officer's determination that it had "knowingly and substantially overbilled the Government" under prior contracts, which led to a determination of nonresponsibility. The company was subsequently formally suspended under Defense Acquisition Regulation (DAR) section 1-605. Old Dominion sought both injunctive and declaratory relief charging that the agency's action was arbitrary and that Old Dominion had been denied due process of law under the fifth amendment because it had not been given notice or an opportunity to contest the agency's nonresponsibility determination.

The district court ruled in the government's favor, but the court of appeals reversed and remanded. It found that the contractor's interest in preserving its reputation plus its interest in not being foreclosed from future government contracts constituted a cognizable "liberty" interest under the fifth amendment. While the court agreed that the contracting officer

115. *Id.*
116. *Id.* Thus, the court concluded that the public interest is not served when the goal of honest, efficient government is sought to be achieved through unlawful means or when blacklisting is based "not on evidence" but on the premise that to do otherwise "wouldn't look very good." *Id.* (citation omitted). The court added that "our system of laws does not operate on the principle of the Queen in *Alice in Wonderland*—'sentence first—verdict afterwards.' It requires the evidence to come first." *Id.* at 8.
118. 631 F.2d at 955.
119. *Id.*
120. *Id.* at 959.
122. 631 F.2d at 966. In reaching this result, the court relied on the Supreme Court's decision in Board of Regents v. Roth, 408 U.S. 564 (1972). The Roth Court considered the circumstances under which the refusal of a public university to reemploy a nontenured university instructor invoked due process "liberty" interests. The Supreme Court concluded that a mere refusal to rehire without notice and a hearing did not violate due process; however, it recognized that "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard
reasonably could have concluded that Old Dominion had overcharged the government, it held that the district court had erred in holding that Old Dominion did not have a due process right to notice and at least a minimal opportunity to respond to charges against it. The court further held that the government's after-the-fact invocation of formal suspension proceedings did not cure the constitutional violation.

Turning to the issue of what process is due, the court of appeals noted that the Supreme Court in Mathews v. Eldridge established three factors to be considered in identifying the specific parameters of due process: (1) the private interest involved; (2) the risk of erroneous deprivation of the individual interest and the additional or substitute procedural safeguards available; and (3) the government's interest, and the administrative burdens that alternative procedural requirements would entail. Under this test, the court concluded that a "full blown hearing" would impair the government's ability to conduct its business. Nevertheless, the contractor has a right to be notified of the specific charges against him and a chance to present his side of the story. Although the court did not rely on

are essential." Id. at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)). See also Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976); Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978). The appellate court noted that here there was no problem with lack of publication of the damaging characterization as recognized by the Supreme Court in Bishop v. Wood, 426 U.S. 341 (1976).

The court found that the contracting officer's nonresponsibility determination was rational. Thus, the court dismissed the company's due process claims because they were "without merit." Id.

124. Id. at 968.

125. Id. at 966-67. The district court had found persuasive the fact that the agency's subsequent initiation of formal suspension proceedings would give the contractor an opportunity to clear its name. 471 F. Supp. at 303. However, following the district court's decision, Old Dominion's request for a hearing pursuant to the suspension regulations was denied. 631 F.2d at 959 n.13.


127. 631 F.2d at 967 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). In so holding, the appellate court distinguished the Supreme Court's decision in Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961), in which it held that the plaintiff, an employee of a government contractor operating a cafeteria at the Naval Gun Factory in Washington, D.C., could constitutionally be excluded from the Gun Factory's premises without a hearing and notice of the specific grounds for exclusion. In reaching this result, the court relied on the historically unquestioned power of the commanding officer to exclude civilians from his command, coupled with the fact that the plaintiff would not be foreclosed from government employment other than at the facility in question. 631 F.2d at 965-66.

128. 463 F.2d 1268. The court was apparently referring to the right, provided in the suspension regulations, to present information or argument in opposition to the suspension in person, in writing, or through representation. 41 C.F.R. § 1-1.605-4(e) (1981). Old Dominion had not requested a formal hearing at any time during the litigation, but had merely asserted its right to be notified of the allegations against its integrity, to present immediately in
Supreme Court precedent in determining what type of notice Old Dominion should have received, its analysis basically mirrored that set forth by the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*,\(^{129}\) in which the Court stressed that notice must be sufficiently specific to permit adequate preparation for an impending proceeding.\(^{130}\)

**C. Current Suspension Regulations**

After the United States Court of Appeals for the District of Columbia's decision in *Horne Brothers*, GSA drafted new suspension regulations covering both the issues of notice and hearing prior to suspension.\(^{131}\) These regulations, currently in force, require that notice be given "upon suspension." The notice must state that the suspension is based on an outstanding indictment or adequate evidence that the firm's dealings with the government reflect serious irregularities.\(^{132}\) The agency is required to describe the nature of the alleged irregularities "in general terms" so as not to disclose the government's evidence.\(^{133}\)

The decision to grant a hearing is discretionary under the Federal Procurement Regulations. A contractor may "request" a hearing upon receipt of a suspension notice,\(^{134}\) and such a request "will be considered" unless the suspension is based on an outstanding indictment or advice from either the Justice or Labor Department that a hearing would prejudice their collateral proceedings against the contractor.\(^{135}\) However, the regulations impose no affirmative duty on the agency to grant a hearing.\(^{136}\) The

\(^{129}\) 339 U.S. 306 (1950). See Note, 50 GEO. WASH. L. REV. 90 (1981), criticizing the *Old Dominion* court's conclusion that corporations possess due process liberty interests, and questioning the necessity of reliance on constitutional grounds in deciding the case.

