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Contractor Accountability

Taking the Long View on the Interagency Suspension & Debarment Council's Latest Report



BY KARA M. SACILOTTO AND CRAIG SMITH

In early March 2014, the government's Interagency Suspension & Debarment Committee ("ISDC") released its latest report to Congress on the suspension and debarment ("S&D") activities of its member agencies. It is tempting to open the report, scroll down to the statistics on S&D actions taken by the agencies, and judge S&D's effectiveness based on figures such as year-over-year changes in total S&D actions. But doing so gives short shrift to the ISDC's activities and mission and the improvements many agencies have made to their S&D programs.

A broader review of the ISDC report, and a comparison with years covered by prior reports, shows that in just a few years, the ISDC has made significant progress in promoting and strengthening the S&D remedies across the government. For example, the report shows how the infrastructure for S&D has grown at all agen-

cies, thereby allowing S&D to become a fairer, more transparent, and more consistently-applied remedy. Although the report also shows that overall S&D actions have increased over the past five years, such statistics are not signs of success unto themselves. Rather, the increase in S&D activities reflects the broader structural improvements detailed throughout the report. The advances span numerous agencies, reflecting the many improvements agencies have made to their S&D programs in response to past Government Accountability Office ("GAO") reports and criticisms by Congress, discussed below. Indeed, with these reported improvements, it warrants asking whether wholesale upheaval of the S&D system, such as proposed by the Stop Unworthy Spending ("SUSPEND") Act, is really necessary.

Background on S&D and the ISDC

Agencies use S&D remedies to ensure that the government contracts only with "responsible" contractors. With these remedies, which are all discretionary, agencies can exclude a contractor from new government contracts and subcontracts temporarily (suspension) or for fixed periods of time (debarment) until the contractor can demonstrate its present responsibility. While a contractor is suspended, debarred, or proposed for debarment, its exclusion from contracting applies government-wide and also extends to non-procurement awards such as grants (and vice versa). Procurement-related S&D regulations are located at Part 9 of the Fed-

Kara M. Sacilotto is a partner in Wiley Rein's Government Contracts Practice. She has extensive experience in government contracting, has taught as an adjunct professor at George Mason University School of Law, has testified before Congress on procurement policy matters, and is active in the ABA Section of Public Contract Law. Craig Smith is an associate in Wiley Rein's Government Contracts Practice.

eral Acquisition Regulation (“FAR”); non-procurement regulations are at 2 C.F.R. Part 180.

The ISDC acts as a government-wide body to coordinate S&D activities among agencies.

The committee was created in 1986 to monitor implementation of Executive Order No. 12549, relating to non-procurement matters, and later expanded to cover procurement-related matters. The ISDC now counts as members all 24 executive agencies covered by the Chief Financial Officers (“CFO”) Act and also 18 independent agencies and government corporations. The members discuss S&D policy, share best practices, and promote fairness and due process in S&D proceedings. The ISDC members also work together to identify the appropriate “lead agency” for a potential S&D matter when more than one agency may have an interest in whether a contractor is excluded from future awards.

The report released on March 5, 2014, was the third prepared by the ISDC. This most recent report covered the ISDC’s activities for fiscal years (“FY”) 2012 and 2013. The ISDC released its first report to cover FYs 2009 and 2010 together and subsequently released a report on FY 2011. The ISDC has been required by Section 873(a)(7) of the 2009 National Defense Authorization Act, Pub. L. No. 110-417, to prepare these reports on “the progress and efforts to improve the suspension and debarment system,” agencies’ activities within the ISDC, and the agencies’ S&D “activities and accomplishments.”

