

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

Papers Prepared for
Seminar on State & Local Procurement Law
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Preface

The introduction to the 2000 version of the American Bar Association's *Model Procurement Code for State and Local Governments* (MPC) (reproduced in an addendum to this document) explained the importance of the MPC:

Since 1979, the Code has been adopted in full by sixteen (16) 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. As described below, the Code was in need of an update based on the ever-changing procurement environment, and the MPC Revision Project was structured to complete the task on or about the Code's twentieth birthday. 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.

Recognizing the importance of the MPC, and the possible need for further reforms, a number of students in the George Washington University Law School spring 2013 seminar in state and local procurement law assessed the MPC critically. Their resulting papers, which are attached here, suggest reforms in a broad range of areas, from cost accounting to human trafficking to corporate compliance – among many others. These working papers, while only first thoughts on possible reform, are worthwhile reading, for they reflect the MPC's importance as a vibrant part of procurement law in the United States.

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ATTACHMENT 1

**Anti-Corruption Measures in the 2000 ABA
Model Procurement Code**

By Richard Alan Coleman, Jr.



/s/ Richard Alan Coleman, Jr.

Abstract

The large amounts of money involved in public procurement creates a strong temptation for actors to behave in a corrupt manner, due to both the potential for large returns and the possibility that small corrupt actions will not be noticed in the larger pool of activity. The American Bar Association's 2000 Model Procurement Code for State and Local Governments contains a number of measures designed to deter corrupt activity; these measure include a preference for competitive bidding, provisions for the suspension and debarment of corrupt contractors, and enforceable ethics standards. Nevertheless, the Model Procurement Code omits a number of provisions employed to great effect in federal procurement, is drafted in such a way that certain important decisions will be inadvertently left to agency discretion, and may promote corrupt agreements through measures intended to prevent them.

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Preface

When the government procures goods and services, the government officials and the private contractors face a constellation of temptations, some of which may be unique or uniquely problematic to the context of government procurement. State contracts can involve significant amounts of money, creating a strong incentive for contractors to try to win at any cost. Moreover, a project that would occupy the majority of a private procurer's resources and attention is, for a state, merely one of many competing concerns, which can contribute a contractor's belief that cheating can yield a victory. On the other side of the table, government procurement officials must uphold ethical obligations far beyond those in the private sector due to the responsibility associated with handling public funds. As a result of these factors, any structure for government procurement must include measures to discourage and correct corrupt behavior. The American Bar Association's 2000 Model Procurement Code for State and Local Governments, which outlines just such a structure, consequently contains a number of robust measures for fighting corruption. Nevertheless, the Model Code fails to utilize certain essential measures, while some measure included in the Model Code are incorporated in a fashion that renders them inadequate, or even contrary to their intended purpose.

I. Introduction: What is Corruption?

Corruption, "the abuse of entrusted power for private gain,"¹ can take a number of forms and interfere in the procurement process in a number of ways. Certain forms of corruption exert the most influence prior to the award of the contract, while others occur only after the award has

¹ 2011 Corruption Perceptions Index – In Detail, Transparency International, http://www.transparency.org/cpi2011/in_detail; see generally, Transparency International, Handbook for Curbing Corruption in Public Procurement 14-24 (2006), available at http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement (identifying various forms of corruption and risk factors contributing to corrupt behavior).

been made. Additionally, some types of corruption of the process involve both the contractor and the government, while other forms of corruption exist only with the contractor and others still exist only with the government.

A. Corruption Prior to the Award

Corruption that exists prior to the award of the contract typically consists of behavior that results in an award to a contractor whose proposed terms would not have obtained the award had the process been undertaken fairly. Bribery, “[t]he corrupt payment, receipt, or solicitation of a private favor for official action,”² is perhaps the most infamous type of this kind of corruption, especially in the context of high officials accepting inappropriate gifts in exchange for illegitimate contracts.³ Illegal gratuities, gifts to a public official in recognition of an official act that the official has undertaken or will undertake,⁴ are of a similar character to bribes, to the extent that the giving or receiving of an illegal gratuity can be considered a lesser included offence of the giving or receiving of a bribe.⁵ Nevertheless, illegal gratuities are considered less severe than bribes because they are not the result of a corrupt deal, but rather, “may constitute merely a reward.”⁶ Despite the visibility of these forms of corruption, bribery and illegal gratuities are not the only misconduct that can disrupt the pre-award stage of government procurement, as both contracting officials and contractors may independently disrupt the process through improper behavior.

² Black’s Law Dictionary 217 (9th ed. 2009).

³ E.g., Green Party v. Garfield 616 F.3d 189, 194 (2d Cir. 2010) (noting the wide attention garnered by a number of scandals involving contractors bribing Connecticut officials in exchange for contracts).

⁴ See, e.g., 18 U.S.C. § 201(c).

⁵ United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 405 (1999).

⁶ Id.

Beyond the possibility of bribery, a contracting official may suffer from a conflict of interest, which prevents the official from issuing the contract in a rational and objective manner. A conflict of interest is, “[a] real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.”⁷ Concern over conflicts of interest is well founded on the gross misconduct that such conflicts can induce in some officials⁸ and on concern over the more subtle subconscious effect that it may have even on highly principled procurement officials. When the government uses outside contractors to assist with the contracting process, the government faces the risk that the contractor will suffer from an “organizational conflict of interest.”⁹

Even beyond conflicts of interest, states may reasonably desire to prevent contracting officials from engaging in “such abuses as fraud, favoritism, improvidence, and extravagance,”¹⁰ a broader category that would seem to reach even poor judgment, rather than the simple pecuniary self-interest at issue in cases of bribery and conflict of interest. Indeed, some cases address the problem in terms of, “exclud[ing] favoritism and corruption,”¹¹ which makes clear that, although the interest in preventing favoritism is the same as that in preventing bribery, the favoritism need not arise out of traditional corruption to violate the principles of public procurement.

⁷ Black’s Law Dictionary 341 (9th ed. 2009); accord Carson Redevelopment Agency v. Padilla, 44 Cal. Rptr. 3d 881, 885-86 (Cal. Ct. App. 2006).

⁸ Nikkos Passas, Corruption in the Procurement Process/Outsourcing Government Functions: Issues, Case Studies, Implications 7-8 (W. Black ed., 2007), available at http://www.theifp.org/research-grants/procurement_final_edited.pdf (noting Air Force procurement official who, in response to a generous job-offer from Boeing, directed a number of contacts to the company and agreed to unreasonably high prices for the company’s contracts).

⁹ 48 C.F.R. § 9.502(c) (2012) (“An organizational conflict of interest may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition.”); see generally Daniel I. Gordon, Organizational Conflicts Of Interest: A Growing Integrity Challenge, 35 Pub. Cont. L.J. 25 (2005) (discussing organizational conflicts of interest and the relevant legal frameworks in the context of federal procurement).

¹⁰ E.g., Griswold v. Ramsey County, 65 N.W.2d 647, 652 (Minn. 1954).

¹¹ Harlem Gaslight Co. v. City of New York, 33 N.Y. 309, 329 (1865).

Although traditional conceptions of corruption may be limited to government officials, contractors are also in a position to disrupt the procurement process through unethical behavior. In this regard, the principle concern is that contractors may collude to submit bids or post prices that are higher than would be secured through a fair competition.¹² When conducted in the context of a competitive bidding process, such an agreement is known as “bid rigging,” which is “[o]ne of the most common violations the [Antitrust] Division [of the United States Department of Justice] prosecutes.”¹³ The essence of bid rigging is that the bidders agree amongst themselves which one of them will submit the winning bid and then either submit bids that they know will not win, a practice known as “complementary bidding,” or decline to submit bids and withdraw bids that have a possibility of beating the agreed-upon winner, which forms the practice of “bid suppression.”¹⁴

Conversely, a contractor may engage in “suicide bidding,” the practice of “bid[ding] at amounts that do not cover the cost of [the] work.”¹⁵ Contractors who suicide bid do so to use the contract, “to ensure they have work for their skilled staff to undertake,”¹⁶ or in the hope of employing, “adversarial behaviour [sic] to increase their final accounts.”¹⁷ Suicide bidding disrupts the procurement process by creating a bid that behaves in a similar manner to the

¹² See, e.g., Preventing And Detecting Bid Rigging, Price Fixing, And Market Allocation In Post-Disaster Rebuilding Projects: An Antitrust Primer for Agents and Procurement Officials, United States Department of Justice http://www.justice.gov/atr/public/guidelines/disaster_primer.htm (identifying various forms of such collusive agreements); Guidelines for Fighting Bid Rigging in Public Procurement, Organization for Economic Co-operation Development, 1-3 (2009), available at <http://www.oecd.org/competition/cartels/42851044.pdf> (identifying forms of bid rigging and conditions that create additional risk).

¹³ Preventing And Detecting Bid Rigging, Price Fixing, And Market Allocation, *supra* note 12.

¹⁴ Id.

¹⁵ Carl Brown, Landlords crack down on ‘suicide-bidding’, Inside Housing (May 27, 2011) <http://www.insidehousing.co.uk/finance/landlords-crack-down-on-%E2%80%98suicide-bidding%E2%80%99/6515756.article>.

¹⁶ A Report Exploring Procurement in the Construction Industry, The Chartered Institute of Building, 12 (2010), available at <http://www.ciob.org.uk/node/25162>.

¹⁷ Id.; accord 48 C.F.R. § 3.501-1 (“*Buying-in*...means submitting an offer below anticipated costs, expecting to (1) Increase the contract amount after award (e.g., through unnecessary or excessively priced change orders); or (2) Receive follow-on contracts at artificially high prices to recover losses incurred on the buy-in contract.”).

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mythical Trojan Horse: the bid appears favorable because the price is lower, but in fact, “can lead to poor quality service and to [the contractor] seeking contract loopholes to charge clients extra.”¹⁸ Additionally, contracts secured by suicide bidding can lead the contractor into bankruptcy,¹⁹ which may disrupt the company’s ability to fulfill its obligations.

B. Corruption Following the Award

Once the procurement process has resulted in an award, the threat of corruption shifts from the risk that the contract will be formed improperly to the risk that the execution of the contract will be subverted in some manner. Although forces other than corruption and outside a contractor’s control may cause it to fail to perform a contract to specification, some contractors may also attempt to circumvent their contractual obligations to their own benefit. Such behavior may take the form of attempts to alter the terms of the contract²⁰ or it may take the form of outright fraud.²¹ Such fraud may take a number of forms, including submission of material as higher quality than it actually is²² or “[s]hifting expenses from one fixed-price contract to another.”²³

¹⁸ Brown, *supra* note 15.

¹⁹ See, e.g., Laurence Knight, *Connaught collapse: What went wrong?*, BBC (Sept. 8, 2010) (noting that bankruptcy of British construction company Connaught may have resulted from the company’s practice of suicide bidding); Grant Prior, *Mears blames suicide bids for Connaught and Rok failures*, *Construction Enquirer* (Mar. 15, 2011) <http://www.constructionenquirer.com/2011/03/15/mears-boss-blames-low-bids-for-rok-and-connaught-failures> (noting allegations that an important factor in the collapse of competing companies Connaught and Rok was the practice of bidding at “unsustainable prices”).

²⁰ *A Report Exploring Procurement in the Construction Industry*, *supra* note 16, at 12 (“[S]ome companies will...use adversarial behaviour [sic] to increase their final accounts.”).

²¹ E.g., Taxpayers Against Fraud Education Fund, *False Claims Act Overview*, available at <http://www.taf.org/resource/fca/false-claims-act-overview>.

²² *Contractor Fraud*, GovernmentFraud.us, <http://www.governmentfraud.us/pages/contractor-fraud.php>; see also Taxpayers Against Fraud Education Fund, *supra* note 21.

²³ Taxpayers Against Fraud Education Fund, *supra* note 21.

II. Anti-Corruption Measures Employed by the 2000 ABA Model Procurement Code

The Model Procurement Code contains a number of measures designed to fight corruption, either by preventing corruption prior to the award of a contract or by correcting an award that was improperly granted or performed. The measures that serve to inhibit corrupt awards include a preference for competitive bidding,²⁴ provisions for the suspension and debarment of contractors for malfeasance,²⁵ and ethics standards regulating both government employees²⁶ and, to a lesser extent, contractors.²⁷ The measures that serve to correct improper solicitations, awards and contract performance include the ability for bidders to protest improper procurement procedures and awards²⁸ and measures to monitor the execution of the contract after the award.²⁹

A. Preference for Competitive Sealed Bidding

The Model Procurement Code requires that, with certain exceptions, all contracts must be formed through competitive sealed bidding.³⁰ Competitive bidding requirements are a well-established method of protecting the public procurement process from corruption and shady dealings. Indeed, measures invalidating public contracts not formed through a competitive bidding process go back over a century and a half³¹ and federal practice calls for the use of

²⁴ ABA Model Procurement Code for State & Local Gov'ts § 3-202 (2000); see also *id.* §§ 3-201 and -203 to -207.

²⁵ *Id.* § 9-102.

²⁶ *Id.* §§ 12-202(1), -204 to -209.

²⁷ *Id.* §§ 12-202(2), -206(2) & -207.

²⁸ *Id.* § 9-401(1) & -506(3).

²⁹ E.g., *id.* §§ 3-601 (Right to Inspect Plant); *id.* § 3-602 (Right to Audit Records).

³⁰ Model Procurement Code § 3-202.

³¹ See *McSpendon v. City of New York*, 20 N.Y.Super.Ct. 601 (1861) (applying a competitive bidding requirement added to the Charter of the City of New York in 1853).

sealed bidding when such bids are feasible,³² with other methods characterized as deviations from the standard of competitive bidding.³³

i. Competitive Sealed Bidding

One function of competitive sealed bidding is to curtail corruption;³⁴ when a state uses competitive bidding for a given procurement, one outcome is that the procuring official's discretion is curtailed: the official must select the contractor that submitted the lowest bid, regardless of any bias or bribes. Some courts have gone as far as endorsing the point of view that restricting contracting officials' discretion is a "fundamental purpose" of competitive bidding statutes.³⁵ Although this purpose has been described as, "plac[ing] all general contractors and subbidders [sic] on an equal footing in the competition to gain the contract,"³⁶ this description is dependent on the idea that competitive bidding "facilitates the elimination of favoritism and corruption as factors in the awarding of public contracts."³⁷ Indeed, at least some jurisdictions have outright rejected the idea that a purpose of competitive bidding is the protection of contractor interests³⁸ such that, for example, a procuring agency could reject all bids and initiate another round of bidding if the agency has reason to believe that it can secure a lower price for

³² 48 C.F.R. § 6.401(a) (2012).

³³ *Id.*, § 6.102(b) ("If sealed bids are not appropriated...contracting officers shall request competitive proposals or use the other competitive procedures."); *id.* 6.102(c) ("If sealed bids are not appropriate, contracting officers may use any combination of competitive procedures.").

³⁴ *E.g.*, New York State Chapter, Inc. v. New York State Thruway Authority, 666 N.E.2d 185, 190 (N.Y. 1996); *but cf.* ; see generally Omer Dekel, The Legal Theory Of Competitive Bidding For Government Contracts, 37 Pub. Cont. L.J. 237 (2008) (analyzing the objectives the public tender mechanism, including prevention of corruption, promotion of equality among bidders, and economic efficiency).

³⁵ Griswold v. Ramsey County, 65 N.W.2d 647, 652 (Minn. 1954).

³⁶ Interstate Engineering Corp. v. City of Fitchburg, 329 N.E.2d 128, 132 (Mass. 1975).

³⁷ *Id.*

³⁸ Conduit and Foundation Corp. v. Metropolitan Transp. Authority, 66 N.Y.2d 144, 148 (N.Y. 1985) ("These laws were not enacted to help enrich the corporate bidders but, rather, were intended for the benefit of the taxpayers.").

the goods or services.³⁹ The Model Procurement Code explicitly provides that the state may reject all responses to a particular solicitation, “when it is in the best interests of the [State] in accordance with regulations,”⁴⁰ demonstrating that the Model Code’s preference for competitive bidding is for the protection of the state.

ii. Small Purchases

The Model Procurement Code contains a number of alternatives to competitive sealed bidding, available upon certain conditions.⁴¹ For example, section 2-304 allows purchases below an amount to be set by regulation to escape the normal bidding requirements through a “small purchases” exception. However, to the extent that the Code’s preference for competitive sealed bidding is intended to limit the discretion of the procuring officials and thereby prevent abuse, the availability of small purchase procedures creates an avenue for corrupt officials to bypass the system. Although the MPC’s small purchases provision obliges that, “procurement requirements shall not be artificially divided so as to constitute a small purchase,”⁴² the effectiveness of such a requirement is contingent on the effectiveness of whatever oversight enforces the provision. Indeed, disputes over whether particular procurement requirements were properly divided into small purchases go back over a hundred years,⁴³ and disagreements over the application of “small purchases” exceptions have continued into the 21st Century.⁴⁴ Nevertheless, competitive

³⁹ *Id.* at 150.

⁴⁰ Model Procurement Code § 3-301.

⁴¹ *Id.* §§ 3-201 and -203 to -207.

⁴² *Id.* § 3-204.

⁴³ *See, e.g., Walton v. City of New York*, 29 N.Y.S. 615 (1898) (addressing whether multiple purchases of butter, each less than \$1,000 but collectively greater than \$4,000, triggered the requirement that all contracts over \$1,000 be awarded by competitive bidding).

⁴⁴ *See, e.g., Advanced Transportation and Logistics Inc. V. Botetourt County*, 2008 WL 8201355, 2 (Va.Cir.Ct.) (rejecting the County’s argument that the contracts for waste hauling services were “small purchases” because the contractors charged the citizens directly).

bidding does produce administrative expenses,⁴⁵ so some form of small purchases procedure is likely necessary to avoid situations where the State would otherwise be forced to spend more administering the bidding process than the value of the contract. Therefore, any flaws in the basic concept of a small purchases process must be addressed by corrective measures, not by removal of the process.

iii. Competitive Proposals

Aside from the exception for small purchases, the Model Procurement Code also contains a number of provisions establishing circumstances where competitive sealed proposals, rather than competitive bidding, apply by default. Certain types of contract are to be formed through competitive sealed proposals rather than competitive sealed bids.⁴⁶ Moreover, the Code contemplates that regulations will establish specific types of goods, services, and construction for which competitive sealed bidding is inappropriate.⁴⁷

The use of competitive proposals involves a great deal more discretion on the part of the procuring officer because the award must be based on a weighing of many factors, unlike competitive bidding, which is based only on the price of the bid. To limit the potential for abuse of that discretion, federal procurement law requires that, “the head of the agency shall award a contract...considering only cost or price and the other factors included in the solicitation.”⁴⁸

Nevertheless, a fair degree of discretion remains: although, “[p]rice (or cost) must always be a

⁴⁵ E.g., House Fiscal Agency, Schools: Competitive Bidding For Non-Instructional Services (Mich. 2011) available at <http://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/htm/2011-HLA-4306-3.htm> (“Requiring a competitive bid process may create additional administrative costs for a district, which may be offset by newly achieved contract savings.”).

⁴⁶ Model Procurement Code § 3-203(1)(c) (“Contracts for the design-build, design-build-operate-maintain, or design-build-finance-operate-maintain project delivery methods specified in Article 5 shall be entered into by competitive sealed proposals.”); cf. 48 C.F.R. § 6.401(b)(1) (“Contracting officers may request competitive proposals if sealed bids are not appropriate under paragraph (a) of this section.”).

⁴⁷ Model Procurement Code § 3-203(1)(b).

⁴⁸ 10 U.S.C. § 2305(b)(4)(C) (West 2013).

‘factor’ in an agency's decision to award a contract,”⁴⁹ a proposal may properly defeat even a significantly cheaper proposal, “if the agency can demonstrate within a reasonable certainty that *the added value of the proposal is worth the higher price.*”⁵⁰ Similarly, at least some state laws allow agencies a fairly wide degree of discretion in selecting the winning proposal.⁵¹

iv. Procurement Methods Selected Through Case-by-Case Discretion

In addition to preferences for certain methods in response to certain products and types of contract, the Model Code also allows for a degree of case-by-case discretion to employ alternative procurement methods that may be more advantageous in the given circumstance. The Model Code contemplates that, notwithstanding the Code’s general preferences, certain procurements may be better conducted through competitive sealed proposals,⁵² or as a sole source procurement,⁵³ an emergency procurement,⁵⁴ or a “special procurement.”⁵⁵ In all cases,

⁴⁹ Lockheed Missiles & Space Co., Inc. v. Bentsen, 4 F.3d 955, 959 (Fed. Cir. 1993).

⁵⁰ Id. at 960 (italics original).

⁵¹ See, e.g., Fleetcor Technologies Operating Co., LLC v. State ex rel. Div. of Admin., Office of State Purchasing, 2009-0976 (La. App. 1 Cir. 12/23/09), 30 So. 3d 102, 108 (quoting Executone of Central Louisiana, Inc. v. Hospital Service District No. 1 of Tangipahoa Parish, 99-2819, p. 4 (La.App. 1st Cir. 5/11/01) 798 So.2d 987, 991) (“Nor is it necessary for an outsider to be able to correctly choose the winner of the contract merely by reading the proposals.”).

⁵² Model Procurement Code § 3-203(1)(a).

⁵³ Id. § 3-205; cf. 48 C.F.R. 6.302-1 (federal conditions for sole-source procurement); see generally Doug Shevelov, Sole Source Construction Procurement Available for Ohio Statutory Municipalities, 21 Ohio Mun. Service 53 (2009).

⁵⁴ Model Procurement Code § 3-206; cf. 48 C.F.R. 6.302-2 (federal conditions for reduced competition on the basis of “unusual and compelling urgency”); Guidelines for Accelerated Public Procurement Procedures, Organization for Economic Cooperation and Development, <http://www.oecd.org/governance/procurement/toolbox/guidelinesforacceleratedpublicprocurementprocedures.htm> (“Emergency procurement is used in contexts where life, property or equipment is immediately at risk or standards of public health, welfare or safety need to be re-established without delay. Examples include government’s responses to natural disasters...and epidemics risks.”).

⁵⁵ Model Procurement Code § 3-207 (“[T]he Chief Procurement Officer or the head of a Purchasing Agency may with prior public notice initiate a procurement above the small purchase amount specified in Section 3-204 where the officer determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest.”); cf. 10 USC § 2304(c)(7) (“The head of an agency may use procedures other than competitive procedures only when...the head of the agency... determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned.”); Guidelines for Accelerated Public Procurement Procedures,

both the Chief Procurement Officer and the head of the purchasing agency have the power to make such a determination.⁵⁶ The Model Code also allows certain “designee[s] of either official” to make the determination that the alternative method is appropriate⁵⁷, save with respect to special procurements, which must be authorized by either the Chief Procurement Officer or the head of the purchasing agency.⁵⁸ In order for such a designee to approve the use of competitive sealed proposals or a sole source procurement, the designee must be “above the level of the Procurement Officer,”⁵⁹ while any designee of the Chief Procurement Officer or the head of the purchasing agency can authorize an emergency procurement.⁶⁰ A decision to use competitive proposals outside the requirements of the statute and regulations, or a decision to use sole source, emergency, or special procurement must be made in writing⁶¹ and, “[is] final and conclusive unless [it is] clearly erroneous, arbitrary, capricious, or contrary to law.”⁶²

B. Suspension and Debarment of Contractors

The Model Procurement Code contemplates that the State may have reason to believe that certain contractors present a greater risk of unethical behavior, non-performance, or other

⁵⁶ *supra* note 54 (“Non-emergency accelerated procurement procedures are used in contexts where unforeseen circumstances arise and require an urgent response by public organisations [sic]. In comparison to emergency procedures, non-emergency accelerated procurement should only be used as an exception and not the norm.”).

⁵⁶ Model Procurement Code §§ 3-203(1)(a) & -205 to -207.

⁵⁷ *Id.* §§ 3-203(1)(a), -205 & -206

⁵⁸ *Id.* § 3-207; *cf.* 10 USC § 2304(c)(7) (requiring the head of the agency to make the determination that other than full competition is in the public interest).

⁵⁹ Model Procurement Code §§ 3-203(1)(a) & -205.

⁶⁰ *Id.* § 3-206.

⁶¹ *Id.* §§ 3-203(1)(a), -205 to -207; *cf.* 48 C.F.R. 6.303-1(a)(1) (“A contracting officer shall not commence negotiations for a sole source contract, commence negotiations for a contract resulting from an unsolicited proposal, or award any other contract without providing for full and open competition unless the contracting officer...[j]ustifies, if required in 6.302, the use of such actions in writing”); Template For Non-Competitive Tender Method Reporting, Organization for Economic Cooperation and Development, <http://www.oecd.org/governance/procurement/toolbox/templatefor-non-competitivetendermethodreporting.htm> (“Establishing a template to document and file information related to non-competitive tender methods allows procurement officers to justify and document why the procuring authority has chosen a non-competitive method thereby ensuring consistency across procuring authorities and support internal and external ex-post evaluation.”).

⁶² Model Procurement Code § 3-701.

misconduct. In response, the Model Procurement Code grants the Chief Procurement Officer and the head of the purchasing agency authority to suspend and/or debar specific contractors after consultation with the “Using Agency” and the Attorney General.⁶³

i. Nature and Purpose of Suspension and Debarment

Debarring a contractor prevents that contractor from doing business with the government for a specified period of time,⁶⁴ while suspension acts as a temporary bar imposed upon contractors suspected of activity sufficient for debarment pending the conclusion of the investigation.⁶⁵ The purpose of these restrictions is not punishment for wrongdoing, but rather the protection of the public procurement process from, “those who do not possess minimal standards of integrity, honesty and fair dealing.”⁶⁶ In many respects, debarment can be seen as a counterpart to prequalification: whereas prequalification creates a presumption that the prequalified contractor will be able to fulfill particular contracts, debarment creates a presumption that the debarred contractor is likely to engage in misconduct during the acquisition or execution of its contracts.

⁶³ Model Procurement Code § 9-102(1); see generally Steven D. Gordon, Suspension and Debarment from Federal Programs, 23 Pub. Cont. L.J. 573 (1994) (examining the history, procedures, and standards of the federal debarment system).

⁶⁴ E.g., Golden Days Schools v. State Dept. of Education, 99 Cal. Rptr. 2d 917, 923 (Cal. Ct. App. 2000) (quoting Gordon, supra note 63, at 574) (“A debarment excludes a person from doing business with the government for a defined period, usually some number of years”).

⁶⁵ Id. (“A suspension is a temporary exclusion which is imposed upon a suspected wrongdoer pending the outcome of an investigation and any ensuing judicial or administrative proceedings.”).

⁶⁶ Gilbert Cent. Corp. v. State, 716 P.2d 654, 662 (Okla. 1986); accord 48 C.F.R. § 9.402(b) (2012) (“The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment.”); but cf. Yuri Weigel, Is “Protection” Always In The Best Interests Of The Government?: An Argument To Narrow The Scope Of Suspension And Debarment, 81 Geo. Wash. L. Rev. 627, 644-46 (2013) (considering that “protecting” the public may not always be in the public’s best interest); Drury D. Stevenson & Nicholas J. Wagoner, FCPA Sanctions: Too Big to Debar?, 80 Fordham L. Rev. 775, 781-83, 802-03 (2011) (considering use of debarment to deter criminal activity); .

Under the Model Code, debarment requires, “reasonable notice to the person involved and reasonable opportunity for that person to be heard”⁶⁷ and may be premised on certain forms of misconduct. Such misconduct includes, “conviction under State or federal statutes of...any... offense indicating a lack of business integrity,”⁶⁸ “conviction under State or federal antitrust statutes arising out of the submission of bids or proposals,”⁶⁹ and “violation of the ethical standards set forth in Article 12 [of the Model Procurement Code].”⁷⁰ Additionally, the Chief Procurement Officer or head of the purchasing agency have discretion to identify circumstances warranting debarment outside those listed in the Model Code.⁷¹ The Model Code appears to leave the decision of whether to debar a contractor that has committed an act justifying debarment fully within the discretion of the Chief Procurement Officer and head of the purchasing agency.⁷²

ii. Structural Protections against Abuse of Suspension and Debarment

Although discretion arguably provides an avenue for abuse, the Model Procurement Code and, to a degree, existing law provides a fair degree of protection against such abuse. The first

⁶⁷ Model Procurement Code § 9-102(1).

⁶⁸ *Id.* § 9-102(2)(b); *cf.* 48 C.F.R. § 9.406-2(a)(5) (2012) (“[c]ommission of any other offense indicating a lack of business integrity or business honesty”); UNCITRAL Model Law on Public Procurement art. 9(2)(f) (2011), available at http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf (establishing as a qualification necessary in a contractor that, “they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract”).

⁶⁹ Model Procurement Code § 9-102(2)(c); *cf.* 48 C.F.R. § 9.406-2(a)(2) (“[v]iolation of Federal or State antitrust statutes relating to the submission of offers”).

⁷⁰ Model Procurement Code § 9-102(2)(f); *cf.* UNCITRAL Model Law on Public Procurement art. 9(2)(f) (requiring contractors, “[t]o meet the ethical and other standards applicable in this State”).

⁷¹ Model Procurement Code § 9-102(2)(e) (“The causes for debarment or suspension include...any other cause the Chief Procurement Officer or the head of a Purchasing Agency determines to be so serious and compelling as to affect responsibility as a [State] contractor”); *cf.* 48 C.F.R. § 9.406-2(c) (“The debarring official may debar...[a] contractor or subcontractor based on any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.”).

⁷² Model Procurement Code § 9-102(1) (“[T]he Chief Procurement Officer or the head of a Purchasing Agency...shall *have authority* to debar a person for cause from consideration for award of contracts.”).

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form of potential abuse is declining to debar a contractor that has engaged in the types of misconduct warranting debarment. The Model Code protects against this sort of abuse by granting the authority to debar to both the Chief Procurement Officer and the head of the purchasing agency,⁷³ such that, if one official corruptly declines to debar an offending contractor, the other can override that decision and institute a debarment. The ability of the Chief Procurement Officer and agency heads to check each other's inaction may be an improvement over federal practice, which seems to leave the matter solely within the purview of the agency heads and their designees.⁷⁴

The other form of potential abuse is suspending or debaring contractors who are likely to out-bid the corrupt official's preferred contractor. However, the Model Code has a number of measures to preempt such an abuse of the debarment process. For example, prior to debaring or suspending a contractor, the debaring official must consult with both the Attorney General and, "the Using Agency."⁷⁵ This requirement provides a check against the corrupt use of the debarment process by placing any suspension or debarment under the scrutiny of both the Attorney General and at least one interested agency. In the case of a debarment, the degree of scrutiny prior to the final determination is even greater, as the Model Code requires that the debaring official must give the contractor notice and, "reasonable opportunity...to be heard."⁷⁶ Although a corrupt official using purported misdeeds as pretext to debar a disfavored contractor is unlikely to be persuaded by any argument that the contractor can present, officials who are merely over-zealous may be persuaded not to debar a contractor in circumstances where debarment would merely serve to limit competition, rather than prevent misconduct. Against

⁷³ Id.

⁷⁴ 48 C.F.R. § 9.403 (2012) ("*Debaring official* means (1) an agency head or (2) a designee authorized by the agency head to impose debarment.").

⁷⁵ Model Procurement Code § 9-102(1).

⁷⁶ Id.

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legitimately corrupt officials, the contractor's ability to explain its position may instead provide deterrent effect.

iii. Review of Debarment Decisions

In addition to protections prior to a suspension or debarment, the Model Code also includes a number of protections that may be utilized after the fact. Any suspension or debarment determination must be made in writing⁷⁷ and include a justification of the suspension or debarment.⁷⁸ Moreover, this written determination must be delivered to the affected contractor⁷⁹ and, "inform the debarred or suspended person involved of its rights to judicial* or administrative* review as provided in this Article."⁸⁰ These requirements are similar to the federal notice requirements⁸¹ and help ensure that the debarment process will not be used for an anticompetitive purpose by allowing comparison of the debarring official's justification of the suspension or debarment with the available facts. In that light, the Model Code provides that a suspension or debarment may be overturned if the written determination is fraudulent.⁸²

In addition to protection against corrupt use of the debarment process, these provisions may play a constitutional role as well: debarment arguably implicates the Due Process liberty interest.⁸³ Indeed, even a "de facto debarment," based on a pattern of behavior by a government

⁷⁷ Id. § 9-102(2).

⁷⁸ Id. § 9-102(3)(a).

⁷⁹ Id. § 9-102(4) ("A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.").

⁸⁰ Id. § 9-102(3)(b).

⁸¹ See 48 C.F.R. § 9.406-3(c) (2012).

⁸² Model Procurement Code § 9-102(5).

⁸³ See, e.g., Related Indus., Inc. v. United States, 2 Cl. Ct. 517, 525-26 (1983) ("Even apart from the procurement regulations on debarment, the due process clauses of the fifth and fourteenth amendments require that a determination by governmental authority...must be preceded by written notice of the facts upon which the charge is based and a reasonable opportunity to submit facts in response."); see generally Nathanael Causey, Past Performance Information, De Facto Debarments, And Due Process: Debunking The Myth Of Pandora's Box, 29

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agency rather than by official action, may be found to infringe upon the Fifth Amendment's Due Process requirement,⁸⁴ although such claims set, "a high standard for plaintiffs to meet when trying to establish a de facto debarment claim."⁸⁵ Nevertheless, the Due Process concerns raised by debarment arguably, "entitl[e] [the contractor] to a hearing on justification for the debarment...before an impartial arbiter or tribunal."⁸⁶ Fortunately, regardless of whether or not review by a neutral party is constitutionally required, the Model Code includes measures to ensure that such review is available.

In order to facilitate neutral review of a decision to suspend or debar a particular contractor, the Model Procurement Code provides two alternative models: either the state can enact de novo judicial review of suspension and debarment determinations or it can create a Contract Appeals Board with the review authority. Under either system, section 9-401(2) provides a template for states to empower either a specific court or all courts of that state to review decisions to debar or suspend a contractor, "to determine whether the debarment or suspension is in accordance with the Constitution, statutes, and regulations." If the state declines to create a Contract Appeals Board, then the Chief Procurement Officer's or agency-head's factual and legal determinations supporting the debarment are not considered conclusive and, "have no finality."⁸⁷ If, instead, the state opts to create a Contract Appeals Board, this board is to

Pub. Cont. L.J. 637, 668-676 (2000) (considering the influence of Due Process reasoning on the development of *de facto* debarment restrictions).

⁸⁴ Phillips v. Mabus, 2012 WL 4476539 (D.D.C 9/30/2012); see also Related Indus., Inc., 2 Cl. Ct. at 525 ("Unqualified and unrefuted evidence in the record establishes that contracting officer Crossin has stated that under no circumstances will he award any contract to Mr. Martin, the plaintiff, or any other company with which he is associated. This amounts to a de facto debarment of plaintiff and Mr. Martin.").

⁸⁵ TLT Const. Corp. v. United States, 50 Fed. Cl. 212, 215 (2001).

⁸⁶ Golden Days Schools v. State Dept. of Education, 99 Cal. Rptr. 2d 917, 920 (Cal. Ct. App. 2000) (overturning debarment of child care contractor whose debarment hearing was held before X rather than a neutral arbiter).

⁸⁷ Model Procurement Code § 9-401(4) ("In any judicial action under this Section, factual or legal determinations by employees, agents, or other persons appointed by the [State] shall have no finality and shall not be conclusive, notwithstanding any contract provision, regulation, or rule of law to the contrary.").

review suspension and debarment decisions de novo⁸⁸ and issue a decision that is final and conclusive before the courts,⁸⁹ “unless arbitrary, capricious, fraudulent, or clearly erroneous.”⁹⁰

C. Ethics Standards Associated with Public Contracting

The Model Procurement Code incorporates ethics standards that apply within in the context of a public procurement. These ethical standards are justified by the principle that, “[p]ublic employment is a public trust,”⁹¹ although the ethics standard also apply, to some degree, to those who do business with the state.⁹² The primary ethics requirement for public employees is the general proscription against, “attempt[s] to realize personal gain...by conduct inconsistent with the proper discharge of the employee's duties.”⁹³ Indeed, many of the other ethics standards, as they apply to public employees, may be seen as mere extensions of or elaborations upon this restriction.⁹⁴ In addition to the restrictions on public employees, the Model Procurement Code subjects non-employees to a general restriction against, “effort[s] to influence any public employee to breach the standards of ethical conduct,”⁹⁵ among a number of other restrictions related to those placed upon public employees. The Model Code’s ethics standards

⁸⁸ *Id.* § 9-507(3).

⁸⁹ *Id.* § 9-401(4)(c).

⁹⁰ *Id.* § 9-507(4).

⁹¹ Model Procurement Code § 12-201; cf 48 C.F.R. § 3.101-1 (establishing the equivalent principle for federal procurement that, “[t]ransactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct.”); see generally Code Of Conduct for Procurement Practitioners, Organization for Economic Cooperation and Development, <http://www.oecd.org/governance/procurement/toolbox/codeofconductforprocurementpractitioners.htm> (illustrating useful elements for procurement ethics codes).

⁹² Model Procurement Code § 12-201 (“[I]t is essential that those doing business with the [State] also observe the ethical standards prescribed herein.”); see also *id.* § 12-202(2) (defining a breach of ethics standards that applies to “non-employees”), *id.* § 12-206(2) (classifying subcontractor-to-contractor “kickbacks” as breaches of ethics standards) & *id.* § 12-207 (classifying the acceptance of a contingent fee as a breach of ethics standards).

⁹³ *Id.* § 12-202(1).

⁹⁴ For example, section 12-206(1) prohibits public employees from soliciting or accepting gratuities for conduct related to procurement that could fall within a public employee’s job responsibilities. Acceptance of such a gratuity would likely constitute a violation of section 12-202(1), but section 12-206(1) leaves no room for doubt or argument.

⁹⁵ Model Procurement Code § 12-202(2).

are more than mere guidelines: employees who violate the standards may face termination of employment,⁹⁶ while non-employees may face suspension or debarment.⁹⁷ Moreover, either may be liable to the state for repayment of, “[t]he value of anything transferred in breach of the ethical standards.”⁹⁸

i. Conflict of Interest Rules

A significant aspect of the ethics standards for public employees is the rule regarding conflicts of interest. Conflict of interests standards exist to prevent public employees from placing themselves in positions where their personal financial interests conflict with their public duties.⁹⁹ In that regard, conflict of interest standards may be seen as measures to ensure that public employees are not placed in positions where they may be tempted to violate the Model Code’s general proscription against improper attempts at private gain from the public employment. However, conflict of interest provisions go beyond enforcing the general proscription because they do not assume an improper motive on the part of a conflicted official, only compromised judgment,¹⁰⁰ thereby preventing the employee from doing subconsciously what would constitute an ethics violation if done consciously. The importance of conflict of interest provisions is demonstrated by the diverse sources of law that prohibit such conflicts:

⁹⁶ *Id.* § 12-301(2)(c).

⁹⁷ *Id.* § 12-302(2)(c).

⁹⁸ *E.g., id.* § 12-303(1).

⁹⁹ *E.g., People ex rel. Madigan v. Bertrand*, 978 N.E.2d 681, 685 (Ill. 2012) (“[The relevant section] is a conflict-of-interest provision designed to deter public officials from placing themselves in positions where their private pecuniary interests conflict or may conflict with their official public duties”); *cf.* Transparency International, Handbook for Curbing Corruption in Public Procurement 22-23 (2006), [available at](http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement) http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement (noting the additional risk of corruption presented by the participation of companies owned by public officials); *see generally* OECD Guidelines for Managing Conflict of Interest in the Public Service, Organization for Economic Cooperation and Development (2003) (detailing elements and related procedures important for managing conflicts of interest).

¹⁰⁰ *Carson Redevelopment Agency v. Padilla*, 44 Cal. Rptr. 3d 881, 885-86 (Cal. Ct. App. 2006) (“If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality.”).

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restrictions against conflicts of interest may be found in statutes,¹⁰¹ the common law,¹⁰² and international conventions.¹⁰³

As a general matter, the Model Procurement Code prohibits employees from participating in procurements where that employee, or a member of that employee's immediate family, has a "financial interest" relating to the procurement.¹⁰⁴ Under the Code, a financial interest may take any one of three forms: a relationship, such as ownership in an interest, that returns an annual value greater than an amount to be specified in the enacted statute;¹⁰⁵ ownership of interest in a property or business, under standards to be determined by the Ethics Committee;¹⁰⁶ or holding certain positions within a business.¹⁰⁷ Additionally, a conflict of interest exists where the employee, or a member of the employee's immediate family, is involved in negotiations or an agreement for future employment with, "any other person, business, or organization... involved in the procurement."¹⁰⁸ These conflict of interest rules ensure that those employees who are authorized to participate in the procurement do not have a financial stake in a particular contractor receiving the award and help reduce the risk that the procuring employees might be

¹⁰¹ E.g., 65 Pa. Cons. Stat. Ann. § 1103(a) (West 2013) ("No public official or public employee shall engage in conduct that constitutes a conflict of interest."); Cal. Gov't Code § 1090 (West 2013) ("Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.").

¹⁰² E.g., Brandenburg v. Eureka Redevelopment Agency, 62 Cal. Rptr. 3d 339, 346 (Cal. Ct. App. 2007) (holding that statute of limitations for "liability created by statute" does not apply to conflict of interest statutes because the liability existed at common law).

¹⁰³ United Nations Convention Against Corruption, G.A. Res. 58/4, art. 9(e), U.N. Doc. A/RES/58/4 (Oct. 31, 2003) ("Such systems, which may take into account appropriate threshold values in their application, shall address...[w]here appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.").

¹⁰⁴ Model Procurement Code §§ 12-204(1)(a) & -204(1)(b); cf. 48 C.F.R. 3.1101 ("Personal conflict of interest means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee's ability to act impartially and in the best interest of the Government when performing under the contract.").

¹⁰⁵ Model Procurement Code § 12-101(5)(a); cf. 48 C.F.R. § 3.1101 (providing examples of conditions creating a "financial interest" for the purposes of a conflict of interest analysis).

¹⁰⁶ Model Procurement Code § 12-101(5)(b).

¹⁰⁷ Id. § 12-101(5)(c).

¹⁰⁸ Id. § 12-204(1)(b).

biased due to a close relationship with the contractor. Therefore, the Model Code excludes from its conflict of interest provisions financial interests in “blind trusts”¹⁰⁹ because the employee is not informed of how the money in the trust is used and therefore cannot determine the degree to which a procurement will affect the trust. In short, the Model Code’s conflict of interest rules are designed to avoid placing public employees in positions where an employee must choose between serving the public trust and serving the employee’s or the employee’s family’s financial benefit.

The Model Code carries a very robust rule against the involvement of employees suffering from conflicts of interest. When an employee discovers a possible conflict of interest, that employee must, “promptly...withdraw from further participation in the transaction involved,”¹¹⁰ and must file a written statement of disqualification, although the employee may ask the Ethics Commission for a waiver.¹¹¹ If a conflict of interest exists, the rule prohibits the employee from, “participat[ing] directly or indirectly in [the] procurement.”¹¹² This restriction prohibits the employee from, “involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.”¹¹³ While the bar against participation may generally serve to call employees’ attention to circumstances that may compromise their judgment, the strong restriction also helps prevent corrupt employees from obtaining financially favorable results through indirect manipulation where the employee is barred from direct action. In addition to the

¹⁰⁹ Id. § 12-204(2). “Blind Trust means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.” Id. § 12-101(1).

¹¹⁰ Id. § 12-204(3).

¹¹¹ Id.

¹¹² Id. § 12-204(1).

¹¹³ Id. § 12-101(4).

bar on participation, a public employee must report “any benefit” that the employee receives from a State contract with an organization in which the employee has a financial interest.¹¹⁴

ii. Other Ethics Rules

In addition to the rules governing conflicts of interest, the Model Procurement Code provides a number of other ethics restrictions. Specifically, the Model Code bars both illegal gratuities¹¹⁵ and kickbacks,¹¹⁶ places limits on the “revolving door,”¹¹⁷ and limits disclosure of confidential information.¹¹⁸ Under the Model Code, an unethical gratuity is, “anything of more than nominal value...unless consideration of substantially equal or greater value is received,”¹¹⁹ that is given, “in connection with any [official] decision.”¹²⁰ Similarly, the Model Code prohibits kickbacks, which are things of value given on behalf of subcontractor to a general contractor or higher level subcontractor, “as an inducement for the award of a subcontract or order,”¹²¹ prohibiting activity between private individuals that would amount to bribery if conducted between a private individual and a public employee. The Model Code also limits the “revolving door” by, for example, permanently restricting former employees from certain involvement in

¹¹⁴ Id. § 12-205(1) (“Any employee who has, or obtains any benefit from, any [State] contract with a business in which the employee has a financial interest shall report such benefit to the [Ethics Commission].”).

¹¹⁵ Id. § 12-206(1).

¹¹⁶ Id. § 12-206(2).

¹¹⁷ Id. § 12-208.

¹¹⁸ Id. § 12-209.

¹¹⁹ Id. § 12-101(6).

¹²⁰ Id. § 12-206(1) (“in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor”); cf. 18 U.S.C. § 201(c)(1) (establishing as an illegal gratuity anything of value offered to or sought by a past, present, or future public official, “for or because of any official act performed or to be performed”).

¹²¹ Model Procurement Code § 12-206(2); cf. 41 USC § 8701 (defining “kickback” as “any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract”).

matters in which the former employee was personally involved,¹²² and by enacting a one-year bar on similar involvement in matters that fell within the former employee's responsibility.¹²³

Finally, the Model Code prohibits employees or former employees from using "confidential information,"¹²⁴ for the personal gain of any person.¹²⁵

D. Bid Protests

Late in the first half of the 20th Century, the law began to recognize that private individuals and organizations aggrieved by governmental action could serve as effective guardians of the public good.¹²⁶ The basic principle behind the use of such "private attorneys general" is that, although they have no legal right to avoid the harm suffered, they are in a position to prevent a harm to the public that the public does have a legal right to avoid.¹²⁷ Within the context of public procurement, this concept may find application in the field of bid protests.¹²⁸ Consequently, although bidders have no legal interest in gaining the award,¹²⁹ a bidder may have standing if it can show that the process was tainted by, "fraud, corruption or

¹²² Model Procurement Code § 12-208(2)(a).

¹²³ *Id.* § 12-208(2)(b).

¹²⁴ "Confidential information" is defined broadly to encompass, "any information which is available to an employee only because of the employee's status as an employee of this [State] and is not a matter of public knowledge or available to the public on request." Model Procurement Code § 12-101(2); *but cf.* 41 USC § 2101(2) (limiting protected information to pricing data, indirect costs, proprietary information, and, "[i]nformation marked by the contractor...in accordance with applicable law or regulation").

¹²⁵ *Id.* § 12-209 ("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.").

¹²⁶ *E.g., F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) ("[Congress] may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.").

¹²⁷ *Id.*

¹²⁸ *Electrical Contractors, Inc. v. Dept. of Education*, 35 A.3d 188, 198 (Conn. 2012) ("unsuccessful bidders have standing to challenge the award of a public contract where fraud, corruption or acts undermining the objective and integrity of the bidding process existed...a suit is brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a private attorney general") (quoting *Connecticut Associated Builders & Contractors v. City of Hartford*, 740 A.2d 813, 821 (Conn. 1999)).

¹²⁹ *E.g., Connecticut Associated Builders*, 740 A.2d at 821.

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acts undermining the objective and integrity of the bidding process.”¹³⁰ However, because corruption may not be obvious, a less deferential standard may be of some use.

To apply such a standard, the Model Procurement Code allows the state to set up one of two bid-protest mechanisms: either de novo judicial review or review by the Contract Appeals Board. In either case, the Model Code grants jurisdiction over bid protest actions to either a court to be designated in the enacted Code or all courts of the state.¹³¹ In such an action, the court is empowered, “to determine whether a solicitation or award of a contract is in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation.”¹³² If the state declines to create a Contract Appeals Board, then the administrative determinations are not considered conclusive and are given no finality.¹³³ Alternatively, should the state create a Contract Appeals Board, the Board has authority to hear protests of solicitations and awards¹³⁴ and, applying de novo review,¹³⁵ issue determinations that are final before the courts,¹³⁶ “unless arbitrary, capricious, fraudulent, or clearly erroneous.”¹³⁷ The creation of a Contract Appeals Board appears to mirror the federal requirement that the Comptroller General¹³⁸ decide bid protests,¹³⁹ save that the Contract Appeals Board would likely develop more specialized

¹³⁰ Electrical Contractors, Inc., 35 A.3d at 198; see generally Daniel I. Gordon, Constructing A Bid Protest Process: The Choices That Every Procurement Challenge System Must Make, 35 Pub. Cont. L.J. 427 (2006) (analyzing the purposes and competing features of bid protest systems); Erik A. Troff, The United States Agency-Level Bid Protest Mechanism: A Model For Bid Challenge Procedures In Developing Nations, 57 A.F. L. Rev. 113 (2005) (establishing elements of effective bid protest systems and evaluating several existing or proposed systems).

¹³¹ Model Procurement Code § 9-401(1); cf. United Nations Convention Against Corruption, art. 9(1)(d), Oct. 31, 2003, 2349 U.N.T.S. 41 (“Each State Party shall...take the necessary steps to establish appropriate systems of procurement...[which] shall address...[a]n effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed.”).

¹³² Model Procurement Code § 9-401(1).

¹³³ Id. § 9-401(3).

¹³⁴ Id. § 9-506(1)(a).

¹³⁵ Id. § 9-506(3).

¹³⁶ Id. § 9-401(3)(b).

¹³⁷ Id. § 9-506(4).

¹³⁸ Director of the Government Accountability Office.

¹³⁹ 31 U.S.C. § 3552

knowledge of the issue while the Comptroller General may have a better understanding of the context and general landscape of issues.

Whichever of the Model Procurement Code's methods of review the state adopts, the determination that a contract solicitation or award was improperly drafted or granted raises the issues of the appropriate method to remedy the error. Should the error be discovered prior to the award of the contract, the Model Code requires that that the solicitation or proposed award be either revised to remedy the defect¹⁴⁰ or simply canceled.¹⁴¹ However, if the determination of error is not made until after the award, then the proper remedy depends both on whether the awardee engaged in misconduct and on whether ratification of the contract is in the best interest of the state. If ratification of the contract is in the best interest of the state, then the state may ratify the contract,¹⁴² although the contractor is still subject to damages if it acted fraudulently or in bad faith.¹⁴³ Conversely, if ratification is not in the state's best interest, the state may end the contract, with the method of ending the contract dependent on whether the contractor acted in bad faith.¹⁴⁴ If the contractor did not act in bad faith, then the state may terminate the contract, in which case it must reimburse the contractor reasonable expenses plus profit,¹⁴⁵ whereas the state may nullify the contract if the contractor did act in bad faith.¹⁴⁶

E. Structural Protections and Additional Measures

The Model Procurement Code utilizes a number of other measures that may help prevent corruption. These measures include a number of structural features, such as the centralization of

¹⁴⁰ Model Procurement Code § 9-202(b).

¹⁴¹ Id. § 9-202(a).

¹⁴² Id. § 9-203(a)(i) & -203(b)(ii).

¹⁴³ Id. § 9-203(b)(ii).

¹⁴⁴ Id. § 9-203(a)(ii) & -203(b)(i).

¹⁴⁵ Id. § 9-203(a)(ii).

¹⁴⁶ Id. § 9-202(b)(i).

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the procurement authority in the Chief Procurement Officer,¹⁴⁷ as well as a number of more direct measures, such as plant inspections¹⁴⁸ and audits.¹⁴⁹

The Model Procurement Code places the full contracting authority of the State in the Chief Procurement Officer.¹⁵⁰ The Chief Procurement Officer is required to possess a certain degree of procurement experience and management ability.¹⁵¹ This requirement presaged the evaluation by the Organization for Economic Co-operation and Development (“OECD”),¹⁵² publicized in 2009, that the recruitment and retention of skilled and professional public procurement officials helps raise resistance to corruption.¹⁵³ The OECD’s report gives a degree of special significance to the merit-based selection of “senior officials” on the grounds that, “senior officials serve as a role model in terms of integrity in their professional relationship with political leaders, other public officials and citizens.”¹⁵⁴ These findings suggest that Model Code’s professional qualifications required for the Chief Procurement Officer help establish an additional resistance to corruption within the state’s procurement structure beyond the structural blocks and individual employee’s ethics.

¹⁴⁷ E.g. Model Procurement Code §§ 2-204(1) (“The Chief Procurement Officer shall serve as the central procurement officer of the [State].”), -204(3)(a) (“Except as otherwise specifically provided in this Code, the Chief Procurement Officer shall, in accordance with regulations...procure or supervise the procurement of all supplies, services, and construction needed by the [State];”) & -301 (transferring all procurement authority to the Chief Procurement Officer).

¹⁴⁸ Id. § 3-601.

¹⁴⁹ Id. § 3-602

¹⁵⁰ E.g., id. § 2-301.

¹⁵¹ Id. § 2-202 (“The Chief Procurement Officer shall have relevant, recent experience in public procurement and in the large-scale procurement of supplies, services, or construction, and shall be a person with demonstrated executive and organizational ability.”).

¹⁵² The OECD is an international organization comprising thirty-four countries, including the United States, with the organizing objective of, “promot[ing] policies that will improve the economic and social well-being of people around the world.” <http://www.oecd.org/about/>

¹⁵³ OECD Principles for Integrity in Public Procurement, Organization for Economic Co-operation Development, 30 (2009), available at <http://www.oecd.org/gov/ethics/48994520.pdf> (“merit-based selection procedures and integrity screening processes for senior officials involved in procurement enhance resistance to corruption”).

¹⁵⁴ Id. at 34.

In addition to structural protections against corruption, the Model Procurement Code also contains a number of more direct measures. For example, the Model Code allows inspection of the places of work of the contractors and subcontractors¹⁵⁵ and also the audit of not only contractors and subcontractors,¹⁵⁶ but also potential contractors offering price data.¹⁵⁷ The Model Code also imposes upon state agency's a "self-auditing" function to ensure that procurement statistics properly make their way to the state's Budget office and State Auditor.¹⁵⁸

III. Matters Not Addressed by Specific Measures

Although the Model Procurement Code includes a variety of anti-corruption measures, additional measures may be desirable to further curtail the risk of improper behavior. Such further measures may include incorporating effective federal mechanisms, providing greater specificity on specific powers, or adapting the availability of information on specific procurements.

A. Useful Federal Provisions

The federal system makes use of a number of different rules and procedures for preventing or punishing corruption that may also be effective at the state level, if utilized. The False Claims Act, which gives individual "whistleblowers" a private right of action, serves to generate private attorneys general who protect the public interest by protecting their own interests. Additionally, the federal procurement system has a fairly well-developed set of rules

¹⁵⁵ Model Procurement Code § 3-601.

¹⁵⁶ Id. § 3-602(b).

¹⁵⁷ Id. § 3-602(a).

¹⁵⁸ Id. § 2-501.

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for handling organizational conflicts of interest, whereas the Model Procurement Code does not seem to address the issue.

i. *Qui Tam* False Claims Acts

The Federal False Claims Act¹⁵⁹ has helped to recover tens of billions of dollars in false claims¹⁶⁰ and may have saved hundreds of billions of dollars in deterred fraud.¹⁶¹ The purpose of False Claims Acts is to encourage “whistleblowers” by allowing private individuals who may have knowledge of corrupt behavior to bring “qui tam”¹⁶² suits on behalf of the government.¹⁶³ However, despite the benefits that have accrued from the federal Act, only 30 states have False Claims Acts¹⁶⁴ and only 21 of those have False Claims Acts that are not “Medicare-only” acts.¹⁶⁵ Although opponents of False Claims Acts may claim that such Acts can deter businesses from operating within the state,¹⁶⁶ seven of Chief Executive.net’s top ten business friendly states of 2011 had False Claims Acts that extended beyond Medicare.¹⁶⁷ Moreover, regardless of the

¹⁵⁹ Found at 31 U.S.C. §§ 3729-3733. E.g., Taxpayers Against Fraud Education Fund, [False Claims Act] FAQ, available at <http://www.taf.org/resource/fca/faq> (“The False Claims Act can be found in the United States Code, Title 31, Sections 3729 through 3733.”).

¹⁶⁰ Id. (“Between 1986 and the end of FY 2011, Federal False Claims Act settlements and judgements [sic] have totaled \$31 billion. This sum does not include criminal fines or money recovered to the states from associated False Claims Act cases -- an additional \$9 billion.”).

¹⁶¹ E.g., Taxpayers Against Fraud Education Fund, False Claims Act Overview, available at <http://www.taf.org/resource/fca/false-claims-act-overview>.

¹⁶² A “qui tam action” is, “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified institution will receive.” Black’s Law Dictionary 1368 (9th ed. 2009).

¹⁶³ See, e.g., 31 U.S.C. 3730(b)(1) (“A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.”).

¹⁶⁴ E.g., Taxpayers Against Fraud Education Fund, States with False Claims Acts, available at <http://www.taf.org/states-false-claims-acts>.

¹⁶⁵ Id.

¹⁶⁶ Why do you think all the most business-friendly states have state False Claims Acts?, Virginia Qui Tam Law.com, <http://vaquitamlaw.com/why-do-you-think-all-the-most-business-friendly-states-have-state-false-claims-acts/> (“The single most common objection is as follows: ‘A state false claims act will drive away business, and we want to improve our image as a business friendly state.’”).

¹⁶⁷ Compare JP Donlon, Best/Worst States for Business 2011, Chief Executive.net (May 3, 2011), <http://chiefexecutive.net/best-worst-states-for-business>, with, e.g., Taxpayers Against Fraud Education Fund, States with False Claims Acts, available at <http://www.taf.org/resource/fca/false-claims-act-overview>.

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effects of a complete False Claims Act on business within a state, some form of *qui tam* provision would likely help detect and deter contractor corruption.

State false claims acts may not be as effective as their federal equivalent, but are still useful tools for combating fraud. A 2004 survey of state False Claims Acts published in Tulane Law Review noted that recoveries under state False Claims Acts tended to be “modest,” with the most significant recoveries occurring from the states’ ability to join federal actions.¹⁶⁸ However, the survey also found that the law enforcement officials of those states with *qui tam* False Claims Acts consider them useful tools for redressing past fraud and preventing future dishonesty.¹⁶⁹ A follow-up survey in 2008 found that nearly three-quarters of states with *qui tam* False Claims Acts consider them effective, although most did not see deterrence as a significant benefit.¹⁷⁰ Nevertheless, *qui tam* provisions’ effectiveness at recovering government funds lost to fraud suggests that such a provision should be integrated into the Model Procurement Code for those states that do not have *qui tam* False Claims Acts.

ii. Organizational Conflicts of Interest

The framework of the Model Procurement Code has very little material for addressing the organizational conflicts of interest that may occur when a contractor assists in the procurement process. The sole provision addressing such conflicts is found, not within the Model Code itself, but within the Model Regulations, which provide that head of Purchasing Agency must determine in writing that no substantial conflict of interest will exist before employing a

¹⁶⁸ James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks & Marc S. Raspanti, States, Statutes, and Fraud: An Empirical Study Of Emerging State False Claims Acts, 80 Tul. L. Rev. 465, 485 (2005).

¹⁶⁹ Id. at 486.

¹⁷⁰ Pamela Bucy, Jonathan Diesenhaus, Marc S. Raspanti, Holly Chestnut, Katherine Merrell & Chad Vacarella, States, Statutes, and Fraud: A Study Of Emerging State Efforts To Combat White Collar Crime, 31 Cardozo L. Rev. 1523, 1539 (2013).

contractor to prepare specifications.¹⁷¹ Neither the Model Code nor the Model Regulations appear to provide any guidance as to what would create a substantial conflict of interest. Conversely, federal regulations provide a set of circumstances that raise concerns that a contractor cannot oversee the process in a neutral manner.¹⁷² Regardless of whether the federal provisions on organizational conflict of interest are fit for state level procurement, some level of either statutory or regulatory guidance should be in place to assist in the determination of the potential existence of an organizational conflict of interest.

B. Clarifying Delegations of Authority

Some of the Model Procurement Code's provisions create anti-corruption measures, but do not identify who has authority to invoke those measures or, at least, do not firmly establish who does and does not have authority to invoke them.¹⁷³ Such provisions contrast sharply with, for example, the grants of authority to use alternative methods of source selection, which are explicitly given to the Chief Procurement Officer, the head of the Purchasing Agency and, depending on the method, certain designees thereof.¹⁷⁴ Similarly, the Model Code clearly

¹⁷¹ ABA Model Procurement Regulations R4-202.01.02(a) (2002).

¹⁷² 48 C.F.R. § 9.500(a) (2012) ("This subpart... [p]rescribes responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest"); see generally Keith R. Szeliga, Conflict and Intrigue in Government Contracts: A Guide To Identifying And Mitigating Organizational Conflicts Of Interest, 35 Pub. Cont. L.J. 639, 642-64 (2006) (identifying the federal organizational conflict of interest rules and providing guidance on identifying organizational conflicts of interest); James W. Taylor & B. Alan Dickson, Organizational Conflicts Of Interest Under The Federal Acquisition Regulation, 15 Pub. Cont. L.J. 107 (1984) (discussing the history behind the organizational conflict of interest rules in the Federal Acquisition Regulation).

¹⁷³ For example, sections 9-201 to -203 deal with remedies that apply when, "it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law." Model Procurement Code § 9-201. Although this clearly applies to a court presiding over a bid protest action and to the Contract Appeals Board, should the state create such a Board, it also arguably applies to, for example, an administrative decision by the Chief Procurement Officer.

¹⁷⁴ Model Procurement Code §§ 2-203(1)(a) and -204 to -207.

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identifies the Chief Procurement Officer and the head of a Purchasing Agency as the officials responsible for initiating suspensions and debarments.¹⁷⁵

In contrast, the Model Code does not identify who is to make the determination that, “it is considered impractical to initially prepare a purchase description to support an award based on price,”¹⁷⁶ the requirement for multi-step sealed bidding. However, clear rules of authority are essential for multi-step sealed bidding because the process allows disqualification of bidders whose “unpriced [sic]” offers have not, “been qualified under the criteria set forth in the...solicitation.”¹⁷⁷ The Model Regulations are similarly unclear as to where the authority to initiate multi-step bidding rests.¹⁷⁸ Consequently, whoever has authority to determine to use multi-step sealed bidding and to determine the qualifications of the offers has a potential avenue for abuse.

Incorporation of federal procedures may not be adequate to address this issue. The federal rules do provide a set of criteria for the use of “two-step sealed bidding,”¹⁷⁹ but these criteria are largely an elaboration on the criterion used by the Model Procurement Code and still fail to address who must make the determination that the criteria are met. Moreover, even if the issue were to come to a court, judicial resolution of the issue is unlikely to be effective. When faced with an ambiguous statutory provision¹⁸⁰, federal courts will typically defer to an agency’s interpretation of its governing statute under the Chevron doctrine so long as the agency’s

¹⁷⁵ Id. § 9-102(1).

¹⁷⁶ Id. § 3-202(8).

¹⁷⁷ Id.

¹⁷⁸ ABA Model Procurement Regulations R4-202.12.2(a) (2002).

¹⁷⁹ 48 C.F.R. § 14.502(a) (2012).

¹⁸⁰ Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 990 (1992) (“The first sign of change was when opinions began to drop any reference to ‘specific intentions’ or whether Congress had ‘clearly spoken to’ the issue at hand and instead described the threshold inquiry simply in terms of whether the statute was ‘ambiguous’ or ‘unclear.’”).

interpretation is reasonable.¹⁸¹ State courts take a broader range of approaches, but many state courts still give agencies absolute or presumptive deference.¹⁸² In the context of a provision with the potential for abuse, a deferential approach raises the concern that the agency may not notice the problem and over-delegate the authority, at which point the courts would defer to the agency's interpretation.

C. Transparency and the Availability of Non-Confidential Information

Transparency¹⁸³ is generally considered an important remedy against corruption.¹⁸⁴ This perception arises, at least in part, from the idea that, “[c]orruption thrives on secrecy,”¹⁸⁵ and that, as a result, greater availability of information yields less opportunity for corruption. Transparency can take the form of prior notice of the rules, procedures, and plans that an agency will use, where the Model Procurement Code does relatively well, or it can take the form of access to information about prior decisions, where the Model Code may need some improvement.

¹⁸¹ See e.g., Claire R. Kelly & Patrick C. Reed, Once More unto The Breach: Reconciling Chevron Analysis And De Novo Judicial Review After United States V. Haggard Apparel Company, 49 Am. U. L. Rev. 1167, 1170 (2000) (“Under the second step, the court assesses whether the agency's interpretation is permissible and reasonable. When the agency's interpretation is reasonable, the reviewing court will not substitute its own interpretation for the agency's.”).

¹⁸² E.g., Michael Pappas, No Two-Stepping In The Laboratories: State Deference Standards And Their Implications For Improving The Chevron Doctrine, 39 McGeorge L. Rev. 977, 985 (2008).

¹⁸³ Black's Law Dictionary defines “transparency” as, “Openness; clarity; lack of guile and attempts to hide damaging information,” and notes, “The word is used of financial disclosures, organizational policies and practices, lawmaking, and other activities where organizations interaction [sic] with the public.” Black's Law Dictionary 1638 (9th ed. 2009).

¹⁸⁴ E.g., United Nations Convention Against Corruption, art. 10, Oct. 31, 2003, 2349 U.N.T.S. 41 (“[t]aking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration”); OECD Principles for Integrity in Public Procurement, Organization for Economic Co-operation Development, 30 (2009), available at <http://www.oecd.org/gov/ethics/48994520.pdf> (“Governments should disclose public information on the key terms of major contracts to civil society organisations [sic], media and the wider public.”); see also Muttitt v. U.S. Central Command, 813 F.Supp.2d 221, 225 (D.D.C. 2011) (noting that the Freedom of Information Act was enacted to increase transparency and that the Act is an important measure against corruption).

¹⁸⁵ OECD Principles, *supra* note 184, at 10.

i. Information on Future and Ongoing Procurements

Transparency may be described as, “mean[ing] that laws, regulations, institutions, processes, plans and decisions are made accessible to the public at large or at least to ‘representatives’ of the public.”¹⁸⁶ Although this is often analyzed in terms of holding officials accountable for their actions,¹⁸⁷ but this also has the element of ensuring that everyone knows the rules, which is an anti-corruption measure itself: if some of the rules are secret, then only those privileged with that knowledge will be able to use the system. To some degree, this type of transparency is inherent in the Model Procurement Code – indeed, one of the main advantages of a model code is that it allows individuals from different jurisdictions to learn the same rules. Moreover, the relevant statute, regulations, and judicial decisions would be freely available in any jurisdiction that adopted the Model Procurement Code. Moreover, the Model Code’s notice requirements establish a fairly robust degree of transparency regarding future procurements.

The Model Procurement Code requires “public notice” of invitations for competitive sealed bids,¹⁸⁸ competitive proposals,¹⁸⁹ and special procurements.¹⁹⁰ A notice requirement would likely be unreasonable for an emergency procurement and unnecessary when a sole source procurement is appropriate, which means that the Model Code’s requirements are relatively thorough. Indeed, the Model Procurement Code’s notice requirements compare favorably with the federal requirements, which also require procuring agencies to provide public notice of

¹⁸⁶ Transparency International, Handbook for Curbing Corruption in Public Procurement 49 (2006), [available at http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement](http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement).

