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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

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Suspension, Debarment, and Disqualification of Highway Construction Contractors

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the research. The report was prepared by Darrell W. Harp. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Activities Division (B) of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This paper continues NCHRP'S policy of keeping departments up to date on all aspects of highway construction law. It will be published in Selected Studies in Highway Law, Vol. 3, Chpt. VI, Highway Contract Law, in an addendum to be published in the near future.

Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976, Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published and distributed early in 1978. An expandable publication format was used to permit future supplemenation and the addition of new papers. The first addendum to SSHL, consisting of 5 new papers and supplements to 8 existing papers, was issued in 1979; and a second addendum, including 2 new papers and supplements to 15 existing papers, was released at the beginning of 1981. In December 1982, a third addendum, consisting of 8 new papers, 7 supplements, as well as an

expandable binder for Volume 4, was issued. In June 1988, NCHRP published 14 new papers and 8 supplements and an index that incorporates all the new papers and 8 supplements that have been published since the original publication in 1976, except two papers that will be published when Volume 5 is issued in a year or so. The text, which totals about 3000 pages, comprises 72 papers and 38 supplements. In addition, 2 original papers and 6 supplements have been initially published in the Legal Research Digest series and will be published in SSHL in the near future. Copies of SSHL have been sent free of charge, to NCHRP sponsors, other offices of State and Federal governments, and selected university and state law libraries. The officials receiving complimentary copies in each state are: the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency. Beyond this initial distribution, the volumes are for sale through the publications office of TRB at a cost of $145.00 per set.

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Suspension, Debarment and Disqualification of Highway Construction Contractors

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I. INTRODUCTION

In the case of *Perkins v. Lukens Steel Co.*,[1] the United States Supreme Court declared "[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."[2] From that very broad statement in the 1940 decision until the present time, the "unrestricted power" has been considerably limited by case law, statutes, rules, and regulations.

In the 1970s and 1980s federal procurement and federal-aid project fraud investigations and prosecutions had a high priority in the Criminal Division of the U.S. Department of Justice. In addition, the Disadvantaged Business Enterprise (DBE) program has raised several issues that relate to contract fraud and contractor honesty, integrity, good faith, and fair dealings. Prevailing Wage Act violations, contractor misconduct, antitrust, and other procurement and federal-aid project frauds have caused aggressive use of suspensions, debarments, or disqualifications of highway construction contractors and subcontractors at both the federal and state levels. Serious legal questions relative to such suspensions, debarments, or disqualifications must be faced by the public officials who administer such proceedings.

It is the intent of this paper to examine federal and selected state cases concerning government actions and proceedings relating to suspensions, debarments, or disqualifications of contractors and subcontractors as well as federal and state laws, rules and regulations concerning such actions and proceedings in order to draw together the controlling legal principles on such matters; including the requirements of due process, authority to cause suspensions, debarments or disqualifications, length and effect of such actions, and Administrative Procedure Act requirements relating to such authority.

Some states, such as New York, have failed in their attempts to be more aggressive toward contractors engaging in misconduct. A clear understanding of why there was failure in those states will assist others in their dealing with contractor misconduct situations.

Discussion of what are the distinguishing features of "protecting a government interest" versus "penal or punitive action" may assist officials who deal with suspension, debarment, or disqualification actions or proceedings.

II. BACKGROUND

Various statutes have required competitive bidding for public construction contracts since the 1840s. The intent of these statutes was to stimulate competition and prevent favoritism and fraud in connection with awards of public contracts. Honesty and integrity on the side of both the government officials and contractors doing business with government was anticipated.

Around the turn of the century the word "responsible" was added to the test of "lowest bidder." In addition many of the bidding statutes started to include "in the public interest" in the determination of who would receive award of a public contract.

In the mid-1930s the Davis-Bacon Act, 40 U.S.C.A. § 276a-2, was amended to provide that, where a firm was found to have disregarded its obligation to pay prevailing wages to employees, no contract would be awarded to that firm for 3 years from the date of publication of the list containing the name of the firm.[3] Several other statutory debarments relating to misconduct, such as bribery of public officials, fraud in the procurement of public contracts, or violation of the Buy American Act, were enacted at the federal and state levels starting in the 1930s and continuing up to the present.[4]

The legal principles of the *Perkins v. Lukens Steel Co.* case[5] effectively barred challenges to the government contracts administrators' determinations of awards. Further, many times in the early suspension or debarment proceedings there was minimal due process given when comparing such requirements with today's standards.

The next important development in the suspension, debarment, or disqualification processes was the situation where the statute itself did not specify suspension or debarment, but such powers were found to be inherent within the powers to establish a program or the regulations to effectuate a program. The case of *L.P. Steuart & Bro., Inc. v. Bowles*[6] dealt with the Presidential power under the Second War Powers Act. The case determined that the President had the powers to allocate materials or facilities of which the fulfillment of requirements for national defense created a shortage, in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest, including the power to issue suspension orders against those who did not conform with the program.

Throughout the 1970s and 1980s hardly a week went by without a major announcement that some large contracting firm was being suspended or debarred from receiving government defense work, or a contractor was being debarred on DBE fraud or misconduct, or some state or city official together with some contractor was subject to criminal prosecution and there would be suspension or debarment proceedings against the contractor for fraud or corruption, with many of these cases resulting from sting operations. The public confidence in public officials and the honesty and integrity of contractors doing business with government was severely shaken.

Court challenges to suspension, debarment, or disqualification proceedings take up much valuable court time as well as government staff time to pursue such actions.

The statutory or regulatory[7] processes for suspensions, debarments,

or disqualifications are a part of one's everyday life and, therefore, must be fully understood if the competitive bidding systems are to survive.

III. LEGAL CONCERNS THAT ARE PRESENT IN SUSPENSION, DEBARMENT, OR DISQUALIFICATION PROCESSES

In connection with federal projects and federal-aid projects involving suspension or debarment of highway construction contractors and subcontractors, contract administrators should be primarily concerned about, and familiar with, the Governmentwide Debarment and Suspension (Nonprocurement) process,[8] as well as be generally familiar with two other sets of federal suspension or debarment rules and regulations. They are 29 C.F.R. §§ 5.1 through 5.12, which deal with the federal wage laws; and, even though it does not apply to federal-aid transportation projects, 48 C.F.R. pt. 9.4, which is a part of the Federal Acquisition Regulation System (FAR).

Under the Federal Administrative Procedure Act, first enacted in 1946 and extensively revised in 1966, the suspension and debarment processes, referred to above, came within the rule-making requirements.[9] To have the force and effect of law, when these processes were promulgated, each was subjected to the appropriate rule-making process.

With respect to debarments, suspensions, or disqualifications at the federal level, when the appropriate processes which are provided for within the rules and regulations are followed, the legal challenges to the validity of such actions have relatively little chance of succeeding.

Even though the federal suspension or debarment rules and regulations require that firms that are ineligible to receive awards of federal or federal-aid projects, and such disqualification is made part of the process which provides for the publication of a consolidated list of suspended or debarred firms and "individuals," state action of suspension or debarment cannot be undertaken, by relying solely on such federal suspension or debarment, in order to effectuate the same result of suspension or debarment when states are administering projects with federal-aid. This caution is especially true relative to debarments or suspensions of individuals. The case of *Berlanti v. Bodman*[10] strongly suggests that an individual who is a major stockholder or officer of a firm that is going through a suspension or debarment process may have greater due process rights than was in the past or is at the present time considered to be essential in order for the action to be effective against the firm only.

In that case the New Jersey Department of Labor informed Berlanti, the then president of Suffolk County Contractors, Inc., that a debarment proceeding had been initiated against the firm and Berlanti personally, for Prevailing Wage Act violations. Under the statute, a debarred person or firm could not submit bids on public contracts for 3 years. After a hearing, Berlanti and his firm were debarred. In the New Jersey Appellate Division, Berlanti's debarment was reversed when the court held that the statute did not authorize the Labor Commissioner to pierce the contractor's corporate veil in order to debar its president. The New Jersey Supreme Court dismissed the appeal when Berlanti died, but in another case ruled "the commissioner's power to debar those individuals in corporate and non-corporate entities who are responsible for the failure to pay the prevailing wage on public works contracts is an incidental power necessary to achieve the legislative objectives that the Act is designed to implement."[11] The *Berlanti* case, however, may stand for the principle that the individual must have notice of the proposed action against him and be afforded all the other due process rights discussed later in this paper, as well as possibly having a "property right" that is greater than that which is enjoyed by a corporation itself in a suspension or debarment proceeding.

The U.S. Department of Transportation's suspensions or debarments of highway construction contractors undertaken pursuant to 49 C.F.R. pt. 29 are serious actions that are "used only in the public interest and for the Federal Government's protection and not for purposes of punishment."[12] In order to be eligible to receive federal-aid for transportation projects, the states must abide by the federal actions or lose the federal-aid. In addition, consistent action by the states compliments and effectuates the federal action.

Most states have what is known as the "good-faith pledge," under which the head of the highway or transportation agency is authorized and directed to perform and do such acts as are not specifically provided for in the various statutes, but which are necessary to perform the work of their agency with the use of federal-aid in order to maximize the receipt of federal funds.[13]

The unreported New York, Supreme Court, Albany County, case of *Liquid Asphalt Distributors Association, Inc. v. Franklin E. White, Commissioner of Transportation*, (STO892), decided June 17, 1987, by Justice Lawrence E. Kahn, is a good example of why state agencies should be concerned about trying to automatically apply federal suspensions, debarments, or disqualifications without proper consideration of due process rights. In the *Liquid Asphalt* case, the New York State Department of Transportation attempted to implement the federal debarred, suspended, or disqualified list and intended to publish such list as a part of its bidding proposals.[14] The Department expressed its intention to apply such debarments, suspensions, or disqualifications for all of its projects to the various trade organizations. The control system was going to be accomplished by a "certificate by bidder" which had to be submitted with each bid proposal. Under that certification, the bidder specified that it would not employ any subcontractor or use any materials, supplies, or labor from any entity which appeared on the federal debarred, suspended, or disqualified list. The Association took the State Commissioner of Transportation to court claiming that the certification requirement was in excess of the Department's jurisdiction even though the Department was relying on the "good-faith pledge" statute.

Essentially, the court determined that because there was a prior court determination that the Department lacked the authority to "punish" a nonresponsible bidder or debar such a bidder from submitting bids in the future, it could not use the federal debarred, suspended, or disqualified list to prevent a contractor from working for the Department. The case referred to by the court was *Callanan Industries v. White*.[15]

The court went on further to find that while the federal suspension or debarment "may certainly be raised in the context of determining irresponsibility, it may not be used as a subterfuge to accomplish that which the legislature has refused to grant."[16] Thereafter, the State Department of Transportation was compelled to consider awards of contracts or consents to subcontract for even federally suspended or debarred firms, on a case-by-case basis, with the prospect of the loss of federal-aid being important in the determination of responsibility or nonresponsibility, but there could be no debarment or suspension of firms in connection with its submission of bids in the future.

In connection with the case-by-case reviews, contractors have claimed that they were subjected to *de facto* debarment, but the courts have upheld New York's determinations of nonresponsibility even where such decisions were repeated several times based on the same facts, as long as an opportunity was given to the contractor to show corrective action.[17] In the *Phelps Guide Rails Inc. v. White* case, the State of New York had made several case-by-case determinations that Phelps should not receive subcontract approval because of its past activities in connection with the DBE program. The court reasoned that:

> Petitioner [Phelps] is correct in a de facto sense that repeated contract determinations relative to sub-contractor approvals based upon the same supporting facts results in a "suspension". However, assuming petitioner is correct in this attack on the MAP [Manual of Administrative Procedures] procedures, then respondent [State Department of Transportation], proceeding upon a contract by contract statutory basis is not unreasonable, and in fact, is quite appropriate.[18]

In the *Callanan* case, the court stated:

> The ability of the Department to reject bids by irresponsible bidders is not frustrated by its inability to debar future bids. Once the Department finds a bidder to be irresponsible for a particular reason, assuming that such a finding was not arbitrary or capricious, it could proceed to reject each of that bidder's future bids, in effect creating the sort of debarment accomplished in the instant case. However, this would force the Department to consider anew the bidder's responsibility upon each bid and presumably, change its position when and if the bidder remedies the cause of the finding of irresponsibility.[19]

The *Liquid Asphalt* case also dealt with the New York State Department of Transportation's attempt to have uniformity by applying the "certificate by bidder" to 100 percent state-funded contracts. The court declared that it was a "rather flimsy pretext at uniformity"[20] and there was no authorization for such automatic suspension or disqualification.

The *Callanan* case[21] is extremely important to examine when implementing any suspension, debarment, or disqualification process. The case deals with both the authorization to debar or suspend at the state level and the requirements relative to a rule-making process, where there is a state Administrative Procedure Act that establishes how rules and regulations are promulgated.

The facts of the *Callanan* case[22] are very interesting. The New York State Department of Transportation was very concerned about Callanan's business relationship with two DBE firms. These firms, one of which Callanan established, were found to be frauds or guilty of misconduct in the DBE program and were decertified. The next time Callanan was the lower bidder, the Department challenged the firm's honesty, integrity, good faith, and fair dealings and indicated that the firm should show good cause why the award should be made to it for that project and declared the Department's intention to suspend or debar the firm for up to 3 years for its past conduct. The Department set forth in its MAP, a copy of which was given to Callanan with the notice, the notice requirements and the criteria that should be applied in any suspension or debarment decision. The MAP also established a Contract Review Unit (CRU) to effectuate the MAP process relative to contract awards and approvals. Prior to the meeting between the CRU and Callanan, the firm submitted the apparent low bid on another project and that too was reviewed by the CRU.

At the meeting, Callanan's attorney did not address the contractor's misconduct but, instead, challenged the authority of the CRU. After the meeting, the CRU determined on January 3, 1986, that Callanan should be debarred from receiving awards of future projects and from participating as a subcontractor, supplier, or provider of labor on future contracts for a period of 30 months. On January 6, 1986, the CRU further found that the firm was not the lowest responsible bidder in the best interest of the State on the two specific projects under consideration.

The MAP procedure was not promulgated as rules and regulations nor was it subjected to any procedure under the State Administrative Procedure Act. The Department considered the MAP to be internal guidelines or criteria to assist the CRU's decision-making process since they did not dictate a particular result, but rather only what should be considered when making a decision. The Department also did not have clear legislative authority to suspend or debar contractors, but assumed it had such power from the legislative direction to award contracts only to the lowest responsible contractor as will best promote the public interest.

