

## **CROSS DEBARMENTS IN THE UNITED STATES**

**Francis C. Kiley**

8417 Golden Aspen Court  
Springfield, Virginia 22153  
703-819-7217  
ABA Membership No. 01958633

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### Abstract

This article examines the advisability of federal and state governments in the United States (U.S.) establishing automatic, cross or reciprocal debarment arrangements to protect themselves from corrupt contractors. The article considers the advantages and disadvantages of such automatic, reciprocal arrangements. It considers whether, without them, other measures (e.g., improved communications or cooperative action) would provide some of the benefits of automatic, reciprocal-debarment arrangements, without the perceived disadvantages. The article examines suspensions and debarments at the federal level. Insights obtained from this examination are then used to analyze the desirability of automatic, reciprocal debarments at the state level. The article considers the current state rules, procedures, and processes. Ultimately, the article concludes that automatic, cross debarment arrangements between states or between the states and the federal government would not be advantageous. The benefits of automatic, reciprocal debarments would be insignificant, and sacrificing discretion and sovereignty, in allowing another jurisdiction to determine automatically the fate of contractors within one's own jurisdiction, would not be worth the small advantages that may occur.

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\* Lieutenant Colonel, Judge Advocate General's Corps, U.S. Army, Retired; LL.M., 2017, The George Washington Law School; currently in private practice.

Questions for Consideration

Is it advisable for federal and state governments to establish automatic, reciprocal-debarment arrangements to protect themselves from corrupt contractors? What other measures are worth considering in the absence of automatic arrangements?

Introduction

The extent of contracting between governments at the federal, state, and local levels and private companies is enormous. The federal government spent \$538.8 billion on contracts for goods and services in fiscal year 2010, \$537.5 billion in fiscal year 2011, and \$514 billion in fiscal year 2012.<sup>1</sup> In fiscal year 2013, federal procurement spending was \$463 billion, in fiscal year 2014 it was \$445 billion,<sup>2</sup> and in fiscal year 2015 it was \$437.8 billion.<sup>3</sup> Although total federal contract spending has fallen by more than 18 percent since 2010, much of this has resulted from reduced Defense spending. Various agencies, such as the Department of Health and Human Services (HHS), the Department of Veterans Affairs, the Department of Homeland

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<sup>1</sup> Major J. Michael Jones Jr., *A Mechanic's View of the Government's Procurement Suspension and Debarment System: Time for a Major Overhaul or a Little Tune-Up?* Army Law. (DA Pam. 27-50-482), 32 n. 5 (July 2013) (available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/07-2013.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/07-2013.pdf)).

<sup>2</sup> *Defense Department spending drops \$24 billion in 2014*, Fed. Times (March 25, 2015) (available at <http://www.federaltimes.com/story/government/acquisition/policy/2015/03/25/contract-spending/70342582/>)

<sup>3</sup> Government Accountability Office (GAO) Report 17-244SP CONTRACTING DATA ANALYSIS *Assessment of Government Wide Trends* (March 2017) at 32 (available at <http://www.gao.gov/assets/690/683273.pdf>)

Security, and the Social Security Administration, have increased spending,<sup>4</sup> and total spending may also rebound.<sup>5</sup>

Far exceeding the amount expended on federal contracting is the amount that state and local governments spend. As one procurement scholar writes, “The magnitude of state and local government procurement is staggering, with annual spending by state and local governments projected at nearly \$2 trillion.”<sup>6</sup> Although local contracting represents the greater share of this amount,<sup>7</sup> for practical reasons, it is outside the scope of this article. Local government

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<sup>4</sup> Supra note 2.

<sup>5</sup> Daniel I. Gordon, former administrator of the Office of Federal Procurement Policy and former associate dean for government procurement law at The George Washington University, believes the reduced spending, related to military drawdowns in the Iraq and Afghanistan and sequestration, will probably be reversed in subsequent years. Id. See also Alison Acosta Fraser, *Federal Spending by the Numbers – 2012*, Heritage Foundation, Special Report #121 on Budget and Spending (Oct. 16, 2012) (available at <http://www.heritage.org/research/reports/2012/10/federal-spending-by-the-numbers-2012>).

<sup>6</sup> Danielle M. Conway, State and Local Government Procurement xiii (ABA Section of State and Local Government Law 2012) (In her preface, Professor Conway states that her 2012 book is “the first to address comprehensively state and local government procurement law, policy, and best practices ...” Id.)

<sup>7</sup> Many U.S. cities, which employ a significant number of contractors, have higher gross domestic products than most foreign countries. Scott Beyer, *America's 20 Largest Metros Have Higher GDPs Than Most Foreign Nations*, *Forbes* (Oct. 9, 2016) (available at

contracting is endlessly varied and complex and often has significantly less competition, transparency, and integrity<sup>8</sup> than federal and state procurement.<sup>9</sup> Moreover, creating cooperative

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<http://www.forbes.com/sites/scottbeyer/2016/10/09/americas-20-largest-metros-have-higher-gdps-than-most-foreign-nations/#7cf65e54afd8>)

<sup>8</sup> The three “pillars” of the U.S. procurement system. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, Pub. Procurement L. Rev., Vol. 11, 103, 2002 (available at <http://ssrn.com/abstract-304620>)

<sup>9</sup> Many instances of major, institutional corruption at the local level can be cited. One example came to light in the Washington, D.C. area in November 2010, when agents from the Federal Bureau of Investigations and other law enforcement officials arrested Jack B. Johnson, the Prince George’s County (Maryland) Executive, and his wife (and County Council Member-Elect), Leslie Johnson, after a lengthy corruption investigation. Paul Schwartzman, Ruben Castaneda and Cheryl W. Thompson, *Jack Johnson, Prince George’s County Executive, and His Wife, Leslie, Arrested*, Wash. Post, Nov. 13, 2010. See also U.S. Attorney, Maryland District Press Release, *Former Prince George’s County Executive Jack Johnson Sentenced to Over Seven Years in Federal Prison for Federal Extortion and Bribery; In Taking Over \$1.6 Million in Bribes, “Defendant Acted as if Corruption was the Normal Way of Doing Business”* (available at <https://archives.fbi.gov/archives/Baltimore/press-releases/2011/former-prince-georges-county-executive-jack-johnson-sentenced-to-over-seven-years-in-federal-prison-for-federal-extortion-and-bribery>). See also Robert A. Mullins, *Corruption in Municipal Procurement: Foreclosing Challenges of Disappointed Bidders in Augusta, Georgia and the Need for Reform*, Pub. Cont. L.J. (Vol. 42 No. 2 Winter 2013) (available at

debarment arrangements among multiple localities may be more difficult, even though corruption can often be addressed effectively at the local level.<sup>10</sup>

Federal and state governments employ countless contractors to accomplish their missions.<sup>11</sup> There has been a trend for the government to become increasingly reliant on them.<sup>12</sup> Many of the tasks that contractors do today were formerly performed by government

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[http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/publications/public\\_contract\\_law\\_journal/pclj\\_winter2013\\_42-2/corruption\\_municipal\\_procurement.pdf](http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/publications/public_contract_law_journal/pclj_winter2013_42-2/corruption_municipal_procurement.pdf)).

<sup>10</sup> “By virtue of the closeness of their interaction with the public, local governments have a better chance of meeting this challenge and controlling corruption than national-level governments.”

Maria Gonzalez de Asis, *Reducing Corruption at the Local Level*, World Bank Institute iv (2006).

<sup>11</sup> An examination of the top 100 federal contractors and the amounts paid to them shows how vital contractors have become to the federal government. See also the Federal Procurement Data System site at [https://www.fpds.gov/fpdsng\\_cms/index.php/en/reports/62-top-100-contractors-report3.html](https://www.fpds.gov/fpdsng_cms/index.php/en/reports/62-top-100-contractors-report3.html). For information about small business contracting, see [https://www.fpds.gov/downloads/top\\_requests/FPDSNG\\_SB\\_Goaling\\_FY\\_2015.pdf](https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2015.pdf)

<sup>12</sup> Consider, e.g., the significant increase in the use of contractors in the intelligence field. Robert O’Harrow, Jr., *The Outsourcing of U.S. Intelligence Raises Risks Among the Benefits*, Wash. Post, Jun. 9, 2013 (available at [https://www.washingtonpost.com/world/national-security/the-outsourcing-of-us-intelligence-raises-risks-among-the-benefits/2013/06/09/eba2d314-d14c-11e2-9f1a-1a7cdee20287\\_story.html](https://www.washingtonpost.com/world/national-security/the-outsourcing-of-us-intelligence-raises-risks-among-the-benefits/2013/06/09/eba2d314-d14c-11e2-9f1a-1a7cdee20287_story.html))

employees.<sup>13</sup> In part, the greater reliance on contractors is based on the huge increase in the size and scope of government responsibilities, without a concomitant increase in government personnel.

### Maintaining Integrity in Federal Procurement

Government officials are responsible for maintaining the integrity of public procurement programs.<sup>14</sup> They must ensure that private companies, largely motivated by profit,<sup>15</sup> act with integrity, so taxpayers will receive the benefits of the government's bargains.

Two of the ways that federal officials hold contractors accountable are through pre-award responsibility determinations and suspensions and debarments.<sup>16</sup> While the subject of this article

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<sup>13</sup> E.g., Volker Franke, *Security by Contractor: Outsourcing in Peace and Stability*, Center for Complex Operations, National Defense University (2010) (available at [http://www.nps.edu/Academics/AcademicGroups/GPPAG/Docs/PDF/Research%20and%20Publications/1\\_TN\\_Security\\_by\\_Contractor.pdf](http://www.nps.edu/Academics/AcademicGroups/GPPAG/Docs/PDF/Research%20and%20Publications/1_TN_Security_by_Contractor.pdf))

<sup>14</sup> For a basic overview of suspension and debarment in the federal government, see the guide produced by the Council of the Inspectors General for Integrity and Efficiency and the [https://www.nsf.gov/oig/outreach/presentations/2014suspdobar/pres/panel\\_1\\_primer\\_on\\_suspension\\_and\\_debarment.pdf](https://www.nsf.gov/oig/outreach/presentations/2014suspdobar/pres/panel_1_primer_on_suspension_and_debarment.pdf)).

<sup>15</sup> Of course, public officials are not always motivated by the public interest either.

<sup>16</sup> The use of Inspectors General (IG) in the various federal agencies is another effective way to maintain integrity. The Inspector General Act of 1978 (Pub. L. 95-452, §1, Oct. 12, 1978, 92 Stat. 1101) (available at [https://www.ignet.gov/sites/default/files/files/igactasof1010\(1\).pdf](https://www.ignet.gov/sites/default/files/files/igactasof1010(1).pdf)) See also the website for the IG community at <https://www.ignet.gov> for various IG actions that have contributed to procurement and program integrity.

concerns suspensions and debarments, note that, from 2006 through 2010, only about 16 percent of the entries on the list of excluded contractors resulted from discretionary exclusions “based on causes specified in regulations for acquisitions or grants and assistance, including fraud, bribery, or a history of failure to perform on government contracts.”<sup>17</sup> The other 84 percent came about through violations of statutes and regulations, e.g., healthcare fraud and illegal exports.<sup>18 19</sup>

### Pre-Award Responsibility Determinations

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<sup>17</sup> GAO Report 11-739 SUSPENSION AND DEBARMENT *Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved* (August 2011) (available at <http://www.gao.gov/new.items/d11739.pdf>)

<sup>18</sup> Id.

<sup>19</sup> FAR 9.405(a) – “Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action ...” FAR 9.405(b) – “Contractors included in SAM [System for Award Management] Exclusions as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. Agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.”



The Federal Acquisition Regulation (FAR) provides that the federal government is to conduct business with only responsible contractors.<sup>20</sup> There shall be no purchase or award “unless the contracting officer makes an affirmative determination of responsibility,” and, absent information “clearly indicating that the prospective contractor is responsible, the contractor shall make a determination of non-responsibility.”<sup>21</sup> The burden rests with prospective contractors to demonstrate that they and any subcontractors are responsible.<sup>22</sup> Contracting officers exercise considerable discretion applying this rule.<sup>23</sup> The “criteria for determining responsibility are not readily susceptible to reasoned review, and because they essentially involve business judgment, affirmative determinations of responsibility generally are not overturned absent fraud or bad faith.”<sup>24</sup> Furthermore, the FAR does not generally require that “offerors be notified before award of a determination of non-responsibility.”<sup>25</sup>

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<sup>20</sup> FAR 9.103(a) “Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.”

