

Recent Reports Show Increased Suspension and Debarment Activity Across Agencies

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As indicated in reports from the Government Accountability Office (GAO) and agency inspectors general (IGs) in the past few years, the efficacy of agency suspension and debarment programs has been a mixed bag. Some agencies have developed robust, well-staffed teams that support independent, experienced suspension and debarment officials (SDOs); others have gone entire years without taking a single suspension or debarment action. Perhaps as a result of increased oversight by GAO, agency IGs and Congress, more agencies are focusing attention on their SDO offices and procedures, a trend that may lead to more contractors facing potential suspension and debarment actions going forward. Two reports released in September, one from the Interagency Suspension and Debarment Committee (ISDC) and the other from GAO, indicate that the least active agencies are strengthening their programs, and some very active agencies continue to serve as "model" programs. In addition to identifying these enforcement changes, these reports offer contractors a few insights into agencies' suspension and debarment activities that may be useful before, during, and after interacting with an SDO.

The ISDC was originally created in 1986 to monitor implementation of Executive Order No. 12549, relating to non-procurement matters, and has expanded to include cognizance of procurement-related suspensions and debarments. Under Section 873(a)(7) of the 2009 National Defense Authorization Act, Pub. L. No. 110-417, the ISDC must submit an annual report on "the progress and efforts to improve the suspension and debarment system," agencies' participation in the ISDC, and a summary of agencies' suspension and debarment activities. In its report for fiscal year 2011, (available at <http://goo.gl/>

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BdPLc) which also covers fiscal year 2012, the ISDC reported increased suspension and debarment activities and initiatives across all agencies. The report addresses in particular how agencies have expanded or strengthened their suspension and debarment activities since August 2011, when GAO released a report criticizing many agencies' programs. See <http://www.gao.gov/assets/590/585277.pdf>.

Some initiatives came from the ISDC itself. For example, the ISDC reports that it has expanded training and educational outreach to agencies, in particular the six agencies identified in GAO's August 2011 report as needing to improve their programs (the departments of Commerce, Health and Human Services, Justice, State, Treasury, and the Federal Emergency Management Agency). Other increased suspension and debarment activities resulted from external forces. For example, under Office of Management and Budget (OMB) Memorandum M-12-02, Suspension and Debarment of Federal Contractors and Grantees (November 15, 2011; available at: <http://goo.gl/KWP6c>) all agencies subject to the Chief Financial Officers Act were required to appoint a "senior accountable official" for suspension and debarment matters. The ISDC report notes that all 24 agencies subject to the Act reported having done so, and an appendix to the report lists the responsible official for each agency.

The ISDC report also shows that several "best practices" are becoming widespread or universal. Of the 27 agencies included in the ISDC report, all now have policies or procedures for suspension and debarment matters, all have procedures for agency employees to refer matters to SDOs, and nearly all have implemented case-management systems for these matters. Also, nearly all agencies now participate in the lead-agency process, in which agency SDOs share information to determine which agency is best positioned to initiate a suspension or debarment action against a particular contractor. Further, most agencies reported having considered suspension and debarment matters based on information from a variety of sources, such as audit findings, contract terminations and assistance-agreement terminations.

Notably, more than half of agencies reported employing other tools such as administrative agreements, show cause notices and voluntary exclusions during fiscal year 2011. These tools still are not used with great frequency, however. According to the ISDC report, agencies collectively entered into 46 administrative agreements during fiscal year 2011, compared with 928 suspension actions, 2,512 proposals for debarment and 2,398 final debarment actions. Greater use of these alternative tools in the future is more likely now that nearly all agencies have implemented (or begun implementing) basic suspension and debarment processes.

GAO's most recent report on suspension and debarment focuses more narrowly on suspension and debarment in four Department of Defense (DoD) components, the departments of the Air Force, Army and Navy as well as the Defense Logistics Agency. GAO-12-932, *Suspension and Debarment: DOD Has Active Referral Processes but Action Needed to Promote Transparency* (Sept. 2012) available at <http://www.gao.gov/assets/650/648577.pdf>. The report found that the components, which are regarded as having comprehensive suspension and debarment programs, already have robust programs through which SDOs receive reports for consideration from numerous sources.

The GAO report listed the components' referral sources as including the Defense Contract Audit Agency, bid protests, decisions by the Armed Services Board of Contract Appeals, and reports from the Federal Bureau of Investigation. The DoD SDOs' referral sources, in other words, are wide-ranging, indicating to contractors that these SDOs will consider evidence that a contractor lacks present responsibility from a host of different sources. When coupled with the increased attention by civilian agencies to suspension and debarment matters, as reported by the ISDC, contractors should expect that civilian agency SDOs will start to receive referrals from wide-ranging sources as well.

The GAO report also included statistics from the previous three fiscal years. In fiscal years 2009 through 2011, the four DoD components collectively took 3,443 suspension, debarment and proposed debarment actions. Yet, through analysis explained in the report, GAO concluded that those actions were taken against a total of 915 contractors. Thus, the raw total of suspension and debarment actions may not tell the whole story: The numbers may reflect overlapping activities (such as suspension of a contractor, two of its employees and two affiliates for the same underlying activity) or multiple steps in the same suspension and debarment matter (e.g., a suspension followed by a debarment of the same contractor).

The report also noted that although the standard period for debarment under FAR 9.406-4 is three years, the DoD components frequently debarred contractors for longer terms. Of the 915 DoD actions in fiscal years 2009-2011, 426 were debarments. Of these, nearly 50 percent (211) were for a period longer than three years. According to GAO, officials reported that in the case of criminal convictions, it is a common practice to add three years to the sentence that an individual receives. Thus, a criminal conviction of five years would result in a debarment of eight years. The basis, as reported to GAO by these officials, is to provide the debarred individual or entity sufficient time to re-establish present responsibility through training and experience.

The GAO report did note where DoD components could improve compliance with applicable requirements. Under FAR 9.405, excluded contractors may still receive prime contracts or subcontracts if the contracting agency determines that a compelling reason necessitates contracting (or subcontracting) with the excluded entity. Although GAO noted that "compelling reason" exceptions were rare, the DoD components were not complying with their regulatory obligations to issue them. Specifically, DoD components are required to submit written justifications for these determinations to the General Services Administration (GSA) for publication, but GAO reported that the components had not submitted justifications for any of their 14 determinations from the previous three years. GAO's report indicated that the components have now begun sending written justifications to GSA as required, which the report noted would improve the transparency of the components' decisions.

For the past several years, largely at the behest of Congress and in response to high-profile situations in which excluded contractors nevertheless received contract awards, agency suspension and debarment programs have received greater scrutiny. The ISDC and GAO reports show that agencies are taking this oversight to heart and strengthening their programs. Likewise, agencies are accepting referrals from multiple sources, another area previously identified for focus. For contractors, this means that the increased attention to suspension and debarment, including raw statistics, will likely continue. If contractors still needed an incentive to shore up their compliance programs, this trend should provide it.