

New Suspension And Debarment Report Shows Innovation

By **David Robbins and Sati Harutyunyan** (April 19, 2022, 5:28 PM EDT)

The long-awaited and much-delayed fiscal year 2020 Interagency Suspension and Debarment Committee Section 873 report to Congress was published over the weekend with a new look and some new information.[1]

Despite data being one-and-a-half fiscal years behind, the document provides helpful context to federal agencies' suspension and debarment activities. As is to be expected, the changes in the report also raise new questions.

Report Summary

The fiscal year 2020 report is broken down into the following key components, among others:

- An overview of suspension, debarment and related administrative activities;
- A review of fiscal year 2020 governmentwide activities;
- Summary highlights of fiscal year 2020 metrics; and
- Frequently asked questions on common misconceptions about suspension and debarment.



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The overview provides a high-level description of suspension and debarment activities generally and their purpose. The overview also describes the factors suspension and debarment officials take into consideration when determining whether to act against a contractor or individual.

The year-in-review section identifies the following primary strategic objectives for the ISDC: (1) promoting the fundamental fairness of the suspension and debarment process; (2) increasing transparency and consistency through training, engagement and outreach; (3) enhancing federal suspension and debarment practices, and alternatives by identifying and developing resources; and (4) encouraging the development of more effective compliance and ethics programs by contractors and nonprocurement participants.

The report highlights the ISDC's newly created subcommittee that will assist Federal Acquisition Regulation Council drafters with aligning coverage in the FAR with the Nonprocurement Common Rule as one initiative intended to further these objectives.

None of these strategic objectives are new, nor is the effort to align the FAR with the NCR. They are all long-time efforts of the ISDC[2] covered in prior reports.

The fiscal year 2020 metrics section summarizes agency suspension and debarment activities by the numbers. According to this section, agencies reported issuing 415 suspensions, 1,317 proposed debarments, and 1,256 debarment in fiscal year 2020.

In fiscal year 2020, 58 administrative agreements were entered into, 103 prenotice letters were issued and 21 voluntary exclusions were reported. The metrics section also breaks down activities by agency, showing that the U.S. Department of Homeland Security reported the most debarment activity — 231 proposed debarments and 215 total debarments. The U.S. Department of Transportation reported the highest number of administrative agreements — eight agreements.

The traditionally active government contracting agencies, such as the U.S. Department of Defense components, the U.S. Environmental Protection Agency and the General Services Administration, were active yet again.

The U.S. Small Business Administration, the U.S. Department of State and the U.S. Agency for International Development also were highly active. DHS, the U.S. Department of Housing and Urban Development, the U.S. Department of Agriculture and National Nuclear Security Administration had notable suspension and debarment activity, despite a comparatively low procurement spend.

Also of interest, the report indicates that "the number of declined referrals [for suspension/debarment action] almost tripled" during fiscal year 2020. This is an important statistic, and it should not necessarily be understood that there are comparatively more poor-quality referrals. Rather, fiscal year 2020 was pandemic-stricken, with remote work and administrative challenges. It is only natural that suspension and debarment officials and their staffs would be more discerning in which cases to take.

These declinations are signs of suspension and debarment officials exercising their discretion to craft what, in their minds, are appropriate remedies. This discretion is what separates the process from a mere collateral consequence of a U.S. Department of Justice or inspector general inquiry and is a vitally important measure of the health of the system.

FAQ Section of the Section 873 Report

The report also contains a novel, and helpful, list of frequently asked questions about suspension and debarment in an effort to address what the report terms "common misconceptions" about the ISDC and suspension/debarment activities. This is a helpful innovation by the ISDC for which it and the Office of Management and Budget staff who approved the report deserve credit, even if the FAQs do raise some additional questions.

For example, the FAQs clarify that suspension and debarment officials do not independently initiate suspension and debarment actions. Instead, they "generally rely on referrals from award officials, law enforcement officials, and others to establish administrative records and determine whether administrative actions should be recommended."

We note, however, that enterprising suspension and debarment officials' offices can initiate suspension and debarment actions — or at the very least prenotice letters such as show-cause letters — from, for example, media inquiries, disclosures from contractors, and other sources that come directly to the suspension and debarment officials and bypass investigators.

Further, the FAQ section indicates that suspension and debarment officials do not "have access into ongoing law enforcement investigations." This point merits some clarification, especially for DOD component offices.

Department of Defense Instruction 7050.05, "Coordination of Remedies for Fraud and Corruption Related to Procurement Activities,"[3] instructs that each DOD component will "monitor, from its inception, all significant investigations of fraud or corruption related to procurement activities affecting its organization."

The individuals who "monitor ... all significant investigations" sit in the DOD components' suspension and debarment officials' offices. So suspension and debarment officials do "have access into ongoing law enforcement investigations." That information should be firewalled from the suspension and debarment official, however, until the suspension and debarment official staff determines that an action is ripe.

And finally, the FAQ makes clear that the ISDC cannot "promulgate regulations and rules" for suspension and debarment. Instead, the ISDC provides "recommendations and technical guidance" to the rulemakers.

The statutory language empowering the ISDC is a bit more precise, saying the committee shall ... (4) recommend to the Office of Management and Budget changes to Government suspension and debarment system and its rules, if such recommendations are approved by a majority of the Interagency Committee; [and] (5) authorize the Office of Management and budget to issue guidelines that implement those recommendations.[4]

Conclusion

The fiscal year 2020 report, delayed though it may be, showed helpful innovation in terms of the information presented and the way the ISDC explained its processes for the first time in more than a decade.

The ISDC has more power, granted by statute, than the committee appears to exercise. If the report is any indication, the ISDC is interested in doing things differently. Perhaps ISDC leaders can embrace their authority to bring more robust changes to suspension and debarment practice in the future.

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[1] https://www.acquisition.gov/sites/default/files/page_file_uploads/ISDC_FY_2020_Section_873_Rep

ort_(use_for_web_upload).pdf.

[2] <https://www.acquisition.gov/isdc-reporting>.

[3] <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/705005p.pdf?ver=2020-07-07-065758-907>.

[4] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, PL 110–417 § 873, October 14, 2008.