



# **REFORMING THE MODEL PROCUREMENT CODE**

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**FREE ONLINE SUMMER SERIES**

**JULY 18, 20, 25, and 27**

**6-8 PM EST**

**GW** | LAW



# BEYOND THE FAR

GW Law Government Procurement Law Program

# Schedule

- 1. Tuesday, July 18:** Introduction to the Model Procurement Code (MPC) – and Potential Reforms
- 2. Thursday, July 20:** Understanding the OMB Uniform Grants Guidance – Special guest: Scott Sheffler (Feldesman Tucker, Washington DC)
- 3. Tuesday, July 25:** Updating the 2000 MPC to Meet the Current OMB Grants Guidance – Special guest: Yolanda Williams (GW Law LLM 2023)
- 4. Thursday, July 27: Looking Beyond the OMB Grants Guidance:** Cybersecurity in State and Local Contracting – Special guests: Brandon Hancock & Jakub Berkowicz (GW Law, JD candidates)

# Session 1: Introduction to the Model Procurement Code – and Potential Reforms

**Christopher Yukins**

Lynn David Research Professor in  
Government Procurement Law

GW Law Government Procurement Law Program

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## STATE AND LOCAL MODEL PROCUREMENT CODE

### Mission

Our Committee broadly focuses on promoting transparency, fairness, and competitiveness in state and local government procurement by encouraging adoption of the "best practices" embodied in the ABA 2000 Model Procurement Code for State and Local Governments (and companion 2002 Model Procurement Regulations).

These principles have been adopted by 17 states and many hundreds of local jurisdictions, and are designed to provide public officials, vendors and contractors, and taxpayers with procurement processes with integrity and value for money.

The Section of Public Contract Law and the Section of State and Local Government Law have also adopted the 2007 Model Code for Public Infrastructure Procurement (the 2007) MC PIP, which is a condensation of the ABA 2000 Model Procurement Code for State and Local Governments. Through both publications, the Committee seeks to foster consideration and adoption of these principles across the United States.

The Committee



## Publications

1979 - The Model Procurement Code for State & Local Governments

(click arrow below to link to PDF)



1980 - The Model Procurement Code for State & Local Governments - Recommended Regulations

(click arrow below to link to PDF)



1982 - The Model Procurement for Local Governments

(click arrow below to link to PDF)

2000 - The Model Procurement Code for State & Local Governments

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2000 - The Model Procurement Code for State & Local Governments - Recommended Regulations

(click arrow below to link to PDF)



2007 - Model Code - Public Infrastructure Procurement (MC PIP)

(click arrow below to link to PDF)

Most Recent

Regulations

Infrastructure

1979

# ABA: Background to MPC (2000)

- Since 1979, the Code has been adopted in full by [seventeen (17)] states; in part, by several more; and by thousands of local jurisdictions across the United States. The 1979 edition of the ABA Model Procurement Code has helped to create transparent, competitive, and reliable processes by which billions of dollars in public funds are expended through contracts with private sector businesses. . . . **The Model Procurement Code is one of the most successful projects ever conducted by the Section of Public Contract Law and Section of State and Local Government Law, and has had a profound and favorable impact on the conduct of public procurement throughout the United States since 1979**



