

Government Contracts Update

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A New Report, But the Same Approach to Assessing the Federal Suspension and Debarment Program

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On March 5, 2014, the Interagency Suspension and Debarment Committee (ISDC) released its report on the status of the federal suspension and debarment system for Fiscal Years 2012 and 2013. The report "discusses the ISDC's progress and efforts to improve the suspension and debarment system by ensuring the fair and effective use of suspension and debarment," "provides data for FY 2012 and FY 2013 on agency suspension and debarment activities," and highlights "[i]ndividual agency activities and accomplishments." The report, however, largely focuses on the number of suspensions and debarments across the federal landscape, thereby fostering a culture within the government that equates the total number of actions to progress. To this end, contractors, grantees and other recipients of federal funds must tread carefully when identifying and addressing missteps.

Specifically, with respect to ensuring the fair and effective use of suspension and debarment, the report notes that all Chief Financial Officers Act agencies:

- Have "an accountable official for suspension and debarment activities," generally a suspending and debarment official (SDO);
- "[T]ook steps to address resources, policies, or both to strengthen the consideration of suspension and debarment," such as "formally establishing suspension and debarment programs;"
- Have "internal agency controls in place to support their suspension and debarment efforts," which in turn, increase "transparency and consistency among agency programs;" and
- Have "procedures to forward actions to the [SDO], and to track referrals with the assistance of an automated case management system."

Department of Defense (DoD) agencies continue to refine their practices. For example, the Navy is actively pursuing "fact-based debarments of recipients who had been terminated for default...or had mischarged costs against Navy contracts." The Air Force, on the other hand, is "utilizing tools that enhance transparency and due process," such as "requests for information, show cause letters, and terminations with conditions." Indeed, from FYs 2012 to 2013, the Air Force has tripled its use of show cause letters.

The report also touts the progress of civilian agencies. For example, the Agency for International Development "received a positive review of its suspension and debarment program from its [Office of Inspector General]," and the Department of Commerce "invigorat[ed] its Suspension and Debarment Program." Over the past five years, NASA has taken more than six times as many administrative actions as it did in the preceding eleven years combined, and the Department of Interior has more than nine times more administrative actions in the past four years than the prior seven years combined.

The ISDC "continues to reinforce the principles of fairness and due process by promoting best practices that enhance transparency and consistency in the Government-wide system," including (1) maintaining "an online library of documents" that includes, among other things, "a sample practice manual and action documents," (2) coordinating the mentoring of agencies with well-established suspension and debarment processes, (3) offering "various other forms of training," and (4) launching "an **enhanced web portal**."

Concerning the data for FYs 2012 and 2013, the reported activity levels "indicate a continued upward trend from the last reporting period and a significant increase when compared to FY 2009." Indeed, the numbers of suspensions for FYs 2012 and 2013 were 836 and 883, respectively, and the number of proposed debarments increased from 2081 to 2244 from FY 2012 to 2013. Similarly, the number of administrative agreements has grown from 54 to 61 between FYs 2012 and 2013. In contrast, the number of debarments decreased slightly from 1722 to 1715 from FY 2012 to FY 2013, though both numbers still represent a marked increase from prior fiscal years. Declinations also decreased from 203

to 154 over the same time period.

A possible explanation for the general upward trend is the growth in referrals, which increased by about 6% from 3715 to 3942 for FY 2012 to FY 2013. However, the report attempts to caution against placing too much emphasis on such indicators: "[The] ISDC does not consider the overall number of suspensions and debarments as a metric of success," but rather, "encourages individual member agencies...to review their own individual trends to determine if the level of activity is reflective of what is necessary to protect their agency and the government from harm."

While the ISDC generally touts "progress" and improvement across the federal government's suspension and debarment landscape, the focus and primary metric for this conclusion remain the same – the total number of administrative actions. This simplistic focus is problematic, as it treats all bases for suspension and debarment as equal. For example, no distinction is made with respect to the bases for action. Consequently, agencies are encouraged to simply increase their numbers (*i.e.*, improve their program) by pursuing administrative actions against the easiest "targets," *i.e.*, those entities with relatively minor violations that meet the most basic basis for action. Such an approach to suspension and debarment is not the best use of resources to truly safeguard federal funds, as it essentially equates increased debarments with increased protection of such funds.

We hope that over time the ISDC and, to a greater extent, Congress recognize that assessing business interests and present responsibility is more than just a tabulation of actions, and is, in fact, a reasoned judgment based on a totality of circumstances. Unfortunately, in the meantime, contractors, grantees and other recipients of federal funds must be mindful that the most innocuous non-compliance issues could transform into a serious administrative action in the name of "progress" and "improvement."

If you have any questions concerning this alert, please reach out to [Dismas Locaria](#) at 202.344.8013 or [Elizabeth A. Buehler](#) at 202.344.4041.