\(^{130}\) 339 U.S. at 314.

\(^{131}\) Steadman, *supra* note 2, at 807-08.

\(^{132}\) 41 C.F.R. § 1-1.605-3(a) (1981). The regulations do not define "adequate evidence," however, this evidentiary standard has been analogized to "probable cause" by the courts. See *Horne Brothers*, 463 F.2d at 1271. See also *supra* note 13.

\(^{133}\) 41 C.F.R. § 1-1.605-3(a) (1981).

\(^{134}\) 41 C.F.R. § 1-1.605-4(a) (1981).

\(^{135}\) 41 C.F.R. §§ 1-1.605-3(f), 1-1.605-4(a) (1981). Although routine limits for filing a hearing request are set forth in the regulations, at least one court has held that a contractor's failure to press for a hearing because of ultimately unsuccessful settlement negotiations with the agency resulted in a waiver of the contractor's hearing rights. *Adamo Wrecking Co.*, 414 F. Supp. at 877. See *supra* note 104.

\(^{136}\) See 41 C.F.R. § 1-1.605-3(f) (1981).
regulations do not define what type of hearing will be held if the hearing request is granted, yet, at least one board of contract appeals has held that there is no right to confront adverse witnesses in a suspension hearing.

Horne Brothers approved suspension without a hearing in the event that the hearing would adversely affect other proceedings against the contractor, and the regulations reflect this exception. If denied a hearing, the contractor is given the option of submitting "any information or argument in opposition to the suspension . . . in person, in writing, or through representation." This information is then considered by the head of the agency or his authorized representative. Absent "prosecutive action" by the Justice Department, the suspension must end after twelve months. If an Assistant Attorney General requests a continuance, however, the suspension may be extended for an additional six months.

Government agencies are given considerable discretion over the length of a contractor's suspension, and they may modify a suspension in the interest of the government or may tailor it to the organizational structure

137. The discretionary nature of the hearing provisions in the Federal Procurement Regulations (FPR) must be contrasted with those provided for the military agencies under the Defense Acquisition Regulations (DAR). DAR § 1-605-2(b)(2) (32 C.F.R. § 1-605-2(b)(2) (1981)), states that a hearing "shall" be granted when requested if the basis for suspension does not involve potential criminal or civil prosecution.

138. Dale J. Leavitt, AGBCA No. 77-135, 79-1 BCA — 13,802. But see Sahni v. Department of Hous. & Urban Dev., 478 F. Supp. 882 (D.D.C. 1979), holding that the Department of Housing and Urban Development Board of Contract Appeals (HUD BCA) erred in excluding a contractor's countervailing evidence in a suspension hearing. As the courts more clearly delineated debarment-suspension hearing requirements, numerous government agencies have delegated the authority to conduct such hearings (or review debarment actions) to their respective administrative boards of contract appeals. HUD BCA issues more debarment-suspension decisions than any other administrative board (about 60 per year). See supra notes 134-35 and accompanying text.

139. See supra notes 134-35 and accompanying text.

140. 41 C.F.R. § 1-1.605-4(e) (1981). If a hearing is denied based on possible impairment of ongoing criminal proceedings, the contractor is so notified in writing within 20 days of the receipt of the request. Id.

141. 41 C.F.R. § 1-1.605-2(a) (1981). Thus, a firm may be suspended for a year and a half before the agency determines whether a reason for debarment exists.

142. 41 C.F.R. § 1-1.605(b) (1981). Appropriate grounds for modification of the debarment period include: "newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, or the elimination of the causes for which the debarment was imposed." Id. See, e.g., Lawrence Bursten, HUD BCA No. 81-555-D9, 81-1
of the contractor. Finally, administrative agencies may suspend a contractor who has been suspended by another agency, but in doing so they must independently follow applicable regulations.

II. **Transco Security, Inc. of Ohio: A Critical View**

In *Transco Security, Inc. of Ohio v. Freeman* the Court of Appeals for the Sixth Circuit was faced with a case of first impression. It was asked to decide whether the regulatory provision permitting a hearing to be denied in the interest of protecting an ongoing criminal investigation, and authorizing a contractor to present “information or argument in opposition to the suspension . . . in person, in writing, or through representation,” provided a hearing for purposes of constitutional due process.

The General Services Administration had denied Transco a hearing based on a decision by the General Services Board of Contract Appeals to debar Transco Security, Inc. of Ohio for submitting false claims in an ongoing criminal investigation. The court held that Transco was entitled to a hearing, and that the debarment was ineffective since Transco had not been given notice of the debarment proceedings.