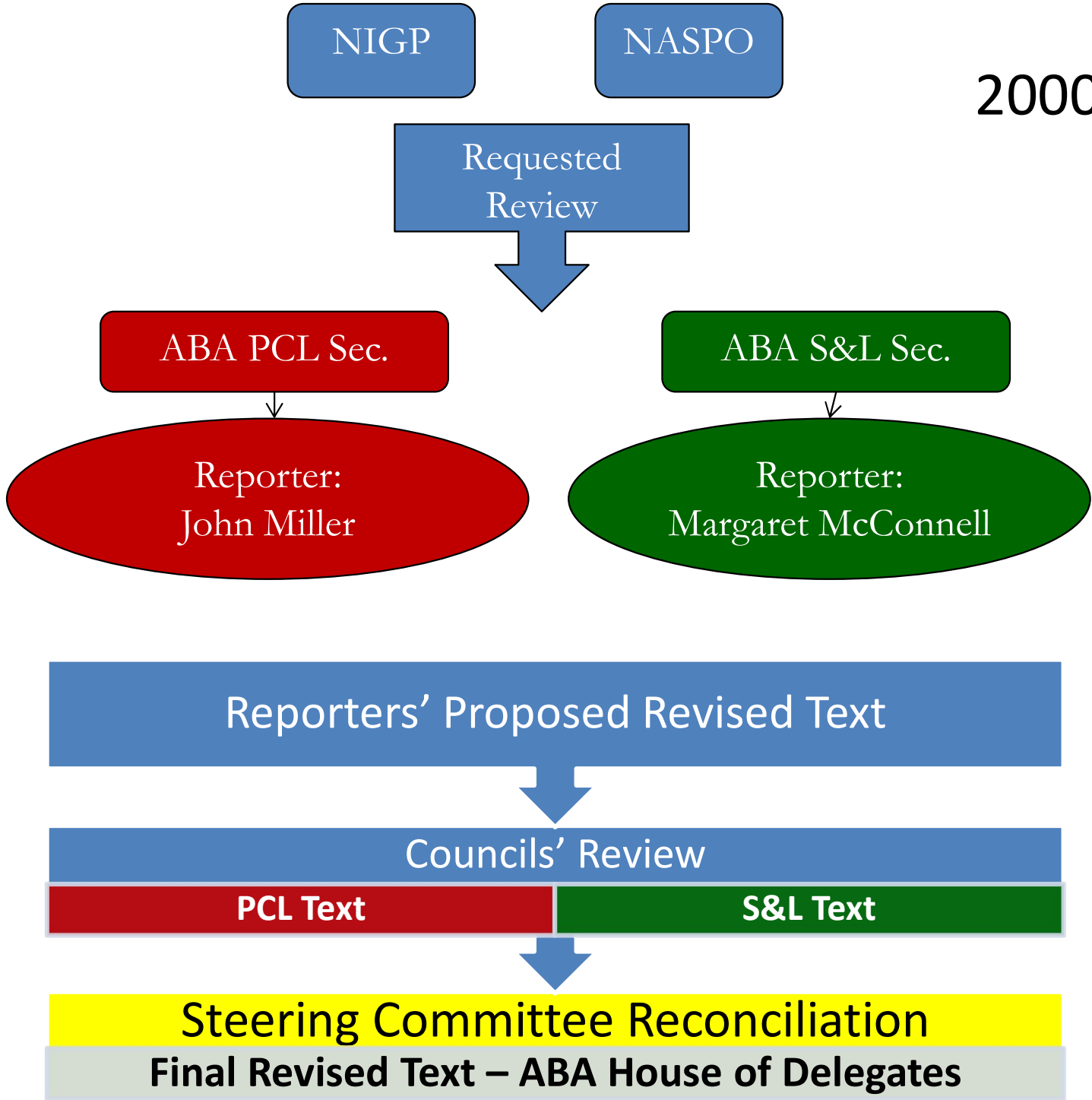
# NASPO and the Model Procurement Code

**“NASPO supports implementing the 2000 American Bar Association (ABA) Model Procurement Code’s provisions into state procurement laws. Sixty percent of the jurisdictions responding to the [NASPO 2018] survey indicated that they have adopted the provisions of the Model Code partially or in its entirety. Of these states, the majority implemented all provisions of the 2000 ABA Model Code, or modeled their procurement codes after it.”**