¹⁸⁷ *E.g., id.* (“...so that processes and decisions can be monitored, reviewed, commented upon and influenced by the stakeholders, and decision makers can be held accountable for them”).

¹⁸⁸ Model Procurement Code § 3-202(3).

¹⁸⁹ *Id.* § 3-203(3).

¹⁹⁰ *Id.* § 3-207.

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certain solicitations.¹⁹¹ The agency must post the notice, “in a public place at the contracting office issuing the solicitation,” when the contract is expected to fall between \$10,000 and \$25,000,¹⁹² while the agency must publish the notice if the contract is expected to exceed \$25,000.¹⁹³ The Model Procurement Code’s notice requirements are not as thoroughly detailed, but mostly because the Model Code contemplates that different jurisdictions will adopt notice regulations more carefully tailored to their needs.¹⁹⁴

Although the Model Procurement Code adopts a fairly robust notice requirement, it is not necessarily the most robust possible. For example, the UNCITRAL Model Law on Public Procurement encourages agencies, “[to] publish information regarding planned procurement activities for forthcoming months or years.”¹⁹⁵ However, the UNCITRAL Model Law’s provision is merely a permissive recommendation, rather than a requirement, although the Model Law does oblige that such procurement information, if published, is not an offer.¹⁹⁶ Although this provision may seem ambitious, it dovetails nicely with the federal requirement that agencies conduct acquisition planning and market research,¹⁹⁷ “begin as soon as the agency need is identified.”¹⁹⁸ When long-term planning is mandated, disclosure of those plans will likely help much and cost little.¹⁹⁹

¹⁹¹ 41 U.S.C. § 1708(a) (West 2013).

¹⁹² *Id.* § 1708(a)(1).

¹⁹³ *Id.* § 1708(a)(2).

¹⁹⁴ Model Procurement Code § 3-202(3) cmt. (“Because the adequacy of notice will, as a practical matter, vary from locality to locality and procurement to procurement, no attempt is made in Subsection (3) to define statutorily either a prescribed method of notice or the duration of its publication.”).

¹⁹⁵ UNCITRAL Model Law on Public Procurement art. 6(1) (2011), [available at](http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf) http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/ML_Public_Procurement_A_66_17_E.pdf.

¹⁹⁶ *Id.* art. 6(3).

¹⁹⁷ 48 C.F.R. § 7.102(1).

¹⁹⁸ *Id.* § 7.104(1).

¹⁹⁹ *But cf. Guidelines for Fighting Bid Rigging in Public Procurement*, Organization for Economic Co-operation Development, 6 (2009), [available at](http://www.oecd.org/competition/cartels/42851044.pdf) <http://www.oecd.org/competition/cartels/42851044.pdf> (arguing that predictable procurement schedules can increase opportunities for bid rigging).

ii. Information on Completed Procurements

The Model Procurement Code's transparency requirements on past procurements are potentially adequate, but are open to the possibility of improvement. The Model Code mandates that, subject to the state's equivalent to the Freedom of Information Act,²⁰⁰ "[p]rocurement information shall be a [public record]...and shall be available to the public as provided in such statute."²⁰¹ In light of the federal Freedom of Information Act's recognized anti-corruption purpose,²⁰² the incorporation of the state's equivalent into the procurement system would appear to be an effective measure. However, effectiveness of this provision is completely dependent on the effectiveness of the state's version of the Freedom of Information Act, which is incorporated by reference.²⁰³ The federal procurement system operates under a similar principle, incorporating the federal Freedom of Information Act,²⁰⁴ but the main concern is that, by incorporating the state Freedom of Information Act by reference, the Model Procurement Code incorporates any weaknesses of the local Act.

Conversely, an alternative concern related to the keeping of public records may be that such records may compromise confidential information of the bidders. Similarly, an important concern related to extensive transparency is the concern that, "[access to] information such as the terms and conditions of each tender helps competitors detect deviations from a collusive agreement, punish those firms and better co-ordinate future tenders."²⁰⁵ Nevertheless,

²⁰⁰ Model Procurement Code § 1-401 cmt. n.2.

²⁰¹ *Id.* § 1-401.

²⁰² *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

²⁰³ Model Procurement Code § 1-401 cmt. n.2.

²⁰⁴ 48 C.F.R. ("Contracting officers shall process requests for specific information from the general public, including suppliers, in accordance with subpart 24.1 [Protection of Individual Privacy] or 24.2 [Freedom of Information Act], as appropriate.").

²⁰⁵ *OECD Principles for Integrity in Public Procurement*, Organization for Economic Co-operation Development, 30 (2009), available at <http://www.oecd.org/gov/ethics/48994520.pdf>; see also *Unilateral Disclosure of Information with Anticompetitive Effects*, Organization for Economic Co-operation Development, 11-14 (2012), available at

“[c]ollusion agreements will take place...even more so in situations where they can be hidden thanks to obscurity and lack of monitoring,”²⁰⁶ because winning the award shows deviation from the collusive agreement just as effectively as disclosing the tender. Consequently, concerns about the use of transparency to enforce collusive agreements may be better addressed by delaying the release of procurement information to the public rather than keeping it concealed permanently.

Conclusion

The Model Procurement Code employs a diverse array of anti-corruption methods, from a preference for competitive sealed bidding to the basis for a professional procurement organization, among others. Nevertheless, the absence of *qui tam* actions, the uncertainty of some requirements and delegations of power, and the failure to protect non-confidential information, together may weaken the Model Code’s ability to prevent corruption.

<http://www.oecd.org/daf/competition/Unilateraldisclosureofinformation2012.pdf> (analyzing the potential anti-competitive effects of certain forms of transparency).

²⁰⁶ Transparency International, *supra* note 186, at 50.

ATTACHMENT 2

Modernizing to the MPC to Recognize the Proliferation of Reverse Auctions

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ABSTRACT

The 2000 edition of the Model Procurement Code for State and Local Governments is a dinosaur in terms of providing guidance on how procurement is being done in the 21st Century. Among its greatest flaws is the omission of (electronic) reverse auctioning. Although not commonplace in all fifty states, reverse auctioning is now a staple in the federal and international procurement community. Foremost, this paper will analyze why it behooves the American Bar Association to revise the MPC. Thereafter, discussion of the advantage and disadvantages of using reverse auctioning for state and local governments is provided. The final portion of the paper sets forth proposed guidance and comments that should be considered for inclusion in any subsequent revision to the MPC. The most significant takeaway from this paper is that amending the MPC to include reverse auctions is not a question of should but is truthfully an obligation of must.

I. Introduction

The American Bar Association's 2000 edition of the Model Procurement Code for State and Local Governments (MPC) does not offer any guidance for how public entities should utilize reverse auctions for acquiring goods and service. It is critical that this omission be redressed and guidance be provided if the ABA intends for the MPC to be useful. Reverse auctions can save state and local governments much needed resources (both time and money). There is, however, a significant caveat in that not all procurements are not suited for reverse auctions.

Reverse auctions have been used in the public sector for over a decade; therefore, the MPC can build off the lessons learned from the experiences of federal, state and foreign governments' procurements. Whether a procurement officer elects to use reverse auctions is immaterial, but the MPC's continual failure to recognize reverse auctions is both questionable and performing a disservice.¹

II. Including Guidance on Reverse Auctioning Helps Fulfill the MPC's Purpose.

In hindsight, it is not surprising that in the year 2000 when the MPC was released that there was no mention of reverse auctions.² It was not too long ago that the federal government prohibited reverse auctions.³ Since that time, many federal agencies, including states and

¹ If the MPC refuses to provide guidance on reverse auctions, it is affirmatively supporting states and local governments to learn about them elsewhere. Essentially that means that most procurement officials will learn about the benefits of reverse auctions from third party administrators, who can provide a wealth of knowledge, but are naturally biased. Alternatively, reverse auctions may be imposed upon procurement offices by the local political administration. In Virginia, for example, there have been pushes to use reverse auction initiated by the administrations of Governor Gilmore and Governor McDonnell and not career procurement officials. (Telephone Interview with Shane Caudill, Deputy Director, eProcurement Bureau (eVA), Division of Purchases & Supply for State of Virginia (Apr 5, 2013)). An updated MPC is needed to provide clarity on the topic from a source that has no economic or political interest in the use of reverse auctions.

² All references to reverse auction in this paper should be construed to pertaining to electronic reverse auctions, also called ERAs or just "auctions." Reverse auctions can be conducted without the Internet, but in practice and in the examples cited herein the auctions are administered electronically.

³ See Aaron E. Woodward, *The Perverse Effect of the Multiple Award Schedules' Price Reduction Clause*, 41 PUB. CONT. L.J. 527, (2012). (Discussing how in less than 15 years, reverse auctions have gone from being taboo to being recognized throughout the federal agencies as a "game changers").

municipalities, have embraced reverse auctions. FedBid, the leading reverse auction administrator for the federal government, administered 30,000 buys involving over \$1.4 billion in 2012.⁴

The ABA, through the MPC, should not urge state and local governments to utilize reverse auctions simply because the federal government does. But by failing to recognize reverse auctions as a viable procurement tool,⁵ makes the MPC analogous to an outdated rule book.

The goal of the MPC is arguably to provide a blueprint of how a well-rounded procurement system should operate. The stated purpose and policies for the MPC support this finding.

The underlying purposes and policies of this Code are:

- (a) to **simplify, clarify, and modernize** the law governing procurement by this [State];
- (b) to permit the **continued development** of procurement policies and practices;
- (c) to make as consistent as possible the procurement laws among the various jurisdictions;
- (d) to provide for increased **public confidence** in the procedures followed in public procurement;
- (e) to ensure the **fair and equitable** treatment of all persons who deal with the procurement system of this [State];
- (f) to provide increased economy in [State] procurement activities and to **maximize** to the fullest extent practicable the purchasing value of public funds of the [State];
- (g) to foster effective broad-based competition within the free enterprise system;
- (h) to provide **safeguards** for the maintenance of a procurement system of **quality and integrity**; and
- (i) to obtain in a cost-effective and responsive manner the materials, services, and construction required by [State] agencies in order for those agencies to better serve this [State's] businesses and residents.

⁴ FEDBID.COM, <http://www.fedbid.com/about/resources/fact> (last visited May 5, 2013).

⁵ See Christopher R. Yukins, *A Case Study in Comparative Procurement Law: Assessing UNCITRAL'S lessons for U.S. Procurement*, 35 PUB. CONT. L.J. 457, 466-67 (2006). (Yukins discusses that among the United Nations Commissions on International Trade Law ("UNCITRAL") deliberated over whether reverse auctions is a method of procurement or simply a tool. Yukins noted that the U.S. Army Corps of Engineers contends that auctions should be characterized "as a complimentary part of other procurement process." At first blush, this issue might appear to be a difference without much distinction – and it might very well be. But, it exemplifies how the procurement community is still trying to evaluate reverse auctions and incorporate them into the buying process.

MPC § 1-101 Purposes, Rules of Construction. 2000 (emphasis added).

A *properly* administered reverse auction has the potential to meet many of the goals that the MPC aspires to achieve. The MPC, however, cannot hold itself as document looking to simplify, clarify and modernize the procurement law if it continues to offer no direction on the use of reverse auctions.⁶ Moreover, it would be hypocritical of the ABA if it did not address the lack of guidance in the MPC given that the ABA's Section of Public Contract Law is on record for recommending that both the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council to provide official guidance on proper use of reverse auctions.⁷ In fact, the ABA even proffered its own limited guidance on reverse auctions to be considered for inclusion in the FAR and DFARS.⁸ Since the ABA clearly recognizes (or at least it did at one time) the gap in guidance on reverse auctions, the improvements to the MPC contained herein should be accepted rather readily.

Defining Reverse Auctions

There is no universal definition for reverse auctions. Further, there is not a universal definition for how it should be codified.⁹ In a reverse auction, also called a “downward auction,”¹⁰ a procuring agency “allows suppliers only a short window of time to bid down the price on their products or services.”¹¹

⁶ *Id.* at 464 discussing that the U.S., unlike the European Union, has yet to promulgate any governmentwide regulations. Note that the Office of Federal Procurement Policy (OFPP) is currently developing further guidance on reverse auction, but the MPC should sit on the proverbial bench waiting for OFPP to act. The MPC does not, nor should it, try to anticipate any and all issues involving reverse auctions, but it should proffer a legitimate blueprint that procuring officials can build on.

⁷ See Woodward, *supra* note 3 at 568-569.

⁸ *Id.*

⁹ Daniel B. Volk, Note, *A Principles-Oriented Approach to Regulating Reverse Auctions*, 37 PUB. CONT. L.J. 127, 131-33 (2007). (Discussing the benefits of having a narrow or broad definition and/or description of reverse auctions).

¹⁰ Jacob Ruytenbeek, *Reverse Auctions, Turning Winners into Losers*, CONT. MGMT. Oct. 2012 at 41.

¹¹ Max Chafkin, *How to Compete in a Reverse Auction*, INC. (May 2007), <http://www.inc.com/magazine/20070501/salesmarketing-pricing.html>. If the MPC includes a baseline definition for reverse auctions, it should consider something generic simply due to the number of variations and goals that each

States already have varying definition of reverse auctions. The State of Virginia defines reverse auctioning as a “means a procurement method wherein bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening.”¹²

A similar definition can be found in a Midwestern state. In Kansas, reserves auctioning is defined as a “means a procurement process following procedures approved by the director of purchases where bidders are invited to bid on specific goods through real-time electronic bidding, with the award being made to the lowest responsible and responsive bidder; during the bidding process, bidders' prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for the bid opening.”¹³

Reverse Auctions can operate ethically without full transparency

In the definitions from Virginia and Kansas, the state incorporated into its definition the need for competitor bidders to see other bidders' prices in real-time. This aspect is not required; reverse auctioning can operate successfully without revealing proprietary data like competitor prices. FedBid utilizes the **lead/lag** approach, whereby bidders are only informed as to whether

auction might provide. For example, defining reverse auctions broadly as “procurement vehicles where sellers of goods and services compete to win an award and in doing so drives the award price down” might suffice.

¹² VA. CODE ANN. §2.2-4301 (West 2012). Interesting to note that Virginia defines reverse auctioning as a method and not a tool. In comparison, the Kentucky definition of reverse auction characterizes reverse auctions as a “real-time, structured bidding *process*.” Ky. R. Civ. P, 45A.070(8). (emphasis added).

¹³ K.S.A. 75-3739a(d).

their bid is in the lead (meaning the lowest priced) or whether their bid is lagging.¹⁴ If a bidder is lagging, they are provided a good-faith opportunity to reconsider its price.¹⁵

Regardless of whether a reverse auction discloses competitor prices or simply utilizes the lead/lag approach, it is the only procurement vehicle that affords offerors the opportunity to resubmit their offer price without any communication or discussion with the procuring agency. This level of transparency is remarkable and part of the reason why reverse auctions need to be part of every procuring agency's toolbox.

III. Reverse Auctions Are Potential Land Mines

It should come to no surprise that reverse auctions are controversial. It is undisputed that reverse auctions pressure vendors into lowering prices, which potentially minimizes profit.¹⁶ Some vendors view reverse auction as a means of "bullying" them into dropping their prices.¹⁷ "With each successive bid in a reverse auction, bidders lose and buyers win. In short, the supplier's loss is the buyer's gain."¹⁸

Reverse auctions also undercut the notion that relation building and forming long term partnership is a top concern to procuring agencies.¹⁹ This argument is hard to rebut considering

¹⁴ FEDBID.COM, <http://www.fedbid.com/marketplace/terms/> (last visited May 5, 2013). Cite to FedBid website on lead/lag. See also Yukins *supra* note 5 at 474.

¹⁵ The MPC should consider mentioning in the comments how lead/lag can be used if a procuring entity does not want actual prices to be disclosed to other bidders. It is uncertain whether the definitions in Kansas and Virginia would prohibit the use of the lead/lag method due to the statutory requirement that competitors see one another's bid prices. State and local agencies should not be prohibited from using the same reverse auction approach that the federal government uses, simply due to an outdated statutory definition.

¹⁶ It is interesting that this characterization is so often made about reverse auctions and that contractors do not feel similarly pressured to lower their prices in negotiated procurements or sealed bidding. Arguably incumbents who might feel entitlement to a contract are particularly threatened by reverse auctions. See Ruytenbeek, *supra* note 10. ("the incumbent suppliers surveyed view online reverse auctions as a divisive purchasing tool that damages relationships with longtime customers.").

¹⁷ David C. Wyld, *Reverse Auctions: Creating winners Through Association Innovation*, CONT. MGMT. Jan. 2013 at 44. (Discusses that this perception is really a myth and that "the only suppliers 'hurt' by the introduction of competition bidding into the acquisition process are incumbent companies who have not had their contract openly and actively competed for several years-or more.").

¹⁸ See Ruytenbeek *supra* note 10 at 43.

¹⁹ "Moreover, non-price factors of consequence to the owner, such as *quality of relationship*, past performance, and unique needs, are deemphasized in the auction." Statement of Mr. Anthony Zelenka of Bertucci contracting

the extreme emphasis reverse auctions put on price.²⁰ So before a state or local government elects to use a dynamic tool like reverse auctions, it needs to consider the potential complications from doing so.²¹

Reverse auctions are not always best suited for construction and design projects.

Nationally, the construction industry has resisted against the proliferation of reverse auctions.²² In a Congressional hearing, Anthony Zelenka testified on behalf of the Associated General Contractors of America that reverse auctions do not provide benefits in comparison to other selection procedures, do not guarantee lowest prices and do not assure the agency that the awardee is responsive and responsible like sealed bidding does.²³

Without addressing the veracity of these conclusions, there are at least four states, Kansas, Kentucky, Pennsylvania and Virginia, which agree with Mr. Zelenka that reverse auctioning is inappropriate for procuring construction services.²⁴ Kansas has gone so far to pass

corporation on behalf of the Associated General contractors of America to the Committee on Small Business, U.S. house of Representative hearing on “The Impact of Emerging Procurement Methods on Small Business” March 6, 2008 at 4. *See cf* Sandy D. Jap, *The Impact of Online reverse Auction Design on Buyer-Supplier Relationships*, 71 J. Mktg., 146-159 (2007) (discussing the paradox finding that reverse auctions actually increase a contractor’s willingness to make dedicated investments toward the buyer). *See also* Wyld, *supra* note 17 at 45, contending that reverse auction does not produce animosity, because it has become more common place as a “best practice” for getting things by leading organizations.

²⁰ As a result, reverse auctions are often used in conjunction with a negotiated procurement after factors like past performance and technical ability have been evaluated independently. Thereby, offerors with superior past performance record might not need to submit the lowest priced proposal in order to win a contract or a task order that determines price through an auction.

²¹ Interesting to note that in Virginia, procurement officials are reluctant to use reverse auctions, in part, because officials have decades of experience using the other more traditional procurement methods. *See Caudill supra* note 1.

²² *See Zelenka supra* note 19.

²³ *Id.* at 2 – 4. Mr. Zelenka’s testimony fails to proffer any study or qualitative research to substantiate his contentions, but seems to be based on anecdotal evidence and personal opinion. Nonetheless, his sentiment reflects the perception of many vendors in the construction industry. In contracts, note that the Minnesota Department of Administration had success in purchasing over \$100,000 worth of structural steel for the Elmer L. Anderson building in St. Paul through reverse auction. *Reverse Auction Trim \$5 Million from State Government Purchases*, US FED NEWS, Nov 2, 2005 available at 2005 WLNR 23204310.

²⁴ KAN STAT. ANN. §75-3739a(c) (West 2012); 62 PA. CODE §§512.1, 4604 (2002, 2006); 2010 Ky. Acts 45A.070(8); VA. CODE ANN. §2.2-4303(J) (West 2012).

a second statute prohibiting the Secretary of Transportation also from acquiring “any good or services through any process of reverse auctioning.”²⁵

Reverse auctions may alienate some vendors.

During his testimony, Mr. Zelenka mentioned that the Office of Federal Procurement policy (OFPP) issued a memorandum in July, 2003 regarding the “high degree of variability” involved with construction projects and complex alterations and how procurement officials should be wary of treating construction as a commodity for procurement purposes.²⁶ Indeed it is questionable whether the public benefits when highly skilled services, like architectural design, are procured like a commodity through reverse auctions.

On the state and local level, the resistance to reverse auctioning by the contract community is much more personal than it is nationally. State vendors claim that reverse auctions makes them feel as if they cannot be trusted to give their best price through other procurement methods.²⁷ Since procuring officials are more likely to interact with vendors on a state and local level as part of a common community, this tension can be problematic.

Some vendors are resistant to the change that reverse auctions provides; they much rather maintain the status quo and find out after award where they ranked.²⁸ Unlike sealed bidding, reverse auctions allow vendors to improve their proposal, but it also creates an unnerving

²⁵ KAN STAT. ANN. §64-480(a) (West 2012). *See Yukins supra* note 5 at 466 “Items that call for technical solutions, require modification, or will be acquired on a basis other than low cost are unlikely to be suited for acquisition through reverse auction method.”

²⁶ *See Zelenka supra* note 19 at 3. Note, that the actual OFPP memorandum is silent on reverse auctioning and never actually uses the term “commodity.” Instead, the thrust of the memorandum is to caution agencies from abusing FAR Part 12 and treating all construction projects like they are commercial items. OFFICE OF Federal Procurement Policy, *Memorandum for Agency Senior Procurement Executives* (Jul 3, 2003) available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/procurement/far/far_part12.pdf

²⁷ *See Caudill supra* note 1.

²⁸ *Id.*

environment of being able to see in real-time as the competition drives prices down.²⁹ The stress of having to second-guess whether an offer is good enough outweighs, to some, the opportunity to improve an offer after it has been submitted.

Vendors can also be suspicious of procurement conducted entirely through the Internet. In spite of the safeguards installed by the auction providers, vendors can be apprehensive of the nuances of an electronic procurement. For example, on a government contracting blog community, a losing bidder took issue with the lowest bid belonging to the procuring agency.³⁰ The vendor felt that the government behaved unethically in acting as a “phantom bidder” to drive prices down.³¹ In truth, the auction administrator, FedBid, allows buyers to set an Active Target Price (ATP); “a price-point that must be underbid before a Bid will receive a ‘lead’ status in an auction.”³² If the ATP is never met, as it was in this particular auction, it tells the buying agency that it needs to expand its applicant pool, extend the length of the auction to allow for more bids, or reassess its market research.

Reverse auctions allegedly can harm businesses and the local community

It is hard to disprove that reverse auctions may encourage imprudent bidding by contractors who might feel pressured to act rash in order to keep up with the quick pace of an auction.³³ Some successful auction participants characterize the experience as the “winner's curse,” which afflicts bidders who get so caught up in the “auction frenzy” that they undercut their ability to

²⁹ *Id.* Reverse auctions will discourage vendors that have not taken preemptive steps to ensure that its supply chain and cost structure has no room for improvement.

³⁰ *Savvy or Unethical? Should the Federal Government be a Phantom Bidder in reverse Auctions?*, WIFCON.COM (Jan. 13, 2012). (last visited Mar. 15, 2013). Note that this single blog entry received over 2,000 views.

³¹ *Id.*

³² *Id.* This anecdote exemplifies the importance of educating vendors fully about the reverse auction process and the additional features an electronically administered procurement introduces.

³³ See Zelenka *supra* note 19 at 3.

just break even.³⁴ Others characterize winning a reverse auction as “Pyrrhic victories” by turning winners into losers and the awardee into a victim of the competitive pressure to bid below costs.³⁵

Critics of the reverse auction also contend that abnormally low bids increase the likelihood that a contractor will default and be unable to perform.³⁶ Therefore, not only does negligent prices secured through auctions hurt contractors, but it hurts the government as well who is forced to default a contractor and endure delays, reprocurement efforts and general transactions costs.³⁷

Local vendors oppose reverse auctions due to the ramifications it has on the state economy.³⁸ Vendors argue that if their prices drop, it will be detrimental to its business and ability to hire employees.³⁹ It is axiomatic that a public agency should not engage in business practices that harm the very public that the agency is trying to serve.⁴⁰

The fact that reverse auctions have the potential to strain relationships with longtime providers and might not be suited for all procurements even further validates that the ABA needs

³⁴ See Volk, *supra* note 8. Arguably, this same suspension of reality of the value of money is what makes gambling, in particular online gambling, such a financial threat.

³⁵ See Ruyenbeek, *supra* note 10 at 43. This author opines that “Suppliers understand that reverse auctions are bad for business and are beginning to take steps to avoid them. A procurement strategy that is built around reverse auctions is unsustainable and is therefore bound to fail.” *Id.* This sentiment, even if true, does not preclude the use of reverse auction on an intermittent basis or as means to supplement an umbrella procurement strategy.

³⁶ See Woodward, *supra* note 3 at 573.

³⁷ *Id.* According to FedBid, there a very few defaults and according to its quality control team there are rarely instances where buyers received inferior or nonconforming goods. (Telephone Interview with Louis Schiavone Jr., Senior Vice President, State and Local Government Education, FedBid (Feb 1, 2013)). FedBid has mechanisms to exclude repeated bad actors. *Id.*

³⁸ See Caudill, *supra* note 1.

³⁹ *Id.* The lead/lag method alleges to minimize the frenzy by intentional blocking competitors prices from another. Although bidders do not know the degree a discrepancy between themselves and the leader, the lack of transparency helps deter the temptation to make a detrimental bid just for the sake of “winning.” See Schiavone, *supra* note 37.

⁴⁰ It is feasible that on the local levels whereby politicians and vendors interact on a more routine basis might dissuade some agencies from using auctions based on this allegation – even if it is not substantiated.

to revise the MPC. Although no guidance can be full-proof, revisions are needed to help state and local governments mitigate these potential problems.⁴¹

IV. Reverse Auctions Are A Potential Gold Mine

The savings that reverse auctions have provided to the federal government is well documented,⁴² but less is known about the many successes of state and local government experience with it. One notable success occurred in the infancy of reverse auctions. Between 2001 and 2005, the State of Minnesota's Material Management Division estimates that it saved \$5 million by procuring items like radar detectors, snowmobiles, rainwear and software development through reverse auctions.⁴³

One county that robustly uses reverse auctions is Maricopa County in Phoenix, Arizona. In December 2008, Maricopa County was looking to leverage the drop in fuel prices by seeking a reduction in its bulk flour costs to support its inmate population.⁴⁴ Although the county's long-term supplier was quick to raise its prices when fuel prices spiked, it refused to reciprocate when prices dropped.⁴⁵ After conducting a reverse auction administered using BidSync software, the county was able lower its per pound price from 38.5 to 20.5 cents.⁴⁶ "Ironically, the winning bid came from the same supplier who had earlier refused to budge on price."⁴⁷ It is unlikely that the county will continue to save almost 50% on all future auctions like it did on the onset, but the county continues to repeat the auction every six months, "thus allowing the **changing market** to

⁴¹ It is noteworthy to mention that opponents argue that using third party vendors to administer auctions is tantamount to outsourcing an inherently governmental function.

⁴² See Woodward, *supra* note 3 at 570-71. (Discussing the savings of various federal agencies including the Department of Homeland Security, which saved more than \$40 million over the course of 2,500 reverse auctions in fiscal year 2009).

⁴³ *Reverse Auction Trim \$5 Million from State Government Purchases*, US FED NEWS, Nov 2, 2005 available at 2005 WLNR 23204310. Note that in 2004 the Minnesota Department of Administration accelerated the use of reverse auction at the urging of then Governor Tim Pawlenty. *Id.*

⁴⁴ Larry Anderson, *Total Transparency in Real Time*, GOVERNMENT PROCUREMENT, Vol 19, Issue July 1, 2011 available at 2011 WLNR 12940648.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

dictate the low bidder and the price.”⁴⁸ Interesting to note that the county has used reverse auction from products ranging from drug testing kits, inmate shoes and canned fruit and beans, but found reverse auctions challenging for procuring inmate mattresses, due to the many different detention centers and facilities.⁴⁹

In 2012, Maricopa County continued to expand the scope of reverse auctions to save “32 percent on new employee life insurance contract and another 36 percent on a pre-paid dental contract.”⁵⁰ In both cases, the auctions were held over a six week period with household-named companies ING and Cigna winning the awards respectively.⁵¹

Reverse auctions, like multiple award schedules, can also be tailored to increase the purchasing power of smaller agencies. Knox County, Tennessee led a “multi-agency” auction to purchase 164 police vehicles for itself, the City of Knoxville and the Blount County Sherriff’s Department.⁵² Knox County administered the auction itself using software from Periscope Holding called BuySpeed.⁵³ The auction stretched over 21 days, although the most activity happened in the last hour.⁵⁴ The final bid came in “\$2,300 under the state price per vehicle; the county saved enough to purchase extra vehicles.”⁵⁵ Part of the reason that this auction was so successful is that the buyers knew exactly what its needs were (type of car, hubcabs, warranty, etc.); therefore, the only variable between competitors was price.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Larry Anderson, *Reverse Auction Lower Costs of Employee Benefits*, GOVERNMENT PROCUREMENT, Vol 20, Issue Nov 2012 available at 2012 WLNR 25449340.

⁵¹ *Id.*

⁵² See Anderson, *supra* note 44.

⁵³ *Id.*

⁵⁴ *Id.* This auction, like the ones discussed above, which were held in 2012 in Maricopa County, AZ were conducted over an extended period of time. Kentucky statute requires that auction remain open for this length of time, but a valid reverse auction can be conducted over a shorter span of time (days if not hours). *Id.* See Press Release, Defense Logistics Agency, DLA Mandates Reverse Auctions for Competitive, High-Cost Contracts (Sept 17, 2012) (on file with author and available at www.dlamil/DLA_Media_Center/PressReleasePages/DLAmandatesrewrseauclions.aspx), which provides that reverse auctions take only 30 to 60 minutes.

⁵⁵ *Id.*

Small businesses benefit through reverse auctions.

According to FedBid, 80% of the federal auctions went to small businesses.⁵⁶ This figure sounds astonishing, but it is plausible considering that the Economics and Statistics Administration of the U.S. Department of Commerce (DOC) opined over ten years ago that “the Internet is actually helping to level the playing field for large and small businesses.”⁵⁷ In addition, small businesses “often have both lower overhead and higher desire to win in reverse auctions to gain business to build their businesses.”⁵⁸

“Large firms may have more resources available to analyze pricing than a small business. Therefore, the off-line process provides an inherent advantage to firms with the best market information. The on-line process [like reverse auctions] levels the playing field by providing all bidders with an immediate bid status.”⁵⁹

In addition to winning awards, reverse auctions offer market insight to small business for whom have limited resource and may not otherwise have access to such data. Arguably, there is no better means of identifying and tracking pricing trends than participating in a real-time reverse auction.⁶⁰

For all businesses, large or small, reverse auction provide valid “health checks.” Reverse auctions flush out a contractor’s “competitive strengths and weaknesses,” which is crucial to determining where a business spends its resources and which suppliers and brands it decides to carry.⁶¹

⁵⁶ See Schiavone, *supra* note 37.

⁵⁷ Patti Ashley, *Reverse Auctions Offer Real-Time Access to the Marketplace, Increase Competition, Lower Costs, and Save Time. So What Are You Waiting For?*, CONT. MGMT. Jun. 2002 at 8

⁵⁸ See Wyld *supra* note 17.

⁵⁹ Henry Persons, *Competing for Contracts Through On-Line Reverse Auctions*, CONT. MGMT. Mar. 2004 at 14.

⁶⁰ See Ashley *supra* note 57 at 8.

⁶¹ See Persons *supra* note 59 at 16.

Transactions costs can be minimized with reverse auctions.

“The hidden value from most reverse auctions may not be the savings in money but the savings in time.”⁶² Not only do reverse auctions have the potential to save procurement dollars, but they have the opportunity to reduce time spent administering a purchase.

According to a study of the Customs and Border Protection bureau (CBP) experience with reverse auctions, the CBP saved 10% annually out of the \$500 million in procurements made through auction over a four year period.⁶³ More interesting is that “in each of the 15 categories surveyed, the contracting official said they preferred reverse auction to traditional procurement methods. Some of the highest grades were for categories such as time savings, managing questions from sellers and ease of use.”⁶⁴

“Among the more significant process efficiencies gained through reverse auctions are those involving notification, competition, and documentation.”⁶⁵ For notification, reverse auctions administrators have a large database of vendors to tap into that allows them to push out notification of new procurement electronically.⁶⁶ When compared to waiting to see if enough applicants respond to synopsis on a Governmentwide Point of Entry like FedBizOpps, this feature has its advantages. Auctions excel at helping agencies avoid overpaying for a product, by giving vendors the opportunity to make multiple bids resulting in a real-time market price.⁶⁷ Reverse auctions also eases the documentation burden by “automatically detailing and recording

⁶² Robert Brodsky, *Study Hails Use of Online Reverse Auctions*, GOVERNMENT EXECUTIVE (Jan. 3, 2011), <http://www.govexec.com> quoting David Wyld of the Reverse Auction Research Center and the Southeastern Louisiana University.

⁶³ *Id.* Note that the study was funded by the same third party that administered the reverse auctions for CBP.

⁶⁴ *Id.*

⁶⁵ Neil Fox, *Reverse Auctions Ready for Prime Time*, CONT. MGMT. Jul. 2007 at 63.

⁶⁶ *Id.*

⁶⁷ *Id.* at 64.

the entire transaction and making the information available at the click of a mouse.”⁶⁸ This type of convenience “enables agencies to better manage their procurement activities without increasing the workload of the contracting specialist.”⁶⁹

No more protests.

When an award is made based on price alone, the transparency offered through reverse auctions makes it almost impossible to protest.⁷⁰ On a federal level, contractors have challenged the use of reverse auctions before the Government Accountability Office (GAO), but have routinely been denied. In *MTB Group, Inc.*, the GAO denied the protest and held among other things that the Federal Acquisition Regulations do not prohibit vendors from disclosing “their own prices--albeit, as a condition of competing--by entering the prices on the auction website.”⁷¹ More recently, a protestor alleged that it was improper for an agency use reverse auction, but that protests was also denied.⁷²

Fighting protests is a time-intensive endeavor; it requires procuring officials to focus on defending procurements instead of conducting new ones.⁷³ With procurement dollars shrinking, contractors are becoming more litigious.⁷⁴ Therefore, any procurement tool that can stymie the flow of protests on the federal level, would be prudent for a state or local agency to consider as well.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ This hyperbole is made for effect; disappointed vendors should always be afforded the opportunity to protest, but when price is the only issue considered as it is with reverse auction procurements, the likelihood that a meritorious protest can be submitted is greatly diminished.

⁷¹ B-295463, 2005 CPD ¶ 40 at 3. *See also* the U.S. Court of Federal Claims case filed by the same protestor on a different contract where the court refused to grant a preliminary injunction prohibiting a reverse auction. *MTB Group, Inc. v. United States*, 65 Fed. Cl. 516 (2005).

⁷² *Encompass Group LLC*, B-405688, 2011 CPD ¶ 272.

⁷³ As noted above, because reverse auctions automatically records the bidding process, many of the relevant documents related to award can be readily located and reproduced. The ability to recreate the contemporaneous documentation to support an award without unduly burdening the contracting agency is a significant benefit, which cannot be understated.

⁷⁴ In April 2013, the U.S. Air Force announced the awardees of its \$6.9 billion NetCents2 program, but within days over 32 protests were filed with the GAO under B-405389.

Auctions help grow a community’s tax base.

Regardless of whether an individual state, county, district or municipality utilizes reverse auctioning, the federal government will. And the winners of the federal auctions will continue to pay more state and local taxes as their businesses continue to thrive. Thereby, it behooves a community to consider using reverse auctions because it fosters local businesses so that they can compete in auctions on the state, regional and national level.

FedBid recently made a pitch based on this rational to the city of Tampa, Florida.⁷⁵ FedBid noted that in 2012 businesses within Tampa brought in over \$4 million dollars of taxable revenue into the city through winning federal reverse auctions.⁷⁶ Arguably, if the city had more local businesses accustomed to reverse auctions, those businesses could also compete to win federal awards. Therefore, if the city of Tampa used reverse auctions for just some of its local needs, it could bring more local businesses “up to speed” and those businesses names would be entered into the national auction databases that each third party administrator maintains.⁷⁷ By doing so, Tampa would also better situate its tax base to win awards outside of the metropolitan area.⁷⁸

V. Recommendations For Improving the MPC With Guidance On Reverse Auctions.

In rewriting the MPC, reverse auctions should at least get two mentions. First, it should be mentioned within Article Three under Methods of Source Selection. It is debatable whether reverse auctions are a method, tool, technique, process, or something entirely different; therefore,

⁷⁵ See Schiavone, *supra* note 37.

⁷⁶ *Id.*

⁷⁷ *Id.* Some states, like Virginia, maintain its own vendor database, which exceeds over 60,000 listings already. See Caudill *supra* note 1.

⁷⁸ *Id.* Professor Schooner enumerates the nine objectives a government’s procurement system may strive for with the importance of each goal varying depending upon the sophistication of the given procuring entity. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. LIC PROCUREMENT L. REV. 103 (2002). FedBid has essentially proffered a **tenth** objective that state and local governments can achieve by cultivating local businesses so that they can win federal reverse auctions; thereby, enabling the businesses to generate more local taxing opportunities and possibly **create more local jobs**.

section 3-208 could simply be reserved for reverse auction discussion on a subsequent rewrite until the procurement community reaches a clear consensus on the issue.⁷⁹ If the ABA is not inclined to take an affirmative stance on recognizing reverse auctions as a bona fide source selection method, than including reverse auctions in the “definition” section might be a more risk-averse alternative.⁸⁰

Secondly, there needs to be some mention of reverse auctions in Article Five, Part B, “Contracting for Infrastructure Facilities and Services.” The ABA need not take a position on whether reverse auctions are appropriate for construction projects, but it needs to “flag” its audience that this issue exists. Further, by taking such a position, the MPC would be more align with the general wisdom that “reverse auctions often work best when price is the only evaluation factor, which is not always the case when purchasing complex services.”⁸¹

In the same vein as warning agencies when to limit the use of reverse auctions, the MPC needs to affirmatively state, if not yell, that anytime commodities or commercial items are procured, reverse auctions should be considered.⁸² This point is particularly true when procuring true “commodities.”⁸³ The District of Columbia, for example, estimated that it will save \$30

⁷⁹ See Yukins *supra* note 5 for discussion on the difficulty of characterizing reverse auctions.

⁸⁰ In defining reverse auction, the ABA should consider a liberal definition that does not preclude the use of the lead/lag approach. Some states, by definition, require reverse auctions to disclose real-time price information of each competitor. When questioned about it, one state procurement official opined that most bidders already know what each other’s price is more or less. See Caudill *supra* note 1. The MPC is not obligated to pick a side on that issue and; instead, is best suited leaving the fine-tuning and tailoring of the definition to each state and local government.

⁸¹ See Brodsky *supra* note 62 quoting Dan Gordon, Administrator of the Office of Federal Procurement Policy at the Office of Management and Budget.

⁸² Thomas F. Burke, *Online Reverse Auctions*, Briefing Papers, 00-11, 3 (Oct. 2000) which states that “the DOD advised the Senate armed service Committee that online auctioning ‘may be well suited for competitive, high volume, commodity type purchases’ and has ‘the potential to save the Department significant resources in time, funding and labor.’” *Id.*

⁸³ While it is well recognized in procurement circles that a commercial item is anything that is or could be sold in a commercial marketplace, it is less obvious when commercial items are not commodities. “A commodity is a product or service of standardized specifications and quality, and for which customers are unwilling to pay a premium for improved quality or features; thus, suppliers of commodities compete on price alone.” (Interview with Greg Ayres, 2013 Harvard Business School MBA graduate (May 11, 2013)). A birthday cake is not a commodity, but it is clearly a commercial item; however, the eggs, butter and frosting used to construct the cake are commodities. *Id.*

million on an electricity contract procured through a reverse auction administered by Co-eXprise in which seven companies competed.⁸⁴ Further, the Defense Logistics Agency (DLA) recently mandated the use of reverse auction for competitive high-costs contracts.⁸⁵

Additional guidance the ABA needs to provide.

If the amount of space afforded to comments regarding reverse auction is limited in the MPC, then the ABA needs to consider drafting a white paper or some sort of compendium to communicate the lessons learned from the both the public and commercial sector on using reverse auctions. Following are some of the bare essentials that needs to be communicated to any agency considering to conduct a reverse auction.

First, in selecting a provider to administer the auction, it is imperative that the source selection information and contractor proprietary data be safeguarded.⁸⁶ Not only will the third party administrators have access to the real time pricing data, but it will have access to sensitive source selection information, which if misused, could create an organizational conflict of interest and give a bidder an unfair advantage.⁸⁷ This prong also echoes the ABA's own suggested guidance that reverse auctioning should only be permitted provided that it does not "compromise the integrity of the procurement process."⁸⁸

Second, the solicitation must be clear and the procuring agency should avail potential offerors to free pre-training webinars or seminars. As stated by Matthew Bauer, the procurement

⁸⁴ *DC saves \$30 million on electricity contract*, Government Procurement, Vol 15, Issue 1, Feb 2007 (2/1/07 Gov' Procurement 9). Co-eXpertise's CEO William Blair claims its reverse auction product, MarketPlace, "seizes market timing opportunities and can secure best market pricing for any city where electricity and natural gas are deregulated." *Id.*

⁸⁵ Press Release, Defense Logistics Agency, DLA Mandates Reverse Auctions for Competitive, High-Cost Contracts (Sept 17, 2012) (on file with author and available at www.dlamil/DLA_Media_Center/PressReleasePages/DLAmandatesreverseauctions.aspx .

⁸⁶ See Burke *supra* note 82 at 5-6.

⁸⁷ If not made clear already, there is no requirement that a third party administrator conduct a reverse auction. In Virginia, the state's Division of Purchase and Supply administers reverse auction in-house using CGI's Advantage program. See Caudill, *supra* note 1.

⁸⁸ See Woodward, *supra* note 3 at 568.

supervisor for Maricopa County, Arizona who managed many of the reverse auctions attributed to the county discussed above, agencies need to have a “predefined plan” and an understanding of the need to avoid both vendor confusion and creating “unduly restrictive” specifications.⁸⁹ Many of the state and local needs are ripe for purchasing through reverse auctions, but auctions are not universal panaceas for all procurements.⁹⁰

The agency should also be clear about any finance charges the awardee will be responsible for if its proposal is selected. Third party administrators are paid through a percentage surcharge assessed to the awardee similar to the fee credit card companies assess merchants. Vendors, therefore, need to be made aware that its offer needs to account for these surcharges in addition to its own cost structure before submitting its best and final offer.⁹¹

Coupled with being obvious and clear, agencies need to have a strong outreach program. Reverse auction do not require vendors to be Internet-savvy,⁹² but with all the data entry being pushed onto the vendors, it is imperative that vendors have a clear understanding as to what is expected to them and how to utilize auction software. In the Knox County police vehicle buy discussed above, vendors were offered a nonmandatory training program.⁹³ “During training, attendees saw how the system works in a test environment with a mock reverse auction. The training session drew a full house – about 20 to 25 vendors and participating agencies.”⁹⁴ In

⁸⁹ See Anderson, *supra* note 50.

⁹⁰ The “sweet spot” for reverse auctions is under the highly sophisticated procurements and above the micro purchases than can be made on a government purchasing card. These transactions are not necessarily high dollar goods or services, but they are procured at such a high volume that they are prone to being “undermanaged.” See Schiavone, *supra* note 37.

⁹¹ FedBid adds an equal percentage transaction fee to all Sellers’ bids prior to the submission to the Buyer to minimize any surprise by the awardee. FEDBID FAQ TOP 5, <http://www.fedbid.com/sellers/faqs> (last visited May 4, 2013).

⁹² See Schiavone, *supra* note 37.

⁹³ See Anderson, *supra* note 44.

⁹⁴ *Id.*

addition, handouts with screenshots of the system were disseminated.⁹⁵ Unless an agency is willing to truly invest the time into educating its vendors, it is not going to have a productive auction.

Finally, during an auction agencies need to “[p]lay careful attention to the potential for contractors “*buying-in*” or submitting “*mistaken binds*.”⁹⁶ This problem can be rectified, in part, by stating in the solicitation, that the agency is not obligated to select the lowest priced offer. Thereby, if a price is dramatically below the independent government estimate and the competition, the agency can perform its own price reasonableness analysis or simply elect the second lowest priced proposal. None of this is possible, however, unless the solicitation provides the agency the needed flexibility.

⁹⁵ *Id.*

⁹⁶ *See* Burke *supra* note 82 at 8.

ATTACHMENT 3



Federal Control Over State Procurement Preferences Affecting International Trade Relations

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ABSTRACT

State procurement policies can act as a barrier to free trade, causing tension between the United States and its international trading partners. The EU, in particular, has repeatedly objected to state and local procurement measures that unfairly prevent foreign investors from accessing their markets. In response to this complaint, the United States has attempted to persuade states to voluntarily agree to sub-regional membership of international trade agreements, which generally requires most favored nation status. In light of upcoming negotiations for a U.S.-EU bilateral trade agreement, the U.S. government has an opportunity to attempt a stronger approach to sub-regional membership. This Paper asks whether the federal government may, based solely upon its Constitutional powers, require states to adhere to the most favored nation status provisions of a bilateral trade agreement.

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I. Introduction

A trade sector worth \$5 trillion per year is set to grow even larger.¹ The U.S. and the EU will begin formal negotiations for a free-trade agreement this year, paving the way for the biggest trade deal in history.² According to European Commission President Jose Manuel Barroso, a free-trade agreement between the world's two most important economic powers will be a "game changer, giving a strong boost to economies on both sides of the Atlantic."³ Indeed, financial experts believe that such a deal has the potential to jump-start economic growth, create millions of jobs, and sidestep the paralyzing debate between painful austerity and costly stimulus.⁴

The anticipatory excitement surrounding this trade deal is tempered, however, by fears that negotiations will fail to surmount several key hurdles, many of which are bureaucratic.⁵ For example, the EU has already harmonized many trade regulations in Europe, while in the U.S., jurisdiction is partly fragmented and relegated to the individual states.⁶ This fragmentation is most significant in the government contracts market, where individual U.S. states still retain autonomous, and often inconsistent, procurement regulations.⁷

¹ *EU-U.S. Free Trade Deal Offers Painless Stimulus for Both*, Bloomberg View, June 17, 2012, available at <http://www.bloomberg.com/news/2012-06-17/eu-u-s-free-trade-deal-offers-painless-stimulus-for-both.html>.

² *EU and US Free-trade Talks Launched*, BBC News, February 13, 2013, available at <http://www.bbc.co.uk/news/business-21439945>.

³ *Id.*

⁴ *EU-U.S. Free Trade Deal Offers Painless Stimulus for Both*, Bloomberg View, June 17, 2012, available at <http://www.bloomberg.com/news/2012-06-17/eu-u-s-free-trade-deal-offers-painless-stimulus-for-both.html>.

⁵ *Id.*

⁶ *Id.*

⁷ *See infra*, pp 7-13.

Analysts agree that government procurement will be a major topic under debate during the free-trade negotiations, as Europe has made it clear that opening this market is a top priority.⁸ Indeed, an interim report by the U.S.-EU High Level Working Group released late last year indicates that a crucial goal of the negotiations will be to “enhance business opportunities through substantially improved access to government procurement opportunities at *all levels* of government on the basis of national treatment.”⁹ Europe has already complained of sub-regional protectionist measures within the United States,¹⁰ so it is clear that this time around, the EU wants a clear commitment to most-favored nation status (MFN) in all U.S. jurisdictions, including state-by-state procurement practices.¹¹ Business leaders and politicians on both sides of the isle are anxious to see this free-trade agreement succeed¹² and are likely to pressure U.S. negotiators to agree to the MFN stipulation on a sub-regional level. For a country devoted to federalism, however, the question remains whether the federal government of the U.S. can unilaterally bind its fifty states to such an agreement – and if it can do so, is this the best way to ensure the sub-regional procurement harmonization the EU seeks?

To analyze these questions, this Paper will look to another international trade agreement to which the U.S. is a party, the Agreement on Government Procurement (GPA),

⁸ See generally Allen B. Green Marques O. Peterson Morgan Lucas, *Converging Procurement Systems -- Part II: International Trade and Public Procurement*, Government Contracts Year in Review Conference Covering 2012 Briefs, February 2013. Indeed, in the EU's negotiations with India and Canada, opening government procurement markets was one of the most important provisions upon which parties had to agree. See e.g., Ranja Sengupta, *Government Procurement in the India-EU FTA: Dangers for India*, 47 Economic and Political Weekly, no. 28, 2012, available at <http://www.ftamalaysia.org/article.php?aid=298>.

⁹ *Interim Report*, United States-European Union High Level Working Group on Jobs and Growth, June 19, 2012, available at http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

¹⁰ See Matthieu Bussiere, et. al., *Protectionist Responses to the Crisis: Global Trends and Implications*, European Central Bank, May 2010, available at <https://www.ecb.int/pub/pdf/scpops/ecbocp110.pdf>.

¹¹ See, e.g., *Member Seeks More Specifics in U.S.-EU Mandate, Press Jurisdiction*, World Trade Online, March 28, 2013, available at <http://insidetrade.com/Inside-Trade-General/Public-Content-Special-GACC-Promo/member-states-see-more-specifics-in-us-eu-mandate-press-jurisdiction/menu-id-1040.html>.

¹² See *supra* at note 1.

which also targets sub-regional ratification of international procurement provision, thus implicating federalism concerns.¹³ Part I of this Paper will introduce the GPA, including its structure and membership requirements, followed by its effects on domestic procurement policies. Part II will address the federalism system in the U.S. as it relates to public procurement, including a look at state procurement policies with direct and indirect international reach. Part III will look to the ways in which the federal government may control state action through specific constitutional powers that trump state sovereignty in certain circumstances. This Paper will then evaluate whether the U.S. government can prevent states from discriminating against foreign vendors in their procurement practices through international agreements such as the GPA and a EU-U.S. bilateral trade treaty.

II. The World Trade Organization Agreement on Government Procurement

On an average year, the total value of world procurement amounts to approximately \$5.5 trillion.¹⁴ The procurement market of the United States accounts for approximately \$400 billion each year.¹⁵ The fifty U.S. states spend even more procurement dollars than the federal government.¹⁶ As federal, state, and local governments increasingly rely upon the private sector to perform government functions, there is increased need to regulate and harmonize the public procurement industry.

¹³ World Trade Organization, Government Procurement: The Plurilateral Agreement on Government Procurement (GPA), Parties and Observers to the GPA, *available at* http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties.

¹⁴ See Organization for Economic Co-operation and Development, *Public Procurement: The Role of Competition Authorities in Promoting Competition*, DAF/COMP(2007)34 (Jan. 8, 2008), *available at* <http://www.oecd.org/dataoecd/25/48/39891049.pdf>.

¹⁵ Acquisition Advisory Panel, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress 1 (Draft Final Report, Dec. 2006), *available at* <http://www.acquisition.gov/comp/aap/documents/DraftFinalReport.pdf>.

¹⁶ According to annual procurement figures issued by the U.S. Department of Commerce, state procurement represents approximately 62 percent of overall federal and state procurement combined. See U.S. Department of Commerce, Economics and Statistics Administration, Bureau of Economic Analysis, Survey of Current Business, September 1997.

a. Structure of the GPA, with Emphasis on Membership and Coverage Requirements

For years, member nations to the World Trade Organization (WTO) discussed the need for regulation and harmonization of the public procurement sector.¹⁷ This need was realized in the form of the Government Procurement Agreement (GPA).¹⁸ Unlike the "multilateral" trade agreements of the WTO, the GPA is a "plurilateral" trade agreement, which applies only to the GPA members that agree to adhere to particular GPA commitments on a reciprocal basis.¹⁹ GPA members selectively offer concessions to certain GPA members only, depending on reciprocal commitments.²⁰ The GPA opens an estimated \$350 billion annually in government procurement contracts to international bidding, a tenfold increase over previous contracts.²¹

In line with other WTO agreements, the GPA obligates contracting parties to establish minimum procedural and substantive rights in their national laws and regulations.²² A key obligation is to follow the basic national treatment and nondiscrimination principles.²³ This requires that member governments give foreign suppliers, goods, and services "no less favorable" treatment than they give to domestic firms.²⁴ Moreover, the GPA prohibits covered governments from discriminating among

¹⁷ See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 4, Plurilateral Trade Agreements, Agreement on Government Procurement, *available at* http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm.

¹⁸ The United States and twenty-five other states, along with the European Union, are members of the GPA. Another eighteen states and three international organizations have "observer" status. WTO, Committee on Government Procurement, *available at* http://www.wto.org/wto/english/tratop_e/gproc_e/memobs_e.htm.

¹⁹ Christopher F. Corr and Kristina Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L. Sch. J. Int'l & Comp. L. 303, 334 (1999).

²⁰ *Id.*

²¹ *Id.*

²² Peter L. Fitzgerald, *Massachusetts, Burma, and the World Trade Organization: A Commentary on Blacklisting, Federalism, and Internet Advocacy in the Global Trading Era*, 34 Cornell Int'l L.J. 1 (2001).

²³ *Supra* note 13, at art. III.

²⁴ *Id.* art. III(1).

domestic suppliers on the basis of foreign ownership or the provision of foreign goods or services.²⁵ The GPA does allow for exceptions to the discrimination policy, including requirements to promote public morals, safety, or health;²⁶ measures necessitated by national security or national defense;²⁷ and special treatment for developing countries.²⁸

Another significant feature of the GPA is the inclusion of sub-central entities.²⁹ This means specific regional bodies within federal states can be covered by the agreement.³⁰ At present, thirty-seven U.S. states are listed members of the GPA.³¹ The exact coverage within each state varies.³² In some instances, the GPA covers all procurements conducted by the state; in others, the GPA only covers procurements by particular agencies.³³ As state government procurement markets are separate from their federal counterparts, U.S. states have been given the choice to implement the GPA through commitments from their

²⁵ *Id.* art. III(2).

²⁶ The GPA permits measures taken to "protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour," but restricts their application "in a manner which would constitute a means of arbitrary or unjustifiable discrimination ... or a disguised restriction on international trade." *Id.* art. XXIII(2).

²⁷ Unlike the other GPA exceptions to the basic obligations, the national defense exception is entirely unrestricted and "self-judging." *Id.* art. XXIII(1).

²⁸ *Id.* art. V.

²⁹ Christopher F. Korr & Kristina Zissis, *supra* note 19, at 348.

³⁰ See GPA app. I, (United States), Annex 2, reprinted in 1 Law & Practice of the World Trade Organization 157 (Joseph F. Dennin et al. eds., 2000).

³¹ The states applying the GPA are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.*

³² Peter L. Fitzgerald, *supra* note 22.

³³ Joseph F. Dennin, *supra* note 30.

governors to the U.S. Trade Representative (USTR).³⁴ An ongoing debate remains as to whether this choice should indeed be optional or not.³⁵

b. Effects of Regional and Sub-regional Membership on International Policy and Procurement

The GPA embodies principles supporting non-discriminatory and reciprocal trade provisions for international government procurement markets.³⁶ However, some member nations, including the United States, are unable to take full advantage of the GPA provisions because of inconsistent domestic practices, such as counter-trade agreements and "buy local" legislation.³⁷ Even the staunchest supporters of federalism recognize that if U.S. foreign trade policy must be determined by the future policies of fifty different entities, there will not be any policy at all.³⁸

Other GPA members have already complained of contradictions between GPA members and non-members with the United States.³⁹ The European Commission for example, has complained about state and local government preference programs and the use of extraterritorial secondary boycotting.⁴⁰ In addition to the twenty-two local jurisdictions that have passed laws targeting human rights violations in foreign countries,⁴¹ the EU pointed to 40 state and local government amicus briefs supporting such efforts as underscoring the potential for "even greater proliferation" of these measures in the

³⁴ Amol Mehra, *Federalism and International Trade: The Intersection of the World Trade Organization's Government Procurement Act and State "Buy Local" Legislation*, 4 *BYU Int'l L. & Mgmt. Rev.* 179, 183-84 (2008).

³⁵ See *infra* pp. 21-22.

³⁶ Joseph F. Dennin, *supra* note 30.

³⁷ Adrian Barnes, *Do They Have to Buy from Burma? A Preemption Analysis of Local Antisweatshop Procurement Laws*, 107 *Colum. L. Rev.* 426 (2007).

³⁸ Mitsuo Matsushita, *Major WTO Dispute Cases Concerning Government Procurement*, 1 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 299, 300 (2006).

³⁹ See World Trade Online, *supra* note 11.

⁴⁰ *Id.*

⁴¹ Peter L. Fitzgerald, *supra* note 22.

future.⁴² While GPA member states may file a complaint with the WTO regarding actions by sub-regional entities that are also members, they would have no recourse against those entities that are not members. Therefore, they instead put pressure on the United States to ensure that both federal and state procurement agencies are speaking with one voice.⁴³

As a response to this pressure, the USTR has worked closely with states, encouraging those that have yet to sign the GPA to do so.⁴⁴ By joining the agreement, state members are free to determine which agencies will be covered and to identify the goods or services they wish to exempt.⁴⁵ Participating GPA members therefore enjoy the best value for public expenditures without the hindrance of discriminatory and anticompetitive legislation.⁴⁶ Anti-competitive measures include the use of offsets, technology licensing, measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, investment requirements, counter-trade or similar requirements for awarding government contracts, or those measures that violate the principle of non-discrimination enshrined in the GPA.

III: Reciprocal Competitive Procurement Practices Among States in the U.S.

In 1996, Massachusetts passed a selective purchasing act⁴⁷ that authorized its state officials to establish a restricted purchase list for any companies doing business in the

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Amol Mehra, *Federalism and International Trade: The Intersection of the World Trade Organization's Government Procurement Act and State "Buy Local" Legislation*, 4 *BYU Int'l L. & Mgmt. Rev.* 179, 183 (2008).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar), ch. 130, 1996 Mass. Acts 239 (codified at MASS. GEN. LAWS, ch. 7, §§ 22G-22M (West Supp. 1998)) [hereinafter *Massachusetts Act or Act*].

country of Burma.⁴⁸ Under the Act, a state procurement agency could not purchase goods or services from persons or entities identified on the restricted purchase list, unless one of several exceptions existed.⁴⁹ These exceptions included procurements that were deemed “essential;”⁵⁰ where the law’s restriction would “eliminate the only bid or offer, or would result in inadequate competition;”⁵¹ when the state was purchasing specific medical supplies;⁵² or where there was no comparable low bid or offer by a bidder who was not on the restricted list.⁵³ Any contract in violation of this Act was deemed null and void.⁵⁴

The National Foreign Trade Council (NFTC) filed suit against the state of Massachusetts, challenging the Act as unconstitutional.⁵⁵ The U.S. Supreme Court agreed with the NFTC, striking down the Act as an unlawful interference with federal powers.⁵⁶ This decision came out during in the midst of increased adoption of selective purchasing laws by state and local governments throughout the United States.⁵⁷ In addition to Massachusetts, twenty-three U.S. states had adopted ordinances prohibiting municipal authorities from transacting business with companies maintaining commercial relations with Burma.⁵⁸ Similarly, twenty-eight state and local governments had adopted purchasing

⁴⁸ National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998).

⁴⁹ *Id.*

⁵⁰ Mass law 22H(b)1 and (2).

⁵¹ *Id.*

⁵² *Id.* at 22(i)

⁵³ *Id.* at 22(g)

⁵⁴ *See id.* § 22L.

⁵⁵ The National Foreign Trade Council brought its complaint in a representative capacity on behalf of its U.S. and foreign members engaged in international trade and investment. *See* Complaint for Declaratory, Injunctive and Other Relief at 3-4, National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998) (No. 98-CV-10757).

⁵⁶ *See id.* at 61-71. For an explanation on the Foreign Commerce Clause, *see infra* pp. 15-17.

⁵⁷ Lucien J. Dhooge, *The Wrong Way to Mandalay: The Massachusetts Selective Purchasing Act and the Constitution*, 37 Am. Bus. L.J. 387, 389 (2000).

⁵⁸ *Id.*

laws targeting Nigeria, Switzerland, Indonesia and the Peoples' Republic of China.⁵⁹ There are various ways in which states may affect international affairs through their procurement systems. Some procurement provisions specifically target countries with poor humanitarian records,⁶⁰ while others have a less intentional, albeit still direct, international reach.⁶¹

a. Procurement Laws with Indirect International Reach

The most common of state procurement laws with unintentional international reach is that of the responsible bidder law.⁶² These laws, used by almost all state and local governments, require that public contracts be awarded to the lowest “responsible” bidder.⁶³ These laws were primarily created in order to prevent corruption, but they have since been extended to require bidder compliance with such ethical standards such as fair labor,⁶⁴ respect for the environment,⁶⁵ and antidiscrimination.⁶⁶ Responsible bidder laws make up the baseline by which state and local procurement officers can control the integrity of their contract partners.⁶⁷

⁵⁹ *Id.*

⁶⁰ See Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 *Syracuse L. Rev.* 923 (2003)

⁶¹ See *infra* pp. 8-11.

⁶² Adrian Barnes, *Do They Have to Buy from Burma?: A Preemption Analysis of Local Antisweatshop Procurement Laws*, 107 *Colum. L. Rev.* 426, 428 (2007).

⁶³ *Id.*

⁶⁴ See, e.g., *Mid-State Indus.*, 633 N.Y.S.2d at 239 (holding prior labor law violation grounds for disbarment from public contracts).

⁶⁵ See, e.g., *Tully Constr. Co. v. Hevesi*, 625 N.Y.S.2d 531, 532 (*App. Div.* 1995) (holding contractor that had previously violated environmental laws could be barred from public contract), appeal withdrawn, 664 N.E.2d 1261 (N.Y. 1996).

⁶⁶ See, e.g., *Weiner v. Cuyahoga Cmty. Coll. Dist.*, 249 N.E.2d 907, 910-11 (Ohio 1969) (holding that failure to assure public entity of compliance with employment discrimination laws is suitable grounds for conclusion that party is not responsible).

⁶⁷ See Adrian Barnes, *supra* note 62, at 429.

A slightly more powerful tool for state and local procurement officers is the option of setting conditions on procurement.⁶⁸ These conditions can be broad in focus and in scope, ranging from a requirement that localities purchase goods with a certain percentage of recycled content⁶⁹ to a requirement that localities only enter into contracts with companies that provide equal benefits to employees with spouses and employees with domestic partners.⁷⁰

Conditions on procurement have recently led to a trend called the “living wage ordinance.” In 1994, the Baltimore City Council enacted the nation’s first living wage ordinance, which required all city service contractors to pay a set minimum wage to their employees, with further grade raises each year.⁷¹ Baltimore legislators explained that this provision would ensure that public dollars did not subsidize “poverty-wage work.”⁷²

Within three years of the Baltimore City Council’s ordinance enactment, thirteen other municipalities around the country adopted similar laws,⁷³ and to date some 122 living wage ordinances have been adopted, with campaigns currently underway in more than seventy-five cities nationwide.⁷⁴ The expansion has not merely geographical – as the

⁶⁸ *Id.*

⁶⁹ *E.g.*, Cal. Pub. Cont. Code §12310 (West 2004) (requiring fifty percent of total paper products purchased to be recycled paper products); Md. Code Regs. 21.11.07.05 (2006) (stating that procurement specifications must require use of materials from state Acceptable Recycled Products List to fullest extent possible).

⁷⁰ *E.g.*, Berkeley, Cal., Municipal Code tit. 13, §§13.29.010-.100 (2006), *available at* [http://www.ci.berkeley.ca.us/bmc/Berkeley Municipal Code/Title 13/29/index.html](http://www.ci.berkeley.ca.us/bmc/Berkeley%20Municipal%20Code/Title%2013/29/index.html) (on file with the Columbia Law Review).

⁷¹ Balt., Md., City Code art. 5, §26-16(c)(2) (2006).

⁷² Living Wage Res. Ctr., *The Living Wage Movement: Building Power in Our Workplaces and Neighborhoods*, *available at* <http://www.livingwagecampaign.org/index.php?id=2071>.

⁷³ *See* Adrian Barnes, *supra* note 62, at 429.

⁷⁴ *Id.*

movement progressed, the living wage ordinances began to include other requirements, such as health benefits,⁷⁵ vacation days,⁷⁶ and support for union organization.⁷⁷

Mindful of the ways in which living wage laws improved employment conditions within local communities, many municipalities sought other ways to extend coverage beyond just city employees.⁷⁸ The result was an emergence of so-called “anti-sweatshop laws,” which take into consideration all workers involved in producing goods purchased by local governments.⁷⁹ Whether intentional or not, this form of procurement regulation had a natural and almost immediate effect on international markets.⁸⁰

One of the first procurement laws with unintentional, but demonstrable international reach was adopted by New York City in 2002.⁸¹ This law, geared toward purchases of apparel and textile goods by city agencies, asserted that such purchases only be made from a “responsible manufacturer.”⁸² To satisfy this requirement, a manufacturer had to pay a “non-poverty wage,”⁸³ calculated as “no less than the level of wages and health benefits earned by a full-time worker that is sufficient to ensure that a family of three does

⁷⁵ See, e.g., Pasadena, Cal., Municipal Code §4.11.020 (2006), at LEXIS, Municipal Codes, California Municipal Codes (requiring wage of \$ 8.20 with health benefits and \$ 9.61 without); S.F., Cal., Administrative Code §12Q.3(a) (2006), available at <http://www.municode.com/Resources/gateway.asp?pid=14131&sid=5> (requiring that minimum wage be accompanied by legislation requiring one of three health care options); Hudson County, N.J., Ordinance 362-6-2003 (1999) (requiring wage of \$ 7.50 and at least \$ 2,000 per year of health care); Buffalo, N.Y., Code §96-19(D)(2) (2006), available at <http://gcp.esub.net/cgi-bin/omisapi.dll?clientID=62182&infobase=buffalo.nfo&softpage=BrowseFramePg42> (requiring wage of \$ 8.08 in 2003 and \$ 9.03 in 2004 with health benefits, or \$ 9.08 in 2003 and \$ 10.15 in 2004 without health benefits).

⁷⁶ See, e.g., Watsonville, Cal., Municipal Code §2-5.02(a) (2006) (requiring ten paid days of sick leave or vacation annually).

⁷⁷ See, e.g., San Jose, Cal., Resolution 68,900 (June 8, 1999) (adopting revised living wage policy with provisions encouraging "labor peace" at city contractors by requiring assurances of protection against labor unrest or labor discord from entities seeking contracts).

⁷⁸ See Adrian Barnes, *supra* note 62, at 432.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ New York, N.Y., Local Law 20 of 2001 (codified at New York, N.Y., Administrative Code tit. 6, ch. 1, §6-124 (2006), available at <http://24.97.137.100/nyc/AdCode/entered.htm>).

⁸² New York, N.Y., Administrative Code tit. 6, ch. 1, §6-124(b).

