**Notes for Procurement Conference**

Abstract

Examined the advisability of U.S. federal and state governments establishing automatic, cross or reciprocal debarment arrangements to protect themselves from corrupt contractors.

Considered the advantages and disadvantages and whether other measures (e.g., improved communications or cooperative action) would provide the benefits without the disadvantages.

Examined S&D at the federal level and used this to analyze the desirability of automatic, reciprocal debarments at the state level.

Considered the current state rules, procedures, and processes.

Conclusion: automatic, cross-debarment arrangements between states or between the states and the federal government would not be advantageous. Benefits would be insignificant. Would sacrifice discretion and sovereignty and allow other jurisdictions to determine automatically the fate of contractors within one’s own jurisdiction. Would not be worth the small advantages.

References

Guide to State Procurement (Melissa J. Copeland ed., ABA Section of Public Contract Law, 2016)

Danielle M. Conway, State and Local Government Procurement, (American Bar Association Section of State and Local Government Law 2012) A list of all procurement codes is contained in an eight-page appendix to Chapter One of Dean Conway’s book.

GSA OIG States Map

links to states. <https://www.gsaig.gov/node/31>

(Contains links to information about twenty-eight states.)

See paper’s full bibliography.

S&D at the Federal level

There is automatic reciprocal debarment among federal departments and agencies.

Large number of S&Ds. As stated in the paper, an Interagency Suspension and Debarment Council report shows that, between 2011 and 2016, there were 5,296 suspensions, 12,320 proposed debarments, and 10,523 debarments at the federal level. Moreover, these figures do not include a massive number of other federal exclusions. For example, during a period when HHS had no suspensions and debarments based on acquisition regulations, it had 15,371 exclusions for violations of health-care regulations. Many of the debarments on state debarment lists are for violating wage-rate laws.

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. 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 agencies without them had “virtually no suspensions or debarments, regardless of the dollar level of their contract obligations.”

S&D offices receive referrals from numerous OIGs, other audit & investigative agencies, DOJ and others.

Significant resources not needed for effective S&D programs. Agencies with limited resources can often produce significant results; sometimes agencies with less produce more.

Significant discretion. Requirements to suspend and debar are not great: adequate evidence for suspensions; preponderance for debarments. Burden on contractor to show present responsibility.

Most debarments result from criminal convictions and civil judgments

Not punishment; for protection of the government.

At the State Level

Similar legal and procedural framework for states. (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.” Bowen Engineering Corp. v. W.P.M. Inc., 557 N.E.2d 1358, 1364-66 (Ind. Ct. App. 1990). As with responsibility determinations, state officials have significant discretion in S&D.

States have a low number of S&Ds. From paper: "Excepting prevailing wage-rate violations, only six debarments could be found for California, Illinois, New York, and Texas combined. 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. Moreover, these totals are not for a week or a year, but for several years." On the other hand, in fiscal year 2016 alone, federal agencies had 718 suspensions, 1855 proposed debarments, and 1676 debarments.

A review of the states showed that the number of S&Ds was unrelated to whether states have adopted ABA Code.

Low state S&Ds numbers are not because resources are unavailable (not a lot needed).

Not much needed to exclude, so automatic debarment is a limited benefit, if not a disadvantage. Tailor S&Ds to states own needs.  Why lose independence, sovereignty? Administrative compliance agreements would be undermined.

Background:

Reviewed a sample of twenty-six of states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Missouri, Montana, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, Washington, West Virginia.

Seventeen states have adopted the Code, others have partially adopted. As most states have not adopted the ABA Model Code, is it likely that states would enact an automatic, debarment regime that would erode or eliminate their own discretion?

Link to ABA Model Procurement Code:

<https://publicprocurementinternational.com/wp-content/uploads/2019/04/2000-ABA-Model-Procurement-Code.pdf>

In addition to the states that have adopted the Code, the ABA reports that thousands of local jurisdictions have also adopted it.

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.