The case was significant because it marked the first time in GSA's history that a hearing was denied to a contractor on a preindictment suspension. The United States Court of Appeals for the District of Columbia Circuit in *Old Dominion Dairy Prod., Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980), specifically noted that the court had denied Transco a hearing based on a decision by the General Services Board of Contract Appeals to debar Transco Security, Inc. of Ohio for submitting false claims in an ongoing criminal investigation. The court held that Transco was entitled to a hearing, and that the debarment was ineffective since Transco had not been given notice of the debarment proceedings.
on advice from the Department of Justice that a hearing would prejudice its collateral criminal investigation of Transco's federal guard service contracts. In addition, the Department of Justice alleged that Transco was attempting to use the administrative hearing process as a means of obtaining pretrial discovery otherwise unavailable to criminal defendants.\footnote{151}

The Transco plaintiffs challenged both the adequacy of the notice accorded them and the absence of a "meaningful opportunity" to rebut the charges against them. The plaintiffs alleged two separate violations of their due process rights. First, they contended that the GSA suspension regulations violate due process to the extent that they can prohibit companies from contracting with the government for up to eighteen months without being afforded a hearing to contest the allegations against them. Secondly, they argued that the suspension notices issued by GSA were so ambiguous as to constitute no notice at all.\footnote{152}

Before addressing the plaintiffs' substantive claims, the court considered whether Transco possessed a cognizable constitutional interest in doing business with the government. The court conceded that the right to bid on federal contracts does not constitute a property interest because procurement statutes are enacted solely for the government's benefit.\footnote{153} Nevertheless, as recognized by the District of Columbia Circuit in \textit{Old Dominion}, a bidder's liberty interest is affected when the bidder is denied a contract based on allegations of fraud or dishonesty.\footnote{154} Having concluded that Transco did in fact have a protected liberty interest affected by GSA's allegations of overcharges and misrepresentation, the court addressed the nature of the hearing which must be held.\footnote{155}

Judge Kennedy recognized that the scope of due process requires balancing the governmental and private interests involved.\footnote{156} In the context of debarment and suspension, the court noted that the government's interests are two-fold: first, its proprietary right to purchase services, and second, its interest in protecting the integrity of a possible criminal prosecution.\footnote{157} These interests, in turn, must be balanced against the con-
tractor's liberty interest in dealing with the government.158

In the court's view, the suspension regulations successfully balance these competing concerns by providing review of the suspension decision by a high-level administrator in accordance with articulated standards, and by allowing the contractor to present information or argument in opposition to the suspension. Unlike Horne Brothers,159 where the plaintiff was given no opportunity to challenge its suspension, the current regulations do provide for rebuttal. The court stated that the right currently provided in the regulations to present information in opposition to the suspension action to the head of the agency or his authorized representative cures the procedural defects criticized by the District of Columbia Circuit in Horne Brothers.160 Nevertheless, the court recognized that this opportunity is meaningful only if the contractor receives notice that is sufficiently specific to enable collection and presentation of relevant rebuttal evidence.161

In light of this finding, the court assessed the notice provided to Transco by the GSA. It determined that the notice was constitutionally deficient both because it was initially in general terms, and because it was later modified to include additional charges. The court stated that proper notice is essential if the opportunity to present information in opposition is to have any meaning,162 especially where, as here, no adversarial hearing is provided.163 In determining what constitutes proper notice, the court relied on Mullane v. Central Hanover Bank & Trust Co.,164 where the Supreme Court stated that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."165 Notice apprises the contractor of the government's allegations so that it may prepare an adequate defense.166

The Sixth Circuit determined that the general notice provided to Transco did not meet established constitutional mandates. Although the

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158. 639 F.2d at 322.
159. 463 F.2d at 1268.
160. 639 F.2d at 322.
161. Id. at 323.
162. Id.
163. Id. at 324.
165. 339 U.S. at 314.
166. 639 F.2d at 323 (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978)). Similar conclusions were reached by the United States Court of Appeals for the District of Columbia in Horne Brothers and Old Dominion.
plaintiffs were notified that their suspension was based on billing irregularities, they were not told the approximate dates of the misbillings or even under which contracts the alleged overcharges had occurred. In addition, Transco had no way of knowing, based on the notice given, how or to what extent the caliber of its employees had been misrepresented.\textsuperscript{167}

At the time of its suspension, Transco was performing numerous contracts at various GSA locations throughout the United States.\textsuperscript{168} The court reasoned that it would be almost impossible for the company to marshal information to refute such a general charge unless it was at least notified of what contracts were allegedly overbilled and the approximate date of those misbillings.\textsuperscript{169} The court also found GSA's allegation that Transco had misrepresented the caliber of its employees constitutionally defective because it failed to state whether qualification or performance misrepresentations were involved, and because it did not state whether the charge applied to employees of Transco-Ohio or to employees of the defunct Transco-Delaware Corporation.\textsuperscript{170}

