Suspension, Debarment Caseloads Up, Individuals Targeted

By David Hansen

Oct. 28 — Law firms are seeing more suspension and debarment actions involving contractors, as well as more fraud actions against individuals.

According to the Interagency Suspension and Debarment Committee (ISDC), the total of suspensions, debarments and proposed debarments jumped 7.6 percent from 4,812 in fiscal 2013 to 5,179 in fiscal 2014. This continues an upward trend; there were 2,850 cases in fiscal 2010, 4,279 in fiscal 2011 and 4,639 in fiscal 2012.

Several factors are responsible, Fox Rothschild LLP Partner Reginald Jones told Bloomberg BNA in an e-mail.

For example, the American Recovery and Reinvestment Act increased funding for staffing at inspector general offices, he said. In addition, the Fraud Enforcement and Recovery Act lowered the standard for proving fraud, and a 2011 investigation by the Government Accountability Office found lax suspension and debarment programs at agencies.

“We have witnessed an increase in the government's desire to suspend or debar an individual employee despite having settled a suspension and debarment action involving the same allegations with the corporate entity,” Jones said. He added that he's seen a “corresponding increase” in False Claims Act allegations and prosecutions.

Suspension and debarment cases are a way for the federal government to save money on procurement in an era of tight budgets, Miles & Stockbridge P.C. Counsel Eric Crusius told Bloomberg BNA. “Minor faults are being played up as time goes on, and the government is giving less leeway to contractors,” he said.

Heightened Focus on Individuals?

Several other attorneys noted an increase in suspension and debarment actions against individuals.

“Employees have historically been afterthoughts for the government in fraud matters, as they tended to focus their efforts on pursuing the corporate entity as the primary wrongdoer,” Jones said. Now, the government “appears to be equally pursuing the corporate entity and its key employees in fraud matters as the facts of each case allow.”

Fried Frank Partner James McCullough said companies have the tools, resources and economic motivation to challenge such actions, whereas most individuals don't.

Thus, representing an individual in a suspension and debarment case requires a different approach compared to defending companies, Crowell & Moring Partner Peter Eyre told Bloomberg BNA.

“The Federal Acquisition Regulation is set up to deal with legal entities,” he said. For example, companies can implement a record of ethics to show they are presently responsible, but individuals don't have that option and aren't audited, he said.

DOJ Memo

A Sept. 9 memo from Deputy Attorney General Sally Yates directed Department of Justice (DOJ) employees to focus on individuals, not just employers, in fraud and misconduct investigations.

“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing,” the memo said.
The memo listed six steps that DOJ employees should take in every investigation of corporate misconduct:

- corporations must provide all relevant facts related to individuals responsible for misconduct in order to qualify for any cooperation credit in the case;
- criminal and civil corporate investigations should focus on individuals from the inception of the investigation;
- criminal and civil attorneys handling corporate investigations should be in routine communication with each other;
- the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;
- DOJ attorneys should not resolve a case with a company without a plan to resolve related individual cases and should memorialize any declinations; and
- attorneys should “consistently focus” on individuals along with the company and evaluate whether to bring suit against an individual based on considerations beyond the individual's ability to pay.

'No End in Sight'?

The trend toward more suspensions and debarments will continue, Pillsbury Winthrop Shaw Pittman LLP Partner Todd Canni told Bloomberg BNA.

He predicted “a high number of actions for 2015,” noting that with just a 5 percent increase over 2014, the number of suspension and debarment actions would come to 5,437 — more than double the 2009 total.

President Barack Obama's July 2014 Fair Pay and Safe Workplaces executive order, which requires businesses to disclose violations of 14 federal labor and employment laws, will increase suspensions and debarments “significantly,” Canni said.

“There appears to be no end in sight for the ever increasing suspension/debarment proceedings and False Claims Act prosecutions,” Jones told Bloomberg BNA in an e-mail. “The government is operating in a new environment under a more aggressive set of rules that allows it to zealously pursue, prosecute, and suspend and debar contractors for alleged fraud.”

As a result, it's “imperative that contractors be well-versed in this new environment” to avoid trouble, he said.

To contact the reporter on this story: David Hansen in Washington at dhansen1@bna.com

To contact the editor responsible for this story: Jeff Kinney at jeffkinney@bna.com