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# DEBARMENT AND SUSPENSION OF BIDDERS ON GOVERNMENT CONTRACTS AND THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PAUL H. GANTT\* AND IRVING R. M. PANZER\*\*

## I. INTRODUCTION

In 1956 in a "pioneering"<sup>1</sup> article on "The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts," we pointed out that no survey of the area had been made since the 1939 Attorney General's Committee on Administrative Procedures<sup>2</sup> concluded that "the penalty of blacklisting is so severe that its imposition may destroy a going business."

During 1961 and 1962 the Committee on Adjudication of Claims of the Administrative Conference of the United States made an excellent survey.<sup>3</sup> Based thereon, the Conference included in its final report to the President recommendations concerning procedural fairness in the debarment of contractors, the grounds and scope of debarment and debarment periods.<sup>4</sup>

The report had no legal or operative effect of its own. It was purely advisory, in line with the functions of the Administrative Conference itself.

This paper, then, will concern itself with comments on the Administrative Conference's findings and recommendations, with the progress or lack of progress of implementation by executive agencies,

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Opinions expressed in this article are solely those of the authors.

<sup>1</sup> The Report of the Committee on Adjudication of Claims points out in its Committee Findings: "For pioneering surveys of government contractor debarment, highly critical of government procedures and practices, see Miller, *Administrative Discretion in the Award of Federal Contracts*, 53 Mich. L. Rev. 781 (1955); Gantt and Panzer, *The Government Blacklist: Debarment and Suspension of Bidders on Government Contracts*, 25 Geo. Wash. L. Rev. 175 (1957)."

<sup>2</sup> Attorney General's Committee on Administrative Procedures, *Division of Public Contracts 3* (1939) (mimeographed).

<sup>3</sup> "The Conference carried forward under the present administration the kind of consideration of administrative law problems that had been undertaken originally by the President's Conference on Administrative Procedure during the Eisenhower administration." Fuchs, *The Administrative Conference of the United States*, 15 Adm. L. Rev. 6 (1963).

<sup>4</sup> The relevant part of the report is entitled Recommendation No. 29.

and with general observations on developments in the field of debarment and suspension since 1956.

## II. THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

A word first about the Administrative Conference of the United States, now (unfortunately) defunct, although bills to revive it on a continuing basis are pending in the Congress as of the date of this writing (November 1963).

Since 1949 it had been suggested that an organization paralleling the Judicial Conference of the United States—the success of which was unquestioned—should be established for federal agencies just as the Judicial Conference of the United States was created for federal courts. Eventually the Administrative Conference was established, not by the Congress as was the Judicial Conference,<sup>5</sup> but rather by the President.<sup>6</sup>

The Conference consisted of a Council of eleven members (the Chairman of which was Judge E. Barrett Prettyman, senior Judge of the United States Court of Appeals for the District of Columbia Circuit, and an acknowledged authority on improvement of administrative agency procedures) appointed by the President and comprised of persons from government agencies, private practice and academic life, all of whom were outstanding experts in administrative law.

In addition to the Council, seventy-five other persons became members of the Conference by invitation or by appointment of federal agencies. Forty-four of these persons were from the federal government, including members of agencies, general counsel, and other high-ranking staff officials; twenty-nine were from outside the government, including private practitioners and professors; and two were hearing examiners.

The Conference organized itself into committees, each dealing with a different area of interest in the field of administrative procedure. One of those committees, headed by Mr. Cyrus R. Vance (then general counsel of the Department of Defense, now Secretary of the Army), dealt with the "adjudication of claims," and it was this committee which investigated and reported on the subject of debarment and suspension of government contractors.

The purpose of the Administrative Conference, as set forth in the executive order, was as follows

The purpose of the Conference shall be to assist the President, the Congress and the administrative agencies and executive departments in improving existing administrative procedures. To this end the Conference shall conduct studies

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<sup>5</sup> 28 U.S.C. § 331 (Supp. IV, 1959-62).

