GIR Global Investigations Review

Automatic debarment is "bad policy", finds report by TI and Covington

Tom Webb, 8 May 2015

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Governments and development banks should be flexible in their approach to debarment and encourage companies to remediate wrongdoing, says a report jointly produced by Transparency International and Covington & Burling.

The report, "Suspension & Debarment: Strengthening integrity in international defence contracting", was launched at Covington & Burling's Washington, DC office on 7 May. It said debarment programmes "appear to be most useful when prophylactically/remedially applied, not punitively".

The authors of the report, Covington senior of counsel Steven Shaw and senior associate Jade Totman in DC, argued that debarment should be a means of removing corruption and fraud from public procurement, and that agencies should allow companies to avoid debarment or reduce the length of debarment periods if they remediate misconduct.

"[A] suspension and debarment system that cannot account at all for these considerations – as happens with automatic suspension and debarment – typically is bad policy, as it robs a government of the ability to implement such effective, pragmatic, and economically sensible solutions," the report said.

Agencies that make debarment decisions should stick to their "core mandate" to promote integrity in public procurement, instead of automatically blocking companies who commit wrongdoing from contracts, the Covington lawyers said.

Speaking to GIR before the launch of the report, Shaw said flexible debarment programmes that allow companies to avoid debarment, or reduce its effects, could even improve business ethics in government contractors. Shaw is a former US Air Force deputy general counsel in its Contractor Responsibility division, where he frequently had to decide whether to debar companies from contracts.

"I found that I was able to have more influence by using both the carrot and the stick," Shaw said. "The stick was debarment, which protects the government from having to deal with the bad guys.

"But the carrot was allowing companies to retain their contracts, if we were satisfied they had good systems and compliance, and had properly remediated any misconduct," he added.

Shaw said mandatory debarment, which exists in some jurisdictions, may fail to incentivise companies from implementing strong compliance procedures.

"The message in those regimes is that it doesn't matter how good your process is. Why bother having them, if it will make no difference to whether or not you get debarred?"

In the report, Shaw and Totman compare debarment approaches of the US, Brazil, India, Kenya and the World Bank, and suggest a set of best practices based on certain aspects of each jurisdiction.

The report says governments should establish goals and standards for debarment; make sure that government agencies respect each other's' debarment decisions, as well as those of foreign governments where necessary; take decisions transparently; avoid disproportionately harsh sanctions; and respect due process.
Shaw said the US is a good example of a jurisdiction that respects due process in debarment proceedings, as there is judicial oversight of government agencies' decisions. Companies can seek judicial review of such decisions, and can have them reversed if judges are satisfied that agencies abused their discretion.

"That's a very high standard, but at least that judicial oversight is there," he said.

Mandatory debarment has recently been under scrutiny in the US, UK, EU and Canada.

In the US, the topic of mandatory disqualifications imposed by the US Securities and Exchange Commission (SEC) has been controversial within the agency. Such debarment is mandatory in theory, but the agency can choose to waive it. In February 2015, SEC commissioner Daniel Gallagher said the agency should "resist the temptation to conflate disqualifications and enforcement sanctions," and urged commissioners to debar companies as a "prophylactic" measure rather than as punishment.

Earlier in April 2014, SEC commissioner Kara Stein had dissented from an SEC order that waived the debarment of RBS following its Libor conviction, fearing the waiver suggested "some firms are just too big to bar."

Meanwhile, in Canada, contractual provisions used by the country's largest federal procurement body, Public Works and Government Services Canada (PWGSC), automatically block companies from government contracts for 10 years if they are convicted of certain criminal offences. In 2014, PWGSC amended the procedures to cover convictions of companies' foreign affiliates.

The agency changed its stance within a year, after the policy reportedly risked debarring US technology company Hewlett-Packard following its FCPA settlement.

Lawyers welcomed PWGSC amendment plans in January 2015, stating the current regime lacks clarity and flexibility, and fails to recognise companies' remediation efforts.

In February 2015, lawyers told GIR that it is likely that mandatory debarment regardless of companies' cooperation could dissuade defendants from self-disclosing and cooperating with prosecutors. Canada's federal government confirmed plans to reform its debarment rules in April 2015.

Meanwhile, the EU in April 2014 amended its public procurement laws to remove provisions that forced member states to indefinitely block companies that were convicted of offences such as bribery and money laundering. Under new guidelines, member states are allowed to avoid debarment if they "self-clean" following corporate convictions. Debarment periods are also capped to five years.

The UK was the first EU member state to reform its debarment rules, which it did in March 2015. UK corporate prosecution guidance had previously referred to the EU-mandated regime as "intended to be draconian in its effect".