

How Gov't Use Of Suspension And Debarment Has Evolved, Law360

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The Interagency Suspension and Debarment Committee, or ISDC, released its combined report for fiscal years 2021 and 2022 to Congress in the waning days of 2023. Though the committee is not yet current on its annual reports because the 2023 fiscal year report is pending, issuing two fiscal years of delayed reports at once is tremendously helpful, as the government contracting community seeks to understand the risks posed by suspension and debarment.

Government insight is helpful here because suspension and debarment are among the largest nonfinancial risks government contractors face. The government can exclude contractors from additional awards and option extensions before ever asking the contractor to give its side of the story.

The consolidated report — addressed to the chairs and ranking members of the U.S. Senate Homeland Security and Governmental Affairs Committee, Sens. Gary Peters, D-Mich., and Rand Paul, R-Ky., and the U.S. House Oversight and Government Reform Committee, Reps. James Comer, R-Ky., and Jamie Raskin, D-Md. — was issued under the annual reporting requirements of Section 873 of the Duncan Hunter National Defense Authorization Act.

Under the act, the ISDC is required to include three topics in an annual report to Congress: (1) progress and efforts to improve the suspension and debarment system, (2) member agencies' active participation in the committee's work, and (3) a summary of each agency's activities and accomplishments in the governmentwide debarment system.

This article analyzes several of the more important points in the combined ISDC report affecting government contractors.

On the whole, the ISDC report details a pandemic-driven dip in overall numbers of referrals and exclusions during fiscal year 2021, and a rebound in fiscal year 2022. There is also a continued trend toward alternatives to exclusions, such as prenotice interactions like show-cause letters or letters of concern, and a marked increase in the number of administrative agreements in lieu of exclusions. More specifically, in fiscal year 2021, the number of administrative agreements tripled.

But there are also some important changes to the government's suspension and debarment operations noted in the report that are relevant to government contractors' understanding of their risks.

First among them is an acknowledgment that suspension and debarment is no longer a sole focus for some agency staff.

Whereas the U.S. Government Accountability Office found in its 2013 report, "Suspension and Debarment: Characteristics of Active Agency Programs and Governmentwide Oversight Efforts," that "dedicated suspension and debarment program and staff" was an important component of highly active programs, suspension and debarment practice has changed in the past decade.

By contrast, the report for fiscal years 2021 and 2022 indicates that additional responsibilities, including "competing demands for unrelated duties and roles," affected the total number of suspensions and debarments.

Second is the continuing, significant shift from reactive suspensions and debarments to more proactive engagements. The ISDC credits ongoing outreach by the ISDC to the broader community — and, of course, by ISDC member agencies — for ushering in this change. The report notes that the use of prenotice letters increased by 56% from fiscal year 2020 to fiscal year 2022.

Third, in multiple places, the ISDC report mentions the importance of promoting "competition and retention of jobs for America" as justifications for the use of alternatives to exclusion such as administrative agreements.

These mentions had additional caveats that competition and American jobs were "especially important [considerations] during the pandemic," but it is difficult to see how these important considerations will fade in the future. They will continue to be important and necessary considerations for government suspension and debarment practitioners.

Additional items highlighted in the ISDC report and therefore of importance to the government suspension and debarment community included:

- Increased numbers of suspension and debarment actions resulting from COVID-19-related fraud, with 14 agencies issuing such actions during the reporting period;
- Efforts to support implementing National Security Presidential Memorandum 33 concerning U.S. government-supported research and development, and other efforts addressing foreign-affiliation fraud;
- Continued efforts to harmonize procedures between procurement and nonprocurement exclusions;

- An "increase in new types of cases, including cases that are more complex" and therefore — presumably — taking more agency time and effort to resolve; and
- A need for government training concerning "unsolicited third-party submissions during suspension and debarment proceedings."

So what should government contractors take away from this ISDC report? The key learning points are:

- Suspension and debarment remains a threat to their businesses and a possible government remedy for alleged misconduct;
- Proactive engagement with suspending-and-debarring officials is becoming increasingly common;
- When exclusions happen, they have become more complex and therefore may take longer to resolve; and,
- Suspension and debarment is increasingly one of many job duties of government staff rather than their primary focus, which may prolong the timeline for resolving exclusions.

Going a level deeper, how should government contractors and grant recipients adjust their internal controls to deal with the information in this ISDC report? The answer depends on the source of the company's federal funds.

The announcement of an ISDC focus on suspension and debarment for foreign influence means that recipients of federal research dollars have an additional reason to closely monitor their funding sources and researchers. Additionally, as best practice, recipients of federal funding would be well advised to consider disclosing suspected violations to the suspending-and-debarring official at the agency that provides the most annual funding, in addition to any other disclosure that may be required.

Bringing misconduct to the attention of the relevant suspending-and-debarring official affords the disclosing entity a vitally important chance to tell its side of the story, and explain any mitigation and remediation efforts taken. By explaining how the recipient of federal funds acted responsibly notwithstanding the alleged misconduct, disclosures offer a rare but vitally important opportunity to shape the issue and attempt to avoid suspension or debarment.

Government contractors should also review which agency is likely to lead any suspension and debarment consideration, and become familiar with the agency's tendencies. The lead agency is most often the largest federal customer of a particular contractor, but it can also be the agency with the closest nexus to any misconduct.

Analyzing likely lead agencies according to their published activity in the ISDC report allows contractors to understand how active the agency is in suspending or debarring contractors, whether

the agency frequently engages with the contractor before issuing a suspension or debarment notice and whether the agency is likely to offer an administrative agreement instead of suspend or debar.

All these are important considerations when deciding how early to disclose misconduct and in what level of detail.

It is an unfortunate reality that the government and contractors work at different speeds when it comes to suspensions and debarments.

Contractors naturally want the matters resolved as quickly as possible. The government's process is slower and the ISDC report makes clear that other duties have been imposed on suspension and debarment staff, meaning exclusions are likely to proceed even more slowly through the system.

Proactive disclosures and prenotice interactions are among the best methods for contractors to avoid suspensions and debarment. Knowing the tendencies of lead agencies is perhaps the most important learning point that ISDC reports offer contractors.

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