<sup>6</sup> 1 U.S. Code Cong. & Ad. News, 87th Cong., 1st Sess. 1299 (1961).

## DEBARMENT AND SUSPENSION

of the efficiency, adequacy and fairness of procedures by which Federal executive departments and administrative agencies protect the public interest and determine the rights, privileges and obligations of private persons. The Conference shall from time to time report to the President any conclusions reached by its members based on such studies, together with suggestions for appropriate measures to improve the administrative process. The Conference shall make a final report to the President no later than December 31, 1962, summarizing its activities, evaluating the need for further studies of administrative procedures, and suggesting appropriate means to be employed for this purpose in the future.<sup>7</sup>

Unlike the Judicial Conference of the United States, which is a permanent body, established by legislation, the Administrative Conference was temporary and expired on December 31, 1962. Shortly before it expired, the Conference made thirty recommendations to the President in many fields of administrative law.<sup>8</sup>

The work accomplished by the Conference was recognized as so valuable, and the reasons for having a permanent, continuing Administrative Conference appeared so clear, that a number of bills were introduced in Congress during early 1963 to establish a permanent conference.

The Administration's bill, S. 1664, was passed by the Senate on October 30, 1963 with no discussion and no dissent. The bill thus went over to the House where an identical bill, H.R. 7200, and an American Bar Association version, H.R. 7201, had languished without action of any sort for many months. The bill reportedly will receive a chilly reception on the House side, but in view of the unanimous (though somewhat unexpected) Senate action there apparently is hope for passage.

In purpose and in organization, the permanent Administrative Conference contemplated by S. 1664 would be quite similar to the now-defunct Conference. Under S. 1664, the Conference would be headed by a full-time Chairman appointed for five years, and would be composed of (1) the heads of the Federal regulatory agencies and executive departments, (2) persons appointed by the President as members of the eleven-member Council and (3) other persons, to be appointed by the Chairman, who shall be "members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure."

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<sup>7</sup> Id. at 1299-1300.

<sup>8</sup> The text of all recommendations appears in Fuchs, *supra* note 3, at 23-45.

It is to be devoutly hoped that a permanent Administrative Conference will be established.

### III. REPORT OF THE COMMITTEE ON ADJUDICATION OF CLAIMS ON DEBARMENT AND SUSPENSION

The Committee on Adjudication of Claims, headed by Mr. Cyrus R. Vance and aided by an excellent research staff, launched a full-scale investigation of the debarment and suspension procedures of all government agencies related to contracting (procurement), including surplus contracting. It was the most thorough research job ever done on the actual facts of debarment and suspension by the federal government. The inadequacy (or total absence) and inconsistency of procedures and safeguards which the staff of the Committee found to be the case paralleled the examples cited by the present authors in their previous article on the same subject.<sup>9</sup> The Committee's written report, dated October 1, 1962, is so important to both its factual findings and its recommendations for procedural changes, that the report deserves to be summarized here.<sup>10</sup>

### IV. FACTUAL FINDINGS OF THE COMMITTEE REPORT

The Committee found that some 340 business firms were barred from participating directly or indirectly in some or all government procurement or surplus disposal contracts. About sixty of those firms were also excluded from contracts for most federally assisted construction work throughout the United States. "Except for a small percentage," said the Report, "this government action is taken without opportunity for an adversary hearing and if based on suspected criminal conduct is generally without being officially notified or informed of meaningful reasons, or opportunity to learn why."

The documentation of this statement is impressive. Only two statutes, the Buy American Act<sup>11</sup> and the Davis-Bacon Act,<sup>12</sup> expressly require debarment of government contractors; a third statute, the Walsh-Healy Act,<sup>13</sup> expressly authorizes debarment. Aside from these three statutes, authority for all government debarment and suspension of contractors is generally implied from statutory provisions (applicable to the bulk of government contracts) that contract awards are

<sup>9</sup> *Supra* note 1.

