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A Deep Dive Into FY 2016 Suspension, Debarment Stats

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Law360, New York (November 7, 2016, 12:02 PM EST) -- Fiscal year 2016 has come and gone, and while the Interagency Suspension and Debarment Committee's (ISDC's) report concerning governmentwide exclusion activity is not due for many months, detailed information is available in the System for Award Management for those willing to dig for it. And the data available in SAM, which is presented differently than what the ISDC reports, does not bode well for small businesses and individuals.

Exporting the SAM data into Excel, sorting it by agency and then by exclusion type and other relevant factors, and comparing the information against publicly available business intelligence websites reveals the following:

	TOTAL	SMALL	LARGE	UNKNOWN	% SMALL OF KNOWN
Dept. of the Army	47	42	1	4	97.67%
Dept. of the Navy	33	23	1	9	95.83%
Defense Logistics Agency	16	15	1		93.75%
Dept. of the Air Force	11	9	1	1	90.00%
General Services Admin.	27	21	4	2	84.00%

Of the domestic businesses for which size data was available, the U.S. Department of Defense excluded at least 90 percent small businesses. The General Services Administration was not far behind, excluding 84 percent small businesses. And the percentages of overall exclusions that are of individuals, as opposed to companies, is similarly striking. Nearly 80 percent of overall exclusion actions focused on individuals.

2016 SAM DATA AGENCY	TOTAL EXCLUSIONS	FIRMS	INDIVIDUALS	SPECIAL ENTITIES
Agriculture	13	5	7	1
AID	37	2	20	15
Commerce	15	3	11	1
DoD – Air Force	102	13	71	18
DoD – Army	611	64	477	70
DoD – DLA	66	26	40	0
DoD – Navy	801	39	725*	37
Education	72	0	71	1
Energy	19	6	13	0
EPA	179	51	107	21
GSA	117	27	70	20
Interior	49	14	33	2
NASA	6	1	5	0
NSF	37	10	22	5
SBA	42	8	26	8
State	49	13	28	8
VA	14	2	12	0
TOTALS	2229	284	1738	207

**Note:* *Navy enters many spellings per name, and excluded 141 unique names in FY16.*

For purposes of clarity, generally, "[f]irms" refer to companies with unique identifiers such as Data Universal Numbering System (DUNS) numbers. "Firms" are not always companies engaged in the government contracting business, but they at least maintain the unique business identifying numbers that would permit their entry into government contracting. "Special entities" are companies that are not found to have DUNS numbers or other unique identifiers. Because these unique identifiers are generally a prerequisite to registering to transact business with the government, "special entities" should not be considered traditional government contractors.

By comparison, the statistics reported by the ISDC in its annual report cover only total numbers of suspensions, total proposed debarments and total debarments. This presentation could easily confuse readers because the aggregated data conceivably "triple counts" exclusions in a given year. For example, a single individual or company may be suspended, proposed for debarment, and debarred in a given year and the ISDC report would count that as three separate actions.

The SAM-driven analysis contained in this article shows the substantial impact of suspension and debarment on small businesses. For a system that is designed for the purposes of protection of the government's business interests and not for punishment, and where "government contractors must be afforded a meaningful opportunity to overcome a blemished past, to ensure that an agency will impose debarment only in order to protect the government's proprietary interest and not for purpose of punishment" (Silverman v. U.S. Dep't of Def., 817 F. Supp. 846, 849 (S.D. Cal. 1993)), this impact on small business is concerning.

Facing the might of the federal government is a daunting and costly experience for small businesses and an unfortunate reality is many companies fail after being suspended or debarred, causing lost jobs and economic harm. And individuals who are suspended or debarred face a lifetime of economic stigmatization in the publicly available SAM archives, making future job prospects more challenging.

What Should Contractors, and Especially Small Businesses, Do to Mitigate Suspension and Debarment Risk?

Large businesses continue to have the resources to address a suspension or proposed debarment, and have learned the importance of previewing and dealing with ethics and compliance issues with suspending and debarring officials proactively. It is reasonable to infer from the fiscal year 2016 suspension and debarment data that these sorts of proactive engagements with suspending and debarring officials help prevent debarment actions.

Small businesses should be aware that, for these proactive suspending and debarring official outreach efforts to succeed, foundational policies, procedures and training should be in place and be effective. Small businesses also should consider maintaining a meaningful compliance function. This does not necessarily require extensive overhead, but should at a minimum be visible within the company, survey the company's internal controls periodically, and recommend updates as needed. While it is possible to convince a suspending and debarring official to forego exclusion in the absence of these items, doing so is more difficult, more costly, and more disruptive to the business.

Conclusion

As shown herein, different counting and reporting rules may provide more insightful analysis and greater transparency into the suspension and debarment activities of federal agencies, and detail the substantially larger impact of suspension and debarment on individuals and small businesses. Regardless of whether the ISDC changes its counting methods, large businesses are well served to continue proactive engagement with suspending and debarring officials, and small businesses must remember the smaller margin for error in their operations and devote sufficient resources to ethics and compliance.

—By David Robbins, Crowell & Moring LLP

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