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## Rights and Duties of Vendors and Government Agencies under Florida's New Public Contracting Law

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RIGHTS AND DUTIES OF VENDORS AND GOVERNMENT  
AGENCIES UNDER FLORIDA'S NEW PUBLIC  
CONTRACTING LAW

DAVID L. POWELL

*Until recently, vendors convicted of "bid-rigging" crimes could continue to receive public contracts with state and local agencies. In 1989, the Legislature enacted legislation to exclude convicted vendors from the public procurement process. In this Article, the author examines how the standards and procedures of the new law safeguard the public treasury while protecting vendors from unfair interference in their transactions with state and local agencies.*

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## RIGHTS AND DUTIES OF VENDORS AND GOVERNMENT AGENCIES UNDER FLORIDA'S NEW PUBLIC CONTRACTING LAW

DAVID L. POWELL\*

IN RECENT years, prosecutors in Florida have aggressively sought to enforce state and federal laws prohibiting price-fixing, customer allocation, and other anti-competitive practices that fall under the rubric of "bid-rigging." In particular, prosecutors have pursued anti-trust offenses involving state and local government contracts for everything from beach renourishment projects<sup>1</sup> to school lunch supplies.<sup>2</sup> During the last decade, the State alone has recovered an estimated \$80 million in civil damages and penalties from offending vendors and has convicted the vendors of criminal offenses in most cases.<sup>3</sup> Despite this, convicted vendors did not suffer even the threat of disqualification from conducting business with state and local agencies because these agencies must let contracts by competitive bidding without considering a vendor's criminal record.<sup>4</sup>

In 1989, the Legislature enacted the Public Contracting Act<sup>5</sup> to authorize disqualification of convicted vendors. Proposed by Attorney General Robert Butterworth after consultation with legislators and vendors, the measure establishes legal standards, as well as a special procedure, for determining when a vendor may be disqualified, or debarred, from doing business with state and local agencies in Florida

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The author wishes to express his appreciation to William D. Preston for his helpful suggestions in the preparation of this Article.

1. See *Suit Claims Companies Fixed Bids in Beach Project*, Orlando Sentinel, Aug. 19, 1988, at D5, col. 3.

2. See *Milk Producers Charged with Price-fixing*, Tallahassee Democrat, Feb. 8, 1989, at 1B, col. 1.

3. Staff of Fla. S., Comm. on Govtl. Ops., SB 458 (1989) Staff Analysis 1 (Apr. 18, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

4. *Id.*

5. Ch. 89-114, 1989 Fla. Laws 307 (codified at FLA. STAT. §§ 287.132, .133) (1989)). Although the legislation has no official name, in this Article the author refers to it as the Public Contracting Act.

on the basis of a criminal conviction.<sup>6</sup> The development of this comprehensive statute<sup>7</sup> may be the precursor of similar laws in other states.

This was not the first bid-rigging bill enacted by the Florida Legislature. In 1983, lawmakers enacted Chapter 83-4, Laws of Florida, in response to a series of antitrust convictions of road contractors doing business with the state Department of Transportation (DOT).<sup>8</sup> That measure provided for automatic disqualification from future DOT road work for a contractor or a related company that had been convicted of bid-rigging in dealings with government agencies anywhere in the United States.<sup>9</sup>

In 1988, drawing directly from the DOT statute, Attorney General Butterworth proposed an anti-bid-rigging bill for all other procurement in Florida.<sup>10</sup> The Legislature did not enact his proposal for several reasons. Strong opposition developed from vendors who disagreed with the Attorney General on the policy issue, or who were concerned about technical flaws and ambiguities in the bill.<sup>11</sup> In addition, legislators said other issues had a higher priority and questioned the constitutionality of such a measure.<sup>12</sup>

By the beginning of the 1989 Regular Session, the Attorney General had developed a new bill to meet many of the objections.<sup>13</sup> This bill represented a balanced, creative approach that asserted the public's interest in maintaining the integrity of the government procurement process while safeguarding vendors' interest in not being unfairly disqualified from doing business with state and local agencies. The Legis-

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6. *See id.*

7. Despite the comprehensive nature of the Act, many issues will benefit from the rule-making process. For example, the Act requires the Department of General Services (DGS) to promulgate certain rules to implement this statute. *See, e.g., id.* (codified at FLA. STAT. § 287.133(3)(a) (1989)) (requiring DGS to promulgate a form for disclosure of convictions for public entity crimes). In addition, the Division of Administrative Hearings (DOAH) may find it necessary to promulgate rules for debarment proceedings. *See id.* (codified at FLA. STAT. § 287.133(3)(e) (1989)).

8. *See* Ch. 83-4, 1983 Fla. Laws 45 (codified at FLA. STAT. §§ 337.164, .165 (1989)).

9. *See id.* § 2, 1983 Fla. Laws at 46 (codified at FLA. STAT. § 337.165(2)(a)-(b) (1989)).

10. *See* Fla. SB 743 (1988); Fla. HB 786 (1988). Because the 1989 Act evolved from the Attorney General's 1988 proposal, the differences between the 1989 bill and the 1988 proposal offer some insights into legislative intent. *See infra* text accompanying notes 20-21, 55, 121-25.

11. *See* Fla. S., Comm. on Govtl. Ops., transcript of hearing at 1 (May 23, 1988) (comments of Att'y Gen. Butterworth) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

12. S. Bousquet, *Taking the Initiative*, Miami Herald (Broward ed.), May 22, 1988, at 1BP, col. 1.

13. *See* Fla. SB 468 (1989); Fla. HB 647 (1989).

lature enacted the bill with few amendments and no significant controversy.<sup>14</sup>

## I. AGENCIES AND VENDORS COVERED BY THE ACT

As with most legislation, the definition of certain key terms is the means by which one may determine the scope and reach of the Act. Indeed, arriving at the definitions was perhaps the most arduous task in the development of this legislation.

### A. *Agencies Within the Purview of the Act*

The Act applies to virtually all business dealings by any "public entity."<sup>15</sup> Accordingly, the definition of the term "public entity" is important for determining upon which contracts the Act may prohibit a vendor from bidding.<sup>16</sup> The term is also important in the context of determining which criminal convictions may be a basis for debarment, which related companies of a convicted vendor, or "affiliates," may be subject to debarment, and which contracts or franchises of a debarred vendor may be rendered voidable in a debarment proceeding.<sup>17</sup>

A public entity includes the State of Florida, any of its departments or agencies, and any of its political subdivisions.<sup>18</sup> The term "political subdivision" is defined to include counties, cities, towns, villages, special tax school districts, special road and bridge districts, and all other districts created by the State.<sup>19</sup>

The definition of public entity in the Act is more concise, but more general, than the definition of public entity in the 1988 bill.<sup>20</sup> In effect,

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14. See Fla. H.R., Comm. on Govtl. Ops., tape recording of proceedings (Apr. 12, 1989, tape 1) (statement of Rep. Michael Langton, Dem., Jacksonville) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.); Fla. S., tape recording of proceedings (May 18, 1989, tape 3) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.) (remarks of Sen. Robert Johnson, Repub., Sarasota).

15. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(2) (1989)); see *infra* text accompanying notes 180-98 (discussing extent of disqualification).

16. See ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(f) (1989)).

17. The scope of the term "public entity" is significant in part because one is not a person under the Act unless one "bids or applies to bid on contracts for the provision of goods or services let by a *public entity*, or . . . otherwise transacts or applies to transact business with a *public entity*." *Id.* (codified at FLA. STAT. § 287.133(1)(e) (1989)) (emphasis added). The term "person" in turn is a limitation on the definition of the term "affiliate," *id.* (codified at FLA. STAT. § 287.133(1)(a) (1989)), and of the term "public entity crime." *Id.* (codified at FLA. STAT. § 287.133(1)(g) (1989)).

18. *Id.* (codified at FLA. STAT. § 287.133(1)(f) (1989)).

19. See Fla. Stat. § 1.01(8) (1989).

20. Compare ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(f) (1989)) with Fla. HB 786, § 2 (1988) (proposing FLA. STAT. § 287.31(1)(g)).

the only change that was made was that a statutorily defined term of art, "political subdivisions," was substituted for a longer, more unwieldy phrase in the 1988 bill.<sup>21</sup> This difference should not be interpreted as having any substantive significance.

A public entity, then, is any state, regional, or local governmental body in Florida. It does not include the federal government or any federal agency, or any other state or its agencies or political subdivisions.<sup>22</sup>

### B. Vendors Subject to Debarment

Two categories of vendors may be debarred under the Act.<sup>23</sup> First, a "person" convicted of certain proscribed offenses may be disqualified from the public contracting process in Florida under the Act.<sup>24</sup> Second, an "affiliate" of a convicted person also may be debarred, based solely on the other person's conviction.<sup>25</sup>

#### 1. "Persons" Who May be Debarred

Generally, a "person" includes any natural person or any business entity organized under the laws of any state or of the United States with the legal power to enter into binding contracts.<sup>26</sup> The domicile of a vendor, whether natural or corporate, is not a relevant consideration in determining whether that vendor may be debarred.

However, a vendor must meet a further qualification in order to be a person under the Act; that is, the vendor must be one that "bids on or applies to bid on contracts for the provision of goods or services let by a public entity, or . . . [that] transacts or applies to transact business with a public entity."<sup>27</sup> Because a public entity is defined as a state or local governmental body in Florida,<sup>28</sup> a vendor is not a person under the Act unless that vendor does business with a state or local

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21. Compare FLA. STAT. § 1.01(8) (1989) and ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(f) (1989)) with Fla. HB 786, § 2 (1988) (proposing FLA. STAT. § 287.31(1)(g)).

22. See ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(f) (1989)); FLA. STAT. § 1.01(8) (1989)).

23. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(2)(a) (1989)).

24. See *id.*

25. See *id.*

26. *Id.* (codified at FLA. STAT. § 287.133(1)(e) (1989)).

