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ISDC Report Highlights New Flexibilities as Alternative Remedies Increase

*By Dominique L. Casimir and Tjasse L. Fritz**

In this article, the authors discuss the key elements for government contractors contained in a recent report to Congress by the Interagency Suspension and Debarment Committee.

The Interagency Suspension and Debarment Committee (“ISDC”) has released its annual Section 873 Report to Congress for fiscal year (“FY”) 2020. The data in this report provides a big picture view of trends in suspension and debarment. Here is what government contractors need to know.

1. DEBARMENTS INCREASED IN FY 2020

Debarments were up slightly, with 1,256 debarments in 2020 compared with 1,199 in 2019, bucking the downward trend of the previous six years. It is reasonable to expect that the increase in debarments will continue, particularly as the government progresses in investigating fraud associated with the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.

2. SUSPENSIONS AND PROPOSED DEBARMENTS DECREASED

Suspensions decreased, after a brief uptick in 2019, from 722 in 2019 to 415 in 2020, consistent with the general downward trend of years prior.

Similarly, proposed debarments fell from 1,437 in 2019 to 1,317 in 2020.

Interestingly, the ISDC attributes these decreases “in part, to delays in mail service, travel restrictions, and postponements in court proceedings,” which means the FY 2020 decrease is likely due to the COVID-19 pandemic rather than an actual governmentwide downward trend in activity.

And the decrease was not uniform: 13 of the 29 agencies reporting their FY 2020 metrics actually increased the number of suspensions.

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3. THE FY 2020 REPORT INCLUDES FAQs ADDRESSING COMMON MISCONCEPTIONS ABOUT SUSPENSION AND DEBARMENT PRACTICE

Contractors facing a potential exclusion sometimes struggle to find answers to basic questions about the procedures and processes surrounding suspension and debarment. The FY 2020 report includes a new question-and-answer-style appendix that can serve as a useful resource for contractors requiring quick access to plain English explanations.

For instance, the frequently asked questions (“FAQs”) section covers topics such as the absence of government quotas for suspensions and debarments, and explains other important facets of suspension and debarment practice including how cases arise and the ISDC’s role in setting regulations.

Notably, the FAQs confirm that Suspension & Debarment Officials (“SDOs”) do not have additional access to ongoing law enforcement investigations and rely on investigators for referrals and records.

4. NO UPDATE ON THE ACTIVITY OF THE ISDC’S SUBCOMMITTEE ON CYBERSECURITY

In its FY 2018 report, the ISDC revealed that it had created a cybersecurity committee for tracking and reporting on contractor cybersecurity compliance issues. This was noteworthy at the time because it was consistent with the continued emergence of cybersecurity compliance as a major area of focus for government enforcement.

However, neither the FY 2019 nor the FY 2020 ISDC report mentions this committee, or otherwise provides insight into the activity or continued existence of this committee.

5. VOLUNTARY EXCLUSIONS MORE THAN DOUBLED

A voluntary exclusion is an agreement between the agency and a respondent in which the respondent agrees not to bid on or assent to government contracts for a specified period. This is an alternative remedy that allows the contractor to avoid some of the worst effects of being suspended or debarred while still protecting the government from the risk of doing business with a contractor that is not presently responsible.

In 2020, there were 21 reported instances of voluntary exclusions, up from 10 in 2019. This two-fold increase between FY 2019 and FY 2020 indicates that SDOs are increasingly using the full array of tools at their disposal to manage their dockets and create solutions unique to the circumstances.

6. ISDC HAS HAD A SEEMINGLY POSITIVE EXPERIENCE WITH VIRTUAL ADMINISTRATION OF CASES DURING THE PANDEMIC

The COVID-19 pandemic forced everyone to find new ways to work. The ISDC noted agencies' increased flexibility to use electronic notice and conduct virtual presentations of matters in opposition ("PMIOs"). Prior to the pandemic, contractors would fly across the country, or even internationally, to attend PMIOs. While remote proceedings are consistent with the ISDC's effort to enhance the efficiency of suspension and debarment practice, it remains to be seen whether remote proceedings will become the norm even after the pandemic subsides.

7. ISDC SAYS FOR THE FIRST TIME THAT NEGOTIATING ADMINISTRATIVE AGREEMENTS CONSUMES "SIGNIFICANT" GOVERNMENT RESOURCES

The ISDC reports 58 administrative agreements for FY 2020, representing a minor fluctuation from 54 agreements in 2019 and 61 in 2018. While the number of administrative agreements has been steady, the FY 2020 report repeatedly notes the "significant additional" time and resources associated with administrative agreements. ISDC's annual reports have not previously offered this government perspective.

If the effort involved in creating and administering administrative agreements becomes overly burdensome, we expect SDOs might decide to enter into such agreements only in circumstances where a respondent is showing signs of improvement but more time is needed to demonstrate present responsibility.