Relying on \textit{Horne Brothers} and \textit{Old Dominion}, the court concluded that Transco should have been given as specific notice of the charges against it as possible if the opportunity to submit rebuttal information were to have any meaning.\textsuperscript{171} The court recognized the government's need to protect the integrity of its investigation by concealing its evidence. However, it pointed out that this interest and the contractor's interest in obtaining adequate notice need not be mutually exclusive.\textsuperscript{172} Transco could have been advised which bills were irregular and how the caliber of its employees had been misrepresented without tipping the government's evidentiary hand. Finally, the court noted that in camera inspection by the lower court may be appropriate to determine whether the contractor has been afforded as specific notice as possible where the government asserts prejudice to an ongoing criminal investigation.\textsuperscript{173} Through an in camera inspection, the court may review all of the government's evidence, and separate documents which could be disclosed "from those that must remain confidential in order to maintain the integrity of the government's legitimate

\begin{itemize}
\item \textsuperscript{167} 639 F.2d at 323.
\item \textsuperscript{168} \textit{Id. See also supra} notes 15-16 and accompanying text.
\item \textsuperscript{169} 639 F.2d at 323.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Id.} at 324.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Id.} at 325. In camera inspection of at least some of the government's evidence was recognized expressly as a possible means of precluding abuse of discretion by suspending officials by the United States Court of Appeals for the District of Columbia in \textit{Horne Brothers}, 463 F.2d at 1272 & n.9.
\end{itemize}
The court concluded that once an adequate evidentiary showing is made, if sufficiently specific notice is provided to contractors under the guidelines discussed above, and they are given the opportunity to present information in opposition to an administrative suspension, no violation of due process will exist. This will generally preclude suspension based on "mere suspicion, unfounded allegation, or clear error."\(^{175}\)

A. Validity of the Decision

In Transco, the Court of Appeals for the Sixth Circuit became the first appellate court to pass on the constitutionality of the federal suspension regulations. Although Transco was the first company in GSA's history to be suspended without a hearing prior to a formal indictment,\(^ {176}\) it is not likely to be the last in view of the court's approval of the summary suspension provided in the regulations.\(^ {177}\) It is therefore important to assess not only the result reached by the court, but also its rationale, and the questions that remain unanswered in the wake of its decision.

The court correctly held that the notice provided to Transco was constitutionally inadequate, but it refused to hold that the FPR notice requirements per se violated constitutional due process. The applicable regulations merely provide that the notice shall "identify the indictment or describe the nature of the irregularities, in general terms, without disclosing the Government's evidence."\(^ {178}\) The regulations thus do not meet basic constitutional notice requirements\(^ {179}\) nor judicially mandated notice standards in the specific context of debarment and suspension.\(^ {180}\) Although the District of Columbia Circuit did not expressly hold that the regulatory notice provisions were constitutionally inadequate in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*,\(^ {181}\) it implied as much when it stated that the government's attempt to invoke formal suspension procedures to cure the lack of notice in its nonresponsibility determination did not satisfy due process requirements because the suspension regulations did not require specific notice of the charges against the contractor.\(^ {182}\)

\(^{174}\) 639 F.2d at 325.

\(^{175}\) Id. at 324.

\(^{176}\) See supra note 146.

\(^{177}\) See infra notes 195-204 and accompanying text.

\(^{178}\) 41 C.F.R. § 1-1.605-3(a) (1981) (emphasis added).


\(^{180}\) See Old Dominion, 631 F.2d at 967.

\(^{181}\) 631 F.2d 953 (D.C. Cir. 1980).

\(^{182}\) Id.
The court's decision to uphold the regulations' general notice requirements is especially troubling in view of its conclusion that the opportunity to rebut allegations of misconduct is only meaningful when adequate notice is given. It can be inferred that where adequate notice is not given both due process notice requirements and hearing requirements are violated. However, the GSA regulations as approved by the court do not provide for specific notice; therefore, each time a contractor is given such notice and simultaneously refused a hearing, his constitutional rights automatically will be violated. Thus, the court's decision will force subsequent contractors to go to court when they too are given "general notice" as authorized by the regulations. Unfortunately, judicial relief may come too late for a suspended contractor, which, like Transco, conducts a substantial portion of its business with the government. As the United States District Court for the District of Columbia recognized in *Art-Metal*,¹⁸³ it is unreasonable to expect a suspended government contractor to be able to rapidly convert its public sales to the private sector.¹⁸⁴

By approving the FPR suspension regulations, the Sixth Circuit has given the federal agencies and the Congress a blueprint for their current attempts to revise the existing debarment-suspension system.¹⁸⁵ The court's refusal to hold the regulations' general notice requirements unconstitutional, and its failure to articulate appropriate standards for an "adequate evidence" determination are likely to be reflected in the impending revisions to the debarment and suspension regulations.

