

New Report Shows Feds' Nuanced Approach To Contractors

By **Daniel Wilson**

Law360 (November 7, 2019, 9:50 PM EST) -- A new interagency report showing the federal government's growing preference for administrative measures over punitive actions when contractors make mistakes reveals an increased propensity to take a measured approach.

The ISDC's fiscal year 2018 report, released Wednesday, shows a year-on-year decline in the number of suspensions, debarments and proposed debarments for federal contractors and grantees, going from 3,640 in 2017 to 3,356 in 2018 and continuing a slow downward trend from previous years. The ISDC is a panel of debarment officials from various federal agencies.

But that modest decline in suspension and debarment activity over time has also been offset in part by suspension and debarment officials' increased use of alternative measures, said Covington & Burling LLP's Mike Wagner, who co-chairs the American Bar Association's Debarment and Suspension Committee.

"This dual trend is interesting — I think it speaks to the overall evolution of the practice of suspension and debarment at the federal level," he said. "We are moving toward a more nuanced and sophisticated approach rather than a one-size-fits-all approach."

One of those alternative measures is an administrative agreement, which allows contractors' compliance violations to be resolved through, for example, external monitoring or internal policy revisions, rather than suspension or debarment.

The uptick in those agreements over time is a positive trend not only for contractors but also for the government, which relies on contractors to meet many of its requirements, said Bass Berry & Sims PLC's Richard Arnholt, who regularly represents clients in suspension and debarment matters.

"There are a number of contractors providing key services and key goods to the U.S. government and it's better to figure out a way to improve their compliance than eliminate them from the contracting market, generally speaking," he said.

Another positive for contractors is the increased use of pre-notice letters, an alternative measure that gives them an opportunity to provide information to an official before any action is taken, Arnholt said. On several occasions, those letters have given him a chance to work with a client to correct misimpressions held by the government, he noted.

"Sometimes a suspending and debaring official will have a legitimate concern based on what he or she's heard from the inspector general of the agency or contracting staff at the agency, but sometimes they're not getting the full story," Arnholt said.

The 197 pre-notice letters sent in 2018 are the highest ever recorded in a single year, which demonstrates suspension and debarment officials' increasing awareness of the consequences of their actions, according to Blank Rome LLP's Dominique Casimir, also a co-chair of the ABA's debarment committee.

"We in the private bar refer to suspension or debarment as the death penalty, and so the fact the government is aware how serious a consequence it is for a contractor is a good thing," she said.

In addition to the growing use of alternative measures by suspension and debarment officials, or SDOs, another important takeaway from the ISDC report is the increasing number of "proactive engagements" by contractors who have reached out to the government after discovering potential misconduct or other issues within their operations, Wagner said.

While the report says that there were only 40 such engagements in 2018, that number is still higher than it has been in the past, and is also probably underreported, as agencies aren't formally required to track those engagements, Wagner noted.

"I think contractors recognize the value ... of telling their story to the SDO before an action is taken and this is another way to have that interaction and engagement in a productive way for both sides, without the existential threat of a debarment already coloring the conversation," he said.

Also, proactively getting out ahead of potential issues before an SDO finds out from another source can be considered a mitigating factor, and it's unlikely to make things any worse for a contractor facing potential suspension or debarment, Casimir said.

"While there are some companies that are still reticent ... I have never seen a situation where a contractor coming forward to disclose a problem had resulted in that contractor being suspended or debarred that wouldn't otherwise have already been suspended or debarred," she said. "Suspension and debarment officials like to give contractors an opportunity to be heard, and it's what they make of that opportunity that ultimately determines their fate."

Contractors, however, still need to consider the agency they're dealing with when deciding on a course of action, Wagner said. The ISDC report shows that although some agencies relatively frequently use administrative agreements and pre-notice letters, other agencies are still more inclined to turn to suspension or debarment, he noted.

"I think it's important for contractors to make sure, if they find themselves in a situation where they're dealing with a potential suspension or debarment issue, that they well understand the particular practices and conventions of the agency they're dealing with," Wagner said.

--Editing by Breda Lund and Alanna Weissman.