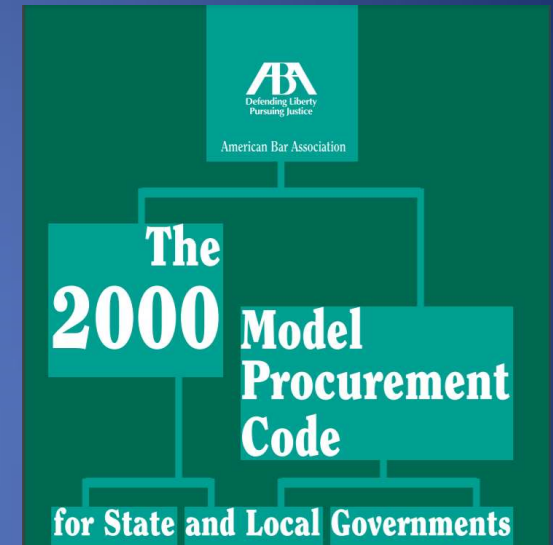
# 2000 MPC Revision Process



# Session 2: Scott Sheffler

## OMB Grant Rules

- Non-Federal Entities (2 CFR 200.317 et seq.)
  - Must have codes of conduct: personal and organizational conflicts
  - Intergovernmental purchases recommended
  - Value engineering: proposals to reduce costs
  - Acquisition records
  - Time & Materials contracting only when no other contracting means
  - Responsible for “source evaluation, protests, disputes, and claims”
  - Must employ “full and open” competition
  - Micro-purchases / simplified acquisitions
  - Sealed bids/ (Requests for) Proposals / Noncompetitive
  - Affirmative steps to promote women- and minority-owned businesses, and those in labor surplus areas
  - To greatest practical extent, preference for U.S. goods
  - Procurement of recovered materials
  - Cost or price analysis required – assess reasonableness and profit
  - Federal agency review of procurement system – unless approved (cf. World Bank “Alternative Procurement Arrangements”)
  - Bonding requirements – payment and performance bonds
  - Appendix II to Part 200: Contract clauses (including anti-Huawei, U.S. domestic preferences, etc.)



GWU Law student Yolanda Williams (USA) wrote on this gap analysis



## SESSION 3: GAP” ANALYSIS – MPC VERSUS OMB UNIFORM GRANTS GUIDANCE

	OMB Grants Guidance - 2 CFR	MPC Revision Issue
	§ 200.317 Procurements by states.	States left to own procurement methods. MPC 11-301 defers to federal requirements.
	§ 200.318 General procurement standards.	OCI rules required; must consider contractor integrity; no T&M (IDIQ?) absent determination; oversight required
	§ 200.319 Competition.	Exclude those with OCIs; no geographic preferences; prequalification must be open
	§ 200.320 Methods of procurement to be followed.	Micro-purchases (optional)
	§ 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms. NFE “must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible” --	MPC sets suggested methods for addressing socioeconomic goals.
	§ 200.322 Domestic preferences for procurements. OMB: “As appropriate . . . the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for . . . goods, products, or materials produced in the United States . . .”	
	§ 200.323 Procurement of recovered materials.	
	§ 200.324 Contract cost and price. OMB: independent estimate before bids required.	
	§ 200.325 Federal awarding agency or pass-through entity review.	No MPC provisions on procurement data standards or open contracting
	§ 200.326 Bonding requirements. Unless NFE bonding requirements approved, must have bid, performance and payment bonds.	
	§ 200.327 Contract provisions. Need remedy-granting clauses, T/C, T/D, EEO, Davis-Bacon, Contract Work Hours, Rights to Inventions, debarment, Byrd Anti-Lobbying, Huawei/ZTE,	MPC does not include clauses; in ancillary MPC materials.



# ADDITIONAL POTENTIAL REFORMS

# Session 4: Cybersecurity

- Will be addressed on July 27
- State and local governments face severe cybersecurity challenges
  - Variety of approaches across nation
  - Federal government offers models
  - StateRAMP

*Working Papers*  
*on the*  
*American Bar Association's*  
*Model Procurement Code*

[Editor's Note: These are summaries of the working papers; the papers themselves are being posted on the ABA Public Contract Law Section's Website, under "News," at [http://www.americanbar.org/groups/public\\_contract\\_law.html](http://www.americanbar.org/groups/public_contract_law.html)]

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**Papers Prepared for**  
**Seminar on State & Local Procurement Law**  
**George Washington University Law School**  
**Professor Christopher Yukins**  
**Spring 2013**