In the court proceeding, the central focus of both the Department's and Callanan's arguments was on the issue of the Department's authority to develop an affirmative action program for 100 percent State-financed projects, absent legislative direction while using the "good-faith pledge" for the projects involving federal-aid. The court, however, was more concerned with the debarment and the MAP when it declared: "The primary issue on this appeal is whether the Department had the authority to provide for a means of debarring or suspending bidders on the ground of irresponsibility."[23] The court stated: "thus, the authority given the Department with regard to awarding of contracts is in the terms of rejecting or accepting bids. Certainly, the Department can and should consider past conduct by a bidder in making its decision as to whether the bidder on a particular contract is responsible."[24] The court also declared: "however, in no statute has the Legislature granted the De-

partment the authority to commence any sort of proceeding for the purpose of punishing an irresponsible bidder or debarring such a bidder from submitting bids in the future. The power to investigate violations of a statute and to punish violators is a significant power and is penal in nature."[25]

In contrast with this finding that suspension or debarment is "penal in nature," in the case of *L.P. Steuart & Bro., Inc. v.Bowles*, the court stated:

> We agree that it is for congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute. *United States v. Two Hundred Barrels of Whiskey*, 95 U.S. 571, 24 L. Ed. 491; *Campbell v. Galeno Chemical Co.* 281 U.S. 599, 74 L. Ed. 1063, 50 S. Ct. 412; *Wallace v. Cutten*, 298 U.S. 229, 80 L. Ed. 1157, 56 S. Ct. 753 supra. Hence we would have no difficulty in agreeing with petitioner's contention if the issue were whether a suspension order could be used as a means of punishment of an offender. But that statement of the question is a distortion of the issue presented on this record.[26]

The case dealt with suspension of a retailer for violations of the regulations regarding rationing, which suspension the United States Supreme Court upheld.

Essentially, the court in *Callanan Industries*[27] found that debarment was a punishment and, therefore, must be based on specific and express legislative terms with appropriate procedural safeguards before debarment can be undertaken. The court also found: "Nor can the power to debar bidders be necessarily implied from the authority to reject bids made by irresponsible bidders."[28]

In the case of *People v. Boreika*,[29] while examining the statutory requirement of awarding to the "lowest responsible bidder" the court observed that the statute imposes the obligation to make such a determination on public officers and is not directly for the benefit of the bidder.

The court in the *Callanan Industries* case also declared that the debarment provisions were invalid because they were not subjected to the State Administrative Procedure Act.[30] The motion to clarify (the effect of the court decision) even though it was denied,[31] actually clarified the issue of the legitimacy of the process to determine the responsibility of bidders by finding that only those sections of the MAP which were concerned with debarment and suspension of prospective bidders and contractors were in excess of the Department's jurisdiction and without legal authority.

The *Callanan Industries* case highlights the problem of attempting to have guidelines or criteria established for internal review of bids. The New York courts have declared that any suspension or debarment process, where guidelines or criteria relative to due process are used, are actually rules or regulations and, therefore, as such, should be subjected to any Administrative Procedure Act requirements.[32]

Where an administrator is undertaking some action relative to suspension, debarment, or disqualification of a contractor, the right effected will be deemed to be impacting either a "property right" or a "liberty right," or both. Therefore, the process must be subjected to appropriate rule-making.

The *Callanan Industries* case[33] also highlights the problem administrators may have because the courts many times have struggled with the concept of suspension or debarment and have considered them to be punishment and, therefore, penal in nature.

In contrast to the *Callanan Industries* case, the case of *Gary Merlino Construction Co. v. City of Seattle*,[34] also dealt with a disqualification for 1 year from bidding or working on city contracts for DBE problems, but the disqualification was upheld. In this case the municipal code permitted adoption of rules and regulations; however, none had been promulgated. The municipal code authorized five possible sanctions for violation of the DBE requirements, one of which was debarment up to 2 years.

Government action was also successful with a 90-day suspension in the case of *Adonizio Bro. v. Penn. D.O.T.*[35] In that case, which also dealt with DBE matters, the Board of Review was following regulations that had been properly promulgated and the central issue was whether or not substantial evidence supported the Board of Review's determination. Specifically note, however, that the issue of the commingling of the administrative and prosecutorial functions was not raised in the case.

The issues raised in *Callanan Industries*[36] should not be confused with those raised in cases like *Dept. of Labor v. Titan Construction Co.*,[37] where there was a statutory debarment (for labor law violations), or *Shurly Contracting, Inc. v. D.O.T.*,[38] which concerned the administrative prequalification process and suspensions of the Certificate of Qualification, nor matters that are raised under the Procurement Protest System.[39]

Where there is legislative direction, it is also important that such direction for a suspension or debarment process be as precise as possible, so that legal challenges by contractors as to the authority to conduct the administrative proceeding should not succeed.

IV. DUE PROCESS REQUIREMENTS—FEDERAL AND STATE

Due process, unlike some legal rules, is not a technical concept with a fixed content unrelated to time, place, and circumstances.[40] As stated in the case of *Morrissey v. Brewer*, "due process is flexible and calls for such procedural protections as the particular situation demands."[41] Procedural due process imposes constraints on governmental decisions[42] which deprive individuals of "liberty" or "property" interests within the meaning of the due process clause of the fifth or fourteenth amendments.[43]

Within this framework, due process requirements relative to suspension, debarment, or disqualification of highway construction contractors at both the federal and state levels are now fairly well established. The deprivation of a right, even on a temporary basis, must meet the constitutional requirement of a meaningful opportunity to respond before the deprivation takes effect and this involves at a minimum the right to

be informed not only of the nature of the charges, but also of the substance of the relevant supporting evidence.[44]

In determining the adequacy of the deprivation procedures, there must be consideration of the government's interest in imposing the deprivation, the private interests of those affected by the deprivation, the risk of erroneous deprivations through the challenged procedures and the probable value of additional or substitute procedural safeguards.[45]

The fundamental considerations that must be addressed in any due process review are:

1. There must be a determination that due process requirements apply to the situation.

2. The question of what process is due must be addressed.

3. Taken into account must be that the required procedures may vary according to the interests at stake in the particular situation, while at the same time the fundamental requirement of due process, which is an opportunity to be heard at a meaningful time and in a meaningful manner, must be addressed.

4. There should be consideration of the government's interest in the matter.

5. There should be consideration of the private interests that are affected by the action.

6. Examination should be made relative to the risk and consequences of an erroneous determination.

7. The probable value of any additional or substitute procedural safeguards should be considered.

Several cases state that depending on the circumstances and the interests at stake, a fairly extensive evidentiary hearing may be required before a legitimate entitlement may be terminated or suspended.[46] In more recent cases, it has been held that procedures will be sufficient, even though they provide for less than a full evidentiary hearing, as long as they do provide some kind of a hearing or meeting which ensures an effective initial check against mistaken decisions before the deprivation occurs in addition to a prompt opportunity for complete administrative and possibly judicial review.[47]

Due process will be considered herein as to what is universally essential before any deprivation of a contractor's rights takes place whether it be "suspension," "debarment," "disqualification," or a finding that the contractor is "nonresponsible," with distinguishing features of the individual type of action noted as appropriate.

The 1987 decision of *Brock v. Roadway Express*[48] brought much of the prior law on the requirements of due process in connection with deprivation of a right into precise focus. That case involved the temporary reinstatement with back pay of a truck driver who claimed that he was discharged in retaliation for complaining about safety violations. Roadway claimed that the discharge was made because the truck driver deliberately disabled the lights on his truck. The Secretary of Transportation, pursuant to § 405 of the Surface Transportation Assistance Act of 1982 (STAA-82), 49 U.S.C.S. Appx., § 2305, ordered the reinstatement of the truck driver with back pay pending a final determination on his complaint. The federal statute did not specify the type or amount of participation to which an employer was entitled in the proceeding before the Secretary of Transportation. The central issue of the case was whether the Secretary of Transportation had provided Roadway appropriate due process when the reinstatement, as well as back pay, was imposed on Roadway by the Secretary of Transportation. Under the Secretary's procedures, Roadway was notified of the driver's charge and given an opportunity to meet with personnel in the Secretary's Office, as well as permitted to submit statements relative to its position in the matter, but was not permitted access to the relevant evidence supporting the driver's complaint nor to other information on which the reinstatement order was based. The Supreme Court stated:

> We thus confront the crucial question whether the Secretary's procedures implementing Section 405 reliably protect against the risk of erroneous deprivation, even if only temporary, of an employer's right to discharge an employee. We conclude that minimum due process for the employer in this context requires notice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses. The presentation of the employer's witnesses need not be formal, and cross-examination of the employee's witnesses need not be afforded at this stage of the proceeding.[49]

The *Roadway* case is significant relative to the court's detailed attention to the type of hearing and review of the positions of the respective parties that was necessary prior to deprivation of any rights which Roadway had. In the particular matter it is noteworthy that Justice White, joined by Chief Justice Rehnquist and Justice Scalia, dissented and expressed the view that the district court had erred in holding that a full trial-type hearing was necessary, prior to termination, so long as the employer had been afforded an adequate post-determination hearing at a meaningful time. The view was expressed that these Justices agreed with the lower court finding that Roadway was entitled to notice of the driver's charges and an opportunity to respond to the charges before being ordered to reinstate the driver. These Justices then went on to disagree with the other Justices that due process required access to the information on which the reinstatement order was based.[50]

Contrast the view of these three Justices with Justice Stevens' and Justice Brennan's dissents in the case, and it is seen that they expressed a much tougher stance relative to the government's ability to interfere with or deprive a party of rights without a full trial-type hearing.[51]

The clear rule that comes out of the *Roadway* case, despite the two dissents, is that due process, where a deprivation is involved, does not require a full trial-type hearing prior to invoking the deprivation, provided there is an adequate post-determination hearing at a meaningful time intended to resolve the disputes of the matter. Further, due process requires access to information upon which the deprivation of rights order was based.

The review opportunity appears to be consistent with the New York

rule as laid down in *Callanan Industries v. City of Schenectady.*[52] In that case, Callanan Industries had submitted the low bid, but the City of Schenectady awarded to the second bidder who was determined to be the lowest responsible bidder. Prior to the award, Callanan discussed its past performance with City officials in view of the City's claim that in the prior year the street rehabilitation contract had been performed by Callanan in a seriously deficient manner, and further that the corrections by Callanan were unsatisfactory to the City Officials.

Callanan claimed that the City's failure to provide it with a hearing prior to the rejection of the bid denied it due process. The court determined that Callanan's informal conferences with the City Council and other City officials as well as the court review satisfied the due process rights of Callanan. This case is also considered with the *City of Inglewood v. Superior Court.*[53] The *Inglewood* case was recently more fully discussed in Richard W. Bower's article on *Liability of Public Agencies Arising Out of Rejection of Bids and Misaward of Contracts.*[54] Within the article, Mr. Bower points out that in the *Inglewood* case the award was made to the second low bidder on the basis of qualifications and that the low bidder was not found to be nonresponsible. That distinguishment between "qualification" issues and "responsibility" issues should be kept firmly in mind when considering suspension, debarment, and disqualification issues because qualification matters usually have less rigorous due process requirements than do suspension, debarment, disqualification, or responsibility matters.

The court found in the *Inglewood* case that due process required giving the low bidder the evidence reflecting on his responsibility and affording it the opportunity to rebut adverse evidence, as well as present evidence that it is qualified to perform the contract. Thus, the *Inglewood* case is consistent with the *Roadway* case as far as due process in case-by-case determinations of deprivation of rights are concerned.

A New York rule relative to the government agency's review of bidders' responsibility and the type of hearing or meeting required is discussed in the *Schiavone* cases[55] and, therefore, they should be examined. In the first *Schiavone* case[56] the Schiavone firm was a low bidder in a tri-venture with Raymond International Builders, Inc. and Kiewit Eastern Company. Because of the Kiewit parent corporation's antitrust difficulties in other parts of the country, the State Department of Transportation reviewed the responsibility of the tri-venture very scrupulously. The Department of Transportation had not reached a determination on responsibility of the tri-venture when the tri-venture requested to be permitted to assign its bid to a joint venture, that being Schiavone and Raymond International.

The State Department of Transportation consented to that assignment and proceeded to make the award to the joint venture. The second bidder then challenged the bid claiming that an assignment of the bid could not be made prior to the award of a contract and that because the Department failed to find the tri-venture responsible, it must have determined that the tri-venture was nonresponsible. The second bidder further demanded that the award be made to it. The court determined that the award to the joint venture was not proper because an assignment of a bid could not be made, and returned the matter to the Department for further consideration.

At about the same time, it was discovered that the order of the bids, originally believed to be the second and third bidders respectively, were actually reversed because of quantity differentials that actually existed, but were miscalculated within the original bidding documents. Thereupon, the Department rejected all bids.

In the second bidding for the same project, the joint venture of Schiavone and North Star Contracting Company was the apparent low bidder. Between the time of the first bid and the second bid, several officials in the Schiavone firm were indicted for Minority Business Enterprise (MBE) fraud. Largely because of that pending indictment, as well as the possible inability of the top officials of the corporation to perform the project while defending against the criminal charges, the Department found the Schiavone firm to be nonresponsible. The award was subsequently made to the second bidder. Prior to the second bid letting on that project, the Schiavone firm was the apparent low bidder on another large project in New York City, but was found to be nonresponsible for the same reasons given above. The matters were considered together in the State's Appellate Division in the case of *Schiavone Construction v. Larocca.*[57] In connection with the Schiavone firm's challenges to the awards and the court determination in the State's favor, the Appellate Division made several important points relative to due process. They were the following:

> (a) That Schiavone did not acquire a property right to the contracts;
> (b) That since the refusal to award the contracts to Schiavone had a drastic effect upon Schiavone's ability to carry on its business, Schiavone had a "cognizable liberty interest."[58]
> (c) [T]hat the procedures afforded petitioners [Schiavone and the joint venture of Schiavone and North Star] were adequate. Due process is flexible and is determined by a weighing of the interests at stake, the risk of erroneous deprivation, the probable value of additional safeguards and the cost of substitute procedures (*Matthews[sic] v. Eldridge,* 424 US 319, 335). In cases such as the one at bar, a formal trial-type hearing is not necessary.... Here, petitioners were given notice of the [Contract Review] Unit's concern over their responsibility and the reasons for that concern. Petitioners were afforded an opportunity to rebut the charges both in writing and at informal hearings. They were informed of the reasons for denial of their contract bids and were afforded this review pursuant to CPLR article 78. We find that these procedures were adequate under the circumstances of this case.[59]

When a governmental contracting authority is considering deprivation of a contractor's rights, if the principles of notice, opportunity to rebut and to have the potential of judicial review as set forth in the *Schiavone* case are adhered to, they would appear to meet the due process standards at least for a state level determination. No cases were found at the federal level which hold that more will be required at the federal level; therefore,

at the present, the standards set forth above for due process may be said to hold at the federal level also. It is cautioned that a Governmentwide Debarment and Suspension type process[60] should be adhered to. Of course, substantial evidence must be available in the administrative record to support the ultimate determination that is made.