27. *Id.* Whether a vendor is governed by the competitive bidding requirements of sections 287.052 and 287.057, Florida Statutes (1989), the Consultants' Competitive Negotiation Act, *id.* § 287.055, or some other procurement law, it would fall within the purview of the Act if it provides "goods or services." See *infra* text accompanying notes 184-98.

28. See *supra* text accompanying notes 18-19.

agency in Florida. Thus, a vendor who does not do business with such an agency is not a person under the Act and may not be debarred.<sup>29</sup>

If the vendor is not a natural person, however, the criminal acts of certain officials or employees may be imputed to it. This result is achieved by including within the definition of person all "those officers, directors, executives, partners, shareholders, employees, members, and agents who are active in management of an entity."<sup>30</sup> Thus, this provision represents a balance between the needs of the public and the needs of vendors. On the one hand, by holding vendors responsible for the acts of certain individuals, the provision creates an incentive for large corporations to police their managers and key employees. On the other hand, allowing individual guilt to be imputed to a business entity only when the guilty individual has been "active in management" of the entity protects a corporation from being punished for the misdeeds of a rogue employee whose acts did not represent conscious corporate policy.

## 2. "Affiliates" Subject to Debarment

In some circumstances, individuals or entities other than those convicted of a proscribed offense may be disqualified from conducting business with state and local agencies. Such individuals or entities are affiliates of a convicted person.<sup>31</sup> Here, too, acts of a responsible corporate official may be imputed to the vendor, but only if that individual was "active in the management" of the affiliate.<sup>32</sup> A person whose conviction is the basis for an affiliate's disqualification need not be debarred as a predicate for the affiliate being debarred.<sup>33</sup> However, because an affiliate may be disqualified from public procurement without having committed a crime—in other words, strictly on the ba-

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29. This geographic limitation creates an incentive for regional and national corporations to conduct business with state and local agencies in Florida by means of separate, wholly owned Florida subsidiaries. Such a step would prevent misdeeds by employees doing business with governmental entities outside of Florida, regardless of whether such offenses were committed with the knowledge of the company, from jeopardizing the vendor's business with state and local governments in Florida.

30. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(e) (1989)).

For example, suppose Mr. X is vice-president for sales of ABC Corporation, a supplier of widgets to various local governments in Florida. In order to make a big widget sale, Mr. X bribes some procurement officials in Tropical County, Florida, and he is subsequently convicted. However, for various reasons, ABC Corporation is not charged with any crime. Nevertheless, ABC Corporation may be subject to debarment because Mr. X was an officer of the company, active in its management, and his conviction of a public entity crime may be imputed to the company.

31. *Id.* (codified at FLA. STAT. § 287.133(1)(a) (1989)).

32. *Id.*

33. *See id.* (codified at FLA. STAT. § 287.133(1)(g) (1989)).



sis of its associations—affiliate status must be demonstrated by clear and convincing evidence.<sup>34</sup>

The principal reason for extending the threat of debarment to affiliates of a convicted vendor is that this eliminates a means by which the unscrupulous vendor could otherwise avoid the effects of disqualification—that is, by setting up a new corporate shell and transferring the assets of the debarred vendor to it.<sup>35</sup>

This goal is balanced against other needs. Allowing any corporate relative anywhere in the country to be an affiliate could create the specter of a Florida subsidiary being debarred on the basis of misdeeds by a small subsidiary in another part of the country. Particularly in large corporations with highly decentralized management structures, such a prospect would be highly unfair. Accordingly, a sufficient nexus must exist between the convicted person and the Florida affiliate in order to justify disqualification of the affiliate on the basis of its association with the convicted person.<sup>36</sup>

For these reasons, the Act includes dual definitions of the term “affiliate.” The purpose of each of these definitions is to prevent a convicted vendor from avoiding the effects of debarment merely by creating a new business entity for the conduct of business with government agencies.<sup>37</sup> Under the first definition, an affiliate is “a predecessor or successor of a person convicted of a public entity crime.”<sup>38</sup> Under the second definition, an affiliate is “an entity under the control of any natural person who is active in the management of the entity and who has been convicted of a public entity crime.”<sup>39</sup>

For purposes of the second definition, the Act offers two alternative tests for determining when one person controls another person—“ownership by one person of shares constituting a controlling interest in another person, or a pooling of equipment or income among persons when not for fair market value under an arm’s length agreement.”<sup>40</sup> Meeting either test is only a prima facie showing of control;

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34. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(4) (1989)).

35. Interview with Jerome W. Hoffman, Chief, Antitrust Section, Div. of Econ. Crimes, Dep’t of Legal Affairs (Aug. 22, 1989) (available at Fla. Dep’t of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

36. *See* ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(a) (1989)).

37. Interview with Jerome W. Hoffman, *supra* note 35.

38. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(a)(1) (1989)).

39. *Id.* (codified at FLA. STAT. § 287.133(1)(a)(2) (1989)).

40. *Id.* The first of these two tests of control is a tautology. A suitable issue to be addressed by rule is the proportion of outstanding shares in a corporation which constitutes a controlling interest.

so a vendor may still adduce evidence attempting to show a control relationship did not exist.<sup>41</sup> Whichever test of control is applied, the evidence offered to establish control must satisfy the requirement for clear and convincing evidence of affiliate status.<sup>42</sup>

An additional provision includes certain partnerships as affiliates. It provides that one “who knowingly enters into a joint venture with a person who has been convicted of a public entity crime in Florida during the preceding 36 months shall be considered an affiliate.”<sup>43</sup> This provision prevents a debarred vendor from circumventing the Act by entering into a joint venture with a vendor who has not been debarred, thus creating a new entity that does not constitute an affiliate, and which is not otherwise subject to debarment.

### C. *Offenses That May be a Basis for Debarment*

Debarment of a person or an affiliate is triggered by a conviction of a specified crime, which is called a “public entity crime.” The nature of the offense, who committed the offense, and the particulars of the judicial proceeding which resulted in a conviction must be examined in order to determine whether the offense may be a basis for debarment.

#### 1. *“Public Entity Crimes”*

A “public entity crime” means:

a violation of any state or federal law by a person with respect to and directly related to the transaction of business with any public entity or with an agency or political subdivision of any other state or with the United States, including, but not limited to, any bid or contract for goods or services to be provided to any public entity or an agency or political subdivision of any other state or of the United States and involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.<sup>44</sup>

This definition includes several salient points. First, a public entity crime may involve a violation of any state or federal law involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.<sup>45</sup> Thus, a violation need not have been

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41. *See id.* (codified at FLA. STAT. § 287.133(3)(e)(5) (1989)).

42. *See id.* (codified at FLA. STAT. § 287.133(3)(e)(4) (1989)).

43. *Id.* (codified at FLA. STAT. § 287.133(1)(a)(2) (1989)).

44. *Id.* (codified at FLA. STAT. § 287.133(1)(g) (1989)).

45. *Id.*

committed against a state or local governmental entity in Florida to be a public entity crime.

Second, a violation must have been committed "by a person," meaning one who does business or seeks to do business "with a public entity,"<sup>46</sup> in order to be a public entity crime. Because a public entity is a state or local government agency in Florida,<sup>47</sup> an offense must have been committed by one who does business or seeks to do business with a state or local agency in Florida for that offense to be a public entity crime. For this reason, a violation in another state may not be a basis for debarring anyone in Florida if the violation was committed by one who does not do business or seek to do business with a state or local entity in Florida.<sup>48</sup>

Third, the offense must be "directly related to" a transaction with a public entity in order to be a public entity crime.<sup>49</sup> Thus, a conviction for customer allocation or price-fixing which involved a government agency only incidentally—in other words, a conviction involving both public and private purchasers—should not constitute a public entity crime.

## 2. "Conviction"

The term "conviction" is broadly defined. It means a finding of guilt, or a conviction without an actual adjudication of guilt, in any state or federal trial court of record.<sup>50</sup> The form of the verdict is not significant.<sup>51</sup> Thus, convictions after trial are not the only basis for debarment. In particular, the Act authorizes debarment proceedings if

46. *Id.* (codified at FLA. STAT. § 287.133(1)(e) (1989)).

47. *Id.* (codified at FLA. STAT. § 287.133(1)(f) (1989)).

48. The Attorney General's Office has adopted this interpretation. Letter from Ronald Villeda, Deputy for Exec. Bus., Off. of the Att'y Gen., Dep't of Legal Affairs, to Herbert F Darby, City Att'y, City of Lake City, Fla. (Feb. 22, 1990) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

Suppose Company *X*, a subsidiary of *XYZ* International, and Company *W*, are convicted of Sherman Act violations for agreeing to allocate between them certain widget contracts let by several western states. Neither Company *X* nor Company *W* does any business in Florida. However, Company *Y*, another subsidiary of *XYZ* International, regularly does business with the State of Florida. The Sherman Act conviction is not a public entity crime because neither Company *X* nor Company *W* does business with a state or local agency in Florida. Therefore, no one—not even Company *Y*—may be debarred in Florida on the basis of it.

49. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(g) (1989)); see also Fla. H.R., Comm. on Govtl. Ops., Subcomm. on Policy & Proc., tape recording of proceedings (Apr. 10, 1989, tape 1) (statement of Rep. Elaine Bloom, Dem., Miami Beach, discussing amendment 7 to Fla. HB 647 (1989)) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

50. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(b) (1989)).

51. See *id.*

a defendant settles a bid-rigging case with a plea of *nolo contendere* or a negotiated penalty.<sup>52</sup>

Thus, vendors facing charges that would constitute a public entity crime must note that a negotiated plea could subject them to a debarment proceeding. Because debarment is an administrative procedure, it would not be subject to the jurisdiction of the prosecutor or trial court during sentencing. However, a prosecutor or court could possibly take debarment into account as punishment during sentencing on the public entity crime.