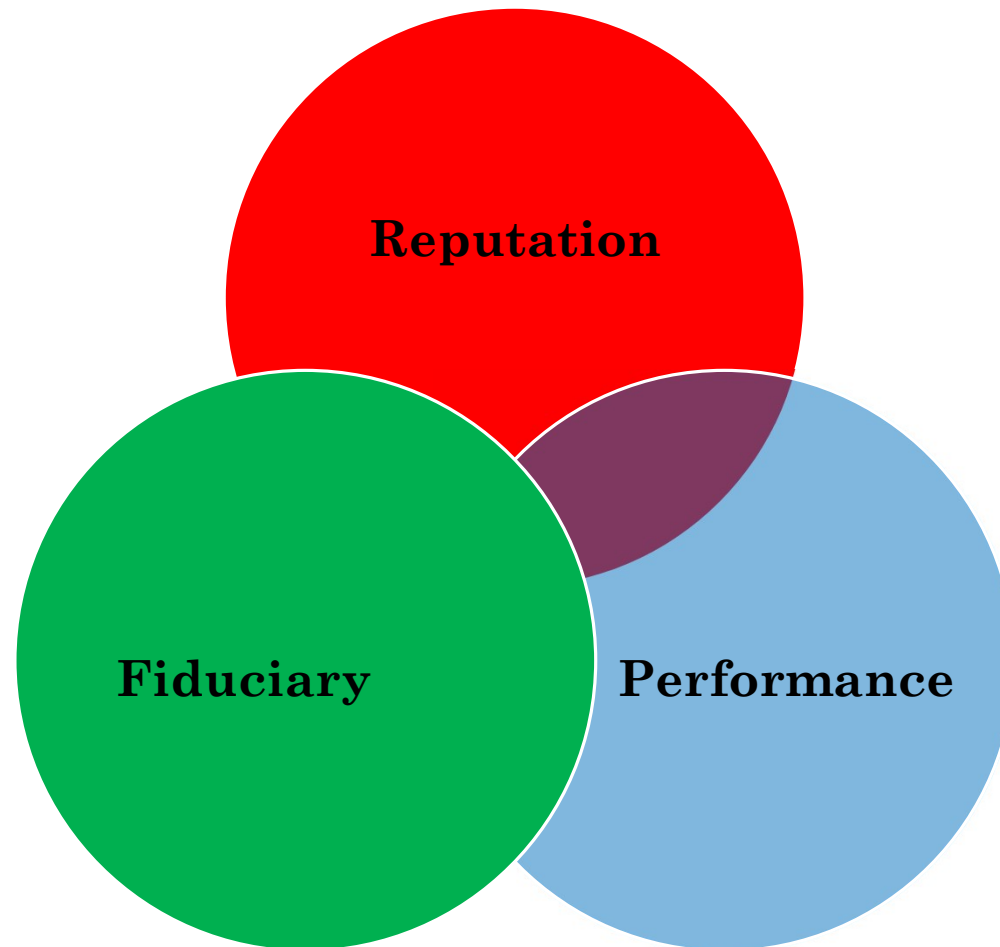
# Enhance MPC on Anti-Corruption

Alan Coleman

- Recommends broadening MPC anti-corruption provisions, such as:
  - Fraud (*cf.* False Claims Act)
  - Organizational Conflicts of Interest (OCIs)
  - Clarifying delegations of authority
  - Enhanced protections for contractor confidential information (*cf.* Procurement Integrity Act)



# Risks of Corruption



# Model Procurement Code: Framework

## §12-102 General Standards of Ethical Conduct.

### (1) *General Ethical Standards for Employees.*

Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust.

In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in: Section 12-104 (Employee Conflict of Interest); Section 12-105 (Employee Disclosure Requirements); Section 12-106 (Gratuities and Kickbacks); Section 12-107 (Prohibition Against Contingent Fees); Section 12-108 (Restrictions on Employment of Present and Former Employees); and Section 12-109 (Use of Confidential Information).

### (2) *General Ethical Standards for Non-Employees.*

Any effort to influence any public employee to breach the standards of ethical conduct set forth in this Section and in Section 12-104 through Section 12-109 of this Article is also a breach of ethical standards.

# OMB Uniform Grants Guidance: Sec. 200.318 Conflicts of Interest

(c)(1) The non-Federal entity **must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts.** **No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest.** Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity **may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.** However, **non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value.** The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(h) The **non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.** Consideration will be given to **such matters as contractor integrity, compliance with public policy,** record of past performance, and financial and technical resources. See also §200.214 [suspension and debarment].

# Personal Conflicts of Interest Model Procurement Code (PIP) – 2007

## §12-104 **Employee Conflict of Interest.**

- (1) ***Conflict of Interest.*** It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when **the employee knows that:**
- (a) the employee or any member of the employee's Immediate Family has a Financial Interest pertaining to the procurement;
  - (b) a business or organization in which the employee, or any member of the employee's Immediate Family, has a Financial Interest pertaining to the procurement; or
  - (c) any other person, business, or organization with whom the employee or any member of the employee's Immediate Family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.
- (2) ***Financial Interest in a Blind Trust. . . .***
- (3) ***Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver.*** Upon discovery of an **actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved.** The employee may, at the same time, apply to the [Ethics Commission] in accordance with Section 12-401(3) ([Ethics Commission], Waiver) for an advisory opinion as to what further participation, if any, the employee may have in the transaction.



