

Suspensions, Debarments Likely To Continue To Increase

Law360, New York (April 07, 2014, 12:25 PM ET) -- On March 5, the Interagency Suspension and Debarment Committee ("ISDC") released a consolidated report to Congress on suspension and debarment developments for fiscal years 2012 and 2013. Issued in the face of continued legislative pressure to utilize suspension and debarment, the report documents an overall rise in the number of suspensions and debarments — from 4,639 in FY2012 to 4,842 in FY2013.

The number of case referrals to an agency's suspension and debarment officer also increased from 3,700 in FY2012 to 3,942 in FY2013; and the number of agencies' declinations to pursue action decreased from 200 to 154. While the trends observed in the report indicate that some agencies are making a greater effort to enhance the transparency and due process in suspension and debarment proceedings, other trends indicate that the process is potentially being used as a punitive measure.

Section 873(a)(7) of the Duncan Hunter National Defense Authorization Act for FY2009 requires the ISDC to annually provide a report of various suspension and debarment-related updates to Congress, including: (1) progress and efforts to improve the suspension and debarment system, and (2) each ISDC agency's activities and accomplishments in the government-wide debarment system. The report focused particularly on the activities of defense agencies, as many of them "have more mature suspension and debarment programs."

Some of these agencies' efforts to improve the suspension and debarment process included steps to make the process more transparent and include additional due process safeguards for government contractors. The Air Force, for example, is utilizing a number of tools "that enhance transparency and due process" in its suspension and debarment procedures, according to the report. These tools include:

- Requesting additional information from contractors where an SDO has insufficient information to suspend or debar a contractor, but has enough information to question the contractor's present responsibility;
- Issuing show cause letters to gain information from a company where the SDO believes he or she has enough to proceed with suspension or debarment against the company, but wants to allow the company additional due process prior to the initial of formal suspension and debarment proceedings under Federal Acquisition Regulation Subpart 9.4;

- A “termination with conditions,” or “hybrid administrative agreement,” which allows contractors to continue to do business with the government under certain conditions, but without the expense or burden that an administrative agreement entails.

These steps reflect not only a greater commitment by the Air Force to due process and transparency, but also a treatment of the suspension and debarment process as a rehabilitative tool that allows the agency to continue receiving the benefits of a contract while ensuring that a company undertakes efforts to demonstrate its responsibility as a contractor.

Other trends reported by ISDC agencies in the report, however, suggest that some agencies may be using suspension and debarment as a punitive measure, with less discretion afforded to the agencies’ SDOs.

For example, according to the report, the Navy is now pursuing fact-based, nondiscretionary debarments of contractors who are terminated for default or who mischarge costs against Navy contracts. Similarly, the Defense Logistics Agency is resorting increasingly to suspension and debarment, rather than traditional contractual remedies, as a penalty for nonconforming parts.

The ISDC report concludes that the reported numbers represent a “significantly increased number of suspension and debarment actions” since it first began collecting this data in FY2009. The trends contained in this report indicate that suspensions and debarments may continue to increase, as agencies look to suspension and debarment more and more as punitive alternatives to basic contractual remedies.

The report also shows that at least some agencies are incorporating additional transparency measures and due process safeguards into suspension and debarment proceedings — developments that should afford contractors more opportunity to present their cases against suspension or debarment to the SDOs. Still, it is more critical than ever for government contractors to be attuned to federal agencies’ growing use of suspension and debarment as a viable form of punishment for government contractors.

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