A clear understanding of whether you are considering a property interest or a liberty interest in a contractor deprivation of rights matter is essential. Both at the federal level and the state level, suspension, debarment, and disqualification, as well as responsibility considerations involving due process court reviews initiated by contractors, should have little chance of success unless the contractor is asserting a liberty interest rather than a property interest.[61]

The *Polyvend, Inc. v. Puckorious* case[62] demonstrates what a difficult time a contractor can have when it asserts a denial of due process in connection with a property interest. In the *Polyvend* case, a license plate manufacturer had its bid for a license plate contract rejected pursuant to a state statute, which prohibited award of a government contract to a person or business that had been involved in the bribery of a state official or employee. The Circuit Court granted the state summary judgment. The Appellate Court reversed with a finding that the state statute was unconstitutional on due process grounds. The Supreme Court of Illinois reversed and decided in the state's favor. Polyvend had the contract for the 3 prior years. The conviction for bribery occurred in 1974. The state statute concerning bribery became effective in 1977. In the decision, in reviewing the *Board of Regents v. Roth* case[63] the court stated: "[T]he range of interests protected by procedural due process is not infinite." Following a review of the pertinent judicial decisions, the Roth court concluded that, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[64] Stated differently, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."

The court found that Polyvend did not have a legitimate claim of entitlement to the future state contract. The case review was centered on a "property right" in the future state contract and no such property right was found. Would the same results have occurred if a "liberty interest" was asserted by Polyvend's attorneys? The answer probably would be "yes" on the particular set of facts of Polyvend. With a slightly different set of facts, the contractor would have had a better chance of success if a "liberty interest" was asserted.[65]

In connection with the due process aspects of suspension, debarment, or disqualification of highway contractors, two important points remain for further consideration: (1) What is a meaningful time for a post-determination hearing? and (2) What additional matters are essential for consideration with respect to a governmentally imposed suspension?

The meaningful time given to rebut a proposed action is set at 30 days by the Governmentwide Debarment and Suspension (Nonprocurement) process,[66] and also under FAR.[67] Both of these procedures give the contractor 30 days after receipt of notice to submit "in person, in writing, or through a representative, information and argument in opposition to the proposed" action.[68] The debarring official has 45 days after submission of the relevant information to render a determination.[69]

The *Horne Bro., Inc. v. Laird*[70] case makes a very interesting analogy to find that 30 days is a proper period for a meaningful time for a post-determination hearing. The *Horne Bro.* case involved the Department of Defense issuing a suspension of and then refusing to award a repair contract for a naval vessel to Horne Brothers. The Circuit Court expressed its concern with a suspension which could be continued for up to 18 months under the Defense Acquisition Regulations and stated: "While we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity [to rebut the adequacy of the evidence against it] to the contractor, that cannot be sustained for a protracted suspension."[71] The Court stated:

> While the Government traditionally defers pressing any civil damage action pending the criminal proceeding, the situation would be different if it were seeking interim relief, say, a preliminary injunction. This could not be issued pending the criminal action without some showing of possibility of success on the merits. While the initial thrust of a suspension may be likened to an ex parte temporary restraining order, the continuance of the suspension beyond a thirty day period is more fairly likened to a preliminary injunction after notice, maintainable only on the showing of adequate evidence that is not self-determined.[72]

The Court went on to further state: "During this interim period, not to exceed one month, the Government could make arrangements for the proceeding and also solidify its position by further preparation of its case; presumably the time would be used to check records and documents, examine additional witnesses,. . . ."[73]

Despite what the federal rules and regulations[74] and the courts may have said about 30 days being an appropriate maximum time in suspension matters before a post-determination hearing, the facts of the particular situation may control and a shorter period may be found to be more appropriate and therefore required. Additional factors which should be taken into consideration are:

1. The public interest that must be preserved that justifies immediate suspension.[74]
2. When a criminal investigation is underway, whether information will be disclosed by the government investigators or will it be withheld.[75]
3. How specific should the notice to the contractor actually be.[76]
4. Whether the action by the government is consistent in similar cases for similar wrongdoing.
5. The length of time the review process will actually take.
6. Any adverse impacts the suspension will have on the contractor's business or reputation.[77]
7. Whether the proposed action actually is a "punishment" rather than a protection of a public interest.

The criteria used to impose the suspension should be carefully considered in view of the fact that a suspension may occur with a post-determination hearing after the imposition of the suspension, whereas in connection with a debarment or disqualification, the determination usually takes place after the hearing or meeting with the contractor.

The Governmentwide Debarment and Suspension (Nonprocurement) process[78] recognizes that suspension is a serious action to be imposed only when there exists adequate evidence of one or more of the causes set out in the regulations[79] and immediate action is necessary to protect the public interest.[80] The regulations provide that a contractor may be suspended upon adequate evidence to suspect the commission of an offense listed in 49 C.F.R. § 29.305(a);[81] or a cause for debarment under 49 C.F.R. § 29.305 may exist.[82] The regulations further provide that: "Indictment shall constitute adequate evidence for purposes of suspension actions."[83] FAR also recognizes that a contractor may be suspended "in the public interest."[84]

In assessing the adequacy of the evidence, governmental agencies should consider how much information is available; how credible is it, given the circumstances; whether or not important allegations are corroborated; and what inferences can reasonably be drawn as a result. This assessment should include an examination of such basic documents as grants, cooperative agreements, loan authorizations, contracts, inspection reports, and correspondence.[85]

Most of the due process procedures for suspensions, both in the Governmentwide Debarment and Suspension (Nonprocurement) process and the FAR process, are identical to the procedures for debarment. The main differential is, as mentioned earlier, that the suspension may predate the hearing or meeting on the matter. Therefore, the prima facie case on the government's side should be even more compelling and accurate, and suspension should not be based on a subterfuge or conjecture unsupported by witness testimony or documentation.

Because suspension actions raise serious due process issues, such actions should be undertaken in only the most extreme cases.

Another issue should be considered with respect to due process. A "fair hearing" argument may be brought up in a contractor's challenge to its deprivation of rights proceeding at the administrative level or in court reviews of that determination. A case to review for "fair hearing" statements and one that is consistent with the cases reviewed within this section of the article is the 1957 case of *FTC v. National Lead Co.*[86] In that case the Supreme Court stated: "It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." Therefore to meet any "fair hearing" challenge much care should be taken relative to the content of the "notice" and the providing of an "opportunity to rebut."

V. SITUATIONS WHERE RESPONSIBILITY DETERMINATIONS MAY IN EFFECT BE A SUSPENSION OR DEBARMENT OF A CONTRACTOR

A contractor may have "nonresponsibility" determinations made on a particular contract that may also drastically affect contract award reviews for that contractor on future projects. Of concern here are the situations that do not rise, or have not risen, to the level of a "suspension," "debarment," or "disqualification" proceeding or where there is a lack of authority to implement a suspension, debarment, or disqualification process. In view of the fact that the future reviews may result in *de facto* suspensions or debarments, the type of situation where such a *de facto* result may occur should be understood.[87] Some typical situations include the following.

A. Labor Practices

The Federal Government and the States almost universally have statutes which provide for suspensions or debarments where prevailing wage law, willful violation determinations have been made. However, a contractor may be found to be "nonresponsible" prior to the determination of the willful wage law violation being completed or in some circumstances where there are perceived labor problems that will affect performance of the project. New York State, for example, has an Executive Order[88] which requires agency consideration of a contractor's labor problems in making contract award decisions. Labor practice situations that may come under such a review include the following:

1. Numerous labor law complaints being filed against a contractor on a previous project which have not been disposed of.
2. Unions involved in a jurisdictional dispute over which union is going to work on the project.
3. A nonunion contractor coming on a project where the other contractors are unionized and the unions threaten to strike, picket, or otherwise disrupt the project.[89]
4. The contractor forms multiple corporations which have the effect of defeating the workers' pension rights from vesting.
5. The contractor having numerous Health and Safety Act violations which have not reached the level for "suspension" or "debarment." Or
6. The cumulative effect of two or more of the above.

B. Antitrust Situations

If the contractor has been found to have violated the antitrust laws, the chances are fairly good that a suspension or debarment proceeding will be undertaken at the federal level and possibly at the state level. However, the following situations may result in "nonresponsible" determinations prior to the actual suspension or debarment:

1. The antitrust matter predated the practice of having suspension or debarment proceedings at the federal level following conviction for antitrust violations.
2. There is or was insufficient evidence for criminal conviction, but there is sufficient evidence to find a contractor to be "nonresponsible."
3. The prosecutors strike a deal with the contractor, in exchange for plea bargaining or testimony, that suspension or debarment will not take place at the federal level.

4. The contractor is named as an unindicted co-conspirator and there is no recovery for antitrust based on a civil action.[90]

5. An antitrust indictment has been rendered against the contractor.[91]

6. Principals of a firm were convicted of antitrust violations while they were with another firm and no suspension or debarment proceeding was undertaken against those principals on an individual basis.

7. The parent or the holding company of the contractor has been found guilty of antitrust violations somewhere else in the country.

C. Illegal Conduct

The type of situations involving illegal conduct cover many areas but important situations which contractors have been involved with include:

1. Income tax evasion by the sole or a principal owner of the contractor.
2. Indictment for theft on a prior public contract.[92]
3. Indictment or conviction of bribery of public officials.[93]
4. Felony conviction of a principal of the firm.[94]
5. Indictment or conviction of obstructing justice on a matter that relates to public works.[95]

D. Improper or Unethical Conduct

In connection with the DBE program, many situations arise where the contractor has transactions with a DBE firm that is later decertified or otherwise looses its status for fraud or illegal conduct. Some states have tried to undertake corrective action against the contractors who have transacted business with these DBE firms by finding the contractor "nonresponsible" in some cases; or having entered into corrective action agreements; or having attempted to suspend or debar the contractor. Such situations include:

1. The contractor sets up a DBE firm with which it exclusively deals (a front for the contractor).
2. The contractor deals with a DBE which it knows is a front by the way the DBE conducts its business.
3. The contractor deals with a DBE which it knows is not rendering a "commercially useful purpose."[96]
4. The contractor performs the DBE's work and gives the DBE a percentage cut.

E. Incompetence

The inability of a contractor to perform in a satisfactory fashion should be reserved for "responsibility" determinations and not become the subject of suspension or debarment processes, unless there are governmental interests that must be protected and such suspension or debarment process gives the contractor the opportunity to demonstrate that it has corrected the deficiencies. If the "opportunity" is not afforded, the deprivation may be considered by the courts to be a "punishment" and therefore invalid.

F. Financial

When a contractor's financial stability is the problem, as when its competence is in question, the "opportunity" to show corrective action must be given if the action by the government is to stand a good chance in the courts. This "opportunity" is present in case-by-case reviews of "responsibility" and is not present when the suspension or debarment period is fixed by the suspension or debarment process.

VI. SUSPENSION, DEBARMENT OR DISQUALIFICATION STATUTES, RULES AND REGULATIONS AT THE FEDERAL AND STATE LEVELS

Several federal statutes provide for suspensions or debarments, but the three major consolidations,[97] which are set forth as federal regulations, are the only realistic way that federal suspensions or debarments are now undertaken.

The earliest was the regulatory provisions that apply to 60 federal statutes concerning labor standards and prevailing wage requirements for federal or federally assisted contracts that are found at 29 C.F.R. §§ 5.1 through 5.12. These regulations provide that following a Secretary of Labor's finding that a contractor or subcontractor is in aggravated or willful violation of the labor standard or prevailing wage provisions of any of the named 60 federal statutes, other than the Davis-Bacon Act, a debarment not to exceed 3 years may be imposed. In the Davis-Bacon Act situations, that statute provides for a 3-year debarment and the regulations set forth the debarment process and provide for the transmission of the list of debarments to the United States Comptroller General. The debarment action under the regulations bars a firm from receiving any contract or subcontract funded under any of the listed 60 statutes. (The federal-aid highway acts are on the list.) The debarment is transmitted to the Comptroller General and the debarment starts on the date of publication of the ineligible listing by the Comptroller General.

Under the proceedings for the 60 federal statutes, those which may be affected include: a contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest.

Under the Davis-Bacon proceedings, those which may be affected include: contractors or subcontractors and "their responsible officers," if any, and any firms in which the contractors or subcontractors are known to have an interest.

Under Davis-Bacon "responsible officers" may be held accountable. Under Davis-Bacon the "interest" in other contractors or subcontractors does not have to rise to the threshold of a "substantial interest" to be held accountable for misconduct.

The "hearing" and "opportunity to rebut" are set forth within the regulations, at 29 C.F.R. § 5.12. These should be examined when establishing a debarment process.

The 1961 case of *Copper Plumbing & Heating Co. v. Campbell*[98] challenged the Secretary of Labor's power to debar for wage law vio-

lations. The court found that the regulations were not "penal" in nature and were necessary for effectuating compliance with and furtherance of the public policy represented by the labor acts. The recent case of *Janik Paving & Const., Inc. v. Brock*,[99] also discusses the power of the Secretary of Labor to debar and cause such debarment to be listed with the Comptroller General.

The second set of federal regulations and the most important to the consideration of suspensions, debarments, or disqualifications of highway construction contractors is the Governmentwide Debarment and Suspension (Nonprocurement) regulations.[100] A working knowledge of these regulations is essential for anyone who is involved with or concerned about suspension, debarment, or ineligibility of contractors performing public works projects. The substantive criteria and standards as well as the procedural requirements are set forth therein, including:

1. The declaration of policy[101] that the Federal Government shall "conduct business only with responsible persons." Suspension and debarment are "serious actions" used to protect the public interest.[102]
2. The causes for debarment are listed.[103]
3. The procedures for debarment are set forth.[104] The debarment actions must be as informal as practicable, consistent with the principles of fairness, using the procedures in §§ 29.311 through 29.314.

The third set of federal regulations is the 1983 adoption of FAR,[105] which relates to procurements and which consolidated numerous federal regulations and procedures that relate to suspension, debarment, and ineligibility of contractors and subcontractors.