⁸³ *Id.* §6-124(a)(2).

not live in poverty, as measured by the nationwide poverty guidelines.”⁸⁴ For employees of contractors and subcontractors working outside of the United States, the law stated, this non-poverty wage should be adjusted to reflect the local country’s level of economic development and national standard of living.⁸⁵

This law was advanced on two primary grounds: that it reduced the unfairness facing local contractors who had to compete with manufacturers who offered discounted prices by reducing labor costs below those achievable when reasonable labor standards are observed,⁸⁶ and that it protected the interests of workers, both domestic and foreign.⁸⁷

b. Procurement Laws with Direct International Reach

Anti-sweatshop acts have a much more direct effect on international trade than other conditional procurement provisions, but they are still much less blatant than other state actions. Indeed, the 1980s saw a host of state laws specifically directed at eliminating apartheid in South Africa.⁸⁸ Twenty-three states, fourteen counties, and eighty cities around the United States enacted either divestment or procurement legislation to limit corporate investment in South Africa, and this effort has been credited at least in part with toppling the apartheid regime.⁸⁹ While the divestment laws were all upheld when challenged,⁹⁰ courts never had an opportunity to address the procurement laws aimed at

⁸⁴ *Id.* §6-124(c).

⁸⁵ *Id.*

⁸⁶ See, e.g., High Road Serv. Ctr., New York City: Victory on Antisweatshop Law, *available at* [http://www.highroadnow.org/fair trade/local ordinances/no sweat procurement/index.cfm](http://www.highroadnow.org/fair%20trade/local%20ordinances/no%20sweat%20procurement/index.cfm).

⁸⁷ See Press Release, Rocky Chin, Rocky Chin Takes His Fight Against Sweatshops to City Hall (Apr. 25, 2001), *available at* [http://www.rockychin.com/PressRoom/pressroom release 042501 sweatshop.html](http://www.rockychin.com/PressRoom/pressroom%20release%20042501%20sweatshop.html).

⁸⁸ See Sedy L. Wallace, *Are States Denied a Voice?: Citizen Driven Foreign Policy After Crosby v. National Foreign Trade Council*, 52 Case W. Res. 793, 793 (2002).

⁸⁹ *Id.* at 793-94.

⁹⁰ See *id.* at 807.

South Africa.⁹¹ This is perhaps the reason why states begin instituting similar sanction-like activities by way of procurement laws, as they did with Burma. Indeed, one of the authors of the Massachusetts Act made specific reference to the anti-apartheid procurement movement, stating “if selective purchasing had been banned ten years ago, Nelson Mandela might still be in prison today.”⁹² There are, of course, other legitimate reasons for states to enact such laws, including a right to spend tax dollars conscientiously and an awareness of the consumer trend requiring better humanitarian purchasing.⁹³

So-called “Buy-America” or “Buy Local” legislation is another form of direct, intentional interference by states into international affairs, but the focus of this type of legislation is more geared at addressing globalization.⁹⁴ The growing public concern over environmental protection, health, outsourcing, and the disappearance of the industrial industry in the United States has resulted in increased scrutiny of the globalization trend.⁹⁵ Many states have sought to assuage these concerns by enacting Buy Local legislation, modeled after the federal government’s Buy American Act,⁹⁶ which require state governments to purchase goods and services locally whenever possible.⁹⁷ Approximately 35 states maintain some form of Buy Local restrictions on their procurement.⁹⁸

IV. The Federal Government’s Powers to Regulate States under the U.S. Constitution

⁹¹ *Id.*

⁹² Leslie Miller, *Wide Impact Possible from Decision Axing Burma Law*, Legal Intelligencer, Nov. 6, 1998, at 1.

⁹³ *Id.*

⁹⁴ *See, generally*, Amol Mehra, *supra* note 34, at 179-80.

⁹⁵ *Id.*

⁹⁶ Federal Acquisition Regulations, 48 C.F.R. § 25.402(a) (2007); Buy American Act, 41 U.S.C. §§ 10a-10d (2000).

⁹⁷ Amol Mehra, *supra* note 34, at 179-80.

⁹⁸ An example is the New Jersey local public contracts law. N.J. Stat. Ann. 40A:11-18 (West 1982).

Anti-sweatshop and other procurement laws with international reach are still relatively new and unique, and they have therefore not been subjected to many lawsuits challenging their constitutionality.⁹⁹ The leading case of its kind remains *Crosby v. NFTC*, in relation to the Massachusetts Act. Specifically, the NFTC alleged that the Act was an invalid state action for three reasons: (1) it interfered with the federal government's exclusive power to regulate foreign affairs; (2) it discriminated against and burdened international trade in violation of the Foreign Commerce Clause of the U.S. Constitution; and (3) it was preempted by a federal statute and an executive order imposing sanctions on Burma.¹⁰⁰

a. Exclusive Foreign Affairs Power

*"The President shall be Commander in Chief of the Army and Navy of the United States . . . He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties."*¹⁰¹

Although the President's exclusive power to regulate foreign affairs is not clearly embodied in Constitutional provisions, numerous constitutional provisions evidence the Framers' intent to vest plenary power over foreign affairs in the federal government.¹⁰² Similarly, courts have concluded that Article II of the Constitution affirms responsibility to the President, and the President alone, with conducting U.S. foreign relations.¹⁰³

⁹⁹ See Adrian Barnes, *supra* note 62, at 436.

¹⁰⁰ See Complaint, *supra* note **Error! Bookmark not defined.**, at 7-8.

¹⁰¹ U.S. Const. art. II, § 2.

¹⁰² U.S. Const. art. I, § 8, cls. 1, 3 give Congress sole authority to provide for the common defense, and to regulate commerce with foreign nations. U.S. Const. art. II, § 2, cl. 2 authorizes the President to make treaties and appoint ambassadors. U.S. Const. art. I, § 10, cls. 1-3 prohibit the states from making treaties, entering into agreements with other countries, or imposing duties on imports and exports.

¹⁰³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (stating that "[t]he President . . . possesses in his own right certain powers, conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ for foreign affairs.").

Consequently, the Court has struck down laws that violate this exclusive authority.¹⁰⁴ For example, in *Bethlehem Steel Corp. v. Board of Commissioners*, the Court of Appeals for the Second District considered the validity of the California Buy American Act, which required public works contracts to be awarded only to those who used or supplied materials manufactured in the United States.¹⁰⁵ The Court held that the Act was effectively an embargo on foreign products, amounting to usurpation by California on the federal government's power to conduct foreign trade policy.¹⁰⁶ This case relied on a usurpation test laid down in *Zschernig v. Miller*, which required courts to strike down state laws that had an incidental or indirect effect on foreign countries and constituted a type of protectionism that invited retaliatory restrictions on U.S. trade.¹⁰⁷

When considering the Massachusetts Act, both the federal district court and the court of appeals held that it had more than an incidental effect on foreign affairs and was therefore an unconstitutional violation of the executive foreign affairs power.¹⁰⁸ The judge at the district court level specifically cited *Zschernig* and its “effects test,” but also found that the Massachusetts Act was a violation of the foreign affairs power simply because it was “designed with the purpose of changing Burma’s domestic policy.”¹⁰⁹ Thus it would appear that the mere intent to perform some arguably foreign affairs purpose can render a state act unconstitutional, without any documented impact.¹¹⁰

¹⁰⁴ Amol Mehra, *supra* note 34.

¹⁰⁵ 276 Cal. App. 2d 221, 224 (Cal. Ct. App. 1969); CAL. GOV'T CODE § 4303 (2007).

¹⁰⁶ *Bethlehem*, 276 Cal. App. 2d at 224.

¹⁰⁷ 389 U.S. 429, 429 (1968).

¹⁰⁸ See *National Foreign Trade Council v. Baker*, 26 F.Supp.2d 287, 289 (D.Mass.1998), and *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999) aff'd sub nom. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000).

¹⁰⁹ *National Foreign Trade Council v. Baker*, 26 F.Supp.2d 287, 291 (D.Mass.1998).

¹¹⁰ Rebecca S. Hartley, *Constitutionality of State and Local Selective Purchasing Legislation: A 9-0 Supreme Court Decision in Favor of and in Defeat of Plaintiff*, 28 Hastings Const. L.Q. 67, 77 (2000).

b. Commerce Clause and the Market Actor Exception

“Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹¹¹

Unlike the foreign affairs power, which had to be interpreted, the President’s power to regulate commerce is expressly provided in Article I of the U.S. Constitution.¹¹² The Supreme Court has recognized that the Commerce Clause “limits the power of the states to erect barriers against interstate trade.”¹¹³ With regard to international commerce, the Court expanded this power into what it calls the “dormant foreign affairs power,” which excludes the states from actively implicating foreign affairs, even in the absence of contrary federal action.¹¹⁴

In cases where Congress has not acted, but states have created laws that could hinder international trade, the Supreme Court is the final arbiter of the competing demands of state and national interest under the Commerce Clause.¹¹⁵ Under this authority, the Supreme Court has considered the enhanced risk of multiple taxation schemes and the impairment of federal uniformity in regulating foreign commerce. Similarly, the Court has found state laws usurp the Commerce Clause powers when they prevent state governments from purchasing foreign-made products.¹¹⁶ This includes Buy Local legislation, which several courts have struck down as unconstitutional under the Commerce Clause, reasoning that the power to regulate foreign commerce belongs solely to the federal

¹¹¹ U.S. Const. art. I, § 8, cl. 3.

¹¹² *Id.*

¹¹³ *Zschernig v. Miller*, 389 U.S. 429, 429 (1968).

¹¹⁴ *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 454 (1979).

¹¹⁵ 441 U.S. 434, 454 (1979).

¹¹⁶ *Matsushita*, *supra* note 38, at 310.

government.¹¹⁷

In determining the constitutionality of procurement provisions under the Commerce Clause rubric, courts have created a distinction between states acting as a market participants and market regulators.¹¹⁸ The market participant doctrine considers states' purchasing entities akin to private enterprises when purchasing the products that they need.¹¹⁹ Under the market participant doctrine, there is no infringement on the Commerce Clause even if state governments exclude foreign products from their public purchases, so long as the government agency was not functioning in a regulatory manner.¹²⁰

In *Reeves, Inc. v. Stake*, for example, the Supreme Court addressed the issue of whether the State of South Dakota violated the Commerce Clause by confining the sale of cement produced solely to its residents during a time of shortage.¹²¹ The Court reasoned that the Constitution did not intend to limit the ability of states to operate in the free market themselves; rather, the Commerce Clause was intended to apply principally to regulatory and taxing actions taken by the state.¹²² The Court also noted, however, that Commerce Clause scrutiny should be more rigorous in cases where a restraint on foreign

¹¹⁷ For example, in *Japan Line, Ltd. v. County of Los Angeles*, the court applied the Commerce Clause to strike down state legislation that imposed a nondiscriminatory property tax on foreign-owned cargo containers of international commerce. The Japanese shipping companies contended they were already subject to property taxes in Japan and California and therefore, a tax on their ships would constitute double taxation. California asserted that the state should be free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. The court struck down this argument, noting that it has long been an accepted constitutional doctrine that the Commerce Clause affords some protection from state legislation inimical to national commerce. Amol Mehra, *supra* note 34 at 185.

¹¹⁸ See, e.g., *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794(1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (stating that the Constitution did not intend to limit the ability of states to operate in the free market themselves; rather, the Commerce Clause was intended to apply principally to regulatory and taxing actions taken by the state).

¹¹⁹ *Matsushita*, *supra* note 38, at 310.

¹²⁰ *Id.*

¹²¹ 447 U.S. 429 (1980).

¹²² *Id.*

commerce is alleged.¹²³ Similarly, the dissent in *Reeves* pointed out that states that enter the private market and operates a commercial enterprise for the benefit of private citizens, still may not evade the constitutional policy against economic fragmentation based in the Commerce Clause.¹²⁴

One court evaluating the Massachusetts Act took the dissent's stance, striking it down as an unconstitutional interference with the Commerce Clause.¹²⁵ The district court asserted that the Act impeded the federal government's ability to "speak with one voice" with respect to commercial relations with other countries.¹²⁶ When the Supreme Court visited this case, however, it found the Act unconstitutional without even getting to the merits of the Commerce Clause argument, including the market participant exception.¹²⁷ The Supreme Court did, however, use the same "speak with one voice" phrase in its holding.¹²⁸ Thus the *Crosby* case did not give a definitive answer to the Commerce Clause and market participant question, but it hinted that the Supreme Court gives great deference to the federal government's "one voice" power with relation to foreign commerce.

c. Preemption Under Supremacy Clause

¹²³ *Id.* at 437.

¹²⁴ *Id.* at 450.

¹²⁵ *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999) *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000).

¹²⁶ *Id.*

¹²⁷ *See Crosby*, *supra* note 108 (stating that because the Massachusetts Law unconstitutionally infringed the federal government's foreign affairs power, it was unnecessary to consider a Foreign Commerce Clause analysis.).

¹²⁸ *Id.*

*"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."*¹²⁹

As a general rule, federal preemption is not presumed,¹³⁰ but rather is invoked where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs.¹³¹ The concept of preemption is often divided into three subcategories: express preemption, implied preemption, and conflict preemption.¹³² In the absence of clear-cut preemption language in a statute, a court must determine whether Congress has clearly, albeit implicitly, intended to preempt state law.¹³³ Determining precisely when a state has intruded upon a federal sphere is not easy or straightforward.¹³⁴ As the Supreme Court once explained, there is no "rigid formula or rule, which can be used as a universal pattern to determine the meaning and purpose of every act of Congress."¹³⁵

When evaluating the preemption challenge to the Massachusetts Act, the Supreme Court looked to a complex set of federal trade sanctions that the President could impose against Burma.¹³⁶ Massachusetts and its supporters argued that their government procurements are intrinsically local - a classic example of an "area traditionally occupied by

¹²⁹ U.S. Const. art. VI, § 2.

¹³⁰ See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938).

¹³¹ *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 73 (1st Cir. 1999).

¹³² Rebecca S. Hartley, *supra* note 110, at 79.

¹³³ *Id.*

¹³⁴ Peter Fitzgerald, *supra* note 22, at 31.

¹³⁵ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹³⁶ Specifically, the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 imposed specific sanctions directly on the Burmese government and authorized the President to impose further sanctions as necessary to improve human rights practices and the quality of life in Burma. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, div. A, §570, 110 Stat. 3009-166 to -167; Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997 § 570(c).

the states," where the congressional intent to preempt must be "clear and manifest."¹³⁷

Ultimately, however, the Supreme Court rejected this argument, holding that a State's 'statutory scheme ... [does not] escape pre-emption because it is an exercise of the State's spending power rather than its regulatory power.'"¹³⁸ Notwithstanding the absence of an express preemption provision, the Act impinged upon the federal sanctions in several ways. The Court stated:

We see the state Burma law as an obstacle to the accomplishment of Congress's full objectives under the federal Act. We find that the state law undermines the intended purpose and "natural effect" of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.

The broad, sweeping language in the opinion poses more trouble for future state and local sanctions programs than the inconsistencies between the respective Burma laws. For one, the Court cited a strong presumption that Congress intends to preempt a field whenever it regulates a matter touching foreign relations.¹³⁹ Moreover, the Court struck down a law that was comprehensively similar to the federal laws on point, stating that preemption may exist even when the means to the goals are the more important factor.¹⁴⁰ Finally, the Crosby decision makes clear that a state law may be preempted even when it exists *before* the conflicting federal law.¹⁴¹ Thus, at least in theory, the federal government may preempt an entire field *ex post facto*, thus superseding any state actions in that subject area, whenever the President intends to speak for the United States. While the

¹³⁷ *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d at 73.

¹³⁸ See *Crosby*, *supra* note 108.

¹³⁹ See *Crosby*, *supra* note 108, at 387.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Supreme Court decision regarding the Massachusetts Act did not come right and declare that all state and local procurement provisions with international reach are unconstitutional,¹⁴² this case does foreshadow such a decision.

V. Incentive for Voluntary Ascension to International Trade Agreements

The Massachusetts Act cases are especially instructive, as they highlight the three major rules covering federalism concerns: preemption through the Supremacy Clause, the dormant foreign Commerce Clause, and the exclusive federal power to regulate foreign affairs. While the Supreme Court decision regarding the Massachusetts Act did not come right and declare that all state and local procurement provisions with international reach are unconstitutional,¹⁴³ this case does foreshadow such a decision.

Although the Court did not base their decision on them, it also did not outright deny the Commerce Clause and foreign affairs powers problems.¹⁴⁴ Indeed, the Court specifically cited those challenges, reaffirming the potential constitutionality issue for even those state laws that are not expressly preempted.¹⁴⁵ It is also noteworthy that the Court resurrected the language used in *Japan Line*, insisting that for matters of international trade, the United States must “speak[] with one voice.”¹⁴⁶ In the narrowest sense, the *Crosby* case and its predecessors indicate that courts give a great deal of deference to the federal government over states when it comes to international trade relations.¹⁴⁷ In another interpretation, one may read into these cases an exclusive congressional power

¹⁴² See *Crosby*, *supra* note 108.

¹⁴³ See *Crosby*, *supra* note 108.

¹⁴⁴ 530 U.S. 363 (2000), at

¹⁴⁵ *Id.*

¹⁴⁶ *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

¹⁴⁷ Amol Mehra, *supra* note 34, at 198.

over foreign commerce that is broad enough to invalidate state laws that impact foreign commerce even in the absence of conflicting federal legislation.¹⁴⁸

The preemption challenge is an even stronger tool for the President, based on the fact that the Supreme Court struck down the Massachusetts Act on these grounds.¹⁴⁹ Despite the fact that the federal preempting action was not express, and it mostly came down after the Massachusetts Act was passed, the Court still confirmed the federal laws' superiority.¹⁵⁰ Based on this decision, one may conclude that Congress could, if it so desired, preempt a majority of state and local government procurement provisions by passing a series of legislation giving this power to the President. Whether it relies on this method, or the Commerce or foreign affairs powers approach, experts do opine that the federal government has the legal power to bind the states under international trade agreements, including the GPA.¹⁵¹ This would, of course, have major implications if executed. For one, the range of laws preempted would be massive if federal trade sanction legislation preempts local and state laws covering all grounds upon which the President is

¹⁴⁸ 2 Minn. J. Global Trade 143, at 145.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 2 Minn. J. Global Trade 143, 170. Several U.S. state courts, though not directly implicating Article XXIV:12, have held that GATT, as part of federal law, prevails over conflicting state law. In *Hawaii v. Ho*, the Hawaii Supreme Court held that a territorial law which required all sellers of foreign eggs to post a sign reading "WE SELL FOREIGN EGGS" was in conflict with GATT's national treatment obligations. 41 Haw. 565, 571 (1957). The court held that GATT was a valid executive agreement, and thus, under the Supremacy Clause, U.S. Const. art. VI, 2, preempts inconsistent state law. BUT Federal officials, however, have not always acknowledged GATT's preemption of state law. A state department official testifying before the Senate Finance Committee in 1949 took the position that Article XXIV:12 only obligates the federal government to persuade states to voluntarily comply with GATT. Thirty years later, Congress took a similar position in implementing the 1979 GATT Standards Code. Agreement on Technical Barriers to Trade, BISD 26th Supp. 8 (Apr. 12, 1979). The Standards Code covers measures aimed at protecting areas such as health, safety, and the environment. The Standards Code itself contains a provision that mirrors the language of GATT Article XXIV:12. *Id.* at 12. The implementing legislation, however, speaks only of a "sense of Congress" that states should not maintain discriminatory product standards, and provides that the President shall take reasonable measures to "promote" state compliance. 19 U.S.C. 2533 (1980) (emphasis added).

authorized to make foreign affairs decisions.¹⁵² Moreover, political tensions and concerns over federalism have made Congress and the executive reluctant to use this power.¹⁵³ Recent disputes over state-level non-tariff trade barriers, as well as negotiations on government procurement, have reflected this dichotomy between what is legally possible, but politically difficult.¹⁵⁴ Thus, the federal government, while constitutionally capable of enforcing the GPA provisions upon states, it may be more politically viable to continue on the path of coercive persuasion.

State procurement is particularly sensitive because preemption of state practices would be perceived as federal intrusion, not only in policy making, but also in how the states spend their own revenues.¹⁵⁵ However, state and local governments can no longer control labor standards, whether directly or indirectly, without implicating international relations given the globalization of the private sector.¹⁵⁶ A voluntary approach to GPA membership on a sub-central level is attractive because it shifts the political decision making to the state level.¹⁵⁷

Additional incentives exist, including an increase in options for contractors from multinational suppliers, more efficiency through shared national and international practices, and lower costs on supplies through increased competition.¹⁵⁸ Moreover, the main reasons why states fear joining the GPA are largely unfounded, including the potential conflicts with state laws that regulate environmental affairs, product safety, and health and

¹⁵² Adrian, *supra* note 62 at 448.

¹⁵³ 2 Minn. J. Global Trade 143, 170.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Adrian Barnes, *supra* note 62, at 445.

¹⁵⁷ 2 Minn. J. Global Trade 143, 170.

¹⁵⁸ *Id.*

employment standards. Suppliers within the GPA already have been required to conform to complex, onerous procedural requirements, and must often supply customized products.¹⁵⁹ And though the complex regulatory framework of the national procurement market was designed to protect taxpayer funds, in practice the framework caused red tape and waste, as illustrated by periodic reports regarding past government purchases at outlandish prices.¹⁶⁰ Implementing streamlined, international standards can eliminate much of this waste.

VI: Conclusion

State and local procurement harmonization is crucial to trade agreements that require the elimination of non-tariff barriers. The GPA recognizes this by explicitly allowing for sub-regional compliance with its national treatment requirements. The U.S. government has attempted to appease foreign trade partners by persuading all states to join the GPA, largely through voluntary means. This has been a long, slow process for the federal government, and state procurement practices, including discrimination against foreign entities and provisions favoring local firms, still hinder global trade.

The EU is likely to press the U.S. strongly when it comes to such restrictions on European access to sub-regional markets. Some will argue that the U.S. should fight back against this pressure, insisting upon GPA-style voluntary accession by sub-regional entities. Of course this will limit access for U.S. businesses to some European markets. As an alternative, some see this trade agreement as an opportunity for the U.S. to put more

¹⁵⁹ *See, e.g.*, 41 U.S.C. 251 (1994).

¹⁶⁰ The infamous cases that came to symbolize these overpriced government purchases involved \$ 500 hammers, \$ 600 toilet seats and \$ 10 ash trays. See Remarks on Signing the Federal Acquisition Streamlining Act of 1994, 30 Weekly Comp. Pres. Doc. 2000 (Oct. 13, 1994).

pressure on its own states to eliminate their discriminatory trade practices in the procurement market. Either course of action will have major implications for modern federalism and Constitutional powers.

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion. /s/ *Kimberly Larson*

ATTACHMENT 4



**A Provision for Debarment for Violations of Environmental Law in the Model
Procurement Code**

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ABSTRACT

The Model Procurement Code for State and Local Governments (MPC) contains only a brief provision on the authority to debar and suspend. The MPC gives the contracting officer discretion to debar a contractor “for cause.” Unlike the MPC, the federal government, some state governments, and the European Union have more specific provisions that recognize violations of environmental law as grounds for debarment. These provisions have the effect of promoting compliance with minimum environmental standards by persons wishing to compete for the award of a government contract. Accordingly, the MPC should consider an amendment to its debarment provisions that reflects the use of government contracting in pursuing environmental goals, by providing environmental violations as grounds for debarment. The proposed amendment should account for states’ obligations to domestic and foreign contractors by maintaining fair and non-discriminatory application of the law through the use of adequate procedural safeguards.

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I. INTRODUCTION

The Model Procurement Code for State and Local Governments (MPC) provides limited coverage on the subject of debarment, which doesn't fully recognize the utility of government contracts in strengthening the enforcement of environmental law.¹ Though the European Union has more abundant laws that apply to a wider range of activities, both the European Union and the United States have shared environmental goals that are reinforced through the process of debarment in government contracting.² By excluding violators of environmental law from participating in government contracts, the European Union and United States emphasize the significance of these laws and put pressure on contractors to maintain a minimum standard of environmental quality.³

The purpose of debarment is to protect the public interest by excluding contractors who pose a business risk to the government.⁴ Though debarment is not used as a punitive measure, it is an additional penalty that may be levied on the vendor regardless of the fines or obligations incurred under environmental law.⁵ In some cases, the economic consequences that flow from debarment are more severe than the

¹ See MODEL PROCUREMENT CODE § 9-102 (2000).

² See *infra* pp. 3-8; EUROPEAN COMMISSION, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PUBLIC PROCUREMENT (EXPLANATORY MEMORANDUM), 9 (2011) (“the proposed Directive is based on *enabling approach* providing contracting authorities with the instruments needed to contribute to the achievement of the Europe 2020 strategic goals by using their purchasing power to procure goods and services that foster innovation, respect the environment”); See Justin Davidson, *Polluting Without Consequence: How BP and Other Large Government Contractors Evade Suspension and Debarment for Environmental Crime and Misconduct*, 29 PACE ENVTL. L. REV. 257, 257-60 (2011) (debarment is used to induce compliance with national socioeconomic programs, including improving the quality of the environment).

³ See Justin Davidson, *supra* note 2, at 263-264 (2011) (The primary purpose of statutory debarment for convictions under the Clean Air and Clean Water Acts is to “improve and enhance environmental quality by promoting effective enforcement of the Acts.”).

⁴ See Justin Davidson, *supra* note 3, at 259; U.S. Environmental Protection Agency, *Suspension and Debarment Program*, <http://www.epa.gov/ogd/sdd/debarment.htm>.; Reina Steinzor & Anne Havemann, Too Big to Obey: Why Should BP Be Debarred, 36 WM. & MARY ENVTL. L. & POL’Y REV. 81, 85-86 (2011).

⁵ See Justin Davidson, *supra* note 3, at 269-74.

consequences imposed by the criminal conviction.⁶ In line with the national and international approaches, the MPC should be amended to include violations of environmental law as grounds for debarment at the state and local level.

II. BACKGROUND

The MPC section entitled “Authority to Debar or Suspend,” calls on the Chief Procurement Officer to consult with the agency and the attorney for the enacting jurisdiction to debar a person “for cause from consideration for award of contracts.”⁷

Before imposing debarment, the vendor is given reasonable notice and an opportunity to be heard.⁸ If debarred, a contractor is entitled to judicial review by the state court.⁹

“Good cause” is not defined in the MPC, but the appended commentary offers a list of six “Causes for Debarment or Suspension,” which might be considered by the Chief Procurement Officer in making a determination.¹⁰ The broadest “cause” for debarment, which arguably encompasses a violation of an environmental law, allows debarment where the “Chief Procurement Officer determines [a cause] 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.”¹¹ The vague language used to

⁶ See KATE MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 4-5 (2012); Paul D’Aloisio, *Accusations of Criminal Conduct by Government Contractors: The Remedies, Problems, and Solutions*, 17 Pub. Cont. L.J. 265, 317 (1987) (recognizing that debarment and suspension threaten the “economic life of the contractor” (citing *Old Dominion Dairy Products, Inc., v. Secretary of Defense*, 631 F.2d 963, 969 (D.C. Cir. 1980))); Sue Arrowsmith, et. al., *Self-Cleaning as Defence to Exclusions for Misconduct – An Emerging Concept in EU Public Procurement Law*, 13 (2009).

⁷ *Id.* at § 9-102.

⁸ *Id.* at § 9-102

⁹ *Id.* at § 9-401. The period of debarment shall not exceed three years. *Id.* at § 9-102.

¹⁰ *Id.*

¹¹ ABA Comm. On MODEL CODE FOR STATE AND LOCAL PROCUREMENT § 9-102 (2002) (Examples of other causes include: a “conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract, [or] a conviction under State or federal antitrust statutes arising out of the submission of bids or proposals”).

define “cause” permits a wide degree of agency discretion but does not guarantee that this discretion will be applied to protect the government from violators of environmental law.

The following three sections explore debarment provisions that may be helpful in the consideration of an amendment to the MPC. The discussion will begin with an international perspective by looking at debarment in the Proposal on Public Procurement of the European Union, and then will turn to the national approach by focusing on debarment in the enforcement of the federal Clean Air and Clean Water Acts. This section will conclude by looking at various models of debarment used at the state level, highlighting the discrepancy among the states that underscores the need for an amendment to the MPC to encourage environmental violations as grounds for debarment.

A. The European Union: Government Contracts and the Environment

On December 20, 2011, The European Commission of the European Union adopted the Proposal for a Directive of the European Parliament and the Council on Public Procurement (Proposal on Public Procurement).¹² The Proposal on Public Procurement sanctions violations of mandatory environmental law in article 55(3)(a), by allowing the contracting authority to exclude vendors for infringement of obligations established by EU legislation in the field of environmental law or international environmental law.¹³ Exclusion from contracts under article 55(3)(a) is discretionary.¹⁴ However, exclusion is mandatory where the contracting authority finds that an “offer is

¹² *Commission Proposal for a Directive of the European Parliament and of the Council on Public Procurement*, COM (2011) 896 final (Dec. 12, 2011).

¹³ *Id.* at art. 55(3)(a).

¹⁴ *Id.* at art. 55(3)(a).

abnormally low” because of violations of environmental law.¹⁵ In that case, the offer must be rejected.¹⁶

The international environmental laws referenced in the Proposal on Public Procurement include four conventions that are ratified by the European Union.¹⁷ There is also an extensive regime of EU law on the environment, which regulates everything from air quality to surface water quality.¹⁸ The Proposal on Public Procurement uses debarment as a way to encourage compliance with these laws.

If an economic operator is debarred because of an environmental violation, the contracting authority should allow “for the possibility that economic operators may adopt compliance measures aimed at remedying the consequences... and preventing further occurrences of the misbehavior.”¹⁹ The measures that may be taken consist of personnel and organizational re-structuring, adoption of monitoring and reporting systems, and use of an internal auditing system.²⁰ Where the compliance measures taken are deemed sufficient, the economic operator should be allowed back into the procurement procedure.²¹

¹⁵ *Id.* at art. 69(4).

¹⁶ *Id.* at art. 69(4).

¹⁷ *Id.* at annex XI (Conventions include the 1) Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer, 2) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 3) Stockholm Convention on Persistent Organic Pollutants, 4) Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and its 3 regional Protocols.).

¹⁸ *See generally* INSTITUTE FOR EUROPEAN ENVIRONMENTAL POLICY, SOURCEBOOK ON EU ENVIRONMENTAL LAW (Andrew Farmer, 2010).

¹⁹ EUROPEAN COMMISSION, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PUBLIC PROCUREMENT (EXPLANATORY MEMORANDUM), 22 (2011) The idea of allowing a contractor to prove present responsibility and future compliance with the law is also recognized by the U.S. Federal Government. *See* administrative agreements and self-cleaning, *infra* pp. 19-23.

²⁰ EUROPEAN COMMISSION, *supra* note 19, at 22.

²¹ EUROPEAN COMMISSION, *supra* note 19, at 22.

B. United States: At the Federal Level, Government Contracts and the Environment

In the federal system of procurement, the Environmental Protection Agency (EPA) has a full time debarment office dedicated to determining present responsibility and issuing suspension and debarment decisions.²² The EPA has discretionary authority to debar contractors for many reasons, including but not limited to: criminal and civil violations, unsatisfactory performance of government contracts, and commission of embezzlement or theft.²³ However, debarment is mandatory for a criminal conviction of the Clean Air Act, 42 U.S.C. §7606, or the Clean Water Act, 33 U.S.C. §1368.²⁴ The Clean Water Act prohibits any federal agency from contracting with a “person²⁵ who has been convicted of an offense under § 1319(c)” of the Act, if the contract would be performed at a facility where the violation occurred and if the facility is “owned, leased, or supervised” by this person.²⁶ Automatic exclusion is warranted for offenses such as, “an unpermitted discharge of any pollutant into the waters of the United States; a discharge of any pollutant into a publicly owned treatment works in violation of a pre-treatment standard; or the introduction into a public owned treatment works of a pollutant or hazardous substance with knowledge that the substance could cause personal injury or property damage.”²⁷

²² Justin Davidson, *supra* note 3, at 268-69.

²³ FAR 9.406-2(a) (2008); Justin Davidson, *supra* note 3, at 263.

²⁴ KATE MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 3 (2012).

²⁵ For the purposes of the Clean Water Act and Clean Air Act,” a person is an individual, corporation, partnership, association, state, municipality, commission, or political subdivision, of a state or any interstate body.” 2 C.F.R. § 1532.1600.

²⁶ 33 U.S.C.A. §1368 (2006).

²⁷ Reina Steinzor & Anne Havemann, Too Big to Obey: Why Should BP Be Debarred, 36 WM. & MARY ENVTL. L. & POL’Y REV. 81, 92-93 (2011).

The person is barred from contracting with any federal agency until the Administrator of the EPA certifies that the problem has been corrected.²⁸ The Administrator is charged with notifying the agencies which persons are on the debarred list and which have come back into compliance and have been removed from the list.²⁹ However, if the President determines that it is in the “paramount interest” of the United States to contract with the violating person, then he may notify Congress and waive the debarment.³⁰

The Clean Air Act uses the same language as the Clean Water Act in reference to debarment procedures.³¹ Pursuant to the Clean Air Act, no federal agency shall contract with any person who has been convicted under § 7413(c) of the Act “for the procurement of goods, materials, and services.”³² Offenses triggering automatic exclusion include, “violating new source performance standards, violating any requirements of state implementation plans, violating emission standards for various new and old sources, and releasing designated hazardous air pollutants in disregard of emissions standards.”³³ Like the Clean Water Act, the person is debarred until the EPA Administrator certifies that the problem has been corrected, or the President has chosen to waive the debarment.³⁴

Under the Clean Air and Clean Water Acts, debarment is referred to as “statutory debarment” and occurs by operation of law following a conviction. After which, the

²⁸ KATE MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 3 (2012).

²⁹ Exec. Order No. 11738, 38 Fed. Reg. 25161 (Sept. 10, 1973).

³⁰ KATE MANUEL, *supra* note 28, at 3.

³¹ 42 U.S.C. § 7606 (2006).

³² 42 U.S.C. § 7606 (2006) (“No Federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) of this title for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person.”).

³³ Reina Steinzor & Anne Havemann, Too Big to Obey: Why Should BP Be Debarred, 36 WM. & MARY ENVTL. L. & POL’Y REV. 81, 92-93 (2011).

³⁴ *See* 42 U.S.C. § 7606(a)(b) (2006).

name of the violating person and facility appear on the list of ineligible contractors before the person receives notice of the listing or is given the opportunity to challenge the disqualification.³⁵ However, contractors may be able to avoid exclusion by participating in an administrative agreement with the EPA.³⁶ If possible, the EPA will negotiate with the violator before an appeal is made to the debarring official or to the court.³⁷

An administrative agreement is entered at the discretion of the debarring official and includes an admission of wrongful conduct and a plan for remedial measures.³⁸ The debarring official may resolve a vendor's eligibility and make an offer for reinstatement, so long as the contractor assumes present responsibility.³⁹ If the violator fails to abide by the terms of the agreement or engages in further misconduct, the EPA may re-instate debarment.⁴⁰ The importance of these agreements is to allow a debarred contractor the opportunity to participate in government contracts, while also ensuring future compliance with the law.⁴¹

If a debarred person seeks to be reinstated, he or she may submit a written request to the EPA debarring official with documentary evidence showing that the conditions that led to the conviction have been corrected.⁴² If there is a question of material fact that arises in the process of considering a person for reinstatement, the EPA debarring official

³⁵ 2 C.F.R. § 1532.1130 (2013).

³⁶ Interview with Mary Owens, EPA Official, in Washington, D.C. (Apr. 20, 2013); Reina Steinzor & Anne Havemann, *supra* note 33, at 93.

³⁷ Interview with Mary Owens, EPA Official, in Washington, D.C. (Apr. 20, 2013).

³⁸ Reina Steinzor & Anne Havemann, Too Big to Obey: Why Should BP Be Debarred, 36 WM. & MARY ENV'T L. & POL'Y REV. 81, 92-93 (2011). Administrative agreements will be discussed in more detail in the Analysis section.

³⁹ 2 C.F.R. § 1532.1300 (2007); Interview with Mary Owens, EPA Official, in Washington, D.C. (Apr. 20, 2013). The EPA requires a showing that: 1) the facility has stopped the violation or removed the contamination resulting from the violation, and 2) the management has reacted responsibly to the event. Justin Davidson, *supra* note 3, at 263-64.

⁴⁰ Reina Steinzor & Anne Havemann, *supra* note 38, at 92-93.

⁴¹ Reina Steinzor & Anne Havemann, *supra* note 38, at 92-93.

⁴² 2 C.F.R. § 1532.1135 (2007).

will hold a fact-finding proceeding.⁴³ The debarring official will generally make a determination of eligibility within 45 days of closing the administrative record⁴⁴; this decision may be appealed, by written request with supporting documentation, to the debarring official or to the Office of Grants and Debarment Director.⁴⁵ Ultimately, debarred contractors are entitled to judicial review.⁴⁶

C. United States: At the State Level, Government Contracts and the Environment

At the state level, the rules regulating procurement vary, and each state has its own method for debarring contractors.⁴⁷ For example, some states have detailed and extensive regulations that spell out grounds for debarment, while others do not address debarment at all.⁴⁸ In states where environmental violations are not included as grounds for debarment, the debarring official may be able to use his or her discretion to debar a violator within the bounds of a broader provision,⁴⁹ such as a provision allowing debarment for a transgression demonstrating a lack of business integrity that affects a contractor's responsibility.⁵⁰ Variance on this issue is problematic because contractors are held to lower or higher standards depending on the contracting state. By encouraging uniformity through the MPC, the states ensure contractors meet minimum environmental standards. To understand the states' position on this issue, a non-exhaustive survey of state practices regarding debarment is provided in the following three sections.

⁴³ 2 C.F.R. § 1532.1215 (2007) (A fact-finding proceeding will be conducted in accordance with 2 CFR §§ 180.830-180.840.).

⁴⁴ 2 C.F.R. § 1532.1225 (2007).

⁴⁵ 2 C.F.R. § 1532.1400 (2007).

⁴⁶ See Administrative Procedure Act 5 U.S.C. § 706(2)(a) (2006).

⁴⁷ See generally AMERICAN BAR ASSOCIATION: SECTION OF PUBLIC CONTRACT LAW, GUIDE TO STATE PROCUREMENT: A 50-STATE PRIMER ON PURCHASING LAWS, PROCESSES AND PROCEDURES (Melissa J. Copeland, 2011).

⁴⁸ See generally American Bar Association: Section of Public Contract Law, *supra* note 47.

⁴⁹ This was also noted as a possibility within the MPC's language on debarment. See *supra* pp. 2-3.

⁵⁰ See American Bar Association: Section of Public Contract Law, *supra* note 47, at 30.

1. Explicit Debarment Provisions for Violations of Environmental Law

Both Michigan and Maine recognize violations of environmental law as grounds for debarment. The process for how each state enforces its provision is outlined below.

a) Michigan

In Michigan, the Department of Technology, Management and Budget (DTMB) possesses all discretionary authority over “solicitation, award, amendment, cancellation, and appeal of state contracts,” unless provided otherwise by law.⁵¹ The DTMB may debar a vendor for conduct over the last three years that demonstrates “a lack of integrity that could jeopardize the interests of the state if the state were to contract with the vendor.”⁵² Pursuant to its authority, the DTMB set forth a policy outlining factors that may demonstrate a vendor’s lack of ability to perform responsibly.⁵³ The factors state that a conviction of a criminal offense or a violation of federal or state law, specifically of the state Natural Resources and Environmental Protection Act, are grounds for debarment.⁵⁴

If a vendor is potentially subject to debarment, the vendor is notified and has 20 days within receipt of the notice to protest by submitting a written opposition and requesting a hearing.⁵⁵ In actions based upon a civil judgment or criminal conviction, the DTMB official may make a final decision based on the administrative record, which takes into consideration the written protest filed by the vendor.⁵⁶ This may be done

⁵¹ Mich. Comp. Laws. § 18.1261(1), (2) (2008).

⁵² Mich. Comp. Laws. § 18.1264 (2010).

⁵³ Michigan’s Official Website: Michigan Department of Technology, *Management & Budget, Vendor Information: Debarment Policy*, <http://www.michigan.gov/micontractconnect/0,4541,7-225-48677-20042--,00.html>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

without affording the vendor the right to a hearing.⁵⁷ If debarment is imposed, the vendor is given written notice and may appeal to the Director of the DTMB.⁵⁸ Decisions of the Director are appealable in the state courts.⁵⁹ Debarred contractors may not contract with any state department or agency for a period not to exceed 8 years.⁶⁰

b) Maine

Maine's method of debarment is similar to the federal approach in that the authority rests with the Commissioner of the Maine Department of Environmental Protection (DEP) to debar contractors for environmental violations.⁶¹ The Commissioner of the DEP may debar a contractor, after a hearing, for "repeated violations of permits or licenses issued by the DEP," when either 1) the time for filing an appeal of determination of the violation expires, or 2) the appeals process has been exhausted.⁶² Debarment is discretionary and excludes the contractor from participating in contracts only with the DEP.⁶³ A contractor may be debarred for up to 2 years,⁶⁴ and final agency action is reviewable by the Superior Court of Maine.⁶⁵

2. Broad Debarment Provisions

Unlike the explicit provisions for violations of environmental law in Michigan and Maine, this section refers to those states that allow for debarment depending on a wide range of conduct, where the conduct bears on the responsibility of the contractor, as

⁵⁷ A hearing will be given only if the written submissions raise a dispute of material fact. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The period of debarment is ordinarily limited to three years. *Id.*

⁶¹ See American Bar Association: Section of Public Contract Law, *supra* note 47, at 217. Both approaches give responsibility to the chief officer of the environmental authority for debarring contractors violating environmental laws. See *supra* pp. 5,10.

⁶² ME. REV. STAT. ANN. tit. 38, § 349-B (2009).

⁶³ See ME. REV. STAT. ANN. tit. 38, § 349-B (2009).

⁶⁴ ME. REV. STAT. ANN. tit. 38, § 349-B (2009).

⁶⁵ ME. REV. STAT. ANN. tit. 5, § 11001 (2012).

states with “Broad Debarment Provisions.” This arrangement gives discretion to the debarment official to decide what circumstances should give rise to debarment.⁶⁶ These states include Arizona and Vermont.

a) Arizona

The Director of the Department of Administration has the sole authority to suspend or debar a contractor.⁶⁷ There are no express provisions for debarment pursuant to violations of environmental law, however a person may be debarred for a “[c]onviction by the federal government or any state” for an offense that shows a lack of business integrity affecting their ability to contract responsibly.⁶⁸ Depending on the nature and degree of the violation, a conviction for a violation of an environmental law could fairly fall within this language as showing a lack of business integrity, but it would be up to the discretion of the Director of the Department of Administration to decide whether the transgression affects responsibility as a state contractor.⁶⁹

Before taking any debarment action, the Director must issue a debarment notice to the affected party, which assigns a date for a hearing on the matter.⁷⁰ Based on the evidence submitted at the hearing, the Director will make a determination that may be appealed to the Superior Court of Arizona.⁷¹ The period of debarment shall not exceed three years.⁷²

⁶⁶ See *infra* pp. 11-12.

⁶⁷ American Bar Association: Section of Public Contract Law, *supra* note 47, at 30.

⁶⁸ American Bar Association: Section of Public Contract Law, *supra* note 47, at 30.

⁶⁹ American Bar Association: Section of Public Contract Law, *supra* note 47, at 30.

⁷⁰ American Bar Association: Section of Public Contract Law, *supra* note 47, at 31.

⁷¹ American Bar Association: Section of Public Contract Law, *supra* note 47, at 31.

⁷² ARIZ. ADMIN. CODE § R2-7-C903 (2006).

b) Vermont

The law in Vermont is even broader than the law in Arizona; in Vermont, a contractor may be debarred if the Commissioner of Buildings and General Services determines that a contractor is not in compliance with the law and has not made “good-faith efforts to change its practices.”⁷³ Based on this determination, the Commissioner has the authority to bar the contractor from bidding on any future state contracts.⁷⁴ Once a person has exhausted all administrative remedies, an agency action may be reviewed by Superior Court of Vermont and ultimately the Supreme Court of Vermont.⁷⁵

3. Omission of Debarment Provisions: Alabama

Finally, some states do not have any provisions defining and regulating the process of debarment. Instead, these states may rely on the federal list of debarred contractors or give authority to each individual agency to specify its own rules for debarment.⁷⁶ Alabama is an example of a state with this approach.

The Alabama Administrative Code does not contain provisions regulating processes or procedures for debarment or suspension, but it does contain prohibitions on “awarding contracts or entering agreements” with debarred or suspended contractors.⁷⁷ Alabama uses the federal list of debarred contractors as grounds for exclusion from local contracts, and individual state and local government bodies have the authority to promulgate rules for debarring or suspending a contractor.⁷⁸

⁷³ See American Bar Association: Section of Public Contract Law, *supra* note 47, at 520.

⁷⁴ American Bar Association: Section of Public Contract Law, *supra* note 47, at 520.

⁷⁵ American Bar Association: Section of Public Contract Law, *supra* note 47, at 520.

⁷⁶ Wyoming is another example of a state that does address debarment in its administrative code. Instead, the state relies on the Excluded Parties List System of the federal government. See WYOMING DEPARTMENT OF EDUCATION, *Procurement Procedures*, p. 13, <http://edu.wyoming.gov/sf-docs/nutrition-publications/procurement-procedures-handbook-2013.pdf>.

⁷⁷ American Bar Association: Section of Public Contract Law, *supra* note 47, at 3.

⁷⁸ American Bar Association: Section of Public Contract Law, *supra* note 47, at 3.

For example, the Department of Economic and Community Affairs has promulgated its own policies for debarment, which specifies multiple grounds for debarment, including commission of an offense indicating a lack of business integrity that “seriously and directly affects the present responsibility of a person,” or for a willful failure to perform in accordance with the terms of a public agreement or transaction.⁷⁹ If the debarring official finds cause for debarment, the official must issue a notice of debarment, after which the respondent has 30 days to submit a written protest.⁸⁰ If the proposed debarment is based on a civil judgment or criminal conviction, the debarring official may make a determination on the administrative record.⁸¹ After this determination, the contractor may request that the debarring official reverse the debarment for a number of limited reasons, such as a reversal of the conviction upon which the debarment was based.⁸² The period of debarment generally does not exceed three years.⁸³

Though state regulations on debarment vary widely, each of the states addressed provide contractors with some level of due process protection through the requirements of notice and an opportunity to be heard, at least in the form of written submissions to the debarring official.⁸⁴ At the federal level, a criminal conviction based on a violation of the Clean Air and Clean Water Acts triggers automatic debarment and may only be protested after the fact, either through the negotiation of an administrative agreement or through filing for review of the decision with the debarring official.⁸⁵ Because cooperation at the

⁷⁹ Ala. Code § 305-0-2-.06 (1993).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Supra* pp. 9-13.

⁸⁵ *Supra* pp. 5-6.

state level is critical to the advancement of environmental goals, the MPC should consider an amendment that reflects the importance of the need for uniformity on this issue.

III. ANALYSIS

When drafting additional provisions on debarment for the MPC, it is important to consider the interplay of state procurement and procurement in the international community.⁸⁶ Thirty-seven of the states are parties to the Agreement on Government Procurement (GPA), and as a result take on obligations, domestically and internationally, when they engage in government contracting.⁸⁷ The GPA is a plurilateral treaty of the World Trade Organization that recognizes the impact of public procurement on the flow of international trade and on national Gross Domestic Product.⁸⁸ Accordingly, the GPA lays out obligations for promoting “fair and non-discriminatory conditions of international competition” for public procurement.⁸⁹ The proposed language for adoption by the MPC should seek to comply with the member states’ international obligations, while effectively reinforcing shared environmental goals, already recognized by the EU Proposal on Public Procurement and by the U.S. Clean Air Act and Clean Water Act.⁹⁰

⁸⁶ See World Trade Organization, General Overview of WTO Work on Public Procurement, http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm.

⁸⁷ See Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement, Mar. 30, 2012, appendix I annex 2, [hereinafter Agreement on Government Procurement], available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm#articleIII_para1a.

⁸⁸ *Id.*

⁸⁹ World Trade Organization, *Government Procurement Agreement*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt. Because the member States of the EU are all parties to the GPA, the Proposal on Public Procurement aims to protect these principles by calling on the contracting authority to use “objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment.” EUROPEAN COMMISSION, *supra* note 19, at 23.

⁹⁰ See *supra* pp. 3-8.

A. *Obligations under the GPA*

Under the GPA, states must give no “less favourable” treatment to the products, suppliers, and services of the Parties to this Agreement than is given to domestic products, suppliers, and services.⁹¹ Additionally, an agency may not discriminate against a locally-established supplier on the basis of degree of foreign affiliation or ownership.”⁹² Five conditions apply to the states’ acceptance to the Agreement.⁹³ One of these conditions speaks directly to environmental concerns: “[n]othing in this annex shall be construed to prevent any state entity from applying restrictions that promote the general environmental quality in that state, as long as such restrictions are not disguised barriers to international trade.”⁹⁴ This condition gives the states leeway in applying environmental standards to government contractors, so long as any adopted rule does not amount to discrimination as prohibited by the GPA.⁹⁵

B. *Preventing and Mitigating Discrimination in Debarment for Violations of Environmental Laws*

An agency regulation could amount to discrimination if it is: 1) applied arbitrarily, or 2) applied without protections afforded by due process.⁹⁶ To protect against discriminatory application of the law to domestic and foreign contractors, the

⁹¹ Agreement on Government Procurement, art. III(1).

⁹² Agreement on Government Procurement, art. III(2).

⁹³ Agreement on Government Procurement, appendix I annex 2.

⁹⁴ Agreement on Government Procurement, appendix I annex 2.

⁹⁵ See Agreement on Government Procurement, appendix I annex 2.

⁹⁶ See Nolan Kulbiski, *Another Perspective on Too Big to Debar: BP, the Environmental Protection Agency, and the World Bank*, 41 PUB. CONT. L.J. 967, 979-982 (2012); Todd Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547, 573 (2009) (citing *ATL, Inc. v. United States*, 736 F.2d 677, 684 (Fed. Cir. 1984)).

MPC should consider a flexible approach to debarment that may be implemented at the discretion of the debarring official.⁹⁷ Like U.S. federal law, the process of debarment should focus on determining present responsibility.⁹⁸ Additionally, the adopted provision should serve the end goal of protecting the public interest and should not be used to punish the violating contractor.⁹⁹ The following section addresses due process concerns in the context of debarment and suggests administrative agreements and self-cleaning as possible ways to limit arbitrary application of the law.

1. Due Process Concerns

Due Process in the context of suspension and debarment raises concerns over notice and an opportunity to be heard.¹⁰⁰ In *Lion Raisin Inc. v. United States*, the court held that the notion of fundamental fairness embodied in the principle of Due Process in an administrative hearing requires “notice and an opportunity for a hearing appropriate to the nature of the case.”¹⁰¹ When a contractor brings a claim alleging the use of improper procedures, the adequacy of due process afforded to the contractor by the agency should be measured by considering: 1) the private interest affected, 2) the risk of erroneous deprivation of these interests, and 3) the probable value of additional procedural safeguards.¹⁰² Due process further requires that the contractor be provided with all of the information relied upon by the contracting official in making its determination.¹⁰³

⁹⁷ See Nolan Kulbliski, *supra* note 96, at 980-981.

⁹⁸ Paul D’Aloisio, *Accusations of Criminal Conduct by Government Contractors: The Remedies, Problems, and Solutions*, 17 PUB. CONT. L.J. 265, 317 (1987).

⁹⁹ Paul D’Aloisio, *supra* note 98, at 316-17.

¹⁰⁰ See Todd Canni, *supra* note 96, at 577.

¹⁰¹ See Todd Canni, *supra* note 96, at 577 (citing *Lion Raisins, Inc. v. United States*, 51 Fed. CI. 238, 249 (2001)).

¹⁰² Paul D’Aloisio, *supra* note 98, at 317-18 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹⁰³ See Todd Canni, *supra* note 96, at 577 (citing *Lion Raisins, Inc. v. United States*, 51 Fed. CI. 238, 250 (2001)).

In the context of debarment for environmental violations, an evaluation of these three factors supports the use of more procedural protections from the agency before imposing debarment. Because the consequences of debarment are “severe and immediate,” the private interest affected is significant.¹⁰⁴ In the federal government and in some states, violators lose the opportunity to compete for the award of contracts with any state agency, and the news of the debarment is publicly available, which could negatively affect the reputation of the individual or corporation.¹⁰⁵ The use of procedural safeguards, such as issuing a notice of *proposed* debarment or allowing the contractor the opportunity to take remedial measures and show present responsibility, enhances the protection of a contractor’s due process rights and guards against arbitrary application of the law.

If the MPC adopted a method of mandatory debarment, the likelihood of an unfair result is heightened, especially as applied to foreign vendors who presumably have less knowledge of and experience with U.S. law at the state level. A violation of U.S. environmental law by a foreign or domestic contractor may not necessarily indicate present nonresponsibility.¹⁰⁶ Instead of protecting the public interest, mandatory debarment may debar contractors who could bring value and increase competition.¹⁰⁷ When considering the adoption of a rule for the MPC, opponents of automatic debarment would urge drafters to take into account concerns for fairness and competition.

¹⁰⁴ See Kara Sacilotto, Suspension and Debarment: Trends and Perspectives, 48 Procurement Lawyer 3, 4 (Fall 2012). Some corporations depend on government contracts for sustained viability. Justin Davidson, *supra* note 3, at 267-68.

¹⁰⁵ See Kara Sacilotto, *supra* note 104, at 4-5; Justin Davidson, *supra* note 3, at 268.

¹⁰⁶ See KATE MANUEL, *supra* note 6, at 9; Paul D’Aloisio, *supra* note 98, at 317 (arguing that automatic debarment should be eliminated and debarment should “resemble the decision of a private party under market pressures” and allow contractors to prove present responsibility).

¹⁰⁷ KATE MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 9 (2012).

In addition to automatic debarment, the MPC may consider the use of discretionary debarment. This is the approach followed by a number of states¹⁰⁸ and by the MPC's current debarment provision. Further, discretionary debarment is traditionally applied in a way that ensures the contractor receives a proposed notice of debarment and an opportunity to be heard.¹⁰⁹

2. Administrative Agreements and Self-cleaning

Administrative agreements and self-cleaning may be used to ensure fair application of debarment by assessing present responsibility and the likelihood of future misconduct by the contractor.¹¹⁰ In circumstances where debarment is discretionary, U.S. federal agencies may negotiate administrative agreements before imposing debarment on the contractor.¹¹¹ Similarly, self-cleaning has been developed in the case law of some Member States of the European Union and may be provided by the courts as a remedy against a challenge to debarment.¹¹² The effectiveness of remedial measures taken by the violating contractor is central to the consideration of whether a contractor will receive the remedy of self-cleaning or will be able to negotiate an administrative agreement in lieu of debarment.¹¹³

¹⁰⁸ For example, Michigan and Arizona are among states that follow this procedure. See discussion on state procurement *supra* pp. 9, 11.

¹⁰⁹ MODEL PROCUREMENT CODE § 9-102 (2000).

¹¹⁰ KATE MANUEL, *supra* note 107, at 9; Sue Arrowsmith, et. al., Self-Cleaning as Defence to Exclusions for Misconduct – An Emerging Concept in EU Public Procurement Law, 5 (2009).

¹¹¹ In cases that do not involve statutory debarment, “it is the debarring official’s responsibility to determine whether debarment is in the government’s best interest.” See 48 C.F.R. 9.406-1(a) (2006). Because statutory debarment under the Clean Air and Clean Water Acts is mandatory and automatic, the EPA uses administrative agreements to reinstate a contractor after debarment has already been imposed. See 2 C.F.R. § 1532.1300 (2007); Reina Steinzor & Anne Havemann, Too Big to Obey: Why Should BP Be Debarred, 36 WM. & MARY ENVTL. L. & POL’Y REV. 81, 92-93 (2011).

¹¹² See SUE ARROWSMITH, et. al., *supra* note 110, at 5-6 (The basic elements of self-cleaning are presented by the paper but may vary depending on the case law of the particular member state.).

¹¹³ See *infra* p. 19.

The authority to negotiate an administrative agreement is conferred by an agency's general authority to choose "with whom and on what terms they contract."¹¹⁴ Pursuant to this authority, the contractor facing a potential debarment has the opportunity to discuss the problems with the debarring official and arrange for remedial measures, including in some cases, long-term supervision of the contractor's activities.¹¹⁵ To ensure adequate enforcement of the law, agreements generally include the payment of restitution and the adoption of compliance efforts such as employee training programs, outside auditing, and agency access to contractor's records.¹¹⁶

Self-cleaning involves a similar procedure and allows an economic operator "to regain the possibility of participating in public contracts by demonstrating that it has taken effective measures to ensure that wrongful acts will not recur in the future."¹¹⁷ The availability of self-cleaning is based on the particular circumstances of the case, evaluated by the seriousness, recurrence, and impact of the conduct, as well as the adequacy of the remedial measures employed by the contractor.¹¹⁸ The effectiveness of the remedial measures are assessed by looking at the firm's ability to identify the relevant facts and circumstances leading to the misconduct, the degree of structural and personnel changes that have taken place, and the means taken to repair the damage caused.¹¹⁹

¹¹⁴ KATE MANUEL, CONG. RESEARCH SERV., RL34753, DEBARMENT AND SUSPENSION OF GOVERNMENT CONTRACTORS: AN OVERVIEW OF THE LAW INCLUDING RECENTLY ENACTED AND PROPOSED AMENDMENTS 10 (2012) (citing 48 C.F.R. § 1.601(a)(2007): "Unless specifically prohibited by another provision of law, authority and responsibility to contract are vested in the agency head.").

¹¹⁵ Christopher Yukins, *Cross-debarment: A Stakeholder Analysis*, GEO. WASH. INT'L L. REV. (forthcoming).

¹¹⁶ Kate Manuel, *supra* note 114, at p. 10. (citing ALAN GRAYSON, SUSPENSION AND DEBARMENT 37-38 (1991)).

¹¹⁷ SUE ARROWSMITH, et. al., *supra* note 110, at 5.

¹¹⁸ SUE ARROWSMITH, et. al., *supra* note 110, at 5-6.

¹¹⁹ SUE ARROWSMITH, et. al., *supra* note 110, at 5-6.

IV. CONCLUSION

In line with EU, federal, and some state law, this paper argues that the MPC should be amended to include an express provision for debarment on the grounds of a violation of environmental law. In light of the states' role in the international community, the law should seek to comply with the GPA and with the broader goals of procurement by allowing for fair and non-discriminatory use of debarment. Both automatic and discretionary debarment could be considered, though it has been argued that automatic debarment may enhance the risk of perceived or actual discrimination. Discretionary debarment has been suggested as a useful alternative for ensuring non-discriminatory application of the law and preservation of a contractor's rights to due process.¹²⁰

Moreover, a flexible approach that considers the use of administrative agreements serves the goals of protecting the public interest and promoting compliance with environmental standards, while avoiding the unnecessarily and disproportionately harsh results that may otherwise flow from imposing debarment.¹²¹ As it stands, the MPC allows for discretionary debarment, notice to the contractor of a proposed debarment, and an opportunity to be heard.¹²² Thus, an amendment providing debarment on grounds of a violation of environmental law could easily be made within the existing structure of the MPC.

¹²⁰ See *supra* discussion on due process pp. 16-18.

¹²¹ See generally SUE ARROWSMITH, et. al., *supra* note 110; Kara Sacilotto, Suspension and Debarment: Trends and Perspectives, 48 Procurement Lawyer 3, 5 (Fall 2012).

¹²² MODEL PROCUREMENT CODE § 9-102 (2000).

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion.

Claire Logan _____

ATTACHMENT 5

**Improving the Effectiveness of State Bid Protest Forums: Going
Above and Beyond the Agreement on Government Procurement and
Adopting the ABA's Model Procurement Code**

*Keith M. Lusby**

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I. Introduction

Problems in state bid protest forums impose major obstacles in the state procurement process. In Massachusetts, one commentator has suggested that its bid protest forum, the State Attorney General's office, has a "distinct" bias toward the awarding public agency.¹ In Alabama, its own Supreme Court has recognized that courts will "seldom" award injunctive relief and, moreover, will not award monetary damages, leaving a contractor with no remedy.² Unlike the Federal Government, which provides independent forums with specialized knowledge of procurement issues to review an agency's award decision,³ state

¹ Jonathan Sauer, *The Why's and Wherefore's of Massachusetts Public Contract Bid Protests* (Mar. 2013), <http://www.sauerconstructionlaw.com/Articles/The-Why-s-and-Wherefore-s-of-Massachusetts-PublicBidProtests%28revised-March-2013%29.pdf>.

² *Spring Hill Lighting & Supply Co. v. Square D Co.*, 662 So. 2d 1141, 1147 (Ala. 1995).

³ While this Article focuses mainly on the state and local procurement process, it will at times compare various state provisions to their federal counterpart. The federal procurement model provides three different venues to bring a protest: the procuring agency itself, the Government Accountability Office (GAO), and the United States Court of Federal Claims. Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243 (2009). The GAO is an independent administrative agency wherein attorneys with particularized expertise in procurement law issue decisions in the name of the Comptroller General, who heads the agency. *Id.* at 246. The Court of Federal Claims is an Article I Court that retains many of the powers of an Article III court, including the power to award attorneys' fees and

bid protest mechanisms vary greatly, ranging from ones lacking a formal protest process to others with independent bodies empowered to take significant corrective action.

Despite these differences, most states recognize that a bid protest forum is essential to the procurement process. Indeed, "[a]llowing disappointed bidders to challenge the conduct of government procurements is widely viewed today as a key element in accountability in [g]overnment, so much so that the World Trade Organization's (WTO) Agreement on Government Procurement requires a challenge process."⁴ However, these differences also mean that it is not yet second nature for aggrieved contractors to bring a protest at the state level as it is on the federal level.⁵

issue contempt orders. *Id.* at 248. Unlike the GAO, the Court of Federal Clams judges are not required to have an expertise in the field of government contracts, although most have developed such an expertise. *Id.*

⁴ Daniel I. Gordon, *Annals of Accountability: The First Published Bid Protest Decision*, PROCUREMENT LAW., Winter 2004, at 1; see also Daniel I. Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J 489, 492 (2013) ("More than ever, a protest system has come to be seen as a required part of a good public procurement regime."). The Agreement on Government Procurement ("GPA") is discussed further in Part V.A.i, *infra*.

⁵ See generally James C. Cok & Damien Specht, *State Bid Protests: New Incentives and Traps for the Unwary* (Aug. 16, 2012), <http://www.lexology.com/library/detail.aspx?g=233ae8d5-8ca6-466b-8533-967e5b31fd20>. As one commentator has noted, "[b]id protests are not as routine a part of major government

This trend may soon change. Because of recent federal spending cutbacks, many businesses that traditionally contract with the Federal Government have turned to state and local government contracts for business.⁶ States and municipalities are also trimming their own budgets, resulting in increased competition for the coveted few contracts that are available.⁷ These spending cuts on both the state and federal level have also increased public scrutiny of state procurement decisions.⁸

procurements in most states as they are at the federal system.”
Id.

⁶ Despite these cutbacks, however, in 2012, state and local government procurement is “estimated to constitute approximate . . . \$1.77 trillion.” Robert A. Mullins, *Corruption in Municipal Procurement: Foreclosing Challenges of Disappointed Bidders—Augusta, Georgia, and the Need for Reform*, 42 PUB. CONT. L.J. 281, 282 (2013).

⁷ *Id.*

⁸ *Id.* For example, Robert Mullins, an Augusta, Georgia Procurement attorney, recently published an article in the *Public Contract Law Journal* criticizing Augusta, Georgia’s local procurement system. See Mullins, *supra* note 5, at 289. In the article, he alleges that Augusta abuses a “materiality” provision, which provides that certain “material” aspects of a proposal must be present otherwise the bid is deemed nonconforming and the procurement director must reject the bid. *Id.* at 288. He alleges that the Augusta procurement director has used the materiality provisions to exercise “virtually unfettered discretion in determining compliance” which has led to abuse and corruption. See *id.* at 289. Because of what Mr. Mullins views as abuse and corruption, he criticizes the Bid Protest rules, which, according to him, makes it “virtually impossible to meaningfully protest a determination of noncompliance.” *Id.* at 295. His article has further increased

Because of this increased competition and scrutiny, it is now more important than ever for states to implement effective bid protest mechanisms.⁹

This Article will first examine the goals and elements of an effective bid protest forum. It will then use these elements to analyze the bid protest systems of the states of Alabama, Massachusetts, and Maryland as examples of systems that range from ineffective, moderately effective, and effective, respectively. Additionally, In Part IV, it will consider the effectiveness of state and federal courts as a bid protest forum. Finally, in Part V, it will examine three protest systems as models for reform: the Agreement on Government Procurement (GPA), the United Nations Commission on International Trade Law Model Law on Public Procurement (UNCITRAL model), and the ABA's Model Procurement Code (MPC). Ultimately, this Article advocates that all states go beyond the

scrutiny in the Augusta community. See, e.g., Susan McCord, *Augusta Lawyer Says City's Procurement System Ripe For Corruption*, AUGUSTA CHRON. (Apr. 3, 2013), <http://chronicle.augusta.com/news/government/2013-04-03/augusta-lawyer-says-citys-procurement-system-ripe-corruption>; GA - *August City's Procurement System Breeds Corruption: Lawyer*, BID OCEAN NETWORK (Apr. 7, 2013), <http://www.bidocean.com/business-news/97507-GA--Augusta-Citys-Procurement-System-Breeds-Corruption-Lawyer.html>.

⁹ See generally Cok & Specht, *supra* note 5.

international models and uniformly adopt the Model Procurement Code's bid protest provisions.

II. The Purposes and Elements of an Effective Bid Protest System

At its most basic level, a bid protest is "a complaint by a would-be contractor regarding the formation stage of the procurement process."¹⁰ A contractor may challenge how the procurement was conducted prior to the selection of a winning contractor, or it can challenge the selection of the winner itself.¹¹ This Article does not distinguish between these types of protests, but rather focuses on the goals and justifications for allowing contractors to file these complaints and challenge the Government's award decisions.

A. The Purposes of a Bid Protest System

The main function of a bid protest forum is oversight of the procurement process. There are six primary purposes of an effective bid protest system that stem from this oversight function: deterrence and corrective action, compliance

¹⁰ Daniel I. Gordon, *Constructing A Bid Protest Process: The Choices That Every Procurement Challenge System Must Make*, 35 PUB. CONT. L.J. 427, 428 (2006),

¹¹ *Id.* A pre-award protest typically involves a challenge to a term of a solicitation. A post-award protest will generally allege that the awarding agency acted unreasonably in awarding a contract to one party, or that the agency did not evaluate the bids consistent with the terms set forth in the solicitation. *Id.* at 428-29.

monitoring, accountability, integrity, speed, and efficiency.¹²

To perform this oversight function, governments enlist private attorneys general, the contractors, who, in protecting their own interest, also monitor an agency's compliance.¹³

An effective bid protest system serves a corrective and deterrent function through the threat of a protest uncovering illegal action.¹⁴ It deters both intentional conduct, such as bribery,¹⁵ and unintentional conduct attributable to a lack of reasonable care.¹⁶ An effective bid protest forum serves its corrective purpose by providing an aggrieved contractor a meaningful remedy and fixing errors in the procurement process that the deterrent function simply cannot reach - namely, inadvertent mistakes.¹⁷

¹² A bid protest system aims to "serve a procurement oversight function," by "monitor[ing] procurement officials, enforcing their compliance with procurement laws and regulations, and correcting incidents of improper government functions." See Erik A. Troff, *The United States Agency-Level Bid Protest Mechanism: A Model for Bid Challenge Procedures in Developing Nations*, 57 A.F. L. REV. 113, 118 (2005).

¹³ *Id.*

¹⁴ Troff, *supra* note 12, at 119.