In order for a conviction to be a basis for debarment, the charges must have been brought by indictment or criminal information after July 1, 1989.<sup>53</sup> This provision embodies the exclusively prospective nature of the Act.<sup>54</sup> Unlike the Attorney General's 1988 proposal, which would have authorized debarment on the basis of convictions or judgments entered on pleas of *nolo contendere* as far back as 1980,<sup>55</sup> the Act looks only forward. Criminal acts committed prior to July 1, 1989, may be a basis for debarment upon conviction, but only if they are based on an indictment or criminal information brought after July 1, 1989,<sup>56</sup> and obviously if they are not barred by any statutes of limitation.

#### D. Exclusions from the Act

Certain persons and activities do not fall within the purview of the Act, and therefore those persons may not be debarred and those activities may not serve as a basis for debarment. First, the Act does not apply to "any activities regulated by the Florida Public Service Commission."<sup>57</sup> No legislative history exists which helps to determine the

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52. *See id.*

53. *Id.* (codified at FLA. STAT. § 287.133(1)(b) (1989)).

54. Fla. H.R., Comm. on Govtl. Ops., Subcomm. on Policy & Proc., tape recording of proceedings (Apr. 10, 1989, tape 1) (statement of Rep. Langton on Fla. HB 647 (1989)) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

55. Fla. HB 786 (1988) (proposing FLA. STAT. § 287.31(2)(a)(5), (d)).

56. Some confusion arose on this point during legislative debate on the bill. At one point, the sponsor, Rep. Langton, averred that "any crime . . . that occurred before the enactment date of July 1, 1989, of course would not be considered." Fla. H.R., Comm. on Govtl. Ops., tape recording of proceedings (Apr. 12, 1989, tape 1) (statement of Rep. Langton) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). In fact, the plain terms of the Act refute that assertion. Only the charges or indictment and disposition by a trial court need occur after July 1, 1989, in order for the offense to be a public entity crime. See ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(b) (1989)).

57. *Id.* (codified at FLA. STAT. § 287.133(5) (1989)).

parameters of this exclusion,<sup>58</sup> but by its very terms the exclusion is directed to regulated activities rather than regulated persons. Therefore, a person regulated by the Public Service Commission (PSC) is still subject to debarment in the event of a conviction for a public entity crime.

Under the Act, debarment would prohibit such a regulated person from selling nonregulated goods and services to public entities. However, debarment would prevent neither a regulated person from providing regulated goods or services under a franchise or contract nor the debarred vendor from seeking additional contracts or franchises with public entities for the provision of regulated services.

Among other things, this exclusion would preclude nullification of any contract or franchise from a state or local agency under which a public utility provides regulated services to the public entity or the general public.<sup>59</sup> Thus, it would prevent the interruption of vital public services from certain regulated monopolies.

Second, the Act does not apply to "the purchase of goods or services made by any public entity from the Department of Corrections."<sup>60</sup> This exclusion prevents the Act from barring the purchase of goods and services from the state prison system simply because some inmates involved in producing those goods and services were convicted of a public entity crime.<sup>61</sup>

The same objective applies to the third exclusion, which exempts "the purchase of goods or services . . . from the nonprofit corporation organized under chapter 946."<sup>62</sup> This type of corporation serves as a private sector vehicle for the operation of prison industry programs.<sup>63</sup> Thus, this exclusion also protects the prison system's rehabilitation programs from disqualification.

The fourth exclusion is for "the purchase of goods or services . . . from any accredited nonprofit workshop certified under ss. 413.032-

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58. This exclusion was added on the Senate floor. FLA. S. JOUR. 398 (Reg. Sess. May 18, 1989) (amendment 4 to Fla. CS for SB 458). However, the amendment was adopted without any explanation by the sponsor. Fla. S., tape recording of proceedings (May 18, 1989, tape 3) (remarks of Sen. Johnson) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

One authority who participated in the drafting of this exclusion stated that its objective is to prevent an electric utility from being disqualified from holding public service franchises in Florida if one of the utility's unregulated subsidiaries commits a public entity crime. Interview with Jerome W. Hoffman, *supra* note 35.

59. See ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(5) (1989)).

60. *Id.*

61. *See id.*

62. *Id.*

63. See FLA. STAT. § 946.504 (1989).

413.037.”<sup>64</sup> This exclusion exempts any nonprofit workshop for blind or handicapped persons if it is accredited by the Commission for Purchase from the Blind or Other Severely Handicapped for purposes of selling products and services to state agencies at commission-set prices.<sup>65</sup>

## II. REPORTING AND INVESTIGATING PUBLIC ENTITY CRIMES

The Act imposes new duties on state and local government agencies and vendors to report convictions that serve as a basis for a disqualification proceeding.<sup>66</sup> It also gives the agency charged with implementing the Act, the Department of General Services (DGS), new powers to conduct investigations to determine whether a debarment proceeding must be held.<sup>67</sup>

### A. *The Duty to Report a Conviction*

The Act imposes two different requirements on vendors for the reporting of a conviction which would be a basis for a debarment proceeding. First, any person who bids on contracts with a public entity, or who otherwise transacts business with a state or local government agency in Florida, is required to notify DGS within thirty days after a conviction for a public entity crime applicable to that person.<sup>68</sup> Such a vendor also must notify DGS after an affiliate has been convicted of a public entity crime.<sup>69</sup>

This duty arises upon entry of an adjudication of guilt, or upon a conviction without an adjudication, and does not depend upon the outcome of any appellate review of the trial court decision.<sup>70</sup> Because the duty extends to the reporting of a conviction of an affiliate, those who do or seek to do business with government agencies in Florida have an implied obligation at all times to make themselves aware of the legal status of any vendor which would be an affiliate under the Act.

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64. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(5) (1989)).

65. FLA. STAT. §§ 413.032-.037 (1989).

66. See ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(b) (1989)).

67. See *id.* (codified at FLA. STAT. § 287.133(3)(e)(1) (1989)).

68. *Id.* (codified at FLA. STAT. § 287.133(3)(b) (1989)).

69. *Id.*

70. See *id.* The Act authorizes debarment even though a convicted person may seek appellate review of his conviction. See *id.* (codified at FLA. STAT. § 287.133(3)(f) (1989) (establishing procedure for restoration of qualifications to bid after reversal of conviction on appellate review)). Therefore, the duty to report attaches upon occurrence of the conviction regardless of the outcome of an appeal.

A vendor also has a duty to report a conviction at the onset of certain transactions. The Act requires that any person entering into a contract with a public entity in excess of a certain amount file a disclosure statement on a form to be adopted by DGS.<sup>71</sup> On this form, the vendor is required to disclose its name, its business address, and whether it or an affiliate has been convicted of a public entity crime since July 1, 1989.<sup>72</sup>

Certain circumstances exist in which a vendor need not disclose a conviction. If a convicted person, or one whose conviction could have been the basis for a vendor's disqualification, went through a debarment proceeding based on the conviction and was not debarred, then the vendor filing the disclosure statement need not disclose the conviction.<sup>73</sup> In addition, if a convicted vendor, or one whose conviction could have been the basis for a person's disqualification, was debarred for a conviction but its qualification to bid was restored prior to expiration of the penalty period, then the vendor filing the disclosure need not disclose the conviction.<sup>74</sup> In all other circumstances, a conviction for a public entity crime must be disclosed if the conviction was after July 1, 1989.<sup>75</sup>

The Act does not impose a penalty for failure to fulfill either duty to report a conviction. However, whether one has complied with these requirements is a factor that must be considered during a debarment proceeding.<sup>76</sup> Because the failure to report a conviction may weigh against a vendor seeking to avoid debarment, the Act creates an incentive for prompt reporting.

A public entity also has a duty to report a conviction of which it is aware. It must notify DGS within ten days of learning that a person has been convicted of a public entity crime.<sup>77</sup> The Act specifies that the notification must be in writing, and further requires that the government agency transmit to DGS information that it has on the conviction.<sup>78</sup> The obligation extends to convictions of any person who

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71. *Id.* (codified at FLA. STAT. § 287.133(3)(a) (1989)). Disclosure is required only if the contract or transaction amounts to more than the "category two" threshold amount. *See* FLA. STAT. § 287.017(1)(b) (1989). As of August, 1989, that amount was \$3,000. *Id.* However, the amount may be adjusted annually by rule, based on changes in a nationally recognized price index. *Id.* § 287.017(2)(a); *see also* FLA. ADMIN. CODE R. 13A-1.001(24) (Nov. 1988) (promulgating specific procedures for indexing by the Division of Purchasing).

72. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(a) (1989)).

73. *Id.* (codified at FLA. STAT. § 287.133(3)(a)(3) (1989)).

74. *Id.*

75. *See id.*

76. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(i) (1989)).

77. *Id.* (codified at FLA. STAT. § 287.133(3)(b) (1989)).

78. *Id.*

bids on business with the specific agency or otherwise conducts business with the agency. This duty does not appear to require a government agency to report on convictions of persons who are not doing business with that agency. In any event, no penalty exists for failing to do so.

### B. *The Power to Investigate a Conviction*

The Act also authorizes DGS to investigate whenever it receives "reasonable information" that a person or a vendor's affiliate has been convicted of a public entity crime.<sup>79</sup> The Act does not specify what constitutes reasonable information, but typically it could be a report from a vendor, a competing vendor, or a state or local agency which recognizes a conviction under the Act.

The requirement that the information be reasonable before DGS may investigate implies that DGS must take steps to assess the credibility of the information. Ordinarily, DGS may be able to establish that a conviction had occurred simply by acquiring a certified copy of the judgment and supporting court records to show that the person convicted is subject to debarment. Additional information could be developed through discovery, if the vendor requests a formal debarment hearing.<sup>80</sup>

DGS has certain powers to conduct formal investigations to determine whether a conviction under the Act has occurred.<sup>81</sup> The only precondition is that the agency have "reason to believe that a person or an affiliate has been convicted of a public entity crime."<sup>82</sup> This requirement implies that the agency has an obligation to assess the credibility of a conviction report prior to initiating the formal investigation. For example, an investigation based solely upon an anonymous phone call to the agency might subject the vendor to unnecessary embarrassment and would therefore be an abuse of the agency's discretion.

