CLIENT ALERT

Government's Annual Suspension & Debarment Report

September 6, 2018

By law, the Interagency Suspension and Debarment Committee (ISDC) is required to report to Congress on government-wide progress toward improving suspension and debarment, and to summarize each constituent agency's suspension and debarment activities. The ISDC's report for FY2017 was issued July 31, 2018 (the "Report"). The Report also appends data about suspensions and debarments in FY2017.

Overall, suspensions and debarments are down 14% from FY2016, though still nearly double the FY2009 numbers (when ISDC first started tracking these data). The report generally apprises Congress that traditional tools—proactive engagement, administrative agreements—continue to play valuable roles in avoiding or resolving potential suspensions or debarments.

Increased use of "pre-notice" letters. Suspending and Debarring Officials ("SDOs") are increasingly using nonexclusionary tools—such as show-cause letters or requests for information—to "better assess the risk to Government programs and determine what measures are necessary to protect the Government's interest without immediately imposing an exclusion action." These letters were sent 21% more frequently this year than last, and are up almost three-fold since FY2009. This suggests a more tempered approach and movement away from a 'suspend first, ask questions later' attitude.

Reconciling procurement and non-procurement rules. Most contractors know that a proposed debarment under the Federal Acquisition Regulation ("FAR") operates as an immediate exclusion. Fewer may know that in "non-procurement" contexts—typically grants or cooperative agreements—a proposed debarment does *not* have that effect.[1] Seeing a need to address that inconsistency, the ISDC says that it "is considering the benefits and drawbacks of utilizing the nonprocurement approach."

[1] Agencies can still *suspend* a company in a non-procurement context, where immediate need exists, under 2 C.F.R. § 180.715.

But amending the FAR to remove the exclusionary effect of proposed debarments (as the ISDC suggests that it is favoring) may have significant pitfalls. If the FAR is amended in that way, SDOs may merely impose more suspensions in order to achieve the same exclusionary effect. For a number of reasons that may not be in the interest of the government or contractors. First, suspensions may increase as they require only "adequate evidence." Second, as suspensions are generally tied to criminal investigations, SDOs may feel the need to include allegations of criminal conduct (or encourage their IGs to initiate criminal investigations) for what, under a proposed debarment, would frequently remain a civil dispute. Further, by forcing SDOs to increase the use of suspensions, a FAR amendment could also have the collateral effect of increasing litigation. A suspension (as opposed to a proposed debarment) may only be imposed where there is record evidence of an immediate need to take such action. Contractors will rightly contest such allegations vigorously.

Continuing weakness in identifying effective programs. As in past years, the FY2017 Report purports to demonstrate that the government's suspension and debarment program is active, and that most agencies are taking aggressive action. But the metrics for reaching such conclusions remain flawed in two respects. First, the number of exclusionary actions, standing alone, does not demonstrate that a program is effective. Careful review and thoughtful analysis of referrals is the best measure of a solid program, regardless of whether that review results in an action or a declination. Second, while decisions to decline referrals are listed and viewed favorably in lauding agencies' programs, decisions to terminate suspensions and proposed debarments are not. It takes much more work, effort and resources to review a full administrative record and to terminate an action than it does merely to defer to the facts alleged in a referral. The ISDC's metrics may have the unintended consequence of pressuring SDOs to impose exclusionary actions solely to achieve higher numbers so as to be viewed favorably in the ISDC's annual reports.

While the Report recognizes declinations of referrals, there were far too few of them to justify any favorable conclusions. Alarmingly most agencies failed to decline *any* of the matters referred to them by investigators and contracting officers, suggesting less than a thoughtful review, and perhaps too much deference to those making the referrals. Referrals to SDOs for action totaled 3,047 in FY2017. Yet only 114 of those (85 of which were from just two civilian agencies) were declined in FY2017. This is in contrast to the 3,640 suspensions, debarments, and proposed debarments imposed in the year. Particularly troubling were the declination numbers for several of the largest Departments. For example, not a single case of the 824 cases referred to the Navy, Air Force or Defense Logistics Agency during FY2017 was declined, yet those same agencies imposed 750 suspensions, debarments, and proposed debarments.

Conclusion

Suspensions and debarments remain among the government's most potent tools. Although the report is largely encouraging—noting a decreased use of these drastic measures and a shift toward pre-notice discovery devices—we will continue to monitor trends in this area.

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