# OMB Uniform Grants Guidance

## Sec. 200.318: Organizational Conflicts

(2) If the **non-Federal entity** has a **parent, affiliate, or subsidiary organization** that is not a State, local government, or Indian tribe, **the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest.**

Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

# Organizational Conflict of Interest

## Minn. Stat. Ann. § 16C.02

**Organizational conflict of interest.** “Organizational conflict of interest” means that because of existing or planned activities or because of relationships with other persons:

- (1) **the vendor is unable or potentially unable to render impartial assistance or advice** to the state;
- (2) the **vendor's objectivity** in performing the contract work is or might be otherwise impaired; or
- (3) the **vendor has an unfair advantage**.

# MPC (Public Infrastructure Procurement (PIP) (2007)) - Kickbacks

***Kickbacks.*** It shall be a breach of ethical standards for **any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor** under a contract **to the prime contractor or higher tier subcontractor** or any person associated therewith, **as an inducement for the award of a subcontract or order.**

# Federal Anti-Kickback Clause: FAR 52.203-7

*Kickback*, as used in this clause, means any **money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided to any prime Contractor, prime Contractor employee, subcontractor, or subcontractor employee** for the purpose of **improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract** relating to a prime contract.

\* \* \*

(c)

(1) The Contractor **shall have in place and follow reasonable procedures designed to prevent and detect possible violations** described in paragraph (b) of this clause in its own operations and direct business relationships.

(2) When the Contractor has **reasonable grounds to believe that a violation described in paragraph (b) of this clause may have occurred**, the Contractor shall promptly report in writing the possible violation. Such reports shall be made to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Attorney General.

(3) The Contractor **shall cooperate fully** with any Federal agency investigating a possible violation described in paragraph (b) of this clause.

# Contractor Confidential Information

**MPC (PIP) §12-109  
Information.**

**Use of Confidential**

It shall be a breach of ethical standards for any employee or former employee knowingly to use **confidential information** for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person.



**Bid or Proposal?**

**Source Selection?**

# MPC and Reverse Auctions

## Greg Harding

- MPC silent on reverse auctions
- Need guidance to avoid improper use
- Recommendation in line with prior PCL

### Section comments on the FAR

- “The Section believes that there is a need for limited guidance in the area of auctions and reverse auctions.”

■ Letter from the Section of Public Contract Law of the American Bar Association letter to the FAR Secretariat on January 5, 2001, regarding **Reverse Auction Notice**, 65 Fed Reg. 65231 (October 31, 2000)



# International Trade – Constitutional Law

**Kimberly Larson**

- As international trade agreements opening procurement markets grow more important, this paper assesses whether, **as a constitutional matter, the federal government has the authority to require states to open their procurement markets to foreign goods and services**



# Debarment for Environmental Offenses

## Claire Logan

- This paper argues that the MPC should be amended to provide, in line with federal and international models, that **contractors may be debarred for environmental violations.**



# Using the MPC as a Benchmark for State Bid Protest Systems

**Keith Lusby**

- As international agreements call for states to have effective bid protest systems, **states should uniformly use the MPC as a benchmark** for updating their protest systems.



# Filling Gaps in MPC, Per National and Int'l Models

## Paul Metzner

- IDIQ Contracts/Framework Agreements
  - Overuse
  - Restricting Competition (packaged procurement)
- Reverse Auctions
  - Inadequate Transparency
  - Overuse
  - Barrier to Competition
  - “Winner’s Curse”

# Improving MPC Guidance on Cost-Reimbursement Contracting

**George Petel**

- This paper argues that the MPC should be revised, to enhance guidance on cost-reimbursement contracting so that states, in implementing federal grants and otherwise, can **use more sophisticated contracting methods in undertaking complex acquisitions** with substantial performance risk.

# Suspension and Debarment: Including a Policy Statement in the MPC

## Alix Town

- No clear direction to the suspension and debarment regime
- A policy statement similar to FAR 9.402 would provide purpose and backdrop
- Guides program and provides role within the procurement system



# Including Remedial Measures and Mitigating Factors in the MPC

## **Alix Town**

- No guideline to establish present responsibility
- Adding mitigating factors and remedial measures similar to FAR 9.406-1(a) provides a target for companies and SDOs alike
- Provides a baseline for judicial review

# Creating Permissive Term Lengths in the MPC

## Alix Town

- Limits suspensions to 3 months and debarments to 3 years
- Changing the limit from “shall not” to “should not” will allow tailored exclusion periods
- Accommodates extended trials and imprisonment