This investigatory power should be useful in establishing whether an affiliate relationship exists between a convicted person and one who has not been convicted but appears to be otherwise subject to debarment. The agency may require a convicted person, or one who appears to be an affiliate, to give a deposition, answer interrogatories,

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79. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(1) (1989)).

80. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2) (1989)); *see also* FLA. STAT. § 120.58(1)(b) (1989) (availability of discovery in agency proceedings).

81. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(c) (1989)).

82. *Id.*



or produce documents and tangible evidence for inspection and copying.<sup>83</sup>

In using these discovery tools, DGS must adhere to the applicable provisions of the Florida Rules of Civil Procedure.<sup>84</sup> Thus, DGS may seek relevant information that would not be admissible as evidence so long as it is calculated to lead to admissible evidence.<sup>85</sup> DGS may not seek privileged information<sup>86</sup> or work-product materials prepared in anticipation of litigation.<sup>87</sup> Additionally, DGS may seek an order compelling discovery,<sup>88</sup> and a vendor may seek a protective order.<sup>89</sup> Either DGS or the vendor would have to apply to the Division of Administrative Hearings (DOAH) for either type of order.<sup>90</sup>

It is not clear whether the agency must adhere to Rule 1.290, Florida Rules of Civil Procedure, for taking a deposition in preparation for a formal debarment investigation. On the one hand, the Act provides that DGS may issue a "written demand" to take a vendor's deposition.<sup>91</sup> The Act is silent on any preliminary requirements which DGS must meet in order to conduct such an examination. Conceivably, DGS could require a vendor to give a deposition without any authorization at all from an impartial arbiter.

On the other hand, the Act expressly requires that depositions be taken in accord with applicable portions of the Florida Rules of Civil Procedure.<sup>92</sup> The rules require that depositions be taken after commencement of a civil action;<sup>93</sup> however, the taking of depositions may be authorized prior to commencement of an action under Rule 1.290.<sup>94</sup> This rule may be interpreted as limiting DGS's discretion to

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83. *Id.* Discovery during a formal investigation may also be effected by deposing and serving interrogatories and requests to produce on an officer, director, executive, partner, shareholder, employee, member, or agent of a vendor if that natural person is active in the management of the vendor, because natural persons meeting those criteria expressly fall within the definitions of "[a]ffiliate" and "[p]erson." *Id.* (codified at FLA. STAT. §§ 287.133(1)(a)(2), (e) (1989)).

The statute does not authorize the serving of requests for admission during a formal investigation prior to commencement of a debarment proceeding. Therefore, this means of discovery is not available to DGS until a petition is filed for a formal hearing under section 120.57(1), Florida Statutes.

84. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(c) (1989)).

85. See FLA. R. CIV. P. 1.280(b)(1).

86. See *id.*

87. See *id.* 1.280(b)(2).

88. See *id.* 1.380(a).

89. See *id.* 1.280(c).

90. See *id.* 1.280(c), 1.380(a)(1).

91. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(c) (1989)).

92. *Id.*

93. FLA. R. CIV. P. 1.310(a) (depositions by oral examination); *id.* 1.320(a) (depositions upon written questions).

94. See *id.* 1.290(a).

depose vendors prior to initiation of a debarment proceeding. If Rule 1.290 applies to formal investigations, then DGS would be required to file a verified petition, with DOAH, and receive an order from a hearing officer to depose a vendor prior to initiation of a debarment proceeding.

This latter interpretation of the Act would seem to be more prudent for two reasons. First, it would ensure that a proper basis exists for the conduct of a deposition. Second, it would establish an impartial forum for the resolution of any dispute that might arise during the formal investigation. For example, if DGS sought an order to compel, or if the vendor sought a protective order, a hearing officer would already have jurisdiction and could quickly resolve the dispute.

The proper procedure for the use of interrogatories and requests for production during a formal investigation is clearer. The Act authorizes their use prior to commencement of a debarment proceeding,<sup>95</sup> negating the requirement in the Rules of Civil Procedure that an action must have been commenced before interrogatories or requests to produce may be served.<sup>96</sup> Unlike the situation with depositions, the Rules of Civil Procedure do not contain a similar procedure for the use of these discovery devices prior to commencement of an action. Because the Act expressly authorizes the use of discovery devices prior to initiation of a debarment proceeding, the Act appears to authorize DGS to serve interrogatories or requests to produce subject only to its own rules of procedure.

The Rules of Civil Procedure do provide that a party must respond to interrogatories and requests to produce within thirty days of service, but that a defendant may respond within forty-five days of the initial service of process.<sup>97</sup> A reasonable application of these rules in a formal investigation preparatory to a debarment proceeding would be that a vendor would have forty-five days to respond because its position would be analogous to a defendant at the onset of a civil action.

### III. PROCEDURE FOR DISQUALIFYING A VENDOR

Once DGS has determined that a person has been convicted of a public entity crime, it must initiate the debarment process as to that person or an affiliate.<sup>98</sup> In a contested case, the debarment proceeding will result in a final order either allowing the vendor to continue trans-

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95. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(c) (1989)).

96. FLA. R. CIV. P. 1.340(a) (interrogatories); *id.* 1.350(b) (requests to produce).

97. *Id.* 1.340(a) (interrogatories); *id.* 1.350(b) (requests to produce).

98. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(1) (1989)).

acting business with public entities, or debarring the vendor by placing its name on a convicted vendor list.<sup>99</sup>

### A. *Proceedings to Debar Persons and Affiliates*

The procedure governing a debarment proceeding differs in significant respects from ordinary adjudicatory proceedings under chapter 120, Florida Statutes.<sup>100</sup> Where an adjudicatory proceeding typically results in a recommended order from the DOAH hearing officer<sup>101</sup> and a final order from the agency head,<sup>102</sup> a contested debarment proceeding will result in a final order from the hearing officer.<sup>103</sup> The Act requires DGS to refer a petition for a formal debarment proceeding to DOAH.<sup>104</sup> The Governor and Cabinet, who collectively serve as the agency head of DGS,<sup>105</sup> do not have final order authority in a debarment proceeding.<sup>106</sup>

The debarment procedure begins when DGS serves on a vendor or affiliate a written notice of intent to debar.<sup>107</sup> Individual notice must be served on a vendor before it may be debarred.<sup>108</sup> Therefore, the Act requires that each member in a family of related companies receive individual notice before it may be disqualified from doing business with state and local agencies in Florida.

If the vendor wishes to avoid debarment, it must file a petition for a formal adjudicatory hearing under section 120.57(1), Florida Statutes,

99. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(d) (1989)).

100. Compare *id.* (codified at FLA. STAT. § 287.133(3)(e)(2) (1989)) with FLA. STAT. § 120.57(1)(b)(9) (1989).

101. See FLA. STAT. § 120.57(1)(b)(9) (1989). An agency head or member of a collegial body which sits as an agency head may conduct the formal hearing. *Id.* § 120.57(1)(a)(1). In that event, a hearing officer would not enter a recommended order for the agency head.

102. *Id.* § 120.57(1)(b)(10).

103. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(2)(d) (1989)).

104. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(b) (1989)).

105. FLA. STAT. § 20.22(1) (1989).

106. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(2)(d)-(e) (1989)).

107. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(1) (1989)). The statute requires that the notice advise the vendor of the right to a formal hearing, the procedure to be followed, and applicable time requirements. *Id.* Because such proceedings are governed by section 120.57(1), Florida Statutes, the notice must conform to requirements for a clear point of entry under the rules of Florida administrative procedure. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2) (1989)); see, e.g., *Capelletti Bros. v. Department of Transp.*, 362 So. 2d 346 (Fla. 1st DCA 1978) (explaining clear point of entry); see also FLA. ADMIN. CODE R. 28-5.111 (Aug. 1989).

108. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(1) (1989)).

within twenty-one days of receiving the notice of intent from DGS.<sup>109</sup> If the vendor does not file a petition for a formal hearing within twenty-one days of notice, DGS must enter a final order disqualifying the person or affiliate from transacting business with state and local agencies in Florida for three years.<sup>110</sup>

The Act establishes a series of deadlines within which the key steps in the adjudicatory process must take place. This timetable is considerably shorter than that which ordinarily applies in adjudicatory proceedings.<sup>111</sup> The Act requires DGS to refer the petition to DOAH within five days of filing of the petition and requires the director of DOAH to appoint, within five days of referral, a hearing officer to preside over the debarment proceeding.<sup>112</sup>

Within thirty days of the appointment, the hearing officer must conduct a formal evidentiary hearing, unless the parties stipulate to a later date.<sup>113</sup> Within thirty days of the hearing or the receipt of the hearing transcript, whichever date is later, the hearing officer must enter a final order.<sup>114</sup> The final order is subject to judicial review in a district court of appeal as provided in section 120.68, Florida Statutes.<sup>115</sup>

Prior to entry of the final order, the vendor and DGS may negotiate a settlement. The Act expressly authorizes informal disposition by stipulation, agreed settlement, or consent order.<sup>116</sup> If a settlement is concluded by DGS and the vendor, the hearing officer is required to

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109. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2) (1989)). Under the rules of Florida administrative procedure, an informal hearing may be conducted by the agency. The hearing results in a final order by the agency head. FLA. STAT. § 120.57(2) (1989). Thus, a final order after a formal debarment hearing would have been entered by a hearing officer, but a final order after an informal debarment hearing could have been entered by DGS. Because this anomaly would have resulted in different administrative authorities making legally binding interpretations of the same provisions, the Act does not allow an informal hearing under section 120.57(2), Florida Statutes, in a debarment proceeding. *See* ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(2) (1989)). The prohibition on informal hearings does not prevent negotiated settlements. *See infra* text accompanying note 116-17.

110. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(1) (1989)).

111. *Compare id.* (codified at FLA. STAT. § 287.133(3)(e)(2) (1989)) with FLA. STAT. § 120.57(1)(b) (1989).

112. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(2)(b) (1989)).

113. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(c) (1989)).

114. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(d) (1989)).

115. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(e) (1989)).

116. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(f) (1989)). Because one may not seek an informal hearing with the agency, *see supra* note 108, the proper means to settle a case after issuance of a notice of intent is to file a petition for a formal hearing and then negotiate a settlement with DGS. Presumably, the Governor and Cabinet, as agency head of DGS, would have a role in arriving at a settlement of a debarment proceeding despite their lack of final order authority. The role of the Governor and Cabinet in such a situation would be a suitable subject for rulemaking.

adopt the terms of the settlement in a final order.<sup>117</sup> In this way, the parties may settle a case on terms which could include, for example, a period of disqualification of less than thirty-six months.

### B. *The Public Interest Test*

The Act charges the hearing officer with the task of determining whether it is in the public interest for the vendor to be disqualified from transacting business with state and local agencies in Florida.<sup>118</sup> Although certain presumptions may arise based upon the evidence,<sup>119</sup> DGS bears the burden of proving that the public interest is served by the debarment of a vendor.<sup>120</sup>

This feature of the Act is a significant departure from the 1983 DOT statute and the Attorney General's 1988 proposal.<sup>121</sup> Both of those earlier measures provided for automatic disqualification of a vendor upon conviction for a public entity crime, without taking into account any of the circumstances.<sup>122</sup> This approach was criticized during development of the Act because, under such a regimen, no one would make a reasoned judgment based upon the particulars of each case.<sup>123</sup>

Under the Act, the public interest determination must be made by examining eleven factors and weighing the evidence adduced as to each of them. These factors were derived from a list of issues which the 1983 DOT statute<sup>124</sup> and the Attorney General's 1988 proposal<sup>125</sup> set forth for considering whether to restore the qualifications of a debarred vendor. Because those factors did not constitute a public interest test *per se*, additional factors were added in an attempt to encompass the whole range of public concerns which might be relevant in a debarment proceeding.

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117. *Id.*

118. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3) (1989)).

119. *See infra* text accompanying notes 162-71.

120. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(4) (1989)).

121. *Compare id.* (codified at FLA. STAT. § 287.133(3)(e)(3) (1989)) with FLA. STAT. § 337.165(2)(b) (1989) and Fla. HB 786, § 1 (1988) (proposing FLA. STAT. § 287.31(2)(e)).

122. *See* FLA. STAT. § 337.165(2)(b) (1989); Fla. HB 786, § 1 (1988) (proposing FLA. STAT. § 287.31(2)(d)-(e)).

123. Memorandum from William D. Preston and David L. Powell, Att'ys, Hopping Boyd Green & Sams, to Jerome Hoffman, Chief, Antitrust Section, Div. of Econ. Crimes, Dep't of Legal Affairs (Nov. 14, 1988) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

124. FLA. STAT. § 337.165(2)(d)(1)-(d)(6) (1989).

125. Fla. HB 786, § 1 (1988) (proposing FLA. STAT. § 287.31(2)(f)(1)-(f)(6)).

These eleven factors are points of consideration for the hearing officer. Determining the public interest in any case is not a matter of deciding which party prevails in an evidentiary battle on a majority of the factors. Rather, the hearing officer must come to a judgment about the public interest based upon the totality of the evidence. In theory at least, evidence adduced on even one factor in a particular case may outweigh countervailing evidence on all the others.

### 1. *Conviction for a Public Entity Crime*

The first factor in the public interest test is “[w]hether the person or affiliate committed a public entity crime.”<sup>126</sup> DGS must prove that the person was convicted, or is an affiliate of one so convicted. If the agency fails to carry the burden on this issue, then the hearing officer must enter a final order which does not place the vendor on the convicted vendor list.<sup>127</sup>

Ordinarily, evidence of the conviction of a person will be sufficient. If a business entity is to be debarred by imputing to it the conviction of one of its key personnel,<sup>128</sup> then DGS must prove that such an individual was “active in management” of the entity. If the vendor is to be debarred merely on the basis of its status as an affiliate, then DGS must demonstrate affiliate status by clear and convincing evidence.<sup>129</sup>

### 2. *Nature and Details of the Offense*

The second factor to be considered is “[t]he nature and details of the public entity crime” which is the basis for the proceeding.<sup>130</sup> This factor requires the hearing officer to examine the actual offense and reflect on its particulars in determining the extent to which the crime itself suggests that the public would be better served by denying the vendor the opportunity to do business with government agencies.

While any of the enumerated public entity crimes may be the basis for debarment and guilty vendors surely are deserving of condemna-

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126. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3)(a) (1989)).

127. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(4) (1989)). A vendor should be able to force DGS to come forward with its proof on this pivotal issue early in the formal proceeding by service of a motion for summary final order. *See* FLA. ADMIN. CODE R. 221-6.030 (1986).

A vendor may not prove it has not been convicted of a public entity crime, or that it is not an affiliate of one so convicted, merely by means of an affidavit. An affidavit to either effect may be introduced in a debarment proceeding but, without more, is not competent substantial evidence to support a finding of fact on either issue. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(5) (1989)).

128. *See* Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(e) (1989)).

129. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(4) (1989)).

130. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(b) (1989)).

tion, some crimes are more pernicious than others. For example, a distinction may be drawn between swindling the public without the involvement of government personnel and crimes which include as an integral feature the corruption of public officials. Distinctions such as this may be taken into account under this factor.<sup>131</sup>

### 3. *Degree of the Vendor's Culpability*

The third factor is the degree of culpability of the person or affiliate to be debarred.<sup>132</sup> Drawn from the 1983 DOT Act,<sup>133</sup> this factor enables the hearing officer to consider the relative guilt of the vendor in the proceeding. If the vendor in the proceeding actually committed the public entity crime, then this factor would militate toward debarment. If, however, the vendor facing debarment is only an affiliate of the person who committed the public entity crime, then this factor might not weigh as heavily toward disqualification of the vendor.

In addition, this factor allows the hearing officer to consider the extent to which a vendor condoned the offense. An offense committed as part of a vendor's conscious policy may weigh more heavily in favor of debarment than one committed by an employee acting without direction from superiors or contrary to a vendor's normal procedures.

### 4. *Payment of Damages or Penalties*

The fourth factor is the "[p]rompt or voluntary payment of any damages or penalty as a result of the conviction."<sup>134</sup> This factor allows the hearing officer to consider whether a convicted person paid any monetary damages to the agency that was the victim of the public entity crime which is the basis of the proceeding, or paid any court-imposed penalty.<sup>135</sup> It is an inducement for vendors to quickly settle accounts with any governmental victims of bid-rigging crimes.

Also based on a factor in the 1983 DOT Act,<sup>136</sup> this factor presents certain definitional problems. For one thing, it does not make clear what is meant by "prompt." For another, it does not define "voluntary." No one voluntarily pays damages or a fine; one does so because a court requires it. A reasonable construction of this factor is that it relates to whether a convicted vendor paid any damages or pen-

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131. *Id.*

132. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(c) (1989)).

133. FLA. STAT. § 337.165(2)(d)(1) (1989).

134. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3)(d) (1989)).

135. *See id.*

136. FLA. STAT. § 337.165(2)(d)(2) (1989).

alty when due without the necessity of the governmental victim instituting legal proceedings to collect. Thus, the posting of a bond necessary to undertake an appeal should satisfy this requirement.<sup>137</sup>

This factor would seem to have limited efficacy in certain debarment proceedings. If the Act is read literally, the failure of a convicted individual to pay, promptly or voluntarily, any damages or penalty related to a conviction could be used against his corporate employer even though the employer may not have had any power over whether the penalty or damages were paid. Given the concern that vendors not be unfairly debarred simply on the basis of their association with someone who has been convicted,<sup>138</sup> such a construction should be avoided when an employer who has not been convicted of any wrongdoing is nevertheless subject to debarment on the basis of another's crime.

### 5. *Cooperation with the Authorities*

The fifth factor to be considered is "[c]ooperation with state or federal investigation or prosecution of any public entity crime."<sup>139</sup> Also based on a similar factor in the 1983 DOT statute,<sup>140</sup> this factor allows the introduction of evidence that the vendor has cooperated, or failed to cooperate, with the authorities in investigating or prosecuting a public entity crime.<sup>141</sup> The evidence of cooperation need not relate to the crime which triggered the debarment proceeding.<sup>142</sup>

This factor is limited by a proviso which precludes the hearing officer from considering as a lack of cooperation any "good faith exercise of any constitutional, statutory, or other right during any portion of the investigation or prosecution of any public entity crime."<sup>143</sup> This

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137. See FLA. R. APP. P. 9.310(b)(1), (c)(1)-(2). This interpretation is supported by the provision creating a presumption that a vendor should not be debarred if it takes certain remedial steps, including the "prompt payment of damages, or posting of a bond." Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3)(k) (1989)) (emphasis added). Those who took part in the drafting of this legislation concur in this interpretation. See Interview with Jerome W. Hoffman, *supra* note 35.

138. This concern is most clearly seen in the requirement that a vendor not be debarred as an affiliate without clear and convincing evidence of affiliate status. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(4) (1989)); see *supra* text accompanying note 34.

139. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3)(e) (1989)).

140. FLA. STAT. § 337.165(2)(d)(3) (1989).

141. See ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3)(e) (1989)).

142. See *id.* The hearing officer must consider cooperation in the investigation of any public entity crime.

143. *Id.*



language was included, among other reasons, to ensure that a vendor's plea of not guilty in a criminal proceeding could not be considered a lack of cooperation with the authorities in any subsequent debarment proceeding.<sup>144</sup>

A vendor's assertion of any procedural rights in the debarment proceeding itself should not be counted against it. Because that proceeding does not exist for the purpose of the "investigation or prosecution of a public entity crime,"<sup>145</sup> the exercise of any legislatively authorized rights in the debarment proceeding would not hinder law enforcement officers in the ferreting out of public entity crimes.