<sup>10</sup> Copies of the Report may be obtained from the Director, Office of Administrative Procedure, Department of Justice, Washington, D.C. The Report is printed at pp. 267-295 of Selected Reports of the Administrative Conference of the United States, S. Doc. No. 24, 88th Cong., 1st Sess. (1963).

<sup>11</sup> 47 Stat. 1520 (1933), 41 U.S.C. §§ 10(a)-(d) (1958), as amended, 41 U.S.C. §§ 10(c), (d) (Supp. IV, 1959-62).

<sup>12</sup> 74 Stat. 418 (1960), 40 U.S.C. § 276a (Supp. IV, 1959-62).

<sup>13</sup> 49 Stat. 2037 (1936), 41 U.S.C. § 37 (1958).

to be made to "responsible" bidders.<sup>14</sup> None of these statutory provisions contains a requirement that an adversary hearing be held, and (as the Report noted) only a few of the administrative agency regulations do. And even as to these latter, the Report states that "[i]n practice, such hearings are rarely held." When the contractor is a business firm suspected of fraud or other criminal conduct in government dealings, and the Department of Justice is investigating the case with a view to a possible criminal or civil action, the contractor is "suspended" from receiving awards until the Department of Justice determines whether to institute the action. Not only was no advance notice to the contractor required before he was "suspended," but some regulations<sup>15</sup> actually prohibited the contractor's having an opportunity to know the reasons or the evidence for the suspension. The Report found that a third of the seventy-five contractors then under suspension by the Department of Defense had been on the suspended list for more than five years, presumably awaiting the day when the government would decide, not the merits of their case, but simply whether to institute proceedings.

In our prior article,<sup>16</sup> we had been speaking of "blacklisting" (which we considered synonymous with debarment) and "grey listing" (which we considered synonymous with suspension). We thought that the color scheme was complete. But the Report turned the spotlight on another whole class of debarments or suspensions—the *de facto* and even secret debarment or suspension, usually based upon an internal agency list of contractors "considered" to be of questionable integrity or responsibility.<sup>17</sup> As the Report states: "For the most part these lists are secret, and business firms are without notice, or meaningful opportunity to challenge, the fact of listing or the denial of contracts on such grounds."

When the Committee attempted to ascertain the grounds and the scope of debarments, it discovered a chaotic situation. Some grounds

<sup>14</sup> E.g., 10 U.S.C. § 2305(c) (1958); 63 Stat. 393 (1949), 41 U.S.C. § 253(b) (1958). In their previous article, the authors intimated (but did not articulate) some question whether the drastic sanction of debarment could be rested upon the one word "responsible" in the statutory pronouncements and expressed the view that in any event express legislative authority should exist before such sanctions are employed. The Court of Appeals for the District of Columbia Circuit has since in *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957), cert. denied, 355 U.S. 939 (1958), sustained a Navy debarment on the authority of the "responsible bidder" concept (41 U.S.C. § 152(b), now codified 10 U.S.C. § 2305(c) (1958)). In *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961), the same court possibly put the matter to rest when it sustained the debarment authority of the Department of Labor under Reorganization Plan No. 14 of 1950, 64 Stat. 1267, 5 U.S.C. § 133z (1958).

<sup>15</sup> ASPR, 32 C.F.R. § 1.605-4 (1961), now obsolete.

<sup>16</sup> *Supra* note 1.

<sup>17</sup> Kulp, *Greylisting in Government Procurement Practice* (September 1962). This paper was written as part of the Government Contracts Seminar of Professor John W. Whelan of the Georgetown Law Center.

were, of course, set forth in administrative regulations, such as conviction of fraud in government contracting, but many grounds were nowhere set out or defined. Some regulations were so vague that "generalized criteria have led to debarments on questionable grounds, not reasonably related to government contracting, including the exercise of the Constitutional privilege against self-incrimination." Although debarment is customarily extended to the business affiliates of the debarred entity, published regulations did not specify the criteria for determining affiliation or for extending the debarment. Where fraud by an owner, officer or employee of a business firm is established or suspected—which might, of course, lead to debarment of the firm—there were no published criteria by which that fraud might be imputed to the firm itself, or by which the termination of that person's relationship to the firm might avoid or remove debarment of the firm. In surveying the length of debarment periods, the Report found no uniformity whatsoever among the various agencies, even for the same act.