Both the Governmentwide Debarment and Suspension (Nonprocurement) and the FAR regulations raise some legal questions which the case law has yet to address. For instance they include—Do the regulations declare that there can be "no genuine dispute over material facts"[106] to the proposed debarment if there is a conviction or civil judgment? Would not the process stand a better chance in any court review if the contractor could offer any evidence it wished to submit relative to material facts and the government administrator gave "great weight" to the conviction or civil judgment? What about the criminal trial where the defendant did not testify, but has important information about material facts that the government administrator should consider in the debarment proceeding? What about the situation where the corporation pleads guilty so that individuals in the corporation do not have criminal convictions? The regulations do, however, require that: "The debarring official may refer disputed material facts to another official for findings of fact."[107] It would appear that if the debarring officer were to be concerned about the "due process issues" in connection with "material facts," the debarring officer could let them be presented and give appropriate consideration thereto.

The federal regulations in addition to the requirements relative to the Notice of Proposed Debarment,[108] the Debarring Official's Decision[109] and Notice of Debarring Official's Decision,[110] further provide that the General Services Administration (GSA) "shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible."[111]

The courts in most challenges to suspensions, debarments, or disqualifications at the state level will rely very heavily on the federal cases and the laws and regulations on the subject and compare the same with the state process. In view of this fact, the major types of possible state processes for suspensions, debarments, or disqualifications will be set forth herein in the order most likely to withstand legal challenge to the least likely to be sustained.

1. State legislation directs the suspension, debarment, or disqualification upon an administrator's finding of violation of the state program after a hearing or meeting which complies with "due process" as discussed hereinbefore. Further, the suspension, debarment or disqualification is not "penal or punitive" in nature but is necessary to effectuate compliance with and furtherance of the public policy or government interest established in connection with the state program.[112]
2. The state program is one in which the power to suspend, debar, or disqualify can be implied as an integral part of the program and is necessary to effectuate compliance with and furtherance of the public policy or government interest established in connection with the state program. The regulations established in connection with the suspension, debarment, or disqualification process are subject to the state Administrative Procedure Act.[113]
3. The state program is similar to (2), but the regulations are not subjected to any Administrative Procedure Act process.
4. The state program of suspension, debarment, or disqualification is one that seeks punishment, fines, or deprivation of rights (considered by the courts to be penal or punitive in nature) for the misconduct of the contractor or subcontractor. It would make little difference if the suspension, debarment, or disqualification was authorized by legislation, by rule or regulation, or by power assumed by the administrator to be inherent in his powers, but each of these ways would respectively have less chance of being sustained.
5. The state contract administrator makes ad hoc determinations.

The state level program should be patterned after (1) or as close thereto as is possible. For those suspension, debarment, or disqualification processes presently in place, adjustments that bring the state process closer to (1) may be helpful.

VII. PRACTICAL AND LEGAL CONCERNS IN IMPLEMENTING OR ADMINISTERING A SUSPENSION, DEBARMENT, OR DISQUALIFICATION PROCESS

The due process requirements (section IV) as well as certain legal concerns (section III) relative to suspension, debarment, or disqualification processes have previously been considered in this paper. Further, in considering additional practical and legal concerns in implementing

or administering a suspension, debarment, or disqualification process, it will be helpful to a better understanding of the concepts involved and being discussed if the distinguishing features between "responsibility" reviews and "suspension", "debarments", or "disqualification" processes are not highlighted or discussed within this part of the paper. Instead, the intent will be to establish the overall concept of the practical or legal concern which is involved.

A. Established Time Periods vs. Flexible Time Periods for Suspensions, Debarments, or Disqualifications

When a statute directs suspension, debarment, or disqualification for a prescribed period of time upon a finding of violation of a governmental program, there is little discretion that has to be exercised by the governmental administrator relative to the length of time the suspension, debarment, or disqualification is to be effective. The administrator's real function in those circumstances is to see that the determination of the violation is accomplished in appropriate due process fashion. The courts, therefore, will examine such a statutorily mandated period to determine whether or not it is "penal or punitive" in nature versus being a period of ineligibility necessary and appropriate to protect a legitimate government interest.

In the flexible time situation, those statutes, which provide that the suspension, debarment, or disqualification may be determined to be up to a certain maximum period of time, leave considerable discretion in the administrator's hands to pattern the length of any suspension, debarment, or disqualification to the particular circumstances that exist relative to the violation, the contractor's or subcontractor's particular situation, and any governmental needs or objectives relative to the program. The most serious aspects that the courts will look at in flexible time matters are whether the period of ineligibility is established on an ad hoc basis, whether there is similar treatment under similar circumstance, as well as whether the length of the suspension, debarment, or disqualification is justified by the facts that are established by the administrative record.

Consistency of the administrator's handling of similar situations will be very important relative to any court challenge. Further, the court review will probably center on "abuse of discretion" and "capricious" handling of the period of the suspension, debarment, or disqualification rather than whether or not the record supports a finding of violation.

An administrator who blindly applies the maximum ineligibility period in each and every case may be looked on very harshly by the courts, because the legislative direction would not have been to "determine" an appropriate length of time for the ineligibility, not to exceed the statutory maximum limit, in a due process fashion if the legislation intended only one set period to be applied to all situations. Clearly, that legislated direction requires the administrator to use "discretion" in fixing the period.

B. Case-by-Case Review Situations

Case-by-case review is essentially a determination of a contractor's responsibility each time government is considering the award of a contract or approval of, or consenting to, work going to a contractor or subcontractor. The review should take into account the most current relevant information. It must give opportunity to the contractor or subcontractor to present "changed circumstances" that would militate against a repetition of a prior determination by the governmental agency. As noted in the *Callanan Industries* case,[114] because numerous adverse determinations in a case-by-case situation may rise to the level of a *de facto* suspension, debarment, or disqualification, care should be exercised to adhere to the due process aspects of the individual reviews.

C. The Prequalification Process and Postqualification Process and What Each May Do or Not Do in Connection With the Suspension, Debarment or Disqualification Process

A key step in the competitive bidding procedure is to rapidly determine who is the lowest responsible bidder. Most states use prequalification and a few states use postqualification to perform this task. The overall goals in any process that is used must be to timely gather the information regards responsibility and to make sure that the information is accurate and current, so that a responsibility determination can be made expeditiously. Therefore, the pros and cons of the postqualification approach as compared to prequalification should be examined. The most important measure in either system is effectiveness. The ability to review bids on a postqualification basis may not present the drama of a contractor not being prequalified or possibly being suspended, debarred, or disqualified by governmental action. It still is, however, effective in conveying to contractors and subcontractors the agency's position that certain conduct is unacceptable and that contractors may suffer substantial losses unless they provide satisfactory evidence of having taken steps to avoid future problems in connection with their responsibility reviews. The most important aspect of postqualification is that it provides an informal and flexible framework for negotiation of arrangements or agreements under which otherwise acceptable contractors, especially large firms with proven capability to perform complex projects on a timely and high quality basis, can be permitted to continue to bid and receive public work even after serious problems have been identified.

Postqualification in terms of the administrative burden presents both favorable and unfavorable aspects. Although rendering determinations on individual bids and negotiating responsibility understandings or agreements can be done less formally, and performed with less effort, than a prequalification determination, or a suspension, debarment, or disqualification proceeding, it does present the opportunity for the other bidders to challenge whether or not the contractor was "responsible" relative to the particular bid. In the situation where the negotiations break down, the contractor which is found "nonresponsible" may well challenge the action indicating that there were attempts to coerce it into

a course of conduct that was beyond the powers of the contract administrator to demand. In addition, the negotiation, as well as the issuing of repeated individual determinations, can be tedious and time consuming.

The most advantageous aspect of prequalification to the administrator is that there generally is a greater amount of time to fully consider the merits of the situation of the particular contractor or subcontractor. The prequalification process generally has sufficient requirements that meet the "due process" test, so that the prequalification determinations have an excellent chance of being sustained when legally challenged by a contractor or subcontractor.

The main disadvantage is that prequalification is not flexible relative to changing conditions. Such changing conditions may favor the contractor or subcontractor or it may be in the best interests of the governmental agency to have such conditions considered. Prequalification for purposes of discussion in this section of the report is not unlike suspension, debarment or disqualification processes and is generally effective for periods up to one year, while suspensions, debarments, or disqualifications are generally found to be in the 3-year to 5-year range.

D. The Property Right of a Bidder in the Bid

The most recent cases hold, as previously discussed under due process (section IV), that a bidder has a relatively limited property right in the bid. However, the bidder has a liberty right which is fairly well recognized both at the federal and state levels. This same right to a bid applies to suspension, debarment, or disqualification processes, with the exception that when an individual is involved, the individual may have both a liberty interest and a property interest that may be protected by due process requirements.

E. The Use of a Clearinghouse in Connection With the Suspension, Debarment, or Disqualification Process

There are two types of clearinghouse situations which may be found in the suspension, debarment, or disqualification process. The first, and the one that should not be disrupted in court challenge, is the use of a consolidated list of ineligible contractors, subcontractors, or individuals for all agencies that come within the terms of the process. That list identifies contractors, subcontractors, or individuals who have been suspended, debarred, or disqualified by appropriate governmental agency action. That type of list is used extensively relative to the Government-wide Debarment and Suspension (Nonprocurement) and the FAR regulations[115] and has been part of the United States Comptroller General's suspension, debarment, or disqualification processes relative to wage law situations.[116]

State agencies should not use the Federal Government's consolidated lists of suspensions, debarments, or disqualifications without considering the matter at the state level in an appropriate due process fashion.

Further, a very serious situation may develop if a clearinghouse or consolidated list of agency determinations is used to deprive a contractor or subcontractor of its rights under the circumstance where one agency determined a matter adverse to the contractor or subcontractor, and the other agency merely follows the "list" and takes a new adverse action against the contractor or subcontractor, without any hearing or meeting or opportunity to rebut. Unless there is clear statutory authorization, or regulations are promulgated pursuant to clear statutory authorizations that permit or authorize the "list" to be used to suspend, debar, or disqualify a contractor or subcontractor, clearinghouse "lists" should be used only to alert governmental agencies at the state level that there is some question of the contractor's or subcontractor's status and there must be a due process review before a deprivation of rights takes place.

The second type of clearinghouse situation is where a central agency or body determines matters of suspension, debarment, or disqualification for all agencies. The governmental body making such a determination is usually quasi-judicial and follows the requirements of relevant state Administrative Procedure Acts. Such a process tends not to consider the recent or pertinent information that may be relevant to the government's interest in progressing its program and the contractor's particular circumstance relative to the program. The central agency or body generally determines whether or not violations or misconduct has occurred and, if it determines that it has occurred, what period would be appropriate for the suspension, debarment, or disqualification.

F. The Controls That Are Used as Well as the Type of Agency Review, Prior to a Suspension, Debarment, or Disqualification Process Being Completed

These controls and the type of agency review relate primarily to a "prequalification status" review or to a "responsibility" review of a contractor or subcontractor. In order to have information for such a review, many states now use questions such as the following:

> Within the previous five (5) years, has the corporation or any major stockholder, officer or employee been the subject of any of the following: any administrative or civil debarment, debarment or disqualification proceeding; any criminal investigation, felony indictment or conviction concerning collusion or fraud in obtaining a contract for public work; any other criminal investigation, felony indictment or conviction involving public work; any administrative proceeding or civil action seeking specific performance or restitution in connection with any public work contract (but not including any audit or disputed work proceeding); any criminal investigation, felony indictment or conviction concerning formation of or any business association with an allegedly false or fraudulent women's, minority, or disadvantaged business enterprise (WBE, MBE or DBE); any bankruptcy proceeding where the bankrupt was a partnership or corporation; suspension or revocation of any professional engineering or other professional license; any criminal investigation, felony indictment or conviction involving business or financial transactions; any criminal investigation, felony indictment or conviction involving bribery, racketeering, mail fraud, tax evasion, extortion, embezzlement, theft, perjury, conspiracy to obstruct justice, filing of a false instrument, arson or murder; any determination of a willful labor violation (either federal or state);

any voluntary exclusion from bidding or any agreement with any public entity to refrain from bidding; any decertification, denial, or forfeiture of Women's Business Enterprise, Minority Business Enterprise, or Disadvantaged Business Enterprise status; any citations, notices of violation, orders or pending administrative hearings or proceedings for violations of:

a. OSHA (Occupational Safety and Health Administration)
b. Federal, state or local health regulations or statutes
c. Federal, state or local environmental regulations or statutes
d. Unemployment insurance or workers compensation coverage or claim requirements
e. ERISA (Employee Retirement Income Security Act)
f. Federal, state or local human rights laws
g. Federal or state securities laws
h. State labor laws
i. Federal, state or local apprenticeship requirements
j. Davis-Bacon Act
k. Fair Labor Standards Act (FLSA)[117]

Prior to any suspension, debarment, or disqualification process being completed, it is appropriate and supported by case law for a governmental agency to review a "prequalification status" if prequalification is used, or a case-by-case review is performed relative to a contractor's "responsibility" to receive awards or approval of subcontracts. The information that supports the government agency's action must be sufficient to meet the due process tests and the review should be limited to the particular situation that is being considered.

Following completion of the suspension, debarment, or disqualification process, whether in favor or adverse to a contractor or subcontractor, the governmental agency may wish to cause further reviews of the "prequalification status" or contractor's "responsibility."

G. Conflicts in Cases Relative to the Status of Low Bidders

From a reading of the cases on the subject it may be perceived that there is much conflict relative to the status of low bidders' rights to challenge adverse determinations relative to the bid. Generally, there is sufficient legal status in the low bidder to have "standing" to cause a legal review of an adverse determination on the bid. The conflict found in the cases involves the power of the courts to direct awards to a particular bidder and to consider compensation to a disappointed bidder.[118] In cases that have developed recently, there is legal standing and therefore status to cause a thorough review of the low bidder's challenge if the low bidder is asserting that a "liberty interest" is being affected by the agency action. If the court challenge involves this interest, there should not be much conflict as to the status of the low bidder; it can at least get into court and have standing to challenge the action.

H. The Public's Rights Relative to the Bidding Process in Contrast With the Contractor's Rights When it Submits a Low Bid

One of the prime interests of the public is to guard the sanctity of the competitive bidding process so that government is doing business with contractors whose honesty, integrity, good faith, and fair dealings are consistent with the goals of the governmental agency's program. Government carries out this concern through the determination of "lowest responsible bidder." The United States Supreme Court in the *Perkins v. Lukens Steel Co.* case[119] explained that procurement statutes are for the benefit of the government—not prospective bidders.[120] Government also has an interest in progressing its programs to accomplish its goals in a timely and efficient manner. Therefore, determinations of a bidder's status, including any suspension, debarment, or disqualification process, should meet the tests of being both timely, as well as appropriate, under the circumstance.