### 6. *Disassociation from Those Convicted*

The sixth factor in the public interest test is "[d]isassociation from any other persons or affiliates convicted of the public entity crime."<sup>146</sup> This factor is similar to a factor in the 1983 DOT Act, but it appears to be framed more narrowly than that factor because it focuses only on those "convicted of the public entity crime" which triggered the proceeding rather than those "involved" in the crime.<sup>147</sup>

This factor may be examined in varying ways, depending upon the facts of the case. If the offense which triggered the proceeding was committed by any "officers, directors, executives, partners, shareholders, employees, members, and agents who are active in management,"<sup>148</sup> the vendor would have to take whatever steps were necessary to sever the relationship, such as discharging the culpable employee. In the case of an entity with affiliate status as the successor of a convicted entity, satisfying this criterion would seem to require the impossible task of rewriting history.

### 7. *Self-Policing to Prevent Public Entity Crimes*

The seventh factor to be considered is "[p]rior or future self-policing by the person or affiliate to prevent public entity crimes."<sup>149</sup> Significantly, this factor is broad enough to allow a vendor facing debarment to introduce evidence that it conducted a self-policing program prior to the conviction or that it has established a program since the offense in order to prevent a recurrence.

144. Interview with Jerome W. Hoffman, *supra* note 35.

145. See ch. 89-114, § 1, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.132) (1989)).

146. *Id.* § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3)(f) (1989)).

147. Compare *id.* with FLA. STAT. § 337.165(2)(d)(4) (1989).

148. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(e) (1989)).

149. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(g) (1989)).

The Act does not specify what constitutes self-policing, so vendors have no guidelines as to what efforts might be relevant under this factor. Therefore, vendors should be creative and aggressive in developing internal programs to educate managers and employees as to what actions occurring during the course of seeking business from public entities, whether committed with criminal intent or inadvertently, would constitute a proscribed offense.

#### 8. *Reinstatement or Clemency*

The eighth factor in the public interest test is “[r]einstatement or clemency in any jurisdiction in relation to the public entity crime at issue in the proceeding.”<sup>150</sup> Under this factor, a hearing officer in a Florida debarment proceeding may take into account how other jurisdictions have treated the crime at issue. For example, the hearing officer can consider whether the originating jurisdiction has removed any disability by restoring the vendor’s right to bid on and receive public contracts. Alternatively, a hearing officer may consider whether the vendor has received a pardon or other form of clemency for the public entity crime.<sup>151</sup>

In most cases, this factor will not be significant because DGS will initiate debarment soon after conviction—indeed, perhaps while the underlying conviction is on appeal—so that the convicted person will not have had sufficient opportunity to seek reinstatement or clemency.

#### 9. *Notification of DGS*

The ninth factor is “[c]ompliance by the person or affiliate with the notification provisions” which require a vendor to report to DGS when it or an affiliate has been convicted of a public entity crime.<sup>152</sup>

As discussed earlier, the Act imposes two duties on vendors who do business, or who wish to do so, with state or local agencies in Florida.<sup>153</sup> The Act requires a vendor, prior to entering into a contract, to disclose whether it or an affiliate has been convicted of a public entity crime since July 1, 1989.<sup>154</sup> Furthermore, a person must notify DGS within thirty days of being convicted, or an affiliate’s being convicted, of a public entity crime.<sup>155</sup>

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150. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(h) (1989)).

151. *See id.* (codified at FLA. STAT. § 287.133(3)(f)(1)-(2) (1989)) (removal proceedings).

152. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(i) (1989)).

153. *See supra* text accompanying notes 68-76.

154. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(a)(3) (1989)).

155. *Id.* (codified at FLA. STAT. § 287.133(3)(b) (1989)).

This factor allows the hearing officer to consider whether the vendor has discharged its legal duties. If a vendor duly reports a conviction, such compliance may militate against debarment. Failure to comply, on the other hand, would militate in favor of disqualification. Thus, inclusion of this factor creates an incentive for vendors to comply with the reporting requirements of the Act.

#### 10. *Need for Market Competition*

The tenth factor to be considered is "[t]he needs of public entities for additional competition in the procurement of goods and services in their respective markets."<sup>156</sup> Based upon a factor in the 1983 DOT statute,<sup>157</sup> it directs the hearing officer's inquiry to the effects of debarment on the state and local agencies which otherwise would be able to do business with the debarred vendor, and through them, the public at large. This factor allows both DGS and the vendor to adduce evidence directed to the issue of whether debarring the vendor would adversely effect state or local government agencies in procuring whatever goods or services the vendor provides.

In addition, this factor provides a basis for state or local agencies to intervene in a debarment proceeding directed at a vendor by whom they are served. A government agency could intervene in a debarment proceeding because its substantial interests would be affected by the proceeding through loss of a needed supplier.<sup>158</sup>

#### 11. *Mitigation for Good Citizenship*

The eleventh factor in the public interest test is "[m]itigation based upon any demonstration of good citizenship by the person or affiliate."<sup>159</sup> The good deeds ordinarily brought before the hearing officer to address this factor could be past or future, one-time-only or continuing commitments.<sup>160</sup>

This factor is a catch-all designed to allow a vendor to show any socially responsible acts which would be a basis to conclude that the public would be better served by allowing the vendor to continue doing business with government agencies. Under this factor, the hearing officer could consider either past good deeds of the vendor or the effect of debarment on a vendor's pattern of civic activity and philan-

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156. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(j) (1989)).

157. *See* FLA. STAT. § 337.165(2)(d)(6) (1989).

158. *See* FLA. ADMIN. CODE R. 221-6.010 (1986) (intervention).

159. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3)(k) (1989)).

160. *See id.* The provision considers *any* demonstration of good citizenship.

thropy. Such considerations are not unprecedented in Florida in proceedings of this nature.<sup>161</sup>

### C. Presumptions

The Act creates a series of presumptions that a hearing officer must take into account during a debarment proceeding. These presumptions serve to shift the burdens of production and persuasion back and forth between the parties, depending upon the evidence adduced. As already discussed, DGS initially must demonstrate that a person has been convicted, or is an affiliate of a person so convicted.<sup>162</sup> Thus, the presumption at the outset of a debarment proceeding is that debarment of the vendor would *not* be in the public interest.

Once DGS has proved that a person has been convicted, or that one is an affiliate of such a person, then it has made a *prima facie* showing that the public interest would be better served by disqualification.<sup>163</sup> In other words, such evidence constitutes competent substantial evidence to support a final order of debarment. Without any other evidence, the hearing officer should order the vendor placed on the convicted vendor list. In effect then, a new presumption arises that a vendor should be debarred.

The vendor may overcome this presumption and create a new presumption in its favor by adducing evidence on three issues drawn from the public interest test. The issues are (1) the prompt payment of damages or the posting of a bond necessary to prosecute an appeal;<sup>164</sup> (2) cooperation with the investigation or prosecution of a public entity crime;<sup>165</sup> and (3) "termination of the employment or other relationship with the employee or other natural person responsible for the public entity crime."<sup>166</sup> Evidence establishing these facts will create a new presumption that it would *not* be in the public interest to debar the vendor.<sup>167</sup>

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161. See, e.g., Department of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Southland Corp. (July 31, 1987) (DOAH Case No. 86-2247) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

162. See ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(4) (1989)); see *supra* text accompanying notes 126-29.

163. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(4) (1989)).

164. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(k) (1989)).

165. *Id.*

166. *Id.*

167. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(k) (1989)). Unfortunately, the placement of this provision creates the potential for mistaking it as part of the factor in the public interest test relating to mitigation for demonstrations of good citizenship. In fact, it is not related to the

Known as the "cleansing" provision,<sup>168</sup> this provision represents one of the Act's more creative features. It serves as a powerful inducement for a convicted vendor to pay damages quickly or post a supersedeas bond, to cooperate with the authorities, and to discharge culpable employees. However, the presumption created by the "cleansing" provision may be rebutted by DGS.<sup>169</sup>

Even if a vendor does not come forward with sufficient evidence to create this last presumption in its favor, it may still prevail. The Act expressly provides that, upon a prima facie showing by DGS, a person or affiliate may prove by a preponderance of the evidence that debarment would not be in the public interest.<sup>170</sup> Thus, with sufficient evidence, the vendor could prevail even without satisfying the requirements of the cleansing provision.<sup>171</sup>

#### IV. DEBARMENT

If the hearing officer concludes that it would be in the public interest to disqualify a vendor, a final order of debarment must be entered. Technically, debarment takes the form of an order to place a vendor

mitigation criterion.

This provision was offered as a substitute for another version which contained express cross-references to criteria in the public interest test. Compare FLA. S. JOUR. 398 (Reg. Sess. May 18, 1989) (amendment 3 to Fla. CS for SB 458 (1989)) with *id.* (amendment 2 to Fla. CS for SB 458 (1989)). Two authorities who participated in drafting these amendments stated that the substitute was not intended to depart from the parameters of the corresponding criteria in the public interest test. Interview with Jerome W. Hoffman, *supra* note 35; Interview with S. James Brainerd, General Counsel, Florida Chamber of Commerce (Aug. 22, 1989) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.). In fact, the substitute was merely an earlier version of the cleansing provision. The fact that it was offered as a substitute for the subsequent, more refined version was nothing more than a vagary of the legislative process. *Id.*

168. Fla. S., tape recording of proceedings (May 18, 1989, tape 3) (remarks of Sen. Johnson) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, Tallahassee, Fla.).

169. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(3)(k) (1989)).

170. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(5) (1989)).

171. For example, suppose Company *X* faces debarment because it and its only competitor, Company *W*, agreed to rig their bids for some contracts for widget purchases by the Florida Department of Widgets. Company *X* has paid the damages and penalty arising from the conviction of it and its owner, Mr. *X*. It has also cooperated with the authorities in investigating and convicting other bid-riggers. Because it is a sole proprietorship, it has not disassociated itself from Mr. *X*, and therefore cannot create a presumption against debarment. Company *W*, on the other hand, has taken all steps necessary to create a presumption against debarment in its favor.