Transco's opportunity to rebut the charges against it was crucial to the Sixth Circuit's holding that the GSA procedures were not constitutionally defective. In assessing whether the opportunity to present rebuttal information satisfied due process, the court properly recognized that a balanc-


¹⁸⁴. *Id.* at 4. The court stated that "[w]e] would have to be blind to the realities to conclude that *Art-Metal* would be able to shift its long-established commercial patterns to private purchases on essentially a 'moment's notice.'" The difficulties inherent in fashioning appropriate relief many months after the fact of suspension were recognized by the Sixth Circuit. The court was unable to predict whether Transco would have been removed from the suspension list had it received adequate notice and an interim hearing, 639 F.2d 318, 325. *See also Old Dominion*, 631 F.2d at 969. Given the admitted inadequacy of judicial relief in suspension situations, as well as the Supreme Court's command that notice be sufficiently specific, the Sixth Circuit should have ruled the regulatory notice provisions unconstitutional.

¹⁸⁵. *See infra* notes 209-13 and accompanying text. Although the *Transco Security* court upheld the constitutionality of the FPR suspension regulations, the decision is equally applicable to the military agencies because the DAR language is virtually identical to that upheld in *Transco Security*. Compare 32 C.F.R. § 1-605.2(a) (1981) with 41 C.F.R. § 1-1.605-2(a)(2) (1981).
ing of interests must occur whenever an important private interest is affected by governmental action. However, the Transco court limited its analysis to a balancing of the “governmental versus private interest involved.” In so doing, it disregarded the Supreme Court’s more recent adoption of a three-part balancing test requiring consideration of whether the administrative procedures used may result in an erroneous deprivation of private (contractor) interests.

The court concluded, albeit without express articulation, that the risk of erroneous deprivation in Transco’s case was slim since the decision to suspend was to be made by a high administrative official within the suspending agency. While, on its face, due process appears to be served by such a procedure, the court overlooked the fact that in this case Transco would be forced to submit evidence to the same “high level” official who previously refused to provide adequate notice to the contractor without judicial intervention. Moreover, as recognized by the Art-Metal court, there are no guarantees that the “high level” administrator will not be influenced by political or public relations considerations either in making his decision to suspend or in subsequently reviewing a contractor’s evidence in opposition to the suspension.

The possible partiality of the “high level” administrator suggests a second point inadequately addressed by the appellate court. The decision to suspend must be based only on “adequate evidence” of wrongdoing as determined by a high administrative official, as opposed to an adjudicative determination of the validity of the allegations by an administrative law judge or other impartial panel. The “adequate evidence” standard has been analogized to one of “probable cause” by the United States Court of Appeals for the District of Columbia in Horne Brothers. The regulations

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186. This balancing test was articulated by the Supreme Court in Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961). See supra note 126.
188. Indeed, the United States Court of Appeals for the District of Columbia in Old Dominion recognized that a full-blown hearing was not necessary. 631 F.2d at 968.
189. 473 F. Supp. at 1. Further support for questioning the impartiality of agency-debarring officials is found in the case of Peter Kiewit Sons’ Co. v. Army Corps of Eng’rs, 534 F. Supp. 1139 (D.D.C. 1982). In that case, the district court found that congressional criticism prompted the Army to a de facto debarment of Kiewit by denying it contracts for a period of five months, without affording it constitutionally required notice and an opportunity to be heard. The court held that congressional intervention into the debarment process, including ex parte communications, violated Kiewit’s liberty interest. These occurrences prompted the district court to conclude that the integrity of the quasi-judicial debarment process had been compromised.
190. 463 F.2d at 1271. See supra note 105. According to the FPR, the decision to debar or suspend is made by the “executive agency.” 41 C.F.R. § 1-1.604 (1981) (debarment), § 1-1.605 (1981) (suspension). Each civilian agency, in turn, is directed to establish its own inter-
require a determination of "adequate evidence" based on credible evidence, corroborated allegations, and proper factual inferences.191 Agency officials are directed to examine contracts, inspection reports, correspondence, and other pertinent documents in making the determination.192

The "adequate evidence" standard, as set forth in the regulations, is not defined sufficiently to serve as the basis for government blacklisting. Moreover, like the court in Horne Brothers, the Transco court assumes that the determination of adequate evidence will be made by an impartial official. If, however, the contractor is forced to submit evidence in opposition to the same official who determined that adequate evidence for suspension existed, the contractor certainly would not be accorded fair consideration by an impartial decisionmaker.193

The court also failed to give adequate consideration to the available alternative safeguards which protect the government's interests and afford the contractor procedural due process. For example, the government could have promptly instituted formal debarment or criminal proceedings, thus entitling the contractor to a full adversarial hearing and an opportunity for judicial review based upon a record.194 The agency also could have availed itself of the procedures favored by the Justice Department whereby the suspending agency and the prosecutor together review the evidence to be used in a proposed suspension proceeding and make complete disclosure of that evidence sufficient to support a suspension.195

Thus, the court could properly conclude that the opportunity to submit evidence in opposition to the suspension would provide the contractor with procedural due process. However, it should have done so only after concluding that this information would be presented to an impartial, internal procedures implementing the FPR. 41 C.F.R. § 1-1.606 (1981). The GSA supplement to the FPR, the General Services Procurement Regulations (GSPR), provides for a chain of review leading to a suspension determination by a "Service Commissioner," subject to review by the General Services Board of Contract Appeals. Modification or termination of the suspension is permitted only when the Service Commissioner's determination is found to lack a reasonable basis. 191. 41 C.F.R. § 1-1.605(b) (1981) provides:

[i]n assessing whether adequate evidence exists for invoking a suspension, consideration should be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, as well as to inferences which may properly be drawn from the existence or absence of affirmative facts.