The contractor's rights revolve around the fact that construction firms generally have a large capital investment, have numerous employees who depend on the company receiving public work, and when the ability of that contractor to submit bids on, or win awards of, contracts or approval of subcontracts is adversely affected by government action, very serious consequences may result to that contractor or subcontractor. In addition, an adverse determination against a contractor or subcontractor is generally not limited to the one particular agency's program, but has a tendency to spread to other state agencies and downward to municipal agencies, and in some cases to the private sector.[121]

VIII. PRACTICAL EFFECTS AND LEGAL CONSIDERATIONS RELATIVE TO THE SUSPENSION, DEBARMENT, OR DISQUALIFICATION PROCESS

The overall public policy objectives of the competitive bidding process include concern for administrative efficiency; appropriate measures to curb fraud, waste, and abuse in governmental programs and increase governmental agency accountability; protection of societal moral values and promotion of social-economic goals. These policies should serve to prevent favoritism in spending public funds while stimulating competition in the highway construction industry. The central object of the process for awarding competitively bid contracts is the full and fair return for expenditure of public funds. The public interest is best served by opening bids on an equal basis to *all* parties able and willing to perform the public work. The real and honest cost basis will best emerge when there is full and fair competition among the bidders.

A. Positive Effects of Having a Suspension, Debarment, or Disqualification Process

1. *The process may be a deterrent to similar activity.* If a contractor or subcontractor engages in activity that results in a suspension, debarment, or disqualification, the corporate officers should be very wary of how they conduct their future business as well as what measures they are going to take to guard against a repetition of what occurred in the past. Ineligibility is, therefore, a very strong deterrent against similar conduct or activity when a contractor or subcontractor has once been declared to be ineligible. For instance, if a corporation has been found guilty of antitrust and prior to it being relieved from any suspension, debarment or disqualification, or findings of nonresponsibility, it will,

at a minimum, be required to establish an antitrust policy; make sure its corporate officers and key employees receive appropriate antitrust training; and take other measures that will have a tendency to reduce the potential of engaging in conduct leading to similar antitrust violations.

If the situation involves bribery or fraud, typically, the contractor or subcontractor must remove the offending individuals from its corporation and take other steps to guard against similar misconduct. It has occurred that the contractor or subcontractor will thereafter essentially plead rehabilitation because of the action to remove offending officers or employees and providing assurances that such conduct will not reoccur.

Extensive bid-rigging by highway construction contractors cause higher prices for highway construction work. It was found that when the Federal Highway Administration debarred numerous contractors, the bid prices did not rise and competition did not fall. In many areas of the country which were experiencing antitrust problems that were dealt with through debarment actions, competition actually rose and prices fell.

2. *The process should improve public confidence in the bidding process.* When the public sees that government does not tolerate misconduct by its contractors and subcontractors, there should be a positive reaction to those efforts and there should be a restoration of confidence of the public in the competitive bidding procedure. Occasionally, the reverse occurs when the misconduct is so pervasive that the public looses most of its confidence in government controls over its public works contracts and in the contractors' honesty, integrity, good faith, and fair dealings. If that should occur, in order to restore public confidence, government should consider a public relation campaign to inform the public of the corrective measures that are being undertaken.

3. *The process may result in a recovery for the loss of public funds.* Upon a finding of misconduct by a contractor, government should, and on many occasions does, pursue recovery for the loss of public funds. Some statutes, such as the Antitrust laws, provide for recovery of treble damages. In other instances, such as DBE misconduct or fraud, it is extremely difficult to measure the damage the public has suffered. In those types of cases, government agencies occasionally have sought recovery against the contractor or subcontractor for the profits it made by its misconduct. In most of those instances, government will refuse to pay the contractor for the public work that was involved in the misconduct or fraudulent payments to the DBEs.

4. *The process will result in a loss of opportunity for the contractor or subcontractor to participate in public works programs.* In any suspension, debarment, or disqualification situation, the contractor usually suffers lost opportunities to participate in public works programs. Therefore, there is strong incentive to rectify the situation so that opportunity to participate in public works projects is restored.

It is noted, for instance, that under 29 C.F.R. § 5.12(c) (wage law violation situations), the contractor, subcontractor, or individual may petition, after 6 months, for a review of the ineligible listing. That type of possibility is an incentive to the contractor or subcontractor to mend its ways because it must demonstrate corrective action as part of the review process. Under the Governmentwide Debarment and Suspension (Nonprocurement) regulations, 49 C.F.R. § 29.320(c), the debarred firm or individual "may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment."

5. *The scarcity of the product being produced or controlled by the suspended, debarred or disqualified contractor or subcontractor has both positive and negative effects.* The scarcity of the product being produced or controlled by the suspended, debarred, or disqualified contractor or subcontractor can have both positive and negative effects on the public as well as on such contractor or subcontractor. The positive effect for the contractor or subcontractor is that there is a strong desire by government to continue to receive the product that is in scarce supply. Therefore, there is an opportunity to demonstrate corrective action, which may be offered to such a contractor or subcontractor at an earlier point in time than if there existed no scarcity. On the public side there is strong desire to continue to receive the product that is in scarce supply and, therefore, government may tend to be more willing to discuss compromises relative to the suspension, debarment, or disqualification period.

Today, this type of effect can be seen relative to the defense contractors and the large contractors that supply scarce products to the Federal Government. Even in gross misconduct cases, it is typical that within a matter of days or a few weeks, the suspension that was imposed on the contractor is lifted "in the interests of the general public."

B. Negative Effects May Result From a Suspension, Debarment, or Disqualification Process

1. *The length of a suspension, debarment, or disqualification affects the contractor's or subcontractor's corporation, its employees and resources.* The ineligibility period may drastically affect the corporate financial structure and most certainly affects the employees of the corporation, as well as the resources of the corporation including its materials and equipment. A well-thought-out suspension, debarment, or disqualification process takes these factors into consideration in weighing the seriousness of the misconduct or violation committed by the contractor or subcontractor and the suspension or debarment period to be imposed.[122]

2. *Utilizing the process may have negative effects on the needs of government.* Because of the intensity of the rebuilding and infrastructure renewal programs, the large number of public works projects and the limited number of contractors who are available to compete in the competitive bidding process, there should be concern by government officials when government seeks to become more aggressive relative to how it handles misconduct by its contractors or subcontractors or violations of its programs. When the number of bidders is reduced there may be a lesser competitive force in a particular area and higher prices for performance of the public work may result. Further projects may

be progressed more slowly because the limited available resources of the remaining contractors or subcontractors are expended. There may also be a reduction in the quality of work that is performed by those remaining contractors or subcontractors.

It should be noted that such results did not occur with respect to the Federal Highway Administration's debarments for antitrust activities where competition actually rose and prices fell after the debarment process was completed.

In connection with the national defense program there has been an attempt to develop a negotiated bid system to protect the sanctity of the bidding process while still addressing the national defense requirements.

A central or government-wide agency which administers suspension, debarment, or disqualification processes generally does not have a system to permit the infusion of information of the particular agency's needs and requirements. At the same time agency administrators of the suspension, debarment, or disqualification processes may be overly concerned with their own agency's needs and requirements.

Therefore, a balance that permits the information relative to the agency needs and requirements to be included in the decision-making process, while not giving it undue consideration, may lead to a suspension, debarment, or disqualification process that is more responsive to the actual public needs and requirements.

IX. GLOBAL OR UNIVERSAL SETTLEMENTS FOR CONTRACTOR OR SUBCONTRACTOR MISCONDUCT

In connection with antitrust matters, going back to the 1970s, we find that the Department of Justice used settlement agreements, which address the contractors' responsibility. Such agreements were negotiated through the federal agency, such as the Army Corps of Engineers, for which the contractor or subcontractor normally performed work. Such agreements initially were applicable only to the agency with which the contractor or subcontractor settled. There is now, however, a greater tendency to try to obtain global or universal agreements that cover all affected governmental units. Such agreements address the contractor's responsibility for bidding public work; provide that the terms of the agreement must be adhered to; and generally require disclosure of all misconduct with amnesty provided through the agreement for all acts which are disclosed. Purging the corporation of offending officials or key employees is typically required. Development of a corporate policy to assist in preventing future reoccurrence is typical, and training of officers and key employees to prevent reoccurrence is generally sought in these agreements. Restitution is a common and almost universal element of these types of agreements.

Some Antitrust enforcement officials claim that the global or universal agreements treatment of restitution, with the individual wrongdoers, is inadequate in view of cases like *Hendrickson Bros.*[123], which hold the conspirators jointly and severally liable for damages.

The global or universal agreement may have a long negotiation time because of the requirements of the numerous elements that must be addressed in order to cover all situations. Such agreements may require numerous approvals by the many affected agencies. There may be conflicting interests among the governmental participants in such agreements. Such conflicting interests would include the prosecuting authorities, who want to dispose of the matter and obtain the greatest amount of punishment from a criminal perspective, and the agency desire to obtain restitution, as well as to restore competition for its public works program.

The prosecuting authorities want greater recovery for past wrongs, while the administering agencies desire to control future conduct and have assurance that the future work will not be disrupted. Some governmental agencies have, therefore, taken the attitude that: "let the criminal elements be resolved and then deal with the civil aspects on an individual agency—contractor or subcontractor basis." Some public officials may see a disadvantage in such waiting, as being the potential of having a contractor or subcontractor taken out of the competitive bidding process through possible suspension, or a finding of "non-responsibility" for a protracted period of time while the criminal matter is pending as well as the potential unfairness of a *de facto* suspension. In addition, there is the possibility of acquittal in the criminal matter.

A few years ago Vermont had its two largest contractors indicted for price fixing and there were no other contractors available that could perform that type of public work. Vermont, therefore, desired to do business with those contractors until the criminal matter was resolved. The Federal Highway Administration did, however, debar the two contractors from working on federal-aid projects. While that federal action may have left Vermont temporarily with an inability to accomplish large projects on its Interstate highways, it should not be considered that it is suggested that performing public works projects is more important and a better public policy than effective criminal prosecutions.

Debarment by the Federal Highway Administration in many of the antitrust situations caused the bid-riggers to make restitution, mostly through the settlement agreements, for the overpriced projects, and the funds that were collected were returned to the individual federal-aid state highway accounts.

The settlement process should be sanctioned or authorized in a legal fashion either by legislation, which authorizes the governmental official to administer a restitution program; or pursuant to a statute, rule, or regulation, which authorizes such official to suspend, debar or disqualify or to determine the lowest responsible bidder and permits corrective action for past misconduct (restitution). There are some officials who administer the bidding process, who believe that the settlement process should not be used as a tool to extract guilty pleas. Just as important, however, it should also not be used to thwart the prosecution of the criminal matter. The needs of government relative to resolution of the criminal matters should be weighed against the desires of government to progress its public works projects in an orderly fashion. At the same

time the competitive bidding process and the traditional tests relative to lowest responsible bidder should also be preserved.

The settlement agreement approach offers an opportunity to consider conflicting program objectives of the various governmental units as well as address the desire of the contractor or subcontractor to continue to perform public works.

X. POSSIBLE PERSONAL EXPOSURE OF PUBLIC OFFICIALS WHO ARE INVOLVED IN THE SUSPENSION, DEBARMENT, OR DISQUALIFICATION PROCESS AND WHAT THEY SHOULD BE AWARE OF

Public officials involved with the suspension, debarment, or disqualification process, particularly when such officials are utilizing appropriate authorizing regulations and are very effective in suspending or debarring contractors, may find that the attorneys on the other side can be very imaginative. The contractor's lawyers may undertake actions or proceedings to try to remove these public officials from the process. Discussed within this section will be the major attempts of contractors or subcontractors to involve these public officials by bringing litigation against such officials in their personal capacity.

A. 1983 Actions

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The case of *Sowell's Meats and Services, Inc. v. McSwain*[124] fully explores the issue of "standing" of a disappointed bidder on a public contract seeking damages under a 1983 Action. Sowell was a supplier of foodstuffs, who brought an action under 42 U.S.C. § 1983 and § 1985 and under South Carolina law against public officials who administered a Federal school program.[125] Sowell sought actual and punitive damages for alleged failure to abide by South Carolina and federal procurement standards. Sowell asserted that the program granted it a "protected right" as a beneficiary of those laws and that "a disappointed bidder has standing to challenge the bid (procurement) procedures administered by state agencies disbursing federal funds pursuant to procedures mandated by the federal government, when the federal government has no enforcement procedure except private actions by citizens."[126]

Sowell lost at both levels of court review of the matter when the court first found "that South Carolina law does not confer a property interest on unsuccessful bidders for public contracts."[127] The Fourth Circuit, U.S. Court of Appeals, went on to make the following statements:

> a. Ordinarily, in the absence of state law creating a property interest in a disappointed bidder for state contracts, the bidder lacks standing to question the award of the contract.[128]
>
> b. [B]idders on federal contracts do not have standing to question the contracting officers' application of procurement statutes unless Congress discloses an intent to confer standing.[129]
>
> c. Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 702 [5 USCS Section 702], now authorizes judicial review of claims asserted by unsuccessful bidders on federal contracts that the contracting agency has failed to follow federal procurement standards. *William F. Wilke, Inc. v. Department of the Army of United States*, 485 F.2d 180 (4th Cir. 1973). Section 10 does not authorize review of claims against state agencies, 5 U.S.C. Section 551(1) [5 USCS Section 551(1)].[130]
>
> d. The Secretary directed state agencies to comply with OMB Circular A-102 which specifies procurement standards for federal assistance programs. 7 C.F.R. Section 210.19(a). The circular authorizes grantees to use their own procedures and apply local laws, providing they meet the prescribed standards.[131]
>
> e. [N]either the statute, the regulations, nor the circular expressly confer standing on a disappointed bidder to question a state agency's award of a procurement contract, and we find no implicit conferral of standing. The standards do not require state agencies to award a contract to the low bidder. The circular provides:
>
> > Awards shall be made only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.[132]
>
> f. Here, as in *Phelps* [*Phelps v. Housing Authority of Woodruff*, 742 F.2d 816, 822-23 (4th Cir. 1984)], the discretion allowed the contracting officer demonstrates a lack of a property interest or of any protected right in federal procurement procedures and indicates that judicial review of the award of a contract at the behest of a disappointed bidder is inappropriate.[133]
>
> g. That Act [Public Contracts Act] does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain.[134]

It should be noted that the court in *Sowell*, statement (c) above, makes a distinction between claims asserting that federal officials are violating federal procurement statutes, as far as the Federal Administrative Procedure Act is concerned, and claims of violation by state officials implementing federal-aid procurement or nonprocurement programs under state statutes.