¹⁵ *Id.*

¹⁶ See, e.g., *id.* ("Procurement officials . . . are susceptible to the temptation to save time and effort by 'cutting corners.'").

¹⁷ Troff, *supra* note 12, at 120. Inadvertent mistakes include errors attributable to "poor training, lack of experience, or simple ineptitude." *Id.*

While compliance monitoring is a purpose of any bid protest system, additional goals will vary with the perspective of each party. For example, from the viewpoint of the contractor, the purpose of the system is simply to obtain relief.¹⁸ From the government perspective, however, providing an aggrieved bidder with a remedy may only be a tangential concern.¹⁹ Rather, the purposes are numerous, ultimately aiming to "efficiently and promptly complete its core role, the acquisitions of goods or services that the [g]overnment needs."²⁰

Effective protest forums also preserve the integrity of the procurement process through transparency.²¹ If the integrity of the protest process is questioned, vendors will be less likely

¹⁸ Gordon, *supra* note 10, at 430.

¹⁹ Interestingly, for many years, "it generally was considered that procurement statutes were adopted for the benefit of the government and that their violation by procurement officials did not bestow rights upon contractors or prospective contractors." Lewis J. Baker, *Procurement Disputes at the State and Local Level: A Hodgepodge of Remedies*, 25 PUB. CONT. L.J. 265, 290 (1996). This view is still prevalent in many state court systems. See discussion *infra* Part IV.

²⁰ *Id.* at 431.

²¹ Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, *supra* note 4. Dean Gordon notes that bid protests may impose high costs, but that the benefits of transparency and integrity outweigh them. *Id.* at 45. For example, on the federal level, the written decisions issued by the GAO make clear to prospective bidders that the GAO will strictly enforce its timeliness rules. *Id.*

to deal with the Government, leading to decreased competition, and consequently, higher priced, lower-quality goods.²²

Finally, speed and efficiency are essential goals of a procurement system because "[b]y its nature the public procurement process is a time-sensitive endeavor Once the award process is complete, the contract will be awarded and performance will begin within a relatively short period of time."²³ Consequently, a protest forum must serve its oversight function during a brief time frame. Moreover, to the extent it fails to do so, contractors will be less likely to bring protests thereby decreasing oversight.

In a perfect world, protest systems would aim to serve all of these purposes: deterrence and correction, compliance, accountability, integrity, speed, and efficiency. These goals, however, are sometimes at odds with each other. For example, accountability and integrity can contradict efficiency and speed.²⁴ Therefore, an effective bid protest forum strikes a

²² See *id.* at 431.

²³ Troff, *supra* note 12.

²⁴ Gordon, *supra* note 10, at 431. As an example, if a bid protest system's sole goal was accountability then it "might hear anyone's protest (even from a private citizen with no stake in the procurement) at any time (even years after a contract has been awarded), and unlimited discovery would be allowed, with depositions and hearing in every case." *Id.* These of course are not ascertainable with limited judicial and administrative

delicate balance between these competing ideals, which allows governments to quickly and efficiently procure the goods and services they need while also preserving the integrity of the process.

B. The Elements of a Bid Protest System

For the sake of simplicity, this Article assumes that there are four elements of an effective bid protest system that further the system's purposes described in Part II.A, *supra*. These elements are (1) speed and efficiency, (2) meaningful review, (3) independent review, and (4) meaningful relief.²⁵ This section will examine each element, the purpose each element is intended to further, and the minutia of bid protest procedures that relate to the element. These elements will then form the basis for the analysis of the three differing bid protest state bid protest systems and the potential models for reform.

i. Speed and Efficiency

The elements of speed and efficiency are intended to further the purpose of efficiency in the procurement system. To facilitate a judicious and efficient process, an effective

resources. Nor are they desirable in a system that values efficiency.

²⁵ Troff, *supra* note 12, at 123 (citing Dean Gordon's Symposium presentation).

system will force protestors to bring timely protests and have the capability to quickly issue a decision.²⁶ Generally, timeliness regulations, which address how quickly a protest must be brought and how quickly the forum must issue a decision, further this purpose.²⁷

ii. Meaningful Review

Meaningful review aids in deterrence by exposing errors by procurement officials who procure goods and services in contravention of applicable regulations. Consequently, meaningful review leads to greater public trust in the process, and therefore, increased integrity. The meaningfulness of the review depends on 1) whether those doing the review have the necessary expertise in the practice area,²⁸ 2) whether there is a

²⁶ *Id.*

²⁷ *Id.* at 122.

²⁸ Many scholars have recognized and emphasized the importance of having an expertise in federal procurement law. Indeed, Professor Schwartz has argued that it is that very expertise that the Court of Federal Claims has developed in the areas of contract formation and contract disputes that justifies the court's very existence. Joshua I. Schwartz, *Public Contracts Specialization As A Rationale for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 863 (2003). Professor Schwartz contends that experts are more capable of handling the unique tension that appears in government contracting in deciding whether to treat the Government like a private contracting party. More specifically, it involves "appreciating that there are indeed respects in which a . . . government as a contracting party, is and ought to be, treated as much as possible like a private contracting party, and simultaneously to appreciate that there

sufficient record to review, and 3) the level of deference afforded to those making the procurement decisions.²⁹

Accordingly, regulations related to the composition of the reviewing panel, the standard of review, and the types of materials that are reviewed are all indicia of the meaningfulness of the review.

iii. Independent Review

Independence, perhaps more than any other element, serves the integrity goal. Contractors and the public will not trust the system if the people or entity reviewing the procurement are also the ones who made the initial procurement decision. Therefore, independence is measured by how much of a stake the reviewing entity has in the outcome of the procurement.³⁰

iv. Meaningful Relief

In one sense, the element of meaningful relief is the purpose itself - obtaining relief. Closely related, however, is the goal of integrity. Contractors must believe that they can receive meaningful relief or they will doubt the entire procurement process. Because the procurement process happens quickly, a bid protest can be rendered moot when the contract

are . . . constraints and duties that demand special treatment" *Id.* at 864.

²⁹ Troff, *supra* note 12, at 123

³⁰ *Id.*

being performed is entirely or substantially completed. Therefore, an effective system requires the forum to have the power to suspend or stay the contract award while the protest is pending.³¹ It must also have the ability to grant meaningful relief either in the form of setting aside the award or awarding adequate compensatory damages, should the protest be sustained.³² Regulations related to stay provisions and the types of relief are particularly relevant here.

III. An Examination of Various State Bid Protest Mechanisms

To illustrate the variety of state protest mechanisms, this Article will discuss the states of Alabama, Massachusetts, and Massachusetts as examples and classify them in three adjectival categories: ineffective, moderately effective, and effective. This Article will examine the scope and effectiveness of the four elements discussed in Part II.B: 1) speed and efficiency, 2) meaningful review, 3) independence, and 4) meaningful remedies.³³

³¹ Troff, *supra* note 12, at 123; see, e.g., 4 C.F.R. 21.6 (2013) (GAO automatic stay provision).

³² See Troff, *supra* note 12, at 123

³³ This Article examines these systems only as they appear on paper and does not purport to evaluate their effectiveness in practice.

A. An Ineffective Bid Protest System - Alabama

Alabama is a primary example of a state that lacks an effective bid protest system. Alabama has no statutory bid protest systems. The Division of Purchasing within the Department of Finance, however, contains some administrative guidance regarding protests of its procurements.³⁴ Its timeliness requirements are strict, allowing only five days to file a notice of protest and an additional seven days to file the formal written protest with the purchasing agency.³⁵ The agency then has thirty days to issue a written decision.³⁶ If the agency denies the protest, the contractor then has the right to seek judicial relief in the form of an injunction.³⁷ The relief is injunctive only, and there is no right to sue for money damages - either compensatory damages for lost profits or

³⁴ MELISSA J. COPELAND, *GUIDE TO STATE PROCUREMENT: A 50-STATE PRIMER ON PURCHASING LAWS, PROCESSES, AND PROCEDURES 2* (2011).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* It states: "Any taxpayer of the area within the jurisdiction of the awarding authority and any bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action in the appropriate court to enjoin execution of any contract entered into in violation of the provisions of the article." In addition to contractors, the statute also confers standing to "[a]ny taxpayer of the area within the jurisdiction of the awarding authority" Ala. Code § 41-16-31.

bid preparation costs.³⁸ The injunctive relief itself is limited, as Alabama law "does not authorize an order compelling" an agency to award a contractor the contract.³⁹

Alabama's protest mechanism is ineffective because "injunctive relief is rarely granted."⁴⁰ This is likely a result of Alabama courts reviewing an agency's decision under a highly deferential standard of review, which requires protestors to show that the agency failed to act in good faith. To make matters more difficult, Alabama appellate courts will dismiss an appeal of a trial court's bid protest decision as moot once performance of the contract has begun unless a stay is issued.⁴¹ Because injunctive relief is so rarely granted, it is unlikely that the appellate courts will consider appeals of bid protest decisions.

³⁸ COPELAND, *supra* note 34, at 2 (citing *Vinson Guard Serv., Inc. v. Ret. Sys. of Ala.*, 836 So.2d 807, 810 (Ala. 2002)).

³⁹ *Vinson Guard Serv.*, 836 So. 2d at 811.

⁴⁰ COPELAND, *supra* note 34, at 3. As Ms. Copeland notes in her *Guide to State Procurement*, Alabama's own Supreme Court has recognized the limitations of its remedy. COPELAND, *supra* note 34, at 2. In *Spring Hill Lighting & Supply Co. v. Square D Co.*, the court stated "[i]njunctive relief is seldom granted in actions alleging violations of the Competitive Bid Law." 662 So. 2d 1141, 1147 (Ala. 1995). Moreover, Alabama courts have noted that the remedy is a "limited one." *Crest Constr. Corp. v. Shelby Cnty. Bd. of Educ.*, 612 So.2d 425, 432 (Ala. 1992).

⁴¹ COPELAND, *supra* note 34, at 2.

The deficiencies in Alabama's protest system are immediately apparent. There is no doubt that the system provides for speed. Protestors are given a maximum of twelve business days to protest the award of the contract.⁴² Despite its speed, however, it is deficient regarding all of the remaining elements.

There is no meaningful review due to the lack of expertise and the deferential standard of review. Because the reviewing body is the Alabama trial courts, there is no specialized expertise in procurement law. The highly deferential standard of review requires "bad motive, fraud, or gross abuse of discretion," which makes it unlikely that even a poor decision by an agency will be overturned.⁴³

This extreme deference is also indicative of a lack of independence, because, practically speaking, the procuring agency is the one who makes the ultimate decision. The agency certainly has a stake in the outcome and is unlikely to question its own judgment.⁴⁴

⁴² This number accounts for the five business days to file a notice and the seven days thereafter to file the formal protests. See *id.*

⁴³ See generally *White v. McDonald Ford Tractor Co.*, 248 So. 2d 121, 129 (Ala. 1971).

⁴⁴ This Article does not intend to suggest that all agency-level bid protests make for inefficient bid protests systems. In fact, agency-level bid protests offer many advantages including:

The Alabama bid protest system also cannot grant meaningful relief, and consequently, is deficient in the element of integrity. Alabama does not have a stay provision.⁴⁵ As discussed *supra*, the state may only grant injunctive relief and cannot award monetary damages. This, particularly in light of the reality that injunctive relief is rarely granted means that, in practice, there is no remedy at all. This creates a vicious cycle. Because contractors do not receive any relief, they are deterred from expending the resources required to protest. This brings into question the integrity of the entire process, because without an incentive on the part of the contractor to protest, there are no private attorneys general to monitor the

1) a review by someone familiar with the procurement process, 2) a less adversarial process, and 3) a substantially faster process. Schaengold et al., *supra* note 3, at 271. Despite these advantages, the lack of independence cannot be ignored. As one commentator has noted, "even if [the reviewing] official, had no involvement in the procurement, agency-level protests almost always involve on [g]overnment official reviewing the work of a colleague in the same agency. Consequently . . . there are very limited safeguard with respect to impartiality or independence of the agency-level protest decisionmaker." *Id.* at 274. Moreover, even in other procurement systems, such as the federal level, disappointed bidders can seek recourse with another venue such as the GAO or the Court of Federal Claims where they can receive meaningful independent review if the error cannot be resolved at the agency level.

⁴⁵ AM. BAR ASS'N, STATE SURVEY OF BID PROTEST PROCEDURES 1, available at http://meetings.abanet.org/webupload/commupload/PC500000/related/resources/STATE_SURVEY_OF_BID_PROTEST_PROCEDURES.pdf.

procurement system, which raises significant deterrence concerns. The cycle continues, as the lack of integrity not only creates incentives not to protest but also *not to compete* in the first place. The ultimate result is a higher cost to the government in the form of decreased competition.

B. A Moderately Effective Bid Protest System - Massachusetts

Massachusetts is an example of a state that has a moderately effective protest mechanism, but is one that could use significant improvements. Neither statutory law nor regulations have specific provisions related to a bid protest system.⁴⁶ Rather, the Office of the Inspector General (OIG) and the State Attorney General's office (AGO) handle protests of goods and services and construction, respectively.

Contractors protesting the award of goods and services can do so through the informal procedures provided by the OIG.⁴⁷ A protest is initiated by contacting the OIG.⁴⁸ The OIG then contacts the procuring agency to get the relevant information

⁴⁶ COPELAND, *supra* note 34, at 230.

⁴⁷ According to the OIG, the purpose of this procedure is to "help resolve disputes efficiently and ensure compliance with the law." Janet Werkman & Lisa Price, *Bid Protests Under M.G.L. c. 30B, The Uniform Procurement Act*, INSPECTOR GEN., <http://www.mass.gov/ig/publications/guides-advisories-other-publications/bid-protests-under-mgl-c30b-the-uniform-procurement-act-1996.html> (last visited Mar. 31, 2013).

⁴⁸ *Id.*

related to the procurement.⁴⁹ Once it obtains all of the relevant information it issues an *advisory* opinion to the procuring agency.⁵⁰ Despite the non-binding nature of the opinion, according to the OIG, “the great majority of bid protests are effectively resolved in this manner” because “awarding authorities regard the OIG as a useful arbiter and choose to heed the OIG’s advice.”⁵¹ Protestors also typically accept the OIG’s decisions and generally do not pursue the protest further if the OIG finds the procurement to be lawful.⁵²

Protests regarding construction contracts are resolved not by the OIG, but rather by the AGO’s bid protest unit. It employs an informal process similar to that used by the OIG, allowing the initiation of a protest with a letter from the protestor that describes the alleged violation.⁵³ The AGO reserves the right to dismiss a protest when the protestor has unduly delayed, particularly if contract performance has already

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (“Most protesters also accept the OIG’s finding that the procurement process complied with [the relevant procurement statutes] and drop the matter rather than pursue the costly avenue of litigation.”).

⁵³ COMMONWEALTH OF MASS., OFFICE OF THE ATTORNEY GEN., GENERAL GUIDELINES REGARDING ATTORNEY GENERAL BID PROTEST CASES, *available at* <http://www.mma.org/public-works-energy-a-utilities/4309-ag-issues-new-bid-protest-guidelines>.

begun.⁵⁴ Standing with the AGO is broad, allowing any "interested party" to protest, including "unsuccessful bidders, citizens, watchdog groups, unions, trade associations[,] and competitors."⁵⁵

The process gets slightly more formal after it is filed in that formal hearings are provided.⁵⁶ If a hearing is scheduled, it is generally conducted within ten days, and the AGO will issue a decision within three weeks.⁵⁷ Although the AGO does not afford the procuring agency a specific standard of review, it appears to evaluate a bid to see if it was 1) inconsistent with the applicable law or regulation or 2) if the decision was arbitrary or capricious.⁵⁸ The AGO may recommend a number of

⁵⁴ *Id.* More specifically, with regard to challenges of prequalification, the protest must be brought within fourteen days of the alleged prequalification issues. The AGO, however, specifically reserves the right to hear the protest even if not brought in a timely manner. *Id.*

⁵⁵ *Id.*

⁵⁶ It does, however, reserve the right to dismiss the protest if it "fails to state a violation of the Bid Laws; the bid protest becomes moot; or there are no disputed, material facts and a decision can be rendered as a matter of law." *Id.*

⁵⁷ *Id.*

⁵⁸ Specifically it evaluates the following questions: 1) Did it comply with applicable statutory requirements; 2) did the agency violate the Bid Laws by awarding to a contractor who has violated a statutory provision; 3) did the awarding authority violate the bid law by making arbitrary decision regarding qualifications; 4) did the agency use unduly restrictive

remedies including rebidding the contract or rewriting a provision of the solicitation. It is not authorized to award any monetary damages.⁵⁹ The AGO may also request that the agency suspend the award of the contract until the resolution of the protest.⁶⁰ As with the OIG, however, these decisions are merely "findings" and accordingly are not binding.⁶¹

Frustrated bidders, however, are not required to bring protests to the OIG or the AGO. They may instead bring a protest directly to Superior Court, where the award is reviewed *de novo* and without deference to any advisory opinions of the OIG or AGO.⁶² Standing in the courts is also rather broad, allowing any

competition" methods; 5) was the decision to decertify the contractor arbitrary or capricious? *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The Attorney General has stated that the AGO's decisions are "usually the final step in a protest" despite the fact that parties, at times, choose to appeal the decision in court. See *Ensuring Accountability and Transparency in the Massachusetts Recovery and Reinvestment Plan: Hearing Before the J. Comm. on Federal Stimulus Oversight* (Mar. 25, 2009) (testimony of Attorney Gen. Martha Coakley), available at <http://www.mass.gov/ago/docs/testimonies/stimulus-testimony-032509.pdf>. The AGO may "bring an action in the Superior Court seeking to enjoin an agreement or otherwise to enforce a bid protest decision." *Brasi Dev. Corp. v. Attorney Gen.*, 925 N.E.2d 826, 833 (Mass. 2010).

⁶² COPELAND, *supra* note 34, at 231; *Brasi Dev. Corp.*, 925 N.E.2d at 835 (noting that because "the Attorney General has authority only to 'require compliance' with its terms . . . and the "decisions involve neither an adjudicatory proceeding nor rule

aggrieved bidder to bring a protest.⁶³ The Superior Court may grant injunctive relief as well as monetary relief in the form of bid preparation costs.⁶⁴ Unlike in Alabama, courts in Massachusetts are more inclined to grant injunctive relief. The court has explicitly recognized the inadequacy of bid preparation costs and accordingly, has stated that "the inadequacy of the remedy . . . has been deemed to constitute 'irreparable harm' for purposes of determining that injunctive relief is warranted."⁶⁵

The bid protest system of Massachusetts receives the rating of moderately effective because it is more developed than Alabama's system. Speed and efficiency are the strongest aspects of the Massachusetts model. Both forums for adjudication provide for quick and expedited reviews of

making . . . the Attorney General's decision . . . should be accorded no deference.").

⁶³ COPELAND, *supra* note 34, at 231. There is no requirement that there be a showing that "but-for" the agency's conduct the contractor would have received the contract. *Id.* Moreover, it affords taxpayer standing to "any ten inhabitants of a city, town, regional school district, or district to challenge the award of a contract in violation of a bidding law." Werkman & Price, *supra* note 47.

⁶⁴ COPELAND, *supra* note 34, at 231.

⁶⁵ *Id.* Moreover, with regard to taxpayer protests, Massachusetts courts have recognized that "the violation of a statute designed to prevent abuse of public funds is, by itself, sufficient harm to justify an injunction in a taxpayer suit." *Id.* (citing *Edwards v. City of Boston*, 408 Mass. 643, 646-47 (1990)).

protests, completing a review within weeks of the initial protest. Additionally, the Massachusetts system provides for meaningful review. The OIG and the AGO are specialized forums that presumably have developed an expertise in the area of procurement law.⁶⁶ These forums also do not show undue deference to the procuring authority. For example, procurement decisions are evaluated *de novo* to see if they were consistent with the application of the statute, and deference is only afforded to decisions related to contractor certification and prequalification.⁶⁷

Despite these strengths, the Massachusetts bid protest system is lacking in two elements: meaningful review and independence. First, the AGO and the OIG may only recommend equitable or injunctive relief. Their decisions are recommendations that can only be enforced by a court. Second, the OIG the AGO are not independent administrative bodies. In fact, the AGO describes itself "an advocate and resource for the Commonwealth," the very entity that is charged with the

⁶⁶ This is particularly true when considering that, not only has each forum developed an expertise regarding bid protests, but also to bid protests in the separate areas of goods and services and construction contracts.

⁶⁷ GENERAL GUIDELINES REGARDING ATTORNEY GENERAL BID PROTEST CASES, *supra* note 53.

wrongdoing.⁶⁸ At least one commentator has noted that the recent economic downturn has caused "the hearing officers at the Attorney General's Office [to have] a distinct tendency to side with the public owner."⁶⁹ That isolated comment alone does not necessarily indicate that the AGO is not exercising its role independently and in a neutral manner. Nevertheless, the appearance of a lack of independence raises integrity concerns and can impact the effectiveness of the forum. As discussed in Part II.B., lack of integrity can result in a cycle that undermines the entire procurement system.

C. An Effective Bid Protest System - Maryland

Generally, Maryland has a well-developed body of procurement law, which began in 1976 when the state waived its sovereign immunity to defenses of contract actions.⁷⁰ Procedurally, any "interested party" must first bring its protest to the procurement officer in charge.⁷¹ The Code of Maryland Regulations (COMAR) defines an interested party as "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the

⁶⁸ See generally *About the Attorney General*, OFFICE OF THE ATTORNEY GEN., <http://www.mass.gov/ago/about-the-attorney-generals-office/> (last visited Mar. 31, 2013).

⁶⁹ Sauer, *supra* note 1.

⁷⁰ Scott A. Livingston & Lydia B. Hoover, *Principles of Maryland Procurement Law*, 29 U. BALT. L. REV. 1, 2 (1999).

⁷¹ STATE SURVEY OF BID PROTEST PROCEDURES, *supra* note 45.

protest.”⁷² Any adverse decision of the officer may then be appealed to the Maryland State Board of Contract Appeals (MSBCA). The COMAR imposes fairly harsh timing requirements. Protests of alleged improprieties in the solicitation must be brought to the procurement official prior to the close of bidding.⁷³ All other protests must be brought within seven days of when the basis of the protest is known or should have been discovered.⁷⁴ A contractor then has ten days to appeal the decision to the MSBCA.⁷⁵

Although it is an administrative forum, the MSBCA employs judicial standards, including “proceedings . . . on the record, witnesses [who] are subject to cross examination, and [a] highly developed area of law”⁷⁶ Because of the sophisticated nature of this process, it generally takes three to four months to consider a challenge and issue a decision.⁷⁷ There is no clearly articulated standard of review in the COMAR, though the

⁷² COMAR 21.10.02.01B.

⁷³ COMAR 21.10.02.03A.

⁷⁴ COMAR 21.10.02.03B.

⁷⁵ COMAR 21.10.02.10A.

⁷⁶ COPELAND, *supra* note 34, at 225. The MSBCA has issued approximately 600 decisions since 1981. *Id.*

⁷⁷ *Id.* The statute provides for more time than this - requiring a final decision within 180 days of when all briefs have been filed. Md. Code Ann., State Fin. & Proc. § 15-221(e) (West 2013).

MSBCA has consistently applied an arbitrary and capricious standard.⁷⁸

Regarding remedies, the COMAR also contains an automatic-stay provision, which requires the suspension of the procurement during the pendency of the adjudication of the appeal. The stay can only be overridden if such an override is necessary to "protect substantial State interests."⁷⁹ The MSBCA has statutory authority to award costs of filing and pursuing a protest (not including attorney's fees),⁸⁰ plus any interest accrued thereon.⁸¹ The MSBCA can also force the agency to re-conduct the procurement.⁸² Decisions of the MSBCA are appealable pursuant to Maryland's Administrative Procedure Act, but there have been "relatively few procurement-related opinions of the Court of

⁷⁸ See, e.g., *L-1 Secure Credentialing, Inc.*, MSBCA 2793 (noting that the standard of review is whether the procurement official's decision was "arbitrary, capricious, unsupported, or contrary to the weight of the evidence"). An even higher level of deference is applied in situations where a protestor challenges a decision to reject all bids. There, the protestor must show that the decision was "fraudulent or so arbitrary as to constitute a breach of trust." *STG, Int'l, Inc.*, MSBCA 2755 (2011).

⁷⁹ COMAR 21.10.02.11.

⁸⁰ Md. Code Ann., State Fin. & Proc. § 15-221.1(a) (West 2013).

⁸¹ *Id.* § 15-222.

⁸² See, e.g., *Yellow Transp.*, MSBCA 2734 *et al.*, at 43 (2004).

Appeals of Maryland,"⁸³ which may indicate that vendors and agencies alike accept the final decisions of the Board.

One of Maryland's greatest strengths is its ability to have a speedy bid-protest mechanism without making significant sacrifices in other areas. Its speed is apparent in both its timeliness requirements for bringing protests and its expedited resolution of cases. Although protests are resolved more quickly in Alabama and Massachusetts than in Maryland, it sacrifices little in speed and, as discussed below, is far superior in the remaining three elements. Additionally, Maryland's three-four month window is consistent with the GAO approach at the federal level.⁸⁴

Additionally, the MSBCA is an independent administrative, quasi-judicial body composed of three members who are appointed by the Governor to five-year terms.⁸⁵ The Board is also empowered

⁸³ COPELAND, *supra* note 34, at 225.

⁸⁴ The GAO has 100 days to issue a decision. *Bid Protest FAQs*, GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/legal/bids/bidfaqs.html#19> (last visited Mar. 30, 2013). Moreover, a protestor in Alabama may be more likely to appeal a decision to a judicial forum, ultimately lengthening the process.

⁸⁵ *Origins & Functions*, MD. BD. OF CONTRACT APPEALS, <http://www.msbc.state.md.us/origins.html> (last visited Mar. 30, 2013). Practically, however, as far back as 1996 there have been some concerns raised about the independence of the Board. One commentator has noted that "[e]ven with the elaborate procedures afforded in Maryland, there have been allegations

to give meaningful relief, as indicated by the automatic stay provision, which allows the agency to implement truly corrective action without rendering the protest moot.⁸⁶ The MSBCA's broad authority to award both monetary and injunctive relief ensures that protestors can expect to receive meaningful relief if their protest is meritorious.⁸⁷

Despite these strengths, the Maryland bid protest system does not provide for a completely meaningful review. On the one hand, Maryland provides a quasi-judicial review with a well-developed record, discovery, and witnesses, which allows for significant fact finding.⁸⁸ Additionally, because the MSBCA is dedicated solely to procurement-related decisions, it has developed significant expertise on these matters.⁸⁹ On the other hand, the arbitrary and capricious standard of review means that

that lobbyists are influential in the drafting of requests for proposals, resulting in an advantage being gained by their respective clients." Baker, *supra* note 19, at 298. However, the U.S. Attorney's office investigated the alleged wrongdoing and revealed no wrongdoing. *Id.* Ultimately, Mr. Baker found that the Maryland system "provide a fair opportunity for competitors to challenge the terms of a solicitation and the administration of a procurement." *Id.*

⁸⁶ See generally COMAR 21.20.02.11 (automatic stay provision).

⁸⁷ See COMAR 21.10.07.09.

⁸⁸ See generally COMAR 21.10.01.01-09.

⁸⁹ See COMAR 21.02.02.01 ("The Appeals Board is an independent agency within the Executive Branch and shall consist of three full-time members qualified to serve in a quasi-judicial capacity and possessing a thorough knowledge of procurement practices and processes.").

the MSBCA is extremely deferential to the decision of the procuring agency.⁹⁰ One Maryland practitioner has raised these concerns, noting that “[a]ppeals to the MSBCA are difficult to win because of the high degree of deference provided to agencies in the procurement selection process.”⁹¹ Thus, there is room for improvement in even one of the most effective bid protest mechanisms.

IV. Effectiveness of a Judicial Forums

In states that have no bid protest forum, or that contain an unsophisticated protest mechanism, judicial recourse plays a crucial role. For example, in Minnesota, there are minimal bid protest procedures, often forcing a protestor to challenge alleged errors through the judicial process.⁹² While Part III of this Article briefly addressed judicial forums when a protestor sought to appeal an administrative decision, this section

⁹⁰ See *supra* note 78 and accompanying text.

⁹¹ *Protest and Appeals to the MSBCA*, KAHN, SMITH & COLLINS, P.A., <http://www.marylandprocurementlawyer.com/category/bidprotest/> (last visited Mar. 31, 2013).

⁹² STATE SURVEY OF BID PROTEST PROCEDURES, *supra* note 45; see also NASPO, STATE BID PROTEST PROCEDURES, available at http://www.naspo.org/documents/.FINAL_NASPO_BidProtests_Research_Brief_042413.pdf (noting that protest procedures are generally dictated by the solicitation itself). In Minnesota, “protests are generally heard by the chief procurement officer of his designee.” NASPO BID PROTESTS, *supra*. Moreover, there are no proscribed rules with regard to standing or timeliness except that which is set by the solicitation itself. *Id.*

considers more broadly the strengths and weakness of a judicial forum adjudicating bid protests.

It is difficult to uniformly classify the effectiveness of a judicial bid protest forum. This is because, as with administrative forums, states and courts have created different rules regarding: the types of claims that may be pursued, who has standing to challenge a procurement decision, and the relief which may be granted. Generally, however, courts have permitted two causes of action. First, protestors may bring suit for monetary damages or injunctive relief based on violations of the applicable competitive bidding laws. Second, protestors may seek damages pursuant to 42 U.S.C. § 1983 alleging violation of their due process rights.⁹³ To illustrate the judicial approaches, this section focuses on the state of Minnesota and compares it with approaches taken by other states.

A. Violations of Statutory Bidding Laws

Minnesota has conferred broad standing to its citizens to bring legal challenges based on violations of its competitive

⁹³ While these appear to be the main avenues pursued for relief, other theories such as violations of statutory obligations of good faith are available. For a comprehensive overview of cases which have allowed a disappointed bidder to recover monetary damages see James L. Isham, *Public Contracts: Low Bidder's Monetary Relief Against State or Local Agency for Nonaward of Contract*, 65 A.L.R.4th 93 (1988).

bidding statutes. Taxpayers⁹⁴ and disappointed bidders have standing to challenge the award of a contract.⁹⁵ Most state courts, however, follow the "rule that where a disappointed bidder is not a taxpayer within that state, they may only bring a bid protest suit where fraudulent, collusive, or dishonest circumstances are involved."⁹⁶

Relief in the Minnesota state court system is somewhat limited. The Minnesota Supreme Court has stated, "[t]he general rule is that an unsuccessful bidder is not entitled to

⁹⁴ Sayer v. Minn. Dep't of Transp., 769 N.W.2d 305, 308 (Minn. Ct. App. 2009), *aff'd*, 790 N.W.2d 151 (Minn. 2010).

⁹⁵ See, e.g., NewMech Cos., Inc. v. Indep. Sch. Dist. No. 206, 509 N.W.2d 579 (Minn. Ct. App. 1993) *rev'd sub nom. on other grounds*, NewMech Cos., Inc. v. Indep. Sch. Dist. No. 206, Alexandria, 540 N.W.2d 801 (Minn. 1995) (finding that disappointed bidders have standing); Rexton, Inc. v. State, 521 N.W.2d 51, 52 (Minn. Ct. App. 1994) (allowing, but ultimately denying, a protest by a would-be bidder whose bid was not accepted because it filed its protest one minute after bids were due); Lovering-Johnson, Inc. v. City of Prior Lake, 558 N.W.2d 499, 501 (Minn. Ct. App. 1997) (allowing the next-lowest bidder to bring an action for injunctive relief and monetary damages alleging improprieties in allowing the winner of a municipal contract to alter his bid when it claimed it made a clerical error).

⁹⁶ Randall L. Erickson, *State Bid Protests*, CROWELL & MORING, http://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_542.pdf (last visited May 29, 2013) (citing *Healthamerica Corp. v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 948 (Ky. 1985); *Gannet Co. v. Delaware*, No. Civ. A. 12815, 1993 WL 19714, *1 (Del. Ch. Jan 11, 1993)). Other states that have allowed non-taxpaying disappointed bidders to bring protests include Tennessee, Arkansas, and Illinois. See *id.*

damages.”⁹⁷ This is because, “the power of letting public contracts must be exercised for the benefit of the public and not of the bidder” and therefore “the award of a contract to one other than the lowest bidder does not entitle the lowest bidder to a recovery of damages from the municipality”⁹⁸ Minnesota courts, however, have permitted recovery of bid preparation costs,⁹⁹ and in some instances, attorneys’ fees,¹⁰⁰ under a theory of promissory estoppel.¹⁰¹

Not all states, however, agree that a protestor is entitled to monetary damages.¹⁰² First, many courts recognize, as Minnesota has, that public bidding statutes are enacted primarily for the protection of the public and not the contractor.¹⁰³ Second, some courts are concerned that allowing a protestor to recovery monetary damages amounts to double

⁹⁷ *Tel. Assocs., Inc. v. St. Louis Cnty. Bd.*, 364 N.W.2d 378, 382 (Minn. 1985).

⁹⁸ *Id.* (quoting 10 McQuillan, *The Law of Municipal Corporations*, § 29.83 at 426 (3d ed. 1981)).

⁹⁹ *Id.* Although this rule was established within the municipal context, it has been applied at the state contracting level as well. See, e.g., *Duininck Bros., Inc. v. State*, No. C3-97-972, 1997 WL 729233 (Minn. Ct. App. Nov. 25, 1997).

¹⁰⁰ *Tel. Assocs., Inc. v. St. Louis Cnty. Bd.*, 364 N.W.2d 378, 383 (Minn. 1985)

¹⁰¹ *Id.*

¹⁰² Most states are in accord with the principle that a lowest responsible bidder wrongfully denied an award is not entitled to lost profits. See Erickson, *supra* note 96.

¹⁰³ Isham, *supra* note 93.

recovery, as the state or city would have to use taxpayer funds to pay both for the completed contract and bid preparation costs to a wholly separate bidder.¹⁰⁴ Ultimately, this negatively impacts the taxpayer, the very group the statutes are designed to protect.¹⁰⁵

Protestors are entitled to seek injunctive relief.¹⁰⁶ Obtaining injunctive relief, however, is a difficult endeavor. In Minnesota, the court of appeals has referred to injunctive relief in the bid protest context as an "extraordinary equitable remedy."¹⁰⁷ In Minnesota bid protest cases, the court will apply the same high bar for injunctive relief that it does for other civil cases.¹⁰⁸ One important element is that the protestor must

¹⁰⁴ *Lawrence Brunoli, Inc. v. Town of Branford*, 247 Conn. 407, 722 A.2d 271 (1999).

¹⁰⁵ *See id.*

¹⁰⁶ *See, e.g., Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. Ct. App. 1999).

¹⁰⁷ *Id.*

¹⁰⁸ For example, in analyzing whether a Temporary Restraining Order (TRO) to enjoin the performance of a contract, Minnesota courts will consider:

[T]he nature of the parties' relationship, the balance between the harm to be suffered by the nonmoving party if the injunction is not granted and the harm to be suffered by the nonmoving party if it is granted, the likelihood of the moving party's success on the merits, the public interest involved; and any administrative burden imposed. *Duininck Bros., Inc. v. State*, No. C3-97-972, 1997 WL 729233 (Minn. Ct. App. Nov. 25, 1997). This is similar to approaches taken by other jurisdictions. *Accord, e.g., Naegele Outdoor Adver. Co. v. City of Jacksonville*, 659 So.2d 1046, 1047 (Fla. 1995).

suffer "irreparable harm."¹⁰⁹ Minnesota courts have ruled, however, that the lost profits from not receiving a contract are not grounds for proving irreparable harm.¹¹⁰ Ultimately, this makes it extremely difficult for a protestor to prevail on a claim for injunctive relief.¹¹¹ The extent of the injunctive relief is also limited. In most states, courts will not direct the award to the disappointed bidder, but will instead cancel the proceeding and allow the opportunity for the disappointed bidder to rebid.¹¹²

B. Due Process Violations

Bidders may also allege violations of their due process rights and seek damages pursuant to 42 U.S.C. § 1983.¹¹³ To prevail on a due process claim, the protestor must establish "a protected property or liberty interest."¹¹⁴ Specifically, in the context of bid protests, the property interest is that "the

¹⁰⁹ *Duininck Bros.*, 1997 WL at *4.

¹¹⁰ *Id.* at *4. Notably, this is in stark contrast to the approach taken by Massachusetts courts that have found the lack of monetary remedy sufficient for a finding of irreparable harm. See discussion *supra* Part III.B.

¹¹¹ This difficulty is demonstrated by cases where the courts have determined that a violation of the competitive bidding laws have occurred, but no injunctive relief was granted. See, e.g., *Sayer v. Minnesota Dep't of Transp.*, 790 N.W.2d 151 (Minn. 2010).

¹¹² Erickson, *supra* note 96.

¹¹³ 42 U.S.C. § 1983 (2006) allows parties to recover for violations of their Constitutional rights.

¹¹⁴ *Id.*

lowest responsible bidder in compliance with the bidding specifications and procedures has a legitimate expectation in being awarded the contract once the governmental body makes a decision to award the contract."¹¹⁵ Accordingly, to prevail on a due process claim, Minnesota requires a bidder to show that it was the next responsible bidder whose bid has conformed to the requirements and that the state had made an affirmative decision to award the contract.¹¹⁶

Under this approach, disappointed bidders will face a difficult task in alleging a due process violation for several reasons.¹¹⁷ First, only the lowest responsible bidder has the

¹¹⁵ *Id.* (quoting *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir. 1985)).

¹¹⁶ *See id.* Other states have adopted this approach to due process claims. *See, e.g., Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118 (W.D. Pa. 1980) (finding a property interest in "the right of the lowest responsible bidder in full compliance with the specifications to be awarded the contract once the city in fact decided to make an award"); *ISC Distributors, Inc. v. Trevor*, 903 P.2d 170, 175 (Mont. 1995) (finding no property interest was created because the city was not "absolutely required to award a contract to the 'lowest bidder,' nor were they absolutely required to award a contract based on any other sufficiently objective basis that property interest was created which would support a due process claim" pursuant to § 1983).

¹¹⁷ Some courts have suggested an even higher bar for prevailing on a due process claim. For example, in *Kendrick v. City Council of Augusta, Ga.*, the U.S. District Court for the Southern District of Georgia held that for a disappointed bidder to maintain a § 1983 action, it must show: "(1) a regulated

right to bring a due process claim, precluding all other actual or prospective bidders.¹¹⁸ Moreover, the reservation of discretion to reject all bids can thwart a due process claim.¹¹⁹ Similarly, in some states, the lack of objective basis for determining who should be awarded the contract will also be a bar to a due process violation. For example, in *ISC Distributors, Inc. v. Trevor*,¹²⁰ the Wisconsin Supreme Court found that there was no property interest protected by due process because the contract was not to be awarded simply to the lowest bidder, but rather, "the responsible offeror whose proposal is determined . . . to be the most advantageous to the state."¹²¹ Because there was no "objective basis" that showed the disappointed bidder was entitled to the award of the contract, the court found that there was no entitlement to the

bidding procedure, (2) material compliance with the procedures by the unsuccessful bidder, and (3) material and significant noncompliance with the procedure by the unsuccessful bidder." 516 F. Supp. 1134, 1139 (S.D. Ga. 1981). Under this approach, even if there was a protected property or liberty interest, relief would be granted only when there was "material and significant noncompliance." *Id.*

¹¹⁸ *Schwandt*, 423 N.W.2d at 66; see also *Douglas N. Higgins, Inc. v. Fla. Keys Aqueduct Authority*, 565 F. Supp. 126 (S.D. Fla. 1983) (finding no violation of due process rights because the Plaintiff was not the lowest bidder in full compliance with the requirements of the invitation for bids).

¹¹⁹ See, e.g., *Kim Constr. Co., Inc. v. Bd. of Trustees of Vill. of Mundelein*, 14 F.3d 1243, 1247 (7th Cir. 1994).

¹²⁰ 903 P.2d 170 (Mont. 1995)

¹²¹ *Id.* at 175.

contract, and thus no property right of which it was deprived.¹²² Consequently, the Wisconsin Supreme Court appears to preclude recovery on due process grounds for all contracts not procured through sealed bidding.

C. The Strengths and Weaknesses of Judicial Forums

As a bid protest forum, a judicial forum excels in two respects. First, because judges elected or appointed to the bench presumably have no stake in outcome of any procurement, a judicial forum provides for independent review. Second, it contains significant strengths with regard to meaningful review by allowing for the development of a full record and the ability to present evidence and witness testimony.

Despite these strengths, a judicial forum raises several concerns. First, it is unlikely that state court judges have significant expertise in the area of procurement law, casting some doubt on the meaningfulness of the review. More concerning, however, is the speed and efficiency of the judicial

¹²² See *id.* Similarly, "[o]ther courts have held that a government agency's reservation of the right to reject any and all bids provides sufficient discretion to preclude a constitutionally protected property interest in a contract award." *Id.* at 174-75 (citing *Kim Constr. Co., Inc. v. Bd. of Trustees*, 14 F.3d 1243, 1246-47 (7th Cir.1994); *Teton Plumbing and Heating, Inc. v. School Dist. No. 1*, 763 P.2d 843, 849-50 (Wyo. 1995)).

process. For example, in *Sayer v. Minnesota Dep't of Transp.*,¹²³ "one of the most heavily traveled bridges" in Minnesota collapsed. The contract to design and rebuild the bridge was awarded, and taxpayers brought a protest alleging that the winning bidder's bid was non-responsive.¹²⁴ While the initial temporary restraining order hearing to stop construction on the bridge was heard and decided in a few weeks, the trial court did not issue a final decision on the merits until over a year later.¹²⁵ Although the Minnesota Supreme Court ultimately found the bid to be responsive and not in violation of applicable law, the lack of expeditious review raises major concerns, particularly where the rebuilding of a bridge necessary for statewide travel is concerned.

Moreover, the lack of speed would be less problematic if courts had the ability to freely grant meaningful relief. For example, in *Sayer*, had the court determined that the bidding laws were violated, there would be no way of awarding any kind of meaningful relief beyond bid preparation costs.¹²⁶ This is precisely what occurred at the city level in *Tel. Associates*,

¹²³ 790 N.W.2d 151 (Minn. 2010).

¹²⁴ *Id.* at 154.

¹²⁵ *Sayer v. Minnesota Dept. of Transp and Flatiron-Manson*, No. CV-07-3425, 2008 WL 4699374 (Minn. D. Ct. 2008).

¹²⁶ See discussion *supra* Part III.A (noting that damages are limited to bid preparation costs).

Inc. v. St. Louis County Board, where the court determined that a violation of the bidding regulations had occurred, but because the project had already been completed, only bid preparation costs were awarded.¹²⁷ If the violation had occurred in a jurisdiction that precluded the recovery of monetary damages, there would be no relief at all. And while due process claims may provide a more significant form of relief in the form of monetary damages, as discussed in Part IV.A., such relief is granted only in the narrowest of circumstances.

Finally, standing rules raise concerns about the extent to which private attorneys general are performing their oversight functions. Because the system entrusts protestors to point out errors in the procurement process,¹²⁸ standing rules can significantly impact the extent to which protestors are capable of performing this role. Ideally, those with the greatest incentive to point out those errors, the contractors, would have standing to bring a protest. In a judicial forum, however, standing can be both too broad and too narrow to be effective. Although taxpayer standing may significantly increase the amount of people who can bring suit, those people are not likely incentivized to bring a protest because they have no stake in

¹²⁷ 364 N.W.2d 378, 383 (Minn. 1985).

¹²⁸ See discussion *supra* Part II.A.

the outcome.¹²⁹ Moreover, those with the greatest stake in the outcome, the contractors, are precluded from bringing a challenge that does not allege fraud or collusion unless they are taxpayers.¹³⁰ This is problematic because contractors are increasingly turning to state and local governments for government contracts.¹³¹

Certainly, a judicial forum is an effective vehicle for hearing a protest when an administrative forum is inadequate.

¹²⁹ See generally *Tel. Assos., Inc. v. St. Louis Cnty. Bd.*, 364 N.W.2d 378, 383 (Minn. 1985) (noting that proper challenges should be encouraged).

¹³⁰ *Erickson*, *supra* note 96.

¹³¹ See *Cok & Specht*, *supra* note 5. For example, in *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, the Kentucky Supreme Court dismissed a seemingly meritorious protest for lack of standing. 697 S.W.2d 946, 948 (Ky. 1985). There, the state had solicited offers for a contract to provide health insurance to state employees. *Id.* at 947. HealthAmerica did not receive the contract, but was permitted to offer health maintenance organization (HMO) coverage to state employees. *Id.* The state then permitted non-federally qualified companies to also offer HMO coverage. *Id.* HealthAmerica alleged that this was in contravention of the enabling statute because HMO providers had to be federally qualified. *Id.* The majority never addressed the merits of the case, but according to the dissenting opinion, the "language of the statute supports this opinion." *Id.* at 948 (Leibson, J., dissenting). The majority instead dismissed the case on standing grounds, stating: "[a] disappointed bidder has no interest in a contract entered into in good faith with his competitor. Relief could only be granted at the instance of a taxpayer of the state agency." *Id.* at 948 (majority opinion).

But, because of the high speed in which the procurement process happens, states should not rely on the court system as a substitute for meaningful bid protest procedures.

V. Models for Reform - the Agreement on Government Procurement (GPA), UNCITRAL, and the Model Procurement Code (MPC)

The GPA, UNCITRAL, and MPC are all models that states can look to in order to improve the effectiveness of their bid protest systems. While the GPA is an international treaty to which the United States and many of its states are bound, not all states are currently in compliance. Therefore, states could make significant improvements to their systems' effectiveness merely by complying with the GPA, or by adopting the UNCITRAL model, which was drafted with GPA compliance in mind. However, states - and particularly states already in compliance with the GPA - should go beyond the minimum requirements set by the GPA and UNCITRAL models and implement the American Bar Association's MPC.

A. The Agreement on Government Procurement (GPA)

The GPA is "the only legally binding agreement in the WTO focusing on the subject of government procurement."¹³² It was

¹³² *The Plurilateral Agreement on Government Procurement (GPA)*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Mar. 31, 2013). For a full overview of the WTO's work on the GPA and other areas of government procurement, see

signed by the participating parties, including the United States, on April 15, 1994.¹³³ The agreement is "plurilateral," meaning that it applies only to parties that have actually signed the GPA rather than all members of the WTO.¹³⁴ The GPA also applies to sub-central government entities as well as federal governments. Therefore, it envisions and accommodates federalist systems so that the GPA can also be applied to the various states.¹³⁵ Notably, there are thirty-seven states in the

General overview of WTO Work on Government Procurement, WORLD TRADE ORGANIZATION,

http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm (last visited June 9, 2013).

¹³³ Christopher F. Corr & Kristina Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 303, 334 (1999).

¹³⁴ *Id.* There are fifteen members of the GPA. They include: Armenia, Canada, the European Union (and its 27 Member States -- Austria, Belgium, Bulgaria, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom), Hong Kong China, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, Taiwan (Chinese Taipei), and the United States. *Appendices and Annexes to the GPA*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#taipei (last visited Mar. 31, 2013).

¹³⁵ Jean Heilman Grier, *Recent Developments in International Trade Agreements Covering Government Procurement*, 35 PUB. CONT. L.J. 385, 389 (2006)

United States that currently procure items in accordance with the GPA.¹³⁶

The GPA contains several requirements for bid protests.¹³⁷ Not surprisingly, the GPA has a number of minimum requirements related to the four categories discussed *supra* - speed, meaningful review, independence, and meaningful relief. As a threshold matter, however, the GPA requires that an agency initially seek to resolve any dispute with the contractor prior to a protest.¹³⁸ The GPA envisions a scenario where protests are initially brought to the agency itself where it should be "accord[ed] impartial and timely consideration . . . in a manner that is not prejudicial to obtaining corrective measures under

¹³⁶ US Appendix 2 to the GPA, *available at* http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#taipei. These include: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New York, Nebraska, New Hampshire, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. The appendix further breaks down the precise departments within each state that procure in accordance with GPA regulations.

¹³⁷ The GPA does not refer to these procedures as "protests" but rather "challenge procedures." WORLD TRADE ORGANIZATION, AGREEMENT ON GOVERNMENT PROCUREMENT, art. XX.

¹³⁸ *Id.* art .XX(1).

the challenge system.”¹³⁹ This is precisely what Maryland has done under its model.¹⁴⁰

Regarding speed, the GPA requires agencies to establish rules regarding timeliness, but mandates that there be *at least* ten days to challenge the decision.¹⁴¹ Apart from this minimum requirement, the GPA is otherwise vague regarding speed and efficiency except for a statement that “[w]ith a view to the preservation of the commercial and other interests involved, the challenged procedure shall normally be completed in a timely fashion.”¹⁴²

The GPA also places significant emphasis on independent review. It explicitly requires that a challenge be heard “by a court or by an *impartial and independent review body*” that does not have a stake in the outcome of the procurement.¹⁴³ It further requires that the reviewing body be “secure from external influence.”¹⁴⁴ It also expresses a preference for judicial-like procedures by requiring that decisions by

¹³⁹ *Id.*

¹⁴⁰ See discussion *infra* Part II.A.

¹⁴¹ AGREEMENT ON GOVERNMENT PROCUREMENT, *supra* note 137, art. XX, § 5.

¹⁴² *Id.* § 8.

¹⁴³ *Id.* § 6 (emphasis added).

¹⁴⁴ *Id.*

administrative bodies lacking such procedures be subject to judicial review.¹⁴⁵

The GPA is almost silent with regard to meaningful review. It does not require any specific standard of review. It does, however, mandate significant quasi-judicial procedures in the event that the reviewing body is not a judicial forum or subject to judicial review. In those cases, the GPA requires the protestor have a right: to be heard, to have counsel, to have access to all proceedings, to public proceedings, a written decision, and witnesses.¹⁴⁶ Because these requirements are only applicable when there is no judicial review,¹⁴⁷ it would be somewhat easy to circumvent any true meaningful review requirements. For example, a state could set up a protest system where protests were adjudicated by the procurement officer and then reviewed by the courts under a highly deferential standard of review.

Finally, the GPA does, in fact, require meaningful relief. Section seven contemplates a stay.¹⁴⁸ Specifically, it requires that protest procedures must provide for "rapid interim measures to correct breaches of the Agreement and to preserve commercial opportunities" and acknowledges that these measures may result

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* § 6(a)-(g).

¹⁴⁷ *See id.*

¹⁴⁸ *See id.* § 7(a).

in the suspension of the procurement process.¹⁴⁹ The stay, however, is not automatic. Rather, it allows for "overriding adverse consequences" such as "the public interest" to be considered in determining whether a stay should be applied.¹⁵⁰ It also specifically enumerates two kinds of relief. First, it provides for the option of "correct[ing] the breach of the agreement" which would presumably include awarding the contract to the protesting party or requiring the agency to re-compete the contract.¹⁵¹ The GPA also contemplates compensatory damages as a form of relief.¹⁵² The damages, however, are limited solely to bid preparation and protest costs.¹⁵³

The foregoing analysis indicates that while the GPA contains many elements of an effective protest system, it certainly has its holes. The bare-bones requirements of the GPA do not alone form a perfect bid protest forum. Therefore, the

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* Interestingly, the GPA's requirements seem to fall somewhere in between the automatic stay provision applied by the GAO and injunctive relief provided by the Court of Federal Claims. The GPA doesn't seem to contemplate an automatic stay (although it appears to be permissible) because it states that it "may" interrupt the procurement process. However, it also seems to put the onus on the agency to justify a decision not to suspend the procurement decision by requiring written justification of its decision. This is in stark contrast to the CoFC's approach which puts the onus on the *contractor* to show that it will be substantially prejudiced to receive injunctive relief.

¹⁵¹ *See id.* § 7(c).

¹⁵² *Id.*

¹⁵³ *Id.*

GPA should be used only a minimum as to what a state bid protest forums should contain. Not surprisingly, the least effective protest model examined by this Article - Alabama - is not in compliance with the GPA, while the moderately effective and effective systems are. Consequently, states such as Alabama that are not in compliance with the GPA can use it as a means to develop a more efficient bid protest system while also furthering the United States' international obligations.

B. The UNCITRAL Model

The United Nations Commission on International Trade Law has issued a Model Law on Public Procurement that was adopted by the UN on July 1, 2011. The UNCITRAL model was drafted specifically to account for the mandatory provisions provided by the GPA.¹⁵⁴ Therefore, it provides more specific guidance off of which states can model their protest systems while also ensuring compliance with the GPA. This model is an improvement on the minimum requirements of the GPA. However, it still has a number of gaps that need to be addressed. Because many of UNCITRAL's provisions are consistent with the GPA's requirements, this Article's description and analysis of the UNCITRAL model will focus on where it expands on the GPA and on some of its more significant features. It does not, however, attempt to give a

¹⁵⁴ UNCITRAL, *2011- UNCITRAL Model Law on Public Procurement* (last visited Apr. 15, 2013)

comprehensive overview of the UNCITRAL's bid protest requirements.

The protest - or challenge - procedures of the UNCITRAL model are located under Chapter VIII. The UNCITRAL model confers broad standing, allowing "a supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity with the provisions of law" to bring a protest.¹⁵⁵ It envisions three means of review: a protest to the agency itself,¹⁵⁶ a protest to an independent body, or a protest to a judicial forum.¹⁵⁷ In the challenge procedures, UNCITRAL provides for two separate stay provisions. First, when a challenge is brought to the agency, "the procuring entity shall not take any step that would bring into force a procurement contract or framework agreement in the procurement proceedings concerned."¹⁵⁸ This stay may only be overturned with approval of the independent or judicial body when the public interest compels it.¹⁵⁹ Similar procedures apply when a contractor requests review by an independent reviewing body.

¹⁵⁵ UNCITRAL art. 64, § 1.

¹⁵⁶ The UNCITRAL refers to this as an application for reconsideration. UNCITRAL art. 64, § 2

¹⁵⁷ *Id.* § 2.

¹⁵⁸ *Id.* art. 65, § 1.

¹⁵⁹ *Id.* art. 67, § 4.

After it receives an application for review, the independent body may order the suspension of the performance of the contract "if it finds such a suspension necessary to protect the interest of the applicant unless [it] decides the urgent public interest considerations require the procurement proceedings . . . to proceed."¹⁶⁰ The stay is thus not automatic, but the language suggests that the stay should be issued more often than not.¹⁶¹

The UNCITRAL model expands on the GPA's requirements primarily in two respects. First, the GPA is silent as to standing requirements, while UNCITRAL confers broad standing allowing for greater compliance monitoring. This is because there are more private attorneys general who can challenge the lawfulness of the procurement. It is not, however, as broad as the standing conferred in Massachusetts and Alabama, which confer standing to taxpayers. Rather, this compromise appropriately balances the needs for compliance monitoring with efficiency.¹⁶²

Second, the Automatic Stay provision goes beyond the requirements of the GPA, requiring judicial approval before it can be overridden.¹⁶³ This requirement indicates a strong

¹⁶⁰ *Id.* § 3.

¹⁶¹ *See id.*

¹⁶² *See supra* note 24 and accompanying text.

¹⁶³ UNCITRAL art. 67, § 4.

concern about the integrity and effectiveness of the system. Again, however, an element of speed and efficiency is lost. Whether this represents an appropriate compromise will largely depend on how appropriately the independent body applies the "urgent public interest" requirement.¹⁶⁴

While the UNCITRAL model furthers many of the requirements of the GPA, it does not address all of the concerns apparent in the three procurement systems analyzed in Part II. The UNCITRAL model calls for an independent body to review protests. It does not, however, define independence. Thus, it is unclear if whether under the Massachusetts model, for example, the independent protest unit within the AGO would satisfy UNCITRAL's mandate for an independent body. Moreover, the UNCITRAL model does not require a specific standard of review. It simply states that it "may declare the legal rules or principles that govern the subject matter of the application" ¹⁶⁵ Thus, the highly deferential review provided in both the Alabama and Maryland fora would not be in contravention of the UNCITRAL procedures.

Ultimately, the UNCITRAL model provides a more advanced system that states may use as a model. However, because of the gaps described above, this Article advocates that states use the

¹⁶⁴ *Id.* § 3.

¹⁶⁵ UNCITRAL art. 67, § 9.

ABA Model Procurement Code, which both complies with the GPA and adopts provisions similar to that of the UNCITRAL model.

C. The ABA Model Procurement Code (MPC)

The MPC serves as an effective model after which states should model their procurement systems. Not surprisingly, the only state evaluated in this Article as "effective" is the only one that has adopted the MPC. The MPC contains a number of provisions related to bid protests.¹⁶⁶ Protest procedures begin once the agency makes a final decision. After that, a protestor has a right of appeal to an independent procurement board comprised of members appointed by the state governor for six-year terms.¹⁶⁷ An "interested party"¹⁶⁸ must bring the appeal

¹⁶⁶ ABA MODEL PROCUREMENT CODE § 9-101.

¹⁶⁷ *Id.* §§ 90101(5); 9-502(1).

¹⁶⁸ Under the MPC, an interested party must satisfy a "but-for" test. Under this test, if a protestor is not next-in-line to receive the contract, it does not have standing to challenge the contract award. In this regard, it is similar to what a disappointed bidder must claim in order to have a satisfactory property interest in the contract award to sustain a due process claim. See discussion *supra* Part IV.B. For example, in *Appeal of Erk K. Straub, Inc.*, No. 1193 (MSBCA Sept. 11, 1984) - an MSBCA case that the MPC cites as a relevant annotation - the Board held that a sixth lowest bidder could not bring a protest as an interested party because it could not show that it was next-in-line to receive the award even if there contention was correct. Right to Protest, Annotations to Model Procurement Code for St. & Loc. Gov'ts § 9-101(1). Notably, this is significantly narrower than the broad standing conferred by the UNCITRAL model.

within seven days of the agency's final decision.¹⁶⁹ During the appeal, there is an automatic stay that can be overridden by the head of the agency only after making a "written determination that the award of the contract without delay is necessary to protect substantial interests" of the state.¹⁷⁰

The extent of the rules and fact-finding procedures are left open-ended by the MPC, merely requiring that it "adopt rules of procedure [that] . . . will provide for the expeditious resolution of controversies."¹⁷¹ Despite its silence on fact-finding procedures, the MPC is clear with regard to its standard of review. The Board reviews all protests to see if the award was "in accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation."¹⁷² Specifically, it mandates that the protest be reviewed *de novo*, without deference to determinations of administrative officials.¹⁷³ The Board is granted authority to authorize "any

¹⁶⁹ *Id.* 9-506(2)(b).

¹⁷⁰ *Id.* § 9-101(6). This requirement is also narrower than the UNCITRAL procedures. As discussed *supra*, the automatic stay may only be overridden upon judicial or administrative approval. Moreover, it appears to allow for an override in situations less compelling than at the federal level where "urgent and compelling circumstances" must be shown. 31 U.S.C. § 3553(c)(2)(A) (Supp. IV 2010).

¹⁷¹ ABA MODEL PROCUREMENT CODE § 9-503.

¹⁷² *Id.* § 9-506(3).

¹⁷³ *Id.* § 9-506(3)

other relief," including protest and preparation costs.¹⁷⁴

Section 9-510 then provides a right of appeal to a judicial forum.¹⁷⁵

The MPC is a significant improvement on all three states discussed in this Article. It provides an actual forum for adjudicating bid protests, rather than simply having procurement officials decide protests, as is the case in Alabama. It also would provide contractors a vehicle for obtaining real and meaningful relief. It also addresses the major independence concerns in Massachusetts. Instead of having arms of the state - the AGO and OIG - making protest decisions, there would be an independent body empowered to do so. Moreover, it would provide a stronger remedy - avoiding the need for the AGO to go to court to enforce its decisions. In addition to providing these benefits, it would also preserve the speed, efficiency, and expertise that the AGO and OIG provide.

Maryland may benefit the most from *full* adoption of the MPC. Maryland has adopted the MPC, and therefore a significant portion of Maryland's system is already in compliance with the MPC.¹⁷⁶ It has similar timeliness requirements and requires that

¹⁷⁴ *Id.* § 9-101(7).

¹⁷⁵ *Id.* § 9-510.

¹⁷⁶ Baker, *supra* note 19, at 298; Livingston & Hoover, *supra* note 71, at 2.

contractors first attempt to resolve disputes with the agency.¹⁷⁷ Moreover, the MSBCA is precisely the type of independent procurement board that the MPC envisions, handling both contract formation and performance issues. The only significant difference between Maryland and the MPC is the standard of review. Unlike Maryland's arbitrary and capricious standard, the MPC calls for a *de novo* review of an agency's decision. Maryland can increase the meaningfulness of the review simply by adjusting its standard of review, consequently enhancing accountability, integrity, and independence.

In additions to the improvements made on the individual procurement systems, universal or near-universal adoption of the MPC's bid protest regime also provides significant advantages that reach beyond state and local governments. As national vendors enter state and local markets, they are going to compete in more than one state. Adopting uniform laws would "simplify[y] the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state" ¹⁷⁸

¹⁷⁷ See COMAR 21.10.02.02.

¹⁷⁸ *Frequently Asked Questions*, UNIFORM LAW COMM'N, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visted Mar. 31, 2013). It is worth noting that the ULC is not the author of the MPC. Nevertheless, the principle of uniformity is equally applicable here.

Moreover, a uniform approach to bid protests would allow the states to draw from each other's legal precedent. For example, the MSBCA currently relies on federal decisions for authority when it confronts a novel issue. Were all fifty states (or a significant number of them) to adopt a uniform approach to bid protests, it would quickly expand the expertise in this area and, more importantly, lead to greater predictability across all fifty states in bid protests. This increased predictability will further legitimize all protest systems, fostering integrity, compliance, and ultimately competition.

IV. Conclusion

As all levels of government continue to cut spending and budgets become more strained, competition for state and local contract awards will become increasingly more competitive. Consequently, it is now more important than ever for states to implement effective bid protest systems. While it is uniformly recognized that a bid protest system is a necessary component to any procurement system, states are inconsistent in their approaches to evaluating these challenges. Currently, the effectiveness of each protest system varies, ranging from almost non-existent to meaningful and complex. There are a number of models that states may use as models for reform, including the

federal approach and international prototypes such as the UNCITRAL model and the GPA. While international models provide a baseline for states to aim for, states should go beyond these requirements and adopt the MPC. This will improve the effectiveness of these systems and increase uniformity across the country, allowing vendors to more easily compete in different jurisdictions. As the process becomes uniform and simplified, more contractors will compete at the state level, ultimately creating lower-cost, higher-quality goods and services for state governments.

ATTACHMENT 6

Updating the ABA's Model Procurement Code: UNCITRAL and EU Gap Fillers and Structuring a Revisionary Body

Paul Metzner
4/02/2013

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I. The Development of the Model Procurement Code

The American Bar Association (“ABA”) promulgated the Model Procurement Code (“MPC”), in 1979, to provide States with a source to rely on for fundamental principles for a “durable procurement system.”¹ These fundamental principles include: “competition, ethics, predictability, a clear statement of procurement needs, equal treatment of bidders and offerors, methods of source selection, bid and proposal evaluation, reduction in transaction costs for public and private sector entities, procurement of construction related services, remedies, and (after a deep breath) facilitation of intergovernmental transactions.”² Efficient and cost effective procurement system depends on these principles detailed in the MPC; and although the MPC’s fundamental principles remain relevant today, the electronic age revolutionized new procurement methods, leaving the 1979 MPC regulations outdated.

In response to the technological challenges of the 1979 MPC, the ABA adopted the 2000 ABA Model Procurement Code for State and Local Governments (“2000 MPC”), which sought to modernize the regulations of the MPC. The 2000 MPC focused on 1) reduction of transaction costs for governmental and private suppliers of goods and services; 2) increase in competition through improved electronic communication; 3) use of new competitive technologies, new ways of performing, and new methods of project delivery.³

The 2000 MPC developed through utilization of a reporter system that focused on updating the MPC to reflect its established basic principles with modern improvements.⁴ Under the reporter system, two reporters, a Steering Committee, and Section Councils, each comprised of national experts in state and local procurement, communicated in a revisionary process that occurred substantially over the World Wide Web.⁵ The Reporters recommended changes, the Section Councils debated on the changes, and the differences between the Section Councils were resolved by the Committee.⁶ Once the Section Councils resolved their differences, the ABA’s House of Delegates adopted the 2000 MPC.⁷

At the August, 2002 ABA Annual Meeting, the Council of the Section of Public Contract Law⁸ and the Council of the Section of State and Local Government Law adopted resolutions approving the 2002 Recommended Regulations to the MPC, urging State and local government consideration of the

¹ The American Bar Association, The 2000 Model Procurement Code Recommended Regulations for State and Local Governments, (the background information on the MPC is located in the index to the Introduction to the 2002 Regulations) (henceforth Recommended Regulations).

² *Id.* at iv-v.

³ *Id.* at v.

⁴ *Id.* at vii.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ A specialty group within the ABA that focuses on the area of public contract law. “Section of Public Contract Law,” http://www.americanbar.org/groups/public_contract_law.html (March 17, 2012).

2002 Recommended Regulations.⁹ Unlike the ABA’s 2000 MPC, which the 2002 Recommended Regulations are designed to implement, the 2002 Recommended Regulations were not approved by the ABA’s House of Delegates, which is the policymaking body of the ABA.¹⁰ Therefore, the 2002 Recommended Regulations are not considered the policy of the ABA.¹¹

In 2007, the ABA then separately published a version of the MPC called the Model Code for Public Infrastructure and Procurement (“MC PIP”). The MC PIP is a condensed version of the 2000 MPC that focuses mainly on new methods of infrastructure development.¹² Despite its valiant attempts to fit the needs of state and local governments, the ABA’s Model Procurement Code grew outdated and causing several gaps to emerge in areas of procurement left unregulated by the MPC.

In an age of constant technological change and evolving contract structures, the Model Procurement Code must adapt to provide a legitimate source of procurement policy for States. This paper identifies the potential solutions for updating the MPC in regard to two of the unregulated gaps in the MPC: Indefinite Delivery Indefinite Quantity Contracts (“IDIQ contracts”) and Electronic Reverse Auctions. This paper will also conjecture that two parallel model regulations, the United Nations Commission on International Trade Law’s (“UNCITRAL”) Model Law on Public Procurement and the European Union’s (“EU Directive on Public Procurement”) Directive 2004/18/EC On the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, will provide possible examples of updating the MPC. Lastly, this paper proposes a method of structuring a governing body to continually update and revise the MPC.

II. UNCITRAL and the European Union

The United Nations General Assembly passed a resolution in 1966 establishing the United Nations Commission on International Trade Law (UNCITRAL)¹³ with a mandate to “modernize and harmonize the law of international trade.”¹⁴ UNCITRAL considered several topics for its work programme to carry out its mandate; not surprisingly, procurement became one of those topics. Under the work programme, “working groups”¹⁵ are assigned specified topics from which they form draft texts.¹⁶ If the draft text is to be a model law, UNCITRAL can finalize the text and formally adopt it at its annual session.¹⁷ Working groups also meet in separate sessions to discuss, of many things, changes to update

⁹Recommended Regulations *supra* at ii.

¹⁰ *Id.*

¹¹ *Id.*

¹² The American Bar Association, *2007 Introduction to Model Code for Public Infrastructure Procurement*, available at <http://meetings.abanet.org/webupload/commupload/PC500500/relatedresources/5IntroductionToModelCodeforPublicInfrastructureProcurement.pdf> (This introduction provides a short summary on the history of the MPC and overview of the Model Code for Public Infrastructure Procurement).