The Armed Services Procurement Regulations provided "as a general rule" that debarment should not exceed a five-year period following a conviction for fraud or other criminal offense<sup>18</sup> or a three-year period for any other cause. The General Services Procurement Regulations, on the other hand, provided that debarment "shall generally be made for periods of not less than one and not more than three years, depending on the seriousness of the offense."<sup>19</sup> And "suspension" of contractors suspected of criminal conduct, pending investigation and determination by the Department of Justice whether to institute action, as mentioned earlier, can continue for an indefinite period of years, exceeding the five-year period stated as the maximum in the Armed Services Procurement Regulations.

No published procurement regulation provided, in express terms, for removal of a debarment prior to the expiration of the debarment period upon a showing of present responsibility of the contractor, "nor," (says the Report) "is there a practice of such removal."<sup>20</sup>

<sup>18</sup> ASPR, 32 C.F.R. § 1.604-2 (Supp. 1963).

<sup>19</sup> GSPR, 41 C.F.R. § 5-1.605(b) (1963). Unlike the Federal Procurement Regulations (FPR), the GSPR apply only within the General Services Administration.

<sup>20</sup> To illustrate the thin line between the "responsible bidder" concept and debarment, we quote the rescission of a somewhat permanent disqualification of a bidder. The contracting officer wrote:

On the basis of your performance for other agencies during the past year, your increasing facilities for performance, and your assurance to us of your willingness to prosecute any future work for . . . with diligence toward completion within specified contract time limits, I am today rescinding the action of . . . [instructing other contracting officers to consider the firm as not being a responsible bidder]. I am notifying each of our . . . [contracting officers] of this action and advising them that, in our opinion, you may henceforth be considered a responsible bidder. However, inasmuch as authority is nor-

## DEBARMENT AND SUSPENSION

As a final procedural note, the Report pointed out that, with one exception (debarments under the Walsh-Healey Public Contracts Act), none of the three statutes and none of the regulations dealing with debarment or suspension provided for separation of functions between the persons who proposed such government action and the persons who decided the matter. And, in fact, there was no such separation in practice. The same officials (in the military departments and in the Department of Labor, to take the two examples cited in the Report) who proposed debarment, supervised the investigation and made the final decision as to debarment.

The mere statement of the above listed practices, when contrasted with modern principles of administrative procedure, as expressed in the Administrative Procedure Act<sup>21</sup> and in the many, book-filling, judicial decisions on other types of administrative action,<sup>22</sup> obviously left something to be desired.

### V. RECOMMENDATIONS FOR PROCEDURAL REFORM

The Report discussed above had previously, in much the same form, been circulated throughout the federal government as a Staff Report. The Staff Report also contained recommendations for reform or improvement, bearing in mind the competing considerations of fairness to the contractor who may be put out of business, the interest of the government in excluding the dishonest, the irresponsible or the untrustworthy from its programs and the public interest in assuring that the drastic sanction of debarment or suspension is exercised fairly. After the detailed views of government departments

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mally delegated . . . [to them] to make award of contract, such advice need not be binding upon them if upon their own judgment of facts relating to the situation they decide otherwise.

5 Gov't Contr. 418 (1963) reports the decision of the Comptroller General, Decs. Comp. Gen. B-151269 (August 8, 1963), as follows:

But the *continued* refusal to award contracts to a company on the basis of non-responsibility (following an *initial* determination thereof) results in *indefinitely* depriving the company of contracts without the right of defense. For this reason, *debarment* proceedings . . . should be begun as soon as practicable after the nonresponsibility determination. . . . Accordingly, until GSA issues to X a notice of intent to debar [thereby starting debarment proceedings], X must—in the absence of evidence of nonresponsibility *other* than the criminal conviction on which the *initial* determination was based—be considered a *responsible bidder*.