<sup>21</sup> FAR 9.103(b).

<sup>22</sup> FAR 9.103(c).

<sup>23</sup> John Cibinic, Jr. & Ralph C. Nash, Jr., Formation of Government Contracts (3rd ed.) 442 (The George Washington University 1998)

<sup>24</sup> Id. at 443.

<sup>25</sup> Id. at 447. But see Old Dominion Dairy Products, Inc. v. the Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980).

Suspension and Debarment at the Federal Level<sup>26</sup>

The FAR provides for the suspension and debarment (S&D) of contractors to effectuate the policy that contracts be awarded only to responsible contractors.<sup>27</sup> The serious nature of the sanctions, which preclude an entity or individual from receiving any contracts, requires that sanctions be imposed only “in the public interest for the Government’s protection” and not as a punishment.<sup>28 29</sup> The focus is on present responsibility, not past misconduct.<sup>30</sup>

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<sup>26</sup> For fiscal years 2006 through 2010, about 47 percent of S&D cases were based on the Non-Procurement Common Rule, which covers federal grants and assistance. The other 53 percent were based on causes specified in the FAR and related to federal procurements. GAO Report 11-739, supra note 17, at 8. This article concerns the FAR cases (the 53 percent). For information about non-procurement debarments, see also CRS Report R40993, *Debarment and Suspension Provisions Applicable to Federal Grant Programs* (May 24, 2010) (available at <https://www.everycrsreport.com/reports/R40993.html>).

<sup>27</sup> FAR 9.402(a)

<sup>28</sup> FAR 9.402(b). Compare the World Bank system, which sanctions contractors for violations such as bribery and fraud. World Bank Sanction Procedures § 1.01(a) (Apr. 15, 2012), cited in Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis* (2013). Geo. Wash. Int’l L. Rev., Vol. 45, 2013; GWU Legal Studies Research Paper No. 2013-112; GWU Law School Public Law Research Paper No. 2013-112 at 224-225 (available at SSRN: <http://ssrn.com/abstract=2316252>). Also, some in the U.S. have occasionally demanded that contractors be punished with debarment, e.g., see DWG, *Rumors of Debarment for BP*, Daily Kos, May 23, 2010 (available at <http://www.dailykos.com/story/2010/05/23/869234/-Rumors-of-debarment-for-BP>). For the approved U.S. view, see paragraph three of the transcript

Suspension and debarment decisions are made by agency heads or their designees<sup>31</sup> (suspension and debarment officials or SDOs), rather than contracting officers.

Causes for Debarment<sup>32</sup>

Pursuant to FAR 9.402, the debarring official may exclude a contractor for various reasons.<sup>33</sup> However, the existence of a cause for suspension or debarment does not necessarily

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of training by Maria Swaby, GSA's suspension and debarment director (and Danielle Muenzfeld) at the Federal Acquisition Institute (<https://www.fai.gov/drupal/content/transcript-suspension-and-debarment>). <https://www.fai.gov/drupal/content/transcript-suspension-and-debarment>

<sup>29</sup> If debarment were considered punishment, it would face constitutional challenges as double jeopardy and an ex post facto application of the law. Bae v. Shalala, 44 F.3d 489 (7th Cir. 1995); DiCola v. Food and Drug Administration, 77 F.3d 504 (D.C. Cir. 1996).

<sup>30</sup> Kate M. Manuel, Cong. Research Serv., RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* 12-16 (2012) at 9, footnote 54, citing Roemer v. Hoffman, 419 F. Supp. 130, 132 (D.D.C. 1976) (available at [http://digital.library.unt.edu/ark:/67531/metadc87357/m1/1/high\\_res\\_d/RL34753\\_2012Jan06.pdf](http://digital.library.unt.edu/ark:/67531/metadc87357/m1/1/high_res_d/RL34753_2012Jan06.pdf)).

<sup>31</sup> FAR 9.403.

<sup>32</sup> For manageability, this article will focus more on debarments than suspensions and debarments.

require that the contractor be suspended or debarred.<sup>34</sup> Also, the debarring official has the discretion to exclude only some “divisions, organizational elements, or commodities” of a

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<sup>33</sup> The following are some of the causes for a contractor’s debarment: (1) a conviction or civil judgment for committing fraud or a crime in connection with obtaining, attempting to obtain, or performing a public contract or subcontract; (2) violating federal or state antitrust statutes relating to the submission of offers; (3) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property; (4) fraudulently affixing a “Made in America” label; (5) committing any other offense indicting a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor. FAR 9.402(a). In addition, the debarring official may debar a contractor for: (1) willfully failing to perform the terms of a contract, a history of failing to perform, or unsatisfactory performance (based on a preponderance of the evidence); (2) violating the Drug-Free Workplace Act; (3) committing an unfair trade practice; (4) federal tax delinquencies; (5) knowingly failing to disclose violations of federal criminal law (18 U.S.C.) involving fraud, conflict of interest, bribery or violations of the civil False Claims (31 U.S.C. 3729-3733); (7) failing to disclose significant overpayments on the contract; (8) not complying with Immigration and Nationality Act employment provisions; and (9) any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor. FAR 9.402(b). See FAR 9.402 for the complete list of debarment causes, and see FAR 9.407-2 for causes for suspension.

<sup>34</sup> FAR 9.406-1(a); FAR 9.407-1(b)(2).

company if he or she finds that the wrongdoing was limited to those parts of the business.<sup>35</sup> In addition, the debarring official has the discretion to consider “the seriousness of the contractor’s acts or omissions and any remedial measures or mitigating factors” before making a decision, and the FAR lists various factors for a debarring official to consider.<sup>36</sup> The existence of mitigating factors or remedial measures, however, does not necessarily determine a contractor’s present responsibility.<sup>37</sup> In the case of suspension, the suspending official may, “but is not

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<sup>35</sup> FAR 9.406-1(b).

<sup>36</sup> FAR 9.406-1(a). The factors for the SDO to consider include, but are not limited to: (1) whether the contractor had effective standards of conduct and internal control systems in place; (2) whether the contractor reported the activity timely; (3) whether the contractor has fully investigated the facts surrounding the debarment and, if so, made the investigative results available to the debarring official; (4) whether the contractor cooperated fully with the Government during the investigation and any court or administrative action; (5) whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability or to make full restitution; (6) whether the contractor has taken appropriate disciplinary action against the responsible individuals; (7) whether the contractor has implemented or agreed to implement remedial measures; (8) whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training; (9) whether the contractor has had adequate time to eliminate the circumstances within its organization that led to the cause for debarment; and (10) whether the contractor’s management understands the seriousness of the misconduct and has implemented programs to prevent recurrence. Id.

<sup>37</sup> Id.

required to, consider remedial measures or mitigating factors, such as those set forth in 9.406-1(a).”<sup>38</sup>

Just as suspensions and debarments do not automatically result from FAR 9.407-2 and FAR 9.404 violations, and mitigating factors do not automatically avoid them, the mechanical application of sanctions, without the use of discretion, may also be inappropriate.<sup>39</sup>

Not only does the government have significant discretion in deciding whether to suspend or debar a contractor, but the proof needed to support a suspension or debarment is not onerous. The SDO may suspend a contractor based on “adequate evidence,” pending completion of the investigation or legal proceedings, when immediate action is needed to protect the government.<sup>40</sup>

In the case of a proposed debarment, not based on a conviction or civil judgment, “the cause for debarment must be established by a preponderance of the evidence.”<sup>41</sup> Furthermore, if a cause for debarment exists, the contractor has the burden of establishing to the SDO’s satisfaction that a debarment is not warranted.<sup>42</sup> Moreover, in most cases, much of the work has already been completed. According to Professors Cibinic and Nash, “Most business integrity

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<sup>38</sup> FAR 9.407-1(b)(2).

<sup>39</sup> In C. & J. Harmon, AGBCA 77-198, 79-1 BCA ¶ 13,705, the Agriculture board overturned a debarment where the agency was found to have “mechanically” applied the debarment sanction, without considering the surrounding circumstances. Cited in Cibinic & Nash, supra note 23, at 458.

<sup>40</sup> FAR 9.407-1(a)-(b). Also see FAR 9.407-1(b) about accessing the adequacy of evidence.

<sup>41</sup> FAR 9.406-3(d)(3).

<sup>42</sup> FAR 9.406-1(a).

debarments have been based upon conviction of criminal offenses in dealing with the federal government.”<sup>43</sup>

Despite the SDO’s significant discretion, contractors have due process rights.<sup>44</sup> Although contractors do not have a right to receive government contracts, this does not mean that “the government can act arbitrarily, either substantively or procedurally, against a person or that such a person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts.”<sup>45</sup> In Gonzalez, the court held that the government improperly debarred the T.P. Gonzalez Corp. when it failed to provide the company with written notice of the charges or give it an “opportunity to present evidence and to cross-examine adverse witnesses.”<sup>46</sup> The FAR now provides that, generally, contractors must receive notice and an opportunity to be heard before being debarred.<sup>47</sup> The FAR provides, however, that the decision-making process be “as informal as is practicable, consistent with principles of fundamental fairness.”<sup>48</sup> The opportunity for a hearing also has several provisos. It applies only to cases that are “not based upon a conviction or civil judgment,”<sup>49</sup> where the contractor has raised “a genuine

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<sup>43</sup> Cibinic & Nash, supra note 23, at 461

<sup>44</sup> Manuel, supra note 30, 12-16.

<sup>45</sup> Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964).

<sup>46</sup> Id. at 578.

<sup>47</sup> FAR 9.406.3.

<sup>48</sup> FAR 9.406.3(b)(1).

<sup>49</sup> Contractors are presumed to have already received ample due process in their civil or criminal cases.

dispute over facts material to the proposed debarment.”<sup>50</sup> Where applicable, the hearing gives the contractor an opportunity to appear with counsel, submit evidence, present witnesses, and confront government witnesses. It allows for the creation of a transcript, at the contractor’s request and expense.<sup>51 52</sup>

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<sup>50</sup> FAR 9.406.3(b)(2).

<sup>51</sup> Id.

<sup>52</sup> A contractor can be *suspended*, however, without prior notice or hearing, provided the contractor is advised immediately of the suspension and allowed to respond within thirty days. FAR 9.407(c). Note that, in practice, federal agencies often send letters to deficient contractors, asking them to “show cause” why they should not be suspended. The contractors’ responses may lack good reasons for not suspending them, or they may contain such reasons and other useful facts, and offer corrective actions for the SDO’s consideration. This approach allows many matters to be resolved without the contractor appearing on the System for Award Management list. Show-cause letters are not mentioned in the FAR and, in the view of some, go beyond the due process to which contractors are entitled. See Brian Young, *Ready for Primetime? The Interagency Suspension and Debarment Committee, the Non-procurement Common Rule, and Lead Agency Coordination*, 4 Wm. & Mary Policy Rev. 110, 136 n.195 (2013) (available at [https://www.wm.edu/as/publicpolicy/wm\\_policy\\_review/archives/volume-4/Young.pdf](https://www.wm.edu/as/publicpolicy/wm_policy_review/archives/volume-4/Young.pdf)). In fiscal year 2016, twenty-nine major federal agencies had a total of 718 suspensions and sent 160 show-cause notices. ISDC’s report to the Chairman of the Committee on Oversight and Government Reform, dated January 12, 2017, Appendices (available at <https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2017/03/873-Report-FY-2016.pdf>).



A debarred contractor can appeal to U.S. district court, but will not prevail unless the government's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" according to the Administrative Procedure Act, 5 U.S.C. 706(2)(A).<sup>53</sup> Further, the judge must not sit as an agency official responsible for weighing evidence and making the initial debarment decision; rather, the judge is limited to finding whether the agency action was "rational, based on relevant factors, and within the agency's statutory authority."<sup>54</sup>

Counsel for government contractors have expressed concerns about the limited due process in suspension and debarment cases.<sup>55</sup> This is understandable, given the serious consequences that result from them. Although suspensions and debarments are for the protection of the government, not for the punishment of contractors,<sup>56</sup> these actions certainly can have punishing effects. Suspensions can continue for twelve months, pending completion of an investigation and legal proceeding, with a six-month extension when requested by an Assistant Attorney General.<sup>57</sup> Debarments continue for a "period commensurate with the seriousness of the

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<sup>53</sup> Shane Meat Co., Inc. v. U.S. Department of Defense, 800 F.2d 334, 336 (3d Cir. 1986).