Defending Liberty  
Pursuing Justice

American Bar Association

# The 2000 Model Procurement Code for State and Local Governments

Agenda: MPC & Debarment



Section of  
Public Contract Law



Section of  
State and Local  
Law

# Debarment: Theory & Models





Corruption  
Risks in  
Procurement:

Performance  
Reputation  
Fiduciary



**Contracting  
Official Finds  
Non-Qualified**



**Higher-Level  
Debarment  
Official  
Excludes**



**Administrative  
Adjudicative  
Process to  
Debar**



**Court Debars**

**DEBARMENT MODELS**





# **Debarment and the Model Procurement Code**

# Model Procurement Code Section 9-102(1)

## -- Authority and Process

**Model MPC regulations** allow affected person to request informal hearing, with due process protections including potentially document production, and a written report on which the affected person may comment. CPO or head of agency may call for oral argument by parties before issuing decision. List of debarred persons available to public on request.

### §9-102 Authority to Debar or Suspend.

- (1) *Authority.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Chief Procurement Officer or the head of a Purchasing Agency, after consultation with the Using Agency and the [Attorney General], shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than [three years]. The same officer, after consultation with the Using Agency and the [Attorney General], shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding [three months]. The authority to debar or suspend shall be exercised in accordance with regulations.

#### COMMENTARY:

- (1) It is intended that the Attorney General or equivalent legal officer in the enacting jurisdiction will be consulted concerning any proposed suspension or debarment.
- (2) The National Association of State Procurement Officials suggests that regulations provide the option to debar a person from doing business with one or more agencies, or all agencies. It also recommends that regulations permit debarment to be limited to units within a corporation, as appropriate.