<sup>21</sup> 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (1958).

<sup>22</sup> The hard question of "standing to sue" in government contract litigation accounts for the paucity of decided cases in this field. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). The decision in *Copper Plumbing*, supra note 14, expressly holding that a contractor debarred by the Department of Labor (on recommendation of the Department of the Army) had standing to challenge in court the government's action may be a breakthrough. The court distinguished the *Lukens Steel* case as a government action not directed specifically at a contractor but at an industry. Previously, in *Schlesinger v. Gates*, supra note 14, the same court had avoided the question by "assuming without deciding" the issue of standing to sue.



and agencies had been submitted in writing, as well as the views of a special subcommittee of the Public Contracts Committee, Administrative Law Section, American Bar Association, the recommendations were somewhat (but not much) modified by the Committee on Adjudication of Claims in its Report dated October 1, 1962, and in that form were adopted by the Administrative Conference after public debate.

Considering the far-reaching nature of the recommendations, impinging as they did upon a province long untouched and jealously guarded by career procurement officials who naturally had come to believe that their experience and their knowledge of contractors had given them the expertise to make, without elaborate procedural proceedings, debarment decisions for the protection of what they considered to be the government's interest, the surprising development was not that there was vigorous opposition, but that a number of government agencies agreed (in principle, at least) with all or almost all of the recommendations; or at least they did not object to them. Several agencies agreed with some recommendations and questioned others. A few agencies objected to any basic change in existing procedures, apparently on the view that government contracting is merely a privilege and that the recommended procedures would be burdensome and might impair the exclusion of the dishonest, irresponsible or untrustworthy from government contracting. But, as the Committee said, and its position was adopted by the Administrative Conference: "The Committee is persuaded, however, that whatever substance these views may have, they are outweighed by the benefits to fair governmental administration which would flow from adoption and implementation of the Committee's recommendations."

The most controversial recommendation was that opportunity for a trial-type adversary hearing, essentially of the type required by section 7(c) of the Administrative Procedure Act, should be required before a contractor can be debarred or suspended, except, as set forth below, in cases of criminal or civil adjudication affecting a contractor's present responsibility, or probable cause for belief of a contractor's fraud or other lack of present responsibility. This means that before debarment can take place, there must be notice of proposed debarment to the parties in question, including all affiliates sought to be debarred; notices must be supported by reasons, and a party contesting the proposed action must be afforded the opportunity to have a trial-type hearing before an impartial agency board or hearing examiner.<sup>23</sup>

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<sup>23</sup> In his comments to Mr. Vance, Mr. Louis Spector, Chairman of the Armed Services Board of Contract Appeals, stated on July 9, 1962 that "it would be appropriate to assign such matters [debarment and suspension] to a single agency or board in the interest of efficiency and fairness." In discussing his concurrence in the staff recommendations, Mr. Spector made the following observations:

## DEBARMENT AND SUSPENSION

In virtually any other field of administrative action this recommendation would seem only to be a statement of what the law is or ought to be. Indeed, the Committee Report<sup>24</sup> suggests that there are "serious doubts" as to whether a trial-type hearing is not required in contested debarment cases, as a matter of procedural due process. Yet, the recommendation was bitterly opposed by a number of important procurement agencies<sup>25</sup> as burdensome, unnecessary, dangerous, etc. It was vigorously argued by some agencies that experience shows that, in practice, most contractors do not actually contest the facts on which debarment is based. The answer would appear to be that this may well be the case (assuming the contractor knows that he is debarred and knows the reasons), but all that is required here is the *opportunity* to request a hearing, and if the protesting agencies are correct, there will be few such hearings.