The case of *Anderson-Myers Co., Inc. v Roach*[135] declined to follow *Sowell*, and therefore the *Anderson-Myers* case highlights the noted distinction and how the court may not follow *Sowell*. In *Anderson-Myers*, the plaintiff was a low bidder on several Kansas State contracts,

who brought a 1983 Action against a government official, a corporate official, and a corporation that had been awarded some of the contracts. Part of the 1983 Action claim was based on alleged violation of due process. The court noted that: "The court will first address defendants' challenge to plaintiff's section 1983 claim. Plaintiff alleges that the defendants' surreptitious conduct in performance of the above-mentioned bidding process constituted a taking of plaintiff's property without due process of law, in violation of the fourteenth amendment.... Plaintiff claims that the wrongful acts were done under color of state law in violation of 42 U.S.C. Section 1983."[136]

The plaintiff, Anderson-Myers, further contended that the statute which required awards of state contracts to the lowest responsible bidder created the basis for an entitlement to the state contract, which in turn established a constitutionally enforceable property interest.

The court found that in prior decisions the Kansas courts had indicated that the Kansas statute which required contracts to be awarded to the lowest responsible bidder "may" create an enforceable property right. In Kansas decisions, this possible property right had previously been held sufficient for an unsuccessful bidder to obtain "injunctive relief" to prevent the award of a contract to one who was not legally entitled thereto.

On the property right issue, the court in *Anderson-Myers* noted that the *Sowell* case dealt with a factual situation in which no state statute or other state or local rule specifically limited the exercise of the state procurement officer's discretion in awarding the particular contract. The court found that in Kansas, however, there is such a statute and it would be applied to the contracts in question. It required that the bid go to the "lowest responsible bidder." The court further referred to the *Three Rivers* case[137] and made two important quotations therefrom:

> Recognition of the fact that the violation of the law is not, ipso facto, a deprivation of due process to all persons affected thereby is fundamental to an understanding of procedural due process. The due process clause is a narrow, personalized guarantee which only protects against the deprivation of one's own *liberty* and *property;* it is not a catchall provision designed to promote the interest of society generally in the obedience of its laws.[138]
>
> [I]n the circumstances of this case a property interest of relatively narrow dimension exists. Simply stated, that interest was 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. The due process to which one possessing the protected interest was entitled was the non-arbitrary exercise by the city of its discretion in making the award. And it follows that a deprivation of the substantive benefit (the protected property interest) without the process due is an actionable wrong.[139]

The Federal Court, based on decisional law, found that there was a "property right" which would form the basis for a 1983 Action against the public official, *as well as the corporate official.* The matter was returned to a lower court with specific direction for further consideration.

The *Anderson-Myers* case is consistent with the case of *Connecticut Legal Services, Inc. v. Heintz.*[140] In that case, the court determined that the disappointed bidder for a legal services contract with a state medical aid agency had standing to bring a 1983 Action challenging the agency's award to another bidder on the basis that the agency awarded the contract without complying with the procedures required in the applicable federal regulations. That case is also very important in that it recognized that the eleventh amendment limited the application of any court determination to *prospective injunctive relief only.* The *Connecticut Legal Services* case also brings out the twofold requirements that have been established for standing in 1983 Actions. They are: First, injury in fact; and, second, the interest sought to be protected is within the "zone of interest" to be protected by the constitutional guarantee, statute or regulation. The court noted that:

> When a bidder's proposal is "capriciously rejected, it is hard to sustain the thesis that the unsuccessful bidder is not even 'arguably within the zone of interests to be protected or regulated,' especially given the congressional direction to evaluate proposed bids carefully based on individual qualities of soliciting contractors." *B.K. Instrument,* 715 F.2d at 719, quoting *Association of Data Processing Serv. Organizations,* 397 U.S. at 153, 90 S. Ct. at 830.[141]

In a Pennsylvania case in the Federal Court, it was found that a disappointed bidder had standing to bring a 1983 Action when the court found that the local laws granted a property interest in the award of the contract.[142]

Many cases have disagreed that a plaintiff has standing even though state or local law granted a property interest in the lowest bidder.[143]

Despite the Kansas, Pennsylvania, and Connecticut cases discussed above, "no standing" appears to be the rule, with "standing" the exception in the 1983 Actions involving contract award situations.[144]

The recent United States Supreme Court case of *Will v. Michigan Department of State Police,*[145] is important relative to the potential of 1983 Actions against public officials in a personal capacity. In the *Will* case the Supreme Court found that State and State officials acting in an official capacity are not "persons" subject to liability under 42 U.S.C. § 1983. It can be anticipated, therefore, that there will be more personal suits against public officials in 1983 Actions because of this Supreme Court decision.

An important defense for public officials in 1983 Actions is the "qualified immunity defense." That defense is fully considered in *Clanton v. Orleans Parish School.*[146] In the *Clanton* case, it was held that the individual defendants were not personally liable for salary backpay because they had established the defense of qualified immunity as a matter of law.

From the *Wood v. Strickland* case[147] there are two components to the qualified immunity defense, one subjective and one objective. Under the subjective test, the official is not entitled to the defense if he acts "with the malicious intention to cause a deprivation of constitutional rights or

other injury to another."[148] Under the objective tests, the public official "is not immuned from liability from damages if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of another."[149] If the public official's actions are consistent with not violating either of these two tests, the qualified immunity defense is available. The *Wood* case also established that the constitutional rights that are in question must have been "clearly established" at the time the official acted in order to hold him personally liable. In *Wood*, the court stated that public officials are not charged with predicting the future course of constitutional law.[150]

Although monetary relief, which has been granted in court actions to disappointed contractors, is not limited to those brought as 1983 Actions, it is appropriate to discuss such damages in connection with 1983 Actions, because public officials will undoubtedly be faced with such type of damage claims in most 1983 Actions.[151]

1. *Claims for lost profits.* The case of *Swinerton & Walberg Co. v. Inglewood-Los Angeles County Civic Center Authority*[152] permitted recovery of only bid preparation expenses and not lost profits. Similarly, lost profits were not permitted to be recovered in *Hassett Storage Warehouse, Inc. v. Board of Election Commissioners*[153] or in *Scottsdale v. Deem*,[154] but was permitted in *North Central Utilities, Inc. v. Walker Community Water System, Inc.*[155]

2. *Bid preparation expenses.* In addition to the *Swinerton* case and the *North Central Utilities* case, many cases permit recovery of bid preparation expenses. Interestingly, in *Neilsen & Co. v. Cassia & Twin Falls County Joint Class A School Dist.*[156] the recovery was limited to actual expenses incurred.

3. *Indemnity for subcontractor claims.* The *North Central Utilities*[157] case also permitted recovery for subcontractor claims.

4. *Attorneys' fees and costs in the litigation.* In the *Neilsen* case as well as *Auburn Board of Public Works and Safety v. Mavis*[158] and *Telephone Associates, Inc. v. St. Louis County Board*[159] attorneys' fees and the costs in the litigation were permitted to be recovered.[160]

In a 1983 Action against a public official in his personal capacity the first defense should be a "standing" challenge, including taking into account the *Will* case, followed with a "immunity defense," based on possible limitations found in the state's Tort Claims Act, and/or a "qualified immunity defense." If the court proceeding continues, examination should be made with respect to the damage issue and what is recoverable in a 1983 Action.

In actions against public officials in their personal capacity, attorneys for plaintiffs in the 1983 Actions may combine "due process" claims with "equal protection" as well as "reverse discrimination" claims. In light of the United States Supreme Court decision in *City of Richmond v. J.A. Croson Company*,[161] which struck down a local DBE Program, a clear understanding of the "qualified immunity defense" and the limitations noted, above, on damages is important for public officials in these combined lawsuits.

B. Compounding a Crime

Public Officials when they are negotiating a settlement agreement should be aware of the fact that many states have a penal statute similar to the following:

> A person is guilty of compounding a crime when:
> (a) [H]e solicits, accepts or agrees to accept any benefit upon an agreement or understanding that he will refrain from initiating a prosecution for a crime;
> or
> (b) He confers, or offers or agrees to confer, any benefit upon another person upon an agreement or understanding that such other person will refrain from initiating a prosecution for a crime.[162]

Therefore, if the settlement agreement calls for the agency refraining from submitting the matter to appropriate prosecuting agencies, public officials in those circumstances may find themselves subjected to criminal liability. Matters such as antitrust violations, bribery, extortion, fraud, or conspiracy should be forwarded to appropriate prosecuting agencies prior to negotiating a settlement agreement that deals with restitution. If a criminal charge is pending, and the governmental agency determines that it intends to continue to do business with a contractor or subcontractor under indictment, it is suggested that an interim agreement be worked out with the "nonresponsible" or "suspended," "debarred" or "disqualified" contractor or subcontractor with issues relative to restitution being left to the final agreement after conclusion of the criminal matter. Public officials should be aware that many prosecuting authorities put pressure on the government agencies not to deal with the contractor or subcontractor while the criminal matter is pending in order to exert greater pressure on the contractor or subcontractor to enter into a plea bargaining agreement and therefore they should be concerned about such pressures while taking into account their own agency's needs.

C. Freedom of Information Law Situations

Most states have Freedom of Information Laws and many have a provision that the records may be denied if disclosure would impair present or imminent contract awards; or where such records were compiled for law enforcement purposes, disclosure would interfere with law enforcement investigations or judicial proceedings or deprive a person of a right to a fair trial or impartial adjudication; or identify a confidential source or disclose confidential information relative to a criminal investigation.[163] Contractors or subcontractors in connection with any suspension, debarment, or disqualification proceeding may use the Freedom of Information Law method to obtain voluminous records of the agency.

The public official must balance the records, which may be denied under the Freedom of Information Law, with the due process requirements, that there be appropriate disclosure of information so as to permit the contractor or subcontractor an opportunity to rebut the unfavorable information.

Of course, after the law enforcement matter has been concluded, or a contract in question has been awarded, there may be very limited ability to deny access to public records. Public officials may be confronted with a Freedom of Information Law tactic by attorneys or contractors or subcontractors in order to "exclude" or "preclude" the records from court consideration when they are seeking damages against the public officials relative to an action undertaken either on a specific contract basis or in a suspension, debarment, or disqualification process. Rather than "excluding" or "precluding" the records, such attorneys may instead be searching for some information that would taint the decision-making process through their use of the Freedom of Information Law.[164]

It would not be unusual to see a Freedom of Information Law request to be so broad that it seeks to require the "compilation" of information on all contracts made and subcontracts approved for long periods of time. In Freedom of Information Law cases, there is a fine distinction between "compiling" statistics for the purpose of responding to the Freedom of Information Law request and permitting access to records that are actually kept. Public officials should not go to the expense and time-consuming effort of doing the attorney's work, but instead should make available the records so that the attorney can do his own "compilation." Judgment, however, should be exercised as to what the attorney's search of all such records may reveal and whether or not it may be more advantageous to have the agency do the "compilation."

D. Contempt of Court

Public officials involved with contractor responsibility determinations or suspension, debarment, or disqualification processes, may find themselves in contempt of court situations. The typical factual situation may involve an Order to Show Cause with a restraining provision or Order or the situation may involve a decision by a court which compels the public official to act in a particular way. A violation of the Show Cause restraining provision or Order or the court decision for which there exists a valid Order, and there is no stay in place available to the public agency during the pendency of any appeal, may result in a criminal and/or civil contempt citation.

Such a situation developed relative to the *Callanan Industries* case[165] in New York State. A January 9, 1986, Order to Show Cause provided that: "until the determination of the application brought on by this order to show cause Respondent [State Commissioner of Transportation] be and he is hereby restrained from withholding the award of contracts to Petitioner [Callanan Industries] and from otherwise enforcing Respondent's determination dated January 3, 1986 which purports to debar Petitioner." The decision to reject Callanan Industries' bids on two projects occurred on January 6, 1986, prior to the issuance of the Order to Show Cause and the rejection was based on individual findings of nonresponsibility and not the debarment order. Despite this, a Supreme Court Judge found a public official of the State Department of Transportation, as well as the Department itself, both criminally and civilly in contempt.

The Appellate Division reversed this decision[166] and found that the January 9, 1986, Order post-dated the action by the agency and was ambiguous and lacked the precision necessary to sustain a finding of either a criminal or civil contempt violation.

The court further found that the Department was within its powers in awarding one contract to another contractor and in rejecting all bids on the second contract. The court also affirmed that the Department and its officials had a right to base its decisions on individual contracts on the contractor's past conduct when it determines "responsibility" or "nonresponsibility."[167]

However, the fine of some $250,000 hung over the public official's head for nearly 11 months between the Supreme Court's decision and the Appellate Division's reversal thereof. Public officials, therefore, should be fully aware of any restraining order or court decision. Such public officials should be advised by their attorneys as to how they should conduct themselves relative to the particular contractor or subcontractor involved in the matter.

E. RICO Claims

RICO is the Racketeer Influenced and Corrupt Organizations chapter of Title 18 United States Code.[168] It was intended to control the illegal endeavors of organized crime. However, it has been turned against public officials in responsibility determinations, or suspension, debarment, or disqualification proceedings. In the *Andersen-Myers* case[169] the plaintiff asserted a RICO claim against a public official. Plaintiff claimed there was a scheme to fulfill the "pattern of racketeering activity" requirement of the statute and claimed injury to its business which is required by 18 U.S.C.S. §1964(c). The court found that the plaintiff failed to plead the "necessary specificity and particularity"[170] of a RICO claim and required the plaintiff to amend the complaint to:

> (1) plead with sufficient particularity the fraud or other wrongful acts that establish racketeering activity; (2) specify the time, date and content, or similar factual background, of any mail and wire fraud acts that constitute racketeering activity; and (3) identify, demonstrate the existence of, and define the scope of an enterprise through which the racketeering activity was conducted, and indicate the role of each particular defendant (treating them separately with specific allegations as to each one) in the conduct of the enterprise.[171]

Although the matter involved criminal RICO, the case of *United States v. Frumento*[172] held that state agencies may be the subject of a RICO action.

Therefore, a public official may find himself the subject of a RICO claim by a disappointed contractor or subcontractor.

F. Hobbs Act

The "Hobbs Act" is 18 U.S.C. §1951 which is part of a chapter of federal statutes dealing with Racketeering. The pertinent portions of this section include:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section. . . . The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of . . . fear . . . under color of official right.

An attorney for a contractor or subcontractor may claim that the public official's conduct, in connection with the negotiations for a settlement agreement, is in violation of the Hobbs Act. The settlement agreement may involve a "responsibility" determination or a "suspension," "debarment," or "disqualification" matter.

A possible fact situation is as follows. The contractor or subcontractor is dealing with a DBE in a fraudulent manner (a "front" or the DBE is guilty of serious misconduct), but wants to remedy or correct his involvement with the situation. The settlement agreement calls for payments into a state or federal "DBE fund" or to a not-for-profit organization that is performing a DBE training program as the contractor's or subcontractor's remedy or corrective action. If the contractor or subcontractor is "forced" to contribute to outside entities other than a state agency in return for a favorable "responsibility" finding or to get relieved of the "suspension," "debarment," or "disqualification" determination, the public official may find that he could be charged with violating the Hobbs Act.