<sup>54</sup> Id., citing Frisby v. U.S. Department of Housing and Urban Development, 755 F.2d 1052, 1055 (3d Cir. 1985).

<sup>55</sup> E.g., Keir X. Bancroft and Robert A. Burton, *Suspension & Debarment: New Trends and the Continuing Due Process Debate*, Venable (available at [http://www.martindale.com/government-contracts-law/article\\_Venable-LLP\\_1552446.htm](http://www.martindale.com/government-contracts-law/article_Venable-LLP_1552446.htm)). (Cited to show the perspective of the contractor defense community, not necessarily as a disinterested statement of the law.)

<sup>56</sup> FAR 9.402(b).

<sup>57</sup> FAR 9.407-4(a)-(b).

cause(s),” but generally not more than three years.<sup>58 59</sup> Contractors excluded through suspension or debarment and federal agencies, “shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason.”<sup>60</sup> When a contractor is debarred or proposed for debarment, it “shall be effective throughout the executive branch of Government” unless the agency head or designee states compelling reasons in writing.<sup>61</sup>

For companies that do most of their business with the federal government,<sup>62</sup> an exclusion from government work for three years can amount to a “death sentence,” if they are unable to endure for that period without government work.<sup>63</sup> Companies and individuals that are

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<sup>58</sup> FAR 9.406-4(a)(1).

<sup>59</sup> The debarring official may extend the debarment to protect the Government, but cannot based the extension upon facts and circumstances on which the initial debarment was based. FAR 9.406-4(b).

<sup>60</sup> FAR 9.405.

<sup>61</sup> FAR 9.406-1(c).

<sup>62</sup> For example, in 2013, Booz Allen Hamilton reported revenues of \$5.76 billion, with the government providing 98 percent of that revenue. Binyamin Appelbaum & Eric Lipton, *Leaker’s Employer Is Paid to Maintain Government Secrets*, N.Y. Times, JUNE 9, 2013.

<sup>63</sup> They would be like wineries selling grapes to sustain themselves during prohibition. Kelsey Burnham, *Prohibition in Wine Country*, Napa Valley Register, Apr 18, 2010 (available at [http://napavalleyregister.com/lifestyles/real-napa/prohibition-in-wine-country/article\\_ed8bdf22-4a81-11df-bb7d-001cc4c002e0.html](http://napavalleyregister.com/lifestyles/real-napa/prohibition-in-wine-country/article_ed8bdf22-4a81-11df-bb7d-001cc4c002e0.html)).

suspended or debarred are placed on the System for Award Management list,<sup>64</sup> which, in addition to exclusion, has numerous negative collateral effects.<sup>65 66</sup>

### Lead Agency Determination

The FAR encourages agencies to establish practices and procedures for coordinating S&D matters.<sup>67</sup> Determining which agency will assume the lead for S&D action against a contractor is determined by an informal process among the agencies that do business with the

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<sup>64</sup> The System for Award Management (SAM), which replaced the Excluded Parties List system (EPLS), can be accessed at <https://www.sam.gov/portal/SAM/##11>.

<sup>65</sup> It can ruin a business and damage reputations; it can lead to lost revenue, goodwill, security clearances, and specialty licenses; and it causes contraction of credit and denial of loans. Also, financial institutions regularly check the SAM list before giving mortgages. Moreover, some states check the debarment list before awarding contracts. Maria Swaby, *Transcript: Suspension & Debarment*, Federal Acquisition Institute (available at <https://www.fai.gov/drupal/content/transcript-suspension-and-debarment>).

<sup>66</sup> Being on the EPLS did not always result in actual exclusion from new contracts. GAO-09-419T *Excluded Party List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds*, Statement of Gregory D. Kutz, Managing Director Forensic Audits and Special Investigations (available at <http://www.gao.gov/assets/130/121604.pdf>).

<sup>67</sup> FAR 9.402(c).

contractor.<sup>68</sup> Often, it is based on which agency has the greatest financial interest (dollar amount of work with the contractor), but it can also be decided by other factors, such as which agency has the most vital interests<sup>69</sup> - however that is informally determined - or which one is most interested or willing to do the work.<sup>70</sup> When more than one federal agency has interest in the suspension or debarment of a contractor, the FAR provides that the Interagency Committee on Debarment and Suspension (ICDS)<sup>71</sup> shall resolve the lead agency issue and coordinate with all interested agencies any suspension, debarment, or related agency administrative action.<sup>72</sup> One

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<sup>68</sup> In 1987, however, the Environmental Protection Agency brought a “debarment action against a contractor doing business with both the Army and Air Force, each of which had affirmatively declined to take action against the contractor despite antitrust convictions. The EPA acted based on its concern that the EPA might use the contractor in future EPA projects.” Young, *supra* note 52, at 134 n.179.

<sup>69</sup> E.g., Defense or intelligence interests.

<sup>70</sup> Automatic cross-debarment could undermine the lead agency system. See Yukins, *supra* note 28, at 232

<sup>71</sup> The ISDC is comprised of S&D officials across the federal government, who meet monthly to discuss common issues and coordinate lead agency matters. Maria Swaby, *Transcript: Suspension & Debarment*, Federal Acquisition Institute (available at <https://www.fai.gov/drupal/content/transcript-suspension-and-debarment>). For the ISDC’s report to the Chairman of the Committee on Oversight and Government Reform, dated January 12, 2017, see <https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2017/03/873-Report-FY-2016.pdf>.

<sup>72</sup> FAR 9.402(d).78

agency's determination not to debar is not necessarily binding on other agencies; however, other agencies will usually defer to the lead agency's decision.<sup>73</sup>

#### Federal Suspension and Debarment Activity

ISDC's report to Congressman Jason Chaffetz, Chairman of the Committee on Oversight and Government Reform, dated January 12, 2017, contains detailed information for fiscal year 2016 on the number of suspensions, proposed debarments, debarments, show cause notices, referrals, declinations, administrative agreements, and voluntary exclusions for twenty-nine federal agencies and departments.<sup>74</sup> The report also shows the total government-wide S&D activity for fiscal years 2011 through 2016.<sup>75</sup> The total number of debarments in fiscal year 2016 for the twenty-nine agencies was 1,676; the Army led the way with 339 debarments, while

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<sup>73</sup> Young, supra note 52, at 153.

<sup>74</sup> ISDC's report to the Chairman of the Committee on Oversight and Government Reform, dated January 12, 2017, Appendices (available at <https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2017/03/873-Report-FY-2016.pdf>).

<sup>75</sup> Id. The ISDC report shows the large increase in S&D activity between 2009 and 2016, going from 417 suspensions, 750 proposed debarments, and 669 debarments in FY 2009 to 718 suspensions, 1855 proposed debarments, and 1676 debarments in FY 2016.

fifteen agencies had fewer than thirty debarments, and seven agencies had zero or single digit numbers.<sup>76</sup>

Having fewer debarments is not necessarily indicative of a deficient S&D program. Federal agencies do not have the same level of activity warranting debarments.<sup>77</sup> However, in 2011, the Government Accountability Office (GAO) conducted a study of federal S&D activity, with interesting results.<sup>78</sup> The study found that more than half of suspensions and debarments were based on acquisition regulations, but that some agencies reported no such cases.<sup>79</sup> The GAO reported that four of the agencies with the most acquisition suspensions and debarments shared several characteristics that were lacking at six agencies that had few or no cases.<sup>80</sup> The four top agencies had “staff dedicated to the suspension and debarment program, detailed implementing guidance, and practices that encourage an active referral process,” while the six

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<sup>76</sup> The ISDC report contains some interesting statistics, e.g., in fiscal year 2016, the Department of Housing and Urban Development (HUD) declined 23% of its referrals (62 of 270 referrals), while the declination rate across the other twenty-eight agencies was only 1.6% (54 declinations of 3285 referrals). Id. In fiscal year 2016, HUD declined 24.7% of its referrals (82 of 332 referrals), while the declination rate across the other twenty-nine agencies was only 0.9% (33 declinations of 3588 referrals). ISDC’s report, dated June 15, 2016, Appendices (available at <https://isdc.sites.usa.gov/files/2016/09/ISDC-873-Report-FY-2015.pdf>).

<sup>77</sup> In the same way that declining crime statistics could reflect either lower crime or reduced enforcement.

<sup>78</sup> GAO Report 11-739, supra note 17 at i.

<sup>79</sup> Id.

<sup>80</sup> Id.

agencies without them had “virtually no suspensions or debarments, regardless of the dollar level of their contract obligations.”<sup>81</sup> The GAO noted that HHS, the civilian agency with the highest amount of contract obligations, had no suspensions and debarments based on acquisition regulations.<sup>82</sup> On the other hand, U.S. Immigration and Customs Enforcement (ICE), with considerably smaller contract obligations, was one of the top agencies.<sup>83</sup> The number of staff dedicated to S&D, however, does not appear to be strictly correlated with results. Agencies with limited resources can often produce significant results, and sometimes agencies with less can produce more.<sup>84</sup>

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<sup>81</sup> Id.

<sup>82</sup> Id. at 10. The report shows, however, that between 2006 and 2010, HHS had a huge number of other exclusions (15,371) for violations of health care regulations. Id. at 9. In its response to GAO, HHS stated that it would work with the HHS OIG “to develop detailed implementing guidance, including a case referral process,” but that the “Department will utilize existing resources to support these and other assigned duties rather than assigning dedicated staff resources.” Id. at 35, 36. The ISDC report shows that in fiscal year 2016, HHS had 38 debarments. ISDC report, supra note 74, at appendix 1. This is an increase of 12 over fiscal year 2015. ISDC report, dated June 15, 2016, at appendix 1 (available at <https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2016/09/ISDC-873-Report-FY-2015.pdf>).

<sup>83</sup> GAO Report 11-739, supra note 17 at i.

<sup>84</sup> In fiscal year 2009, the Navy had a full-time staff of fourteen attorneys and three support staff, and it produced 58 suspension and debarments. Id., Table 3 and Appendix I, Table 7. During

### Debarment of Large Contractors

The accountability of large contractors may be important to consider in evaluating possible federal and state automatic, reciprocal debarment arrangements. It would appear that multi-jurisdictional contractors are generally larger, making inquiry about their debarments relevant.

For years, experts have expressed concerns about the accountability of major contractors.<sup>85</sup> More than a decade ago, Professor Steven L. Schooner opined that the government does not have the resources to fight most large contractors in court, and that it is therefore reluctant to suspend or debar them. He advised, “There are no incentives for individual agencies to debar or suspend contractors because it will be a big fight ... The larger the firm, the bigger the lawsuit.”<sup>86</sup>

Not only is it the toughness of the fight that limits debarment of large companies, it is also the government’s dependence on them. “The top 100 government contractors have paid more than \$19 billion in cases of fraud, bribery, falsifying records, and other violations over the past 15 years, but only four of them have been suspended from government contracting, and

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the same year, the Army produced 132 suspensions and debarments with only six attorneys and one staff support. *Id.* at 29 and the author’s personal knowledge.

<sup>85</sup> E.g., see Scott H. Amey, *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, Project on Government Oversight May 10, 2002 at <http://www.pogo.org/our-work/reports/2002/co-fcm-20020510.html>.

<sup>86</sup> Kellie Lunney, *Watchdog Group Calls for Better Oversight of Contractors*, Gov’t Executive, May 7, 2002 (available at [http://www.govexec.com/story\\_page.cfm?articleid=22908](http://www.govexec.com/story_page.cfm?articleid=22908)).



none have been debarred,” based a database of the Project on Government Oversight.<sup>87</sup> The argument is not settled, however. In discussing whether debarment is a viable response to large companies that commit violations of the Foreign Corrupt Practices Act, for example, there are advocates on both sides as to whether large companies are shielded from accountability.<sup>88</sup>

### Congressionally Mandated Automatic Debarments

In 2011, in response to reports that U.S. military contractors in Iraq and Afghanistan continued to receive contracts despite criminal activity and poor performance, Congress considered legislation<sup>89</sup> that would have included provisions for the automatic debarment of contractors for certain improper conduct. These automatic exclusions, which would have added

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<sup>87</sup> Ron Nixon, *Size Protects Government Contractors That Stray*, N.Y. Times (DEC. 17, 2010) (available at <http://www.nytimes.com/2010/12/18/us/politics/18contractor.html>).