Reported Growth in S&D Infrastructure

The new ISDC report shows that for the first time, all 24 CFO Act agencies have a common set of basic S&D infrastructure. For instance, each of the 24 CFO Act agencies reported having an official accountable for S&D activities, in most cases a formally-designated suspending and debarring official (“SDO”). All 24 agencies also reported internal controls for S&D such as standard operating procedures, which improve transparency and consistency across matters, and regular coordination with other activities in the agency, such as an inspector general (“IG”). All 24 agencies also reported having referral procedures for possible S&D matters and having automated systems for managing matters under consideration. Further, all 24 agencies reported augmenting their S&D policies or resources (or both). These efforts ranged from establishing an S&D program for the agency to revising the agency’s existing referral procedures, a change likely to encourage more referrals.

The new ISDC report shows that agencies have expanded their S&D toolkits as well. One example is show cause notices, which the report describes as “a tool to gain information from a company when the SDO has sufficient information to move forward with a suspension or debarment, but allows the company additional due process prior to the initiation of formal administrative proceedings under FAR Subpart 9.4.” In the first ISDC report, covering FYs 09 and 10, either seven or eight¹ agencies reported using show cause notices; in

¹ The ISDC report for FYs 09 and 10 lists on pages 4-5 seven agencies that use show cause notices. On a table at page 12 of the same report, an eighth agency, the Department of Homeland Security, is identified as using show cause notices. It is unclear from the report which count is correct.

the current ISDC report, fifteen agencies reported using them.² Similar growth appears in the use of administrative agreements, which are agreements reached between an agency and a contractor in lieu of suspension and debarment and which provide assurances to the agency of future compliance. In the report for FYs 09 and 10, six agencies reported entering into administrative agreements; by the time of the current report, eighteen agencies reported using these agreements.

The current ISDC report notes positive developments at individual agencies, too. The Agency for International Development (“AID”) reports that its IG gave “a positive review” to AID’s S&D program just a few years after issuing a report critical of the program. The Department of Commerce instituted an S&D case tracker and conducted training for personnel as part of a broader effort to “invigorat[e]” S&D at the department. The Department of Health & Human Services (“HHS”), for its part, set up a formal S&D program with dedicated staff. These and numerous additional examples of developing infrastructure at civilian agencies are described in the new ISDC report.

Department of Defense agencies have expanded their programs as well, according to the ISDC report. The Navy reported pursuing fact-based debarments for default terminations and mischarging, the Army revised its regulations to better guide its personnel on S&D, the Air Force rolled out new tools aimed at improving transparency and due process, and the Defense Logistics Agency used its S&D remedies to advance its push against counterfeit and non-conforming parts.

Reported Statistics on S&D Activities

The latest ISDC report includes statistics for the 24 CFO Act agencies, and these numbers show marked increases in S&D activities government-wide from the first ISDC report. Indeed, in looking across fiscal years, the ISDC member agencies collectively more than doubled their total suspensions, debarments, and proposed debarments between FY 09 and FY 13,³ with the increases coming early and then holding steady over the past three fiscal years:

<i>Actions</i>	<i>FY 09</i>	<i>FY 10</i>	<i>FY 11</i>	<i>FY 12</i>	<i>FY 13</i>
Suspensions	417	612	928	836	887
Debarments	669	973	1,633	1,722	1,696
Proposed Debarments	750	1,265	1,718	2,081	2,229
<i>Total</i>	<i>1,836</i>	<i>2,850</i>	<i>4,279</i>	<i>4,639</i>	<i>4,812</i>

The ISDC report rightly cautions over-emphasis on these statistics, noting that it “does not consider the overall number of suspension and debarments as a metric of success,” because S&D activity during each year “is purely a function of circumstance and need.” Still, it is hard to ignore the increase in S&D actions at some agencies over the past five years. As examples, the De-

² When tallying agency activity, we counted DoD and its components (the Navy, Army etc.) as a single agency even though the components have their own independent, and robust, S&D programs.

