

ISDC Report to Congress for FY17: Suspensions and Debarments Decrease, and More Agencies Use “Pre-Notice Letters”

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On July 31, 2018, the Interagency Suspension and Debarment Committee (ISDC), an interagency body created by Executive Order 12549 to provide support for suspension and debarment programs throughout the Government, released its annual report to Congress, pursuant to Section 873 of the FY 2009 NDAA, regarding suspension and debarment activities during FY17. The report identifies the activities the ISDC pursued in furtherance of its four strategic objectives: promoting fundamental fairness in the suspension/debarment process; increasing transparency; enhancing federal suspension and debarment practices; and encouraging the development of more effective compliance and ethics programs by contractors. These activities included providing member program training with an emphasis on procedural consistency, transparency, and fairness; inviting private stakeholders to make presentations to ISDC agencies; maintaining ISDC’s website to increase transparency; and improving the effectiveness of ISDC operations.

The ISDC also reported on survey results from its participating agencies. Notably, in FY17, agency suspensions and debarments decreased 14 percent from FY16, with agencies reporting 604 suspensions, 1613 proposed debarments, and 1423 debarments in FY17. Although a decrease from FY16, the report notes that these figures represent nearly double the activity reported in FY09, when the ISDC began tracking this data. This decrease cannot be explained by statistics on proactive outreaches by contractors before a debarring official raises concerns, because the number of reported proactive engagements also decreased from 76 to 53 between FY16

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and FY17. Nonetheless, as the report recognizes, these types of outreach are beneficial to both contractors and debarring officials because they allow both parties to focus on any remedial or corrective actions before an exclusion might be deemed necessary by a debarring official. In this report, DOD agencies and the Department of Housing and Urban Development, among civilian agencies, had the most exclusionary actions.

Perhaps tracking the reduced number of exclusions, the use of administrative agreements, which are used as an alternative to suspension and debarment, also decreased between FY16 and FY17. In FY16, 75 administrative agreements were reported in contrast to 64 agreements entered into by 14 agencies in FY17. Even this reduced number is significantly higher than the administrative agreements reported in FY09 (35 agreements by five agencies). Over the past five years, 17 agencies also reported having entered into administrative agreements with individuals.

The most encouraging statistic, however, relates to the use of "pre-notice letters," such as show cause letters or requests for information. From FY16 to FY17, the use of such pre-notice letters jumped 21 percent (from 160 to 193) and represent a nearly three-fold increase from FY09. This is good news for contractors. Pre-notice letters are not specifically identified as a tool or option in the FAR. Nonetheless, as the ISDC report notes "[u]se of these letters helps the agency better assess the risk to the Government's interests without immediately imposing an exclusion action," which is the effect of a suspension or proposed debarment under FAR subpart 9.4. The increased use of these "pre-notice letters" provide contractors an opportunity to address a debarring official's concerns with the same seriousness of purpose as an exclusion action, but maintain the ability to generate income, improve performance, and demonstrate responsibility real-time by working with the Government. Because the debilitating effects of an exclusion are not imposed, such letters also provide the time and opportunity to open and continue a dialog between the contractor and debarring official's office, which should help a contractor committed to demonstrating present responsibility avoid an exclusion down the road. The Department of the Navy, General Services Administration, and Environmental Protection Agency reported issuing the most pre-notice letters in FY17.

In other good news, the ISDC states that it is exploring means of promoting consistency between procurement and non-procurement suspension and debarment procedures. Noting that a notice of proposed debarment under the FAR leads to immediate exclusion whereas the same notice provided under the Non-Procurement Common Rule, 2 C.F.R. Part 180, does not, the ISDC reports that it is exploring standardizing practices between the procurement and non-procurement community. In particular, the report notes that the ISDC "is considering the benefits and drawbacks of utilizing the nonprocurement approach."

This is good news because exclusion under the FAR and the Non-Procurement Common Rule are reciprocal, meaning an exclusion under one is an exclusion under the other. Yet, there are two sets of rules with different exclusionary results and different factors a debarring official should consider when assessing present responsibility. These differences risk inconsistent application and results. Standardization and consistency also would benefit the suspension and debarment system by creating a single set of rules and factors to consider.

Overall, the ISDC's FY17 report shows that the ISDC's efforts to strength suspension and debarment practices, but also promote fairness and transparency, through training, outreach, and sharing of best practices are yielding results. After a period when many agencies had programs that either "did not exist or had significant weaknesses," and then perhaps a period of "over-correction" to increase statistics by excluding contractors outright that may not have presented an immediate risk to the Government's interests, debarment programs seem to be maturing and using more non-exclusionary ways of ensuring the contractors with whom they do business are presently responsible. Good news all around.