<sup>88</sup> Compare Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?* 80 Fordham L. Rev. 775, 775 (2011) (available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4671&context=flr>) and Jessica Tillipman, *A House of Cards Falls: Why “Too Big to Debar” is All Slogan and Little Substance*, 80 Fordham L. Rev. Res Gestae 49, 49–51 (2012), (available at [http://www.fordhamlawreview.org/assets/res-gestae/volume/80/49\\_Tillipman.pdf](http://www.fordhamlawreview.org/assets/res-gestae/volume/80/49_Tillipman.pdf)). Dean Tillipman agrees that large companies are less likely to be debarred, but attributes this to their greater ability to cordon off corruption, make changes, and remain viable.

<sup>89</sup> S. 2139 (112th): Comprehensive Contingency Contracting Reform Act of 2012

to various other statutory debarment provisions already in place,<sup>90</sup> would have eroded SDOs' discretion to decide certain cases on an individual basis, pursuant to the procedures in FAR 9.4. In considering the matter, Congress heard testimony from representatives of several concerned agencies, who opposed the new automatic exclusion provisions.<sup>91</sup> After the hearings, the automatic debarment provisions were abandoned.<sup>92</sup>

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<sup>90</sup> E.g., see Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 Cath. U. L. Rev. 363, 426-430 (1995) (available at <http://scholarship.law.edu/lawreview/vol44/iss2/2>).

<sup>91</sup> Jones, supra note 1, at 39.

<sup>92</sup> In his statement, Patrick Kennedy, Under Secretary for Management, Department of State, advised, “[W]e believe that the current, long-standing policy requiring a reasoned decision from the SDO based on a totality of information remains a sound approach, and would have concerns with a provision that imposes automatic suspension and debarment which will likely lead to due process challenges by the affected contractor community and potential court action that could delay necessary action in crisis situations.” Richard T. Ginman, Director, Defense Procurement and Acquisition Policy, advised, “DoD opposes mandating automatic suspension because for the suspension and debarment process to have legitimacy and credibility, SDOs need independence, freedom of action, and discretion to exercise judgment regarding whether an exclusion is appropriate.” Angelique M. Crumbly, Acting Assistant to the Administrator, Bureau for Management, Agency for International Development, advised, “We must take issue, however, with any mandate that removes the procedural protections for a case-by-case review of allegations, or reduces the discretionary authority of the SDO.” Daniel I. Gordon, Administrator for Federal Procurement Policy, advised, “I have concern when I hear people talk about

### Administrative Compliance Agreements

Suspension and debarment officials sometimes exercise their considerable discretion by taking no debarment action; instead, they may enter administrative compliance agreements, when appropriate. These agreements, negotiated after a contractor has been suspended or proposed for debarment, are solely within the government's discretion, when they further the government's interest. Generally, the contractor will acknowledge its wrongdoing, agree to pay restitution, remove the corporate bad actors, institute training and compliance programs, and commit to independent outside monitoring. Administrative agreements are included in the Federal Awardee Performance and Integrity Information System (FAPIIS).<sup>93</sup> Establishing a system of automatic, reciprocal debarments would eliminate SDOs' discretion and undermine the creation of many mutually beneficial agreements.<sup>94</sup>

### Maintaining Integrity in State Procurement

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automatic suspension . . .,” and Willard D. Blalock, Chair of ISDC, advised, “I am strongly opposed to automatic exclusions because I believe the SDO needs to have discretion to judge each case on its own facts and circumstances.” *Id.* at 37-40.

<sup>93</sup> ISDC's report to the Chairman of the Committee on Oversight and Government Reform, dated January 12, 2017, Appendices (available at <https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2017/03/873-Report-FY-2016.pdf>); Kate M. Manuel, Cong. Research Serv., RL34753, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments* 9 (2008) (available at <http://www.readbag.com/fas-sgp-crs-misc-rl34753>)

<sup>94</sup> Consider the World Bank's system, which leaves much less discretion for settlement through administrative agreements. *See* Yukins, *supra* note 28, at 226

The volume of state procurement activity is extraordinary, and state procurement has been the subject of major reform efforts.<sup>95</sup> Seventeen states have adopted the American Bar Association Model Procurement Code since its introduction in 1979,<sup>96</sup> and several others have adopted similar provisions;<sup>97</sup> however, many state procurement law and regulations are not uniform.<sup>98</sup> Not only do state procurement laws vary,<sup>99</sup> so do their suspension and debarment rules. It is not surprising that the various sovereign states would try different approaches to meet

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<sup>95</sup> Conway, supra note 6, at xiii. Professor Conway describes state *and* local procurement activity as “staggering” and the reform efforts as “astounding.” Id.

<sup>96</sup> American Bar Association (ABA) site (available at <http://apps.americanbar.org/dch/committee.cfm?com=pc500500&ct=29332c5d8157c6a57b7ad60e8a0667e29b94ec9404ff04ca268b6f64a310eae392b32079076074e7a434eaa718f4897cfcfb5ac09a6e4c4b3f5a48a9a6990ecd>).

<sup>97</sup> E.g., “The Maryland procurement regulations generally reflect the Model Procurement Code, which in turn, corresponds loosely to federal procurement.” Guide to State Procurement (Melissa J. Copeland ed., ABA Section of Public Contract Law, 2016) at 248. Copeland’s 622-page guide contains a section for each state on the extent of its adoption or adaptation of the ABA Code.

<sup>98</sup> Conway, supra note 6, at 2. A list of all state procurement codes is contained in an eight-page appendix to Chapter One of this work. See also Copeland, supra note 97.

<sup>99</sup> In the thirty-seven years since the ABA Model Code was initially created, only seventeen states have fully enacted it. Most states have decided to go their own way. A fortiori, what is the likelihood that many states would now enact an automatic, debarment regime that would erode or eliminate their individual discretion?

their individual challenges.<sup>100</sup> For one thing, there appear to be significant differences in the level of corruption, involving contractors and otherwise, in various locations.<sup>101</sup>

State officials employ several methods to maintain the integrity of their public procurement programs.<sup>102</sup> Like their federal counterparts, they generally hold contractors accountable through pre-award responsibility determinations and suspensions and debarments.

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<sup>100</sup> “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

<sup>101</sup> E.g., see C. Liu and J. L. Mikesell, *The Impact of Public Officials’ Corruption on the Size and Allocation of U.S. State Spending*, *Pub. Admin. Rev.*, 74: 346–359 (2014). The authors state that corruption inflates state spending artificially, and that the “ten most corrupt states” could have reduced their annual spending by more than \$1,300 per capita (5.2% of the average state per capita expenditures) if they had “average” corruption. A digest of the article appears at <http://fortune.com/2014/06/10/most-corrupt-states-in-america/>. Also see Mike Maciag, *Which States Have the Highest Public Corruption Convictions?* *Governing*, *The States and Localities* (March 23, 2012) (available at <http://www.governing.com/blogs/by-the-numbers/state-public-corruption-convictions-data.html>).

<sup>102</sup> See, e.g., <http://www.dgsweb.state.pa.us/comod/CurrentForms/ContractorIntegrityProvisions.doc>

The use of Inspectors General is increasingly becoming an effective way to combat corruption at the state level also.<sup>103</sup>

#### Pre-Award Responsibility Determinations at the State Level

State procurement officials make responsibility determinations prior to the award of contracts; they are vested with significant business judgment; and their responsibility determinations are based on protecting the government, not penalizing the contractor.<sup>104</sup> Also like federal procurement officials, state officials have “wide discretion” in assessing responsibility, and a reviewing court must not substitute its judgment, unless an agency’s decision is “clearly arbitrary, illegal, corrupt, or fraudulent.”<sup>105</sup> Included among the many factors that a procuring agency may properly consider are the bidder’s character, reputation, faithfulness, honesty, judgment, and its history of fraud in prior dealings.<sup>106</sup>

#### Suspension and Debarment Provisions at the State Level

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<sup>103</sup> See, e.g., Philip Zisman, *The People's Watchdog*:

*Inspectors General Foster Accountability, Transparency*, Council of State Government website (Nov./Dec. 2016) at [http://www.csg.org/pubs/capitolideas/2013\\_mar\\_apr/inspectors\\_general.aspx](http://www.csg.org/pubs/capitolideas/2013_mar_apr/inspectors_general.aspx). For the most part, however, state inspectors general lack the resources, independence, and cooperative networks that their federal counterparts possess.

<sup>104</sup> Conway, supra note 6, at 125-26.

<sup>105</sup> Id. at endnote 1 to Chapter Six, referencing Bowen Engineering Corp. v. W.P.M. Inc., 557 N.E.2d 1358, 1364-66 (Ind. Ct. App. 1990).

<sup>106</sup> Id.

In turning to an examination of suspension and debarment provisions at the state level, we find that, where enacted, state S&D provisions are often akin to federal standards,<sup>107</sup> with various exceptions. A review of select state S&D programs is instructive.

In Alabama, there are no procedures or processes for suspension or debarment in either the Alabama Code or Alabama Administrative Code (AAC), although provisions of the AAC prohibit awarding contracts to suspended or debarred contractors.<sup>108</sup> The AAC provisions rely on debarment lists of federal, state, and local governments.<sup>109</sup>

In Colorado, a contractor may be debarred if he is debarred by the federal government.<sup>110</sup> And many states make violations of federal law a debarment ground.<sup>111</sup> Moreover, states

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<sup>107</sup> Richard S. Gruner, Corporate Criminal Liability and Prevention, Chapter 13: Collateral Consequences of Corporate Crime, § 13.03 (available at <https://advance.lexis.com/api/permalink/a6c5a756-6402-48df-8ebf-371d8ce9ef1f/?context=1000516>).

<sup>108</sup> Copeland, supra note 97, at 3.

<sup>109</sup> Id.

<sup>110</sup> Id. at 61.

<sup>111</sup> Louisiana, for example, provides as a ground for debarment conviction under state or federal law for embezzlement, theft, forgery, bribery, and other offenses showing a lack of integrity or honesty that currently, seriously, and directly affects responsibility. Copeland, supra note 97, at 222. As noted supra, most federal debarments are themselves based on criminal convictions. Cibinic, supra note 23, at 41.

generally have catch-all provisions that can use existing debarments and convictions as reasons for debarment.<sup>112 113</sup>

As with responsibility determinations, state officials have significant discretion in suspension and debarment. In Missouri, for example, a vendor may be debarred whenever, in the director's sole discretion, it is in the best interests of the state to do so. A vendor may be debarred after one incident of serious misconduct or multiple less serious incidents.<sup>114</sup> In Arkansas, after a contractor has reasonable notice and an opportunity to be heard, the head of procurement has the authority to debar the contractor for cause, in the state's interest, and determinations are final and conclusive.<sup>115</sup>

In Colorado, before being debarred, a contractor is entitled to reasonable notice and a reasonable opportunity to be heard.<sup>116</sup> In Wisconsin, "debarment procedure is intentionally informal, and hearings are reserved only for matters that can be contested, which does not

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<sup>112</sup> E.g., see Montana Procurement Act § 18-4-241, which includes among the causes of removal: "... or any cause determined to be so serious or compelling, including removal by another government entity."

<sup>113</sup> Recognizing the importance of federal results, various state procurement websites have links to the federal SAM site, although the links must be updated in some cases. Some of the states' interest in the federal debarment list could be connected to the fact that federal funds are involved in state projects.

<sup>114</sup> Copeland, supra note 97, at 293.

<sup>115</sup> Id. at 41.

<sup>116</sup> Id. at 61.



include criminal convictions.”<sup>117</sup> Georgia’s policy and procedures provide that debarment hearings “shall be as informal as may be reasonable and appropriate under the circumstances,” and that the burden of proof is a preponderance of evidence. The hearing panel has significant discretion during the hearing.<sup>118</sup> The hearings in Georgia may be recorded, but will not be transcribed, except at the request and expense of the vendor. A record of attendees, identification of any written evidence, copies of all written statements, and a summary of the hearing will be a sufficient record.<sup>119</sup>

The ABA Model Procurement Code has influenced a number of states with the following grounds for debarment: (a) a criminal conviction incident to obtaining or performing a contract or subcontract; (b) a state or federal conviction for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity which currently, seriously, and directly affects the contract’s responsibility; and (c) conviction under state or federal antitrust statutes concerning bid submissions. Interesting for our present discussion, the ABA Model Code features a principle of reciprocity, whereby an offense or debarment in one jurisdiction is a ground for debarment in others.<sup>120</sup>

#### Suspension and Debarment Activity at the State Level

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<sup>117</sup> Cited in Copeland, supra note 97, at 610.