The recommendation for a trial-type hearing was adopted by the Conference, including the requirement that disputed material facts should be quasi-judicially decided by an independent agency board or hearing examiner on a record made in an adversary hearing.

The perplexing problem of what to do initially in the situation of a contractor suspected—but not adjudicated—of fraud or other conduct showing lack of present suitability for government contracting, which agitated some of the agencies, was the prime exception mentioned above to a trial-type hearing requirement. Here it seems obvious that the government has a right to protect itself, for a reasonable time, against having to deal with such a person or firm until the facts are determined. Further, it is argued that the government should have

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The concepts of due process and equal treatment run deep in our society and have, for example, helped shape the charter and rules governing the procedures before the Armed Services Board of Contract Appeals. Continuing the parallel with the "Disputes" procedures of the ASBCA, we quasi-judicially administer the appeals which come before us by determining the facts and applying thereto the contract terms and the law. These debarment proceedings similarly involve determining the facts, and applying thereto the regulations, representing the policy, and the law. Yet in the type of case covered in the staff report, a mere accusation or charge is alone sufficient to visit upon the contractor the penalties associated with guilt. The rights involved, that is, entitlement to a contract, are at least substantial as those involved in determining disputes under a contract already in being. Although it has been stated that no one is entitled to a Government contract, it would appear that certain rights vest in a party who, but for debarment, would have had a right to the contract under existing laws and regulations.

The authors agree completely with Mr. Spector's analysis. They suggest that such boards as the ASBCA, the Corps of Engineers Contract Appeals Board, the Interior Board of Contract Appeals, and the Veterans Administration Board of Contract Appeals would be singularly fitted to handle debarment and suspension proceedings on a government wide basis.

<sup>24</sup> The Committee Report relies on *Greene v. McElroy*, 360 U.S. 474, 496 (1959) and cites Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193 (1956).

<sup>25</sup> Agencies which filed no objection to a trial-type hearing included: AEC, GSA, NASA, Department of Agriculture, HEW, Department of the Navy and SBA.

the right to protect its trial evidence for a reasonable period. In practice, as we have seen, the contractor has been summarily suspended, often without notice or notification of grounds or opportunity to show that the alleged facts are incorrect, pending governmental determination whether to institute criminal or civil action. Frequently the contractor has remained in a limbo for years, with the government not having decided whether the facts did or did not justify institution of an action, or perhaps having simply forgotten the matter. (Of course a criminal conviction or civil judgment, in matters affecting a contractor's present responsibility, would be ground, without more, for a suspension, pending administrative determination of a debarment proper.) The Report adopted the device of giving the government a period of one year, following a notice of suspension on the grounds outlined above, within which to obtain a criminal charge by indictment or information against the contractor or to file a civil suit. If judicial proceedings are instituted within the one-year period, the suspension may continue for the duration of any trial in a federal court and for 120 days thereafter, within which period, if the decision is against the contractor, debarment action should be completed. But if no such judicial proceedings are instituted within the one-year period, the suspension should automatically terminate, but without prejudice to any right of debarment. The government could extend the one-year suspension period to eighteen months—but not longer—if the Attorney General or his designee (of at least the rank of an Assistant Attorney General) should certify to the head of the suspending agency that disclosure, for purpose of administrative debarment, of the government's evidence would be substantially harmful to the government's case or activities.

Where grounds other than alleged fraud or present lack of integrity or honesty in government contract work are involved, the original suspension period is not to exceed ninety days. Suspension beyond ninety days should not be imposed except upon a written determination, by an official of at least the rank of an Assistant Secretary, stating the reasons and the necessity therefor. Three additional suspension periods of up to ninety days could be imposed in this manner, with the contractor being in each instance furnished a copy of the determination, but in no event could the total suspension period exceed one year.

Except as provided above, says the Committee, "the practice of summary suspension of individuals and firms from Government contracting without notice and opportunity for a trial-type hearing should be discontinued."