¹³ UNCITRAL, *A Guide to UNCITRAL Basic Facts About the United Nations Commission on International Trade Law*, (United Nations, 2013), available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>. [hereinafter *A Guide to UNCITRAL*].

¹⁴ *Id.* at 13.

¹⁵ Working group I promulgated the Model Law on Public Procurement. *Id.* at 18.

¹⁶ *Id.*

¹⁷ *Id.*

regulations and make the law more uniform.¹⁸ These sessions are an integral part of keeping the Model Law provisions effective and up-to-date.

The European Community, established after the Second World War, promoted economic cooperation as a means of ensuring peace and prosperity in Europe.¹⁹ The European Community which operates according to the EC Treaty is now the "first pillar" of the broader European Union.²⁰ The "Commission of the European Communities." is the applicable body of the EU in charge of proposing and enforcing legislation.²¹

The Commission recognized that restrictive behavior in the area of public procurement created a barrier to free flow of trade between Member States.²² So in 2004, the Commission passed Directive 2004/18 (the Public Procurement Directive).²³ EU Directives are legislation that compels Member States of the European Union to conform their laws to those in the Directive.²⁴ The EU is endowed with the power to make and enforce directives against member states,²⁵ making the EU Directive an effective tool for harmonizing procurement law. The EU Directive on Public Procurement seeks to apply the basic principles of equal treatment, non-discrimination, and transparency to Member-States procurement policies.²⁶

Together, the EU Directive on Public Procurement and the UNCITRAL Model Law provide a comprehensive anthology on procurement regulations.²⁷ The next two sections of this paper consider the dangers associated with unbridled use of IDIQ/reverse auctions and how the EU/UNICTRAL models work to prevent those dangers from being realized.

¹⁸ *Id.* at 8.

¹⁹ Sue Arrowsmith & Jessica Tillipman, *Reform of the UNCITRAL Model Law on Procurement*, (Thomas Reuters 2010), 145.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 146.

²³ *Id.*

²⁴ European Commission, *What Are EU Directives?*, http://ec.europa.eu/eu_law/introduction/what_directive_en.htm (accessed March 15, 2013).

²⁵ The Treaty on the Functioning of the European Union [2012] OJ C326/171.

²⁶ John Grayston & Peter Trepte, *International Public Procurement A Guide to Best Practice*, Roberto H. Garcia ed. (Globe Business Publishing Ltd 2009), 36.

²⁷ Another international regulation that could be a source for updating the MPC regulations is the World Trade Organization ("WTO") Agreement on Government Procurement ("GPA"). The WTO designed the GPA to promote free flow of trade between countries by covering such areas as non-discrimination and national treatment of vendors with respect to procurement of goods; transparency and the process of procurement, ensuring adequate competition; accession of new parties to the agreement; and an agenda for improving the Agreement. World Trade Organization, *Government Procurement: General Overview*, http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm, (accessed March 30, 2013).

III. The First Gap: IDIQ Contracts

Indefinite Delivery/Indefinite Quantity Contracts (“IDIQ”) are umbrella contracts formed between an agency and several preferred contractors.²⁸ These agreements outline the terms and conditions under which a government agency may procure goods or services.²⁹ The umbrella contract is typically managed by a single agency, and is available for use by other agencies.³⁰ Contractors within an industry compete to be a party to the umbrella contract, and when selected, become one of many contractors that are qualified to perform the work specified in the contract.³¹ The contractors preselected under the umbrella contract will then compete for work in a secondary competition under a contract known as a task order or delivery order.³²

IDIQ contracts are highly attractive because the procuring agency bears fewer costs than when using other contracting methods,³³ this temptation of cutting transaction costs can lead to administrative loss from overuse. Administrative costs are relatively low in IDIQ contracts, because after the umbrella agreement is set, goods and services may be procured pursuant to that agreement with significantly less notice or process, and often with “very little risk of accountability.”³⁴ As Christopher Yukins, a leading expert in government procurement, suggests:

[C]ontracting officials choose IDIQ contracts over other methods even when those more traditional contracting methods would provide a better outcome. Thus, IDIQ contracts... distort the procurement market in an inefficient way, by drawing purchases that should, in a properly functioning procurement market, be made by other means.³⁵

There arises yet another danger of IDIQ contracts with respect to full and open competition, when procuring agencies bundle their requirements under one master agreement. Smaller businesses struggle to compete when they do not have the resources to provide the range of services under the packaged procurement.³⁶ As a result, this bundling effect under the umbrella agreement may result in an unreasonable restriction of competition.

The dangers facing the use of IDIQ contracts provide an incentive for the ABA to adopt MPC provisions to guide State procurement away from IDIQ contract dangers. The 2000 MPC is silent on IDIQ contracts and the 2002 MPC Regulations provide little guidance for IDIQ contract use, thus creating a gap in the MPC. The UNCITRAL Model Law and the EU Directive both identify potential ways of updating the MPC to include IDIQ contracts.

²⁸ IDIQ contracts and framework agreements are synonymous. The term framework agreement is used in the international spectrum, and will be used when referencing the UNCITRAL Model Law and EU Directive.

²⁹ Danielle M. Conway, *State and Local Government Procurement*, (American Bar Association, 2012), 96.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Christopher R. Yukins, *Are IDIQs Efficient? Sharing Lessons With the European Framework Contracting*, Pub. Contract L.J. 545, 547 (2008).

³⁴ *Id.*

³⁵ *Id.* at 548.

³⁶ Conway, *supra* note 29, at 96.

A. Conditions for Use Clause

By limiting the circumstances under which a procuring agency may use a framework agreement, the “conditions for use” clause combats problems of overuse. The UNCITRAL Model Law clause provides that “a procuring [agency] may engage in a framework agreement procedure ... where it determines that:” the subject matter of the procurement is going to arise on an indefinite or repeated basis during a specific period of time; or when the procurement need is expected to arise on an “urgent basis.”³⁷ Relatively standard items or services such as office supplies, and janitorial services fall into this first category; while, procurement in response to emergency circumstances such as, natural disasters and pandemics fall under this second category.³⁸ Given the observed risks of overuse, this clause also requires that the procuring agency establish and report the justifications for using a framework agreement.³⁹ Interestingly, the EU Directive overlooks this elementary procurement clause, and for various policy reasons, neglects to limit framework agreements to a particular use.⁴⁰ Nevertheless, the “conditions for use clause” is essential in guiding State away from framework agreements (IDIQ contracts) overuse.⁴¹

B. Open vs. Closed Framework Agreements

The beginning of Chapter VII of the UNCITRAL Model Law addresses the dichotomy between open and closed framework agreements. In an open framework agreement, the agreement remains essentially “open” so that new suppliers and contractors may become a party to the agreement at any time during the operation of the agreement.⁴² In allowing new parties to become members of the agreement there is less risk that competition will be restricted.⁴³ And all that is required at the initial agreement stage is that the contractor or supplier be responsive and qualified.⁴⁴

In contrast, under a closed framework agreement a supplier or contractor may not join the agreement after it has been concluded.⁴⁵ Closed framework agreements can either be between a single or

³⁷ UNCITRAL Model Law on Public Procurement, art. 32 G.A. Res. 2205 (XXI), Annex, U. N. GAOR, 66th Sess., Supp. No. 17, U.N.Doc. A/66/17 (Jul. 1, 2011). [hereinafter UNCITRAL Model Law].

³⁸ *Guide to Enactment UNCITRAL Model Law on Public Procurement*, page 207, available at <http://www.uncitral.org/pdf/english/texts/procure/ml-procurement-2011/pre-guide-2012.pdf> (“Recent model laws completed by UNCITRAL have been accompanied by a “guide to enactment” setting forth background and other explanatory information to assist Governments and legislators in using the text. The guides include information that would assist States in considering what, if any, provisions of the model law might have to be varied to take into account particular national circumstances, information relating to discussions in the working group on policy options and considerations, and matters not addressed in the text of the model law that may nevertheless be relevant to the subject matter of the model law.”) [hereinafter Guide to Enactment].

³⁹ *Id.* at 208.

⁴⁰ Under the EU prerogative “...such matters should not be addressed at all in regulatory provisions. The EC directive does not deal with them simply because they are matters for Member States to address in the context of their own national policies. Arrowsmith & Tillipman, *supra* note 19, at 161.

⁴¹ Yukins suggests that overuse is a rampant side effect of framework agreements, that framework agreements are “being used... not to make procurement more efficient, but rather to bypass the procedural steps required by law.” Yukins, *supra* note 33, at 547-548. (The EU Directive on Public Procurement was designed to knock down barriers to free trade in the procurement of goods and services. However, by not creating a policy on the use of framework agreements, the EU Directive allows Member States to create barriers through these framework agreements.)

⁴² UNCITRAL Model Law *supra* note 27, art. 59, 60.

⁴³ Yukins, *supra* note 33, at 568

⁴⁴ Guide to Enactment, *supra* note 28, at 198.

⁴⁵ *Id.* at 201.

multiple contractors.⁴⁶ These agreements effectively restrict maximum competition by limiting competition to only those contractors that are parties to the agreement. And not only is competition limited, but procuring agencies may use this lockout effect to favor one contractor over others.⁴⁷ The UNCITRAL Model Law attempts to release this restrictive effect by requiring that closed framework agreements have a maximum duration and be re-opened upon subsequent purchases.⁴⁸ Favoritism is further quelled with the requirements of open tendering⁴⁹ and significant competition at the initial stage of the agreement.⁵⁰ The transparent nature of open tendering⁵¹ coupled with a fair competitive process, mitigates the chance that a procuring agency will resort to favoritism.

The most obvious difference between the UNCITRAL Model Law and the EU Directive is the EU's exclusion of an open framework agreement. The EU Directive only distinguishes between single award contracts and multiple award contracts. Under the single award, only the terms of the framework agreement apply, and only a single contractor is awarded the contract; whereas, under the multiple award contracts, the second stage of competition is based on the framework agreement⁵² and there must be at least three contractors, or at least enough competition to satisfy the selection criteria.⁵³ For multiple award contracts in the second stage of competition, contracts are awarded based on the terms in the initial framework agreement, or when there are undefined terms, using more precisely formulated terms in the second stage procurement.⁵⁴ The procuring agency must consult the parties that are capable of performing the agreement, fixing the time for solicitation of a bid sufficiently long to allow for the submission of tenders.⁵⁵ The time limit is based on such factors as complexity of the contract and time needed for the tender.⁵⁶ The tender shall be submitted in writing, and the contract is awarded based on the criteria set out in the specifications of the framework agreement.⁵⁷

The EU Directive establishes a time limit of four years for framework agreements, except for in “exceptional cases duly justified, in particular by the framework agreement.”⁵⁸ The four year limit is a rigid standard; and the obvious reason for this standard is that the EU Directive does not allow for open framework agreements. Thus, the shorter contract duration alleviates the restrictive nature of the closed framework agreement, which squeezes out competition.⁵⁹

Where the EU Directive provides a rigid standard, the UNCITRAL Model Law allows for some flexibility providing that only set duration should be included when the procuring agency awards a

⁴⁶ UNCITRAL Model Law, *supra* note 37, art. 59(1)(d).

⁴⁷ Yukins, *supra* note 33,

⁴⁸ UNCITRAL Model Law, *supra* note 37, art. 59(1)(a).

⁴⁹ *Id.* art. 58(1)(a).

⁵⁰ Guide to Enactment, *supra* note 38, at 198.

⁵¹ An invitation to tender in open tendering shall be published in the publication identified in the procurement regulations. UNCITRAL Model Law, *supra* note 27, art. 33(1).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Yukins, *supra* note 33, at 557.

procurement contract with a second stage of competition.⁶⁰ Similar to the conditions for use clause, a clause limiting the time frame of a contract hampers the potential for unbridled use of framework agreements. The threat of overuse arises from the quest for efficiency, and procuring agency may find it seemingly efficient to continue outdated contracts and skirt the procurement process avoiding transaction costs. In promulgating the Model Law, Working Group I immediately recognized this dilemma. The Guide to the Enactment of the Model Law on Public Procurement, in reference to the duration provision, provides that the agreement should not be excessive, so as to allow for new technologies and solutions.⁶¹

C. Procedures for Invitation to IDIQ contracts.

The invitation to become a party under the UNCITRAL framework agreement must include all of the information contained in the framework agreement, including the terms and conditions relating to the procedures the agency will use to evaluate the submission and if the procuring agency decides to limit competition, the reasons for limiting.⁶² In contrast to the terms and conditions of the UNCITRAL agreement, the EU agreement must be concluded between a minimum of three suppliers or contractors, or as many as it takes to satisfy the award criteria.⁶³ While, the EU Directive does not anticipate procuring agencies placing a limit on competition, stating a minimum amount of competition may in fact result in the equivalent competition stimulating outcome.

UNCITRAL recognizes that a comprehensive solicitation diminishes surprise on the part of the contractor. As a result, the procuring agency shall respond to contractor submissions in accordance with aforementioned procedures set out in the invitation, and must issue prompt notification of acceptance of a party, and if not accepted, the reasons for rejection.⁶⁴ Similarly, under the EU Directive the procuring agency must specify in the initial contract notice, the weighting of criteria for determining the most economic advantageous tender.⁶⁵ Contracting agencies must also provide prior notice of the information contained in the framework agreement by sending the EC Commission the required information or publishing the information on their buyer profiles.⁶⁶ With these procedures in place, contractors will be more willing to participate because the transparency eliminates the risk associated with competing. This improved competition will inevitably lead to procuring a better price.

⁶⁰ *Id.* art 61(1)(a).

⁶¹ Guide to Enactment, *supra* note 38, at 221.

⁶² UNCITRAL Model Law, *supra* note 37, art. 60(3)(d).

⁶³ Council Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/137 art. 32(4) (hereinafter EU Directive).

⁶⁴ *Id.* art 60(8).

⁶⁵ *Id.* art. 53 (2); *Id.* art. 53(1). ("[W]hen the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.")

⁶⁶ "Publication of complementary or additional information (a) Contracting authorities are encouraged to publish the specifications and the additional documents in their entirety on the Internet. (b) The buyer profile may include prior information notices, . . . information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as a contact point, a telephone and a fax number, a postal address and an e-mail address." EU Directive, *supra* note 38, annex VIII.

D. Public Notice

Framework agreements are prone to overuse,⁶⁷ the UNCITRAL Model Law restrains this abuse by requiring that the framework agreement state the procedures and criteria used in the second stage of competition, and if those procedures and criteria are relatively varied, the agreement shall provide a permissible range.⁶⁸ The scope of the second stage of competition is, therefore, tied to the initial framework agreement. This clause compels procuring agencies to enter into subsequent framework agreements, instead of recycling an overly broad agreement for subsequent procurements.

Additionally, throughout the life of the framework agreement the contracting agency shall “republish at least annually the invitation to become a party to the open framework agreement and shall in addition ensure unrestricted, direct and full access to the terms and conditions of the framework agreement and to any other necessary information relevant to its operation.”⁶⁹ Upon award of the framework agreement or procurement contract the procuring agency shall publicize the names of the suppliers or contractors awarded the contracts.⁷⁰ By allowing full access to all the information relevant to the operation of the agreement these provisions enhance the transparency of the framework agreement.

The EU also requires notice for the results of awarding the framework agreement; however, notice is not required for awarding subsequent contracts based on the agreement.⁷¹ Not only must contracting agencies provide notice of award of the framework agreement, but they must also, as soon as possible, inform submitting suppliers or contractors about the conclusion of the agreement and the reasons and basis for its decision not to select a particular candidate.⁷² Upon request, the contracting agency may provide a submitting supplier or contractor with information regarding any unsuccessful submission regarding the reason for rejection, and the characteristics and advantages of any successful submission, as well as the identity of the successful submission or the parties to the framework agreement.⁷³

E. Estimating Total Value of Procurement

Estimating the total value of the framework agreement is necessary for contractors or suppliers to keep an adequate amount of stock and ensure security of supply.⁷⁴ For UNCITRAL, the procuring agency shall include “the estimated maximum total value... of all procurement contracts envisaged under a framework agreement over its entire duration, taking into account all forms of remuneration.”⁷⁵ The EU Directive similarly states that the value of a framework agreement is the combined “maximum estimated value net of VAT”⁷⁶ of every contract that arises within the framework agreement.⁷⁷ The “estimated total

⁶⁷ Yukins *supra* note , at 548.

⁶⁸ UNCITRAL Model Law, *supra* note 37, art. 61(1)(f).

⁶⁹ *Id.* art. 61(2).

⁷⁰ *Id.* art. 23.

⁷¹ *Id.* art. 35(4).

⁷² *Id.* art. 41(1).

⁷³ *Id.* art 41(2).

⁷⁴ Guide to Enactment, *supra* note 28, at 70.

⁷⁵ UNCITRAL Model Law, *supra* note 37, art. 12(2).

⁷⁶ “The Value Added Tax, or VAT, in the European Union is a general, broadly based consumption tax assessed on the value added to goods and services. It applies more or less to all goods and services that are bought and sold for use or consumption in the Community. *Taxation and Customs Union*, http://ec.europa.eu/taxation_customs/taxation/vat/how_vat_works/ (March 15, 2013).

value” of the framework agreement, must be published as soon as the framework agreement is approved.⁷⁸

F. Second Stage of Competition Procedures

This second stage of competition shall follow the terms and conditions of the initial framework agreement and the award of which may only be given to the parties to the framework agreement.⁷⁹ The procuring entity will simultaneously present a written invitation to all parties to the framework agreement or to those parties capable of fulfilling the requirements of the procurement.⁸⁰ The invitation shall include: restatement of terms and conditions of the framework agreement, and the terms and conditions of the second stage procurement; restatement of the procedures and criteria for award; the time, place, and manner of submission; the manner in which the submission price is to be formulated and expressed, and whether it encompasses elements other than cost of the procurement itself; the name, title, and address of contracting officers authorized to communicate on behalf of the procuring agency; and notice of the right to challenge or appeal decisions or actions taken by procuring agency that are not in compliance with this law.⁸¹ Adding to this list of requirements, the EU Directive establishes that the procuring agency shall allot a sufficiently long time for submissions for the solicitation; the time shall be based on such factors as complexity of the contract.⁸²

G. Amending the IDIQ contract

Article 63 expressly prohibits any amendments or changes to the “subject matter” of the framework agreement during the life of the agreement, while allowing changes to other terms and conditions of the procurement, including criteria and procedures for awarding second stage procurement contracts.⁸³ This article allows for some flexibility in changing the terms and conditions of the framework agreement; however, “a change would not be acceptable if it effectively led to a change in the description of the subject matter for the procurement.”⁸⁴ Again, this clause is a sufficient restraint on overuse.

The above UNCITRAL Model Law clauses are fundamental for proper functioning framework agreement. A combing of each provision reveals a theme of open process and advanced publication that promotes accountability and competition. Most of the UNCITRAL Model Law clauses combat the problems facing IDIQ contracts.

Under the EU Directive, there should be no substantial amendments to the terms laid out in the framework agreement.⁸⁵ Despite the difference in wording, the EU Directive language is commensurate with that of the UNCITRAL Model Law’s “no change to the subject matter of the agreement” language.

⁷⁷ EU Directive, *supra* note 63, art. 35(1); *Id.* art. 9.

⁷⁸ *Id.*

⁷⁹ UNCITRAL Model Law, *supra* note 37, art. 62.

⁸⁰ *Id.*; Similarly, the EU Directive provides that “for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract.” EU Directive, *supra* note 38, art. 32(4)(a).

⁸¹ UNCITRAL Model Law, *supra* note 37, art. 62.

⁸² EU Directive, *supra* note 38, art. 32(4)(b).

⁸³ *Id.* art. 63.

⁸⁴ Guide to Enactment, *supra* note 38, at 226.

⁸⁵ EU Directive, *supra* note 63, art.

As aptly considered under the analysis of the UNCITRAL Model Law clause, the EU clause will also seemingly negate the dangers of overusing framework agreements.

The comprehensive international regulations outlined above identify the framework from which the ABA can adopt MPC provisions on IDIQ regulations. While it should be noted that ABA can utilize the U.S. Federal Acquisitions Regulations (“FAR”) as a potential source for updating the MPC on IDIQ regulations, the FAR cannot also be used as a source for reverse auction provisions. The FAR contains no federal regulations on reverse auctions. A United States source for reverse auction provisions exists in the Defense Logistics Acquisition Directive which is a supplement to the FAR that establishes the Department of Logistics Agency’s (“DLA”) policies regarding procurement.⁸⁶ However, the deficiency of a federal regulation on point necessitates the utilization of the UNCITRAL Model Law and the EU Directive on Public Procurement to identify possible solutions for implementing a reverse auction regulation.

IV. Second Gap: Electronic Reverse Auctions

In electronic reverse auctions a procuring agency solicits bids from multiple suppliers of products or services, the suppliers then bid the price down.⁸⁷ This process is driven by the suppliers who must determine how low to bid, while still making a profit.⁸⁸ These competitive auctions are usually held online, through third party service providers that host the auction and allow bidders to compete in real time.⁸⁹ The procuring agency will then select the bidder who has made the lowest responsive and responsible bid.⁹⁰ Throughout this process, the bidders’ prices are displayed electronically to the public.⁹¹ Based on this process electronic reverse auctions greatly improve the procuring agency’s ability to receive the best price

Electronic reverse auctions have recently emerged as an extremely popular procurement tool. At its very inception in the U.S., reverse auctions saved government agencies millions.⁹² Regardless of this fact, there is still hesitation for implementation of regulations to govern these thrifty reverse auctions.

The frugality of reverse auctions does not occur without collateral consequences. For instance, where a procuring agency holds an auction based on price, and awards the contract based on evaluation of several other features of the supplier or contractor, the procuring agency may fail to provide adequate

⁸⁶ DLAD1.101 (2013) *available at* http://farsite.hill.af.mil/reghtml/regs/other/dlad/part52.htm#P5438_460492.

⁸⁷ Conway, *supra* note 15, at 102.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² “Federal and state governments were relatively quick to try the emerging reverse auction models. In 1999, the State of Pennsylvania claimed millions in savings using the services of Pittsburgh-based FreeMarkets Inc. The Federal Government got involved the next year, when the Naval Supply Systems Command in Mechanicsburg, Pennsylvania, used a fifty-one-minute online reverse auction to award a \$2.375 million contract for 756 recovery sequencers used in aircraft ejection seats, reporting a 28.9 percent savings over historical prices. Later that month, the army reported 50 percent savings from another auction. By many accounts, the Government was saving millions, although critics were visible as well.” Daniel B. Volk, *A Principles-Oriented Approach to Regulating Reverse Auctions*, 37 Pub. Contract L.J. 127, 129 (2007).

transparency.⁹³ Problems with Overuse arise where procuring agencies use reverse auctions when other procurement methods would be more effective. Overuse may result from the attractive thrill of seeing the price on procurement drop or from the overall ease of using the auctions. Reverse auctions may also cause barriers to competition if they are used for too complex of contract.⁹⁴ Using a reverse auction when the contract is too complex may serve as a barrier to competitors.⁹⁵

When the government contracts with entrepreneurial governmental agency to host reverse auctions there is the threat that these third parties may influence the auctions trying to advance their own agenda.⁹⁶ They may become more concerned with administrating the next procurement contract, instead of using the most effective procurement technique. Hosting contractors, separate from governmental agency contractors, may also gain an unfair advantage over other competition, because of their access to competitor information.

Another danger, commonly referred to as the “winner's curse,” occurs when winning bidders find that, in the heat of a competitive auction being conducted in real time, they have gone too far in attempting to secure or retain the buyer's business.⁹⁷

UNCITRAL and the EU envisaged that these dangers would inevitably crop up with reverse auction use.⁹⁸ As a result, both international organizations’ drafted their respective regulations with an eye toward preventing these dangers. These regulations can equally aid in updating the MPC, which currently lacks a provision on reverse auctions.

A. Conditions for Using Reverse Auctions

The electronic reverse auction process thrives on the participation of numerous contractors to drive price down. In order for contractors to submit a bid to drive down costs, they need to ascertain the cost of completing the subject matter of the procurement. Under the UNCITRAL Model Law, a procuring entity may only use an reverse auction when: (a) the subject matter of the procurement is easily defined in detail, (b) a ready market of qualified suppliers and contracts ensures effective competition, (c) and the criteria for evaluating a successful submission are quantifiable and can be expressed monetarily...” Without these details, contractors are left to speculate on each bid. Some may bid unrealistically low causing the “winner’s curse,” and others, more hesitant to participate in the auction process, would not compete at all. Procuring agencies avoid dangers like the winner’s curse by providing the bidder with more information.

⁹³ “While the only variable the auction involves is price, the low bidder does not necessarily win. Under this solicitation, the agency has the auction facilitator, FedBid, rank the bidders by price and then submit that ranking to the purchasing agency. The purchasing agency will then award the contract on the basis of “price, technical capability, delivery, and past performance.” *Id.* at 135.

⁹⁴ Christopher R. Yukins, Don Wallace, *UNCITRAL Considers Electronic Reverse Auctions, as Comparative Public Procurement Comes of Age in the U.S.* (2005) *Public Procurement Law Review*, Forthcoming, 25. available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=711847.

⁹⁵ *Id.* at 25-26.

⁹⁶ *Id.*

⁹⁷ Volk, *supra* note 92, at 137.

⁹⁸ D. Wallace, C. Yukins, and J. Matechak, *UNCITRAL Model Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Contracts*. *The Procurement Lawyer*, Vol. 40, No. 2, (Winter 2005), 2. available at <http://ssrn.com/abstract=711401>.

The three conditions for use not only protect the value of reverse auctions, they also protect against the threat of overuse. Allowing for electronic reverse auctions only in those circumstances in which the three aforementioned conditions are met, prevents procuring agencies from using reverse auctions in place of more effective procurement methods.

B. Invitation to Submit a Bid

The invitation to submit a bid must include the name and address of the procuring agency; a detailed description of the subject matter of the procurement; criteria and procedures used for qualifying suppliers and contracts; criteria and procedures for evaluating bids; date and time of the opening of the auction and requirements for identifying bidders; the name of officers or employees authorized to communicate on behalf of the procuring entity; and notice of the right to challenge award of the contract.⁹⁹ Adding to this list, the EU Directive provides that the invitation to an electronic reverse auction must state: (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages; (b) limitations on values; (c) the information provided during the course of the electronic auction and when that information is available; (d) the relevant information concerning the electronic auction process; (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will be required when bidding; (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.¹⁰⁰ Also, the invitation must state: a fixed date and time for closing the auction; the time allowed to lapse after receiving the last submission before closing the electronic auction, if no new prices or values that meet the requirements of the solicitation are submitted; and if all of the phases in the auction are completed, in which the phases are fixed in the invitation, the invitation must state the timetable for every phase in the auction.¹⁰¹

C. Evaluation of Initial Bid

The UNCITRAL Model Law gives the procuring agency discretion in determining whether an examination or evaluation of the initial bid is warranted before the reverse auction. The procuring agency shall promptly, after the completion of the examination or evaluation of initial bids, provide the notice and reason of rejection of a supplier or contractor. To contractors or suppliers whose bid is responsive, the agency shall provide an invitation with the information needed to participate in the auction; and each invitation must also include the outcome of that supplier or contractor's evaluation.¹⁰² The reverse auction is based on price, where the contract is awarded based on the lowest-price bidder, and where the contract is based on price and other criteria, the auction is awarded to the most advantageous bidder.¹⁰³

The EU Directives diverge from UNCITRAL with respect to initial evaluations of a bid. Under the Directive, initial evaluations are mandatory and are based on set criteria with fixed weighting.¹⁰⁴ Once evaluated, admissible tenders are immediately invited to submit a new price.¹⁰⁵ These invitations are composed of all the relevant information about the electronic equipment being used and the date and time

⁹⁹ UNCITRAL Model Law, *supra* note 37, art. 53(1).

¹⁰⁰ EU Directive, *supra* note 63, art. 54(3).

¹⁰¹ *Id.* art. 54(7).

¹⁰² UNCITRAL Model Law, *supra* note 37, art. 53(4).

¹⁰³ *Id.* art. 56(1).

¹⁰⁴ EU Directive, *supra* note 63, art. 54(4).

¹⁰⁵ *Id.*

the reverse auction will commence¹⁰⁶. However, the procuring agency must wait at least two days after sending invitations to start the reverse auction.¹⁰⁷

Moreover, a full evaluation is required when the procuring agency awards the contract to the most “economically advantageous tender” in accordance with Article 53(2).¹⁰⁸ The ensuing invitation must then state the formula for determining automatic rerankings for submitted new prices or values.¹⁰⁹ The formula encompasses the weighting of all fixed criteria to ascertain the most “economically advantageous tender,” as indicated by the contract notice or the specifications, and any ranges must be reduced to a specified value beforehand.¹¹⁰ By disclosing the criteria and the set formula used in evaluating a supplier or contractor beyond price, the EU Directives provide for transparency within the reverse auction.

D. Maximum Limit of Suppliers or Contractors

The procuring agency may impose a limitation on the maximum amount of suppliers or contractors that may be registered under the electronic reverse auction.¹¹¹ However, it must state the reasons and basis for limiting.¹¹²

E. Phase Preceding the Award of the Procurement Contract

When an electronic reverse auction is to be used as a phase in the procurement process, the procuring agency must inform the competing parties an auction will be held during the procurement process, and must provide: the formula used to evaluate each bid under the auction and appropriate information about the auction, including how the parties may access the auction.¹¹³

F. Registration for the Electronic Reverse Auction

The deadline and requirements to register for the reverse auction must be included in the invitation.¹¹⁴ Confirmation of acceptance into the reverse auction must be promptly communicated to each supplier or contractor.¹¹⁵ If the number of contractors registered under the electronic reverse auction is insufficient for effective competition, the auction may be cancelled; and this must also be communicated promptly to registered parties.¹¹⁶ The time between the issuance of an invitation and the commencement of the auction must be long enough to allow the parties to prepare for the auction.¹¹⁷

G. Requirements during the Auction

The UNCITRAL Model Law and the EU Directive agree that, during the auction, all bidders are expected to have an equal opportunity to bid,¹¹⁸ and evaluations of the bids are subject to the criteria,

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* art. 54(5).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ UNCITRAL Model Law, *supra* note 37, art. 53(2).

¹¹² *Id.*

¹¹³ *Id.* art. 54.

¹¹⁴ *Id.* art. 53(1)(m).

¹¹⁵ *Id.* art. 55(1).

¹¹⁶ *Id.* art. 55(2).

¹¹⁷ *Id.* art. 55(3).

¹¹⁸ *Id.* art. 56(2)(a).

procedures, and formula already provided under the invitation.¹¹⁹ It is also agreed that every bidder must continually receive instantaneous information updating them on the status of their bid.¹²⁰ However, the UNCITRAL Model Law is narrower than the EU Directive in providing that “there should be no communication between the procuring entity and the bidders or among the bidders,” other than the communication regarding the status of the bid and communications for allowing an equal opportunity to bid.¹²¹ Whereas, the EU Directive allows for other information beyond submitted prices and values to be communicated as long as it is stated in the specifications.¹²² The number of participants may also be communicated in each phase of the auction; however, the procuring agency may not, under any circumstances, reveal the identity of any tenderer during the auction.¹²³ Despite the differences of approach between UNCITRAL and the EU, each results in promoting fairness of competition.

H. Requirements after the Auction

Fairness of competition must also be considered after the close of the auction. The winning bid at the close of the reverse auction is the lowest-priced bid or the most advantageous bid.¹²⁴ If the auction was not preceded by examination or evaluation of initial bids, under the UNCITRAL Model law, the procuring agency must determine, after the auction, whether the successful bid is responsive and whether the supplier or contractor is qualified.¹²⁵ If the bidder does not meet both requirements then the bid shall be rejected.¹²⁶ The procuring agency must then select the next lowest-price bid or most advantageous bid, provided that it meets the two requirements under this paragraph.¹²⁷ When a procuring agency rejects a bid because it is abnormally low,¹²⁸ it must select the next lowest-priced bid or next most advantageous bid.¹²⁹

¹¹⁹ *Id.* art. 56(2)(b); EU Directive, *supra* note 63, art. 54(6) (The UNCITRAL clause is identical to that of the EU Directive.)

¹²⁰ *Id.* art. 56(2)(c).

¹²¹ UNCITRAL Model Law *supra* note 37, art. 56(2)(d).

¹²² EU Directive *supra* note 63, art. 54(6).

¹²³ *Id.*

¹²⁴ UNCITRAL Model Law, *supra* note 37, art. 57(1); The EU Directive similarly provides: once the electronic reverse auction is closed, the procuring agency awards the contract to the lowest priced tenderer or the most economically advantageous tenderer based on a number of criteria to be given weight. The standards for the most economically advantageous tenderer and the most advantageous bid (under UNCITRAL) are different. EU Directive *supra* note 63, art. 53, 54(8).

¹²⁵ UNCITRAL Model Law *supra* note 37, art. 57(2); Every reverse auction under the EU Directive must be preceded by an initial evaluation. EU Directive *supra* note 63, art. 54(4).

¹²⁶ UNCITRAL Model Law, *supra* note 37, art. 57(3). (Article 53(1)(e) provides that the criteria for determining qualifications shall be included in the invitation to bid.)

¹²⁷ *Id.*

¹²⁸ Rejection of abnormally low submissions

1. The procuring entity may reject a submission if the procuring entity has determined that the price, in combination with other constituent elements of the submission, is abnormally low in relation to the subject matter of the procurement and raises concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

- (a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract; and

There is more to reverse auctions than the “thrill of the bargain.” Reverse auctions must be carefully considered, implemented and regulated to prevent dangers of inadequate transparency, overuse, anti-competition, and the dreaded winner’s curse. The two parallel international models offer a solution for updating the MPC, and avoiding these problems. The next step is to implement these solutions through a governing body that will consistently update and revise the MPC to preemptively eliminate gaps.

V. Structuring a MPC Governing Body

As a consideration for implementing a process to continually revise a model regulatory body on state and local procurement, one might consider consulting organizations such as the American Law Institute (ALI)¹³⁰ or the Uniform Law Commission (ULC).¹³¹ However, both organizations want nothing to do with the outdated MPC. The ABA could potentially adopt a framework system similar to that of the ALI or the UCL; however, implementation of a like-system would be financially difficult for the ABA. Alternatively, the ABA could bolster its’ reporter system, by integrating it with the system used by UNICTRAL to promulgate the Model Law on Public Procurement.

The UNICTRAL Model (delicately touched on earlier in this paper) consists of three levels of work.¹³² The first level is UNCITRAL (“Commission”) itself, which typically finalizes and adopts draft texts.¹³³ As a parallel to the UNCITRAL system, the ABA’s first level is the House of Delegates, which formally adopts draft text.¹³⁴ Unlike the ABA system, however, decisions under the Commission are made by the member States of the Commission, under which the members vote at annual sessions.¹³⁵ This “open process” could be integrated into the ABA system. As a natural side effect of allowing the open process, states, lobbying for their interests, would participate in the regulatory structure of the MPC. The open process would also include other groups such as the National Association of State Procurement Officials (“NASPO”). As a means for cutting costs in the updating and revising the MPC, open process will be substantially cost free. States would bear the brunt of the costs, hiring a representative (preferably an expert on procurement) to come to the ABA annual meeting to vote and comment on his or her States’ behalf.

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request and the information included in the submission, but continues, on the basis of all such information, to hold concerns.

Id. art. 20.

¹²⁹ *Id.* art. 57(3).

¹³⁰ “The Institute [that] engages in intensive examination and analysis of legal areas thought to need reform.” American Law Institute, *Overview*, (March 30, 2013)

<http://www.ali.org/index.cfm?fuseaction=about.instituteprojects>.

¹³¹ The ULC “...drafts and promotes enactment of uniform state laws in areas of state law where uniformity is desirable and practical.” Uniform Law Commission, *About the ULC*, (March 30, 2013)

<http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC>.

¹³² Guide to Enactment, *supra* note 38, at 8. (The entire UNCITRAL enactment process is laid out in the Guide).

¹³³ *Id.*

¹³⁴ Recommended Regulations, *supra* note , at viii.

¹³⁵ Guide to Enactment, *supra* note 38, at 8.

The second level under the UNCITRAL system is comprised of the secretariat and working groups that perform preparatory work to form the draft text.¹³⁶ This second level holds its own sessions once or twice during the year.¹³⁷ The Secretariat prepares the topics for discussion in working group meetings, which includes, among other things, drafting and revising legislative text.¹³⁸ The managerial role of the Secretariat is similar to that of the Section Councils of the ABA, who provide oversight over the Reporters and Steering Committee.¹³⁹ In the UNCITRAL Model, the size and composition of a working group may vary according to topic; however, delegations are usually comprised of experts, government officials, or private sector lawyers.¹⁴⁰ The Reporters and Steering Committee of the ABA, like the working groups, are comprised of national experts in procurement, who propose revisions and form draft text.

The ABA/UNCITRAL integrated governing system would begin with the annual sessions, from which paneled experts, consisting of a Secretariat/Council, who would provide oversight, and a small committee, which would meet and discuss revisions to the MPC. In the interest of cost efficiency, the panel would be limited to drafting text for a set number of issues, as determined by the ABA. Once completed, the panel would submit the draft text to the House of Delegates to be finalized and adopted. At the ABA Annual Meeting, the draft text would undergo approval through open process.

VI. Conclusion

The ABA's MPC is an integral tool in the evolution of state and local procurement. As procurement methods change with technology, States will need a reliable source to update their own regulations. In light of its importance, the MPC, itself, has fallen behind. Two examples of this are the missing MPC regulations on IDIQ contracts and electronic reverse auctions. These two methods of procurement are growing at the state and local level; and, without guidance, States are likely to abuse and overuse these methods. As a solution, the UNCITRAL Model Law and the EU Directive on Public Procurement identify ways in which to update and revise the MPC.

The Next step is the revision process by a governing body based on the ABA system. The basic principles of: revision by the Reporters, oversight by the Councils, and adoption by the House of Delegates can be utilized efficiently. As suggested in the last section, through an integration of the ABA and UNCITRAL models, the ABA can form a structure to consistently update and revise the MPC.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Recommended Regulations, *supra* note , at viii.

¹⁴⁰ Guide to Enactment, *supra* note 38, at 8.

ATTACHMENT 7



***State and Local Cost-Reimbursement Contracting: Heightened
Federal Grant Cost Accountability Requirements Will Diminish Key
Objection***

The George Washington University Law School: State and Local
Procurement Seminar

Submitted by,

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Abstract: Federal agencies have recognized that the varied and inadequate cost oversight of federal grant money that passes through state and local governments negatively impacts non-profit grant recipients. New requirements for more harmonized administration of grant funds can be leveraged by these governments to reap the benefits of cost-reimbursement contracting. Therefore, the Model Procurement Code should be updated to provide better guidance on the appropriate use of cost-type contracts.



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I. Introduction

The American Bar Association (“ABA”) 1979 Model Procurement Code (“MPC”) was last updated in 2000,¹ and Model Procurement Regulations (“MPR”) were incorporated into that code in 2002.² These updates were driven by the dramatic changes in procurement in the intervening decades.³ Given the even greater innovations in acquisition reform since then, in part driven by foreign

¹ See generally Model Procurement Code for State and Local Gov’ts i (2002) [hereinafter MPC].

² See generally Model Procurement Regulations ix (2002). The Model Procurement Regulations (“MPR”) have been incorporated into the MPC.

³ MPC, *supra* note 1, at v-vii.

developments,⁴ these models need to be revisited again. In particular, the MPC's guidance on cost-reimbursement contracts must be updated to aid states in realizing the benefits of these contracts.⁵ Additionally, increased federal pressure to more accurately account for grant money⁶ will forcibly remove one of the largest impediments to the use of cost-reimbursement contracts: lack of auditing resources.⁷ This paper will address the benefits and costs of this contract type, and will show that the balance weighs in favor of more expansive use. Part II will briefly discuss the difference between fixed price and cost-reimbursement contracting.

The MPC does not provide state and local government with enough guidance on the use of cost-reimbursement contracts.⁸ The model regulations focus on allowable costs,⁹ rather than the threshold question of when to employ these contract types. Part

⁴ See, e.g., UNCITRAL Model Law on Public Procurement (2011).

⁵ MPC § 3-501, MPC § 7-501, and accompanying model regulations.

⁶ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-937, POLICIES FOR THE REIMBURSEMENT OF INDIRECT COSTS NEED TO BE UPDATED (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-477 TREATMENT AND REIMBURSEMENT OF INDIRECT COSTS VARY AMONG GRANTS, AND DEPEND SIGNIFICANTLY ON FEDERAL, STATE, AND LOCAL GOVERNMENT PRACTICES (2010).

⁷ See *id.*

⁸ See MPC § 3-501, cmt 1 (stating that this section is only meant to "authorize any type of contract which best suits the interest of the [State] except that a cost-plus-a-percentage-of-cost contract is prohibited." (brackets included in original)); MPC § 7-101 (stating that either the Policy Office or Chief Procurement Officer "shall promulgate regulations setting for cost principles which shall be used to determine the allowability of incurred costs.").

⁹ See MPC § 7-101.

III of this paper will explore the development and usage of cost-benefit contracts at the federal level. Part IV will compare the current MPC with the codes from Virginia, Maryland, and the District of Columbia. Part V will address the lack of auditing resources, which is a key objection to the use of cost-reimbursement contracts, and the increasing focus on new cost accounting requirements for federal grant money which will require increased auditing resources. Part VI will suggest the course that the ABA Section on Public Contract Law should take to update Articles 3 and 7 of the MPC and the accompanying regulations.

II. Fixed Price vs. Cost-Reimbursement Contracts

There are two primary types of procurement contracts: fixed price and cost-reimbursement.¹⁰ These contract types are defined under the Federal Acquisition Regulations ("FAR"),¹¹ and both may have incentive clauses.¹² In addition, MPC section 3-501 comment 1¹³ and MPR R3-501.01¹⁴ list the types of contracts available.

¹⁰ There are many iterations of these primary types. See *infra* note 14.

¹¹ FAR 16.2, 16.3.

¹² See *e.g.*, FAR 16.204, 16.304, 16.305, 16.403, 16.404.

¹³ MPC § 3.501, cmt 1.

¹⁴ MPR § R3-501.01 (2002) ("Permitted contract types include, but are not limited to, the following: Fixed price contracts (with contract specified adjustments); Firm fixed-price contracts; Fixed-price contracts with price adjustment; Cost-reimbursement contracts; Allowable Cost Contracts; Cost-Plus-Fixed Fee Contracts; Cost Incentive Contracts; Fixed-Price Cost Incentive")

Fixed price contracts can be firm-fixed-price contracts,¹⁵ or may include adjustable prices subject to the contract's clauses.¹⁶ A firm-fixed-price contract "places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss . . . and imposes a minimum administrative burden upon the contracting parties."¹⁷ To account for this risk, contractors may increase their total bid prices.¹⁸ Additionally, too much uncertainty may force either the Government to submit frequent change orders or the contractor to seek price adjustments.¹⁹ Thus, these contracts work best for commercial items with well-defined market prices,²⁰ or repetitive tasks that establish a historical record used to estimate costs and lower the uncertainty for both the contractor and the Government.

¹⁵ FAR 16.202.

¹⁶ See Far 16.201(a).

¹⁷ FAR 16.202-1.

¹⁸ John Cibinic & Ralph C. Nash, *COST-REIMBURSEMENT CONTRACTING 2* (3rd ed. 2004) ("To obtain financial protection . . . the contractor would have to include large contingencies in its fixed price."); Sarah Chacko, *Downside of fixed-price contracting: Inflated bids*, *FEDERAL TIMES* (Mar. 10, 2011, 6:00 AM), <http://www.federaltimes.com/article/20110310/ACQUISITION03/103100302/Downside-fixed-price-contracting-Inflated-bids> (statement of Malcolm O'Neill, Assistant Army Secretary for Acquisition, Logistics, and Technology: "But in my experience when you offer a fixed-price bid, it's 10 percent to 15 percent more than you need.").

¹⁹ See Cibinic, *supra* note 18, at 2 & 7-9.

²⁰ *Cf.* FAR 16.301-3(b) ("The use of cost-reimbursement contracts is prohibited for the acquisition of commercial items.").

By contrast, a cost-reimbursement contract provides for allowable incurred costs²¹ up to a predetermined ceiling: the Limitation of Cost clause.²² "Contracts based on the cost-reimbursement principle were designed, first, to protect contractors against risks they could not be expected to bear without excessive reserves for contingencies, and, second, to protect the Government and the nation against excessive profits."²³ Therefore, these contracts place more of the risk burden on the Government and require more oversight.²⁴ However, cost-reimbursement contracts are crucial in areas such as information technology development, where reliable fixed prices are too difficult to estimate.²⁵ The primary disadvantage of cost-reimbursement versus fixed price is that the Government is responsible for paying the contractor's costs of performance, regardless of whether the finished product is delivered.²⁶ Thus, if the cost ceiling is reached without a satisfactory product,

²¹ FAR 16.301-1.

²² FAR 52.232-20. The clause requires the contractor to notify the Government when it expects to reach 75% of the total estimated costs in the next 60 days. *Id.*

²³ Robert Braucher & Covington Hardee, *Cost-Reimbursement Contracts with the United States*, 5 STAN. L. REV. 4 (1952).

²⁴ FAR 16.301-1.

²⁵ Kara M. Sacilotto, *Déjà vu All Over Again: Cost-Reimbursement Contracts Fall Out of Favor (Again), But Should They?* 40 PUB. CONT. L.J. 681, 686 (2011).

²⁶ Scott Cook & Don Philpott, *Managing Cost Reimbursable Contracts: Providing Guidance in Difficult Waters*, 2 (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-374T, DEFENSE ACQUISITIONS: MANAGING RISK TO ACHIEVE BETTER OUTCOMES 7 (2010).

the Government is forced to either abandon the project or add money to the contract.²⁷ Incentive fees can mitigate this risk.²⁸ Moreover, although there is less reason to cut corners under a cost-reimbursement contract, there is also more reason to be inefficient, at least up to the cost cap.²⁹

Although the FAR favors the use of fixed-price contracts,³⁰ the Federal Government spent over \$160 billion on cost-reimbursement contracts in FY 2010.³¹ Critics argue that such contracts are over-used, but concede that they are necessary acquisition tools.³² The risk of cost over-runs must be weighed against the negative effects of placing too much of the risk burden on the contractor, such as a smaller marketplace. As suggested by the Government Accountability Office ("GAO"), the best practice for mitigating this risk is to migrate from cost-reimbursement during the development phase and into fixed

²⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-374T, DEFENSE ACQUISITIONS: MANAGING RISK TO ACHIEVE BETTER OUTCOMES 3.

²⁸ Chako, *supra* note 18.

²⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-374T, DEFENSE ACQUISITIONS: MANAGING RISK TO ACHIEVE BETTER OUTCOMES 7.

³⁰ See FAR 16.301-3; Sacilotto, *supra* note 25, 706-07.

³¹ Letter from Daniel I. Gordon, Administrator, Office of Federal Procurement Policy, to Sen. Joseph I. Lieberman, Chairman Sen. Comm. on Homeland Sec. and Gov't Affairs 9 (July 8, 2011) [Hereinafter Gordon Letter], available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/reports/cost-reimbursement-contracting-by-executive-agencies-report-to-congress.pdf>.

³² See National Defense Authorization Act for FY 2009, Pub. L. No. 110-417, § 864 (requiring guidance in the FAR stating when cost-reimbursement contracts are appropriate); FAR 16.103(b).

pricing during production.³³ Notably, the GAO did not recommend discontinuing the use of cost-reimbursement contracts.

III. Historical Stages of Cost-Reimbursement Procurement at the Federal Level

As discussed above, cost-reimbursement contracts are a large percentage of total federal procurement spending.³⁴ Approval of these contract types waxed and waned over the last 80 years,³⁵ driven in large part by negative reaction to the cost-overrun risk inherent in cost-reimbursement contracts.³⁶ The cyclical resurgence of this contract type highlights its benefits to the Government when securing development work needing capable contractors for important programs.

A. World Wars: Early Cost Contracting

The rapidly changing pace of technology during World War I and World War II led to the use of overuse of cost-plus sole-source contracts.³⁷ During World War I, cost-plus-a-percentage-of-cost ("CPPC") contracts were widely used.³⁸ However, they

³³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 10-374T, DEFENSE ACQUISITIONS: MANAGING RISK TO ACHIEVE BETTER OUTCOMES 7 (2010).

³⁴ Gordon Letter, *supra* note 31.

³⁵ See Sacilotto, *supra* note 18, at 687.

³⁶ See *supra* note 27 and accompanying text.

³⁷ See Braucher, *supra* note 23, at 5; James Nagle, Procurement Regulations: Development, Essence, Effect 45-47 (Feb. 1986) (unpublished L.L.M. thesis, George Washington University) (on file with Burns Library, George Washington University).

³⁸ *Id.*

were subsequently outlawed during World War II and beyond,³⁹ because—as noted by the Supreme Court—CPPC contracts incentivize inflated costs.⁴⁰ Despite the criticism of cost-plus contracting in general during World War II, cost-plus-a-fixed-fee (“CPFF”) contracts were common, although the fees were heavily regulated.⁴¹

In the 1940s, cost-plus contracting again became disfavored, but “the course was taken to limit rather than to forbid the use of contracts for cost reimbursement.”⁴² Even when cost-plus contracts were expressly forbidden near the end of World War II, “exceptions were made for (1) operation of government-owned facilities, (2) service contracts such as modification-center and airline contracts, (3) research, experimental and development contracts and (4) contracts for first production quantities of new articles.”⁴³ There was clear recognition that cost-type contracts were vital to certain acquisitions: “For work involving extraordinary risks it will probably continue to be used indefinitely.”⁴⁴

³⁹ *Id.*; see also FAR 16.102(c) (citing 10 U.S.C. § 2306(a) (2006) and 24 U.S.C. § 254(b)).

⁴⁰ *Muschany v. United States*, 324 U.S. 49, 62-63 (1945).

⁴¹ *Braucher*, *supra* note 23, at 5.

⁴² *Id.* “Fixed-price type contract . . . directed as ‘the general practice. . . .’” *Id.*

⁴³ *Id.* at 9.

⁴⁴ *Id.* at 29.

B. Post-War Period: Regulatory Experimentation

Following the world wars, federal procurement underwent dramatic structural and regulatory changes.⁴⁵ Part of those changes included a shift away from CPFF towards cost-plus-incentive-fee ("CPIF") contracting, and then further towards fixed price contracting, for weapon development acquisitions.⁴⁶ This change was led by acquisition officials primarily concerned with cost containment, and accompanied attempts to inject more competition into the process.⁴⁷ For example, Research and Development ("R&D") contracts had an additional competition phase to seek greater cost assurance. However, contractors often submitted "low-ball" bids with the knowledge that they were likely to receive the subsequent contract on a sole source basis and could recoup the differences through price adjustments.⁴⁸

In response to this system-gaming behavior, the Air Force developed the Total Package Procurement Concept ("TPPC").⁴⁹ The

⁴⁵ Nagle, *supra* note 37, at 59 & 71.

⁴⁶ Sacilotto, *supra* note 25, at 686-88.

⁴⁷ *Id.* But see Cibinic, *supra* note 18, at 5 (stating that both the National Aeronautics and Space Administration ("NASA") and the Atomic Energy Commission (later the Department of Energy) avoided any controversy over their frequent use of Research and Development and major management and operations cost-reimbursement contracts).

⁴⁸ *Id.* The U.S. Department of Defense ("DoD") instituted the competitively awarded Contract Definition Phase in the 1960s. *Id.*

⁴⁹ *Id.* at 688.

intention was to have development, production, and support under one fixed price contract in order to remove the incentives for "buying in" to the Contract Development Phase.⁵⁰ The hope was that contractors would be incentivized to submit realistic, efficient cost estimates for all of the acquisition stages because later pricing opportunities were foreclosed.⁵¹ However, as the GAO review of the first weapon system to rely on TPPC noted,

Our preliminary conclusion indicates that this method may be best suited for the procurement of those systems requiring only limited additional development effort and where it is reasonable to break down the Government's requirements into manageable segments and where commitments of contractor performance will not extend over too long a period of time.⁵²

The TPPC concept failed in its objectives, and GAO reiterated that even this comprehensive fixed price contract was inappropriate where the actual costs were so unpredictable.⁵³ In

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² U.S. GENERAL ACCOUNTING OFFICE, GAO 094474, REVIEW OF SELECTED ASPECTS OF THE C-5A PROGRAM 20 (1969), *available at* <http://archive.gao.gov/f0202/094474.pdf>.

⁵³ *Id.* See also Albert J. Gravalles, An Evaluation of the Total Package Procurement Concept as Exemplified by Three Air Force Weapon Systems Contracts 30 (June 1968) (unpublished M.S. thesis, MIT), *available at* <http://www.archive.org/details/evaluationoftota00grav>; Cibinic, *supra* note 18, at 4-5.

1971, DoD issued a directive prohibiting TPPC in favor of cost-type development contracts.⁵⁴

C. 80s and 90s: Fixed Price Contracting Failures Lead to Congressional Emphasis on Cost Contracts

A decade later, fixed price contracting for development again became favored, particularly as a number of high profile Air Force and Navy development contracts, from shipbuilding⁵⁵ to the Advanced Medium Range Air-to-Air Missile ("AMRAAM") program,⁵⁶ were issued as fixed-price contracts. These agencies felt that fixed price contracts would both hold down costs and reduce the risk of overruns.⁵⁷ However, the unpredictable nature of development contracts led to cost overruns in the hundreds of millions, and consequently numerous change orders, price adjustments, and even extensive litigation.⁵⁸

⁵⁴ DoD Directive 5000.1, Acquisition of Major Defense Systems (1971); *AT&T v. United States*, 124 F.3d 1471, 1474-75 (Fed. Cir. 1997) (discussing the debate over fixed price vs. cost plus contracting at DoD through the years).

⁵⁵ See, e.g., *Navy Shipbuilding: Cost and Schedule Problems on the DDG-51 AEGIS Destroyer Program: Hearing Before the Subcomm. on Seapower & Strategic & Critical Materials of the H. Comm. on Armed Servs.*, 101st Cong. 2 (1990) (statement of Martin M. Ferber, Dir., Nat'l Sec. & Int'l Affairs Div., U.S. Gen. Accounting Office), available at <http://archive.gao.gov/t2pbat12/140453.pdf>; U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-88-15, *Navy Contracting: Cost Overruns and Claims Potential on Navy Shipbuilding Contracts 1* (1987).

⁵⁶ U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD 87-78, *MISSILE PROCUREMENT: AMRAAM COST GROWTH AND SCHEDULE DELAYS 2* (1987).

⁵⁷ See *id.* at 24.

⁵⁸ See Sacilotto, *supra* note 25, at 688.

The far-reaching negative results of the fixed-price development contracting in the 80s were summed up in a speech by Eleanor R. Spector, DoD Director of Defense Procurement:

The negative consequences of the inappropriate use of fixed-price development contracts have become so clear that the department's senior management has said 'no more[]' . . . However, the consequences of the large, long-term fixed price development contracts that were awarded several years ago will be with us for years to come.⁵⁹

In response to these problems, Congress expressly restricted fixed-price contracts for large development programs.⁶⁰

Beginning in 1987, the defense appropriation bills prohibited fixed-price contracts over \$10 million unless authorized in writing by the Under Secretary for Defense Acquisition.⁶¹

D. Fixed-Price Contracting Rebounds in the 21st Century

Once more, the Federal Government decided that the problems of fixed-price development contracting are in the past.

Beginning with the National Defense Authorization Act of FY 2007

⁵⁹ *AT&T v. United States*, 124 F.3d 1471, 1477 (Fed. Cir. 1997), *vacated*, 136 F.3d 793 (Fed. Cir. 1998), *reh'g en banc*, 177 F.3d 1368 (Fed. Cir. 1999), *remanded to* 48 Fed. Cl. 156 (2000), *aff'd*, 307 F.3d 1374 (Fed. Cir. 2002).

⁶⁰ *Infra* note 61.

⁶¹ *See, e.g.*, DoD Appropriations Act for FY 1993, Pub. L. No. 102-396, § 9037, 106 Stat. 1876, 1910 (1992); DoD Appropriations Act for FY 1992, Pub. L. No. 102-172, § 8037, 105 Stat. 1150, 1179 (1991); DoD Appropriations Act for FY 1991, Pub. L. No. 101-511, § 8038, 104 Stat. 1856, 1882-83 (1990); DoD Appropriations Act for FY 1990, Pub. L. No. 101-165, § 9048, 103 Stat. 1112, 1139 (1989); DoD Appropriations Act for FY 1989, Pub. L. No. 100-463, § 8085, 102 Stat. 2270, 2270-32 (1988); DoD Appropriations Act for FY 1988, Pub. L. No. 100-202, § 8118, 101 Stat. 1329, 1343, 1384 (1987).

("FY07 NDAA"), Congress repealed the ban on fixed-price contracting for large development projects.⁶² Like the optimism of the TPPC, the legislative history of the FY07 NDAA suggested that a renewed focus on requirements development and planning would avoid the TPPC's failures.⁶³

Additionally, the Obama Administration has targeted cost-reimbursement contracting as a source of excessive risk and waste.⁶⁴ The FAR already included a preference for fixed-price contracting,⁶⁵ but as a result of this new push, it has been updated to strengthen its existing preference for fixed-price contracting by making it harder for Contracting Officers to enter into cost-reimbursement contracts.⁶⁶ However, given the history of the policy fluctuations on contract types, it is

⁶² John Warner National Defense Authorization Act for Fiscal Year 2007 ("FY 2007 NDAA"), Pub. L. No. 109-364, § 818, 120 Stat. 2329 (2006).

⁶³ Sacilotto, *supra* note 25, at 699.

⁶⁴ Memorandum from the White House to the Heads of Exec. Dept's and Agencies, Government Contracting, 74 Fed. Reg. 9755, 9756 (Mar. 6, 2009); *but see* Matthew Weigelt, *Industry wants agencies in control, not mandates*, FCW.com (Apr. 30, 2012), <http://fcw.com/articles/2012/04/30/industry-contracting-officer-decision-making.aspx> (the Acquisition Reform Working Group stated that the new FAR rules aimed at reducing cost-reimbursement contracting would "have a negative impact on the industrial base.").

⁶⁵ *E.g.*, FAR 16-301-2 (Jan. 31, 2011) ("[c]ost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.").

⁶⁶ Sacilotto, *supra* note 25, at 707; *see also* FAR 16.301-2 (Mar. 2, 2012).

likely that the future will once again witness the pendulum swing back towards cost-reimbursement contracts.

IV. Sample State and Local Cost-Reimbursement Statutes, Regulations, and Internal Rules

As noted above, the MPC focuses on allowable costs during contract administration rather than selecting a contract type during acquisition planning.⁶⁷ There is a lack of uniformity among State and Local Governments in this area. For example, Virginia lacks any regulations on cost-reimbursement contracts, and instead only Virginia's Agency Procurement and Surplus Property Manual ("APSPM") makes any mention of these contracts.⁶⁸ On the other hand, Maryland has regulations specific to cost-reimbursement contracts.⁶⁹ Interestingly, unlike the FAR's blanket prohibition, some statutes and regulations still permit CPPC contracts in emergency situations.⁷⁰ These wildly differing approaches reveal the need for a better model.

⁶⁷ *Supra* note 5 and accompanying text. *But see* MPC § 3-501, cmt 1 (stating that cost-reimbursement contracts may be used in cases of cost estimate uncertainty, or where other contract types are "impracticable").

⁶⁸ Virginia Department of General Services, Division of Purchases and Supply, Agency Procurement and Surplus Property Manual, § 4.3d (1998) [hereinafter VA APSPM], available at http://www.eva.virginia.gov/library/files/APSPM/APSPM_ALL.pdf. The Virginia Public Procurement Act merely states that cost-reimbursement contracts are permitted. VA. CODE ANN. § 2.2-4331 (West 2013) (amended Mar. 18, 2013 to also allow cost-plus-percentage of the private investment made by a private entity).

⁶⁹ MD. CODE REGS. 21.06.03.03 (2013).

⁷⁰ *E.g.*, VA. CODE ANN. § 2.2-4331(b) ("Except in case of emergency affecting the public health, safety or welfare, no public

A. Virginia

Under Virginia law "public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited."⁷¹ The APSPM describes eight permissible types of contracts available and provides some general pros and cons.⁷² First is fixed price, and the manual expresses a clear preference for this type:

A fixed price contract may result from bidding or negotiation processes. Specifications are clear. Costs are predictable. There is minimal risk to the purchasing activity when firm fixed price contracting is used. This type of contract encourages efficient performance and is least costly to administer. Financial requirements are known.⁷³

Even this section, however, acknowledges that uncertainties may render this contract type inappropriate. By contrast, the seventh type is CPFF.⁷⁴ Aside from the description, the APSPM acknowledges that a CPFF contract "accelerates procurement of new technologies" but that it has high administrative costs with no incentives for contractors to reduce their costs.⁷⁵

In addition to these two categories, the APSPM also includes another type of cost-reimbursement contract: "(3) Time

contract shall be awarded on the basis of cost plus a percentage of cost."); *but see* MD. CODE REGS. 21.06.03.01 (Prohibiting CPPC contracts and subcontracts).

⁷¹ VA. CODE ANN. § 2.2-4331(a).

⁷² VA APSPM § 4d.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

and Materials Contracts (T&M).”⁷⁶ Unlike the other two types mentioned above, the APSPM includes many more details about how agencies should set up T&M contracts from the outset.⁷⁷ It specifies that such contracts are appropriate for “maintenance, design, engineering, emergencies, etc.” It also provides guidance on how agencies must pre-evaluate job estimates, and to vigilantly review costs that are submitted.⁷⁸

B. Maryland

Unlike Virginia, both Maryland statute and regulations address cost-reimbursement contracting. The Maryland Finance and Procurement Code disfavors this contract type, allowing it only if the Contracting Officer determines that it is “likely to be less costly to the State than any other type of contract.”⁷⁹ Furthermore, the statute requires the Contracting Officer to pre-certify the adequacy of the contractor’s accounting system, and to approve any cost-reimbursement sub-contracts.⁸⁰

Additionally, the Code of Maryland Regulations includes the various types of contracts when addressing contract formation.⁸¹ Consistent with the Finance and Procurement Code, the regulations ranks the types of contracts in order of

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ MD. CODE. ANN., STATE FIN. & PROC. § 13-215 (West 2012).

⁸⁰ *Id.* § 13-215(c)-(d).

⁸¹ MD. CODE REGS. 21.06.03 (2013).

preference,⁸² and lists eight factors for the Contracting Officer to consider when making the selection.⁸³ Many of these factors pertain directly to potential uncertainties for both the State and the contractor, and the State's ability to mitigate those uncertainties.⁸⁴ Moreover, the regulations address each contract type individually, including definitions and appropriate applications.⁸⁵

C. District of Columbia

As in Maryland, the D.C. Code disfavors cost-reimbursement contracts. They may not be issued unless it is "likely to be less costly" than other types, or the contract would be "impracticable" except under cost-reimbursement.⁸⁶ The D.C. Code is otherwise silent on this contract type.

The D.C. municipal regulations are slightly more informative than the Virginia APSPM,⁸⁷ but less than the Maryland regulations. Use of cost-reimbursement contracting is limited by reference to the D.C. Code noted above, by the Contracting

⁸² *Id.* 21.06.03.01B(1) ("(a) Fixed-price; (b) Fixed-price incentive; (c) Cost plus incentive fee; and (d) Cost-plus fixed fee or cost-reimbursement.")

⁸³ *Id.* 21.06.03.01B(3).

⁸⁴ *See, e.g.,* 21.06.03.01B(3) (b) ("The difficulty of estimating performance costs such as the inability of the State to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract.").

⁸⁵ *Id.* 21.06.03.02-.09.

⁸⁶ D.C. CODE § 2-355.02 (2012).

⁸⁷ *See supra* note 68.

Officer's evaluation of the contractor's accounting system, and by the adequacy of the District's audit capability during performance.⁸⁸ Uncertainties surrounding costs are mentioned,⁸⁹ but overall these regulations lack the precision that the Maryland regulations provide.⁹⁰ The D.C. municipal regulations do speak to some of the specifics found in the Maryland regulations, but these are scattered throughout the descriptions of various cost-plus iterations.⁹¹

V. The Audit Objection and Federal Grant Funds

Common to all three examples in Part IV is an emphasis on the need for vigilance over costs during performance and after invoices have been submitted. The lack of adequate resources to perform cost accounting audits may be a reason why budget strapped states and localities do not utilize cost-reimbursement contracts to their fullest potential, if at all. However, this problem may be forcibly removed by the Federal Government if changes to grant oversight are mandated such as more uniform allowable cost rules and more robust auditing requirements.⁹²

⁸⁸ D.C. MUN. REGS. tit. 27 § 2405 (2013).

⁸⁹ *Id.* § 2405.1.

⁹⁰ *Supra* note 84 and accompanying text.

⁹¹ See D.C. MUN REGS. tit. 27 § 2405.5-.9.

⁹² See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-733T, FEDERAL GRANTS: IMPROVEMENTS NEEDED IN OVERSIGHT AND ACCOUNTABILITY PROCESSES 18 (2011) ("Because many national objectives are now being carried out through state, local, and nongovernmental organizations, enhancing accountability and oversight at all levels is equally important, and these efforts should be mindful of the scarce

The GAO investigated complaints from non-profits that they are not receiving their full entitlements.⁹³ Because non-profit accounting varies wildly and does not correspond to Generally Accepted Accounting Principles used by for-profit entities, the interpretations of allowable costs vary, especially for indirect costs.⁹⁴ Office of Management and Budget ("OMB") guidance⁹⁵ does not provide enough clarification. Where federal money is passing through state and local government agencies to the non-profits, this uncertainty may threaten the long-term well being of the non-profit sector that relies on these funds.⁹⁶ Consequently, GAO recommended that the OMB bring together all of these stakeholders to determine how to consistently treat these costs.⁹⁷

oversight and accountability resources and shared responsibilities as improvements are made.").

⁹³ U.S. Gov't Accountability Office, *Nonprofit Sector: Treatment and Reimbursement of Indirect Costs Vary among Grants, and Depend Significantly on Federal, State, and Local Government Practices* 10 (2010).

⁹⁴ *Id.* at 10-11.

⁹⁵ See OMB Circular A-122, "Cost Principles for Non-Profit Organizations," 2 C.F.R. § 230 (2004)

⁹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, *NONPROFIT SECTOR: TREATMENT AND REIMBURSEMENT OF INDIRECT COSTS VARY AMONG GRANTS, AND DEPEND SIGNIFICANTLY ON FEDERAL, STATE, AND LOCAL GOVERNMENT PRACTICES* 1.

⁹⁷ *Id.* at 22. GAO has noted that University research grants face similar problems depending with which agency the schools negotiate for the funding, and that there is a need for better cost guidance from the Office of Management and Budget, and better auditing by DoD. U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO 10-937, UNIVERSITY RESEARCH: POLICIES FOR THE REIMBURSEMENT OF INDIRECT COSTS NEED TO BE UPDATED* 38-39 (2010).