<sup>118</sup> [http://gsfic.georgia.gov/sites/gsfic.georgia.gov/files/related\\_files/document/Debarment-Policy.pdf](http://gsfic.georgia.gov/sites/gsfic.georgia.gov/files/related_files/document/Debarment-Policy.pdf).

<sup>119</sup> Copeland, supra note 97, at 122.

<sup>120</sup> Gruner, supra note 107, citing the ABA Model Procurement Code (2000).

In examining suspension and debarment activity at the state level, we find that state activity is minuscule when compared with federal activity.<sup>121</sup> The latest ISDC report shows that, between 2011 and 2016, there were 5,296 suspensions, 12,320 proposed debarments, and 10,523 debarments at the federal level.<sup>122</sup> Moreover, these figures do not include a massive number of other federal exclusions.<sup>123</sup> As noted above, for example, during a period when HHS had no

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<sup>121</sup> A website created by the General Services Administration (GSA), Office of the Inspector General (OIG) provides some links to state suspension and debarment sites at <https://www.gsaig.gov/content/suspension-and-debarment-sites-state>. However, in December 2016, the GSA-OIG website contained no links to sixteen states (i.e., Alabama, Colorado, Delaware, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Mississippi, Nebraska, Nevada, New Hampshire, Oklahoma, South Dakota, and Wyoming). In addition, some of the links on the GSA-OIG site were not comprehensive (e.g., the S&D link for Illinois - <https://www.illinois.gov/idol/Laws-Rules/CONMED/Pages/Debarred-Contractors.aspx> - showed companies and individuals debarred only for violating the Illinois Wage Law; an additional search for Illinois S&D sites disclosed other suspensions and debarments at <https://www.illinois.gov/cpo/general/Pages/suspensionsdebarments.aspx>). The author went well beyond the GSA site in searching for state S&D activity.

<sup>122</sup> <https://s3.amazonaws.com/sitesusa/wp-content/uploads/sites/272/2017/03/873-Report-FY-2016.pdf>

<sup>123</sup> As stated supra, only about 16 percent of the entries on the list of excluded contractors resulted from discretionary exclusions “based on causes specified in regulations for acquisitions or grants and assistance, including fraud, bribery, or a history of failure to perform on government contracts.” GAO Report 11-739, supra note 17, at 8.

suspensions and debarments based on acquisition regulations, it had 15,371 exclusions for violations of health care regulations.<sup>124</sup> As detailed below, many of the debarments on state debarment lists are for violating wage-rate laws.

The volume of debarment activity and select rules and procedures, for more than half the states, were reviewed with the following results.

Alabama: A list of suspended and debarred contractors for the State of Alabama could not be located. As stated supra, Alabama does not have suspension and debarment procedures.<sup>125</sup> Alabama has not adopted any portion of the ABA Model Code.<sup>126</sup>

Arizona: There are no suspended or debarred contractors on the Arizona list.<sup>127</sup> Arizona has an interesting way to address contractor misconduct. When contractors are found to have acted contrary to the procurement statutes, they can be held personally liable for all public monies paid out, plus 20% interest and all costs and damages arising from the violation. There is

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<sup>124</sup> Id. at 9. The small debarment figures on many state debarment lists would shrink significantly without the latter type of exclusions. For a comparison of exclusions by the World Bank and the U.S. federal government, see Pascale Hélène Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, 2012 U. Chi. Legal F. 195, 235 n.188.

<sup>125</sup> Copeland, supra note 97, at 3.

<sup>126</sup> Id. at 4.

<sup>127</sup> <https://spo.az.gov/administration-policy/state-procurement-resource/suspended-debarred-firms>.

also a criminal penalty, which is a Class 4 felony.<sup>128</sup> Arizona adopted the original ABA Model Code in 1984, and has partially adopted the amendments in the 2000 version.<sup>129</sup>

Arkansas: There are no vendors currently on the Arkansas list for suspended and debarred contractors.<sup>130</sup> Before being debarred, Arkansas contractors are afforded reasonable notice and the opportunity to be heard. The state procurement director has authority to debar contractors, for up to three years, if in the best interest of the state.<sup>131</sup> The Arkansas Procurement Code is closely modeled after the 1979 version of the ABA Model Code.<sup>132</sup>

California: The California debarment list contains thirty-seven debarment actions, involving forty-five related individuals.<sup>133</sup> Of the thirty-seven actions, twenty-eight resulted in three-year debarments,<sup>134</sup> eight resulted in debarments of under three years, but one – for "Fast Demolition, Inc." – was imposed for a term of thirty-two years (4/1/2015 – 3/31/2047).<sup>135</sup> A

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<sup>128</sup> Copeland, supra note 97, at 31.

<sup>129</sup> Id. at 35.

<sup>130</sup> <http://www.dfa.arkansas.gov/offices/procurement/guidelines/Pages/suspendedDebarredVendors.aspx>

<sup>131</sup> Copeland, supra note 100, at 41.

<sup>132</sup> Id.

<sup>133</sup> <http://www.dir.ca.gov/dlse/debar.html>. This site, for the California Division of Labor Standards Enforcement, contains a link to “The Federal debarment list at the Excluded Parties List System”; however, it connects only to the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) list of debarred companies.

<sup>134</sup> One of these debarments was for a company named “Integrity Sheet Metal, Inc.”

<sup>135</sup> <http://www.dir.ca.gov/dlse/debar.html>. As with the federal government, most state debarments are for a period of three years.

search for other California exclusions disclosed one additional debarment, of unknown duration, listed on an apparent Department of Transportation site.<sup>136</sup> No other S&D lists were found.<sup>137</sup> California has not adopted the ABA Model Procurement Code.<sup>138</sup>

Colorado: A list of suspended and debarred contractors for Colorado could not be located. As stated supra, in Colorado, a contractor may be debarred if he is debarred by the federal government.<sup>139</sup> Colorado adopted the ABA Model Code in 1982 and has made state-specific changes to it since.<sup>140</sup>

Connecticut: There are ten companies and thirteen related individuals on the debarment list, which is for the Connecticut Department of Labor. All the debarments are for an “indefinite” period,<sup>141</sup> although the maximum debarment period for Connecticut is five years.<sup>142</sup> Connecticut models its procurement rules on the ABA Model Code, but has not adopted it.<sup>143</sup>

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<sup>136</sup> <http://www.dot.ca.gov/hq/construc/debarred.doc>. (This is an unusual looking government site.)

<sup>137</sup> Copeland provides no information about California’s S&D program, other than a link to the California Division of Labor Standards Enforcement debarment list, mentioned above.

<sup>138</sup> Copeland, supra note 97, at 48.

<sup>139</sup> Id. at 61.

<sup>140</sup> Id. at 62.

<sup>141</sup> <http://www.ctdol.state.ct.us/wgwkstnd/wgdisbar.htm>

<sup>142</sup> Conn. Gen. Stat. § 4a-57, as cited in Copeland, supra note 97, at 72.

<sup>143</sup> Copeland, supra note 97, at 73.

Delaware: A search for a list of suspended and debarred contractors disclosed eight contractors on a prevailing wage debarment list.<sup>144</sup> No other debarment lists could be located. Delaware provides for “permanent” debarment for a third offense.<sup>145</sup> Delaware has not adopted the ABA Model Code.<sup>146</sup>

Florida: There are eight names on Florida’s convicted vendor list, and eighty-seven on its suspended vendor list. Many of the companies on the suspended list are listed as inactive. Companies on the latter list were suspended as early as 1991. There is also a "discriminatory debarment list," which contains no names.<sup>147</sup> In 1989, the Florida legislature opted for a case-by-case exclusion of contractors for bid-rigging convictions, and only in the public’s interest, after considering automatic exclusions. The legislature also provided contractors with procedural safeguards and agreed that debarred contractors should be restored to public contracting when the circumstances warranted.<sup>148</sup> Florida has not adopted the ABA Model Code.<sup>149</sup>

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<sup>144</sup> [https://dia.delawareworks.com/labor-](https://dia.delawareworks.com/labor-law/documents/Prevailing%20Wage%20Debarment%20List.pdf)

[law/documents/Prevailing%20Wage%20Debarment%20List.pdf](https://dia.delawareworks.com/labor-law/documents/Prevailing%20Wage%20Debarment%20List.pdf)

<sup>145</sup> 29 Del. C. § 6962(d)(14), as cited in Copeland, supra note 97, at 82.

<sup>146</sup> Copeland, supra note 97, at 82.

<sup>147</sup> [http://www.dms.myflorida.com/business\\_operations/state\\_purchasing/vendor\\_information/convicted\\_suspended\\_discriminatory\\_complaints\\_vendor\\_lists](http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists). This site contains an inactive link to the Federal Excluded Parties List System.

<sup>148</sup> David L. Powell, *Review of Florida Legislation: Rights and Duties of Vendors and Government Agencies under Florida’s New Public Contracting Law*, 17 Fla. St. U.L. Rev.

Georgia: There are eight companies on one list of suspended and debarred suppliers<sup>150</sup> and four companies on another list.<sup>151</sup> The debarment period cannot exceed five years.<sup>152</sup> Georgia has partially adopted the ABA Model Code.<sup>153</sup>

Illinois: The GSA site for state debarments links to the Illinois Department of Labor site.<sup>154</sup> A total of ten companies and seven related individuals are debarred for violating the Illinois Prevailing Wage Act.<sup>155</sup> A search for other debarments disclosed one other site with one additional exclusion – a five-year suspension, to commence upon completion of the contractor’s sentence.<sup>156</sup> The latter site contained a workable link to the federal SAM site.<sup>157</sup>

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<sup>149</sup> Copeland, supra note 97, at 115.

<sup>150</sup> [http://doas.ga.gov/assets/State%20Purchasing/State%20Suspended%20and%20Debarred%20Suppliers/State%20of%20Georgia%20Suspended%20and%20Debarred%20Suppliers\\_2016.pdf](http://doas.ga.gov/assets/State%20Purchasing/State%20Suspended%20and%20Debarred%20Suppliers/State%20of%20Georgia%20Suspended%20and%20Debarred%20Suppliers_2016.pdf)

<sup>151</sup> [http://gsfic.georgia.gov/sites/gsfic.georgia.gov/files/related\\_files/document/Debarred%20List.pdf](http://gsfic.georgia.gov/sites/gsfic.georgia.gov/files/related_files/document/Debarred%20List.pdf)

<sup>152</sup> [http://gsfic.georgia.gov/sites/gsfic.georgia.gov/files/related\\_files/document/Debarment-Policy.pdf](http://gsfic.georgia.gov/sites/gsfic.georgia.gov/files/related_files/document/Debarment-Policy.pdf).

<sup>153</sup> Copeland, supra note 97, at 123.

<sup>154</sup> <https://www.illinois.gov/idol/Laws-Rules/CONMED/Pages/Debarred-Contractors.aspx>.

<sup>155</sup> 820 ILCS 130/0.01-12 (2000).

<sup>156</sup> Vendor Suspensions & Debarments, Chief Procurement Office, Ellen H. Daley, General Services - <https://www.illinois.gov/cpo/general/Pages/suspensionsdebarments.aspx>.

<sup>157</sup> Id.

Illinois provides that a vendor's suspension "shall not exceed 10 years."<sup>158</sup> It also provides that a contractor may be debarred or permanently suspended in cases of bribery or attempted bribery of state officials.<sup>159</sup> Illinois has not adopted the ABA Model Code.<sup>160</sup>

Indiana: There are no vendors currently suspended by Indiana.<sup>161</sup> The Indiana debarment site contains a working link to the federal SAM list.<sup>162</sup> In Indiana's Professional Services Contracts Manual, there are various references to debarment (e.g., contractors have to certify that they and their subcontractors are not debarred).<sup>163</sup> Indiana provides that any person may challenge a contractor's small business status, and that if a contractor is found to be other than small, it may be debarred for up to two years.<sup>164</sup> Indiana adopted state procurement laws closely modeled after the ABA Model Code.<sup>165</sup>

Kentucky: Kentucky was the first state to adopt the ABA Model Procurement Code.<sup>166</sup> Like other states, Kentucky performs pre-award responsibility determinations.<sup>167</sup> It provides

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<sup>158</sup> Ill. Admin. Code tit. 44, § 1.5560(d).

<sup>159</sup> Id., § 1.5560(e).