192. Id.
195. See Hearings supra note 21, at 437. Information carved out in this fashion will not prejudice a continuing criminal investigation, either because such evidence is already public or because it is not the focus of the criminal investigation.
dependent reviewer, and only upon a showing that alternative remedies other than summary suspension would have protected the government's interests.

III. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION: REGULATIONS IN THE WAKE OF TRANSCO

A. Congressional Initiatives

In view of the serious nature of the sanctions of debarment and suspension, federal agencies in the past have been reluctant to use their power to impose them. Nevertheless, they are being used with increasing frequency. Moreover, further increases in the use of these sanctions are likely as a result of the growing emphasis on eliminating waste and abuse in federal programs.

In March 1981, the Senate Governmental Affairs Subcommittee on Oversight of Government Management held hearings on federal debarment and suspension procedures. The subcommittee concluded that there were three major problems with the existing debarment and suspension system: (1) agencies do not debar or suspend contractors suspected of fraudulent or irresponsible conduct; (2) they fail to take advantage of other agencies' information which previously led to a suspension; and (3) agencies often fail to impose reciprocal suspensions or debarments.

Accordingly, the subcommittee made a series of recommendations to the Interagency Task Force on Debarment and Suspension. The two major

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196. According to the Senate Subcommittee on Oversight of Government Management, DOD debarments increased from a low of 25 in 1975 to a high of 39 in 1980. GSA statistics reflect the greatest increase in debarments and suspensions, with 29 debarments and 42 suspensions in 1980, compared to no suspensions and 13 debarments in 1978. Id. at 463.

197. The political pressures for curbing fraud and waste within the federal bureaucracy are exemplified by the Senate Subcommittee on Oversight of Government Management's recent hearings in this area. See supra note 21. A further example of fraud, waste, and abuse prevention efforts is the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978), 5 U.S.C. app. 1 (Supp. V 1981), which established Offices of Inspector General within the Departments of Agriculture, Commerce, Housing and Urban Development, Interior, Labor, and Transportation, and within the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans Administration. The various Inspectors General were given a broad statutory mandate to audit and investigate the agencies' overall operations.

198. SENATE COMM. ON GOVERNMENTAL AFFAIRS, SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT, 97TH CONG., 1ST SESS., REFORM OF GOVERNMENT-WIDE DEBARMENT AND SUSPENSION PROCEDURES 11 (Comm. Print 1981) [hereinafter cited as COMM. REP.].

199. The task force was established by OFPP to assist in developing the debarment and suspension provisions. Id. at iii.
changes urged by the subcommittee were (1) that new government-wide debarment and suspension regulations be issued making debarments and suspensions by one agency binding on all other agencies; and (2) that the GSA debarred-suspended bidders list be updated daily and distributed quarterly (as opposed to the current practice of semiannual distribution). The subcommittee also urged that contracting officers be prohibited from awarding contracts to listed bidders absent compelling circumstances, and that the Justice Department issue a policy statement encouraging agencies to pursue administrative sanctions when sufficient evidence of fraud or poor performance exists.

Finally, the subcommittee announced plans to consider legislation that would establish a statutory presumption of validity for individual agency suspensions and debarments. According to the subcommittee report, legislation would serve both to clarify the underlying statutory basis for such action and demonstrate congressional recognition of the importance of this subject.

B. Proposed Office of Federal Procurement Policy Guidance

In response to these congressional criticisms, the Office of Federal Procurement Policy (OFPP) has issued Policy Letter 81-3 setting forth government-wide debarment and suspension rules which incorporate the Senate Oversight Subcommittee's recommendations. The Policy Letter also establishes a uniform framework of causes and procedures for debarment and suspension actions. The new rules attempt to satisfy due process requirements by providing for notice and “fact-finding proceedings” if the debarment or suspension is not based on a conviction or indictment. Fact-finding proceedings (not necessarily a hearing) are not guaranteed, how-

200. Id. at 18-20.
201. Id. at 18.
202. Id. at 19. The full Congress has already acted to make civilian agencies' debarments and suspensions binding on the Department of Defense. Section 914(a) of the 1982 Defense Authorization Act, Pub. L. No. 97-86, 95 Stat. 1099 (1982), prohibits the military agencies from dealing with contractors who have been debarred or suspended by other agencies, absent a determination by the Secretary of the procuring agency that there are “compelling reasons” to award to the debarred or suspended firm.
203. Id. Senate Governmental Affairs Subcommittee member Carl Levin (D-Mich.) subsequently introduced S. 1882, patterned on the 1982 Defense Authorization Act provisions, discussed infra at note 215, which would prohibit all federal agencies from “soliciting offers from, awarding contracts to, extending contracts with, or approving subcontracts for any person who has been debarred or suspended by another agency,” 97th Cong., 1st Sess., 127 CONG.REC. 13,937-38 (1981). The bill is currently pending before the Senate Governmental Affairs Committee.
ever. They will be conducted only if the contractor's information or arguments submitted in opposition to the proposed action raise a genuine dispute over the material facts.\textsuperscript{205}