One result of GAO's recommendation was OMB's formation of a new Single Audit Workgroup, combining two previous workgroups: the Single Audit Workgroup, and the Circular No. A-87 - Cost Principles for State, Local, and Indian Tribal Governments Workgroup (Circular No. A-87 Workgroup).⁹⁸ The single audit process is designed to provide oversight to high-dollar federal grants.⁹⁹ GAO received complaints from state auditors that federal management of the single audit process was inadequate and slow.¹⁰⁰ State and local auditors are critical components of effective grant oversight, and will continue to assist OMB in the shaping of audit programs.

Consequently, OMB released a "Proposed Uniform Guidance: Cost Principles, Audit, and Administrative Requirements for Federal Awards."¹⁰¹ The guidance aims to streamline a number of OMB Circulars into this one document, including A-87, "Cost Principles for State, Local, and Indian Tribal Governments," and A-133, "Audits of States, Local Governments, and Non-Profit

⁹⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-733T, FEDERAL GRANTS: IMPROVEMENTS NEEDED IN OVERSIGHT AND ACCOUNTABILITY PROCESSES 19 (2011).

⁹⁹ *Id.* at 1.

¹⁰⁰ *See id.* at 15.

¹⁰¹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, PROPOSED OMB UNIFORM GUIDANCE: COST PRINCIPLES, AUDIT, AND ADMINISTRATIVE REQUIREMENTS FOR FEDERAL AWARDS 1 (2013), available at http://www.whitehouse.gov/sites/default/files/omb/financial/grant_reform/proposed-omb-uniform-guidance-for-federal-financial-assistance.pdf.

Organizations.”¹⁰² It also aims to increase the effectiveness and efficiency of federal grant programs through audit changes.¹⁰³ This new guidance will assist all levels of the grant chain in appropriately accounting for federal grant money.

VI. Conclusion: Updating the MPC and MPR

As shown by the three examples above and by the FAR, there are a variety of approaches to official guidance for the use of cost-reimbursement contracts. As Part III demonstrated, these contract types are invaluable tools for development contracts, and therefore governments need guidance on their use beyond what is current written in the MPC. Although state and local governments are not procuring their own battleships, they are increasingly relying on sophisticated and complex information technology solutions that entail similar development uncertainties. Failure to utilize cost-reimbursement contracts results in higher bids from a smaller pool of contractors for these projects. The MPC should continue serving as an invaluable source to these governments by updating its own guidance on cost-reimbursement contracts.

A crucial step in updating the MPC will be to conduct a more thorough survey of the statutes, regulations, and internal

¹⁰² *Id.* at 20.

¹⁰³ McGladrey, “Proposed OMB Uniform Guidance,” <https://mcgladrey.com/NotForProfit/Proposed-OMB-Uniform-Guidance-Cost-Principles-Audit-and-Administrative-Requirements-for-Federal-Awards> (last visited May 3, 2013).

rules across the United States. The samples in Part IV from Virginia, Maryland, and the District of Columbia are a glimpse into the range, with Maryland providing the most direction for its agencies. Maryland is also a better model than the other two because its level of direction impresses upon procurement officials that cost-reimbursement contracts are useful, and should be considered under all of the circumstances provided by the Maryland code and regulations. Furthermore, even if these contract types continue to be officially disfavored, harmonization in this area is valuable for its other effects.

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion.

/s/ George Petel

ATTACHMENT 8

A Fork in the Road

Suspension and Debarment in The 2000 Model Procurement Code for State and Local Governments

Alix K. Schroeder

5/3/2013



All views represented in this article are the author's views and do not represent the views of the United States Air Force.

Abstract

Suspension and debarment is the government's hammer for when contractors act illegally and unethically. It can have drastic effects on the contractor's ability to survive and on the government's ability to contract for the goods and services it needs. This paper reviews the 2000 Model Procurement Code for State and Local Government's (MPC) suspension and debarment procedures and compares them with the Federal Acquisition Regulation's (FAR) procedures. The MPC provides alternatives for states from the federal model in terms of policy and procedure. The FAR is based on present responsibility. The MPC is not but leaves open to states what standard to choose. The FAR provides for an independent Suspension and Debarment Official position. The MPC does not. The FAR does not require pre-exclusion notice. The MPC does. The FAR does not require the Suspension and Debarment Official to coordinate with other persons prior to exclusion. The MPC does. The FAR provides for a standard of proof for a fact-based debarment. The MPC does not. The FAR allows the Suspension and Debarment Official flexibility in determining the length of the exclusion. The MPC does not. The FAR provides specific mitigating factors and remedial measures to review to determine present responsibility. The MPC does not. The FAR only allows for arbitrary and capricious review of the Suspension and Debarment Official's decision. The MPC applies a *de novo* review. Thus states have many options to choose from to fashion their own suspension and debarment regimes; however, some thought to the cohesiveness of these factors is required. These pieces from the FAR and the MPC act as parts of a puzzle where some parts are interchangeable and some parts simply will not fit.

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I. Introduction

§ 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.¹

In explaining the importance of integrity to a procurement system, Professor Steven Schooner stated “[p]rivate industry expects fair evaluation of its proposals to do contract work. Government agencies expect contractors to compete solely upon the merits of their demonstrated capabilities and the quality and price of their offers ... This mutual trust, bolstered by meaningful oversight, not only sustains but enhances the competitive environment.”² Suspension and debarment is one measure of meaningful oversight and a vital part of a functioning procurement system. Hiring unethical or incompetent contractors can lead to cost overruns and massive delays in receiving the end product or service and general public distrust of the procurement system. The Model Procurement Code for State and Local Governments (MPC) envisions a different model for suspension and debarment from the Federal Acquisition Regulation (FAR). This paper reviews the MPC’s proposed suspension and debarment system to point out areas of concern that states should consider when adopting the MPC and suggests areas where the MPC could be strengthened.

¹ Model Procurement Code for State and Local Gov’ts § 9-102(1) (2000).

² Steven Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 2 Public Procurement Law Rev. 103, 105 (2002).

II. History of Regulatory Suspension and Debarment

The Act of July 5, 1884 first recognized in statute the concept of contracting only with responsible contractors and required Executive Branch contracts be awarded to the lowest responsible bidder.³ The General Accounting Office (GAO) was hesitant to find performance concerns justified refusing to award the contract to the low bidder.⁴ In 1928, the GAO changed its position finding “there may be cases where the supplies or services are of such character as to require other safeguards...to insure performance.”⁵ The federal regulatory system of suspension and debarment originated out of the Armed Services Procurement Regulation (ASPR) and the Federal Procurement Regulation (FPR) in the middle of the 20th century.⁶ Both sets of regulations were similar to the current Federal Acquisition Regulation (FAR) with a few notable exceptions: the ASPR limited debarments to five years for a criminal conviction and three years for a debarment based on a different cause; and the FPR did not originally have a suspension provision.⁷ Both the ASPR and the FPR were subsequently revised to address these areas. The APSR allowed for a general three year debarment but did not limit the term, and the FPR added a suspension function.⁸ Suspension and debarment were then transitioned to the Federal Acquisition Regulation when it was first published in 1984.

Suspension and debarment has had a long history of criticism and adjustment. In 1962, the Administrative Conference of the United States’ (ACUS) Committee on Adjudication of

³ Richard J. Bednar *et al.*, Committee on Debarment and Suspension Section of Public Contract Law Am. Bar Ass’n, *The Practitioner’s Guide to Suspension and Debarment* 10 (3d. ed. 2002) citing Act of July 5, 1884, ch. 217, 23 Stat. 109.

⁴ *Id.* at 11.

⁵ *Id.* citing 7 Comp. Gen. 547 (1928).

⁶ *Id.* at 17 citing Act of June 30, 1949 ch. 288 § 303 and 24 Fed. Reg. 1933 (March 17, 1959).

⁷ *Id.* at 18 citing 18 Fed. Reg. 5031-32

⁸ *Id.* citing 30 Fed. Reg. 5962-65 (Apr. 29, 1965) (ASPR 1.604-2); 29 Fed. Reg. 10, 118 (July 24, 1964) (FPR 1-1.605).

Claims found the suspension and debarment system lacked adequate safeguards for procedural fairness, rules for the grounds and scope of a debarment, uniformity in length of debarment, and separation of prosecutorial and judicial functions.⁹ ACUS then adopted nine recommendations to improve the suspension and debarment process.¹⁰ Most of these recommendations were instituted into the regulations including: a trial-type hearing, notice of proposed debarment prior to debarment, limitations on the length of suspensions and proposed debarments, explicit grounds for debarment set forth in regulation, and reciprocal debarment.¹¹ This was only the first of many reviews of the suspension and debarment regime.

Nearly 20 years later in 1981, the Senate Subcommittee on the Oversight of Government Management criticized the suspension and debarment system again. The subcommittee believed Federal agencies failed to use suspension and debarment, refused to recognize suspensions or debarments from other agencies, and lacked communication between each other.¹² This criticism led to a statutory requirement that military departments recognize the suspensions and debarments of the civilian agencies.¹³ In addition, the Office of Federal Procurement Policy (OFPP) issued a Policy Letter that set forth uniform policies for all government agencies.¹⁴ This uniformity was translated into the FAR leading to a standardized set of rules for all government agencies.

⁹ Senate Subcomm. On Administrative Practice and Procedure, Selected Reports of the Administrative Conference of the United States, S. Doc. No. 24, 88th Cong., 1st Sess. 265 (1963).

¹⁰ *Id.*

¹¹ *Id.*

¹² Bednar *et al.*, *supra* note 3, at 29.

¹³ National Defense Authorization Act of 1982, Pub. L. No. 97-86 § 914, 95 Stat. 1124 (codified at 10 U.S.C. § 2393 (1994)).

¹⁴ Bednar *et al.*, *supra* note 3, at 28 citing 40 Fed. Reg. 22,318-19.

In 1986, the Final Report by the President’s Blue Ribbon Commission on Defense Management, also known as the Packard Commission, recognized the need for a clearer benchmark for present responsibility and recommended adopting criteria that would be used to determine if a contractor was presently responsible. The Packard Commission believed “[t]here is concern that DoD has improperly concluded that the fact of a criminal indictment of a contractor or management employee is an ‘automatic’ ground for suspension, without sufficient regard for corrective actions already taken.”¹⁵ While the FAR already had provisions for considering mitigating factors, the Packard Commission created an enumerated list which started the current FAR list.¹⁶

The MPC was first written in 1979 to provide basic principals and procedures through which state and local governments could develop a procurement system.¹⁷ These principals included: “competition, ethics, predictability, clear statements of procurement needs, equal treatment of bidders/offerors, methods of source selection, bid and proposal evaluation, reduction in transaction costs for public and private sector entities, procurement of construction related services, remedies, and facilitation of intergovernmental transactions.”¹⁸ The MPC has a wide constituency to cater to from highly-populated states such as California to geographically large but less-populated states such as Alaska. The MPC was revised in 2000; however, Article 9 which contains the suspension and debarment statute was not revised.¹⁹ Placing the MPC in historical context, the MPC’s suspension and debarment provisions have not been revised after the institution of the major changes from the 1982 OFPP Policy Letter and FAR revisions.

¹⁵ President’s Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report to the President* 102 (June 1986) [hereinafter Packard Commission].

¹⁶ *Id.* at 106.

¹⁷ *Introduction to The 2000 Model Procurement Code for State and Local Gov’ts*, iv (2000).

¹⁸ *Id.*

¹⁹ *Id.* at xv-xvi.

Suspension and debarment are important to furthering the goals of ethics, predictability, and reduction in transaction costs; however, as they are set up in the MPC now the suspension and debarment statutes have the ability to hamper those goals rather than further them.

III. Pre-Exclusion Notice of Administrative Action

MPC	FAR
<i>After reasonable notice to the person involved and reasonable opportunity for that person to be heard</i> ²⁰	No prior notice requirement

The MPC makes a clear statement requiring pre-exclusion notice and hearing to the intended contractor. The federal system allows for exclusion without prior notice if “immediate action is necessary to protect the Government’s interest.”²¹ The FAR does not require immediate exclusion, and agencies are able to issue a “show cause” notice or a “request for information” rather than proceed immediately to an exclusion.²²

Pre-exclusion notice of administrative action is a concept that has been debated in the federal system from ACUS to the present day with both sides making legitimate arguments. Mr. Todd Canni, advocating for pre-exclusion notice, stated:

The lack of pre-exclusion notification undermines the notion that the suspension and debarment system is carried out with ‘fundamental fairness’ and casts doubt on its effectiveness and integrity. The practice subjects contractors to a devastating sanction from a reputational and economic standpoint without giving them even a brief pre-exclusion opportunity to demonstrate their responsibility.²³

The requirement that a suspension must be immediately necessary to protect the government’s interest is a countervailing weight to pre-exclusion notice. While a debarment is not under the

²⁰ Model Procurement Code for State and Local Gov’ts § 9-102(1) (2000).

²¹ FAR 9.407-1(b) (2012). The MPC limits conflicts of interest to financial matters and does not address other potential conflicts of interest. Model Procurement Code for State and Local Gov’ts §12-204(1) (2000).

²² Bednar *et al.*, *supra* note 3, at 61.

²³ Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment*, 38 Pub. Cont. L.J. 547, 550 (2009).

same restraint, FAR 9.4's policy section explicitly states that suspension and debarment can only be used to protect the government's interests.²⁴ Therefore if the contractor is not likely to harm the government, the suspension or debarment cannot be maintained. Pre-exclusion notice risks allowing a non-responsible contractor to continue to receive government contracts while an unlimited pre-procedural process takes place. Mr. Canni disputes this is much of a concern as "[g]ranting the contractor a brief period in which to respond to the serious allegations directed at it ... is unlikely to expose the Government to a new award, let alone any harm. ... [contractors] are going to implement corrective action expediently to address those concerns."²⁵ Still if the main purpose of a suspension and debarment regime is to protect the government from non-responsible contractors, pre-exclusion notice is a bitter pill to swallow.

The MPC statute is unhelpful in determining whether or not pre-exclusion notice furthers the purpose of the suspension debarment regime as the MPC does not contain a clear and defining policy rationale for a suspension and debarment regime. Therefore, pre-exclusion notice could very well be a worthwhile endeavor. When keeping in mind ethics, predictability, and reducing transaction costs, the code achieves two of these goals as pre-exclusion notice does not affect ethics or predictability. Transaction costs, however, rise with the MPC's suspension and debarment regime as compared with the FAR.

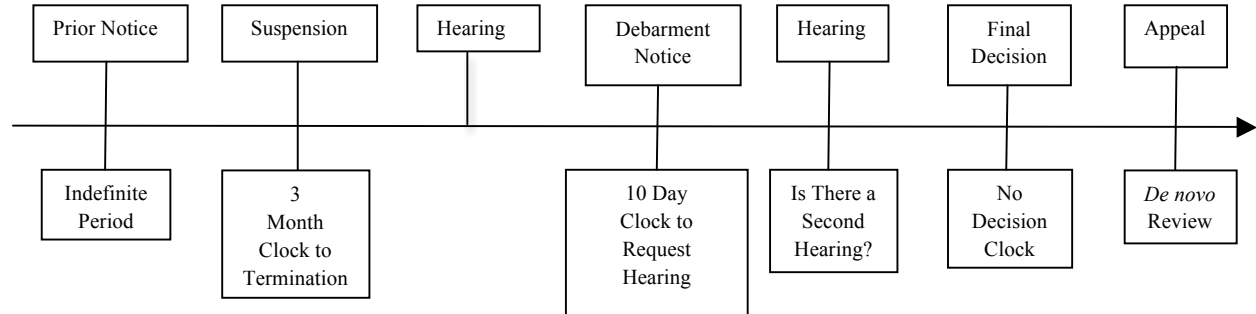
Each time the contractor and the government must interact on a suspension or debarment matter the transaction costs for both sides increase. The FAR envisions the contractor presenting its material to the SDO at most twice, once to demonstrate its present responsibility and once for a hearing of disputed material facts in a non-conviction, fact-based case. The MPC could have as many as four separate transactions points for a suspension leading to a debarment and three

²⁴ FAR 9.402(b) (2012).

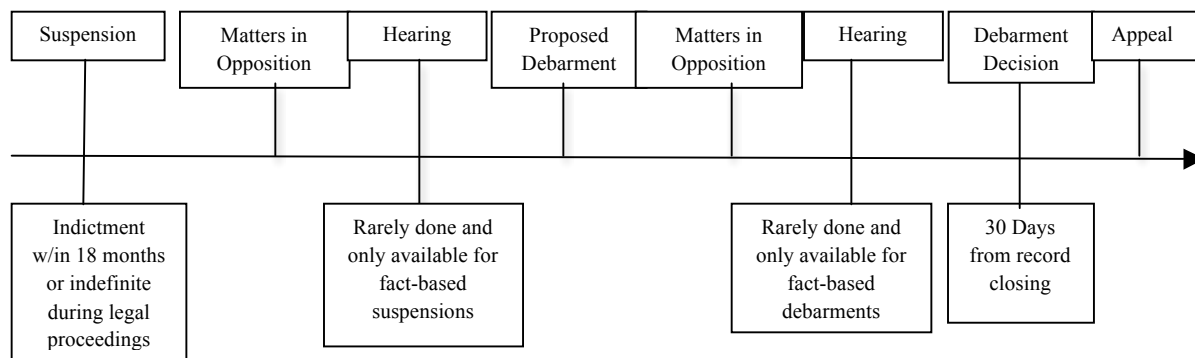
²⁵ Canni, *supra* at note 23, 604.

transaction points for a debarment only. The timeline below demonstrates the MPC’s suspension and debarment system.

Path of an MPC Exclusion



Path of a FAR Exclusion



These figures demonstrate highly procedurally complex systems, but the MPC is not clear as to how its system should work. The MPC does not explain if the suspension terminates at the point when the contractor is noticed that the CPO determined the contractor should be debarred. The proposed regulations state a suspension should cover an appeal of a debarment.²⁶ Does this mean that there must be a suspension before noticing a debarment? If the contractor is noticed a debarment is intended after being granted a suspension hearing, is the contractor allowed a second hearing? If the debarment is based on a conviction, is the contractor allowed to re-litigate the facts in a debarment hearing? Is the contractor then again allowed to re-litigate the facts of a

²⁶ Model Procurement Code for State and Local Gov’ts Regulations R9-102.02.1(a) (2000) (unadopted).

conviction upon its appeal to the Procurement Appeals Board or district court, which is based on *de novo* review? The MPC is unclear.

The MPC regulations balance the need to protect the government with the need to ensure contractors are not unfairly excluded allowing a debarment decision to be made 10 days after contractor receipt of the notice, unless the contractor requests a hearing.²⁷ This presumptively gives a contractor 10 days to launch a full-scale investigation of the matter and determine if the contractor believes any facts are in dispute. This could lead to contractors automatically requesting a hearing and then delaying the hearing process in order to investigate all the while leaving the government open to harm.

Pre-exclusion notice is practice that a suspension and debarment program can support. Suspension and debarment can equally be practiced with an immediate exclusion. The main concern with allowing pre-exclusion notice is a contractor receiving a contract and then immediately after being suspended or debarred. With immediate exclusion, the rights of contractors also must be respected to ensure that a contractor is adjudicated quickly and not left in administrative limbo.

IV. Official Responsible for Suspension and Debarment

MPC	FAR
<ul style="list-style-type: none"> • Chief Procurement Officer • Head of the Purchasing Agency 	<ul style="list-style-type: none"> • Head of the Agency • Delegate of the Head of the Agency

The MPC creates an inherent conflict of interest if the SDO is also the Chief Procurement Officer or the head of the Purchasing Agency. Dean Daniel Gordon defined a conflict of interest as a situation where “when some one finds him – or herself trying to serve (or be loyal to) two or more people (or organizations) whose interests conflict with one another. The conflicted person

²⁷ Model Procurement Code for State and Local Gov’ts Regulations R9-102.04 (2000) (unadopted).

is trying to serve two masters who are pulling in different directions.”²⁸ FAR 3.1101 defines personal conflict of interest as “a situation in which a covered employee has a...relationship that could impair the employee’s ability to act impartially and in the best interest of the Government.”²⁹ The MPC limits personal conflicts of interest to financial situations.³⁰

There are three elements to a conflict of interest: the conflicted party, the conflicted interest, and the responsibility to a third party.³¹ The Chief Procurement Officer (CPO) is responsible for overseeing all aspects of the acquisition process for the entire state government.³² The MPC does not define what “the head of a Purchasing Agency” means but it is reasonable to believe the head of a Purchasing Agency would be responsible for all aspects of procurement for that agency. Thus the CPO is a conflicted party. The CPO has an interest in ensuring the best acquisition outcome for the government.³³ The CPO as the SDO also has the responsibility for ensuring the government only contracts with those contractors that are in the government’s best interests.³⁴ These interests can conflict. When Mr. Shaw testified before the Senate Committee on Homeland Security and Governmental Affairs, his first point emphasized the importance of his independence from the acquisition chain.³⁵ He testified this separation from the acquisition

²⁸ Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25, 28 (2005).

²⁹ FAR 3.1101 (2012).

³⁰ Model Procurement Code for State and Local Gov’ts §12-204.

³¹ Gordon, *supra* note 21, at 29.

³² Model Procurement Code for State and Local Gov’ts § 2-204(3) (2000).

³³ *Id.*

³⁴ *Id.* at §9-507(3).

³⁵ *Weeding Out Bad Contractors: Does the Government Have the Right Tools? Before the S. Comm. On Homeland Sec. and Governmental Affairs*, 112th Cong. 1 (2011) [hereinafter *Weeding Out Bad Contractors*] (testimony of Mr. Steven A. Shaw, Deputy General Counsel of the Air Force, Contractor Responsibility).

chain insulated him from “political or acquisition-driven pressure.”³⁶ The MPC does not provide any protection from these pressures.

GAO reports and practitioners in the federal system have advocated for full time suspension and debarment staff. The GAO found the most active programs within the federal government were those with full time staff.³⁷ The agencies without full time staff routinely had no exclusions, not just for a single year but for all four years the GAO studied.³⁸ Most of the agencies with dedicated staff had a greater percentage of the government-wide exclusions than their percentage of the allotment of the federal budget. Mr. Shaw testified to the House Committee on Oversight and Government Reform, Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform:

[T]he Air Force’s suspension and debarment program is effective because it has a full time, senior career Suspending and Debarring Official who is supported by a dedicated staff, is separate from the acquisition chain, and is empowered to do the right thing to protect the Government. This structure has allowed me in every instance to do what I believe is the right thing to protect the Government.³⁹

Thus practical experience and empirical evidence prove suspension and debarment programs are most effective when the suspension and debarment officials are solely responsible for its implementation.

State budgets are tighter than federal budgets and finding the budget allocation for an additional full time position can be an impossible task. An effective suspension and debarment

³⁶ *Id.*

³⁷ U.S. Gov’t Accountability Office, GAO-11-739, *Some Agency Programs need Greater Attention, and Governmentwide Oversight Could be Improved*, 13 (2011).

³⁸ *Id.* at 12.

³⁹ *Protecting Taxpayer Dollars: Are Federal Agencies Making Full Use of Suspension and Debarment Sanctions? Before the Subcomm. On Tech., Info. Policy, Intergovernmental Relations & Procurement Reform of the H. Comm. On Oversight & Gov’t Reform*, 112th Cong. 2 (2011) [hereinafter *Does the Government Have the Right Tools*] (testimony of Mr. Steven A. Shaw, Deputy General Counsel of the Air Force, Contractor Responsibility).

program brings returns back to the government in avoidance costs and returned funds and that starts with enabling the SDO to perform his or her role fully and independently.⁴⁰ The best solution, in a world where financial constraints, were not a concern would be for suspension and debarment officials to be a full time dedicated official. At a minimum, a dual-role person with suspension and debarment responsibilities should not be part of the acquisition chain but instead be placed in a separate area of the agency.

V. Consultation Requirements

MPC	FAR
<i>After consultation with the Using Agency and the [Attorney General]</i> ⁴¹	No prior consultation requirement

The MPC requires consultation with the Using Agency, which requires studying the acquisition cost of the exclusion action. Federal regulations do not require consultation or coordination. Each agency determines its own coordination process within the agency.⁴² Within the Department of Defense, there is no requirement that the acquisition chain be alerted about a pending exclusion.⁴³ Once again, Mr. Shaw’s testimony reflects this structure prevented acquisition driven suspension or debarment decisions.⁴⁴ The MPC’s requirement for consultation instead seems to champion acquisition driven decisions. While this is not necessarily a negative, acquisition driven decisions prioritize the best decision for the agency

⁴⁰ See David Robbins, *As Suspension and Debarment Grows the National Discourse, We Should Not Lose Sight of Broader Procurement Fraud Remedies*, 48 Procurement Law. 1 (2012).

⁴¹ Model Procurement Code for State and Local Gov’ts § 9-102(1) (2000).

⁴² The Department of Defense (DoD) for example has DoD Instruction 7050.05 and the Air Force has its own subsequent Air Force Instruction 51-1101 that determine how the Air Force will coordinate its Procurement Fraud Remedies Program.

⁴³ DoD Instruction 7050.05 (June 4, 2008).

⁴⁴ *Weeding Out Bad Contractors*, *supra* note 25, at 1 (testimony of Mr. Steven A. Shaw, Deputy General Counsel of the Air Force, Contractor Responsibility); *Does the Government Have the Right Tools*, *supra* note 29, at 2 (testimony of Mr. Steven A. Shaw, Deputy General Counsel of the Air Force, Contractor Responsibility).

rather than the best decision for the government as a whole or the taxpayer. Hypothetically, a bribed end user could continue to champion a contractor that was under scrutiny for other violations without anyone knowing of the conflict of interest. Even without illegal activity, end users develop relationships with these contractors, especially in services contracts. They are not unbiased actors. The FAR recognizes that there are instances where a contractor is excluded that is vital to the government's needs. This waiver provision, however, can only be used in situations where no other contractor can provide these goods or services.⁴⁵ The MPC does not have a waiver provision. With an addition of a waiver provision, the MPC may be able to avoid requiring consultation with the Using Agency and the creation of acquisition driven exclusion decisions.

The MPC also requires coordination with the Attorney General. The FAR again does not require consultation of any kind prior to taking action.⁴⁶ Often if a contractor is being pursued criminally or civilly, the prosecutor is hesitant to concur with any suspension or debarment action as the misconception persists that an administrative remedy may hurt the criminal or civil case. Recognizing the importance of coordination of remedies, Attorney General Eric Holder issued a memorandum directing Department of Justice attorneys to “timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate to the case and permissible by law, whenever an alleged offense or violation of federal law gives rise to the potential for criminal, civil, regulatory, and/or agency administrative parallel

⁴⁵ FAR 9.405 (2012); DFARS 209.405(a) (2012).

⁴⁶ Most of the active suspension and debarment offices in the federal government are placed within the Office of the General Counsel so any legal review is done within the office. As the MPC places the Suspending and Debarment Official within the acquisition chain, an independent legal review of the action for legal sufficiency is necessary.

(simultaneous or successive) proceedings.”⁴⁷ Mr. Holder further provides the policy rationale for cooperation supports “better protection of the government’s interests (including deterrence of future misconduct and restoration of program integrity) and [securing] the full range of the government’s remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion and debarment).”⁴⁸ Coordination between the Attorney General and the SDO is vital and requiring coordination on these matters is not a negative. States must be aware, however, that SDO decision could then be compromised through litigation based decision making rather than decisions made in the best interests of the government.

VI. Eligibility for Suspension and Debarment

MPC	FAR
<p><i>The Chief Procurement Officer... shall have authority to debar a person for cause from consideration for award of contracts.</i>⁴⁹</p>	<p><i>The debaring official may, in the public interest, debar a contractor for any of the causes in 9.406-2.</i>⁵⁰</p> <p><i>Contractor means any individual or other legal entity that – (1) Directly or indirectly...submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a government contract, including a contract for carriage under government or commercial bills of lading, or a subcontract under a government contract; or conducts business or reasonably may be expected to conduct business, with the government as an agent or representative of another contractor.</i>⁵¹</p>

⁴⁷ Memorandum from Attorney General Eric Holder, *Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings*, 1 (January 30, 2012) (<http://www.safgc.hq.af.mil/shared/media/document/AFD-120227-013.pdf>).

⁴⁸ *Id.*

⁴⁹ Model Procurement Code for State and Local Gov’ts § 9-102(1) (2000).

⁵⁰ FAR 9.406-1(a) (2012).

⁵¹ FAR 9.403 (2012).

The MPC and the FAR have separate jurisdictions. The MPC could reasonably institute a suspension or debarment proceeding against any person that fit one of the causes for debarment. The FAR's scope is much narrower and only allows those that contract with the government or reasonably could be expected to contract with the government to be subjected to an exclusion proceeding. Mr. Yuri Weigel argues that debarring individuals without any direct connection to government contracting is "overprotective, punitive, or merely symbolic- none of which is in the government's best interest."⁵² Mr. Weigel instead would argue that the FAR should allow suspension or debarment only against those who have participated in government contracting activities.⁵³ The MPC does not limit exclusion to those that participate in government contracting but instead to the entire universe of people and, presumably, companies through their legal personhood. Realistically only contractors will be concerned as to the effects of this statute, but this statute poses a problem for the SDOs. Is the SDO fulfilling his or her duties under the statute if they only consider those individuals that contract with the government or do they need to review everyone that qualifies for a cause for debarment? A person could fall under MPC 9-102(2)(b) after being convicted for embezzling from his former employer. This would directly affect his responsibility as a state contractor. Must the SDO consider debarring him even though there is no evidence that he will be a government contractor in the future? The MPC is unclear.

The MPC does not promote predictability with such a broad statute. Anyone in any state could theoretically be subject to this statute in any state that enacted this statute. This does not allow for predictability in application. While a person could predict the outcome if their actions

⁵² Yuri Weigel, *Is "Protection" Always in the Best Interests of the Government?: An Argument to Narrow the Scope of Suspension and Debarment*, 81 Geo. Wash. L. Rev. 627, 652 (2013).

⁵³ *Id.* at 655.

apply, they cannot predict if this statute will be enforced against them. States should consider if such a broad application enhances their procurement regime or if a narrower, more defined jurisdiction is more appropriate.

VII. Elements of Suspension

MPC	FAR
<ul style="list-style-type: none"> • Burden of Proof: Probable Cause⁵⁴ • Purpose: Unclear • Length: No longer than 3 months⁵⁵ 	<ul style="list-style-type: none"> • Burden of Proof: Adequate Evidence⁵⁶ • Purpose: <i>[A] serious action to be imposed...pending the completion of investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the government's interest.</i>⁵⁷ • Length: No longer than 18 months unless legal proceedings have been initiated.⁵⁸

The purpose of a suspension in the FAR system is to protect the government during an investigation and legal proceedings where “immediate action is necessary to protect the Government’s interest.”⁵⁹ A suspension can last up to 18 months without an indictment and indefinitely once an indictment is in place.⁶⁰ Both the FAR and the MPC recognize a similar burden of proof standard. The resemblance between the MPC and the FAR ends at the burden of proof for suspensions. The MPC itself does not provide a rationale for a suspension, but the MPC’s regulations propose a suspension in a situation where allegations need to be developed.⁶¹ The MPC suspension consolidates the FAR suspension and proposed debarment functions

⁵⁴ Model Procurement Code for State and Local Gov’ts § 9-102(1) (2000).

⁵⁵ *Id.*

⁵⁶ FAR 9.407-1(b)(1) (2012).

⁵⁷ *Id.*

⁵⁸ FAR 9.407-4(b) (2012).

⁵⁹ FAR 9.407-1(b)(1) (2012).

⁶⁰ FAR 9.407.4 (a)-(b) (2012).

⁶¹ Model Procurement Code for State and Local Gov’ts Regulations R9-102.02.1(a) (2000) (unadopted).

because it acts as the sole developmental exclusion. While the FAR allows for fact development in both the suspension and the proposed debarment, the MPC only has a suspension to do that.⁶² Partially this is because the MPC requires pre-exclusion notification so fact development is contemplated during this period.⁶³ The FAR contemplates an exclusion during court proceedings.⁶⁴ The MPC has no such protection. Both the MPC and the FAR present valid suspension and debarment models. The question becomes how much protection is the state interested in.

VIII. Elements of Debarment

MPC	FAR
<ul style="list-style-type: none"> • Burden of Proof: Conviction; No basis for fact-based debarments • Purpose: Unclear • Length: No longer than 3 years⁶⁵ 	<ul style="list-style-type: none"> • Burden of Proof: Conviction, Civil Judgment, and Preponderance of the Evidence⁶⁶ • Purpose: To exclude from government contracting contractors which are not presently responsible⁶⁷ • Length: Generally 3 years but as long as the SDO believes necessary⁶⁸

The MPC and the FAR are fairly similar in regards to the debarment process. They are substantively different, however. The MPC provides no burden of proof for fact-based debarments. The FAR requires a preponderance of the evidence⁶⁹. Thus an SDO cannot make a fact-based decision under the MPC because he or she cannot know what standard to judge the facts on. The difficulty in determining how to adjudge facts is perhaps best described in a

⁶² FAR 9.406-3(b); FAR 9.407-3(b)(2012); Model Procurement Code for State and Local Gov'ts Regulations R9-102.02.1(a) (2000) (unadopted).

⁶³ Model Procurement Code for State and Local Gov'ts § 9-102(1) (2000).

⁶⁴ FAR 9.407-4(a) (2012).

⁶⁵ *Id.*

⁶⁶ FAR 9.406(b)(1) (2012).

⁶⁷ FAR 9.402(a)-(b) (2012); FAR 9.406-1(a) (2012).

⁶⁸ FAR 9.406-4(a)-(b) (2012).

⁶⁹ FAR 9.406(b)(1) (2012).

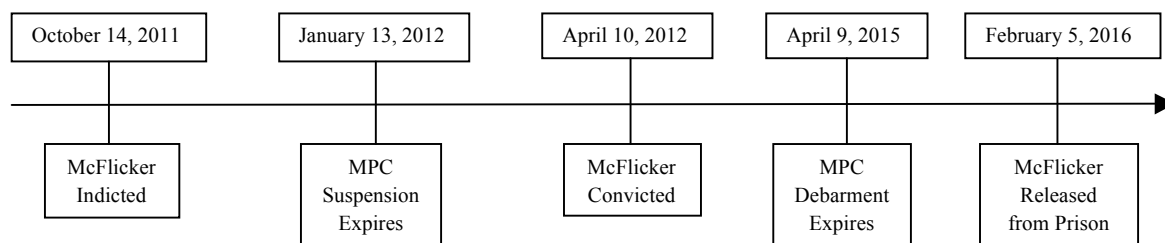
hypothetical. Mr. Doe is a contractor employee in Massachusetts, and he assists three other people in stealing sand from the government before the oncoming Hurricane Sandy. He signs a confession saying he helped steal the sand in return for \$5,000. The State of Massachusetts gives notice to Mr. Doe saying they intend to debar him. Mr. Doe replies that the confession was given under duress because the police threatened to hurt him if he didn't confess and refused him access to counsel. Mr. Doe says he was just helping his coworker into the facility and did not know they were actually stealing the equipment. The police deny that they did any of the things Mr. Doe claims they did to him. What level of proof does the SDO need to make a debarment decision? Is it a preponderance of the evidence? Should beyond a reasonable doubt apply? The MPC is unclear.

IX. Terms for Suspension and Debarment

Suspension		Debarment	
MPC	FAR	MPC	FAR
<ul style="list-style-type: none"> Limited to 3 months 	<ul style="list-style-type: none"> 18 months without an indictment No limitation when an indictment is issued 	<ul style="list-style-type: none"> Limited to 3 years 	<ul style="list-style-type: none"> Generally 3 years Commensurate with the seriousness of the offense

The MPC artificially limits the length of suspension and debarments impractically due to the nature of investigatory and legal proceedings. These problems are best illustrated through the suspension and eventual debarment of Mr. Henry McFlicker.

Timeline for Mr. McFlicker's Case



On October 14, 2011, Mr. McFlicker was indicted for conspiring to fraudulently misrepresent the origin of airplane parts.⁷⁰ If Mr. McFlicker had been suspended on the date he was indicted, he would be eligible for government contracting again on January 14, 2012 under the MPC.⁷¹ He, however, would not have been eligible to be debarred because he had not yet been convicted.⁷² On April 10, 2012, Mr. McFlicker was convicted.⁷³ Only then could he be debarred under the MPC.⁷⁴ In Mr. McFlicker's case, a seven month gap existed between his indictment and conviction. Because the MPC limits a suspension to three months, Mr. McFlicker would have been eligible to receive government contracts for a four month period before he could have been debarred. In this case, Mr. McFlicker was sentenced to 45 months in prison.⁷⁵ Had the debarment been issued on the date he was convicted, Mr. McFlicker would be eligible to bid on government contracts while still in prison.⁷⁶

Because the FAR is more flexible about timelines, the Air Force was able to adequately protect the government from Mr. McFlicker. In this case, the Air Force suspended Mr. McFlicker on August 30, 2011 prior to his indictment.⁷⁷ The Air Force then debarred Mr. McFlicker for an eight year period until August 29, 2019 extending back to when Mr. McFlicker was first suspended and covering past the term of his incarceration.⁷⁸ The Air Force found it

⁷⁰ Memorandum in Support of the Proposed Debarment of Henry McFlicker from Steven A. Shaw, Deputy Gen. Counsel (Contractor Responsibility), Dep't of the Air Force Office of the Deputy General Counsel, 1 [hereinafter Henry McFlicker Proposed Debarment].

⁷¹ See Model Procurement Code for State and Local Gov'ts § 9-102(1) (2000).

⁷² See Model Procurement Code for State and Local Gov'ts § 9-102(2)(b) (2000).

⁷³ Henry McFlicker Proposed Debarment, *supra* note 58, 2.

⁷⁴ See Model Procurement Code for State and Local Gov'ts § 9-102(2)(b) (2000).

⁷⁵ Henry McFlicker Proposed Debarment, *supra* note 58, 2.

⁷⁶ See Model Procurement Code for State and Local Gov'ts § 9-102(1) (2000).

⁷⁷ Notice of Debarment of Henry McFlicker from Steven A. Shaw, Deputy Gen. Counsel (Contractor Responsibility), Dep't of the Air Force Office of the Deputy General Counsel, 2 [hereinafter Henry McFlicker Debarment].

⁷⁸ *Id.*

necessary for Mr. McFlicker to be debarred three years beyond his term of incarceration.⁷⁹

Requiring a period of exclusion beyond incarceration allows the contractor “a period of time to re-establish present responsibility through training and experience.”⁸⁰ This exercise of discretion allowed the SDO to protect the government so that the government could be assured that Mr. McFlicker was able to act as a responsible contractor.

The MPC’s limitation on the length of debarment promotes the MPC’s goal of predictability but at the expense of ethics. The MPC model does not promote ethics in this instance because those that are not presently responsible must be removed from the exclusion list due to an arbitrary timeline rather than due to a determination that they are actually presently responsible. Contractors can predict the maximum time they could be excluded for their actions; however, they cannot predict that they will be competing against presently responsible contractors.

The FAR, however, demonstrates predictability can be achieved without having to limit an SDO’s ability to protect the government. The GAO found of the 426 debarments the DoD issued between 2009 and 2011 almost 50 percent exceeded the three year guideline.⁸¹ Looking at debarments that exceed the guideline alone does not tell a complete picture of the practice. Upon reviewing one agency’s debarment actions, it appears exclusions under the FAR rarely exceed the three year guideline when debarments for convictions with prison sentences are excluded. The Air Force has 180 debarment cases posted on its website.⁸² These debarments

⁷⁹ *Id.*

⁸⁰ U.S. Gov’t Accountability Office, GAO-12-932, Suspension and Debarment: DOD has Active Referral Processes, but Additional Action Needed to Promote Transparency, 14 (2012) [hereinafter GAO Active Referral Processes Report].

⁸¹ *Id.*

⁸² *List of Recent Debarments*, Dep’t Air Force Gen. Counsel, (<http://www.safgc.hq.af.mil/organizations/gcr1/debarmentactions.asp>) (last visited May 3, 2013).

represent the debarments the Air Force has issued between 2005 and 2013 that are still in effect.⁸³ Of these 180, 30 cases, 17 percent, had an exclusion period greater than three years.⁸⁴ Of those with an exclusion period greater than three years, 20 cases, 70 percent of these cases, were longer than three years as a result of a prison sentence.⁸⁵ Thus the FAR's permissive system allows for necessary protection of the government and evidence does not demonstrate the three year guideline is abused. States should consider whether the MPC's mandatory restriction or the FAR's permissive system fits their procurement needs best.

In the federal system, suspensions often last far longer than three months. Between 2009 and 2011, the Department of Defense suspended 410 contractors. Of these suspended contractors, 180 contractors were suspended between 12 and 36 months, presumably due to legal proceedings.⁸⁶ The current MPC model leaves the government in an odd position of having established probable cause for a debarment but without an ability to continue the protection of the government through the end of legal proceedings because no conviction has been established.⁸⁷ States should consider whether exclusion of a contractor during legal proceedings is necessary for their procurement program.

⁸³ *Id.*

⁸⁴ *Id.* The GAO in their review counted each individual action listed in EPLS rather than evaluating on a case-by-case basis. GAO Active Referral Processes Report, *supra* note 68, at 24-26. Case-by-case analysis is more appropriate in this instance because individual actions can distort the data. A case with one individual actor and 19 companies counts as 20 instances of a case extending beyond the three year mark rather than its true weight of a single case.

⁸⁵ *List of Recent Debarments*, Dep't Air Force Gen. Counsel, (<http://www.safgc.hq.af.mil/organizations/gcr1/debarmentactions.asp>) (last visited May 3, 2013).

⁸⁶ GAO Active Referral Processes Report, *supra* note 68, at 13.

⁸⁷ *See* Model Procurement Code for State and Local Gov'ts § 9-102 (2000).

X. Present Responsibility

MPC	FAR
<p><i>Violation of contract provisions...of a character which is regarded by the Chief Procurement Officer or the head of a Purchasing Agency to be so serious as to justify debarment action⁸⁸</i></p> <p><i>Any other cause the Chief Procurement Officer or the head of a Purchasing Agency determines to be so serious and compelling as to affect responsibility⁸⁹</i></p>	<p><i>Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only.⁹⁰</i></p> <p><i>The contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary.⁹¹</i></p>

The cornerstone of the federal suspension and debarment system is present responsibility. Present responsibility means companies can have done wrong but then mitigate that damage to demonstrate they are no longer a liability to the government. SDOs are suggested to consider how the company is presently not how it might be in the future and not how it was when the violations occurred.

Suspension and debarment can only be used to protect the government – not for punishment. Mr. Steven Gordon articulates:

Not only is this limitation explicitly stated in the debarment regulations themselves, but it has constitutional underpinnings as well. The Constitution reposes in the legislative branch the power to prescribe penalties for violations of the law. As the Supreme Court cautioned nearly 50 years ago in *L.P. Steuart & Bro., Inc. v. Bowles*, it would transcend the administrative function for agencies to create sanctions for law enforcement purposes.⁹²

Thus federal suspension and debarment is neatly couched in the realm of protection rather than punishment. State constitutions may not have such restrictions and could allow suspension and

⁸⁸ Model Procurement Code for State and Local Gov'ts § 9-102(2)(d) (2000).

⁸⁹ Model Procurement Code for State and Local Gov'ts § 9-102(2)(e) (2000).

⁹⁰ FAR 9.402 (2012).

⁹¹ FAR 9.406-1(a) (2012).

⁹² Steven Gordon, *Suspension and Debarment from Federal Programs*, 23 Pub. Cont. L.J. 573, 582 (1994).

debarment to be used for punishment. Assuming that these restrictions still apply, what standard should an SDO apply to determine what the protection of the government means? The MPC is unclear.

In developing present responsibility, the FAR provides a contractor 10 remedial measures and mitigating factors it can present, as applicable, to demonstrate that it is *presently* responsible, even if the contractor may not have been responsible in the past. The D.C. Circuit held a “contractor can meet the test of present responsibility by demonstrating that it has taken steps to ensure that the wrongful acts will not recur.”⁹³ Thus once a contractor has demonstrated it has taken remedial measures it has proven a large part of its present responsibility.

The MPC provides no guiding principle to follow in statute. It merely provides the authority for suspension and debarment to occur. Present responsibility need not be the basis for suspension or debarment action to be taken but some basis should be stated in the code itself. The MPC provides for a Procurement Appeals Board to review the SDO’s decision *de novo* that the decision “was in accordance with the Constitution, statutes, regulations, and the best interests of the [State], and was fair.”⁹⁴ What basis should the Procurement Appeals Board or the court use to determine if the decision was in the best interests of the State or fairness? The MPC is unclear.

⁹³ *Robinson v. Cheney*, 876 F.2d 152, 160 (D.C. Cir. 1989).

⁹⁴ Model Procurement Code for State and Local Gov’ts § 9-507(3) (2000).

XI. Mitigating Factors

MPC	FAR
No defined mitigating factors	Extensive list of mitigating factors and remedial measures ⁹⁵

Prior to the Packard Commission in 1994, the FAR allowed for mitigating factors to be considered when determining whether a contractor was presently responsible but it did not provide a list of what mitigating factors or remedial measures should be considered.⁹⁶ After the Packard Commission, the FAR adopted the current list of mitigating factors and remedial measures.⁹⁷ The Packard Commission used the example of a suspension to illustrate its case stating:

The bare fact of an indictment may thus be an improper measure of the contractor's "present responsibility" should suspension occur at the time of indictment. During the period following the misconduct alleged in the indictment, the contractor may have replaced employees guilty of wrongdoing, corrected faulty systems, made restitution, better communicated and implemented a corporate code of conduct, improved internal auditing practices, and otherwise taken actions demonstrating its present responsibility. An "automatic" suspension does not afford opportunity for such proof, and may defeat incentives for implementing more responsible self-governance.⁹⁸

Thus the Packard Commission recommended a list of mitigating factors and remedial measures of which many were then incorporated into the FAR and DFARS.

Suspension and debarment are severe measures for the government to consider implementing. As such, the mitigating factors and remedial measures provide a target for contractors with problems to reach for in order to demonstrate their present responsibility. The FAR increases predictability and ethics and reduces transaction costs.

⁹⁵ FAR 9.406-1(a) (2012).

⁹⁶ Packard Commission, *supra* note 16, at 104 citing FAR 9.406-1(a) (1986).

⁹⁷ FAR 9.406-1(a) (2012).

⁹⁸ Packard Commission, *supra* note 16, at 103 n.22.

Contractors are aware of the standard they will be held to and can easily demonstrate whether or not they meet these criteria. Not having a public list of mitigating factors and remedial measures can result in the opposite effect. Contractors are not aware of what standards they are held to and are unaware of what measures they should have taken proactively to maintain their present responsibility. This can also lead to a lack of uniformity between agencies if one SDO requires different standards than another. This increases transaction costs because contractors then must implement measures based on the demands of several individuals as they come across them through time or differing agencies rather than based on a single uniform semi-permanent list. States should consider whether adopting mitigating factors would enhance their procurement regime.

XII. Judicial Review

MPC	FAR
Decision is reviewed <i>de novo</i> . ⁹⁹ Facts are reviewed arbitrary, capricious, fraudulent, or clearly erroneous. ¹⁰⁰	Decision is reviewed under the arbitrary and capricious standard. ¹⁰¹

Judicial review is the last chance for a contractor to overcome an exclusion. Therefore the role of the courts is important from a due process and fairness standpoint. Under the MPC all decisions of the SDO are reviewed *de novo*.¹⁰² Under the FAR, all decisions fall under the Administrative Procedures Act and are reviewed according to an arbitrary and capricious standard where “the decision was based on a consideration of relevant factors and whether there

⁹⁹ Model Procurement Code for State and Local Gov’ts § 9-507(3) (2000).

¹⁰⁰ *Id.*

¹⁰¹ 5 U.S.C. § 706(2)(A).

¹⁰² Model Procurement Code for State and Local Gov’ts § 9-507(3) (2000).

has been a clear error of judgment.”¹⁰³ The MPC allows the court to substitute its judgment for that of the SDO. The FAR does not.¹⁰⁴

De novo review of suspension and debarment does not encourage predictability or reduction of transaction costs. The SDO is placed in the position of guessing how the court would view this matter rather than using his or her own judgment as to whether or not this contractor is presently responsible. A panel of judges could easily each have a different interpretation not just whether this contractor should be excluded but for how long. Especially without mitigating factors, predicting the outcome of the SDO or of the court can be, well, unpredictable. *De novo* review does not limit transaction costs because the contractor can be forced to litigate the case up to four separate times. The contractor litigates the case in court prior to conviction, in the suspension hearing, in the debarment hearing, and finally before the court again to contest the debarment. In each instance, the full panoply of the case is available for argument. Particularly in complicated cases, this can be extremely expensive. The arbitrary and capricious standard asks if the decision was reasonable and rationale; it does not require a full litigation of the case. This burden is not only on the contractor. The state is forced to defend its action four separate times as well. Therefore states should consider whether the *de novo* review enhances the procurement system or if it creates a drain on the system.

XIII. Conclusion

Federal budgets are tighter. State budgets are tighter. These are the times that test companies financially and ethically. Although many will succeed, some will fail. Against this backdrop, suspension and debarment remains a vital tool, now more than ever, for ensuring an

¹⁰³ *Burke v. United States Environmental Protection Agency*, 127 F. Supp. 2d 235, 237 (D.D.C. 2001) (internal citations omitted).

¹⁰⁴ *Bednar et al.*, *supra* note 3, at 193.

ethical procurement environment because it removes these actors from the procurement system. Criminal and civil penalties cannot do this. Suspension and debarment is currently the most effective method to ensure the government contracts with responsible contractors and to encourage companies to be ethical contractors. This tool allows the government to leverage its buying power to protect the public fisc and public confidence. Every tool requires periodic maintenance. In order for the process to work, suspension and debarment codes and regulations require a clear purpose, clear expectations, and clear processes for review. Given the significant period of time between the original drafting of the suspension and debarment code in the MPC and the present day, the states should review the MPC to see if it fits the needs of the state governments.

Appendix I: Proposed Revised Model Procurement Code

- (1) *Policy.* Agencies shall solicit offers from, award contracts to, and consent to subcontracts only with responsible contractors. Suspension and debarment is discretionary and shall be exercised only in order to protect the public interest.
- (2) *Authority.* After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Suspension and Debarment Official shall have authority to debar a person for cause from consideration for award of contracts based on a preponderance of the evidence. The debarment shall be commensurate with the offense but shall not generally be for a period of more than [three years]. The same officer 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 [twelve months] unless an indictment has been issued. The authority to debar or suspend shall be exercised in accordance with regulations.
- (3) *Causes for Debarment or Suspension.* The causes for debarment or suspension include the following:
 - (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
 - (b) conviction under State or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a [State] contractor;
 - (c) conviction under State or federal antitrust statutes arising out of the submission of bids or proposals,
 - (d) violation of contract provisions, as set forth below of a character which is regarded by the Suspension and Debarment Official to be so serious as to justify debarment action:
 - (i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - (ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;
 - (e) any other cause the Suspension and Debarment Official determines to be so serious and compelling as to affect responsibility as a [State] contractor, including

- debarment by another governmental entity for any cause listed in regulations; and
- (f) for violation of the ethical standards set forth in Article 12 (Ethics in Public Contracting).
- (4) *Mitigating Factors.* The Suspension and Debarment Official may consider the following factors in determining the present responsibility of a contractor.
- (a) Whether the person had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.
 - (b) Whether the person brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.
 - (c) Whether the person has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
 - (d) Whether the person cooperated fully with Government agencies during the investigation and any court or administrative action.
 - (e) Whether the person has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.
 - (f) Whether the person has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.
 - (g) Whether the person has implemented or agreed to implement remedial measures, including any identified by the Government.
 - (h) Whether the person has had adequate time to eliminate the circumstances within the person's organization that led to the cause for debarment.
 - (i) Whether the person's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.
- (5) *Decision.* The Suspension and Debarment Official shall issue a written decision to debar or suspend. The decision shall:
- (a) state the reasons for the action taken; and

- (b) inform the debarred or suspended person involved of its rights to judicial *or administrative* review as provided in this Article.
- (6) *Notice of Decision.* A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.
- (7) *Finality of Decision.* A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or
 - (a) the debarred or suspended person commences an action in court in accordance with Section 9-403(2) (Waiver of Sovereign Immunity in Connection with Contracts, Debarment or Suspension); or
 - (b) *the debarred or suspended person appeals administratively to the Procurement Appeals Board in accordance with Section 9-507(Suspension or Debarment Proceedings)*
- (8) *Waiver.* If the Chief Procurement Officer determines there is a compelling reason to solicit offers from, award contracts to, or consent to subcontract with an excluded contractor, the agency may do so.

*Language between asterisks to be enacted if Article 9, Part E (Procurement Appeals Board) is enacted.

ATTACHMENT 9



REVISING THE 2000 MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS TO ENSURE CORPORATE COMPLIANCE

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ABSTRACT

Corruption in the procurement system interferes with integrity and competition requirement of the procurement system. This paper proposes an addition to the 2007 Model Procurement Code to combat corruption via a corporate compliance program requirement. The proposed addition builds on the existing articles of the Model Procurement Code, and both mandates a corporate compliance program and enumerates the basic features that should be present in the program. The basic principles that the Model Procurement Code should required in a corporate compliance program stem from the emerging universal standard of requirements corporate compliance programs. Having a corporate compliance program will benefit both government contractors as well as serve as a quality control system for the state and local procurement process.

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I. INTRODUCTION

Integrity and competition are two of the core principles that make up the procurement process.¹ These principles of integrity and competition must remain intact while state and local governments try to “maximize the best value in purchasing, to ensure that the state – the buyer – receives the best quality for the money spent”.² Corruption and unethical conduct threaten both the integrity and competition of the procurement system. Ethical misconduct is anti competitive by “leading to distorted prices and disadvantages honest businesses”.³ Additionally, misconduct affects the integrity of the procurement system by undermining democratic values, public accountability, and economic development.⁴

The unethical misconduct of contractors must be eliminated to ensure reliability of the procurement process.⁵ One method of insuring the dependability of both the contractors and the procurement process in its entirety is implementing a

¹ See, e.g., Jeffrey Branstetter, *Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 PUB. CONT. L.J. 443 (2004-2005) (discussing the case study of Darleen Druyun, a high ranking acquisition official and her corruption); see, e.g., Megan Kinsey, *Transparency in Government Procurement: An International Consensus?*, 34 PUB. CONT. L.J. 155 (2004-2005) (discussing the importance of transparency in the procurement process).

² Christopher R. Yukins, COORDINATING COMPLIANCE AND PROCUREMENT RULES IN A SHRINKING WORLD (Feb. 2013); see, e.g., Gene Ming Lee, *A Case for Fairness in Public Works Contracting*, 65 FORDHAM L. REV. 1075 (1996-1997) (discussing the importance of fairness in public works as billion of tax dollars are at risk).

³ *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) [hereinafter *FCPA Guidance*], 2-3, available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

⁴ *Id.* at 2-3.

⁵ See Christopher R. Yukin, *Ethics in Procurement: New challenges after a Decade of Reform*, 38 PROCUREMENT LAW. 5 (2002-2003) (discussing ethics in the procurement system and benefit of the use of a formal corporate compliance system).

sufficient corporate compliance program.⁶ Corporate compliance programs combat both corruption and unethical misconduct. While each state has its own standards of ethics, conflicts of interest to ensure corporate compliance methods, with both civil and criminal ramifications, they differ from one jurisdiction to the next.⁷ Ironically on the global scale, the requirements of corporate compliance systems are becoming more uniform, all containing the same basic principles.⁸ Implementing this globalized standard of corporate compliance on the state level will both put the contractors on notice and serve as a quality control system for the state and local procurement process.

The Model Procurement Code is a code published by the American Bar Association that aims to enumerate the “best practices” that should be implemented to ensure transparency, fairness and competitive in state and local procurement systems.⁹ States have the option of adopting the Model Procurement Code in its entirety or selecting specific provisions.¹⁰ Thus, the Model Procurement Code serves as a benchmark or reference for state and local governments when constructing its procurement system.

⁶ *Id.*

⁷ *Id.*; *NASPO Survey of State Procurement Practices*, Summary report (June 2012) available at http://www.naspo.org/Survey/Documents/Zip/FINAL_SummaryReport_2011-2012_Survey_6-28-12.pdf (States ethical statutes differ, for example statutes that explicitly prohibits any kickbacks are only in 36 states, bribes are in 38 states, contingent fees are in 27 states and anything of value to a state officer or employee are in 37 states).

⁸ Christopher R. Yukins, *COORDINATING COMPLIANCE AND PROCUREMENT RULES IN A SHRINKING WORLD* (Feb. 2013) (citing FCPA guidance).

⁹ State and Local Model Procurement Code Committee, *Mission Statement*, AMERICAN BAR ASSOCIATION, (Jan. 18, 2013) <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>.

¹⁰ *Id.*

As the international community is harmonizing its corporate compliance standards, the Model Procurement Code for state and local governments should be revised to include a compliance system that adheres to those principles. This paper will first demonstrate that the compliance standards have become relatively uniform across the globe. The five main corporate compliance standards that will be used to show the convergence of principles are the Organization for Economic Co-operation and Development, United States Sentencing Commission, U.S Federal Acquisition Regulation, UK Bribery Act, and the Foreign Corrupt Practices Act. Next this paper will discuss the purpose of the 2000 Model Procurement Code as well as its article on the ethics in public contracting. Lastly, this paper will propose changes to the 2000 Model Procurement Code that will add the requirement of a compliance program using the globalized standards and discuss the benefits contractors gain from an effective compliance program.

II. THE HARMONIZATION OF WORLDWIDE COMPLIANCE STANDARDS

Both the United States and the international community at large have agreed that they must combat and reduce corruption.¹¹ One method of insuring this goal is met is to require companies to have corporate compliance programs.¹²

¹¹ *FCPA Guidance* at 7; *see, e.g.*, Lisa Landmeier et al., *Anti-Corruption International Legal Developments*, 36 INT'L L. 589 (2002) (discussing the different international developments that have occurred to combat corruption); *see, e.g.*, Kathleen M Hamann, Philip Urofsky, Nicole M. Healy, Alexandra Wrage, Margaret & Ayres, *Developments in U.S. and International Efforts to Prevent Corruption*, 40 Int'l Law. 417 (2006); *see, e.g.*, Steven R. Slbu, *Battling*

A. Corporate compliance programs

A corporate compliance system is defined as “a formal program specifying an organization’s policies, procedures, and actions within a process to help prevent and detect violations of laws and regulations”.¹³ The purpose of a corporate compliance program is to promote “an organizational culture that encourages ethical conduct and a commitment to compliance with the law”.¹⁴ While compliance programs are

Global Corruption in the New Millennium, 31 LAW & POL’Y INT’L BUS. 47 (1999-2000) (discussing the history of bribery and its consequences); Bruce Zagaris & Shaila Lakhani Ohri, *The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL’Y INT’L BUS. 53 (1998-1999); World Bank Group, *Integrity Compliance Guidelines* (2011), available at http://siteresources.worldbank.org/INTDOII/Resources/Integrity_Compliance_Guidelines.pdf; International Chamber of Commerce, Transparency Int’l, United Nations Global Compact, and World Economic Forum, *Resisting Extortion and Solicitation in International Transactions: A Company Tool for Employee Training* (2011), available at http://www3.weforum.org/docs/WEF_PACI_RESIST_Report_2011.pdf; International Chamber of Commerce, *et al.*, *Clean Business Is Good Business*, available at http://www3.weforum.org/docs/WEF_PACI_BusinessCaseFightingCorruption_2011.pdf; Lauren O. Youngman, *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, 412 (2013); see, e.g., Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int’l & Comp. L. 793 (2001).

¹² *FCPA Guidance* at 56; see also, Christopher R. Yukin, *Ethics in Procurement: New challenges after a Decade of Reform*, 38 PROCUREMENT LAW. 5 (2002-2003); see, e.g., Suzanne D. Reifman, Michael R. Charness & Kathleen C. Little, *The Changing Landscape of Federal Government Contracting; Increasing Opportunity, Accountability, and Enforcement*, Aspatore (Sept. 2010) (Discussing the changes to the federal regulation governing acquisition and stating that it is essential that all contracts have a “robust compliance infrastructure”).

¹³ See Ron Kral, *Effective Corporate Compliance Programs*, CORPORATE COMPLIANCE INSIGHTS (Dec. 3, 2010) <http://www.corporatecomplianceinsights.com/effective-corporate-compliance-programs-ron-kral-candela/>; see, e.g., Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs As A Defense to Criminal Liability: Can A Corporation Save Its Soul?*, 47 Rutgers L. Rev. 605, 645 (1995); see, e.g., Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 956 (2009) (discussing the evolution of corporate compliance regulation).

¹⁴ U.S. Sentencing Commission, *Organizational Sentencing Guidelines* § 8B.2.1(b) (2012) [hereinafter *U.S. Sentencing Commission Guidance*]; see, e.g., International Chamber of Commerce, *ICC Rules on Combating Corruption* (2011), available at http://www.iccwbo.org/uploadedFiles/ICC/policy/business_in_society/Statements/ICC_Rules_on_Combating_Corruption_2011edition.pdf.

implemented to ensure compliance with laws and regulations, there are additional operational benefits to them.¹⁵ An effective compliance program “will help ensure that a company’s organizational structure, people, processes and technology are working in harmony to manage risks, keep customers happy, grow the business, oversee vendors, and achieve numerous other goals.”¹⁶ Further, each corporate compliance system is customized to a company’s internal structures, specific business and risks of that business.¹⁷

B. Emerging global consensus

While procurement rules in general differ drastically across the world, corporate compliance systems are becoming more and more alike.¹⁸ The convergence has been recognized by the U.S. Justice Department and the U.S. Securities and Exchange Commission in stating, “there is also an emerging international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance”.¹⁹ It has been further suggested that there is a “broad emerging global consensus on what governments expect for compliance programs. This global standard for effective anti-corruption compliance programs contains

¹⁵ Ron Kral, *Effective Corporate Compliance Programs*, CORPORATE COMPLIANCE INSIGHTS (Dec. 3, 2010) <http://www.corporatecomplianceinsights.com/effective-corporate-compliance-programs-ron-kral-candela/>.

¹⁶ *Id.*; see, e.g., John F. Fatino, *Corporate Compliance Programs: An Approach to Avoid or Minimize Criminal and Civil Liability*, 51 Drake L. Rev. 81 (2002) (discussing the benefits and pitfalls of compliance programs).

¹⁷ *FCPA Guidance* at 56.

¹⁸ See Yukins, *supra* note 2.

¹⁹ See Yukins, *supra* note 2. (citing *FCPA Guidance* at 63); *Guide to the Mandatory Disclosure Rule: Issues, Guidelines, and Best Practices*, (Robert K. Huffman & Frederic M. Levy, 2010).

common elements and standardized responsibilities.”²⁰ The five main standards of corporate compliance standards that will demonstrate the convergence of standards are the Organization for Economic Co-operation and Development [hereinafter OECD], United States Sentencing Commission, U.S Federal Acquisition Regulation, UK Bribery Act, and the Foreign Corrupt Practices Act.

To begin with the OECD’s good practice guidance on internal controls, ethics, and compliance (“the guidance”) was published in 2010.²¹ The guidance sets broad elements that make up the “blueprint” of a good ethics and compliance program.²² The guidance contains twelve elements, the first of which is the requirement from management to show strong support and commitment to the ethics and compliance program and due diligence in screening employees.²³ Next, the corporate compliance system must also be clearly displayed in corporate policy as it applies to

²⁰ *Id.* (citing Keith M. Korenchuk, Samuel M. Witten & Mauricio J. Almar, *The Emerging Global Standard for Effective Anti-Corruption Compliance: Meeting Expectations of Governments Worldwide* (Jan. 2013), available at http://www.arnoldporter.com/resources/documents/Advisory%20The_Emerging_Global_Standard_Effective_Anti-Corruption_Compliance_Meeting_Expectations_Governments_Worldw%20-%20Copy.pdf); see also Aaron Greiser, *Defining the Outer Limits of Global Compliance Programs: Emerging Legal and Reputational Liability in Corporate Supply Chains*, 10 ORE. REV. INT’L L. 285 (2008); see Ethics & Policy Integration Center, *Guide to Global Corporate Responsibility Standards*, available at <http://www.epic-online.net/global/index.html>; see, e.g., Jon Jorda, *The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment*, 117 PENN ST. L. REV. 89 (2012).

²¹ See Joe Murphy & Donna Boehme, *Commentary on the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance*, 9 Rutgers J.L. & Pub. Policy 581 (2012) (Note that the guidance “primarily speaks to foreign bribery most of the provisions could be readily applied to ethics and compliance programs on a much broader basis as well”).

²² Working Group on Bribery, OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance 2010*, available at <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.

²³ *Id.*

all employees of all levels.²⁴ There must also be established monitoring and reporting methods for employees to follow.²⁵ Further, the compliance system requires training, encouragement as well as disciplinary procedures.²⁶ Lastly, periodic reviews of the program and general risks are required to ensure effectiveness and completeness.²⁷

The U.S. sentencing commission presents organizational guidelines, which “describe a corporate good citizenship model” and incorporate “into the sentencing structure the preventive and deterrent aspects of systematic compliance programs”.²⁸ All of which are enumerated in section 8 B.2.1.²⁹ The organizational guidelines include basic principles, the first of which is the establishment of standards and procedures that apply to all employees.³⁰ Second, the program must include methods for monitoring, reporting, and disciplining suspected misconduct.³¹ Third, high level management must ensure the effectiveness of the program.³² Lastly, the compliance program must allow for training programs and periodic evaluations of the risk and success of the system.³³

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ US Sentencing Commission. *An Overview of the Organizational Guidelines* (2012); *Organizational Sentencing Guidelines* § 8B.2.1 (2012).

²⁹ *Organizational Sentencing Guidelines* § 8B.2.1 (2012); see Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697 (2002).

³⁰ US Sentencing Commission. *An Overview of the Organizational Guidelines* (2012).

³¹ *Id.*

³² *Id.*

³³ *Id.*

The United States Federal Acquisition Regulation [hereinafter FAR] governs acquisitions by all executive agencies.³⁴ FAR 52.203-13 requires all contractors to implement a compliance program.³⁵ The FAR lists the minimum requirements of the requested compliance program that all employees of the contractor must adhere to.³⁶ First the compliance program must be in established standards and procedures.³⁷ The system must allow for monitoring, screening with due diligence, and reporting of ethical misconduct.³⁸ Additionally the FAR requires training of employees and disciplinary actions for employees found to be breaching ethical standards.³⁹ Lastly, systematic evaluation of risk and the success of the compliance system are also required.⁴⁰

The U.S. Foreign Corrupt Practices Act [hereinafter FCPA] was established to counteract the widespread bribery of foreign officials and “create a level playing field for honest businesses”.⁴¹ Both the Department of Justice [hereinafter DOJ] and

³⁴ FAR 1.101; see Sandeep Kathuria, *Best Practices for Compliance with the New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulation*, 38 Pub. Cont. L.J. 803 (2009); see, e.g., Jay DeVecchio, *Developing a Compliance Program to Address Mandatory Disclosure*, Aspatore (April 2010).