<sup>160</sup> Copeland, supra note 97, at 154.

<sup>161</sup> <http://www.in.gov/idoa/2481.htm>. In this context, the term "suspended" probably means "suspended or debarred."

<sup>162</sup> Id.

<sup>163</sup> [https://secure.in.gov/idoa/files/2015\\_Professional\\_Services\\_Contract\\_Manual.pdf](https://secure.in.gov/idoa/files/2015_Professional_Services_Contract_Manual.pdf)  
<http://www.in.gov/idoa/files/2016%20Professsional%20Services%20Contract%20Manual.pdf>

<sup>164</sup> Copeland, supra note 97, at 176

<sup>165</sup> Id. at 182.

<sup>166</sup> Id. at 199.



“disciplinary” action for failure to perform.<sup>168</sup> However, a list of suspended and debarred contractors could not be located. There is no link to one on the GSA map of state debarments, and Kentucky’s website for purchasing and e-procurement services did not provide one.<sup>169</sup> The state procurement site also has no link to the federal SAM list.<sup>170</sup>

Maryland: Ten companies are ineligible to do business in Maryland because they invested in Iran.<sup>171</sup> In addition, eighty other companies and individuals are on the debarment list, each for an “indefinite” period.<sup>172</sup> Neither Jack B. Johnson nor Leslie Johnson<sup>173</sup> are on the debarment list.<sup>174</sup> Maryland was considering legislation to debar contractors for one year if they were found to have knowingly violated a contract clause on minority business enterprise participation.<sup>175</sup> Maryland provides for mandatory and permissive debarment. “By operation of law,” contractors are debarred if they are convicted, under Maryland law, for bribery, attempted bribery, or conspiracy to bribe, in furtherance of obtaining a public contract.<sup>176</sup>

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<sup>167</sup> <http://www.lrc.ky.gov/Statutes/statute.aspx?id=22348>

<sup>168</sup> <http://www.lrc.ky.gov/kar/200/005/315.htm>

<sup>169</sup> <http://finance.ky.gov/services/eprocurement/pages/default.aspx>

<sup>170</sup> Id.

<sup>171</sup> <http://bpw.maryland.gov/Pages/Debarments.aspx>

<sup>172</sup> Id.

<sup>173</sup> See supra, note 9.

<sup>174</sup> Id.

<sup>175</sup> Conway, supra note 97, at 264.

<sup>176</sup> Id. at 263.

Missouri: There are ninety-three exclusions on Missouri's S&D list, eight of them going back as far as 1998 or 1999.<sup>177</sup> Missouri's Department of Labor also has a debarment list, but with no names on it.<sup>178</sup> One additional list - for the Division of Facilities Management, Design and Construction - contains eighteen debarments, eight of which became effective between 1992 and 1998.<sup>179</sup> Missouri has detailed S&D procedures.<sup>180</sup> It has not adopted the ABA Model Code.<sup>181</sup>

Montana: There are no suspended contractors and three debarred ones on Montana's S&D list.<sup>182</sup> All of the debarments are for an "indefinite" period.<sup>183</sup> Montana's site has an up-to-date link to the federal SAM list.<sup>184</sup> Two other entities are contained on the labor and industry's debarment list.<sup>185</sup> Montana has not adopted the ABA Model Code, but has similar procurement provisions.<sup>186</sup>

New Jersey: New Jersey has a large number of individuals and companies on its debarment list, although many are there for medical disqualification; medical suspension; and

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<sup>177</sup> <https://oa.mo.gov/sites/default/files/suspven.pdf>

<sup>178</sup> [https://labor.mo.gov/DLS/PrevailingWage/debarment\\_list](https://labor.mo.gov/DLS/PrevailingWage/debarment_list)

<sup>179</sup> <http://oa.mo.gov/facilities/project-management/debarred-contractors>

<sup>180</sup> <https://www.sos.mo.gov/cmsimages/adrules/main/agency/4csr/4c170-8.doc>.

<sup>181</sup> Copeland, supra note 97, at 294.

<sup>182</sup> <http://emac.mt.gov/DebarredSuspendedVendors>

<sup>183</sup> Id.

<sup>184</sup> Id.

<sup>185</sup> <http://erd.dli.mt.gov/labor-standards/public-contracts-prevailing-wage-law/debarment>

<sup>186</sup> Copeland, supra note 97, at 301.

medical debarment.<sup>187</sup> Imposition of suspension or debarment is for protecting New Jersey state interests, not punishment; suspensions must be based on adequate evidence; debarments are to be for a reasonable period, not to exceed five years; and hearings are to be conducted in accordance with the provisions of the Administrative Procedures Act.<sup>188</sup> New Jersey does not follow the ABA Model Code.<sup>189</sup>

New York: According to state procurement law expert Melissa Copeland, the State of New York has “no statutes, regulations, or procedures that govern suspension or debarment except for those purchases where prevailing wages must be paid.”<sup>190</sup> New York has a fourteen-page list of contractors that have been barred from contracting for five years for failing to pay prevailing wage rates.<sup>191</sup> Two other sites, both for the N.Y. State Office of General Services (involved in design and construction, real estate, and procurement), contain no names on the debarment or non-responsibility lists.<sup>192</sup> No other debarment lists were located. New York has partially adopted the ABA Model Code.<sup>193</sup>

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<sup>187</sup> <http://www.state.nj.us/treasury/revenue/debarment/index.shtml>;

<http://www.state.nj.us/treasury/treasfiles/debarment/Debarment.txt>

<sup>188</sup> Copeland, supra note 97, at 331-33.

<sup>189</sup> Id. at 334.

<sup>190</sup> Id. at 339.

<sup>191</sup> N.Y. State Department of Labor site:

<https://www.labor.ny.gov/workerprotection/publicwork/PDFs/debarred.pdf>

<sup>192</sup> [http://ogs.ny.gov/acpl/regulations/SFL\\_139j-k/NonResponsible.asp](http://ogs.ny.gov/acpl/regulations/SFL_139j-k/NonResponsible.asp);

[http://ogs.ny.gov/acpl/regulations/SFL\\_139j-k/Debarred.asp](http://ogs.ny.gov/acpl/regulations/SFL_139j-k/Debarred.asp).

<sup>193</sup> Copeland, supra note 97, at 349.

North Carolina: The North Carolina Purchase and Contract Division has an excellent website for state government procurement. The site is graphically appealing and easy to navigate, with clear, prominent links to North Carolina’s debarred contractors list and the federal SAM list.<sup>194</sup> There are 224 entries on North Carolina’s debarment list; twenty-three (10.2%) have an effective date of more than fifteen years ago. North Carolina’s policy allows debarment for a period of time at the discretion of its Purchase and Contract Division.<sup>195</sup> North Carolina has not adopted the ABA Model Code.<sup>196</sup>

Ohio: On its websites, Ohio has several lists of debarred contractors. A general site provides links to five debarment lists: Procurement Services; Department of Transportation; Secretary of State; Ohio Facilities Construction Commission; and the Federal List of Excluded Parties Listing System (sic).<sup>197</sup> There are no debarments on the Procurement Services list.<sup>198</sup> The debarment list for the Ohio Department of Transportation contains fifty-three companies and individuals; twenty-five of these (47.2%) are “permanent.”<sup>199</sup> The Ohio Secretary of State

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<sup>194</sup> <http://ncadmin.nc.gov/about-doa/divisions/purchase-contract>.

<sup>195</sup> Copeland, supra note 97, at 359.

<sup>196</sup> Id. at 361.

<sup>197</sup> <http://www.procure.ohio.gov/html/debarment.htm>

<sup>198</sup> [http://procure.ohio.gov/pdf/OPS\\_Debarment\\_List.pdf](http://procure.ohio.gov/pdf/OPS_Debarment_List.pdf)

<sup>199</sup> <http://www.dot.state.oh.us/Divisions/ContractAdmin/Pages/default.aspx>. Six of the “permanent” debarments went into effect in 2004 or 2005. All twenty-eight of the debarments that are not “permanent” had debarment end dates that have already passed. One of them had an end of debarment date of November 1, 1999. Nine others had debarment end dates between 2000 and 2002. Several of the debarments that are no longer active had debarment periods of

debarment list contains three contractors.<sup>200</sup> The Ohio Facilities Construction Commission debarment list contains one company.<sup>201</sup> The purported link to a federal debarment list links instead to a general government data catalog.<sup>202</sup> The Facilities Construction site also contains a link to the debarment list of the U.S. Department of Labor Office of Federal Contracts Compliance Programs.<sup>203</sup> Ohio produces a procurement handbook for state agency customers; Chapter 10 contains information on contract compliance, suspension, and debarment.<sup>204</sup> Ohio has not adopted the ABA Model Code.<sup>205</sup>

Oregon: There are fifty-eight names on the debarment list. Forty-four of them are for three years, one is for two years, three are for five years, two are for seven years, five are for ten

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twelve or thirteen years. (Section 10.6.2 of the Ohio procurement manual – see note 205 infra - cites the “interest of the state” in deciding whether to shorten debarments. But why would a contractor be debarred “permanently” if debarment were not considered punishment? Why would an entity be debarred for twelve or thirteen years? Why would one's name stay on the list seventeen years after the debarment period has ended?)

<sup>200</sup> <http://www.sos.state.oh.us/sos/upload/records/contractors.pdf>

<sup>201</sup> <http://ofcc.ohio.gov/Resources/Debarments.aspx>

<sup>202</sup> <http://catalog.data.gov/dataset>

<sup>203</sup> <https://www.dol.gov/ofccp/regs/compliance/preaward/debarlst.htm>

<sup>204</sup> [http://das.ohio.gov/Portals/0/DASDivisions/EqualOpportunity/pdf/MBEEDGE\\_PUR\\_ProcManual.pdf](http://das.ohio.gov/Portals/0/DASDivisions/EqualOpportunity/pdf/MBEEDGE_PUR_ProcManual.pdf)

<sup>205</sup> Copeland, *supra* note 97, at 401.

years, and two are “Not to be removed.”<sup>206</sup> The stated policy, however, is that debarments may not exceed three years.<sup>207</sup> Oregon’s Public Contracting Code is closely modeled on the ABA Model Code.<sup>208</sup>

Pennsylvania: Pennsylvania’s debarment list shows a total of nineteen debarments, eighteen for violations of the state prevailing wage act, involving the state department of labor and industry. Each of the eighteen is for three years. The one other debarment involves the state transportation agency. It has a start date of June 30, 2015, and an end date of December 31, 2999 (sic); it is characterized as "permanent." The stated policy, however, is that debarments may not exceed three years.<sup>209</sup> The website includes a heading for "Settlement," but states, "None at this time."<sup>210</sup> Pennsylvania has adopted the ABA Model Code.<sup>211</sup>

Rhode Island: There are ten debarments on the Department of Labor and Training Prevailing Wage site.<sup>212</sup> No other debarments lists were found for the state. Rhode Island has partially adopted the ABA Model Code.<sup>213</sup>

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<sup>206</sup> “Pursuant to ORS 279C.860, contractors on this list are ineligible to receive public works contracts subject to the Prevailing Wage Rate Law.”

[http://www.oregon.gov/boli/WHD/PWR/docs/debar\\_list.pdf](http://www.oregon.gov/boli/WHD/PWR/docs/debar_list.pdf).

<sup>207</sup> Copeland, supra note 97, at 427.

<sup>208</sup> Id.

<sup>209</sup> Copeland, supra note 97, at 435.

<sup>210</sup> [https://www.dgs.internet.state.pa.us/debarment\\_list/](https://www.dgs.internet.state.pa.us/debarment_list/)

<sup>211</sup> Copeland, supra note 97, at 436.

<sup>212</sup> [listhttp://www.dlt.ri.gov/pw/debarment.htm](http://www.dlt.ri.gov/pw/debarment.htm)

<sup>213</sup> Copeland, supra note 97, at 469.

Texas: The debarred vendors list contains four companies, and each is debarred for five years.<sup>214</sup> The same site contains a working link to the federal SAM list.<sup>215</sup> Information about debarring vendors can be found in Title 10 Texas Code Sec. 2155.076.<sup>216</sup> Texas has not adopted the ABA Model Code.<sup>217</sup>

Virginia: There are seventy names on the list of suspended and debarred contractors, all but one a debarment. Many are for “one year or until funds are paid, whichever is longer,” but fifteen are “indefinite.”<sup>218</sup> Among the grounds for Virginia debarments is that another state or federal agency has debarred a contractor or any of its affiliates for any reason.<sup>219</sup> Virginia’s procurement act is based on the 1989 version of the ABA Model Code.<sup>220</sup>

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<sup>214</sup> <https://www.comptroller.texas.gov/purchasing/programs/vendor-performance-tracking/debarred-vendors.php>

<sup>215</sup> Id.