Therefore, care should be exercised by public officials with respect to negotiating settlement agreements. It should be noted that there would be no Hobbs Act problem if the settlement agreement resulted from the prosecuting authority plea bargain agreement or if there is clear statutory authority to the public official to negotiate recoveries or restitution on behalf of the state or local government.

G. Citizen Taxpayer Actions

Many states have citizen taxpayer action legislation which recognizes that individual citizens and taxpayers have an interest in the proper use of state funds and properties. Further, such legislation recognizes that whenever such interest is or may be threatened by an illegal or unconstitutional act of a public officer or employee, the need for relief is so urgent that citizens and taxpayers should have a right to seek the remedies to correct the situation.

The pleadings in a citizen taxpayer action are against the public official in a personal capacity. Even states that have state employee coverage through "defense and indemnification" statutes[173] typically do not include coverage for citizen taxpayer actions. Therefore, the personal resources of the public official must sustain the expenses involved in the defense of the matter and any recovery which is obtained.

Where the low bid is not used for the award of a contract, then typically the disappointed low bidder could potentially bring a citizen taxpayer action to recover the difference between its bid and the price of the contract which was awarded; or it may seek to enjoin the award of the contract through the citizen taxpayer action. Typically, the recovered funds go to the state rather than the individual bringing the law suit; with the individual being only reimbursed for costs and expenses, including attorney fees.

H. Extortion

Public officials, in connection with negotiating settlement agreements, may find themselves subject to allegations of "extortion" made by disappointed contractors or subcontractors. Extortion has two basic forms. The first is in the nature of larceny—the taking away or depriving a party of his rightful property; and the second is in the nature of bribery—the offering of or taking of something of value when one is not entitled to receive the same.

The term "property" as used in the penal statutes relating to larceny is all encompassing—any interest, both tangible or intangible.

Any contractor or subcontractor who has to buy its way to "responsibility" or out of "suspension," "debarment," or "disqualification" could well claim extortion by the public official. Therefore, the public official should never be negotiating a settlement agreement with a sense that the contractor or subcontractor is "buying" anything, but rather that under the settlement agreement the contractor or subcontractor is correcting or remedying the unfavorable situation, or the public agency is controlling the unfavorable situation, and that the provisions of the agreement are authorized by the program and are necessary to protect the government's interests in the program.

I. Accusations of Abuse of Power or Power Brokering

In administering a suspension, debarment, or disqualification process, public officials must understand that accusations of abuse of power or power brokering go "with the territory." The honesty, integrity, fair dealing of, and consistent handling of, similar situations by such administrators is very important for the process to be effective. It is suggested that a periodic review of the process would be appropriate to ascertain that the program is meeting its goals and objectives.

J. Harassment

Harassment in the context of a suspension, debarment, or disqualification process could be defined as an unwarranted number of requests or unreasonable demands made for "favorable" action by a contractor or subcontractor. Within the limits of courtesy that could be extended to such a contractor or subcontractor, the public official could examine these "unwarranted" or "unreasonable" situations and determine if there may be appropriate means to control the situation by such activities as: scheduling of a meeting, which is denoted as a final opportunity; or developing "form responses" if a public letter writing campaign develops relative to the suspension, debarment, or disqualification situation; or some other method to establish finality in the decision-making process.

XI. RECOMMENDATIONS ON SUSPENSION, DEBARMENT, OR DISQUALIFICATION PROCESSES

A suspension, debarment, or disqualification process should be undertaken when it furthers the goals and objectives of the competitive bidding process. Such a process should not be established or implemented as a penal method or punishment for contractors or subcontractors who misbehave relative to their honesty, integrity, good faith, and fair dealings with respect to public works projects. Before initiating such a process there should be specific goals and objectives in mind, as well as a determination of the need for such a process. There should be a balancing of the needs of the public works program with the negative effects that may occur in a suspension, debarment, or disqualification process. A statutory authorization directing the process and the maximum length of time for any suspension, debarment or disqualification, as well as specific criteria for implementation of the suspension, debarment or disqualification procedure, and determining the length of time of the suspension, debarment or disqualification, gives such a process the greatest opportunity to be carried out without extensive litigation relative to the authority to have such a process.

Within such a process, and the rules and regulations implementing the same, great care should be taken relative to the notice provisions and the adequacy of such notice; the opportunity to rebut, which is afforded to the contractor;[174] the notice that must be given relative to the decision; the effect of implementing the decision; and any appeal opportunities, including appeals to the courts that may be available in connection with an adverse determination.[175] As indicated within the paper, consideration should be given as to whether or not a central body will perform the suspension, debarment, or disqualification process, or whether it will be on an agency-by-agency basis. Care should be addressed to the effect of an adverse determination on the contractor's activities with other state agencies and the need for clear statutory authorization if the suspension, debarment, or disqualification is implemented on an agency-by-agency basis and, then, such decisions are to be applied by other agencies without further review opportunity given to the contractor.

All rule-making processes that may apply to the suspension, debarment, or disqualification regulations, even those that are somewhat questionable as to whether or not they come within the perimeters of the respective Administrative Procedure Act, should be followed. If possible, the authority to negotiate and implement settlement agreements should be contained within the authorizing legislation or, absent legislation, should come clearly within the terms of the statute, so that the settlement agreement potential is "inherent" within the powers of the administrating officials.

No suspension, debarment, or disqualification process should be undertaken without a thorough review of the respective state's cases on the authority to implement a suspension, debarment, or disqualification process and any unique requirements that must be made part of such a process. The term "due process" must be thoroughly understood by the drafters of such a process, as well as by those who are implementing the same. Any administrator implementing a suspension, debarment, or disqualification process should anticipate that there will be very lengthy and difficult litigation because the effect of such a process in some cases may be to perform "economic capital punishment" on a contractor or subcontractor.

XII. CONCLUSION

In connection with suspension, debarment, or disqualification processes, there still is a limited amount of conflict in the case law determinations in some state jurisdictions on the issues of: whether or not there are inherent powers in the governmental officials to use such a process in carrying out public works programs; standing to bring court actions, particularly in 1983 Actions; the type of a hearing required in a deprivation matter; whether compensation is available to disappointed contractors; if compensation is available, what elements of claimed damage are recoverable; the type of relief which may be granted by the courts; and the amount and type of review which the courts have in deprivation matters. These issues may require further clarification in those few jurisdictions either by statutes which deal with the subjects or by further court determinations.

The basic legal principles of such a due process, however, have been firmly established. The suspension, debarment, or disqualification process, therefore, remains an effective method to thwart and control misconduct by government contractors and subcontractors. As set forth in this paper, the processes have many benefits and some disbenefits. Its use by government officials as a "punishment" or "retribution" for past misconduct by highway construction contractors has some pitfalls. Its use by government may cause conflicts in the respective interests of governmental agencies. Most notably is the conflict in the interests of the prosecuting authorities to obtain the greatest "punishment," "retribution," or "reimbursement" while the contracting agency is trying to carry out its program with the smallest amount of disruption. The amount of competition may not only affect the "price" for performance of the public work, but may also affect the "capacity" to carry out the public works program. At the federal level there are three major suspension, debarment, or disqualification processes; Governmentwide Debarment and Suspension (Nonprocurement) 49 C.F.R. pt. 29; FAR, 48 C.F.R. pt. 9.4; and Wage Law situations, 29 C.F.R. §§ 5.1 through 5.12. Except for the "suspension" potential—"due process" issue—these processes appear to meet the requirements of due process as long as "notice" and "opportunity to rebut" are afforded to a contractor or subcontractor. A suspension, debarment, or disqualification process, at the state level should be patterned after these federal processes. At the state level, public officials who act without clear statutory authority to implement a suspension, debarment, or disqualification process may have a very difficult time with court actions by contractors or subcontractors. They may also find themselves the subject of legal actions seeking dam-

ages from such public officials in a personal capacity. The suspension, debarment, or disqualification process implementing regulations must be subjected to any appropriate rule-making process if they are to be sustained. A suspension, debarment, or disqualification process, which balances the prosecuting authorities' interests with those of the various other government interests and needs,[176] when the process is established or in the manner it is implemented, potentially has the greatest long term benefits to government and the people as a whole.

[1] 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940).

[2] *Id.* at 127.

[3] There was a consolidated regulatory approach that applies to 60 statutes relating to labor standards for federal or federally assisted contracts which is found at 29 C.F.R. §§ 5.1 through 5.12. This regulatory approach was a part of Reorganization Plan No. 14 of 1950. *See also, e.g.,* N.Y. LAB LAW § 220-d which specifies that: "[a]ny person or corporation that wilfully pays after entering into such [public works] contract, less than such stipulated minimums regarding wages and supplements shall be guilty of a misdemeanor and upon conviction shall be punished, for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited."

[4] *See, e.g.,* 41 U.S.C. § 10b (Buy American Act).

[5] *Supra* note 1.

[6] 322 U.S. 398, 64 S.Ct.1097, 88 L.Ed. 1350 (1944).

[7] Sometimes the authorization to suspend or debar which is set forth in the resultant regulations is actually contained in the statutory delegation and sometimes such power is assumed by the public official to be inherent in the delegation to implement a program.

[8] 49 C.F.R. pt.29

[9] 5 U.S.C.A. ch. 5, subch. II, and ch. 7.

[10] 780 F.2d 296 (3d Cir. 1985).

[11] Department of Labor v. Titan Construction Co., 102 N.J. 1, 11–12, 504 A.2d 7 (1985).

[12] 49 C.F.R. § 29.115(b).

[13] *See, e.g.,* N.Y. HIGH. LAW § 85.

[14] Subsequent to New York State's attempt to implement the federal list, the provisions of 49 C.F.R. §§ 29.500 through 29.510 have been more fully implemented. The further action at the federal level included the U.S. Department of Transportation amendments to its rules and regulations which comprise 23 C.F.R. pt. 635, as they relate to advertising for bids, noncollusion affidavit/declaration requirement.

[15] 118 A.D.2d 167, *motion to modify denied,* 123 A.D.2d 462, *leave to appeal denied,* 69 N.Y.2d 601 (1987).

[16] *Supra* page 8, *Liquid Asphalt* at 3.

[17] *See, e.g.,* the unreported Albany County, N.Y. Supreme Court case of Phelps Guide Rails Inc. v. White, decided April 25, 1986, by Justice David H. Prior, Jr.

[18] *Id.* at 2.

[19] *Supra* note 15, at 170–171.

[20] *Supra,* at 8, *Liquid Asphalt* at 3.

[21] *Supra* note 15.

[22] *Id.*

[23] *Id.* at 169.

[24] *Id.* at 170.

[25] *Id.* at 170–171.

[26] *Supra* note 5, at 404.

[27] *Supra* note 15.

[28] *Id.* at 170.

[29] 9 A.D.2d 1002 (1959).

[30] *Supra* note 15, at 171.

[31] 123 A.D.2d 462 (1986).

[32] *Supra* note 15.

[33] *Id.*

[34] 108 Wash.2d 597, 741, P.2d 34 (1987).

[35] Board of Review, No. 837 C.D. 1985, Pa. Commw. Ct., 529 A.2d 59 (1987).

[36] *Supra* note 15.

[37] 102 N.J. 1, 504 A.2d 7 (1985).

[38] 477 So.2d 24 (Fla.App.1stDist. 1985).

[39] 31 U.S.C. §§ 3551 through 3556.

[40] *See,* Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961).

[41] 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

[42] *See,* Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[43] *Id.* at 331.

[44] *See, e.g.,* Brock v. Roadway, Inc., 481 U.S. 252, 107 S. Ct. 1740, 95 L.Ed.2d 239 (1987); Mathews v. Eldridge, *supra* note 42; and Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

[45] *See,* Mathews v. Eldridge, *Supra* note 42, at 335.

[46] *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

[47] *See, e.g., Supra* note 44, third case at 546.

[48] *Supra* note 44, first case.

[49] *Id.* at 264.

[50] *Id.* at 271.

[51] *Id.* at 269,276.

[52] 116 A.D.2d 883 (1986).

[53] 103 Cal.Rptr.689 (1972).

[54] *NCHRP Legal Research Digest 7,* "Liability of Public Agencies Arising Out of Rejection of Bids and Misaward of Contracts," Richard W. Bower (July 1989).

[55] DeFoe Corp. v. Larocca, 128 Misc.2d 39 (1984), *aff'd* 110 A.D.2d 965 (3d Dept., 1985); and Schiavone Construction v. Larocca, 117 A.D.2d 440 (1986).

[56] *Supra* note 55, first case.

[57] *Supra* note 55, second case.

[58] *Id.* at 443.

[59] *Id.* at 443–444.

[60] 49 C.F.R. Part 29.

[61] *See, e.g.,* Goldberg v. Kelly, *supra* note 46; and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) at the Federal level; and Callanan Indus. v. City of Schenectady, *supra* note 52, at the state level.

[62] 77 Ill. 2d 287, Ill. Dec. 872, 395 N.E.2d 1376 (1979), *appeal dismissed* 444 U.S. 1062, 100 S.Ct. 1001, 62 L.Ed.2d 744 (1980).

[63] *Supra* note 61, second case.

[64] *Id.* at 577.

[65] *But see,* Schiavone Construction v. Larocca, *supra* note 55, second case.

[66] 49 C.F.R. § 29.313.

[67] 48 C.F.R. § 9.406-3(c)(4).

[68] *See,* Governmentwide Debarment and Suspension (Nonprocurement) regulations, 49 C.F.R. § 29.412 and FAR, 48 C.F.R. § 9.407-3(c)(5) for similar meaningful time provisions for hearings relating to suspensions.

[69] 49 C.F.R. § 29.314; but also see FAR, 48 C.F.R. § 9.406-3(d)(1), which provides for a thirty (30) working day period.

[70] 463 F.2d 1268 (D.C. Cir. 1972).

[71] *Id.* at 1270.

[72] *Id.* at 1272.

[73] *Id.* at 1272.

[74] 49 C.F.R. pt. 29 and 48 C.F.R. pt. 9.4.

[75] *See,* ATL, Inc. v. United States, 736 F.2d 677 (Fed. Cir. 1984), particularly, at 686 for an interesting discussion on disclosure obligations of the government official in a bid protest situation.

[76] *See, e.g.,* Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984), where a government suspension was sustained based on "adequate" notice and a "limited" amount of disclosure on the government side.

[77] *See,* Cleveland Board of Education v. Loudermill, *supra* note 44, third case.

