

DoD Cautions Congressional Commission About "Automatic Suspension" Proposal

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Ashton B. Carter, Under Secretary of Defense for Acquisition, Technology and Logistics, expressed caution about a proposal to make contractor suspensions "automatic" in a recent statement before the Commission on Wartime Contracting.

The proposal was one of 32 recommendations made by the Commission on Wartime Contracting in Iraq and Afghanistan's Second Interim Report to Congress, dated February 24, 2011. In its Interim Report, the Commission concluded that agencies' "failure to effectively use suspension and debarment tools" has contributed to an environment "where contractors misbehave with limited accountability." Interim Report at 4. The Commission expressed particular concern that entering into administrative agreements with contractors in lieu of suspension or debarment could result in "wasted" taxpayer dollars and "compromised" mission objectives. Interim Report at 50. As a result, Recommendation 24 includes the recommendation that Congress "[m]ake suspension actions based on contract-related indictments mandatory for a predetermined time, not subject to the suspension-and-debarment official." Interim Report at 51.

By contrast, the ABA's Section of Public Contract Law recommended in February that the ABA adopt a resolution *opposing* any legislation mandating such "automatic" suspensions or debarments. The Section's Resolution notes that recently proposed legislation, such as the Student Aid and Fiscal Responsibility Act of 2009 (H.R. 3221) and the 2010 Overseas Contractor Reform Act (H.R. 5366), could significantly expand the use of "statutory debarments." The Resolution contends that these kinds of proposals not only undermine the discretion historically afforded suspension and debarment officials, but also threaten due-process principles currently embedded in suspension and debarment regulations.

DoD has now added its voice in opposition to recent efforts to expand statutory debarments. In his March 28 prepared statement before the Commission on Wartime Contracting, Carter cautioned the Commission against its "automatic suspension" recommendation:

The Department has consistently advocated the policy that Debarring and Suspension Officials need to treat each case on its own facts and circumstances. There is a potential unintended consequence of turning suspensions and debarments from tools to protect the government's interest into tools that automatically

punish contractors. Such an approach may have a chilling effect on contractor cooperation in identifying and fixing real problems including those that affect the health and safety of our personnel.

Carter concluded that "[w]e need to preserve the discretion of our officials to determine on a case-by-case basis what makes the best sense."

The Commission's final report is due to Congress in July 2011.