<sup>216</sup> <http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2155.htm#2155.077>. Also see the Texas state procurement manual at <https://www.comptroller.texas.gov/purchasing/publications/procurement-manual.php>

<sup>217</sup> Copeland, supra note 97, at 523.

<sup>218</sup> <https://eva.virginia.gov/library/files/buyers/debarred.pdf>

<sup>219</sup> See, e.g., Virginia Department of General Services, Department of Enjoinment Procedures for Construction policy statement, dated June 29, 2016, at page 7 (available at [http://dgs.virginia.gov/LinkClick.aspx?fileticket=\\_CjR2BkQIKM%3d&portalid=0](http://dgs.virginia.gov/LinkClick.aspx?fileticket=_CjR2BkQIKM%3d&portalid=0))

<sup>220</sup> Copeland, supra note 97, at 565.

Washington: Washington has 371 entries on the debarred contractors list for the Washington State Department of Labor & Industries.<sup>221</sup> The agency states that a contractor may be debarred for violations or infractions of prevailing wage law (chapter 39.12 RCW), contractor registration law (chapter 18.27 RCW), or industrial insurance law (chapter 51.48 RCW).<sup>222</sup> Another state agency – the Washington State Department of Enterprise Services - advises, “Vendor debarment is not a punishment, but a procedure to ensure that state-funded business is conducted legally with responsible parties, maintaining the integrity of the state’s procurement process.”<sup>223</sup> Washington’s debarment procedures, including information about causes, aggravating and mitigating factors, and hearings are contained in Chapter 200-305, WAC.<sup>224</sup> No additional debarment lists were found.

West Virginia: There are three companies on West Virginia’s Purchasing Division debarred vendor list.<sup>225</sup> West Virginia has not adopted the ABA Model Code.<sup>226</sup>

#### Thoughts on State Suspension and Debarment Activity

Based on the preceding information, the characterization of state suspension and debarment activity as “minuscule” appears to be accurate. Excepting prevailing wage-rate violations, only six debarments could be found for California, Illinois, New York, and Texas

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<sup>221</sup> <https://secure.lni.wa.gov/debarandstrike/ContractorDebarList.aspx>

<sup>222</sup> <http://www.lni.wa.gov/TradesLicensing/PrevWage/AwardingAgencies/DebarredContractors/default.asp>.

<sup>223</sup> <http://des.wa.gov/services/contracting-purchasing/doing-business-state/vendor-debarment>

<sup>224</sup> Available at <http://apps.leg.wa.gov/WAC/default.aspx?cite=200-305&full=true>.

<sup>225</sup> <http://www.state.wv.us/admin/purchase/debar.html>.

<sup>226</sup> Copeland, supra note 97, at 596.



combined.<sup>227</sup> No debarments of any kind could be found for Alabama, Arizona, Arkansas, Colorado, Indiana, Kentucky, and Rhode Island, and various other states had negligible numbers.<sup>228</sup> Moreover, these totals are not for a week or a year, but for several years.<sup>229</sup>

The small number of suspensions and debarments is not because states lack sufficient suspension and debarment policies and procedures. With a few possible exceptions, states appear to have all the procedures they need to do the job. State systems give procurement officials the discretion to act in the states' interest and to suspend and debar contractors on grounds no more onerous than at the federal level.

There are probably many reasons for the wide disparity in suspension and debarment activity at the federal and state levels. For one thing, the federal government has a massive, unmatched audit, investigative, and prosecutorial apparatus.<sup>230</sup> Some states surely have lower

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<sup>227</sup> See the footnotes to the summaries for California, Illinois, New York, and Texas, supra.

<sup>228</sup> In preparing this article, the author examined the suspension and debarment activities of more than half of the states. Other states, which were not examined, may also have minimal or no debarments.

<sup>229</sup> It is conceivable that some states have additional suspensions and debarments that could not be found. (Maybe some states even choose not to publish all their debarments; however, the author is aware of no evidence of this, and it is unclear why states would list scores of debarments for wage-rate violations and other matters, but few debarments based on acquisition regulations.)

<sup>230</sup> There are independent Offices of Inspector General in nearly every department and agency. There are numerous federal law enforcement agencies. There are the major resources of the Department of Justice and the individual U.S. attorney offices. There is the GAO, and there are

corruption levels than others, but would this explain the small number of debarments in such different states as California, Illinois, New York, and Texas? Are states dealing with corruption in other ways? Are states reluctant to go after corruption aggressively because of political considerations or because they want to avoid an anti-business climate? There has not been much study on this. Professor Danielle M. Conway states that her 2012 book is the first one to address comprehensively state and local government procurement law, policy, and best practices.<sup>231</sup>

### Review of Factors

The foregoing review of suspension and debarment at the federal and state levels provides many insights for deciding whether automatic, reciprocal exclusions would be advantageous between the federal government and state governments and between states 

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many others. This is an incredible concentration of resources, much of it directed in the Washington, D.C. area, and these groups generally work together auditing, investigating, and prosecuting companies and individuals engaged in fraud, waste, abuse involving numerous federal programs. Not only are the various government players, by and large, motivated by doing the right thing and maintaining the integrity of programs, they are also motivated by the rewards they receive in terms of good performance evaluations, promotions, and other forms of recognition. Frequently, the rewards come to those with statistical measures of accomplishment (e.g., significant findings, indictments, convictions, fines, restitutions, savings, suspensions, debarments, and prison sentences). The author believes that, for the most part, this system is sound, although, certainly, there have been many individual misapplications and abuses. Various states also have significant resources, but they do not appear to be focusing on corrupt contractors.

<sup>231</sup> Conway, supra note 97, at xiii.

governments. Among the matters that were examined above are: the importance of SDO discretion; mitigating considerations; debarment decisions being business decisions; debarment not being punishment; jurisdictional sovereignty; lead agency; the limited proof needed to obtain exclusions; the prevalence of debarments that are based on convictions; the features of successful debarment programs, including personnel requirements; the processes that need to be established; the due process accorded in S&D matters; the debarment of large contractors; and whether the absence of debarments reflects a lack of resources or a lack of will. Relevant also are the different suspension and debarment standards in some jurisdictions and the level of S&D activity across many states.

#### Automatic Agreements with the Federal Government

Before going further, the matter of automatic, reciprocal arrangements between the federal government and states can be addressed succinctly.

It is inconceivable that the federal government would ever enter agreements with states, whereby its own contractors could be automatically debarred based on state action. As stated above, it is not particularly difficult for the federal government to exclude a contractor. Suspensions can be obtained based on adequate evidence, and debarments can be obtained on a preponderance of evidence. When a conviction has been obtained against a contractor, little needs to be done; the contractor has already had its day in court. Further, the federal government can use state and local convictions as grounds for debarment.<sup>232</sup> Moreover, debarment

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<sup>232</sup> FAR 9.403: “Conviction means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of *nolo contendere*.” The federal government can also use a state *debarment*,

proceedings are informal, and SDOs have significant discretion. Insofar as the federal government's requirements for contractor exclusions are not great, it would gain little in bargaining away its discretion and sovereignty. Also, the federal government could potentially jeopardize vital defense, intelligence, or other programs, or create Supremacy Clause issues, in leaving the fate of its contractors to others.<sup>233</sup> Recall also the critical statements by leading federal procurement officials, above, about the automatic-debarment regimes that were being considered for U.S. military contractors in Iraq and Afghanistan.<sup>234</sup>

On the states' side, they would most likely resist surrendering their discretion and sovereignty by having the federal government automatically decide the fate of their contractors.<sup>235</sup> States can use relevant federal debarments to exclude their own contractors without difficulty,<sup>236</sup> as *they* deem appropriate, so there is little apparent gain from an automatic

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which can often provide adequate or a preponderance of evidence for a federal suspension or debarment, without significant difficulty.

<sup>233</sup> The federal government could require that it be the "lead agency" in a certain class of cases or that it have veto power over debarment determinations, but the number of cases where this could come into play could negate any benefits from the automatic arrangement.

<sup>234</sup> Jones, supra note 1, at 37-40.

<sup>235</sup> Fears would abound about the federal government using debarment as a political weapon to harm disfavored, local industries and their principals.

<sup>236</sup> See, e.g., Pennsylvania, which includes as a basis for suspension and debarment: the debarment by any agency or department of the federal government or by any other state. Copeland, supra note 97, at 434.

arrangement.<sup>237</sup> As for any incremental deterrent effect of automatic, reciprocal debarments against corruption, see the next section.

Moreover, there are some matters that are prohibited at the federal level that are considered acceptable in some states and vice versa. For example, violations of 41 U.S.C. chapter 81 (Drug-Free Workplace) are grounds for federal debarment,<sup>238</sup> but some states, such as those that have “de-criminalized” marijuana use (e.g., Colorado), may take a different view of this.

#### Potential Benefits of Automatic Regimes at the State Level

There do not appear to be many benefits to automatic, reciprocal debarment arrangements. One seeming benefit – the pooling of resources – presupposes that significant resources are needed for effective debarment programs. In fact, S&D programs generally do not require many of them.<sup>239</sup> States do not have to work through proof-beyond-a-reasonable doubt

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<sup>237</sup> To the extent that state suspension and debarment provisions do not explicitly state that federal suspensions and debarments may be used to support state actions, such adjustments can be readily made. See, e.g., the Rules for the Tennessee Department of Transportation Construction Division, p. 12 at [https://tn.gov/assets/entities/tdot/attachments/Ch-1680-05-01\\_Contractor\\_Debarment\\_and\\_\\_Suspension.pdf](https://tn.gov/assets/entities/tdot/attachments/Ch-1680-05-01_Contractor_Debarment_and__Suspension.pdf).

<sup>238</sup> FAR 9.406-2(b)(1)(ii).

<sup>239</sup> E.g., The Defense Logistics Agency had eighty-nine procurement-related suspensions and debarments cases in fiscal year 2009 with a staff of three attorneys and one part-time paralegal.

jury trials to debar contactors. States can suspend contractors based on adequate evidence and debar them based on a preponderance of it; SDOs have significant discretion; and hearings are usually informal. If states such as California, Illinois, New York, and Texas wanted more aggressive S&D programs, it is hard to imagine that the necessary resources would be unavailable.

Deterrence – One would expect that automatic, reciprocal debarments would significantly deter corruption by contractors and enhance business integrity; however, it is unclear that this is so. For the many small, local contractors that work in a limited geographical area, debarment across multiple jurisdictions would not likely be a greater deterrent than debarment in a single jurisdiction. Such companies, if debarred in one locale, could, where feasible, move to another jurisdiction; however, in these cases, the second jurisdiction, exercising its discretion, could exclude the contractor, without difficulty, based on the first debarment. Automatic reciprocal debarments would be unnecessary for these instances.

In the case of large contractors, it seems that multi-jurisdictional debarments would significantly deter corruption for those that do business in multiple locations and rely on government contracts for a significant amount of their business.<sup>240</sup> For such contractors, debarment from doing business in multiple jurisdictions for a significant period could amount to a “death sentence” for their businesses. However, such debarments may be too severe to impose,

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GSA had fifty-eight such cases that year with a division director and four staff members. GAO Report 11-739, supra note 17, at 13, 29.

<sup>240</sup> Debarment deters corruption even when a contractor does not have significant business with the government. Whether a company is debarred in one jurisdiction or many, that information damages the company’s reputation and adversely affects its non-governmental business.

taking many of them off the table.<sup>241</sup> Would other issues, which occur in debarring large contractors at the federal level, also apply? Would large contractors escape multi-state debarments because of their ability to fight, because the government needs their services, or because they can cordon off corruption to remain viable?

Integrity and Competition – Automatic, reciprocal debarments may interfere with the satisfactory resolution of cases through administrative agreements that enhance contractor integrity.<sup>242</sup> Furthermore, the possibility of being debarred across many states could discourage contractors from bidding on contracts at all, thereby reducing competition.<sup>243</sup>

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<sup>241</sup> Not only can such debarments destroy businesses, but they can also hurt the governmental entities that rely on them.