The Policy Letter also provides guidance to the agencies on two issues not addressed by the interagency task force. First, it recognizes that debarment or suspension of a contractor by one agency may have a serious impact on other agencies' operations. If such is the case, agencies are urged to coordinate their actions, perhaps with one agency designated as the lead agency for making debarment or suspension decisions.\textsuperscript{206} Second, the Policy Letter advises agencies to use their regulatory and statutory authority to withhold payments due under a contract in order to recoup funds paid as a result of fraud or other misconduct.\textsuperscript{207}

\textbf{C. Problems With the Proposal}

Technically OFPP's authority to require an agency to debar or suspend a contractor government-wide is questionable since each agency's right to suspend or debar is grounded in its general procurement authority which does not extend to purchases by other agencies. As a practical matter, however, each agency will implement this policy suggestion in its own regulations,\textsuperscript{208} and thus will be acting under its own procurement authority.

More importantly, the proposed procedures do not meet the due process requirements established by the United States Court of Appeals for the District of Columbia\textsuperscript{209} and by the Sixth Circuit Court of Appeals in \textit{Transco}. These cases basically hold that a contractor must be given \textit{specific notice} of the charges against it and the opportunity to defend against the charges. The proposed regulatory coverage merely provides that irregularities be described "in terms sufficient to place the contractor on notice without disclosing the Government's evidence."\textsuperscript{210}

The courts have also addressed the \textit{type of hearing} that a suspended contractor must receive. In general, contractors are entitled to an opportunity to present evidence and cross-examine witnesses.\textsuperscript{211} Although the proposed rules contemplate such a procedure, a hearing is not guaranteed;

\begin{itemize}
\item \textsuperscript{205} \textit{Id.} at 37,837.
\item \textsuperscript{206} \textit{Id.} at 37,833.
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} In adopting their own debarment and suspension regulations, patterned on the Federal Procurement Regulations, many civilian agencies have sought to tailor these regulations to their individual procurement needs. For a list of the various agency debarment and suspension regulations, see \textit{Comm. Rep., supra} note 197, at 4 n.5.
\item \textsuperscript{209} See \textit{supra} notes 89-107 and accompanying text.
\item \textsuperscript{210} \textit{46 Fed. Reg.} at 37,837 (1981).
\item \textsuperscript{211} See \textit{Gonzales}, 334 F.2d at 578.
\end{itemize}
instead one will be held only when the suspending official, not necessarily a lawyer or Administrative Law Judge, concludes that the contractor's submission raises a dispute of material fact. Thus, a hearing could be denied solely on an agency representative's interpretation of the facts.

As is the case under the current regulations, Policy Letter 81-3 provides different standards of proof for debarment and suspension. A debarment which is not based on a conviction must be proved by substantial evidence; whereas the lesser sanction of suspension need only be proved by adequate evidence. The adequate evidence standard has been analogized to "probable cause" by the courts. OFPP's proposal, however, would base the determination of adequate evidence on how much information is available and whether "important allegations" are corroborated. This minimal definition arguably conflicts with the Horne Brothers dicta, and it provides no guarantee that suspension will not be arbitrary or capricious.

Two additional provisions of the proposed procedures deserve attention. First, the Policy Letter deletes that portion of the current regulations which affords agencies discretionary authority to impose debarments and suspensions on a case-by-case basis. This omission could conceivably allow debarring officials to infer that these sanctions must be imposed automatically. Such a construction would run counter to existing district court and contract appeals board precedents. Second, the Policy Letter gives the debarring official the discretion to extend the debarment sanction to affiliates, provided they are given written notice of the proposed debarment and an opportunity to respond to the issue "of their status as affiliates."

212. See supra note 204. The American Bar Association House of Delegates has approved a recommendation by the Public Contract Law Section urging that Congress enact a Debarment and Suspension Reform Act designed to cure what are viewed as "widespread deficiencies in notice, opportunity for evidentiary proceedings and combinations of prosecutorial and judicial functions." Among the changes recommended by the ABA is that government-wide debarment and suspension determinations be made by an independent Debarment and Suspension Board of administrative judges. 9 Gov't Cont. Rep. (CCH) ¶ 92,563 (1982).

213. See Horn Brothers, 463 F.2d at 1271.

214. See 41 C.F.R. § 1-1.604(b)(2) (1981), stating that existence of a cause for debarment does not require that a firm or individual be debarred. Rather, the decision is in the agency's discretion and it must consider the seriousness of the offense and all mitigating factors. See also 32 C.F.R. § 1-604.1 (1981).