Over the years, Company *X* has been a major financial supporter of several charities. In addition, if Company *X* is debarred, Company *W* will have a monopoly on widget sales to government agencies in Florida, a prospect which alarms many local governments. For these reasons, the hearing officer finds it would not be in the public interest to debar Company *X* even though Mr. *X* still owns the firm.

on a convicted vendor list<sup>172</sup> which DGS will compile and regularly update.<sup>173</sup>

### A. *Effective Date and Duration*

The purpose of the convicted vendor list is to provide regular notification to all state and local agencies in Florida, and all bidders, of those vendors with whom the agencies may not do business by virtue of debarment.<sup>174</sup> The initial list must be compiled by DGS and be published in the *Florida Administrative Weekly* by January 1, 1990.<sup>175</sup> Thereafter, every three months DGS must prepare and publish a revised list which shows any vendors which either have been added to the list or removed from it.<sup>176</sup>

Inevitably, a lapse in time will occur between an order of debarment and publication of an updated list showing that the vendor has been debarred. Accordingly, the Act provides that disqualification from public contracting shall be effective upon entry of the final order of debarment, not upon publication of the revised convicted vendor list which first includes the vendor's name.<sup>177</sup>

The Act also provides that a vendor shall be disqualified under the Act "for a period of 36 months from the date of being placed on the convicted vendor list."<sup>178</sup> Accordingly, the Act does not appear to give a hearing officer discretion to resolve a debarment proceeding by disqualifying a vendor for less than three years.

However, the Act encourages settlements of debarment proceedings. It expressly requires a hearing officer to enter a final order adopting any "stipulation, agreed settlement, or consent order" adopted by the parties to a debarment proceeding.<sup>179</sup> Because it is in the nature of settlements to agree on sanctions of less than the maximum provided by law, the parties could decide on a period of debarment of less than three years and the hearing officer would be bound by the decision.

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172. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(2)(d) (1989)).

173. *Id.* (codified at FLA. STAT. § 287.133(3)(d) (1989)).

174. Interview with Jerome W. Hoffman, *supra* note 35.

175. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(d) (1989)).

176. *Id.*

177. *Id.*

178. *Id.* (codified at FLA. STAT. § 287.133(2)(a)-(b) (1989)).

179. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(f) (1989)).

### B. *Extent of Disqualification*

The extent of disqualification is explicit and sweeping:

A person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide any goods or services to a public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in s. 287.017 for CATEGORY TWO . . . .<sup>180</sup>

Several features of this provision are noteworthy. First, the disqualification covers all purchases by public entities of more than the "CATEGORY TWO" amount.<sup>181</sup> Thus, any act of procurement, whether subject to competitive bidding, competitive negotiation, or otherwise, is covered by the Act; a debarred vendor may not take part in furnishing anything to a public entity.

Second, the Act prohibits not only direct transactions between government agencies and vendors on the convicted vendor list, but also indirect transactions in which a debarred vendor serves as a subcontractor or supplier to a prime contractor who actually would enter into a contract with the public entity.<sup>182</sup> For this reason, contractors and public entities must determine whether any subcontractors or suppliers in contract bids have been debarred.<sup>183</sup>

Third, debarment covers all transactions involving the purchase of "goods or services" by public entities. As such, it covers transactions whether they are governed by competitive bidding statutes,<sup>184</sup> the Consultants' Competitive Negotiation Act,<sup>185</sup> or any other procurement

180. *Id.* (codified at FLA. STAT. § 287.133(2)(a) (1989)).

181. *Id.*; see also *supra* note 71. This low threshold brings within the purview of the Act all but the smallest government procurement contracts. Consequently, large regional and national corporations are not the only vendors which could face the prospect of debarment upon a conviction. Small businesses may face debarment proceedings as well.

Because of small businesses' limited resources, they could prevail on the merits but still suffer significant adverse consequences because of the high cost of litigation. For such vendors, Florida law provides a limited remedy in the Florida Equal Access to Justice Act. See FLA. STAT. § 57.111 (1989). This statute provides for an award of attorneys' fees and costs for certain small businesses which prevail in administrative or civil proceedings initiated against them by the state "unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust." *Id.* § 57.111(4)(a). Because of this limitation, the remedy provided by this statute may be more theoretical than real.

182. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(2)(a) (1989)).

183. See *id.*

184. FLA. STAT. §§ 287.057, .062 (1989).

185. *Id.* § 287.055.

statute.<sup>186</sup> In particular, a debarred vendor may not enter into any transaction with a public entity, regardless of whether the transaction involves the same kind of good or service which was at issue in the public entity crime which resulted in the debarment.

Although the terms "goods" and "services" are not defined in the Act, their use is significant. Elsewhere, chapter 287, Florida Statutes, employs the terms of art "commodity,"<sup>187</sup> "contractual service,"<sup>188</sup> and "professional services."<sup>189</sup>

The term "goods" means "tangible movable personal property having intrinsic value usu[ally] excluding money."<sup>190</sup> As defined in Chapter 287, the term "commodity" includes "any of the various supplies, materials, goods, merchandise, class B printing, equipment, and other personal property purchased, leased, or otherwise contracted for by the state and its agencies,"<sup>191</sup> Although the term "goods" is one of those subsumed by the broad definition of commodities in chapter 287, the two terms would seem to be co-extensive because both cover a broad range of items of personal property.<sup>192</sup>

Grasping the breadth of the term "service" is more difficult. Its common meaning is "useful labor that does not produce a tangible commodity."<sup>193</sup> This all-encompassing definition stands in stark contrast to the terms of art used in chapter 287, Florida Statutes.

Contractual services include "the rendering by a contractor of its time and effort" in various professional, managerial, and technical fields.<sup>194</sup> Although a wide range of services are excluded from this definition under chapter 287,<sup>195</sup> those services nevertheless constitute useful labors that do not produce tangible commodities, and should be considered services for purposes of the Act.

Professional services include the practice of architecture, engineering, and other specified disciplines.<sup>196</sup> The acquisition of these services is governed by the Consultants' Competitive Negotiation Act.<sup>197</sup> However, these professional services constitute useful labors that do not produce tangible commodities; so they too should be considered to be

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186. *See id.* § 287.059, .0595.

187. *Id.* § 287.012(3).

188. *Id.* § 287.012(4).

189. *Id.* § 287.055(2)(a).

190. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 978 (1986).

191. FLA. STAT. § 287.012(3) (1989).

192. *Compare id. with* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 978 (1986).

193. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1986).

194. FLA. STAT. § 287.012(4)(a) (1989).

195. *See id.* § 287.012(4)(b).

196. *Id.* § 287.055(2)(a).

197. *See id.* § 287.055.



services for purposes of the Act. At a minimum, the term "services" appears to cover those persons subject to competitive bidding for contractual services, those whose work is excluded from the term "contractual services," and those whose work is subject to the Consultants' Competitive Negotiation Act.<sup>198</sup> Indeed, it is not clear what labor, if any, would not be a service within the meaning of the Act.

### C. Anticircumvention Provisions

The Act includes three principal provisions to ensure that a debarred vendor does not circumvent the statute and avoid the penalizing effects of debarment. Perhaps the most important provision operates to debar an affiliate of a convicted vendor. The definition of affiliate includes successors of a convicted person.<sup>199</sup> Therefore, a person who has been debarred may not circumvent the Act by creating a new corporate vehicle and transferring to it all assets, including contracts and franchises with state or local governments.<sup>200</sup>

The second anticircumvention provision prevents a debarred vendor from setting up a joint venture with another vendor for purposes of entering into business transactions the debarred vendor could not conduct. A person who knowingly enters a joint venture with a vendor convicted of a public entity crime in Florida during the preceding three years also is considered an affiliate of the debarred vendor and thus becomes subject to debarment.<sup>201</sup> The joint venture itself is technically not subject to disqualification, but a partner of a convicted vendor would be subject to disqualification, thus creating a powerful disincentive for entering into such an arrangement.<sup>202</sup>

The third anticircumvention provision is aimed at a corporate relative which does not technically meet the definition of an affiliate of a convicted person. A vendor "under the same, or substantially the same, control" as a disqualified person may not conduct business with any public entity which was transacting business with the disqualified person at the time of the commission of the public entity crime which resulted in the disqualified person being placed on the convicted

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198. See *id.* § 287.012(4)(a), (b), .055(2)(a).

199. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(a)(1) (1989)).

200. See *id.* (codified at FLA. STAT. § 287.133(2) (1989)).

201. *Id.* (codified at FLA. STAT. § 287.133(1)(a)(2) (1989)); see text accompanying *supra* note 43.

202. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(1)(a)(2) (1989)).

vendor list.<sup>203</sup> This provision prohibits certain business transactions by a corporate relative of a debarred vendor even though that relative is not an affiliate or otherwise subject to debarment.<sup>204</sup> This provision operates to prohibit large corporations with multiple subsidiaries from simply deploying a different subsidiary to conduct public business that had been transacted by a debarred subsidiary.

This third provision suffers, however, from two defects. First, the Act does not provide any benchmarks for determining when one is under "the same, or substantially the same, control" as a debarred vendor.<sup>205</sup> By contrast, the Act suggests two tests for determining when one person controls another for purposes of determining affiliate status.<sup>206</sup> Second, because corporate relatives which are not affiliates are not subject to debarment, the Act does not establish a mechanism for enforcing this prohibition. Enforcement is left to local governments, presumably with the assistance of vigilant competitors.

#### D. Nullification of Contracts and Franchises

Although the Act describes the debarment process as being something other than a penalty for wrongdoing,<sup>207</sup> in fact the Legislature provided severe sanctions for convicted vendors. Perhaps the most serious sanction is the potential nullification of existing contracts or franchises with state and local governments.<sup>208</sup>

Generally, the Act provides that neither a vendor's conviction for a public entity crime nor its debarment shall "affect any rights or obligations under any contract, franchise, or other binding agreement which predates such conviction or placement on the convicted vendor list."<sup>209</sup> This provision precludes the disqualification of a vendor un-

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203. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(2)(b) (1989)).