<sup>242</sup> “A mandatory debarment regime would have made the level of cooperation by Siemens, BAE, Daimler, and other contractors very unlikely and would have resulted in the crippling of the companies rather than the establishment of ‘exemplary’ compliance frameworks.” Lauren O. Youngman, *Note, Deterring Compliance: The Effect of Mandatory Debarment Under the European Union Procurement Directives on Domestic Foreign Corrupt Practices Act Prosecutions*, 42 Pub. Cont. L.J. 411, 422.

<sup>243</sup> “One of the central tenets of law and economics holds that punishing borderline corporate misconduct with severe penalties may unintentionally lead to overdeterrence. In other words, ‘salutary . . . conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment.’” Stevenson & Wagoner, *supra* note 88, at 818, quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 (1978). However, some contractors might be more inclined to

Transparency – Multi-jurisdictional debarments would receive more visibility and publicity, and could enhance transparency; however, states can create greater transparency without automatic, reciprocal debarments. Knowledge of corporate corruption in other jurisdictions would allow states to take prompt action to protect their own interests.

#### Disadvantages and Concerns

Loss of discretion and sovereignty – At the federal level, where there is automatic, reciprocal debarment across the government, the various departments and agencies are all part of the same political entity – the U.S. Government, with total annual spending as of 2012 at \$3.6 trillion.<sup>244</sup> It is different with the fifty states. As Professor Conway notes, “The power of state governments to enter into contracts and to seek their enforcement emanates from the inherent authority of states as ‘sovereigns.’ This authority may also be affirmed by express authorization by state constitutions or statutes.”<sup>245</sup> It is conceivable, therefore, that interstate debarment arrangements could implicate state constitutional issues.

Loss of local control – The jurisdiction that employs a contractor is more likely to know the risks, benefits, and disadvantages of excluding it from working in its jurisdiction.<sup>246</sup>

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participate if they believe that the rules in a corrupt venue were finally being enforced, and that they would be treated fairly.

<sup>244</sup> See Alison Acosta Fraser, *Federal Spending by the Numbers – 2012*, Heritage Foundation at: <http://www.heritage.org/research/reports/2012/10/federal-spending-by-the-numbers-2012>. Even though some departments and agencies have budgets larger than many countries, they are still part of one political entity.

<sup>245</sup> Conway, supra note 6, at 4.

<sup>246</sup> “No One Knows Where the Shoe Pinches But Him Who Wears It.” See



Debarment is a business decision,<sup>247</sup> and the business interests of one state may differ from another. Local markets may rely heavily on a limited number of contractors. A contractor may have several competitors in one state, but few, if any, in another one. One must not automatically debar the only game in town.

Corruption in a company may be limited to certain places or individuals. The company may be a good candidate for debarment in one area, but not others. Unfortunately, another state might initiate an automatic, reciprocal debarment and shortcut the analysis.

A contractor may be debarred in one state based on intrastate reputational issues or political concerns, resulting in automatic debarments elsewhere. This is not an imaginary concern where debarment rules grant significant discretion to government officials.

As noted above, large companies are more likely to avoid debarment because, among other reasons, they have the resources to cordon off the corruption and remain viable. Thus, there may be no debarment in many cases.<sup>248</sup>

Clearly, large contractors would resist fiercely and lobby against creation of automatic debarment arrangements before they are enacted.<sup>249</sup>

### Comparisons

Comparable situations may be instructive. In the matter of attorney discipline, it appears that, while there is no automatic suspension or debarment of an attorney based on the actions of

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<http://collections.vam.ac.uk/item/O125429/no-one-knows-where-the-oil-painting-farmer-alexander/>

<sup>247</sup> Swaby, supra note 28.

<sup>248</sup> Obviously, debarment is not an end in itself.

<sup>249</sup> Yukins, supra note 28, at 233.

another state where an attorney is admitted, the other state's action is given considerable weight. In the District of Columbia, for example, there is a rebuttable presumption for like action against the attorney.<sup>250</sup>

In considering automatic cross suspensions and debarments among sovereign nations, Professor Christopher R. Yukins concludes, among other things, that some stakeholders (e.g., SDOs) would oppose automatic cross-debarment, wanting to retain discretion and leverage for remedial measures, and that a better alternative would be increased communications and publicity.<sup>251</sup> Professor Yukins also concludes that investigators and prosecutors would be among the stakeholders who may oppose automatic exclusions.<sup>252</sup> Eliminating government discretion would remove the "leeway and leverage" that can be used to influence contractors to cooperate with investigations and compensate for damages.<sup>253</sup>

Presently, contractors (and their legal representatives) must weigh and address multiple factors in seeking "global settlement" of their cases. The U.S. Attorney's Manual advises that federal prosecutors should consider the collateral consequences of criminal convictions such as potential suspension or debarment from federal contracts and funded programs. However, the Manual reminds attorneys that where a company has committed fraud against the government, a

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<sup>250</sup> Joyce E. Peters, *Reciprocal Discipline Revisited: Traps for the Unwary*, Washington Lawyer, February 2004 (available at <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/february-2004-bar-counsel.cfm>).

<sup>251</sup> Yukins, *supra* note 28, 232-34. *See also supra* note 242.

<sup>252</sup> Yukins, *supra* note 28 at 232.

<sup>253</sup> *Id.*

prosecutor may not negotiate away an agency's right to debar or delist the company.<sup>254 255</sup> In any case, attorneys must never threaten to present criminal charges for an advantage in a civil matter.<sup>256</sup>

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<sup>254</sup> U.S. Attorney's Manual, 9-28.1100 - Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.

B. Comment: ... Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. ... Determining whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that will be made based on the applicable statutes, regulations, and policies.

... [I]n evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. ... [W]here the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing, and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing. On the other hand, where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. ... Obtaining a conviction may produce a result that seriously harms innocent third parties who

The agreement by the Multilateral Development Banks (MDB) is worth mentioning, although an extensive discussion of it is beyond the scope of this article. The agreement was entered in 2010 by the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and

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played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement.

9-28.1500 - Plea Agreements with Corporations

... B. Comment: ... A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. ... [W]here the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in fraud against the government (e.g., contracting fraud), a prosecutor may not negotiate away an agency's right to debar or delist the corporate defendant. [Emphases added.]

U.S. Attorney's Manual (available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>).

<sup>255</sup> It was the author's experience, while serving in the Army's Procurement Fraud Branch, that negotiation of debarment issues did not occur until any criminal case had been concluded.

<sup>256</sup> ABA Model Code of Professional Responsibility (1983), DR 7-105, Threatening Criminal Prosecution (available at <https://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM>).

the World Bank Group.<sup>257</sup> Per the agreement, entities debarred by one MDB may be sanctioned for the same conduct by the other MDBs, thereby preventing companies debarred by one MDB from seeking contracts financed from the others.<sup>258</sup>

### Options to Consider

There are several courses of action. In an earlier analysis of automatic, cross or reciprocal debarments, but at the international level, Professor Yukins presented four options for policymakers to consider: (1) Do nothing; (2) Call for officials to consult other systems' adverse information; (3) Call for contracting and debarring officials to take other systems' debarment decisions into account; and (4) Adopt other systems' debarment decisions.<sup>259</sup>

The focus of this article has been on the fourth option. Based on everything reviewed above, this does not appear to be an advisable option for policymakers to consider. Federal SDOs have a significant amount of discretion in deciding whether to suspend or debar contractors,<sup>260</sup> and it is not overly difficult to obtain suspensions and debarment. Most

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<sup>257</sup> <http://siteresources.worldbank.org/NEWS/Resources/AgreementForMutualEnforcementofDebarmentDecisions.pdf>.

<sup>258</sup> <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22535805~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>. See also Stephen S. Zimmermann and Frank A. Fariello Jr, *Coordinating the Fight Against Fraud and Corruption: Agreement on Cross-Debarment Among Multilateral Development Banks*, 3 *World Bank Legal Rev* 189 (2012). And see Dubois, *supra* note 124, at 232.

<sup>259</sup> Yukins, *supra* note 28, at 226-31.

<sup>260</sup> Contractors can be debarred not only for actual offenses, but also in some cases for reputational deficiencies.

debarments come about after the hard work of obtaining criminal convictions has already occurred.<sup>261</sup> State SDOs enjoy the same discretion in their work. Therefore, there appears to be little benefit in having automatic reciprocal debarment when a state can "semi-automatically" debar contractors based on convictions and debarments of other jurisdictions. Sovereign entities need to maintain flexibility in making local business decisions.

Option 2 (Call for officials to consult other systems' adverse information) and Option 3 (Call for contracting and debarring officials to take other systems' debarment decisions into account) are probably being done already, in varying degrees, in different states. As noted above, some states explicitly provide that debarments and convictions from other states and the federal government may be considered as grounds for debarment in their own. The ABA Model Code also calls for this. Various state sites have links to the federal SAM list; in other cases, there are no links or the links do not work. Having better access to information about the responsibility of potential state contractors can only help states avoid the risk of hiring unscrupulous, interstate contractors. However, as we seek better communications between states and between states and the federal government, we might consider that sometimes there are communications problems even within the federal level.<sup>262</sup> So, some resistance to changes in this area is not inconceivable. The author did not find it simple to locate some S&D lists, which demonstrated to him the need for improved data bases.

Doing nothing (Option 1) – As counterintuitive as it may seem, there are probably more than a few advocates for the do-nothing option. The low-key nature of some state suspension

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<sup>261</sup> As noted in Cibinic, supra note 23, at 41, more than half of federal debarments result from criminal convictions.

<sup>262</sup> Young, supra note 52, at 118.

and debarment programs may be a policy choice, and there may be reservations about having other states – potential competitors – looking too closely.

There is a fifth option to consider, particularly when dealing with large contractors with significant economic power. The importance of some issues extends beyond particular states, which individually may lack the resources to go up against a major industry. In such cases, cooperative or coordinated action by multiple states may be advisable. Such action has been successful in some landmark matters. For example, in 1998, the attorneys general of forty-six states reached a settlement agreement with the four largest U.S. tobacco companies,<sup>263</sup> an unachievable result for a single state. In another matter, the federal government and state attorneys general reached a \$25 billion agreement with the five largest mortgage services.<sup>264</sup>

The National Association of Attorneys General “facilitates interaction among attorneys general as peers, thereby enhancing the performance of attorneys general and their staffs to

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<sup>263</sup> [http://web.archive.org/web/20080625084126/http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724\\_1032468605\\_cigmsa.pdf](http://web.archive.org/web/20080625084126/http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf)

<sup>264</sup> <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest>

respond effectively to emerging state and federal legal issues.”<sup>265</sup> Such efforts have not been immune from criticism, however, from across the political spectrum.<sup>266</sup>

### Conclusion

The benefits of automatic, reciprocal debarments between the federal government and states and between states do not justify the loss of sovereignty and discretion. More advisable would be improving information about state debarment activities and having state officials consult each other’s improved databases, and, with their own discretion and flexibility, take other states’ actions into account in making their business decisions. In significant trans-jurisdictional matters, federal and state officials should team up for the common good.

As a final note, it is good to recall that there is only so much that the law can do.<sup>267</sup>

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<sup>265</sup> [http://www.naag.org/naag/about\\_naag/faq/what\\_do\\_the\\_attorneys\\_general\\_do\\_at\\_naag\\_meetings.php](http://www.naag.org/naag/about_naag/faq/what_do_the_attorneys_general_do_at_naag_meetings.php). Also see the NAAG’s annual report at <http://www.naag.org/assets/redesign/files/annual-reports/2014-2015-Annual-Report---FINAL.pdf>

<sup>266</sup> See Paul Nolette, *State Attorneys General Are More and More Powerful. Is That a Problem?* Wash. Post, March 5, 2015 (available at <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/05/state-attorneys-general-are-more-and-more-powerful-is-that-a-problem/>). Also see Adam Shaw, *AGs, Activists Accused of “Collusion” on Exxon Probe Amid New E-Mails*, Fox News, April 18, 2016 (available at <http://www.foxnews.com/politics/2016/04/18/ags-activists-accused-collusion-on-exxon-probe-amid-new-emails.html>).

<sup>267</sup> Thomas More: [in his prison cell] ... If we lived in a state where virtue was profitable, common sense would make us saintly. But since we see that abhorrence, anger, pride, and stupidity commonly profit far beyond charity, modesty, justice, and thought, perhaps we must



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stand fast a little – even at the risk of being heroes ... Robert Bolt, A Man for All

Seasons (1966)