³⁵ FAR 52.203-13.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *FCPA Guidance* at 2; see Jacob S. Frenkel, Ira E. Hoffman, *International Compliance Mitigating Risk in Fcpa and Other Cross-Border Transactions*, 43 Md. B.J. 32 (Aug. 2010); see Paul L. Friedman & Ronald W. Davis, *A Primer on Government Contracting (Part 1)*, Prac. Law. (June 1994); see, e.g., Zack Harmon, *Confronting the New Challenges of FCPA Compliance: Recent Trends in FCPA Enforcement and Practical Guidance for Meeting These Challenges*, Aspatore (July 2010) (discussing how companies must “carefully evaluate and frequently update their business practices and compliance programs in light of the

the Securities and Exchange Commission [hereinafter the SEC] hold the enforcement authority of the FCPA, which contain a requirement for a corporate compliance system.⁴² The SEC and DOJ have listed basic requirements that are taken into account when evaluating a company's corporate compliance system.⁴³ To begin with they look for a clearly articulated code of ethical compliance procedures and commitment from senior management.⁴⁴ Next, proper oversight and reporting of misconduct is key.⁴⁵ Additionally, the SEC and DOJ require both the assessment of risk for the effectiveness of the program as well as incentive and discipline measures.⁴⁶ The last elements that must be in an effective corporate compliance system are the monitoring and testing of employees and continuous training of employees.⁴⁷

Lastly, the UK bribery act, established in 2011, is the United Kingdoms legislation implemented to combat bribery and corruption at a whole.⁴⁸ The

expanding anti-corruption demands"); *see, e.g.*, Palmina M. Fava, *Strategies for Staying in Compliance with the FCPA and Other International Anti-Corruption Laws*, Aspatore (2011).

⁴² *FCPA Guidance* at 56 – 62.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*; *See, e.g.*, Lauren Giudice, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. Rev. 347 (2011) (discussing the history and current implementation of the FCPA).

⁴⁸ United Kingdom Ministry of Justice, *The Bribery Act of 2010, Guidance About Procedures Which Relevant Commercial Organizations Can Put Into Place to Prevent Persons Associated with Them from Bribing* (2011) [hereinafter *UK Bribery Act Guidance*], available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>; *see, e.g.*, David Krik, *Guiding Light on Bribery*, 74 J. CRIM. L. 157 (2011); *see, e.g.*, Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New Uk Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J. L. & Bus. 845 (2011); *see, e.g.*, Sharifa G. Hunter, *A Comparative Analysis of the Foreign Corrupt*

guidance of the act contains basic principles in which corporations should put into place to prevent bribery and corruption.⁴⁹ The first principle is to implement clear compliance procedures that are proportionate to the risk it faces to bribery and corruption.⁵⁰ Next, top management must be involved in insuring ethical compliance.⁵¹ Further, there is a standard of due diligence that is required of a corporation to inspect and monitor its employees, and disciplinary action must be established for employees who do not adhere to the ethical standards.⁵² Monitoring, evaluating and reporting methods should also be implemented.⁵³ Lastly, training is required in any form as long as those participating receive the education and awareness of the threats posed by bribery.⁵⁴

Thus crafting a corporate compliance system that would be consistent with worldwide requirements must contain the seven principles listed below.⁵⁵ The chart illustrates the discussed guidelines and displays the similarities of the principles covered.

Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business, 18 ILSA J. Int'l & Comp. L. 89 (2011); see, e.g., Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 Colum. J. Transnat'l L. 365 (2011).

⁴⁹ See UK Bribery Act Guidance.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Working Group on Bribery, OECD, *Good Practice Guidance on Internal Controls, Ethics, and Compliance* (2010) [hereinafter *OECD Guidance*], available at <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.

	OECD Guidance	U.S. Sentencing Commission	U.S. Federal Acquisition Regulation	UK Bribery Act Guidance	FCPA Guidance
Standards and Procedures	✓	✓	✓	✓	✓
Knowledgeable Leadership	✓	✓		✓	✓
Exclude Risky Personnel	✓	✓	✓	✓	✓
Training	✓	✓	✓	✓	✓
Monitor, Evaluate; Reporting Hotline	✓	✓	✓	✓	✓
Incentives and Discipline	✓	✓	✓	✓	✓
Adjust Program to Risk	✓	✓	✓	✓	✓

Christopher Yukins, *Coordinating Compliance and Procurement Rules in a Shrinking World: the Case for a Transatlantic Dialogue* (Feb. 2013).

III. THE 2000 MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS

CURRENT ETHICS PROVISION

To begin with, the purpose of the Model Procurement Code is to promote “transparency, fairness, and competitiveness in state and local government procurement by encouraging the adoption of the “best practices” embodied in the ABA 2000 Model Procurement Code for State and Local Governments”.⁵⁶ States have the option of adopting the Model Procurement Code in its entirety or selecting specific provisions. Currently six states have adopted the complete Model Procurement Code as legal provisions governing their jurisdictions and nineteen

⁵⁶ State and Local Model Procurement Code Committee, *Mission Statement*, AMERICAN BAR ASSOCIATION, (Jan. 18, 2013) <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>.

states have partially adopted the Model Procurement Code.⁵⁷ Additionally, hundreds of other local jurisdictions have also adopted the best practices principles demonstrated in the Model Procurement Code.⁵⁸

One way the Model Procurement Code [hereinafter “MPC”] ensures its devotion to fairness and competition is its article devoted to ethics. Contractor ethical standards are governed by article 12 of the MPC, titled ethics in public contracting.⁵⁹ The article begins with a statement of policy of public trust and “. . . to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the State. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public office.”⁶⁰

The MPC’s ethical provisions apply to both government employees as well and non-governmental employees. The general standard of ethical conduct for employees is defined as “any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of a public trust”.⁶¹ And the general standard for ethical conduct of non-employees is defined as “any

⁵⁷ *NASPO Survey of State Procurement Practices*, Summary report (June 2012) available at http://www.naspo.org/Survey/Documents/Zip/FINAL_SummaryReport_2011-2012_Survey_6-28-12.pdf.

⁵⁸ State and Local Model Procurement Code Committee, *Mission Statement*, AMERICAN BAR ASSOCIATION, (Jan. 18, 2013) <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>.

⁵⁹ MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS[hereinafter *MPC*], Art. 12 (2000).

⁶⁰ *Id.*

⁶¹ *Id.*

effort to influence any public employee to breach the standards of ethical conduct”.

⁶² The MPC then discusses six specific standards of ethical conduct, which must be satisfied in order to meet this general provision.

The six specific standards of ethical conduct the MPC addresses are employee conflict of interest, employee disclosure requirements, gratuities and kickbacks, prohibition against contingent fees, restrictions on employment of present and former employees, and use of confidential information. ⁶³ The first standard is that of conflict of interest, prohibiting the direct or indirect participation of an employee who knows that either “the employee or any member of the employee’s immediate family has a financial interest pertaining to the procurement”, “business or organization in which the employee has a financial interest pertaining to the procurement” or lastly if a business or person which employee or employees family is “negotiating or has an arrangement concerning prospective employment is involved in the procurement”. ⁶⁴ Second, the MPC requires employees who receive a benefit from the procurement contract to report the benefit. The third standard the MPC prohibits is the use of gratuities and kickbacks. ⁶⁵ Next the MPC prohibits the use of contingent fees in the procurement process and restricts the employment of

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (Note the MPC defines gratuities as a “payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value”, and kickbacks as “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”).

present and former government employees.⁶⁶ The restriction places a minimum time limitation of one year for former employees before they may work for a contracting body, and strictly prohibits the employment of current employees in contracting organizations.⁶⁷ Lastly, the use of confidential information for personal gain or for the personal gain of another person is prohibited.⁶⁸

The overarching goal of the ethical standards in the MPC is to “foster public confidence in the integrity of the State’s procurement organization”.⁶⁹ The six standards contained in the MPC covers the basic ethical provisions an employee and contractor must adhere to. Although these provisions cover sufficient ethical standards for employees, it lacks direction and standards for contractors.

IV. PROPOSED CHANGES TO THE 2000 MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS

The “best practices” that the Model Procurement Code exemplifies should portray the highest standard required of the procurement process. The federal government and the international community as a whole have highlighted the use of corporate compliance systems as an effective method to combat corruption.⁷⁰ Thus, this case the best practices standard in the MPC should require that all contractors

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *UK Bribery Act Guidance; FCPA Guidance; OECD Guidance; FAR 52.203-13; U.S. Sentencing Commission Guidance.*

implement a corporate compliance system.⁷¹ Having a break down of the specific elements required in an effective corporate compliance system will benefit both the contractor as well as the state.⁷² The contractor will have a framework to base the corporate compliance system and the state will have guidelines on what to look for in a contractors compliance systems.

The proposed changes should take cues from the standardizing global principles of an effective global compliance system, and would come in the form of an addition to article 12 of the MPC. The requirement of a contractor internal compliance system directly achieves the policy of public trust and integrity that is offered in article 12.⁷³ Corporate compliance program standards across the globe contain common elements that should be present in an effective system. These broad common elements are the benchmark that should be used in the MPC.

A. Proposed language

The proposed change would require the addition of:

§12-209 Contractor Compliance and Ethics Program⁷⁴

⁷¹ See Angela B Styles, *Developing Effective, Transparent Compliance Programs for Government Contractors*, Aspatore (2012) (discussing how establishing a compliance system promotes transparency in the procurement process).

⁷² See Ryan A Murr, *How to Avoid Corporate Governance Issues by Establishing an Effective Compliance Program*, Aspatore (2008) (discussing the steps involved in establishing a corporate compliance system).

⁷³ MPC §12-201.

⁷⁴ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

(1) *Compliance and Ethics Program.* Contractors shall implement an effective internal controls, ethics, and compliance program in order to prevent and detect criminal and civil misconduct. At a minimum, the contractors compliance system must provide for the following:⁷⁵

(a) Clearly established standards and procedures of ethical conduct and to prevent and detect misconduct.⁷⁶

(b) High-level personnel must be knowledgeable of the ethical standards and must show visible support and commitment of the implements compliance program.

⁷⁷

(c) Due diligence must be used in detecting and excluding employees, current or future, who have engaged in conduct inconsistent with the compliance program.

⁷⁸

(d) Conduct training programs to all level employees on ethical conduct and the compliance system.⁷⁹

(e) To promote and enforce the compliance system both, measures to encourage and incentive performance consistent with the compliance program and

⁷⁵ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

⁷⁶ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

⁷⁷ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

⁷⁸ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

⁷⁹ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

disciplinary procedures to address violations of the compliance program, must be established.⁸⁰

(f) Internal reporting mechanism, for example a hotline, that allow for confidentiality or anonymity must be established in order to create a method that employees may report instances of misconduct.⁸¹

(g) Reasonable efforts must be made to monitor and evaluate conduct to ensure the observance of the compliance program.⁸²

(h) Periodic assessment of risk of misconduct must be conducted in order to modify the compliance system and ensure its effectiveness.⁸³

B. Purpose and benefits of the requirements

These requirements listed in the subsections are broad requirements. This is so that every contractor is encouraged to embrace the flexibility and independence in designing a program that is best suited for their needs.⁸⁴ As is true with all provisions in the Model Procurement Code, states have the option to adopt the revised provision in its entirety or select the provisions that it believes would be relevant to its jurisdiction. Each of the broad requirements is put forth in the “global

⁸⁰ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

⁸¹ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

⁸² Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

⁸³ Language adapted from: *OECD Guidance*; FAR 52.203-13; *U.S. Sentencing Commission Guidance*. §8B2.1.

⁸⁴ The U.S. Sentencing Commission. An Overview of the organizational guidelines; *see, e.g.*, Donna M. Flammang, *Organizing Compliance Programs to Effectively Protect Corporations*, Aspatore (2008) (discussing how to create an effective compliance program).

harmonized compliance standards”, and serves a particular benefit. To begin with, clearly articulated standards and procedures are the foundation of an effective compliance system.⁸⁵ Having the established rules in a concise format that is available to all employees is the first step necessary in communicating the desired conduct.⁸⁶ The next step is the support and commitment of high-level employees. This is because these employees set the tone for the rest of the company.⁸⁷ Producing a trickle down effect – when senior managers adhere to ethical compliance standards, middle managers will in turn adhere to those standards and encourage all employees to do so as well.⁸⁸ Next, placing the standard of due diligence on excluding risky personnel ensures that a company continues to protect itself from future and present employees that have diverged from ethical conduct.

Training programs, incentive measures, disciplinary procedures and reporting methods all serve integral purposes in an effective compliance system. Training programs serve as a method of communicating throughout a company what is required of the compliance program.⁸⁹ Incentive measures have been found to initiate compliant behavior.⁹⁰ Additionally, establishing clear disciplinary procedures have a critical deterrent effect on employees because it demonstrates

⁸⁵ FCPA guidance at 57.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (Note that no standardized training program is required as long as the training presents the information relevant to the target audience. For example web- based or in-person training have been used by a number of companies.)

⁹⁰ *Id.* at 59 (This has been recognized by the DOJ and SEC).

“unethical and unlawful actions can have swift and sure consequences”.⁹¹ Reporting mechanisms that allow employees, without fear of repercussions, to report misconduct is essential for internal monitoring an effective system.

Lastly, monitoring and reviewing the current system will ensure an effective compliance system. Diligent monitoring of employees conduct is the main way to ensure the program that has been implemented is being respected. Further, to ensure that the program is not stagnating, assessing the external risks that a contractor is facing is necessary. As a contractors environment changes so should its compliance program.⁹² This suggests one of the benefits of a compliance system, its flexibility in allowing contractors, no matter how large or small, to evaluate their own risks and customize a program that fits their needs.⁹³ Every compliance system is different; each tailored to a contractor’s specific risks, needs, and challenges.⁹⁴

C. Benefits of compliance programs

Framing a compliance system as a requirement in the MPC would benefit all contractors. All government contractors should implement a compliance program.

⁹⁵⁹⁶ The first reason for this is that a compliance system “will eliminate any need to

⁹¹ *Id.*

⁹² *Id.* at 61 (The changes may include the “environment in which [the contractor] operates, the nature of its customers, the laws that govern its actions, and the standards of its industry”).

⁹³ *Id.* at 57.

⁹⁴ *FCPA guidance* at 57.

⁹⁵ *See, e.g.,* David A. Collins & Samuel C. Damren, *Persuading Business Clients to Implement Gold-Plated Compliance Programs: See it as Quality Control*, Aspatore (2008) (discussing how a corporate compliance system can be seen as a quality control system).

“catch up” should the new regulations be extended or should the dollar and performance period thresholds be reduced or eliminated”.⁹⁷ Further it will put all contractors on notice for what is required of an effective compliance program. Another reason for all government contractors to implement a compliance system is if a “civil or criminal proceeding [should] be initiated against the contractor based upon an allegation of unethical conduct or noncompliance with a law, regulation, or contract requirement, the existence of, and adherence to, a written code of conduct will demonstrate the contractor's commitment to compliance and could thereby reduce potential liability”.⁹⁸

Additionally an effective compliance program leads to a strong ethical culture within an organization.⁹⁹ Statistically there is a correlation between strong ethical cultures and effective compliance programs.¹⁰⁰ The argument that all contractors will benefit from a culture that encourages ethical behavior is twofold. First, the promotion of an ethical culture will develop a reputation for responsible conduct, which in turn may grow business. Second, research indicates that an “[e]thical culture is the single biggest factor determining the amount of misconduct

⁹⁶ Sandeep Kathuria, *Best Practices for Compliance with the New Government Contractor Compliance and Ethics Rules Under the Federal Acquisition Regulation*, 38 Pub. Cont. L.J. 803, 856 (2009).

⁹⁷ *Id.*; W. Hartmann Young, *Effective Government Contract Compliance Strategies in a Constantly Evolving Legal Landscape*, Aspatore (June 2012).

⁹⁸ *Id.*; see, e.g., Marc S. Raspanti & Gregg W. Mackuse, *What's Really So Important about an Effective Compliance Program?*, Champion (May 2007) (discussing the benefits of a corporate compliance program).

⁹⁹ Ethics Resource Center, *2011 National Business Ethics Survey: Workplace Ethics in Transition* (2012) at 34.

¹⁰⁰ *Id.*

that will take place in a business”.¹⁰¹

V. CONCLUSION

State and local governments have an obligation to the taxpayer to ensure that their tax dollars are being spent in an honorable way. Total state expenditures for 2011 were estimated at 1.69 trillion dollars.¹⁰² A compliance program is a method of ensuring the ethical conduct of a contractor, which would in turn guarantee the observance of the core principles of the procurement process, integrity and competition.

In addition to benefiting the procurement process, compliance programs also benefit individual contractors. A compliance program produces an ethical culture and serves as a protection in the event of a civil or criminal case. Lastly, it will keep the contractor up to date with new regulations. Fortunately, compliance standards have converged worldwide and it is now possible to create a compliance program that meet the emerging global consensus. With all the benefits a compliance program entails, a compliance program requirement in the Model Procurement Code for State and Local Governments, governed by the global consensus, is the ideal approach to show ethical “best practices” to contractors.

¹⁰¹ Ethics Resource Center, 2009 National Business Ethics Survey: Ethics in the Recession (2009), at 41; *see, e.g.*, Weston C. Loegering, Joshua S. Roseman, Samantha Cox, The Hidden Costs of Bribery, 59 the Advoc. 8 (2012) (discussing how compliance systems help mitigate legal risks); *see, e.g.*, Gardner Davis & Jeff McFarland, *Corporate Compliance Programs: Protecting the Business from the Rogue Employee*, Fla. B.J. (1996) (discussing how corporate compliance programs protect companies from rogue employees).

¹⁰² *See* Holly Beville, *Opportunity Knocks: State Procurement*, MULTISTATE INSIDER (April 16, 2012) <http://multistate.com/insider/?p=126>.

Pledge of honesty

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion.

/s/ Laura Sheldon

ATTACHMENT 10



UPDATING THE 2000 MODEL PROCUREMENT CODE TO FACILITATE STATE GOVERNMENT USE OF SOCIOECONOMIC POLICIES

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Abstract

Using the procurement system as a vehicle for advancing social and economic goals within the states creates barriers to entry for contractors that seek to enter markets across state lines. Adopting a more uniform approach to the implementation of these policies, through a revision to the 2000 Model Procurement Code (MPC), will help facilitate these cross-border transactions. The MPC and its 2002 Model Procurement Regulations provide very limited guidance for states' adoption of socioeconomic programs. This paper proposes that the MPC should be updated by adding more specific socioeconomic provisions to the Code. When drafted, these provisions should employ the federal government's socioeconomic programs as models. Importantly, because these policies have been burdened with challenges throughout their implementation, the MPC provisions should be formulated so as to reflect the lessons learned from the execution of these programs. The inclusion of these new requirements will tear down these barriers to entry and help achieve greater uniformity among the states.

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I. Introduction

A. The Role of Competition in Government Procurement

Underlying the procurement process is the basic tenet that the Government will engage in full and open competition.¹ By promoting competition through transparent solicitations, evaluations, and award decisions, the Government builds trust in the contractor community and benefits from large contractor pools that subsequently fuel a cycle of robust competition and the receipt of best value for taxpayer dollars.²

Importantly, the competition requirement sends a message to taxpayers and those who do business with the Government that favoritism in the procurement process will not be tolerated.³ By encouraging integrity in the process through adherence to competition requirements, Governments signal that they recognize their responsibility to protect the public interest.⁴ However, despite the Government's goal to engage in free and open competition for procurement and its desire to suppress favoritism, competing interests at times outweigh this focus.⁵

B. Procurement As a Means Of Implementing Social Policies

The Government often uses procurement to implement policies that do not address its traditional goals.⁶ Oftentimes “these programs will override the fundamental goals of procurement, in order to implement a certain social or economic goal.”⁷ These policies,

¹ DANIELLE M. CONWAY, STATE AND LOCAL GOVERNMENT PROCUREMENT 53 (American Bar Association, 1st ed. 2012).

² *See id.*

³ CONWAY, *supra* note 1, at 52-53 (citing *see Sloan v. Greenville County*, 356 S.C. 531, 556, 590 S.E.2d 338, 351-52 (S.C. App. 2003)).

⁴ *Id.* at 53 (citing Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Re. 103 (2002)).

⁵ Roney, *supra* note **Error! Bookmark not defined.**, at 935 (citing John Cibinic Jr. and Ralph Nash Jr., *Formation of Gov't Contracts* 608) (1st ed. 1982).

⁶ Conway, *supra* note 1, at 52.

⁷ *Id.*

commonly referred to as collateral socioeconomic policies, are “usually of a social, economic, or environmental nature”⁸ and most often address preferences or handicaps for certain contractors.⁹ Through these measures, targeted groups will receive preferential treatment in the procurement process.¹⁰

There are many such programs in federal and state procurement law. Among the significant collateral socio-economic policies that operate in these arenas are: small business preferences, preferences for disadvantaged business owners and female owned businesses, domestic preference policies, equal employment opportunity policies, labor standards, and environmental policies.¹¹ Therefore, when choosing a contractor, the government may take several factors into consideration. The government may give weight to the size of the contractor (i.e., is it a small business?); the place of performance (i.e., is the work being done in a labor surplus area?); the ownership of the contractor (i.e., is it women-owned?); and the compliance of the contractor with a variety of other federal standards (e.g., minimum wage and hour requirements).¹²

Under federal and state procurement, some of these programs are well established and accepted, while some are increasingly controversial. Accordingly, there has been and continues to be debate over whether the Government should have particular collateral policies or indeed

⁸ *Guide to Enactment of the UNICITRAL Model Law on Public Procurement* 4, available at <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/pre-guide-2012.pdf> (last visited April 20, 2013). [hereinafter *Guide to UNICITRAL Model Law*].

⁹ Roney, *supra* note **Error! Bookmark not defined.**, at 53.

¹⁰ *Id.*

¹¹ JOSHUA SCHWARTZ, CASES AND MATERIALS FOR A SURVEY OF GOVERNMENT PROCUREMENT LAW 719 (Fall 2012).

¹² JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1403 (3d ed. 1998).

any such policies at all.¹³ Therefore, when collateral socioeconomic policies are employed, it is important to consider: (1) the extent to which the pursuit of these collateral policies undercuts the generic objectives of the scheme of procurement law, such as providing the government with the best available goods and services at the best available price, and curbing favoritism and corruption in procurement; and (2) if the social benefits that these policies seek to achieve are worth the costs that they impose on the operation of the procurement system.¹⁴ Although implementing these collateral policies through the acquisition process conflicts with the Government's policy of full and open competition, the prevailing view is that these negative features are offset by the benefits that flow to many contractors that would otherwise be excluded from the process.¹⁵

C. State and Local Government's Use of Procurement to Implement Socioeconomic Preferences and its Consequences on Entry Into the Marketplace

Because each state has undergone a unique social history, state governments balance their social policy objectives differently from one another.¹⁶ As a result, although many state

¹³ See Roney, *supra* note **Error! Bookmark not defined.**, at 53 (citing CIBINIC & NASH, *supra* note 12, at 608); See Christopher R. Yukins, *Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement*, 33 Pub. Cont. L.J. 667, 697 (2004) ("All of these competing priorities [socio-economic policies] have long placed an enormous burden on the system, in terms of costs, complexity, and ultimately irreconcilable conflicts between the Government's many procurement goals"); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 719-20 (2001) ("There seems little doubt that the government would be more businesslike and could work better...if buyers were unencumbered by congressionally mandated social policies"). The pursuit of socioeconomic policies involves an exception to principle of full and open competition and can bring additional costs to procurement by increasing the ultimate price paid. The cost of monitoring compliance with government policies may add to administrative or transaction costs, which may have a negative affect on efficiency. *Guide to UNICITRAL Model Law*, *supra* note 8, at 5.

¹⁴ SCHWARTZ, *supra* note 11, at 719.

¹⁵ CIBINIC & NASH, *supra* note 12, at 1404.

¹⁶ Conway, *supra* note 1, at 137.

governments have enacted statutes and regulations that implement socioeconomic objectives, these provisions vary widely from state to state. This lack of uniformity between states' socioeconomic policies acts as a barrier to entry for contractors that seek to enter into markets across state lines.

D. Updating the Model Procurement Code

The ABA's 2000 Model Procurement Code (MPC) is a code created by the American Bar Association that is focused on "promoting transparency, fairness, and competitiveness in state and local government procurement."¹⁷ States may adopt the MPC in full, they may select certain provisions, or they may reject it in its entirety. Because it is aimed at encouraging the adoption of "best practices" that are embodied in the code,¹⁸ the MPC provides a basis for achieving harmonization among the states.

Using the procurement system as a vehicle for advancing social goals within the states creates barriers to entry for contractors seeking to enter markets across states lines. Adopting a more uniform approach to these social and economic goals through an update to the MPC will help facilitate these cross-border transactions. The MPC and its 2002 Model Procurement Regulations provide very limited guidance for states' adoption of socioeconomic programs. The Code explicitly addresses preference policies for small business, and leaves the implementation of additional socioeconomic preferences to the discretion of the states. This "gap" in the MPC should be updated by adding more specific socioeconomic provisions to the Code. The inclusion of these new requirements will help achieve greater uniformity and help remove barriers to entry.

¹⁷ State and Local Model Procurement Code, *Mission*, AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW, <http://apps.americanbar.org/dch/committee.cfm?com=PC500500> (last visited April 14, 2013).

¹⁸ *Id.*

When drafted, these provisions should employ the Federal Government's socioeconomic programs as models. Importantly, because these federal policies have been burdened with challenges throughout their implementation, the MPC provisions should be formulated so as to reflect the lessons learned from the execution of these programs. However, the unsettled nature of some of these issues may hinder their adoption into the MPC. Therefore, it is important to look to international models that have successfully harmonized national law and also incorporated the pursuit of socioeconomic goals. These models include the European Directives and the United Nations Commission on International Trade Law's (UNCITRAL) Model Law.

This paper is recommending reforms to the MPC to provide for greater uniformity by breaking down barriers to entry between the states. Part II provides an overview of the most significant collateral policies that operate in the area of federal and state procurement. Part II also discusses the major issues that have plagued the execution of these policies. Part III discusses the current MPC provisions on socioeconomic policies. Part IV argues that in order to achieve greater uniformity and tear down barriers to entry, more socioeconomic provisions should be added to the MPC. The note further contends that these additions should be tethered by considerations of the major issues that have accompanied the implementation of these policies and proposes that a look to international models will help to achieve this balance between harmonization and the pursuit of socioeconomic goals.

II. Types of Collateral Socioeconomic Policies

Both federal and state governments are committed to furthering socioeconomic policy. Governments have consistently viewed federal procurement as an instrument for implementing

social and economic goals.¹⁹ Accordingly, although many of the collateral policies that have been implemented by the Federal Government serve as models for state and local governments, state governments still maintain unique approaches to socioeconomic implementation. Among the significant collateral policies that operate in the area of federal and state procurement are: (1) policies assisting small business; (2) preferences for disadvantaged business owners; (3) policies for assisting women-owned enterprises; (4) domestic preference policies; and (5) policies on the environment and energy.

A. Policies Assisting Small Business

1. Federal Policies

Increasing small businesses contracting has been recognized as a top priority in the Federal Government for many years.²⁰ Accordingly, Congress enacted the Small Business Act of 1958 to encourage the growth of small business through the federal procurement process.²¹ The Act requires federal agencies to use certain mechanisms to ensure that a “fair proportion” of government purchases are placed with small businesses.²² Additionally, the Act establishes a number of business preferences for small business, including “set-aside” programs²³ and

¹⁹ Nathan Page, Note, *Leading the Charge: Using Green Builder Set-Asides to Expand Sustainable Construction and Design*, 39 PUB. CONT. L.J. 373, 376 (2010).

²⁰ Kathleen Mee, Note, *Improving Opportunities for Women-Owned Small Businesses in Federal Contracting: Current Efforts, Remaining Challenges, and Proposals for the Future*, 41 PUB. CON. L.J. 721, 728 (2012).

²¹ *Id.*

²² *Id.* (citing 15 U.S.C. §§ 631-657 (2000)). These mechanisms include outreach programs, financial assistance, international development, and restrictions on bundling and set-asides. *Id.*

²³ Set-asides allow a contracting official to reserve an acquisition for a specific type of business. See Alicia Cullen, *The Small Business Set-Aside Program: Where Achievement Means Consistently Failing to Meet Small Business Contracting Goals*, 41 Pub. Cont. L.J. 703, 706 (2012).

programs to assist in small business subcontracting.²⁴ These programs are under the general supervision and control of the Small Business Administration (SBA).²⁵

Congress has authorized a number of contracting programs that are designed to assist small business in the procurement process.²⁶ The SBA runs programs for service-disabled veteran-owned small businesses,²⁷ Native American-owned small businesses,²⁸ Alaskan-owned corporations,²⁹ Native Hawaiian-owned corporations,³⁰ businesses in historically underutilized business zones (HUBZones),³¹ women-owned businesses,³² and businesses owned by socially and economically disadvantaged individuals.³³ In addition to creating specific procurement

²⁴ CIBINIC & NASH, *supra* note 12, at 1405.

²⁵ *Id.* Pursuant to the Act, the SBA is authorized to establish small business size standards, rules on size appeals, and can solely determine that a small business is not a responsible contractor. *Id.*

²⁶ *Id.*

²⁷ The Veterans Benefit Act of 2003 allows federal contracting officers to restrict competition to small businesses owned by service-disabled veterans and to allow for sole source and set-aside contracts. The Veterans Entrepreneurship and Small Business Development Act of 1999 established a three percent government-wide goal for contracting with service-disabled veterans. *See Mee, supra* note 20, at fn. 78.

²⁸ Native American-owned small businesses qualify for the 8(a) contracting program if they can also show economic disadvantage. *Id.* at 728 n.79.

²⁹ Alaskan Native-owned small businesses (ANCs) can receive sole-source contracts from the 8(a) program. *Id.* at 728 n.80.

³⁰ Native Hawaiian-owned businesses can qualify under the 8(a) program if they can show economic hardship. *Id.* 728 n.81.

³¹ The HUBZone program is an example of a geographically based preference. The program was created to foster preferential contracting in historically underutilized business zones and serve as an alternative to race-based affirmative action efforts. Under the HUBZone program, each Contracting Officer aims to award a certain share of small business set-aside contracts to companies that are located in and employ a certain percentage of people living in historically underutilized business zones. A HUBZone is an “area located within one or more qualified census tracts, qualified nonmetropolitan counties, or lands within the external boundaries of an Indian reservation.” 13 C.F.R. 126.103 (1999). The program attempts to improve economically depressed areas by stimulating employment through the awarding of contracts to businesses in those areas. *See Roney, supra* note **Error! Bookmark not defined.**, at 934.

³² *See infra* Part II(C).

³³ *See infra* Part II(B).

programs for small businesses, Congress has created goals specifying the percentage of procurement dollars that should be funneled to each type of small business.³⁴

2. Issues with Fraud and Abuse With the Federal Policies

Several issues have arisen in these federal small business programs: (1) the programs are consistently unsuccessful in meeting contracting goals, and (2) the programs have largely failed to enforce effective monitoring mechanisms, which allows large businesses to fraudulently receive contracts intended for small businesses.

Since its inception of the small business set-aside program, the Government has consistently failed to meet its twenty-three percent government-wide small business procurement goal.³⁵ In fiscal years 2009 and 2010, even though small businesses won a record \$98.6 and \$97.95 billion in federal contracts, this only represented 21.89% and 22.7% of federal spending. Therefore, the Government yet again fell short of its twenty-three percent prime contracting goal.³⁶

Another problem facing small business contracting programs is that large businesses often receive small business procurement awards. According to a report by the American Small Business League (ASBL), in recent years, almost two-thirds of procurement spending that allegedly went to small businesses actually went to larger corporations such as Lockheed Martin, Boeing, General Electric, AT&T, and Dell Computer.³⁷

Large businesses are able to acquire federal set-aside contracts intended for small business programs through several means. Set-aside preferences for small businesses can be an

³⁴ Mee, *supra* note 20, at 729.

³⁵ Cullen, *supra* note 23, at 703.

³⁶ *Id.* at 712.

³⁷ *Id.* at 713 (citing Lloyd Chapman, *ASBL Report: Small Business Contract Recipients FY 2009*, AM. SMALL BUS. LEAGUE 7 (2010), available at http://www.asbl.com/documents/ASBL_2009_dataanalysis.pdf.)

incentive for non-qualifying companies to falsely claim eligibility status under the program.³⁸ In recent reports, the SBA Inspector General determined that large businesses were receiving federal small business contracts by illegally making “false” and “improper” size certifications.³⁹ These problems have been extensive in both the SDVOSB program and the HUBZone program.

A recent Government Accountability Office (GAO) investigation found that ten firms that were ineligible under the SDVOSB program nevertheless had received about \$100 million in SDVOSB contracts.⁴⁰ Another GAO report recently uncovered similar issues in the HUBZone Program. In response to a multitude of false HUBZone certifications, the GAO reviewed the mechanisms that SBA used to ensure that only eligible businesses participated in the program.⁴¹ The GAO found that the map used by the SBA to publicize HUBZone areas was inaccurate, in that it contained areas that were not eligible for the program and excluded eligible areas, therefore allowing ineligible small businesses to participate in the program, and preventing eligible businesses from participating.⁴² The GAO further determined (1) that the mechanism that the SBA used to certify and monitor firms was ineffective in measuring whether qualified firms were participating, (2) that the SBA had fallen behind in their recertification efforts, and (3) the SBA lacked the ability to promptly decertify firms that were no longer eligible.⁴³

Large businesses can also acquire federal set-aside contracts by way of “pass-through” contracting. A pass-through contract is one that is held nominally by a small business, but that is

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-740T, SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS PROGRAM: FRAUD PREVENTION CONTROLS NEEDED TO IMPROVE PROGRAM INTEGRITY HIGHLIGHTS (2010)).

⁴¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-643, SMALL BUSINESS ADMINISTRATION: ADDITIONAL ACTIONS ARE NEEDED TO CERTIFY AND MONITOR HUBZONE BUSINESSES AND ASSESS PROGRAM RESULTS 1 (2008).

⁴² *Id.*

⁴³ *Id.*

performed primarily by a firm that is other than small.⁴⁴ Under these schemes, when a small company receives a set-aside contract, they will subcontract with a large business subcontractor, who will carry out the majority of the contract.⁴⁵ These relationships are in violation of congressional “limitations on subcontracting” that aim to ensure that small businesses are performing a significant portion of the contract.⁴⁶

In the face of these violations, these programs have made increased efforts to reduce the risk of certification of ineligible firms. However these improprieties continue to persist.⁴⁷ Due to the lack of an effective monitoring strategy, companies continue to falsely represent themselves.⁴⁸ Agencies rarely take action against these bad actors and the Government rarely prosecutes such cases.⁴⁹ Additionally, due to the lack of an effective monitoring strategy, federal procurement data in this area is often inaccurate and incomplete, allowing firms with fraudulent intentions to take away opportunities intended for small businesses.⁵⁰

3. State Policies

Although a number of states have adopted statutes and regulations that implement small business contracting programs, each state government has taken a unique approach to designing these policies. Many states have employed the federal programs as a model for developing their own policies for small businesses and several have designed preferences for veterans. Other

⁴⁴ See Press Release, Senator Casey’s Office, Casey Calls for End to Pass-Throughs that Hurt Small Businesses (May 26, 2011).

⁴⁵ *Id.*

⁴⁶ See generally 15 U.S.C. § 637(a)(14)(A)(i)(ii) (limitations on subcontracting for 8(a) firms); 15 U.S.C. § 644(o)(1)(A)-(B) (limitations on subcontracting for other firms). There are separate provisions applicable to contracts awarded under the authority of Section 8(a) of the SBA and to contracts awarded under Section 15 of the SBA, in addition to the Code of Federal Regulations, and the Federal Acquisitions Regulation. The text of these provisions is identical.

⁴⁷ See Cullen *supra* note 24, at 715.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

states have adopted the MPC as the primary means for constructing their small business socioeconomic programs, while others have refrained from implementing small business policies altogether.

States have implemented small business policies through a variety of means, including, establishing small business contracting programs, setting aside purchases for small business, or instituting price preferences. Arizona has implemented a small business program through the state's Administrative Procedure Act. Accordingly, any procurement that does not exceed the aggregate dollar amount of less than \$50,000 shall be restricted, if practicable, to small businesses.⁵¹ The procurement officer shall rotate the small business solicited to compete for any procurement of less than \$50,000.⁵² Additionally, New Jersey's regulations provide for small business set-aside purchases. In New Jersey, the goal of the program is to award twenty-five percent of state contracts and purchase order dollars to small businesses.⁵³ Maryland has two small business procurement programs, the Small Business Preference Program and the Small Business Reserve Program.⁵⁴ Under the Small Business Preference Program, small businesses enjoy a five-percent price preference, while certified veteran-owned small businesses (VOSB) enjoy a seven-percent price preference and certified disabled veteran-owned businesses enjoy an eight-percent preference.⁵⁵

⁵¹ See Ariz. Rev. Stat. §§ 41-2535 (2011).

⁵² *Id.* at § 41-2636. If it is impracticable to restrict a particular procurement to small businesses, the procurement officer shall provide a written determination setting forth the reasons for not setting aside the procurement for small business participation.

⁵³ See CONWAY, *supra* note 1, at 138 (citing N.J. Admin. Code §§ 17:13-2.1 and 17.14-2.1(2011)).

⁵⁴ COMAR 21.11.01.05(B)(1). Additionally, Michigan has implemented a 10% price preference for Disabled-Veteran Contracts. See Mich. Comp. Laws § 18.1261(8).

⁵⁵ *Id.* at 21.11.01.05(4).

Some states have chosen not to implement any small business policies. For example, Utah has no small business requirements separate from those that may be required on federal or federally assisted projects.⁵⁶ Additionally, although Hawaii statutes authorize the establishment of rules and practices providing preferences to small business, implementing regulations are currently in draft form and have not been submitted to their Procurement Policy Board.⁵⁷ Therefore, in practice, Hawaii does not afford any small business preferences.

B. Disadvantaged Business Owner Preferences

1. Federal Policies

It is the policy of the Federal Government to assist minority and other “socially and economically disadvantaged” small businesses become fully competitive and viable business concerns.⁵⁸ There are currently three primary categories of disadvantaged small businesses. These include: (1) small businesses participating in the Small Business Administration’s Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program); (2) “small disadvantaged businesses” (SDBs); and (3) “disadvantaged business enterprises” (DBEs).⁵⁹

Although these firms are characterized as disadvantaged because they are at least fifty-one percent owned by one or more socially and economically disadvantaged individuals or

⁵⁶ GUIDE TO STATE PROCUREMENT: A 50-STATE PRIMER ON PURCHASING LAWS, PROCESSES, AND PROCEDURES 496 (American Bar Association, Section of Public Contract Law 2011) [hereinafter GUIDE TO STATE PROCUREMENT].

⁵⁷ *Id.* at 118.

⁵⁸ JODY FEDER, CONG. RESEARCH SERV., RL33284, MINORITY CONTRACTING AND AFFIRMATIVE ACTION FOR DISADVANTAGED SMALL BUSINESSES: LEGAL ISSUES (2012) [hereinafter MINORITY CONTRACTING AND AFFIRMATIVE ACTION]

⁵⁹ KATE M. MANUEL, CONG. RESEARCH SERV., R40987, “DISADVANTAGED” SMALL BUSINESSES: DEFINITIONS AND DESIGNATIONS FOR PURPOSES OF FEDERAL AND FEDERALLY FUNDED CONTRACTING PROGRAMS, 1 (2011) [hereinafter DISADVANTAGED SMALL BUSINESSES]

groups,⁶⁰ “social and economic disadvantage” is defined differently for each program. For the purposes of 8(a) and SDB programs, members of certain racial and ethnic groups are presumed to be socially disadvantaged, while women are also presumed to be socially disadvantaged in the DBE program.⁶¹ An individual must have a net worth less than \$250,000 to be accepted into the 8(a) program, while net worth can be as high as \$750,000 for SDBs or DBEs.⁶²

These programs also each operate differently. The 8(a) Program is restricted to firms that have been certified and approved by the SBA pursuant to an application process.⁶³ 8(a) participants are eligible for set-aside or sole source contracts, as well as assistance from the SBA.⁶⁴ All 8(a) firms qualify as SDBs.⁶⁵ Under the 8(a) Program, the SBA is tasked with entering into prime contracts with other federal agencies and subcontracting the business to small business concerns that participate in the program.⁶⁶ An SDB must generally meet the same eligibility criteria as 8(a) firms, although they do not apply to the SBA to be designated SDBs in the same way that 8(a) firms do.⁶⁷ SDBs rarely need to be certified, but in the few cases where SDB certification is required, 8(a) firms are already deemed to be certified, and other firms may be certified by the agency conducting the procurement, private certifying entities, or state and local governments.⁶⁸ In contrast, DBEs must be certified by the state of the funding recipient.⁶⁹

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ CIBINIC & NASH, *supra* note 12, at 1428

⁶⁷ *Id.* at 5.

⁶⁸ *Id.*

⁶⁹ *Id.*

8(a) firms and SDBs are not automatically deemed to be DBEs, however, their application for 8(a) status or SDB certification generally suffices as their application for DBE certification.⁷⁰

2. Constitutional Issues with the Federal Policies

The constitutionality of one or another devices that benefit minority or other disadvantaged business owners has been the subject of intense debate for several years.⁷¹

Specifically, the Supreme Court has narrowly approved of congressionally mandated racial preferences.⁷²

In 1995, in *Adarand Constructors, Inc. v. Peña*, the Supreme Court held that affirmative action programs benefitting “socially and economically disadvantaged individuals” that employ race-based presumptions of eligibility, are subject to strict scrutiny review under the Equal Protection doctrine.⁷³ Although the Court refrained from deciding the constitutional merits of the particular program before it,⁷⁴ it determined that all “racial classifications” by Government at any level must be justified by a “compelling governmental interest” and “narrowly tailored” to that end.⁷⁵ On remand, the United States Court of Appeals for the Tenth Circuit held that the programs challenged in *Adarand*, in the form that they took after revisions in response to the Supreme Court’s first *Adarand* decision, met these tests.⁷⁶ Although the Supreme Court once again granted certiorari to review this decision,⁷⁷ it ultimately determined that, because of

⁷⁰ *Id.*

⁷¹ SCHWARTZ, *supra* note 11, at 720.

⁷² MINORITY CONTRACTING AND AFFIRMATIVE ACTION, *supra* note 58, at 1.

⁷³ *Id.*

⁷⁴ The program was a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by socially and economically disadvantaged group members.

See id.

⁷⁵ *Id.*

⁷⁶ SCHWARTZ, *supra* note 11, at 721 (citing *Adarand Constructor, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000)).

⁷⁷ *Id.* (citing 532 U.S. 941 (2001)).

changes in the posture of the case, the issues raised, and the underlying programs, over time, the case no longer presented an appropriate vehicle for review, and it dismissed the writ of certiorari as improvidently granted.⁷⁸ Ultimately, *Adarand* and its progeny suggest that racial preferences in federal law or policy are a remedy of last resort, which must be adequately justified and narrowly drawn to meet constitutional standards.⁷⁹

In the post-*Adarand* era, lower federal courts have at times upheld and other times struck down federal programs that contain minority contracting preferences.⁸⁰ In *Rothe Development Corporation v. Department of Defense*, the Federal Circuit recently held that the Department of Defense's (DOD) Small Disadvantaged Business program was unconstitutional, ruling that Congress lacked a "strong basis in evidence" for concluding that race-conscious remedies were necessary when they enacted 10 U.S.C. § 2323, the statutory authority for the DOD's program.⁸¹ The *Rothe* decision is particularly noteworthy because it is the latest in a long line of cases that places an increasingly heavy evidentiary burden on Congress when it enacts race-conscious legislation.⁸²

3. State Policies

Despite the unsettled constitutional concerns that burden federal policies aimed at benefiting disadvantaged business owners, many states still do employ preferences and set-aside programs for small, disadvantaged business owners. Ohio law establishes a set-aside program for

⁷⁸ *Id.* (citing 534 U.S. 103 (2001)).

⁷⁹ MINORITY CONTRACTING AND AFFIRMATIVE ACTION, *supra* note 58, at 1.

⁸⁰ *Id.*

⁸¹ *Id.* In order to establish a compelling governmental interest in remedying a history of past discrimination, the governmental entity creating racial classifications must (1) identify public or private discrimination with some specificity before resorting to race-conscious remedies and (2) establish a "strong basis in evidence" to conclude that race-conscious remedies are necessary before enacting or implementing those remedies. *See Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

⁸² *Id.* at 19.

minority business enterprises (MBEs).⁸³ The director of the Department of Administrative Services must set-aside 15% of its purchases for competition by MBEs.⁸⁴ Additionally, in Minnesota, the Material Management Division (MMD) of the Department of Administration operates a program for Economically Disadvantaged (ED) small businesses.⁸⁵ To participate, the business must be a Minnesota small business, defined by gross annual sales, which can range from one million dollars to ten million dollars or more depending on the industry.⁸⁶ The business must also obtain certification from the Commissioner of Administration indicating that it meets the program standards. To be certified as an ED, the business must be located in an Economically Disadvantaged Area in Minnesota.⁸⁷ As a participating member of the ED program, a business may be eligible for up to a 6% preference in selling their products or services, and may be eligible for up to a 4% preference on bidding for construction projects.⁸⁸

However, a number of states have experienced recent contests to their regulations implementing these policies. In Arizona, prior to November 2010, certain percentages of state, and local government projects, or portions of work on those projects, were established as set-asides for what were known as DBEs and SBEs.⁸⁹ However, in the elections of 2010, a

⁸³ Ohio Rev. Code Ann. § 125.081 (2012). The Ohio code also requires the director of the Department of Administrative Services to establish a business assistance program known as the encouraging diversity, growth, and equity program (EDGE), which aims to facilitate access to state government contracts and business services for EDGE certified businesses. *See* Ohio Rev. Code Ann. § 123.152. To be considered eligible for certification to the EDGE program, the business must be (1) a small business enterprise; (2) owned by a U.S. citizen and Ohio resident; (3) in business one year prior to applying for certification; and (4) at least 51 percent owned and controlled by a socially and economically disadvantaged business owner or economically disadvantaged business and located in a qualified census tract. *Id.* at §§ 123:2-16-01, 02.

⁸⁴ *Id.* at § 125.081(A)

⁸⁵ Minn. R. §§1230.1400-1230.1910 (2010).

⁸⁶ GUIDE TO STATE PROCUREMENT, *supra* note 56, at 254.

⁸⁷ *Id.* at 255

⁸⁸ *Id.*

⁸⁹ *Id.* at 28-29 n.1

constitutional amendment that seemingly prohibits such set-aside programs was adopted after a successful initiative driven by the voters of the State.⁹⁰ Additionally, some states have refrained from implementing these policies altogether. Similar to its approach to small business policies, Utah has no minority or disadvantaged business entity assistance requirements separate from those that may be required on federal or federally assisted projects.⁹¹

C. Policies for Assisting Women Owned Businesses

1. Federal Policies

Pursuant to the passage of the Federal Acquisition Streamlining Act (FASA) in 1994, Women Owned Businesses (WOSB) became one of the more recent targets of the federal procurement program.⁹² FASA subsequently created a government-wide goal for participation by women-owned and controlled small business concerns in prime contracts and subcontracts of not less than five percent of the total value of all prime and subcontract awards for each fiscal year.⁹³ However, between 1996 and 2010, the program was ineffective because contracting officials did not have access to any tools that would allow them to meet this goal.⁹⁴

In 2000, Congress passed the Equity in Contracting for Women Act (ECWA), which was designed to reserve contracts for WOSBs in industries where such businesses are historically underrepresented. The ECWA added section 8(m) to the Small Business Reauthorization Act,⁹⁵ which gave contracting officials the power to restrict competition for certain government contracts solely to small businesses owned and controlled by women.⁹⁶ Importantly, the

⁹⁰ *Id.*

⁹¹ *Id.* at 496.

⁹² Mee, *supra* note 20, at 723.

⁹³ See 15 U.S.C. § 644(g) (2006).

⁹⁴ Mee, *supra* note 20, at 729.

⁹⁵ 15 U.S.C. § 637 (2006).

⁹⁶ Mee, *supra* note 20, at 729.

procurement program for WOSBs was not applicable to every government contract, and was typically restricted to WOSB that are “economically disadvantaged” or to WOSBs operating in an industry in which WOSBs are “substantially underrepresented.”⁹⁷ However, section 8(m) did not determine all covered industries and required the SBA to conduct a study to identify the industries to which the program would apply.⁹⁸ Although section 8(m) required the SBA to perform this study, the SBA did not issue a final rule including the information until ten years after the Small Business Reauthorization Act was enacted.⁹⁹ Accordingly, the “Women-Owned Small Business Federal Contract Program Final Rule” was passed on October 7, 2010, and the rule took affect several months later.¹⁰⁰

In general, to be eligible for the program, the firm must be at least fifty-one percent owned and controlled by one or more women, and primarily operated and managed by one or more women.¹⁰¹ To be deemed “economically disadvantage,” the WOSB’s owners must demonstrate economic disadvantage in accordance with the requirements set forth in the final rule.¹⁰²

2. Issues with these Federal Policies

Socioeconomic policies aimed at increasing women-owned businesses in the government

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *See id.* This delay was a result of a long history of failed attempts to accurately complete the study. *See U.S. Women's Chamber of Commerce v. U.S. Small Bus. Admin.*, No. 1:04-CV-01889, 2005 WL 3244182, at *2 (D.D.C. 2005).

¹⁰⁰ *Id.* In the 2010 final rule, the SBA identified eighty-three North American Classification System codes that would be eligible for the WOSB federal contracting program. Of these, forty-five were identified industries in which WOSBs were underrepresented and thirty-eight were identified as industries in which WOSBs were substantially underrepresented. *Id.*

¹⁰¹ Small Business Administration, Women-Owned Small Business, <http://www.sba.gov/content/contracting-opportunities-women-owned-small-businesses> (last visited April 12, 2013)

¹⁰² *Id.*

contracting industry have faced several problems. These include: (1) a failure to meet contracting goals; and (2) challenges to its constitutionality.

Although the Government has repeatedly failed to meet contracting goals in other small business categories, this failure has been strikingly evident in the Women-Owned Small Business Program.¹⁰³ Despite the new Women-Owned Small Business Federal Contract Program Final Rule, commentators are concerned that WOSBs may not see a significant increase in federal contract awards.¹⁰⁴ These concerns are reflected in a GAO study called the “Trends and Challenges in Contracting with Women-Owned Business.”¹⁰⁵ In the study, the GAO interviewed federal contracting officials about what they believed to be the largest obstacles to contracting with WOSBs.¹⁰⁶ Contracting officials thought: (1) creating another small business contracting program would put too much pressure on already overworked contracting officials; (2) adding another small business program would be ineffective due to the limited number of small contracts available for small businesses; (3) there was a lack of WOSBs that are qualified to participate in contracts.¹⁰⁷

Potentially, these policies could also be burdened with constitutional concerns. If challenged, presumptions based on sex (WOSBs) may be subjected to heightened scrutiny because courts have required the Government to show that other programs classifying individuals on the basis of sex are substantially related to important government objectives.¹⁰⁸ Something similar to a “strong basis in evidence” standard, as is established in the *Rothe*

¹⁰³ Cullen, *supra* note 23, at 712.

¹⁰⁴ See Mee, *supra* note 20, at 723.

¹⁰⁵ See Mee, *supra* note 20, at 736 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-346, FEDERAL PROCUREMENT: TRENDS AND CHALLENGES IN CONTRACTING WITH WOMEN-OWNED SMALL BUSINESSES (2001)).

¹⁰⁶ *Id.* at 737.

¹⁰⁷ *Id.*

¹⁰⁸ DISADVANTAGED SMALL BUSINESS, *supra* note 59, at 13.

decision,¹⁰⁹ might also be required for programs incorporating the presumption that women are disadvantaged.

3. State Policies

Many states have implemented policies through their procurement processes that aim to strengthen female contractor presence. In these states, preferences for WOSBs are often incorporated into the state's policies on economically or socially disadvantaged business owners and policies for small businesses. For example, Minnesota's Department of Administration runs a Targeted Group program.¹¹⁰ To participate in the program, the business must be a Minnesota-based "small business" and certified as a Targeted Group small business.¹¹¹ To be certified, the business must be at least 51% owned by a woman, racial minority, or person with a substantial physical disability and the qualifying owner must have operational control of the business.¹¹² If successfully certified, a small business may be eligible for up to a six-percent price preference in selling products or services or bidding on construction projects.¹¹³

Additionally, consistent with its policy on refraining from implemented any socioeconomic preferences; Utah has not executed any statutes or regulations that assist women-owned businesses.

D. Domestic Preference Policies

1. Federal Policies

¹⁰⁹ *See supra* Part II(B)(ii).

¹¹⁰ *See* MN ADC 1230.1830 (2010).

¹¹¹ *Id.* at 1230.1600.

¹¹² *Id.*

¹¹³ *Id.* at 1230.1830.

The Government has a variety of policies favoring the acquisition of articles of domestic origin or acquisition of domestic sources.¹¹⁴ The major policy is the Buy American Act. The Buy American Act generally requires federal agencies to buy American manufactured and unmanufactured articles, materials, or supplies needed for public use.¹¹⁵

However, the Act identifies five discernible exceptions under which the Federal Government may bypass the Act and procure from different sources: (1) procurement that is inconsistent with the public interest; (2) procurement that is unreasonable in cost; (3) procurement meant to be used outside the United States; (4) procurement that is not domestically produced in sufficient and reasonably commercial quantities and of satisfactory quality; or (5) procurement under the micro threshold.¹¹⁶

Additionally, these policies are increasingly trumped by international trade agreements. Under the auspices of the World Trade Organization's (WTO) General Agreement on Tariff and Trade (GATT), countries that wish to eliminate preference and price discrimination in public procurement have collaborated to enact the GATT Government Procurement Code.¹¹⁷ The Code establishes a framework of rights and obligations for government procurement among the signatory WTO members. Signatories' reciprocal obligations require suppliers of goods and services in signatory countries to treat each other no less favorably than domestic suppliers in procurement covered by the Code.¹¹⁸ Thus, under this Agreement, the United States is obligated to lift its "Buy American" preferences.¹¹⁹

¹¹⁴ CIBINIC & NASH, *supra* note 12, at 1435.

¹¹⁵ Kingsley S. Osei, Article, *The Best of Both Worlds: Reciprocal Preference and Punitive Retaliation in Public Contracts*, 40 PUB. CONT. L.J. 715, 723 (2011).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

2. State Policies

Many states have adopted procurement protectionist policies that are aimed at maximizing the economic welfare of their domestic companies against competition from external or foreign companies in their public procurement.¹²⁰ In regards to out-of-state bidders, states employ a variety of direct and indirect schemes that limit or deny these businesses from participating in their public procurement.¹²¹ First, some states have taken “affirmative steps to deny, inhibit, curtail, or prevent out-of-state businesses from competing in their public procurement” by giving procurement preference to persons, firms or corporations that are registered to do business in a state or giving preference to products made, manufactured, or grown in a state.¹²² Second, other states have taken retaliatory or reciprocal measures against states that they deem to discriminate against their businesses.¹²³ Accordingly, thirty-one states have reciprocal preference laws, which require governmental agencies to increase the proposed bid price of an out-of-state bidder in proportion to the set differential preference accorded that state to its resident or qualified bidders in its procurement.¹²⁴ Additionally, New York applies retaliatory sanctions against bidders who do business in a locale that penalizes New York vendors through bid price distortions or procurement preferences.¹²⁵ Third, one state, New Hampshire, is of a neutral stance, and has not adopted either of the foregoing approaches.¹²⁶

¹²⁰ *Id.* at 734.

¹²¹ *Id.* at 717.

¹²² *Id.* at 719. In Louisiana, products “assembled,” “manufactured,” or “processed” in Louisiana enjoy a set percentage preference over non-Louisiana products. *See* LA. REV. STAT. ANN. § 38:2251 (2005).

¹²³ *Id.* (citing *See, e.g.,* Pennsylvania Reciprocal Limitations Act, 62 PA. CONS. STAT. ANN. § 107 (West 1986)).

¹²⁴ *Id.* at 721.

¹²⁵ *Id.* Under Section 165(6)(b), New York State Commissioner of Economic Development enumerates a list of six states that discriminate against New York bidders. New York agencies,

In regards to foreign businesses, many state governments employ procurement preferences that favor their resident bidders over out-of-state or foreign bidders.¹²⁷ Some states have mini “Buy American” statutes, which require certain domestic articles acquired by a state government for public use to be produced or manufactured in the United States.¹²⁸

3. Federal and State Governments: How Are They Working Together?

Both federal and state policies that prefer domestic contractors to foreign or out-of-state bidders have been challenged by critics that seek to harmonize the market.

In regards to states’ rights to prefer domestic bidders over external entities, the “constitutionality of price discrimination and procurement preferences by state and local governments that favor domestic businesses has largely survived Commerce Clause, equal protection, and due process challenges.”¹²⁹ In effect, the courts allow states to impose these preferences and discriminatory requirements, as long as they do so as market participants and not as market regulators.¹³⁰

In regards to federal harmonization, despite international efforts to eliminate domestic preferences through the creation of the Government Procurement Agreement (GPA), structural weaknesses in the multilateral enforcement of the Agreement has resulted in a disregard for the consultative and dispute resolution mechanisms designed to enforce the reciprocal obligations.¹³¹

This has lead to increased domestic efforts to offer more forceful measures to get U.S. suppliers

public authorities and public benefit corporations are prohibited from awarding contracts to bidders in these jurisdictions. *Id.*

¹²⁶ *Id.* at 717.

¹²⁷ *Id.* at 727.

¹²⁸ *Id.*

¹²⁹ *Id.* at 728.

¹³⁰ *Id.*

¹³¹ *Id.* at 715.

fairer treatment from other countries.¹³² Title IV of the Omnibus Trade and Competitiveness Act of 1988, which amended the Buy American Act of 1933 and the Trade Agreement Act of 1979, requires the President to annually report to Congress and identify countries that discriminate against U.S. suppliers.¹³³

It is also important to note that the United States' adoption of the Government Procurement Agreement will have ramifications for state and municipal governments. The European Union has encouraged the U.S. Government to expand the Code to include state governments, although it does not directly apply to state governments.¹³⁴ This expansion could present problems for the many state governments that favor their resident bidders over foreign companies. These state statutes present obstacles to the United States adoption of the GPA, particularly because "it appears that the door has been shut on any attempts to curtail state government preference schemes that negatively impede the reach of the GPA."¹³⁵

E. Policies on the Environment and Energy

1. Federal Policy

Since the 1960s, Congress has passed a number of statutes concerning the environment and energy.¹³⁶ These statutes, and the regulations implementing them, contain a variety of provisions that use federal contracts to foster the policies established for environment and energy. These statutes include the National Environmental Policy Act, the Energy Policy and

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 727.

¹³⁵ *Id. Trojan Technologies, Inc. v. Pennsylvania*, where Pennsylvania's "Buy American Act" was upheld, has "solidified the protectionist stance of many states in their anti-foreign procurement schemes in direct contravention of the basic nondiscrimination requirements and procedures prescribed by the GATT Procurement Code." *Id.*

¹³⁶ CIBINIC & NASH, *supra* note 12, at 1450.

Conservation Act, Preferences for Low-Pollution Products, and the Clean Air and Water Amendments.¹³⁷

More recently, the Federal Government has issued guidelines that reinforce “an overarching governmental philosophy that aims to take advantage of green technologies and purchasing.”¹³⁸ Seeking to improve its energy efficiency, the Government began advocating the procurement of environmentally friendly (“green”) products through its Executive Order 13123, “Greening the Government Through Efficient Energy Management.”¹³⁹ Ultimately, Executive Order 13123 led to the promulgation of Federal Acquisition Regulation (FAR) Part 23 in 2001, which generally “directs federal agencies to purchase energy-efficient products.”¹⁴⁰ In 2007, the issuance of Executive Order 13423, “Strengthening Federal Environmental, Energy, and Transportation Management,” sparked several revisions to FAR Part 23.¹⁴¹ In 2009, President Obama built on these policy goals by issuing Executive Order 13514, “Federal Leadership in Environmental, Energy, and Economic Performance.”¹⁴² The order is aimed at making various “green initiatives” a priority for federal agencies, and although it is generally consistent with the green policy objectives promulgated in earlier years, it goes a step beyond these earlier actions by mandating certain agency action.¹⁴³

¹³⁷ *Id.*

¹³⁸ Page, , *supra* note 19, at 374.

¹³⁹ *Id.* (citing Exec. Order No. 13,123, 64 Fed. Reg. 30,851 (June 8, 1999)).

¹⁴⁰ *Id.*

¹⁴¹ See J. Catherine Kunz, The Greening of Government Procurement, 08-9 BRIEFING PAPERS 1, 2 (Aug. 2008) [hereinafter *The Greening of Government Procurement*].

¹⁴² Executive Order 13514 declares that as a matter of social policy that, “Federal agencies shall increase energy efficiency; measure, report, and reduce their greenhouse gas emissions from direct and indirect activities; conserve and protect water resources through efficiency; re-use and storm water management; recycle and prevent pollution...” among many other matters. See Millian, Stanley, *Far in the Lead in Going Green*, Procurement Lawyer 7, 8 (2001).

¹⁴³ *New Executive Order Makes Green Initiatives a Priority for Federal Agencies*, Venable, LLP, “Client Alert,” <http://www.venable.com/files/Publication/4fa09503-1c8e-4b23-b32b->

2. Issues with these Federal Policies

In December 2008, the Office of Federal Procurement and Policy (OFPP) proposed issuing a policy letter, “Acquisition of Green Products and Services Policy.”¹⁴⁴ The letter would require agencies to identify opportunities for and give preference to the acquisition of green products and services.¹⁴⁵ The letter would primarily address (1) general responsibilities for agencies for the procurement of green products and services; (2) the relationship of green products and services to other socioeconomic programs, and (3) energy efficiency, in addition to many other issues.¹⁴⁶ Although the letter was never finalized, the comments that were raised in response to its proposal reflect some of the major issues that surround the implementation of green policy in the federal arena. Despite the fact that the subsequently issued Executive Order 13514 addresses some of these concerns, other issues still linger.

In response to the proposed policy letter, most commentators agreed with the general policy goal of “green procurement.” However, they voiced concerns about the impact of the policy on federal procurement practices and the need for greater expertise amongst procurement officials to implement the policy’s goals.¹⁴⁷ The American Bar Association Section of Public Contract Law was concerned that agencies would enact and enforce certain policies and strategies differently because the letter failed to identify how the Government intended to aid

f9244579eff0/Presentation/PublicationAttachment/5441d72d-10a2-4bf2-b31f-fe45f2e724aa/GVC.pdf (last visited April 20, 2013).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ The Greening of Government Procurement, *supra* note 141 (citing, See generally Nadler & Berger, “Feature Comment: OFPP Evaluating Proposed Policy on Procurement of “Green” Products and Services,” 50 GC ¶ 207 (June 11, 2008)).

agencies and contractors in implementing and adhering to the letter's policies and strategies.¹⁴⁸ They suggested that guidance could be provided from an agency designated to provide recommendations on green procurement.¹⁴⁹ Additionally, the section raised concerns that the policy letter did not explain how the Government would ensure that executive agencies meet proposed requirements.¹⁵⁰ Although the letter outlined general reporting requirements, it did not indicate how the Government planned to monitor and hold agencies accountable for implementing the policies.

In response to these concerns, Executive Order 13514 called for the creation of a Steering Committee on Federal Sustainability that would be tasked with ensuring that agencies are held accountable for conformance with the requirements of the order.¹⁵¹ However, the "objective of the order is [still] to maximize the effectiveness of the Government's sustainability efforts by placing the burden of prioritizing and monitoring progress on individual agencies."¹⁵² Although all agencies have been given the same targets and deadlines, each agency must determine for how it will comply with the mandates.¹⁵³

3. State Policies

A number of states have enacted statutes and regulations that speak to these "green policies." Massachusetts set forth its policy regarding environmental awareness in public procurement pursuant to Executive Order 515, "Establishing an Environmental Purchasing

¹⁴⁸ *Green Procurement Policy Needs Refinement, Commentators Say*, 50 GOV'T CONTRACTOR ¶ 127, April 9, 2008.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *New Executive Order Makes Green Initiatives a Priority for Federal Agencies*, Venable, LLP, "Client Alert," <http://www.venable.com/files/Publication/4fa09503-1c8e-4b23-b32b-f9244579eff0/Presentation/PublicationAttachment/5441d72d-10a2-4bf2-b31f-fe45f2e724aa/GVC.pdf> (last visited April 20, 2013).

¹⁵² Millan, Stanley, *Far in the Lead in Going Green*, 46-WTR Procurement Law. 7 (2011).

¹⁵³ *Id.*

Policy.”¹⁵⁴ The state seeks to, “reduce their impact on the environment and enhance public health by procuring Environmentally Preferable Products and services (EPPs) whenever such products and services are readily available, perform to satisfactory standards, and represent best value.”¹⁵⁵ To carry out this mission, Massachusetts has established an Environmentally Preferred Products Program.¹⁵⁶ Maine has also instituted an Environmentally Preferable Procurement Policy, which establishes an EPP Program aimed at reducing the environmental and health impacts associated with procurement, reducing costs where possible, and increasing operational efficiency.¹⁵⁷ In 2008, Maine issued Executive Order No. 15, which directs the Division of Purchases to implement Certified and Recycled Paper Procurement Policies. Additionally, in Michigan at least twenty-percent of all supplies, materials, and equipment are required to be made from recycled materials and at least fifty-percent of the paper products purchased by the State must be made with recycled paper.¹⁵⁸

III. Current Provisions on Socioeconomic Policies in the Model Procurement Code

The 2000 Model Procurement Code demonstrates the ABA’s effort to promote transparency, fairness and competitiveness in state and local government by encouraging

¹⁵⁴ Exec. Order No. 515, “Establishing an Environmental Purchasing Policy,” (October 27, 2009).

¹⁵⁵ *Id.*

¹⁵⁶ Massachusetts Official Website of the Executive Office for Administration and Finance, Environmentally Preferable Products (EPP) Procurement Program, <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/procurement-prog-and-serv/epp-procurement-prog/> (last visited April 20, 2013).

¹⁵⁷ State of Maine Division of Purchases, Environmentally Preferable Procurement Policy and Program, <http://www.maine.gov/purchase/green/epp.shtml> (last visited April 20, 2013).

¹⁵⁸ Mich. Comp. Laws §§ 18.1261(a)(1), 18.1261(b)(1) (2010). Recycled materials includes: “recycled paper products, structural materials made from recycled plastics, rerefined lubricating oils, reclaimed solvents, recycled asphalt and concrete...” *Id.* at § 18.1261a(6) (2010).

adoption of best practices’ that are embodied in the MPC.¹⁵⁹ Importantly, the ABA purports that the 2000 Code continues the ABA’s commitment to a “model” rather than a “uniform” procurement code because of the diverse organizational structures used by the States and the multitude of local government bodies and the differences in their procurement needs.¹⁶⁰ However, in substantive matters, the 2000 Code continues to reflect certain policies equally applicable to the conduct of procurement by all public bodies.¹⁶¹ The 2007 MC PIP is a condensation of the ABA 2000 Model Procurement Code for State and Local Governments.¹⁶² The ABA hopes that the 2007 MC PIP will provide a mechanism for local jurisdictions, which have not already adopted the ABA 2000 MPC and which may be unable or unwilling to undertake a major revision of their overall procurement procedures, nevertheless to benefit from use of the Code’s best practices without limiting their ability to employ innovative new methods for infrastructure design, finance, construction, and maintenance.¹⁶³

The MPC explicitly addresses the use of socioeconomic policies in Article Eleven. Articles One through Ten cover basic policies for the procurement of supplies, services, and construction; disposal of supplies; and legal remedies.¹⁶⁴ Article Eleven provides socioeconomic policies that a State may wish to amplify.¹⁶⁵ Notably, the MPC neither requires a state to implement any socioeconomic policies, nor does it limit a state’s right to execute certain collateral policies.