³ The new ISDC report notes that data from the FYs 09/10 and 11 reports were found to require revision. The new report also has inconsistencies in the data reported for FY 13. We used the figures in the graphs on pages 14-15 and the table on page 20 rather than the small table on page 9.

partment of State took 96 actions in FY 13, up from eight in FY 09; the Department of the Interior took 88 actions in FY 13 compared with 13 in FY 09; and the Department of Transportation took 114 actions in FY 13 versus 15 in FY 09. Some smaller increases were notable also: the departments of Commerce and Treasury, which between them took a single S&D action in FY 09 and FY 10 combined, increased such actions to eight and four actions, respectively, by FY 13.

The S&D numbers do not tell the whole story, however, and in some cases the numbers may obscure progress. The Social Security Administration (“SSA”) provides an apt example. The SSA reported zero suspensions, debarments, and proposed debarments for each of the five fiscal years covered by the ISDC reports. Over this time, however, the SSA has added policies and procedures for S&D and also a case-management system for S&D matters—new and important infrastructure not captured by a tally of S&D actions—and reported issuing show cause notices/pre-notice investigative letters in FYs 12 and 13. The report’s data also suggest the SSA could next build out its referral processes and training, because the agency did not report any referrals in the current report for (FYs 12 and 13) or the initial report (for FYs 09 and 10).⁴

The ISDC Report and S&D ‘Reform’

The ISDC report shows real progress and organic development of S&D programs tailored to agencies’ individual business needs. This development has been important because, over the past several years, the GAO, agency IGs, and other groups have identified flaws and gaps in S&D practices at individual agencies and government-wide.⁵ These gaps ranged from significant problems (such as contract awards made to suspended and debarred contractors) to proposals for refinements (such as improving transparency of robust programs).

Based on these reports from the GAO and other sources, reforms large and small have been proposed in Congress and elsewhere seemingly every six months for the past few years. The most recent noteworthy ex-

ample is the SUSPEND Act, a bill currently before the House of Representatives.⁶ The SUSPEND Act would consolidate civilian agencies’ S&D functions at a single board housed in the General Services Administration to, as the act states, improve the transparency, efficiency, consistency, fairness, and agency engagement in S&D. These are laudable goals, yet they would represent the very types of improvements now being made in large measure in response to the efforts of the ISDC.

Continuing the progress the ISDC has made is a better path to achieving transparency, efficiency, and engagement than the wholesale change reflected in the SUSPEND Act. S&D actions are discretionary. They require consideration of fact-intensive scenarios that look backwards at the actions that triggered the S&D inquiry, horizontally at the contractor’s responsibility at present, and forward to any remedial measures designed to ensure an ethical and responsible culture. They also require business judgment that recognizes the different and competing needs of each individual agency. These essential features of suspension and debarment can be preserved through strengthening the remedy within agencies at paces of development appropriate to each agency’s needs. These features might not be preserved, or preserved as well, if each agency has a generic S&D system divorced from individual agency business considerations, such as the consolidation proposed via the SUSPEND Act.

Conclusion

The ISDC’s latest report highlights growth and development of the S&D remedies over the two covered fiscal years (2012 and 2013) and across a longer, five-year horizon. The report shows that the ISDC’s members have heard past criticisms and worked together to build the S&D infrastructure and awareness at many agencies while refining already-robust programs at others. To be sure, room for further improvement remains at agencies with longstanding, robust programs and at those with newer programs. Nonetheless, the ISDC report shows that these types of improvements are being made and that there is no pressing need to scrap the S&D system in favor of a one-sized-fits-all replacement. Indeed, the report shows quite the opposite—that agencies should be allowed to continue developing their own S&D programs tailored to each agency’s business needs. That is just what the ISDC is in place to do.

⁴ The FY 11 ISDC report did not include referral statistics.

⁵ See, e.g., Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds, GAO Report No. 09-174 (Feb. 2009); DOD IG Report D-2011-083, Additional Actions Can Further Improve the DoD Suspension and Debarment Process (July 14, 2011); Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved, GAO Report No. 11-739 (Aug. 2011).

⁶ H.R. 3345, sponsored by Rep. Darrell Issa (R-CA), the chairman of the House Committee on Oversight and Government Reform.