

Suspension, Debarment And Fraud Response: 2013 In Review

Law360, New York (December 16, 2013, 1:14 PM ET) -- What a year it has been in the suspension, debarment and fraud remedies field! The year saw a perfect storm of financial weakness, multiple government spending crises, rising sentiment that the government can spend its procurement and grant dollars more effectively, a paradox of populist anti-contractor sentiment on the Hill paired with genuine interest in meaningful suspension and debarment reform, legislation working through Congress to completely revamp the federal suspension and debarment process (the Stop Unworthy Spending (SUSPEND) Act, summarized [here](#)), and a (normal, expected, mostly meaningless and likely to be overblown) year-over-year decline in the numbers of publicly reported suspensions and debarments.

There are so many moving parts that it can be difficult to assess which direction trends are heading, much less divine overall meaning. But, in sifting through the data, two points jump off the page. First, broad-based, government-wide suspension and debarment activity is increasing, despite a year-over-year decline in the overall top-line numbers of actions. Second, structural change in the way the government handles suspension, debarment, and procurement and grant fraud cases appears to be on the way. Some change is likely whether or not The SUSPEND Act becomes law.

Suspension and Debarment Activity Increasing, Notwithstanding Recent Statistics

Despite the recent quotes in the popular press expressing concern over a year-over-year decline in the number of reported suspension and debarment actions, there is no question that overall government activity is increasing and more agencies are getting into the act. Citing numbers from the House Oversight and Government Reform Committee, the media recently reported there were 836 discretionary suspensions and 1,722 discretionary debarments in fiscal year 2012. This represented a decrease from the previous year's totals. But these numbers are not helpful.

Top-line, government-wide numbers are virtually useless as a metric for the overall health of the suspension and debarment mission because the numbers can move dramatically as new tools (such as the Federal Awardee Performance and Integrity Information System) become available to practitioners or new agencies begin to focus on suspensions and debarments and work through large historical backlogs of contractors in relatively short periods of time. More meaningful are the trends in overall numbers of agencies with suspension and debarment programs and how active those programs are.

A little digging through federal exclusions data shows more and more agencies are jumping into suspension and debarment practice, and in volume. The U.S. Departments of Commerce, Health and Human Services, State, components within the U.S.

[Department of Homeland Security](#), and many others have increased (and in some cases dramatically increased) efforts to suspend or debar non-responsible contractors and grant awardees in recent years. This data is difficult to uncover, requiring multiple database queries and some work with Excel, but it is meaningful. The qualitative improvements from innovative agencies with historically strong programs are also worthy of note, but they are easily missed with the current, unyielding focus on suspensions and debarments.

Structural Change Likely

Given the difficulty in accessing meaningful data, perhaps it may be said that executive branch suspension, debarment and procurement fraud professionals have a “public relations problem.” The public relations problem has been covered in depth, including in the pages of Law360 [here](#) and [here](#), by this author and others. It is also this inability to agree on how to assess effectiveness of the system that is likely to drive systemic changes.

Executive branch suspension and debarment practitioners feel that their work to achieve the “right answer” and craft appropriate protection for the government using all remedies at their disposal — even if suspension and debarment is not necessary in every case — is not appreciated. Recent news reports suggest that the legislative branch believes more suspensions and debarments are needed and that meaningful progress is unlikely to be achieved without systematic reform.

And government contractors and grant recipients are feeling caught in the middle, not knowing whether the competing pressures within the government change the risks facing their businesses. Given all the pressures on the system and our increasing national focus on how the government spends its money, change seems likely. No matter what form the change takes and regardless of whether the SUSPEND Act passes into law, the need for suspending and debarring official discretion to achieve the result that best protects the government from future unethical behavior, whether or not that means excluding the contractor, will remain constant.

There are models available for change that preserve vitally important suspending and debarring official discretion. Among the more common-sense changes is to shift how Executive Branch agencies account for their suspension, debarment and procurement fraud activities so as to paint a more complete picture of these activities.

For example, [U.S. Department of Defense Instruction 7050.05](#) sets up a single point of contact in each Department of Defense component to monitor significant procurement fraud investigations and to de-conflict and coordinate, on a continuing basis, the various remedies for procurement fraud, including but not limited to suspension and debarment. The SUSPEND Act, if it becomes law, would carry that central coordination concept throughout the government.

Even if The SUSPEND Act does not become law, the way executive branch agencies

discuss their suspension and debarment missions likely will evolve to incorporate an analysis of all available remedies. How else will these agencies address the public relations problem except by providing a more holistic response to allegations of procurement or grant fraud in an era of declining budgets and declining tolerance for misuse of federal dollars? This shift in wording will be subtle but important, because it will happen internally to the agency in ways that set future priorities. It will also occur before Congress and auditors as agencies seek to justify past performance. Even if nothing else changes, the language used will eventually change the mission.

What Does This Mean for Contractors and Grant Recipients?

Contractors and grant recipients that are able to plan beyond the current budget uncertainty and focus on scalable, integrated programs for compliance and risk management would do well to follow developments in the suspension, debarment and procurement fraud arena. As agencies pay more attention to telling the “whole story” of their responses to procurement fraud and misconduct, the risk of parallel proceedings (simultaneous government efforts from different stakeholders that include some a combination of criminal prosecutions, civil fraud cases, contractual actions, and/or suspension and debarment actions) increases.

Government stakeholders, such as law enforcement, acquisition, legal and end-users, may begin communicating more frequently and sharing more information in the months and years to come. In short, the risks facing contractors and grant recipients are slowly but surely changing. Among the many techniques to manage these risks include proactively managing relationships with relevant suspending and debarring officials, and continuously improving compliance programs.

Managing the Suspending and Debarring Official Relationship

Contractors and grant recipients would be well served to review their procedures for discussing business problems with their government customers, including contracting officers, procurement leaders, and suspending and debarring officials. Some may rationalize that their organization would never engage in misconduct so severe as to face a criminal investigation, making this step unnecessary. Yet, that rationalization underestimates the risk of appearing before a suspending and debarring official. Performance problems can be a basis for suspension or debarment and may be addressed through an agency’s procurement fraud apparatus.

With that as preamble, it may make sense to get to know your suspending and debarring official or her staff and periodically summarize, before any problems arise, the proactive steps the organization is taking to prevent problems and address areas of risk. That way, if a referral from law enforcement ever arrives on that official’s desk (and these files rarely contain the contractor’s side of the story), the government has some context before making an initial decision whether to exclude the contractor from further awards or to open discussions before issuing an exclusion.

Continuous Improvements in Compliance Programs

Because the organizational sentencing guidelines and suspension and debarment mitigating factors focus heavily on preventive measures, contractors and grant recipients might also consider using continuous improvement models for their internal controls, including periodic reviews of their ethics and compliance programs. To be useful (not to mention credible to the government), these efforts need to be more than paper exercises or “cookie-cutter” approaches.

The focus needs to be on what works for the enterprise, why, and how to incentivize appropriate and ethical behavior throughout the organization. This process is scalable. It can occur with the facilitation of an outside lawyer or consultant, or it can be driven entirely from within. But having that external voice may help prevent business-as-usual from missing red flags and may also provide added credibility to the proactive efforts (and therefore more mitigating factor credit with the government) if a problem develops in the future.

This past year was a challenging and changing time in the suspension, debarment and fraud mission sets for all participants. Here is a toast to next year, with hope that it is full of constructive and productive developments in this area.

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