¹⁵⁹ State and Local Model Procurement Code, *Mission*, AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW, <http://apps.americanbar.org/dch/committee.cfm?com=PC500500> (last visited April 14, 2013).

¹⁶⁰ THE 2000 MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS XI (ABA 2d. ed. 2006) [hereinafter MPC].

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at xii.

¹⁶⁵ *Id.*

More specifically, Article Eleven “Assistance to Small and Disadvantage Businesses; Federal Assistance or Contract Procurement Requirements,” provides administrative procedures for assisting small disadvantaged businesses in learning how to do business with the enacting jurisdiction.¹⁶⁶ Part B purports that “it shall be the policy of this [State] to assist small and disadvantaged businesses in learning how to do business with the [State].”¹⁶⁷ The Chief Procurement Officer (CPO) is tasked with implementing this policy.¹⁶⁸ More specifically, the CPO is obligated to perform certain duties to assist small and disadvantaged businesses in learning how to do business with the State. Accordingly, the CPO shall provide appropriate staff within state agencies,¹⁶⁹ give special publicity to procurement procedures and issue special publications,¹⁷⁰ compile and maintain source lists of small and disadvantaged businesses,¹⁷¹ include small and disadvantaged businesses on solicitation mailing lists,¹⁷² assure that small and disadvantaged businesses are solicited on each procurement for which they may be suited,¹⁷³ and develop special training programs.¹⁷⁴ Additionally, the CPO may establish business assistance offices throughout the State.¹⁷⁵ Where a procurement involves the expenditure of federal assistance of contract funds, the Chief Procurement Officer shall comply with such federal law.¹⁷⁶

¹⁶⁶ *See generally*, MPC § 11-101

¹⁶⁷ *Id.* at § 11-201(1)

¹⁶⁸ *Id.* at § 11-201(2)

¹⁶⁹ *Id.* at § 11-202(1)

¹⁷⁰ *Id.* at § 11-202(2)

¹⁷¹ *Id.* at § 11-202(3)

¹⁷² *Id.* at § 11-202(4)

¹⁷³ *Id.* at § 11-202(5)

¹⁷⁴ *Id.* at § 11-202(6)

¹⁷⁵ *Id.* at § 11-205

¹⁷⁶ *Id.* at § 11-301

Importantly, as delineated in Part D, entitled “Other Socioeconomic Procurement Programs,” Article Eleven also can be used to incorporate additional state socioeconomic policies. The Code notes, “a [State] enacting the Code should place any legislatively authorized socioeconomic procurement programs here.”¹⁷⁷ The lack of guidance in this area is a reflection of the ABA’s desire to create a “model,” rather than a “uniform” code. Therefore, states are given a wide array of discretion and flexibility when deciding to implement socioeconomic policies, which creates problems for contractors that seek to do business across state borders.

IV. Proposed Changes to the Model Procurement Code

Using the procurement system as a vehicle for advancing social goals within the states creates barriers to entry for contractors seeking to enter markets across state lines. Adopting a more uniform approach to these social and economic goals through an update to the MPC will help facilitate these cross-border transactions. However, while this note advocates for uniformity among the states by proposing the addition of more socioeconomic provisions in the MPC, the unsettled nature of the major issues that have plagued the implementation of these federal policies may hinder the effectiveness of any additional provisions. Therefore, it is important to look to international models that have successfully harmonized national law and also incorporated the pursuit of socioeconomic goals. These models include the European Directives and the United Nations Commission on International Trade Law’s (UNCITRAL) Model Law.

A. Looking to International Mechanisms for Use in the United States

1. European Directives

¹⁷⁷ *See id.* at Part D.

Under the European Union (EU) Directives, the EU is aimed at creating a strong internal market by facilitating harmony among the laws of the Member States.¹⁷⁸ The success of the EU's internal market demonstrates the benefits of harmonizing many different statutory regimes. In order to create uniformity across the fifty state statutes on collateral policies, the MPC could use the EU Directives as a model.

The European Community (EC) regulates public procurement in all of its twenty-five Member States in order to create a single market.¹⁷⁹ Procurement is governed by both general principles in the EC Treaty and by detailed secondary legislation in the form of directives, which set out award procedures for major contracts.¹⁸⁰ The original EC procurement regime was established as a framework, in that it laid down a limited body of rules on certain issues, and left considerable discretion to Member States to supplement these with their own national procurement laws.¹⁸¹ However, the regime is moving markedly away from its framework character in the direction of a system of common rules.¹⁸² In this attempt to create a single market and harmonize the rules of the Member States, the EC seeks to suppress national bias and discrimination in public procurement, but also maintain some discretion on behalf of the member states.¹⁸³

¹⁷⁸ The Directives seek to create an internal market by supporting the obligation not to discriminate through transparency, with competition being the means for transparency, and removing barriers that prevent suppliers from other Member States from accessing the market. The main purpose of Community harmonization is to ensure a level playing field by requiring transparency and objectivity. See Sue Arrowsmith, Article, *The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?*, 35 PUB. CONT. L.J. 337, 338 (2006).

¹⁷⁹ Arrowsmith, *supra* note **Error! Bookmark not defined.**, at 338.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* The EC Treaty does not prohibit discrimination in public procurement specifically, but it contains general rules that prohibit Member States from discriminating against the industry of other Member States and that also forbid certain other barriers to market access. The main

More specifically, the functioning of the internal market in public contracts is implemented mainly through two sets of provisions.¹⁸⁴ First, there are the free movement provisions of the EC Treaty.¹⁸⁵ These prohibit unjustified discrimination in public procurement and certain other restrictions on access, which have been interpreted as requiring transparency in awarding public contracts.¹⁸⁶ Second, in regards to larger public contracts, is secondary legislation, called directives.¹⁸⁷ These directives require authorities to award contracts using specific procedures that the directives lay out.¹⁸⁸ The objectives of the directives are, first, to ensure that opportunities are opened up to firms from other Member States, by requiring contracts to be advertised and awarded through a competition, and secondly, to ensure a minimum level of transparency so that Member States cannot conceal easily discriminatory award decisions.¹⁸⁹ The current directives are those adopted in 2004, namely Directive 2004/18/EC,¹⁹⁰ which governs most major public contracts (the Public Sector Directive), and

provisions are Article 28 EC, which prohibits discrimination against products imported from other Member States; Article 49 EC, which prohibits discrimination against EC firms wishing to provide services in another Member State; and Article 43 EC, which provides for freedom for EC firms to establish in other Member States. *Id.*

¹⁸⁴ Sue Arrowsmith & Peter Kunzlik, *Public Procurement and Horizontal Policies in EC Law: general principles*, in *SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW: NEW DIRECTIVES AND NEW DIRECTIONS 29* (Sue Arrowsmith & Peter Kunzlik, ed. 2009) [hereinafter Arrowsmith & Kunzlik].

¹⁸⁵ *Id.* at 30.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Arrowsmith, *supra* note **Error! Bookmark not defined.**, at 338.

¹⁹⁰ Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts, OJ 2004 No. L134/114.

Directive 2004/17/EC,¹⁹¹ which regulates contracts in certain utilities sectors (the Utilities Directive).¹⁹²

The aim of these directives is to increase flexibility available to procuring entities, to allow them to respond to new market developments.¹⁹³ However, despite the desire to maintain Member State discretion, the directives also include many measures providing for tighter regulation of the procurement process, or for common policies on certain issues.¹⁹⁴ At first sight, the reforms might appear as a qualification to the claim that EC procurement law is evolving towards a more harmonized set of rules: because States may generally enact stricter rules than those of the directive, greater flexibility will increase the discretion of the Member States, which may choose to implement either the more flexible approach or a stricter regime.¹⁹⁵ The EU is working towards striking a balance between national practice and procedures, as is emphasized in the preambles to the directives, and regulating national discretion. It is in this way that the benefits of the EU uniformity can be used as a model for the MPC.

2. UNCITRAL Model Law

UNCITRAL, established by the United Nations General Assembly in December 1996, is aimed at pursuing progressive harmonization and modernization of the law of international

¹⁹¹ Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport, and postal service sectors ('Utilities Directive'), OJ 2004 No. L134/1.

¹⁹² These two new directives almost entirely replace the EC's previous secondary legislation on procurement. This major reform had its origins in a Green Paper of 1996, *Public Procurement in the European Union: Exploring the Way Forward*, discussing the future of EC policy on procurement.

¹⁹³ Arrowsmith, *supra* note **Error! Bookmark not defined.**, at 357.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 34.

trade.¹⁹⁶ In 1994, the UNCITRAL Model Law was adopted by the UNCITRAL Member States to help achieve that goal in the procurement context. The Model Law is “designed to assist nations in reforming and modernizing their laws on procurement procedures; it is built on ensuring competition, transparency, fairness, and objectivity in procurement so that that nations will be able to buy goods and services more cheaply and efficiently.”¹⁹⁷ The Model Law provides a useful backdrop to procurement reform in the United States because it is moving towards striking “middle ground” in the utilization of socioeconomic policy tools.¹⁹⁸ The MPC should adopt a similar approach when adopting socioeconomic provisions.

In 2004, the UNCITRAL working group addressed how the Model Law might handle socioeconomic initiatives that are interwoven into procurement systems. The working group recognized that “socioeconomic programs would affect the economy and efficiency of an overall procurement system.”¹⁹⁹ However, they also understood “that the power of public spending is an important social policy tool.” The working group found that they “would have to weigh the very different role that socioeconomic preferences – say, for a particularly disadvantaged group – may play in smaller, emerging economies.”²⁰⁰

In 2011, UNCITRAL enacted its 2011 Model Law on Public Procurement (Model Law).²⁰¹ Subsequently, UNCITRAL prepared a Guide to provide background and explanatory

¹⁹⁶ A Guide to UNCITRAL: Basic Facts About the United Nations Commission on International Trade Law by United Nations Commission on International Trade Law (January 2013).

¹⁹⁷ Don Wallace, Jr., Christopher R. Yukins, Jason P. Matechak, *UNCITRAL Model Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Contracts*, 20-WTR Procurement Law. 12 (2005).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Guide to UNCITRAL Model Law*, *supra* note 8, at i.

information on the policy considerations reflected in the Model Law.²⁰² The Guide specifically addresses how the drafters balanced procurement policy expressed in the Model Law and the overall socioeconomic objectives and policies of the enacting States.²⁰³ The drafters acknowledged that while the pursuit of socio-economic policies involves exceptions to the principle of full and open competition and can bring additional costs to procurement, they are often employed to open the procurement market to groups or sectors that have been traditionally excluded from procurement contracts.²⁰⁴ The drafters warn, “the pursuit and implementation of socio-economic policies through procurement should be carefully weighed against the costs that the policies may involve in both the short and long term.”²⁰⁵

B. Harmonizing Socioeconomic Policies in the United States Through Additions to the Model Procurement Code

The MPC should use both the EU Directives and the UNCITRAL Model law as models for harmonization. However, when updating the MPC to include more specific socioeconomic provisions and achieve greater uniformity among the states, it is important to remain aware of the currently unsettled issues that accompanied their implementation in the federal context. Therefore, if additional policies are added, they should be tailored to accommodate for this sensitive procurement setting.²⁰⁶ Here, the addition of preferences targeting race and gender may be ineffective because of the currently unsettled debate surrounding their constitutionality. Importantly, when implementing socioeconomic programs in this environment, they need to be

²⁰² *Id.*

²⁰³ *Id.* at 3

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Page, *supra* note 17, at 373.

constructed so as to best balance achieving their social and economic objectives, “while at the same time, minimizing any concomitant losses of efficiency.”²⁰⁷

V. Conclusion

State and local governments have long used procurement as a tool to implement social and economic goals. However, because each state has undergone a unique social history, governments balance their social policy objectives differently from one another.²⁰⁸ As a result, although many state governments have enacted statutes and regulations that implement socioeconomic objectives, these provisions are not uniform across the states. This lack of uniformity between states’ socioeconomic policies acts as a barrier to entry for contractors that seek to enter into markets across state lines.

Adopting a more uniform approach to the implementation of these social and economic goals should be done through an update to the MPC. The MPC and its 2002 Model Procurement Regulations provide very limited guidance for states’ adoption of socioeconomic programs. The Code explicitly addresses preference policies for small business, and leaves the implementation of additional socioeconomic preferences to the discretion of the states.²⁰⁹ This “gap” in the MPC should be updated by adding more specific socioeconomic provisions to the Code. The inclusion of these new requirements will help achieve greater uniformity and help remove barriers. When drafted, these provisions should employ the Federal Government’s socioeconomic programs as

²⁰⁷ *Id.* (citing Christopher R. Yukins, *Making Federal Information Technology Accessible: A Case Study in Social Policy and Procurement*, 33 PUB. CONT. L.J. 667, 692-93 (2004) (examining the practical compliance difficulties that section 508, a socioeconomic program, creates for federal agencies)).

²⁰⁸ Conway, *supra* note 1, at 137.

²⁰⁹ See *infra* Part III.

models, but also should be formulated so as to reflect the lessons learned from the execution of these programs at the federal level.²¹⁰

The Pledge of Honesty

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion.

_____Lyndsey Waddington _____
Lyndsey Waddington

²¹⁰ See *infra* Part II.

ATTACHMENT 11



Addressing Human Trafficking through the ABA Model Procurement Code

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Abstract

Although human trafficking is not a particularly recent problem, efforts made by the U.S.

Government to combat this phenomenon have seen a notable increase over the last decade and a half. As globalization swells, procurement industries are more frequently utilizing international contractors for the completion of U.S. Government contracts.

Unfortunately, as the media has amplified in full color, many of the foreign nationals that

are recruited to complete these contracts are often subjected to severe forms of exploitation and abuse at the hands of U.S. Government contractors. The federal government has made numerous attempts to deter and punish these corrupt practices.

However, federal approaches to anti-trafficking have failed to produce the desired results.

States, acknowledging the value of addressing human trafficking at a more local level, have shown a noteworthy commitment to this end in recent years. Nevertheless, state anti-trafficking legislation is varied and piecemeal; while some states have implemented comprehensive programs, others have failed to make any real steps toward identifying and punishing human-trafficking activity. This paper proposes a revision of the ABA

Model Procurement Code to include a section on human trafficking. Through the proposed human-trafficking provisions, states would be provided a comprehensive guide with which to construct and/or revise existing legislation with a view toward enhancing efforts to eradicate human trafficking in relation to government procurement.



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I. Introduction

With increased globalization and a distribution of wealth that leaves much in the hands of powerful government and corporate actors, human trafficking has become a pressing concern. Beginning in the late 1990's with public attention surrounding the participation of Soviet women and children in Western commercial sex industries¹, both the United States ("U.S.") Government and the international community have demonstrated a marked commitment to strengthening efforts to combat human trafficking through multilateral action.

In 2003, the United Nations ("U.N.") adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("U.N. Protocol"), and became the first multilateral instrument to effectively define human trafficking and mandate its criminalization among State Parties. While not all State Parties have adopted the U.N. Protocol to date, a U.N. study conducted in 2012 reported that 134 countries and territories had criminalized trafficking in persons.² Moreover, the U.S. Federal Government has been an active participant in the fight against human trafficking, as is demonstrated by its broad support of international efforts to abolish trafficking as well as the proliferation of U.S. legislation and executive endorsements from the late 1990's into today. Nevertheless, human trafficking continues to pervade the U.S. Government procurement industry.³

¹ See Liana Sun Wyler, CONG. RESEARCH SERV., RL 42497, *Trafficking in Persons: International Dimensions and Foreign Policy Issues for Congress*, 1-2 (2012).

² See UNODC, *Global Report on Trafficking in Persons*, December 2012, available at http://www.unodc.org/documents/Global_Report_on_TIP.pdf.

³ See generally AMERICAN CIVIL LIBERTIES UNION, *Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors*, 19 (June 2012); see also NORTHEASTERN UNIVERSITY and URBAN INSTITUTE, *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, (April 2012), available at <http://www.urban.org/UploadedPDF/412592-State-and-Local-Human-Trafficking-Cases.pdf>.

Beyond federal initiatives, U.S. states have also stepped into the playing field in a major way. In 2010, state legislators introduced approximately 350 state bills related to human trafficking.⁴ In 2011 alone, twenty-eight states passed new laws addressing human trafficking.⁵ The participation of state and local governments in efforts to combat human trafficking is vital, as their proximity to these abuses facilitates more hands-on approaches to enforcing prohibitions and punishing perpetrators. However, state efforts are varied and often piecemeal,⁶ and increased legislation has not yet demonstrated subsequent increases in convictions.⁷ Moreover, state approaches have largely failed to address the relationship between government contractors and human trafficking violations.

This paper proposes that the ABA Model Procurement Code (the “Code”) should include a section on compliance with human trafficking standards. A common provision would improve the efficacy of state engagement by serving as a model for the imposition of minimum standards and guidelines for state action in this domain. This model would in turn enable states to draft stronger and more comprehensive rules and regulations for contractor compliance.

II. The Interplay Between Government Contractors and Human Trafficking

The trafficking and abuse of third country nationals (“TCNs”) contracted by the U.S. Government has increased drastically in recent years as a result of both globalization and cost-

⁴ Derek Pennartz, *The Irony of the Land of the Free: How Texas is Cleaning Up It’s Human Trafficking Problem*, 12 TEX. TECH. ADMIN. L. J. 367, 382 (Spring 2011).

⁵ Polaris Project 2012, *Majority of States Actively Passing Laws to Combat Human Trafficking*, POLARIS PROJECT, available at <http://www.polarisproject.org/media-center/press-releases/634-majority-of-states-actively-passing-laws-to-combat-human-trafficking>.

⁶ For example, while Texas has in place anti-trafficking statutes, civil remedies and hotlines for victims, asset forfeiture provisions, and training programs, Mississippi has only a minimal anti-trafficking statute with no additional programs or related causes of action. *See id.*

⁷ Michael W. Savage, *State Legislatures Step Up Efforts to Fight Human Trafficking*, THE WASH. POST, July 19, 2010, at A03, available at http://www.ilo.org/sapfl/News/WCMS_143047/lang--en/index.htm.

saving interests. While transparency and integrity are touted as being among the key principles of the U.S. procurement system⁸, competition and efficiency often trump compliance with these ideals. By recruiting vulnerable workers from developing countries, government contractors are able to pad their workforces with essential service providers at very low costs.⁹

a. Defining and Identifying Human Trafficking

“Trafficking in persons” is defined by the U.N. Protocol as recruiting, transporting, transferring, harboring or receiving persons through the threat or use of force or coercion, including by abduction, fraud, deception, abuse of power or vulnerability, “for the purpose of exploitation.”¹⁰ Although federal statutes do not provide a formal definition for human trafficking, the Trafficking Victims Protection Act (“TVPA”) alternatively defines “severe forms of trafficking in persons” as including both (a) commercial sexual acts induced by force, fraud, coercion or where the actor is a minor; and (b) labor obtained through the recruitment, harboring or transport of persons by means of force, fraud or coercion “for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.”¹¹

While sex trafficking is often thrown into the spotlight, the trafficking of persons for purposes of labor exploitation has been particularly worrisome in the current global economy. Lured by deceptive promises of high-paying employment, TCNs are often tricked into signing contracts to work abroad, only to discover upon arrival that what they were promised was a

⁸ See Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002).

⁹ See generally Sarah Stillman, *The Invisible Army*, NEW YORKER, June 6, 2011; see also NORTHEASTERN UNIVERSITY and URBAN INSTITUTE, *supra* note 3.

¹⁰ *Proposal to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25, Annex II, at 32, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

¹¹ See Alison Siskin and Liana Sun Wyler, *Trafficking in Persons: U.S. Policy and Issues for Congress*, CONG. RESEARCH SERV., RL 42497, 2 (February 19, 2013).

hoax.¹² Although human trafficking often involves the smuggling of persons across international borders, both TCNs and American citizens fall victim to human trafficking on U.S. soil as well as internationally.¹³

b. Human Trafficking by U.S. Government Contractors

The U.S. procurement system is among the most sophisticated in the world. Nonetheless, as noted above, its goals often come into conflict.¹⁴ Namely, integrity and transparency frequently give way to competition and best value concerns. Given the wide availability of low-wage labor from developing countries, subcontractors and labor brokers often exploit vulnerable TCNs in an effort to keep costs low. By hiring cheaper labor, U.S. contractors can offer lower bids and thereby increase their competitiveness. When prime contractors fail to properly investigate the sources of their subcontractors' labor, they contribute to the perpetuation of trafficking – whether intentionally or not.¹⁵

Both within the U.S. and abroad, U.S. Government contractors recruit tens of thousands of TCNs each year to support U.S. military and industry operations.¹⁶ Recruited with promises to

¹² TCNs are often coerced into paying exorbitant recruitment fees only to be transported out of their home countries and onto military bases throughout the Middle East. *See* Stillman at 56.

¹³ In 2010, Fang Ping Ding was sentenced to 37 months in prison for trafficking a Chinese woman as a domestic servant in her California home. Ding had confiscated the woman's passport, visa and other documents, physically abused her, and refused to pay her for her work. *See* FEDERAL BUREAU OF INVESTIGATION, *California Woman Sentenced to More Than Three Years in Prison for Human Trafficking Charge, Daughter, Son-In-Law Sentenced on Immigration Charges*, November 17, 2010, available at <http://fbi.gov/sanfrancisco/press-releases/2010/sf111710.htm>.

¹⁴ *See supra* p. 2-3.

¹⁵ *See generally* COMM'N ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN, August 2011, 159-60 (Aug. 2011), available at <http://cybercemetery.unt.edu/archive/cwc/20110929213815/http://www.wartimecontracting.gov>.

¹⁶ *See* AMERICAN CIVIL LIBERTIES UNION, *Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors*, 19 (June 2012); *see also* NORTHEASTERN UNIVERSITY and URBAN INSTITUTE, *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, *supra* note 3.

pay salaries they are unable to get in their home countries, some TCNs are taken from their home countries to military bases abroad and made to work in substandard conditions for very little compensation.¹⁷ Others are brought into the U.S. by contractors hoping to put them to work for wages much lower cost than what they would have to pay U.S. citizens for the same work.¹⁸ Labor contractors often provide these TCNs visas, help them travel to the U.S. and promise to find them good work, only revealing the reality of the situation once they have arrived in the U.S. and are unable to escape the situation for fear of legal or retaliatory repercussions.¹⁹ The problem is perpetuated when prime contractors are not held accountable for trafficking that occurs along their supply chains.²⁰ Labor cost pressures diminish respect for human rights as contractors turn a blind eye to these violations in hopes of financial profit. Procurement regulation creating a floor for human rights standards in connection with government contracts could guarantee basic safeguards for victims of human trafficking.

¹⁷ Recruiters often promise to pay TCNs \$1,000-3,000 or more per month, while the actual pay ends up being between \$150-500 per month. *Id.* at 22. After arriving on military camps, workers are frequently housed in overcrowded and unsanitary living quarters, and their passports are sometimes taken from them to ensure their inability to escape. *Id.* at 29-30.

¹⁸ In Sacramento, California, a woman was recruited from the Philippines by a U.S. labor contractor who later informed her that she owed \$12,000 and would have to work 10 years to pay off her debt. For two and a half years, the immigrant worked 18-hour days at a home for the elderly, slept in hallways and was fed next to nothing. She was threatened with deportation if she tried to escape. See Steven Harmon, *Bills to Protect California Immigrant Workers Introduced*, MercuryNews.com, available at http://www.mercurynews.com/politics-government/ci_23140773/steinberg-introduces-bills-protect-california-immigrant-workers. Thousands of foreign workers are given special visas and brought into the U.S. every year to work in the homes of U.S. diplomats as cooks, housemaids and caretakers. A U.S. Government Accountability Office Report released in 2008 revealed that many of these workers are often abused – given little pay, forbidden from leaving their worksites, and subjected to less-than-stellar living conditions. See Kirk Semple, *Government Report Points to Diplomats' Abuse of Workers They Bring With Them*, THE NEW YORK TIMES, available at <http://www.nytimes.com/2008/07/30/nyregion/30traffic.html?ref=slavelabor>.

¹⁹ See Harmon, *supra* note 18.

²⁰ See Michelle Clark, *Ending Human Trafficking in U.S. Government Contracts: Implications for Federal Contractors*, STABILITY OPERATIONS, Vol. 8, No. 3 (2012) available at <http://web.peaceops.com/archives/2376>.

III. Federal Attempts to Combat Human-Trafficking

Since the late 1990's, human trafficking has become a U.S. Government priority and has been addressed as such by Congress as well as the Clinton, W. Bush and Obama administrations.²¹ This section outlines some of the recent legislative and executive efforts made to combat human trafficking.

a. Legislative Action

Beginning in 2000 with the TVPA, Congress adopted the sentiment iterated by the Administration concerning the abolition of human trafficking, and a waterfall of legislation followed. This portion of the paper focuses on two of the most prominent legislative attempts at combating human trafficking in government contracts over the last decade.

i. The Trafficking Victims Protection Act

On October 28, 2000, President Clinton signed the first bill introduced by Congress in the fight against human trafficking – the TVPA.²² The provisions of the TVPA were extensive and mandated the cooperation of multilateral stakeholders including U.S. governmental bodies, international actors and civil society. For example, the TVPA directed the State Department to file annual country reports for the dissemination of information regarding international efforts to eliminate trafficking. Additionally, the act called for increased public awareness and governmental collaboration with NGOs to combat trafficking as well as the establishment of programs both domestically and abroad to ensure the safe reintegration of trafficking victims into society.²³

²¹ Siskin and Wyler, *supra* note 11, at 47.

²² 22 U.S.C §§ 7101-7112 (2000).

²³ *See* Siskin and Wyler, *supra* note 11, at 48.

Between 2000 and today, the TVPA has seen a number of revisions.²⁴ The Trafficking Victims Protection Reauthorization Act (“TVPRA 2003”) of 2003 added 22 U.S.C. § 7104(g), which specifically addressed the issue of forced labor in government contracts. TVPRA 2003 also substantially increased funding for anti-trafficking programs, refined minimum standards for governments with respect to trafficking and created a ‘watch list’ of countries exhibiting particularly worrisome trafficking practices.²⁵ The 2005 revision of the TVPA sought, among other things, to extend U.S. criminal jurisdiction to government contractors engaged in trafficking while performing contracts abroad.²⁶ In 2008, a system for monitoring and evaluation of trafficking assistance was included in the TVPA, as well as the creation of an integrated database for intergovernmental collaboration regarding trafficking analyses.²⁷

The most recent amendment to the TVPA was in the 112th Congress by the National Defense Authorization Act for Fiscal Year 2013. Under this act, the President is required to authorize the termination of contracts without penalty where labor recruiters or other agents of the contract engage in trafficking activities in connection with the performance of a government contract.²⁸

Unfortunately, criticisms of the TVPA remain. Notably, the lack of federal prosecutions stemming from the TVPA’s enactment, inadequate victims’ services, and insufficient state and

²⁴ The TVPA was revised in 2003, 2005, 2008 and, most recently, in 2013. Reference to the TVPA in this paper will be to the most recently amended version unless otherwise specified.

²⁵ Pub. L. No. 108-193, 117 Stat. 2875 (2003); *see* Siskin and Wyler at 50; *see also* Victoria L. Starks, *U.S. Government’s Recent Initiatives to Prevent Contractors from Engaging in Trafficking in Persons: Analysis of Federal Acquisition Regulation Subpart 22.17*, 27 PUB. CONT. L. J. 879, 883 (Summer 2008).

²⁶ Pub. L. 109-164, 119 Stat. 3558 (2005); *see also* Siskin and Wyler, *supra* note 11, at 51.

²⁷ Pub. L. 110-457, 122 Stat. 5044 (2008); *see also* Siskin and Wyler, *supra* note 11, at 52.

²⁸ Pub. L. 112-239 [HR 4310], 126 Stat 1632. For more information concerning the 2013 amendment’s provisions, *see* Siskin and Wyler, *supra* note 11, at 53.

local involvement are among the most prevalent criticisms of the TVPA to date.²⁹ The last of these criticisms is the subject of this paper’s proposal (described in more detail below). By strengthening state and local efforts, more tangible results in anti-trafficking regulation are possible.

ii. The End Trafficking in Government Contracts Act of 2012

On March 26, 2012, Senator Richard Blumenthal, joined by Senators Franken, Rubio, Portman Lieberman and Collins, introduced the “End Trafficking in Government Contracts Act of 2012” (“S. 3324”) to the 112th Congress.³⁰ Congressmen Issa, Cummings, Lankford, Connolly and Smith introduced a companion bill to the House of Representatives on the same day.³¹ At a hearing before the House Committee on Government and Oversight Reform, senators expressed concern that ‘existing prohibitions on trafficking have failed to suppress it’³² and urged the adoption of this legislation to address these inadequacies.

Among S. 2234’s objectives is to strengthen existing legal safeguards for potential victims of trafficking by requiring the implementation of ‘proactive prevention plans’ to prevent government facilitation or support of human trafficking.³³ By enhancing reporting and monitoring requirements and enabling COs to impose stricter penalties on contractors found to

²⁹ Jennifer A.L. Sheldon-Sherman, *The Missing “P”: Prosecution, Prevention, Protection and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 457-58 (Fall 2012).

³⁰ S. 2234; See RICHARD BLUMENTHAL UNITED STATES SENATOR FOR CONNECTICUT NEWSROOM, *Senators Introduce Bill to Halt Human Trafficking on Federal Grants and Contracts Overseas*, (Mar. 26, 2012), available at <http://www.portman.senate.gov/public/index.cfm/press-releases?ID=c943ad0b-f021-4039-814a-5c5f47310f6e>.

³¹ See *Labor Abuses, Human Trafficking and Government Contractors: Is the Government Doing Enough to Protect Vulnerable Workers?: Hearing Before the Subcomm. on Techn., Info. Policy, Intergovernmental Relations and Procurement Reform or the Comm. on Oversight and Governmental Reform*, 112th Cong. 112-137 (2012) (statement of Richard Blumenthal, U.S. Senator, Connecticut).

³² See *id.*

³³ See *id.* at 6.

be complicit in trafficking offenses, this legislation aims to abolish trafficking practices in connection with government contract performance. The bill's extension of federal criminal law to overseas contracts 'closes a loophole' in the current U.S. legal system by holding contractors engaged in U.S. Government contracts overseas to the same standards they would face on U.S. territory.³⁴

Given the notable increase in human trafficking violations occurring in connection with U.S. government contractors' recruitment of TCNs to perform contracts on U.S. military bases abroad, this amendment seems particularly relevant to the current debate surrounding contractor accountability. On December 4, 2012, the Senate approved a November 2012 vote to amend the National Defense Authorization Act of 2013 ("FY2013 NDAA") by adding S. 2234 to the FY2013 NDAA.³⁵ However, albeit commendable, these legislative efforts seem largely to ignore contractor involvement in trafficking occurring on U.S. soil. In order to effectively combat the facilitation of human trafficking by government contractors, legislators must look inward and begin to strengthen regulation of human trafficking in connection with government contracts at the state and local level.

b. The Executive Mandate: A Trend in POTUS Support

Beginning with President Clinton's March 1998 directive, the executive branch has demonstrated unwavering support for the implementation, improvement and enforcement of anti-

³⁴ *Id.*

³⁵ H.R. 4310, 112th Cong. (2012); *see also* RICHARD BLUMENTHAL UNITED STATES SENATOR FOR CONNECTICUT NEWSROOM, *Blumenthal, Portman, Bipartisan Coalition Secure Inclusion of Groundbreaking Anti-Human Trafficking Legislation in NDAA*, (Nov. 30, 2012), available at <http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-portman-bipartisan-coalition-secure-inclusion-of-groundbreaking-anti-human-trafficking-legislation-in-ndaa>.

human trafficking initiatives from both government and civil society alike.³⁶ In December 2002, President George W. Bush introduced a “zero tolerance” policy toward U.S. government contractors implicated in human trafficking. His National Security Presidential Directive (“NSPD-22”) mandated, among other things, that federal government personnel obtain proper training with which to effectively carry out the Directive’s government-wide policy to combat trafficking in persons.³⁷ Moreover, the Directive specifically encouraged federal cooperation with state and local law enforcement as a means of strengthening these efforts.³⁸

i. The Federal Acquisition Regulation

Since 2006, the Federal Acquisition Regulation System began incorporating clauses reiterating the anti-human trafficking provisions contained in the TVPA to be applied to government contracts.³⁹ FAR 22.17 became effective on April 19, 2006, and, along with the “Combating Trafficking in Persons” clause at FAR 52.222-50,⁴⁰ served as an interim rule aimed at facilitating the implementation of TVPRA provisions for government contracts.⁴¹ Under the FAR rule, contractors are prohibited from partaking in severe forms of trafficking in connection

³⁶ President Clinton’s strategy for combating human trafficking posited a “prevention, protection and prosecution” model and directed governmental-wide action from entities including the Department of Justice, the Department of Labor and the Department of State to revamp efforts to this end through initiatives like the creation of task forces, rigorous investigation of cases, review and reform of existing criminal laws and the dissemination of information concerning trafficking practices through newly launched international databases. *See* H.R. 4310, *supra* note 35.

³⁷ *See id.*; *see also* President George W. Bush, National Security Presidential Directive 22 (hereinafter NSPD-22), *Combating Trafficking in Persons*, December 16, 2002.

³⁸ *See* H.R. 4310, *supra* note 35; *See* NSPD-22, *supra* note 37.

³⁹ *See* Marc Frey et al., *Compliance Issues Associated with Private Security Contracting in Support of the U.S. Government*, 12-12 Briefing Papers 1, 9 (Nov. 2012).

⁴⁰ *See* Combating Trafficking in Persons, 72 Fed. Reg. 46,335, 46,336 (Aug. 17, 2007) (to be codified at 48 C.F.R. pt. 12, 22 and 52).

⁴¹ *See* 72 Fed. Reg. 46,335, *supra* note 40; *see also* John G. Bradbury, *Human Trafficking and Government Contractor Liability: Is FAR 22.17 a Step in the Right Direction?*, 37 PUB. CONT. L. J. 907, 913 (Summer 2008).

with contract performance, and mandatory provisions must be included in contracts to allow for termination where this prohibition is violated.⁴²

Although FAR 22.17 demonstrates a marked effort by the executive to support the fight against human trafficking, the rule has many flaws that may be remedied through the proposed Code provision. For instance, FAR 22.17's ambiguous language makes it difficult to interpret the rule's scope and application. Where terms like "commercial sex act" and "employee" are not clearly defined, the rule fails to provide adequate guidance for contractors attempting to abide by its provisions.⁴³ A model provision in the Code could alleviate this problem by pooling terminology from various sources to provide comprehensive definitions and guidelines for contractor compliance. State and local officials could then apply the terminology provided to formulate language and programs suited to their respective jurisdiction's procurement needs.

Another issue with FAR 22.17 is its application to acts not considered within the realm of 'human trafficking,'⁴⁴ to employees' personal time outside of working hours, and to subcontractor employees far down the chain of command from the CO⁴⁵ result in increased risks for contractors seeking to partake in government procurement projects. Heightened uncertainty in relation to engagement in government contracts stemming from these broad provisions will drive up costs for contractors willing to assume these risks. The proposed model provision would provide a starting point from which state and local officials could draft legislation catered to each municipality's respective contextual circumstances. These particularized approaches to

⁴² FAR 22.17.

⁴³ See Bradbury, *supra* note 41, at 914.

⁴⁴ For example, the FAR 22.17 goes so far as to apply to individuals who willingly engage in prostitution – an act that does not fall under the "trafficking" umbrella due to the free will exhibited by the actor in performing commercial sex acts. *See id* at 915.

⁴⁵ For example, a contractor who provides goods to Company A may be found in violation of FAR 22.17 when the employee of one of its subcontractor parts suppliers is found to have procured commercial sex acts in a foreign country. *Id.*

procurement reform would help to clarify the rules and regulations applicable to contractors within each locality. This, in turn, would decrease contractor skepticism and enable contractors to engage in long-term contracts with a clear view of their obligations and potential liabilities.

Under the current FAR provisions, contractors have a duty to report any information they receive concerning potential violations to their contracting officers (“COs”).⁴⁶ In turn, contractors, subcontractors or related employees found to be in violation of FAR 22.17 are subject to punishment by means of removal from the project, termination of subcontractors, payment suspension, nonpayment of award fees, termination of the contract or contractor debarment.⁴⁷ However, while government discretion in the punishment of violations is broad under this rule, the rule lacks any form of auditing mechanism. Because contractors are not likely to self-report misdemeanors in the absence of an auditing process that would reveal their practices independently, enforcement of the FAR 22.17 provisions is largely ineffective.⁴⁸

Furthermore, the requirement that contractors report violations only when they become “aware” of such activity creates perverse incentives for contractors to subcontract as much work as possible so as to insulate themselves from liability. Where contractors are able to turn a blind eye to FAR 22.17 violations down the chain of command, they may effectively escape punishment under this rule.⁴⁹ Again, the inclusion of a provision in the Code could serve to resolve this problem. Strengthening contractor compliance with anti-trafficking efforts at the state and local level would increase transparency and make it difficult for contractors to hide their awareness of such practices. Following the guidance provided by an anti-trafficking

⁴⁶ FAR 52.222-50(d).

⁴⁷ FAR 22.1704, 52.222-50.

⁴⁸ See Tenley A. Carp, *Feature Comment: The FAR and DFARS Ban on Human Trafficking – Heavy on Rhetoric, Light on Enforcement*, 49 GOV’T CONTRACTOR ¶ 12 (Jan. 17, 2007).

⁴⁹ FAR 22.1704.

provision in the Code, state and local officials could expand and improve oversight mechanisms and more effectively prevent contractors from evading reporting requirements.

ii. Executive Order 13627: Strengthening Protections Against Trafficking in Persons in Federal Contracting

Most recently, President Barack Obama released an executive order (“EO”) on September 25, 2012, entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracting.” The EO reiterates the goals set forth by President Obama’s predecessors and mandates revisions to the current Federal Acquisition Regulation (“FAR”) to include specific prohibitions on practices including deceptive recruitment, the charging of exorbitant recruitment fees and the confiscation of workers’ passports.⁵⁰ Moreover, the EO grants increased authority to federal officials to investigate and punish U.S. government contractors found to be complicit or involved in human trafficking in connection with government contracts.⁵¹

The 2012 EO launched a review process for the identification of industries or sectors with a history of trafficking-related practices. Based on the results of this review process, determinations would be made as to whether the U.S. Government should adopt compliance programs in these identified areas to prevent the facilitation of trafficking or forced labor in relation to government contracts.⁵² Additionally, the EO mandates all government agencies and departments to act within 180 days to take the steps necessary to incorporate the proposed FAR expansions into their respective application schemes.⁵³

⁵⁰ See *id.*; Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012).

⁵¹ See Marc Frey et al., *supra* note 39, at 9.

⁵² *Id.*

⁵³ *Id.*; Exec. Order No. 13627, §2(a).

The Project on Government Oversight has emphasized key differences between the EO and existing legislation that should be taken into account.⁵⁴ First, the EO prohibits the charging of recruitment fees completely, while the legislation merely prohibits ‘exorbitant’ fees; although this may be unrealistic, it may also provide needed accountability for contractors who are forced to do more direct hiring as a result. Second, the EO neglects to refer to the criminal penalties proposed in the legislations that would intensify remedial measures for contractors engaged in trafficking practices. Third, the EO excludes reference to the detailed reporting and monitoring processes included in the legislation. These processes provide for the notification of higher-ups when instances of trafficking are detected by COs and other government officials.

Despite broad support for the objectives it represents, President Obama’s most recent EO received wide criticism for merely politicizing the human trafficking issue rather than implementing any concrete provisions for its solution. California Republican Darrell Issa, Chairman of the House Oversight and Government Reform Committee, noted the President’s liberal use of provisions from recent legislative efforts in his EO, and expressed disappointment regarding the President’s decision to take undeserved credit for the arduous efforts being made from within the legislature to remedy this issue.⁵⁵ Representative Issa pointed out that, while the EO included much of the language and substantive provisions from the Congressional bill, it excluded “the most important part[s]:” the expansion of the criminal code to foreign labor bondage in connection with government contracts performed overseas, and application to grants

⁵⁴ See Scott Amey, *Executive Order Focuses on Prohibiting Human Trafficking*, PROJECT ON GOV’T OVERSIGHT (Oct. 4, 2012, 11:02 AM), <http://pogoblog.typepad.com/pogo/2012/10/executive-order-focuses-on-prohibiting-human-trafficking.html>.

⁵⁵ Compare S. 2234 and HR 4259 with Exec. Order No. 13627; see also Darrell Issa, *Issa Statement on the President’s Executive Order on Human Trafficking*, COMMITTEE ON OVERSIGHT & GOVERNMENT REFORM (September 25, 2012), <http://oversight.house.gov/release/issa-statement-on-the-presidents-executive-order-on-human-trafficking/>.

and grantees in addition to contractors.⁵⁶ Notably, President Obama's EO also failed to specifically address the need to combat contractor involvement in human trafficking at the state and local level.

c. Shortcomings of the Federal Approach

Critics maintain that, although progress has been made in federal efforts to combat human trafficking, real results are often stifled due to the federal government's lack of implementation mechanisms at the local level, where violations actually take place.⁵⁷ Given local law enforcement's proximity to the instances of human trafficking these federal initiatives aim to abolish, local officers are in a much better position from which to identify and subsequently address human trafficking violations.

Moreover, while victims of trafficking rarely report their status for fear of retaliation from their traffickers, local government officers who are more familiar within their communities offer a more attractive alternative should they choose to disclose this information than do far-removed federal authorities. However, inadequate attention to human trafficking by state and local governments has resulted in the weak or nonexistent training for state and local officials regarding appropriate anti-trafficking policies and procedures.⁵⁸ The following sections explore the efforts made by states in recent years to address human trafficking, and expand upon the proposed Code provisions as a recommendation for improving these efforts with an eye toward strengthening procurement reform at the state and local level.

⁵⁶ See Issa, *supra* note 55.

⁵⁷ See Sheldon-Sherman, *supra* note 29, at 457-60.

⁵⁸ *Id.*

IV. State Efforts to Combat Human Trafficking

As demonstrated above, federal laws can only go so far in providing the resources and protections needed by victims of human trafficking. In order to effectively combat the facilitation of human trafficking through government contracts, state and local actors must get involved and be willing to enforce standards and penalties at the local level. State involvement in anti-trafficking efforts would allow for the creation of comprehensive, victim-specific laws, mobilize community awareness and local involvement, and ultimately result in the increased identification and protection of victims and the prosecution of perpetrators. Over the last few years, a majority of states have recognized the need for local involvement in anti-trafficking efforts, and have passed laws to this effect.⁵⁹ However, state laws fail to adequately address contractor obligations with respect to trafficking prevention. Moreover, the societal and contextual discrepancies between states have made uniformity among these laws difficult to achieve, and discrepancies in terminology, penalties and enforcement have thrown their effectiveness into question. This section outlines recent state anti-trafficking legislation and activism and points out the shortcomings of the existing multi-state approach.

a. The Recent Influx of State-Enacted Laws Demonstrates a Marked Effort to Ensure Compliance at the Local Level

According to the Texas Office of the Attorney General, it is generally agreed upon by federal authorities that local law enforcement is the best avenue through which to identify and combat human trafficking.⁶⁰ This is due to the familiarity that local officials possess within their communities as well as the relative ease with which they can identify problems as compared with

⁵⁹ POLARIS PROJECT, *Majority of States Actively Passing Laws to Combat Human Trafficking*, August 7, 2012, <http://www.polarisproject.org/media-center/press-releases/634-majority-of-states-actively-passing-laws-to-combat-human-trafficking>.

⁶⁰ OFFICE OF THE ATT'Y GEN., *The Tex. Response to Human Trafficking Rep. to the 81st Leg.*, 9 (2008), https://www.oag.state.tx.us/AG_Publications/pdfs/human_trafficking_2008.pdf.

federal agents in larger jurisdictions.⁶¹ In 2003, Texas became the first of two states to introduce its own anti-trafficking statute, along with Washington state.⁶² As of August 2012, over half of states in the U.S. had passed anti-trafficking legislation – twenty-eight of them within the last year.⁶³ On February 27, 2013, Wyoming became the last of the 50 states to outlaw human trafficking through state legislation.⁶⁴ It seems that, with time, states are beginning to see that strong state laws are pivotal to the effective identification and prosecution of traffickers, as well as the provision of adequate support systems for survivors of human trafficking.

Aside from criminal statutes, some states have also created statewide task forces to detect issues within state borders; others have implemented collaboration mechanisms between state agencies and nongovernmental organizations. Studies investigating potential avenues for statewide action, as well as training requirements for state law enforcement officials, have also been employed in a handful of states.⁶⁵

Only a couple of states have specifically identified the connection between government contracts and human trafficking. In 2006, Alaska amended its legislation to prohibit procurement from persons headquartered or conducting business in countries listed in Tier 3 of the U.S. State

⁶¹ *Id.*

⁶² Derek Pennartz, *The Irony of the Land of the Free: How Texas is Clearing Up Its Human Trafficking Problem*, 12 TEX. TECH. ADMIN. L. J. 367, 374 (Spring 2011).

⁶³ POLARIS PROJECT, *Majority of States Actively Passing Laws to Combat Human Trafficking*, August 7, 2012, <http://www.polarisproject.org/media-center/press-releases/634-majority-of-states-actively-passing-laws-to-combat-human-trafficking>.

⁶⁴ POLARIS PROJECT, *Wyoming Becomes 50th State to Outlaw Human Trafficking*, February 27, 2013, available at <http://www.polarisproject.org/media-center/press-releases/742-wyoming-becomes-50th-state-to-outlaw-human-traff>.

⁶⁵ See Kelly Heinrich and Kavitha Sreeharsha, *The State of State Human Trafficking Laws*, AMERICAN BAR ASSOCIATION (Winter 2013), http://www.americanbar.org/publications/judges_journal/2013/winter/the_state_of_state_humant_trafficking_laws.html.

Department's Trafficking in Persons Report.⁶⁶ California's Civil Code was amended in August 2008 to include a provision prohibiting contracts seeking to withhold wages as compensation for the transportation of persons into the U.S..⁶⁷ Nevertheless, legislation aimed at combating U.S. contractor involvement in trafficking offenses at the state level is notably lacking.⁶⁸

The recent influx of state legislation followed heightened attention to human trafficking by civil society; public attention has put the severity of trafficking on the minds of both governmental and nongovernmental actors throughout the nation.⁶⁹ In November 2011, the National Conference on State Legislatures released a policy statement on trafficking at its annual summit, noting the progress made by states up to that point in the fight against human trafficking.⁷⁰

However, the real measure of these states' progress will be the number of convictions seen following passage of these laws – a statistic that reveals the unfortunate shortcomings of state efforts to date.⁷¹ Poor accountability for contractors complicit in human trafficking violations at the state and local level is a likely factor in the low levels of trafficker prosecution. The proposed Code provision, by providing guidance to state and local officials, could serve to

⁶⁶ SB 12; *see also* CENTER FOR WOMEN POLICY STUDIES, *Fact Sheet on State Anti-Trafficking Laws from US PACT* (March 2012), 3.

⁶⁷ AB 1278; *see also* CENTER FOR WOMEN POLICY STUDIES at 4.

⁶⁸ For a detailed outline of the approaches taken by states as of March 2012, *see generally* CENTER FOR WOMEN POLICY STUDIES, *supra* note 66.

⁶⁹ Michael Savage, *State Legislatures Step Up Efforts to Fight Human Trafficking*, THE WASHINGTON POST, July 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/18/AR2010071801839.html?sid=ST2010071802771>.

⁷⁰ *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, *Human Trafficking Laws in the States* (November 2011), available at <http://www.ncsl.org/issues-research/justice/human-trafficking-laws-in-the-states-updated-nov.aspx>.

⁷¹ An April 2012 study by the Urban Institute and Northeastern University determined that state prosecutors are hesitant to enforce recently enacted state laws due to their unfamiliarity with the laws, while others are ignorant even to these laws' existence. Moreover, state prosecutors often lack the necessary resources, support and training with which to take on frequently complex trafficking cases. *See* NORTHEASTERN UNIVERSITY and URBAN INSTITUTE, *supra* note 3.

improve contractor accountability. By strengthening state legislation, raising awareness about the penalties associated with trafficking complicity and/or involvement, and providing guidance for the implementation of training and education programs, the Model Procurement Code could help improve the anti-trafficking movement at the local level.

b. The Difficulties of a Multi-State Approach: Discrepancies and Shortcomings

Despite the recent trend in state support for anti-trafficking efforts, inconsistency between state laws remains, resulting in discrepancies in the implementation and enforcement of the provisions therein. Definitions among state anti-trafficking laws differ widely, as do the elements required for a trafficking offense.⁷² Moreover, the lack of resources, guidance, support and training at the local and state level inhibits the implementation and enforcement of these recently enacted laws, thereby rendering them ineffective.⁷³

Whereas the TVPA defines ‘severe trafficking in persons’ as including both labor and sex trafficking, some state laws refer only to sex trafficking at the exclusion of labor trafficking; others address only the sex trafficking of minors or contain unclear terminology. Given that labor trafficking is estimated to account for 78 percent of human trafficking worldwide, this is notably problematic.⁷⁴ Most state laws fail to include victim assistance programs, the availability of a private right of action for trafficking victims, or protections from unjust arrests resulting from the forced commission of offenses by trafficking victims.⁷⁵

The Polaris Project, a leading anti-trafficking organization, conducted a 2012 study analyzing state statutes based on their inclusion of ten key elements: (1) sex trafficking; (2) labor trafficking; (3) asset forfeiture for individuals convicted of trafficking-related crimes; (4) law

⁷² See Heinrich and Sreeharsha, *supra* note 65.

⁷³ See generally NORTHEASTERN UNIVERSITY and URBAN INSTITUTE, *supra* note 3.

⁷⁴ See *id.*

⁷⁵ *Id.*

enforcement training programs (5) trafficking task forces, commissions or advisory committees; (6) human trafficking hotlines; (7) safe harbor laws; (8) lack of a force, fraud or coercion requirement for crimes against minors; (9) victim assistance programs; and (10) civil remedies.⁷⁶ Notably, no state program was found to address all ten elements.⁷⁷

Most significant to the present discussion, however, is the absence of procurement-specific provisions in most states' anti-trafficking legislation. The ambiguity of state trafficking laws and their failure to address contractor involvement enable contractors to be used as middlemen by companies and/or individuals evading culpability.⁷⁸ In light of these shortcomings, as well as the states' demonstrated commitment to improving anti-trafficking efforts at the state and local level, comprehensive reform is necessary.

V. A Model Approach: Revision of the ABA Model Procurement Code to Include Anti-Trafficking Provisions as a Guide for State Practice

In order to remedy the demonstrable inefficiencies in current state and local anti-trafficking legislation, comprehensive guidance is needed. This paper proposes that the ideal way to achieve statewide consistency is to revise the Code to include a provision outlining the recommended components of an effective legal framework with which to combat human trafficking at the state and local level.

a. The ABA Model Procurement Code

In February 1979, the House of Delegates of the American Bar Association adopted the first edition of the Code in an effort to create a transparent, competitive and reliable procurement

⁷⁶ See POLARIS PROJECT, *Polaris Project Releases the Dirty Dozen: State Ratings on Human Trafficking Laws and Policy* (2012), <http://www.polarisproject.org/what-we-do/policy-advocacy/current-laws/2011-state-ratings>.

⁷⁷ See POLARIS PROJECT, *How Does Your State Rate on Human Trafficking Laws in 2012?*, March 2011, available at <https://na4.salesforce.com/sfc/p/300000006E4SZ2vOAvBtmKICytWEBvS.6oLeE4k>.

⁷⁸ See NORTHEASTERN UNIVERSITY and URBAN INSTITUTE, *supra* note 3, at 152.

environment for public and private actors.⁷⁹ For the first time, state and local jurisdictions were provided with a comprehensive guide outlining the basic principles upon which a durable procurement system could be built. Since 1979, the Code has been revised a number of times in connection with changes in the procurement environment, of which there are constantly many. Sixteen states have adopted the Code in full and several have adopted portions of it; thousands of local jurisdictions have also signed on to the Code's provisions.⁸⁰

The reasons for the continued revisions of the Code are many. As the volume, processes, and means by which procurement transactions are conducted evolve over time, resultant changes to the Code have been and will be needed. For example, the constant advancement of technology demands editions to the Code's text to include provisions applicable to new forms of communication – personal computers, fax machines, email, and the internet were not in existence at the time of the Code's promulgation, but are now vital components of an efficient procurement system.⁸¹ The volume of procurement has also seen significant gains since the Code's implementation; as electronic procurement tools enable the purchase of small procurements at increasingly affordable prices, governmental entities are eager to participate.⁸² As states begin to assume greater responsibility and presence within the procurement environment, these trends are likely to persist.⁸³

⁷⁹ See generally Lewis J. Baker, *Procurement Disputes at the State and Local Level: A Hodgepodge of Remedies*, 25 PUB. CONT. L.J. 265 (1996); see also 2002 ABA Model Procurement Regulations, AMERICAN BAR ASSOCIATION (2002); see also AMERICAN BAR ASSOCIATION, *State and Local Model Procurement Code*, available at <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>.

⁸⁰ See 2002 ABA Model Procurement Regulations, *supra* note 79.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Variability among states is another notable factor in the rationale behind the Code's constant maturation. As state and local governments have responded to changes in the equipment and services available to them, the methods by which these jurisdictions have procured these goods and services has been subject to broad experimentation.⁸⁴ Moreover, 'local content' regulations have perpetuated these differences.⁸⁵ Unfortunately, this wide variability among state procurement systems has historically led to decreased competition due to high costs associated with companies' attempts to understand and comply with differing regulations across jurisdictions.⁸⁶ These costs are ultimately borne by state and local governments themselves.⁸⁷

In light of the variability among state and local procurement contexts, the Code attempts to promote a 'model' in lieu of uniform requirements for state and local procurement regimes. The Code seeks not to impose restrictions on states' freedom to structure their local procurement systems as their respective contextual limitations permit, but to provide guidance for state and local governments to follow in an effort to ensure that the essential elements of a successful and durable procurement regime are acknowledged and, ultimately, met.

b. Human Trafficking Should Be An Integral Part of Model Procurement Regulations

The equally flexible and structured nature of the Code makes it an ideal tool through which to address inconsistent state practices regarding human trafficking. Given the Code's adaptability and attention to changes in the political landscape of the procurement industry, demonstrated by its continual revision, the inclusion of section within the code to provide guidance for states on anti-trafficking legislation seems a logical next step. Despite criticisms

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

about its content, President Obama's 2012 Executive Order is a testament to the significance of human trafficking among American citizens and governmental actors alike.

As discussed throughout this paper, there is a resounding consensus in support of state action as the avenue most likely to bring about tangible change in anti-trafficking legislation. In light of the recent incursion of TCNs being utilized and abused in connection with U.S. government contracts, it is essential that steps be taken to remedy gaps in the legal regime governing procurement activities. Federal attempts have yet to bring about any significant improvements with respect to trafficking practices, and state efforts have failed to adopt sufficiently comprehensive or far-reaching anti-trafficking regimes. The implementation of regulations through the Code would provide states with guidance for the implementation of anti-trafficking laws and procedures.

The main goals of the proposed Code provision would be the promotion of policies that contribute to the sustainability of state regimes and reduce demand within states for the services that victims of human trafficking frequently provide. The provision should include, among other things, procedures for implementing training and outreach programs, public awareness campaigns, and ardent task forces. Moreover, the provision should provide guidance for the efficient detection and prosecution of traffickers, as well as clear and well-defined terminology and penalties to guide state and local government actors in the identification and punishment of traffickers within their jurisdictions.

VI. Conclusion

Ultimately, although ample efforts have been made by the U.S. Government to combat human trafficking, much progress has yet to be made. Reports of foreign nationals recruited to provide labor and subjected to exploitation and abuse by U.S. Government contractors continue

to pervade the media. Transparency is critical to effecting real change in this domain. Inasmuch, it is imperative that state and local governments become integrally involved in the fight against human trafficking. Contractor complicity in trafficking violations can be more easily detected at the local level, and it is therefore essential that state and local officials be trained in how to identify such activity and equipped with comprehensive legislation that enables them to invoke penalties upon doing so.

Currently, state approaches to anti-trafficking differ widely in both substance and effectiveness. A provision in the Code specifically addressing human trafficking would provide state and local officials with comprehensive guidance for the implementation of trafficking-specific regulations structured around an ABA-approved model. Using this model, legislators could draft state-specific laws aimed at combating human trafficking within their respective jurisdictions, with each state's respective idiosyncrasies in mind. By increasing transparency at state and local levels, the resulting legislation would serve to facilitate the eradication of human trafficking in connection with U.S. Government contracts.

ADDENDUM:

**EXCERPT FROM THE *ABA MODEL PROCUREMENT CODE*
(2000)**

ON THE 1997-2000 REVISION PROCESS

I. Introduction to the 2000 ABA Model Procurement Code

A. Background: The 1979 ABA Model Procurement Code

On February 13, 1979, after years of extensive work by the Section of Public Contract Law, Section of State and Local Government Law, and other national organizations interested in state and local procurement, the 1979 Edition of the ABA Model Procurement Code for State and Local Governments was adopted by the House of Delegates of the American Bar Association. Since 1979, the Code has been adopted in full by sixteen (16) 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. As described below, the Code was in need of an update based on the ever-changing procurement environment, and the MPC Revision Project was structured to complete the task on or about the Code's twentieth birthday. 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.

B. The Revision Project: 1997 to 2000

The Sections of Public Contract Law and State and Local Government have been joint sponsors of the Model Procurement Code Revision Project since July 1997. The purpose of the Project was to update the Model Procurement Code for State and Local Governments to fit the requirements and needs of state and local governments and their contractors in the year 2000 and beyond.

The goals of the Revision Project were simple, yet profound:

- Reduce transaction costs for all governmental entities at the state and local levels;
- Reduce transaction costs to private sector suppliers of goods and services;
- Substantially increase available levels and ranges of competition through modern methods of electronic communications; and
- Encourage the competitive use of new technologies, new methods of performing, and new forms of project delivery in public procurement, particularly in the construction area.

C. Broad Participation in the Revision Project Through the Internet

Broad participation in the Revision Project was essential to its success. To achieve this goal, the Project was conducted on the World Wide Web through the Massachusetts Institute of Technology (MIT). The Project solicited and encouraged full participation by members of the sponsoring Sections, interested associations, and individual procurement officials and agencies throughout the country through the revision process. In addition to participation via the World Wide Web, extensive comments and suggestions were received by leading procurement

organizations. These groups included, to name just a few: the National Institute of Governmental Purchasing (NIGP), the National Association of State Procurement Officials (NASPO), the Construction Industry Roundtable (CIRT), the American Consulting Engineers Council, and the Council On Federal Procurement of Architectural & Engineering Services.

II. Preserving the Principles of the 1979 Model Procurement Code

The 1979 Code offered states and local jurisdictions, for the first time and in one place, a basic formulation of the fundamental principles upon which durable procurement systems rest. For twenty years, these principles have well served the public officials who manage state and local procurement systems and the thousands of private sector suppliers. The Revision Project did not result in any major changes to these basic principles. Indeed, these principles have become bedrock notions in the American law associated with public procurement. Coverage of these basic principles was preserved in the revised Code:

1. Competition
2. Ethics
3. Predictability (stability, advanced publication, accountability)
4. Clear Statements of Procurement Needs
5. Equal Treatment of Bidders/Offerors
6. Methods of Source Selection
7. Bid / Proposal Evaluation
8. Reduction in Transaction Costs for Public and Private Sector Entities
9. Procurement of Construction Related Services
10. Remedies
11. Facilitation of Intergovernmental Transactions (Cooperative Procurements)

III. Why Update the Processes in the Code?

Since 1979, the process by which procurement transactions are conducted has progressed exponentially. Technology has changed dramatically since the 1979 Code was formulated. Indeed, personal computers, email, and the internet did not exist in 1979, and there were few fax machines. These new technologies offer exciting and innovative opportunities to make public procurement processes even more predictable and more accessible to potential suppliers, to produce greater competition through wide distribution of procurement needs, and to substantially lower the average cost of procurement transactions to both government and private sector suppliers. In the construction industry, the development of Computer Aided Design (CAD) has made new and different forms of project delivery for constructed facilities possible, such as Design-Build, Design-Build-Operate, and Design-Build-Finance-Operate. The sponsoring Sections identified at least five reasons why the 1979 Code required updating in order for it to keep its place as the leading national policy blueprint for state and local purchasing.

A. Procurement Volume Has Increased Rapidly

In 1997, state and local governments were spending approximately 750 billion dollars annually in the procurement of goods, supplies, equipment, services, and construction. The dollar value of spending by the states has risen significantly since 1979 when the Code was first introduced. The number of procurement transactions per year is also rising dramatically, as electronic

procurement techniques make smaller purchases more affordable to governmental entities. Shifting program responsibility from the federal government to the states will likely accelerate this trend. Simply stated, the 1979 Code requires updating to adapt the language for use in the electronic age.

B. Procurement Has Changed Significantly Since 1979

The nature of the procurement process has changed significantly since 1979, primarily in the area of the need to purchase proprietary technology. Much of this proprietary technology relates to computers, networks, and the software and hardware required to operate, maintain, upgrade, and replace them. To keep pace and to remain the leading publication for public acquisition in the United States, the 1979 Code had to be updated to fit the changing nature of the items that state and local governments are buying, and to offer the best practices as to how these technology-oriented procurements should be handled.

C. The Means By Which Procurement Transactions Are Conducted Have Changed

The means by which public procurement needs can be advertised, questions answered, bids received, and awards made has been revolutionized since 1979. Through commercially available software programs that notify subscribers of specifically targeted opportunities, the internet offers dramatic opportunities to widely advertise public procurement needs, to increase levels of competition, and to improve the private sector's confidence in the predictability of state and local procurement processes.¹ Electronically based commercial contracting is being regularly practiced in the private sector. The mechanisms for advertising needs, opening bids, and similar processes have been overtaken, in many respects, by technological changes in telecommunications. The 1979 Code was confining in these respects and needed to be repositioned to wisely incorporate electronic commerce developments into public procurement.

D. Variability Among the States

Since 1979, state and local governments have had few alternatives other than responding to changes in the nature of equipment and services purchased on an ad hoc basis, except where good fortune and other circumstances have permitted joint effort by a few jurisdictions. The result has been great experimentation and variation among the state and local governments in the methods by which equipment and services have been procured. The proliferation of "local content" procurement regulations has, in turn, created a multitude of arcane differences among the thousands of jurisdictions buying such equipment and services on an annual basis.

The resulting trends were negative, because complex, arcane procurement rules for such acquisitions by numerous jurisdictions discouraged competition by raising the costs to companies of understanding and complying with different rules in each jurisdiction. These costs are recovered in the prices offered by a smaller pool of competitors, resulting in unnecessarily high costs to state and local governments.

¹ For simplicity, concepts of predictability and private sector confidence in stability of procurement systems, through advanced publication, open processes, and remedies are sometimes referred to as "transparency."

E. National Progress Was Again Required

The greatest contribution of the 1979 Code was the identification, with the American Bar Association acting as a neutral organization, of a national consensus among knowledgeable professionals, organizations, public agencies, and private firms as to the key elements of effective, transparent, yet stable procurement systems. The 1979 Code provided an objective national benchmark against which procurement legislation and regulations at the state and local level have been measured for two decades. The Revision Project extended the unique position of the ABA as a neutral facilitator to once again collect comments from procurement officials, agencies, associations, and private firms throughout the nation.

IV. The Update Process

Prior to the commencement of the Revision Project, both the National Association of State Procurement Officials (NASPO) and the National Institute of Governmental Purchasing (NIGP) approached the sponsoring ABA Sections and unofficially requested that the 1979 Code be updated to meet the modern requirements of advanced procurement transactions. Throughout the Project, these and other groups interested in state and local procurement practices contributed their suggestions and their comments to the Project.

The approach followed in updating the Code was a simpler, more focused version of the extensive process followed in 1979 to generate the original document. A Reporter system was used to focus on the technical improvements required to update the Code, while preserving its basic principles.

A. Reporters

Two Reporters were named by the sponsoring Sections to conduct and manage the Project. These Reporters operated at the direction of the Councils of each Section, and were coordinated by a small Steering Committee comprised of two representative members from each Section. The Reporters and the Steering Committee members are national experts in state and local procurement with significant experience in past Code drafting efforts. The Reporters were **Margaret E. McConnell** and **John B. Miller**. Ms. McConnell was a member of the original MPC Project Staff from 1976 to 1980. After returning to Arizona, she was actively engaged in the private practice of procurement law in Phoenix until 1990. From 1990 to 1996, she served as State Procurement Administrator for the State of Arizona. She is currently Assistant General Counsel for Maricopa County Community College District. John B. Miller is Associate Professor of Civil and Environmental Engineering at MIT, in Cambridge, MA. Mr. Miller was engaged in private practice concentrating on construction and government contracts law in Boston for fifteen years, prior to returning to MIT in 1995. He is a past Chair of the Section of Public Contract Law.

B. The Steering Committee

The four members of the Steering Committee were: **Thomas J. Madden**, **Larry C. Ethridge**, **Craig T. Othmer**, and **Charles D. Olson**. Messrs. Madden and Othmer represented the Section

of Public Contract Law. Messrs. Ethridge and Olson represented the Section of State and Local Government Law. Messrs. Madden and Ethridge are previous Chairs of the Model Procurement Code Coordinating Committee. Mr. Madden, now in private practice in Washington, D.C., was instrumental in the formation of the original Code project through his former position as General Counsel of Law Enforcement Assistance Administration (LEAA), the governmental entity that provided the initial financial support for the original Code project. He is a Past Chair of the Section of Public contract Law. Mr. Ethridge served as Assistant Project Director to the original Code project, and is now actively engaged in the practice of procurement law in Louisville, Kentucky. He is a Past Chair of the Section of State and Local Government Law. Mr. Othmer is Chair of the State and Local Procurement Division of the Section of Public Contract Law and was a member of the Section's Council from 1996 -1999. He is in private practice in Santa Fe, New Mexico. Mr. Olson is the Budget Officer and a member of the governing Council of the State and Local Government Law Section, and is in private practice in Waco, Texas, representing numerous local governments.

C. The Section Councils

The Councils of each of the sponsoring Sections retained the right to conduct individual debates on the revisions proposed by the Reporters. Although the Reporters' recommendations were largely adopted by each of the respective Section Councils, differences in language were adopted by the separate Councils between August, 1999 and March, 2000. These differences were resolved by the Steering Committee, acting as a conference committee for both Sections and the document submitted for approval by the House of Delegates was then separately approved by each sponsoring Section Council.

D. Project Communications

Most communications during the course of the project were conducted on the World Wide Web, through a Project web site hosted at MIT, and through quick links among this site and web sites of sponsoring and participating organizations. Individuals were able to participate in the work of the Project by accessing any of these web sites. Through this set of links, which provided instant notification of the Project's existence and status, the Project was able to access the expertise of thousands of procurement professionals in both the public and private sectors.