It is apparent that the agency most directly concerned with this recommendation is the government's litigation arm, the Department

## DEBARMENT AND SUSPENSION

of Justice. It is important, then, to know that the Committee formulated this recommendation only after detailed discussions with officials of that Department, and that a letter from the Attorney General to the Committee,<sup>26</sup> stating the Department's views, recites that the recommendation "will not hamper the investigation and prosecution of criminal and civil frauds."

The Report would of course outlaw the secret blacklist, such as the GSA "Review List of Bidders" (the very existence of which was not to be disclosed to contractors) and the *de facto* blacklist, such as the Navy "Contractor Experience List" (as to which the contractor was at least told that it was proposed to put him on the list, and the reasons therefor. He was also told that he might "furnish" the pertinent facts.). Any government rejection of an otherwise successful bid, solely or primarily on the ground that the bidder is believed to be lacking in business honesty or integrity, should, said the Report, be preceded by written explanation to the bidder, stating the reason for the belief. The bidder should have the opportunity to reply within a reasonable period consistent with the need for making an award in a timely manner. In practice, the Report said, this would tend to channel such government actions into the debarment or suspension procedures outlined earlier. This is where they belong. The distinction here is between an "individual" rejection of a bid and true debarment. The Report considered, but found unacceptable, the protest of some agencies that procurement would be unreasonably delayed, pointing out that no particular form of hearing is required prior to bid rejection.

One recommendation to which there was no objection whatsoever was that agency rules of procedure in all types of debarment should be published, should be uniform to the extent practicable and should provide for a fair and speedy determination. In its comments on this recommendation the Report stated that agency rules, in dealing with evidentiary and trial matters, should require that in a trial-type debarment hearing the government has the burden of proof in the sense of coming forward with a *prima facie* case.

The Report further recommended that any decision to debar a contractor should be made in writing, should set forth findings, conclusions and reasons and should be furnished to the debarred person or firm. The mere fact that such a recommendation should be necessary, in this rather advanced age of administrative law, speaks volumes concerning the present state of the practice of debarment. The Report also urges, in an attempt to build up case law and policy in this field, that such documented debarment decisions should in general be published or be publicly available.

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<sup>26</sup> Printed as Appendix C to the Committee Report in Selected Reports of the Administrative Conference of the United States, *supra* note 10.

The indefensible failure of agency regulations to state grounds for debarment, or to state them in specific and understandable terms was naturally the subject of a major recommendation. The Report said that all grounds for debarment should be explicitly set forth in published agency regulations, and that "to the extent practicable and desirable" agency regulations should be uniform. The grounds would include, presumably as the major item, fraud incident to obtaining or performing a government contract or subcontract or any other conduct showing a serious and present lack of business integrity or business honesty on government contracts, but would not be limited to those matters. The vexing question of determining business affiliates, and of imputing fraud or criminal conduct of an owner, officer or employee to the firm to which he is connected, should, to the extent feasible, be spelled out by standards and criteria in the regulations.

The final recommendation of the Report dealt with debarment periods, a matter (it will be recalled) of considerable variance among the federal agencies. The Report proposed that debarment periods should be uniform, should be for a reasonable and definitely stated period of time, commensurate with the seriousness of the cause, but never to exceed three years, and that provision should be made for removal of debarment within the period upon a showing of present responsibility for government contract work.<sup>27</sup>

The selection by the Report of a three-year maximum period in all cases brought protests from several branches of the military, which preferred the five-year period authorized by ASPR for some causes. However, the Report found that five years was out of consonance with the vast majority of agency practices and with Congressional policy as implied by the three statutes bearing on the issue, and adhered to the three-year maximum.

One agency, the Defense Supply Agency, argued for indefinite debarment in "appropriate cases," coupled with a requirement that the debarment be periodically reconsidered, but the proposal was found unacceptable.