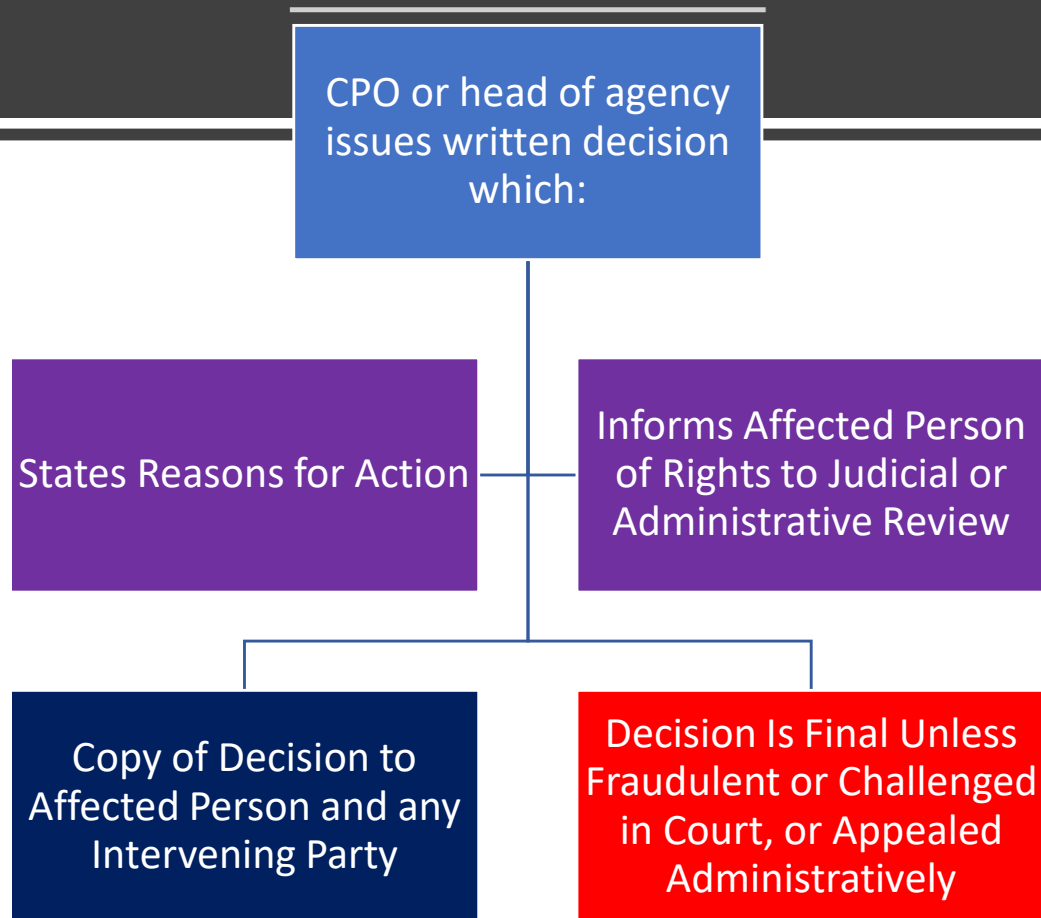


# Model Procurement Code Section 9-102(2) Causes for Debarment or Suspension

CAUSE	COMMENT
(a) Criminal conviction related to contract	Parallels FAR 9.406-2(a)(1)
(b) State or federal conviction for embezzlement, theft, forgery, bribery, etc., “or any other offense indicating a lack of business integrity . . . which currently, seriously, and directly affects responsibility as a contractor	Parallels FAR 9.406-2(a)(3)
(c) State or federal conviction for antitrust violation arising out of bid or proposal	Parallels FAR 9.406-2(a)(2)
(d) Contract violation which is considered by Chief Procurement Officer or head of agency “to be so serious” as to justify debarment: (i) deliberate failure to perform per specifications or schedule; (ii) recent record of failure to perform.	Parallels FAR 9.406-2(b)
(e) any other cause CPO or head of agency “determines to be so serious and compelling as to affect responsibility as a . . . contractor, including debarment by another governmental entity for any cause listed in regulations”	Parallels FAR 9.406-2(c), which includes subcontractors
(f) violation of the ethical standards set forth in Article 12 (Ethics in Public Contracting).	No direct FAR parallel

Additional federal grounds for debarment include “Made in America” fraud, arms export violations, failing to pay taxes, unfair trade practices under the Defense Production Act, Drug Free Workplace violations, immigration violations, and failure to make mandatory disclosures of wrongdoing.

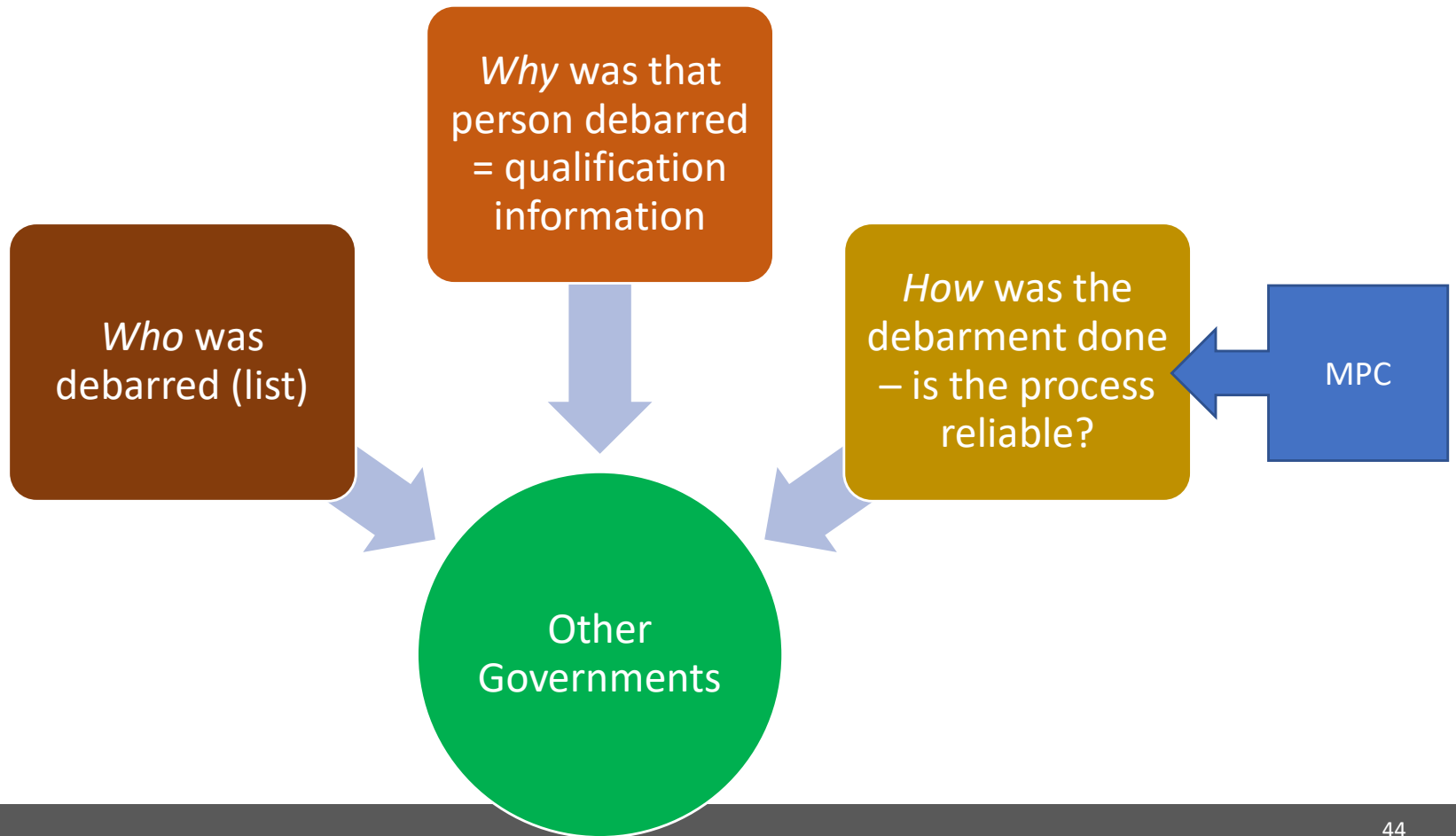
# Model Procurement Code Section 9-102(2) Debarment Decision