204. Suppose Company *X* and Company *Y* are wholly owned Florida subsidiaries of XYZ International. Company *X* sells pencils to City *A* but does no business with City *B*. Company *X* is convicted of a public entity crime and debarred for three years. Company *Y* is not an affiliate of Company *X*, so it is not subject to debarment.

City *A* then requests bids for erasers, and City *B* requests bids for pencils. Because it has been debarred, Company *X* may not bid on the eraser contract with City *A* or the pencil contract with City *B*. In addition, Company *Y* may not bid on the eraser contract because Company *X* had a contract with City *A* when it committed the crime, and Company *Y* is under the same control as Company *X*, namely, XYZ International. Company *Y* may bid on the pencil contract with City *B* because Company *X* was not doing business with City *B* when it committed the crime.

205. See ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(2)(b) (1989)).

206. *Id.* (codified at FLA. STAT. § 287.133(1)(a)(2) (1989)).

207. *Id.* § 1, 1989 Fla. Laws at 308 (codified at FLA. STAT. § 287.132(3)-(4) (1989)).

208. See *id.* § 2, 1989 Fla. Laws at 308 (codified at FLA. STAT. § 287.133(4) (1989)).

209. *Id.*

der the Act from constituting a per se cancellation of any contract or franchise into which the debarred vendor entered prior to a final order of debarment, including any contract or franchise that may have been at issue in the underlying public entity crime.<sup>210</sup> Thus, a final order of debarment will not disrupt any previously contracted business transactions between a vendor and a state or local agency.

An exception to this rule exists. Under certain circumstances, the hearing officer, as part of the final order of debarment, may declare a contract, franchise, or other binding agreement between a debarred vendor and a public entity voidable at the option of either the public entity or the vendor.<sup>211</sup> However, certain conditions must be met. The contract or franchise must be specifically identified by the hearing officer in the final order of debarment.<sup>212</sup> The contract also must have been entered into between a public entity and the debarred vendor after July 1, 1989.<sup>213</sup>

A vendor is not without recourse when facing the potential nullification of existing contracts or franchises. A vendor may protect its existing contracts or franchises from being rendered voidable by satisfying the three criteria of the public interest test.<sup>214</sup> A vendor subject to debarment may not have any existing contracts or franchises declared voidable during a debarment proceeding if it promptly or voluntarily pays any damages or penalty, disassociates itself from any other persons or affiliates convicted of the public entity crime, and demonstrates a prior or future self-policing program to prevent public entity crimes.<sup>215</sup>

This provision is one of the more creative features of the Act. In effect, it creates a compelling incentive for a vendor to take certain remedial and preventive actions that are in the public interest. In addition, the provision creates an opportunity for state or local agencies which are not parties to a debarment proceeding to intervene if their contracts or franchises with the vendor might be subject to nullification.

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210. *See id.*

211. *See id.*

212. The Act provides that a hearing officer may declare voidable "any *specific* contract, franchise, or other binding agreement" between a debarred vendor and a public entity. *Id.* (emphasis added). Thus, only those contracts or franchises specifically identified by the hearing officer in a final order of debarment may be rendered voidable. Accordingly, a public entity may not rely on the mere fact that a vendor has been debarred to justify abrogation of a contract or franchise between it and the vendor.

213. *Id.*

214. *Id.* For a discussion of these three criteria in the public interest test, see *supra* text accompanying notes 134-38 and 146-49.

215. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(4)(b) (1989)).

## V. RESTORATION OF QUALIFICATIONS

A debarred vendor may be restored to the public contracting process prior to completing a three-year period of disqualification under two circumstances—the legal negation of the conviction, or a determination by a hearing officer that it would be in the public interest to restore the vendor to the public contracting process. Each of these grounds has separate procedural requirements.

### A. *Grounds for Removal from the Convicted Vendor List*

A debarred vendor may petition for removal from the convicted vendor list—in effect, petitioning for restoration of its right to participate in the public contracting process—if the conviction upon which debarment was based has been reversed on appeal, or if the vendor has been pardoned.<sup>216</sup> A vendor may seek removal from the list based on these grounds at any time.<sup>217</sup> This provision applies to either a debarred person or a debarred affiliate.<sup>218</sup> Thus, an affiliate could seek removal from the list if the vendor whose conviction formed the basis for the affiliate's disqualification won a reversal of its conviction.

Otherwise, a disqualified vendor may seek removal from the convicted vendor list only by demonstrating that it would be in the public interest to restore its right to conduct public business.<sup>219</sup> Removal on these grounds may be sought no sooner than six months after entry of a final order of debarment.<sup>220</sup> In addition, a vendor may not seek removal on this ground within nine months of denial of a petition for removal.<sup>221</sup>

### B. *Removal Procedure*

In either circumstance, the vendor must file a petition for removal with DGS.<sup>222</sup> The removal proceeding is to be conducted according to the requirements for a debarment proceeding.<sup>223</sup> Thus, DGS is authorized to refer the matter to DOAH for assignment of a hearing officer within five days of receiving the petition,<sup>224</sup> and DGS is considered a

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216. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(f)(1) (1989)).

217. *Id.*

218. *See id.* (codified at FLA. STAT. § 287.133(f)(2) (1989)).

219. *Id.*

220. *See id.* (codified at FLA. STAT. § 287.133(3)(f)(1) (1989)).

221. *Id.* (codified at FLA. STAT. § 287.133(3)(f)(3) (1989)).

222. *Id.* (codified at FLA. STAT. § 287.133(3)(f)(1) (1989)).

223. *Id.*

224. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(b) (1989)).

party to the proceeding for all purposes.<sup>225</sup> The removal hearing should be conducted no more than thirty days after assignment of a hearing officer unless the parties agree otherwise.<sup>226</sup> The hearing officer must enter a final, appealable order within thirty days after the hearing or receipt of the transcript, whichever occurs later.<sup>227</sup>

When the ground for removal is a pardon or reversal of the underlying conviction, the hearing officer has no discretion. The hearing officer must determine that removal is in the public interest and enter a final order of removal.<sup>228</sup> The only requirement is that the vendor present "proof" that the underlying conviction has been reversed or pardoned.<sup>229</sup> Although the proof may be disputed, a certified copy of the mandate of an appellate court or a pardon should be sufficient.<sup>230</sup>

If the vendor offers other grounds for removal, the hearing officer must make a public interest determination using the same criteria that were considered when the vendor was debarred.<sup>231</sup> In that event, the vendor and DGS adduce evidence addressing each of the eleven issues in the statutory public interest test. Because the same criteria guide a removal proceeding as guided the debarment proceeding, a debarred vendor should seek removal only when it can demonstrate a significant change in the relevant facts. For example, a vendor who could not demonstrate the facts necessary to create a presumption that it should not be disqualified during its initial debarment hearing<sup>232</sup> might find it advantageous to seek removal only if circumstances had changed so that it could prove those facts.<sup>233</sup>

Two procedural avenues exist for concluding a removal proceeding without an evidentiary hearing. Either may be employed no matter which grounds a vendor offered for removal. However, these short-

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225. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(a) (1989)).

226. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(c) (1989)).

227. *Id.* (codified at FLA. STAT. § 287.133(3)(e)(2)(d) (1989)).

228. *Id.* (codified at FLA. STAT. § 287.133(3)(f)(2) (1989)).

229. *Id.*

230. See FLA. STAT. § 90.902(1) (1989). Certified copies of court records are self-authenticating.

231. *Id.*

232. See *id.* (codified at FLA. STAT. § 287.133(3)(e)(3)(k) (1989)).

233. Assume that at its debarment hearing, Company X proved that it had paid the damages and penalty in its plea-bargained deal with prosecutors. It also proved that it had cooperated with investigators. However, Company X had not discharged the executive who actually committed the public entity crime, and Company X was subsequently debarred.

After discharging that executive and waiting six months, Company X seeks removal from the convicted vendor list. Company X must be removed from the list because it can now meet all three criteria that create the presumption that it should not be disqualified from the public contracting process—unless, of course, DGS can rebut the presumption created in favor of Company X.

cuts would seem to be particularly appropriate if the underlying conviction has been reversed or the vendor has been pardoned, or if the vendor and DGS otherwise agree that removal is appropriate.

First, the vendor and DGS may enter into a stipulation which the hearing officer would then be bound to accept.<sup>234</sup> Second, either party may serve a motion for summary final order based upon the facts alleged in the petition or responsive pleading.<sup>235</sup> In either event, the need for a full-fledged hearing would be avoided, conserving the resources of DOAH and the parties and, if the vendor's disqualification is to be removed, quickly restoring the vendor to the public contracting process with all the attendant public benefits of enhanced competition in the marketplace.

## VI. CONCLUSION

During its 1989 Regular Session, the Legislature enacted legislation to exclude vendors from the public procurement process in Florida after a conviction for certain economic crimes which fall under the rubric of "bid-rigging." The underlying premise is that the opportunity to do business with state and local agencies is a privilege, not a right, and the government may choose not to favor convicted bid-riggers with its patronage.

At the behest of Attorney General Butterworth, the Legislature turned away from the blanket approach which had been found wanting the previous year. Instead, lawmakers mandated debarment of convicted vendors and related companies only when the public interest, as determined by a case-by-case examination of eleven issues, would be better served by doing so. Further, the Legislature created a debarment procedure which includes important procedural safeguards for vendors, such as vesting impartial hearing officers with the power to make debarment decisions. Lastly, the Legislature agreed that debarred vendors should be restored to the public contracting process when circumstances warrant, again based on a public interest determination by an impartial hearing officer.

The Act still must be tested in the cauldron of case-by-case adjudications. Yet it holds out the promise of safeguarding the public treasury while still protecting vendors from the specter of unfair interference in their business transactions with state and local agencies.

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234. Ch. 89-114, § 2, 1989 Fla. Laws 307, 308 (codified at FLA. STAT. § 287.133(3)(e)(2)(f) (1989)).

235. FLA. ADMIN. CODE R. 22I-6.030(1) (1986) (summary final orders).