[78] 49 C.F.R. pt. 29.

[79] 49 C.F.R. § 29.405.

[80] 49 C.F.R. § 29.400(a)(2).

[81] (a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

[82] Debarment may be imposed in accordance with the provisions of §§ 29.300 through 29.314 for (see note 81 (a) for portion of section):

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR Subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in section 29.215 or section 29.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted; or

(4) Violation of a material provision of a voluntary exclusion agreement entered into under section 29.315 or of any settlement of a debarment or suspension action.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[83] 49 C.F.R. § 29.405(b).

[84] FAR 48 C.F.R. § 9.407-1(a); 48 C.F.R. § 9.407-1(b) provides: "Suspension is a serious question to be imposed on the basis of adequate evidence, pending the completion of investigation or legal proceedings, when it has been determined that *immediate action is necessary* to protect the government's interest" (emphasis added); and 48 C.F.R. § 9.407-2 provides:

Causes for suspension.

(a) The suspending official may suspend a contractor suspected, upon adequate evidence, of—

(1) Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;

(2) Violation of Federal or State antitrust statutes relating to the submission of offers;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.

(b) Indictment for any of the causes in paragraph (a) above constitutes adequate evidence for suspension.

(c) The suspending official may upon adequate evidence also suspend a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.

[85] *See*, 49 C.F.R. § 29.400(c).

[86] 352 U.S. 419, 1 L.Ed.2d 438, 77 S.Ct. 502 (1957).

[87] *See, e.g.*, Callanan Industries v. White, *supra* note at 170–71.

[88] 9 N.Y.C.R.R. § 4.8.

[89] Even though the case predated the Executive Order, *see*, M. Cristo, Inc. v. State Office of General Services, 42 A.D.2d 481, 349 N.Y.S.2d 191 (3d Dept. 1973). In that case the State Office of General Services (O.G.S.) refused to make an award to Cristo because of union threats to strike the entire project if the nonunion contractor (Cristo) was awarded a contract in the project area. No independent investigation was conducted by the O.G.S. as to Cristo's labor difficulty and no hearing was held to give Cristo an opportunity to show that it could perform the contract and not disrupt the entire project. If a hearing or meeting had been held, the determination not to award to Cristo in the "best interests of the State" would have had a better chance of being sustained.

[90] *See. e.g.*, State of New York v. Hendrickson Bros., Inc., 840 F.2d 1065 (2d Cir. 1988), *cert. denied*, 102 L.Ed.2d 101, 109 S.Ct. 128 (1988).

[91] *See, e.g.*, 49 C.F.R. 29 and 48 C.F.R. 9.4, where suspension at the Federal level is probable with an antitrust indictment. *Also see*, Schiavone v. Larocca, *supra* note 55, second case. The case involved indictment for MBE fraud but affirms the principle that indictment is a sufficient basis to at least cause a responsibility to review. An interesting situation developed with respect to the Lizza Industries matter in New York State. Lizza Industries, along with several other defendants, was indicted for antitrust violations (the Hendrickson Brothers firm was an unindicted co-conspirator). The State Department of Transportation held a meeting with Lizza Industries relative to its responsibility on a particular project, and the Department also proposed a 3-year debarment based on the indictment. A 3-year debarment was found to be appropriate after review by the Contract Review Unit. (The Lizza Industries matter predated the *Callanan Industries* case.) After conviction, Lizza Industries was then debarred by the Federal authorities for 3-years. The dual effect of the State and Federal debarments was a debarment for Lizza Industries of approximately 5 years.

[92] *See, e.g.*, Zara Contracting Co. v. Cohen, 45 Misc. 2d 497, 257 N.Y.S.2d 479 (1964) *Aff'd* 23 A.D.2d 718, 257 N.Y.S.2d 118, *leave to appeal denied* 16 N.Y.2d 482 (1965) where the court upheld an administrative finding that an award to a contractor indicted for a crime arising out of a similar contract would not "best promote the public interest."

[93] Some states have statutory suspensions or debarments for such convictions. Of concern here is where there is no such statute and the circumstance is used in connection with a finding of "nonresponsible." To obtain a good understanding of the subject of bribery of public officials and witnesses, see 18 U.S.C.S. § 201 as well as the "Conflict of Interest" provisions which relate thereto. These Federal Conflict of Interest Laws were first enacted by P.L. No. 87–849, 76 Stat. 1119 (1962) and substantially revised thereafter.

[94] *See, e.g.*, DeVeau v. Braisted, 360 U.S. 144, 4 L.Ed.2d 1109, 80 S.Ct. 1146 (1960) for an example of how old (36 years prior) the felony conviction may be and still form the basis for a deprivation of rights.

[95] *See, e.g.*, 18 U.S.C.S. 1503.

[96] *See*, Adonizio Bros. v. Penn. D.O.T., *supra* note 35, even though it involves a suspension matter.

[97] *Supra* at 5.

[98] 290 F.2d 368 (D.C. Cir. 1961).

[99] 828 F.2d 84 (2d Cir. 1987).

[100] 49 C.F.R. pt. 29.

[101] 49 C.F.R. § 29.115.

[102] *Supra* at 7 and note 12; In procurement situations FAR, 48 C.F.R. § 9.402 declares that debarment and suspension are discretionary actions that, taken in accordance with the regulations, "are appropriate means to effectuate" the policy of soliciting offers from, award contracts to, and consent to subcontracts with "responsible" contractors only. The regulations further provide that the serious nature of debarment and suspensions requires that the "sanction" be imposed only in the public interest for the Government's protection and not for the purpose of "punishment."

[103] *Supra* notes 81 and 82; for FAR *see* 48 C.F.R. § 9.406-2.

[104] 49 C.F.R. §§ 29.310 through 29.314; for FAR *see* 48 C.F.R. § 9.406-3.

[105] 48 C.F.R. pt. 9.4

[106] 49 C.F.R. § 29.314(a); for FAR regulations *see* 48 C.F.R. § 9.406-3(b)(2). This apparent weakness when an absolute presumption is used as well as the "suspension" issues raised in the Due Process section of the article should be considered and dealt with in suspension or debarment regulations at the state level.

[107] 49 C.F.R. § 29.314(b)(2); FAR does not appear to have a similar provision.

[108] 49 C.F.R. § 29.312; for FAR *see* 48 C.F.R. § 9.406-3(c).

[109] 49 C.F.R. § 29.314; for FAR *see* 48 C.F.R. § 9.406-3(d).

[110] 49 C.F.R. § 29.314(d); for FAR *see* 48 C.F.R. § 9.406-3(e).

[111] 49 C.F.R. § 29.500; for FAR similar provisions *see* 48 C.F.R. § 9.404.

[112] At the federal level, the Davis-Bacon Act is a good example.

[113] At the federal level, the Government-wide Debarment and Suspension (Nonprocurement) and the FAR regulations are good examples.

[114] *Supra* note 15.

[115] 49 C.F.R. pt. 29 and 48 C.F.R. pt. 9.4

[116] *See, eg.*, U.S. General Service Administration, Office of Acquisition Policy, Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs.

[117] *See, e.g.*, CONR 500-18a, Forms of New York State Department of Transportation.

[118] With respect to the court directing an award to a bidder when the court has found such entity to be the low bidder, *see*, DeFoe Corp. v. Larocca, *supra* note 55, first case. In that case at 41 the court stated: "Despite the illegal conduct by respondents [State Department of Transportation], petitioner [De Foe Corp.] is not entitled to a judgment in the nature of mandamus directing award of the contract to it since the bid proposal specifically reserves the right to

the Department to reject all bids and, thus, the proper remedy is remittal to the Department of Transportation. . . ." The issue of compensation to a bidder is taken up in section X(A) of this paper under "1983 Actions".

[119] *Supra* note 1.

[120] *Id.* at 126.

[121] A determination to suspend, debar, or disqualify a contractor or subcontractor basically is a holding that the contractor's honesty, integrity, good faith, or fair dealings do not measure up to the standards required for obtaining public work. In view of this fact it may be well for public agencies to consider, under appropriate limited circumstances, not making an adverse determination relative to the contractor or subcontractor, but to permit that contractor to withdraw its bid in the best interest of the public. That suggestion must not be universally applied, but instead should be considered in *extreme circumstances* where the public interest in progressing the work is very strong and particularly where a criminal or civil action, or a suspension, debarment, or disqualification proceeding has not been completed, so that there still remain material factual issues in dispute.

[122] *But see* 49 C.F.R. § 29.320 where the period shall be "commensurate with the seriousness of the cause(s)."

[123] *Supra* note 90.

[124] 788 F.2d 226 (1986).

[125] 42 U.S.C. 1985 deals with "conspiracy to interfere with civil rights." *See*, particularly, subsection (3) which is concerned with "Depriving persons of rights or privileges."

[126] *Id.* at 229.

[127] *Id.* at 229.

[128] *Id.* at 230.

[129] *Id.* at 230.

[130] *Id.* at 230, footnote 2 thereof.

[131] *Id.* at 231.

[132] *Id.* at 231.

[133] *Id.* at 231.

[134] *Id.* at 231–232.

[135] 660 F. Supp. 106 (Dist. Kan. 1987).

[136] *Id.* at 108.

[137] Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1128 (W.D. Pa. 1980).

[138] *Id.* at 1138.

[139] *Id.* at 1131.

[140] 689 F. Supp. 82 (D. Conn. 1988).

[141] *Id.* at 89.

[142] *See*, Teleprompter of Erie Inc. v. Erie, 537 F. Supp. 6 (W.D. Pa. 1981).

[143] *See, e.g.*, L. & H. Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517 (8th Cir. 1985); Douglas N. Higgins, Inc. v. Florida Keys Aqueduct Authority, 565 F. Supp. 126 (S.D. Fla. 1983); Kendrick v. City Council of Augusta, 516 F. Supp. 1134 (S.D. Ga. 1981).

[144] The following cases in their respective jurisdiction support the principle that the contractor or subcontractor has "no standing" to bring an action for damages: Scottsdale v. Deem, 27 Ariz. App. 480, 556 P.2d 328 (1976); Rubiono v. Lolli, 10 Cal. App. 3d 1059, 89 Cal. Rptr. 320 (3d Dist. 1970); Beaver Glass & Mirror Co. v. Board of Education, 59 Ill. App. 3d 880 (2d Dist. 1978); Sutter Bros. Construction Co. v. Leavenworth, 238 Kan. 85, 708 P.2d 190 (1985); Malan Construction Corp. v. Board of County Road Commissioners, 187 F. Supp. 937 (E.D. Mich 1960); and M.A. Stephen Construction Co. v. Rumson, 125 N.J. Super. 67, 308 A.2d 380, *certif. den.*, 64 N.J. 315 A.2d 405 (1973).

[145] 491 U.S. __, 109 S. Ct. __, 105 L.Ed. 2d 45 (1989).

[146] 649 F.2d 1084, (5th Cir. 1981).

[147] 420 U.S. 308, 95 S. Ct. 992, 43 L.Ed.2d 214 (1975).

[148] *Id.* at 322.

[149] *Id.* at 322.

[150] *Id.* at 322.

[151] It should be noted that some cases being reviewed within this section of the paper also involve claims under the Procurement Protest System, 31 U.S.C. §§ 3551 through 3556. Section 3554 permits recovery for costs of filing and pursuing the protest, including reasonable attorneys' fees and bid and proposal preparation.

[152] 40 Cal. App. 3d 98, 114 Cal. Rptr. 834 (2d Dist. 1974).

[153] 69 Ill. App. 3d 972, 25 Ill. Dec. 909, 387 N.E.2d 785 (1st Dist. 1979).

[154] *Supra* note 144, first case.

[155] La. App. 2d Cir., 437 So. 2d 922 (1983).

[156] 103 Idaho 317, 647 P.2d 773 (1982).

[157] *Supra* note 155.

[158] Ind. App. 468 N.E.2d 584 (1984).

[159] Minn. 364 N.W.2d 378 (1985).

[160] Starting at page 647 of 91 L.Ed.2d is the article entitled: *Supreme Court's Views as to Measure or Elements of Damages Recoverable in Federal Civil Rights Actions Under 42 U.S.C.S. Section 1983.* Two important points made therein relative to some of the more questionable types of damages are: (1) "Compensatory damages for emotional distress, embarrassment, humiliation, impairment of reputation, and similar injuries are available in a proper Section 1983 Action." and (b) "However, the Supreme Court has held that an award for the 'value' or 'importance' of the constitutional rights alleged to have been violated is not the proper subject of a Section 1983 compensatory damages award."

[161] 488 U.S. __, 102 L.Ed.2d 854, 109 S.Ct. 706 (1989).

[162] N.Y. PENAL LAW § 215.45.

[163] N.Y. PUB. OFF. LAW § 87.

[164] *See*, Plumbers Coop. v. Ameruso, 105 Misc. 2d 951 (1980) where a corporation which submitted a bid for a contract for certain work in the streets of the city of New York was entitled, pursuant to the Freedom of Information Law, to disclosure of the contents of the successful bid proposal and the basis of the determination to accept that proposal. Interestingly, the court also determined that the successful bidder had no standing to intervene as a party in the proceeding.

[165] 123 A.D.2d 57 (1986).

[166] *Id.*

[167] *Id.* at 59.

[168] 18 U.S.C. §§ 1961 through 1968, Title IX of the Organized Crime Control Act of 1970.

[169] *Supra* note 135.

[170] *Id.* at 112.

[171] *Id.* at 112.

[172] 563 F.2d 1083 (3d Cir. 1977).

[173] N.Y. PUB. OFF. LAW § 17.

[174] Although the cases involve bid rejection situations, *see*, Haughton Elevator Div. v. State, 367 So.2d 1161 (La. 1979), where the contractor was entitled to damages for violation of its fourteenth amendment due process rights by the agency arbitrarily rejecting low bids without notice or hearing; and Millette Enterprises, Inc. v. State, 417 So.2d 6 (La. App. 1st Cir. 1982), which discusses good faith requirements imposed on government administrators.

[175] For the type of review a court should make in a debarment proceeding, *see* Shane Meat Co., Inc. v. U.S. Dept. of Defense, 800 F.2d 334 (3d Cir. 1986). In that case the court review was not to redetermine the debarment and the length of its duration, but rather was limited to finding whether the agency action was rational, based on relevant factors, and within the agency's statutory authority.

[176] Some of these types of issues were discussed in section VIII of this paper.

APPLICATIONS

The foregoing research should prove helpful to state highway and transportation administrators, engineers, and legal counsel who must deal with construction contract administration; the letting of highway construction contracts; and the proper method of suspending, debarring and disqualifying contractors who violate the rules, regulations, and laws which govern the performance of the contract.

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