# Observations on MPC Debarment Provisions

- MPC contemplates **relatively formal adjudicative process**
  - Federal debarment procedures often pivot informally to forward-looking discussions regarding contractor remedial and compliance efforts
- **No reference in 2000 Model Procurement Code or 2002 model regulations to remedial (compliance) measures** which are central part of current federal approach
  - Contrast with risk-based compliance approach advanced by federal 2008 contractor compliance and mandatory disclosure rule
- **Only suspension/debarment list** will be published by state or local government, and only on public request – no public statement of reasons
  - Difficult for other states/governments to assess qualification issues raised by suspension or debarment
  - Within foreseeable future, probably most qualification information will be public

# Using Debarment Information Across Borders





# Contractor Compliance Systems

**Laura Sheldon**

- This paper argues that the MPC should be updated **to include contractor compliance requirements**. The paper notes that these corporate compliance systems are becoming the norm internationally, and should be adopted at the state and local level, as well.



**ICC**

<b>1. Standards and procedures</b>	✓	✓	✓	✓
<b>2. Knowledgeable leadership</b>		✓	✓	✓
<b>3. Exclude risky personnel</b>	✓	✓	✓	✓
<b>4. Training</b>	✓	✓	✓	✓
<b>5. Monitor, evaluate, reporting hotline</b>	✓	✓	✓	✓
<b>6. Incentives and discipline</b>	✓	✓	✓	✓
<b>7. Adjust program to risk</b>	✓	✓	✓	✓

**Compliance**

# Socioeconomic Policies

## Lyndsey Waddington

- This paper points out that, given the broad diversity of socioeconomic programs in other procurement systems (such as the federal system), the **MPC should be updated to provide additional guidance on possible socioeconomic preferences in procurement.** The paper argues that the current hodge-podge of socioeconomic rules, which vary enormously from jurisdiction to jurisdiction, creates what is in practice an extremely inefficient barrier to competition across jurisdictional boundaries.

# Human Trafficking

## Erica Young

- This paper argues that, given the pivotal role that state and local law enforcement agencies play in fighting human trafficking, **the MPC should be updated – per the federal model -- to include a provision banning human trafficking** in state and local contracting.

# Open Issue: MPC to be Public Document?

## Related Resources

[2000 Model Procurement Code Cover Table of Contents](#) 

[2002 Updates Incorporated into 2000 Model Procurement Code](#) 

[2000 Model Procurement Code Introduction and 2002 Regs](#) 

[2002 Table of Contents to 2002 Model Regs](#) 

[2007 Introduction To Model Code for Public Infrastructure Procurement](#) 

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[2007 May 2 ABA Comments on FHWA Model](#) 

## Get the 2000 Code and the 2007 MC PIP



### **2007 Model Code for Public Infrastructure Procurement**

The 2007 Model Code for Public Infrastructure Procurement ("2007 MC PIP") is a condensation of the ABA 2000 Model Procurement Code for State and Local...  
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# Conclusion