As to establishing procedures for removal of names from a debarment list, upon a showing of present responsibility, a few agencies expressed concern over the possibility of undue administrative burdens in dealing with claims having no substantial basis. However, the Report took the position that a removal procedure is legally inherent in the concept of listing, since if new facts develop which show that the original judgment was incorrect when made or is without continuing

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<sup>27</sup> This would require not only the amendment of the ASPR, FPR and of the regulations of the Secretary of Labor under Reorganization Plan No. 14 of 1950, but also the amendment by the Congress of the now mandatory three-year debarment period of the Buy American Act and of the Davis-Bacon Act.

validity, there is probably no authority to continue the debarment. Adequate protections could be set up to screen out insubstantial claims.

VI. FOLLOW-UP OF THE RECOMMENDATIONS OF  
THE ADMINISTRATIVE CONFERENCE

After all written comments and objections from government agencies had been received and considered by the Committee, and incorporated into the Committee Report summarized above, the Report and its recommendations were publicly argued before the Council of the Administrative Conference on October 17, 1962. Debate was vigorous. Several of the findings and recommendations were attacked by some agencies and defended by the Committee. In the end, the Committee Report in its entirety was adopted by the Administrative Conference. Together, with other subjects studied, it was sent to the President on December 15, 1962, as part of the final Conference Report.

By his letter of January 15, 1963,<sup>28</sup> President Kennedy thanked the Conference for its "excellent" report and recommendations, stated that the report contained many valuable suggestions for improving administrative procedures, and said:

I have instructed the appropriate Government departments to consider them and report to me upon the best method to assure their implementation. I am confident that actions on these recommendations will contribute materially to improved administration of Federal regulatory programs.

And in a bulletin issued to all federal agencies and departments, the Bureau of the Budget stated:

The President has requested the Bureau of the Budget to follow up on recommendations made in the final report of the Administrative Conference of the United States to assure that actions to realize potential benefits are taken promptly. This Bulletin requests each department or agency to submit a report of agency views and the status of agency actions to carry out the Conference recommendations. . . . Each agency will evaluate the recommendations in terms of its own operations, keeping in mind the advantages to the public of Government-wide uniformity in policies and procedures when such uniformity is consistent with effective discharge of the agency's specific responsibilities.<sup>29</sup>

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<sup>28</sup> S. Doc. No. 24, *supra* note 10 at IV.

<sup>29</sup> Bureau of the Budget, Bulletin No. 63-10 (Feb. 27, 1963).

VII. ACTUAL RESULTS OF THE ADMINISTRATIVE  
CONFERENCE STUDY

We recapitulate that the Administrative Conference made its final report to the President on December 15, 1962; that the President of the United States had endorsed that report and "instructed" the government departments to consider and assure best methods of implementation and that the Bureau of the Budget had followed up in February, 1963 with a bulletin and that prior thereto the Attorney General of the United States had stated that the recommendations of the Staff Report "will not hamper the investigation and prosecution of criminal and civil frauds." What, then, has been the actual result of the Administrative Conference study? At the time of this writing (November 1963), some eleven months after the Conference report and eight months after the agencies were requested to review their debarment and suspension procedures, some progress can be reported.

A. ARMED SERVICES PROCUREMENT REGULATIONS

The Department of Defense has bowed to the recommendation for a maximum three-year period of debarment. It has also adopted the one-year period for suspension, extendable to a maximum of eighteen months upon request by an Assistant Attorney General.

At the time of this writing, the pertinent ASPR revisions have not been published. However, the writers have been assured that these changes will be made in the ASPR. They will also include the Conference recommendation for defining "affiliation."

But the Department of Defense has refused to accept the most important Conference recommendation, the requirement of a trial-type hearing. The individual military departments, which are bound by the ASPR, could presumably adopt for themselves the trial-type hearing concept, but at this time there is no indication that any of them intend to do so.

B. FEDERAL PROCUREMENT REGULATIONS

With regard to the civilian departments and agencies, no changes have yet been made in the FPR. The General Services Administration has advised the writers that changes are in process to conform the FPR to "certain of the Conference recommendations."