216. 46 Fed. Reg. 37,836 (1981). The proposed guidance also extends the definition of affiliates to individuals who directly or indirectly own, manage, or control the debarred company in whole or in part. Id. at 37,834. The Policy Letter states that: business concerns or individuals are affiliates if, directly or indirectly: (1) either one owns, manages, directs, or controls the other in whole or in part, or has the power
opportunity is insufficient in view of the severity of the sanctions to be imposed. It is inequitable to automatically attribute to all affiliates knowledge and responsibility for the particular facts with respect to any given procurement, and this approach reflects an unrealistic view of today's complex corporation structures. The Office of Federal Procurement Policy should provide a standard for judging a corporate or individual affiliate's culpability with respect to the debarment causes, and allow affiliates to challenge both their status as affiliates and the underlying causes and scope of the debarment.

D. Recommendations

At the very least, the proposal should be amended to provide for more uniform and equitable procedures. Equity requires that government-wide debarment and/or suspension should not be a one-way street. Accordingly, OFPP should consider developing a mechanism whereby clearance by one agency would give rise to a rebuttable presumption that the contractor be cleared by all agencies. Such a provision would make the binding nature of debarments and suspensions more balanced. Further, it would save contractors from having to clear themselves before every federal agency following a government-wide debarment or suspension.

In addition, the terms “affiliate” and “adequate evidence” should be more clearly defined, and the hearing procedures should be amended to expressly provide for production of witnesses and cross-examination. These changes are crucial to insure adequate due process.

Finally, it is essential that minimum qualifications be established for officials responsible for debarment and suspension determinations and that such officials be competent, independent adjudicators of the facts. It makes little sense to give the contractor an opportunity to respond to allegations of wrongdoing if the functions of prosecutor, grand jury, and judge rest in a single official. To preclude this result, and in order to provide specific notice and adequate hearing procedures for suspended contractors, OFPP should reappraise its approach prior to adopting the proposed debarment and suspension regulations. As Judge Green pointed out, the public interest in assuring honest, efficient government is not served through contractor blacklisting based on mere suspicion.217

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IV. Conclusion

In Transco Security, Inc. of Ohio v. Freeman, the Sixth Circuit Court of Appeals upheld the constitutionality of the FPR suspension regulations, concluding that the opportunity to submit information in opposition to a suspension action constituted a "meaningful opportunity" to be heard. The court ruled that where all the proper procedures are followed, a potential eighteen-month suspension is not constitutionally defective.

The Sixth Circuit's rationale is flawed in three major respects. First, its conclusion that the opportunity to submit information in opposition to a suspension constitutes a meaningful opportunity to be heard is based on the erroneous premise that agency officials can equitably serve as prosecutor, grand jury, and judge. Second, although the court correctly determined that the notice given to Transco was constitutionally defective, its refusal to hold the suspension notice procedures themselves unconstitutional will force other contractors to seek judicial relief when they too are given "general notice" as authorized by the regulations. Thus, the court's decision virtually guarantees additional litigation as more and more contractors are suspended prior to indictment. Finally, the court's decision left unanswered a number of questions regarding the method of determining whether "adequate evidence" to suspend exists. As a result, the Executive Branch and Congress have attempted to fill this gap with proposed regulations that evidence a clear disregard for contractors' due process rights.

To avoid the Alice in Wonderland result of "sentence first—verdict afterwards," contractors must be given specific notice and a meaningful opportunity to rebut the charges against them. The power to debar or suspend may destroy a contractor who, like Transco, does a substantial amount of its business with the government. The general public, as well as federal contractors, have an interest in assuring that these administrative sanctions are exercised fairly.

V. Epilogue

As this Note went to press, the Office of Federal Procurement Policy issued its government-wide debarment, suspension, and ineligibility rules in final form. The revised Policy Letter 82-1 is scheduled to take effect on September 1, 1982. The Policy Letter retains the basic concept of government-wide debarment and suspension by providing that a contractor who is not responsible to do business with one agency is not responsible to

218. Id.
do business with any agency.  

A number of revisions have been made in the final version of the rules, presumably in an attempt to provide contractors with a measure of protection against unwarranted debarments and suspensions. For example, the standard for debarment has been changed to a "preponderance of the evidence" as opposed to "substantial evidence," and the "adequate evidence" standard for suspension proceedings has been clarified to some extent.  

"Adequate evidence" is now defined as "information sufficient to support the reasonable belief that a particular act or omission has occurred." Finally, suspended contractors will be able to "appear with counsel, submit documentary evidence, present witnesses and confront any person the agency presents" provided the suspension is not based on an indictment and that a hearing would not prejudice pending or contemplated legal proceedings.

Despite these changes, however, the OFPP's rules fall short of providing contractors with adequate due process. Although additional safeguards have been added to the hearing procedures, a hearing following suspension is still not guaranteed. Rather, a hearing is conditioned on a determination that the contractor's submission in opposition raises a genuine material factual dispute. Moreover, the required notice remains nonspecific, and qualifications for debarring and suspending officials are left to the agencies' discretion.

OFPP has asserted that the Policy Letter provides adequate procedural safeguards for contractors. It remains to be seen how the courts will react when confronted with the first judicial challenge to the new rules.

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220. Id. at 28,855.
221. Id. at 28,855-86.
222. Id. at 28,857.
223. Id. at 28,860.
224. Id.
225. Id.
226. Id. at 28,857.
227. Id. at 28,855.