

Department of General Services ("DGS")

Debarment and Enjoinment Procedures

for Construction and Construction

Related Professional Services

Pursuant to Va. Code § 2.2-4321

Various persons engaging in business transactions with the Commonwealth of Virginia or its agencies, political subdivisions, or authorities (the “**Commonwealth**”) may be debarred or enjoined from contracting or bidding for particular types of good, supplies, services, insurance, or construction, for specified periods of time on the basis of unsatisfactory performance for a public body.

Any debarment procedure shall be established in writing for state agencies and institutions by the agency designated by the Governor and for political subdivisions by their governing bodies. The Director of the Department of General Services (“**DGS**”) was delegated the authority by the Governor to establish written procedures for debarment and injunction under Executive Order 88 (01).

Defined terms not otherwise defined in this “Debarment and Enjoinment Procedures for Construction and Construction Related Professional Services” (these “**Procedures**”) shall be as defined in Section II of these Procedures. Singular words shall connote the plural number as well as the singular and vice versa, and the masculine shall include the feminine and the neuter.

SECTION I. PURPOSE

The purpose of these Procedures is to specify the reasons and manner by which certain persons doing business with the Commonwealth may be debarred or enjoined (“**Disqualification Action**”) for construction and construction related professional services with the Commonwealth. A “**Contractor**” or vendor may be debarred or enjoined only under the circumstances outlined in these Procedures.

SECTION II. DEFINITIONS

Affiliate - an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10% of the voting securities of the entity. For the purposes of this definition “**voting security**” means a security or interest that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be considered a voting security.

Bidding - submitting a bid in response to an “Invitation for Bids” or submitting a proposal in response to a Request for Proposal (“**RFP**”) or Request for Qualifications (“**RFQ**”), or any other document submitted to the Commonwealth in response to any solicitation intended to find potential Contractors and set forth the price(s) for a construction project and construction related professional services.

Bidding Crime - any act in violation of state or federal law governing competitive bidding including, but not limited to, fraud, conspiracy, collusion, perjury, or material misrepresentation.

Committee - a committee comprised of the Director of the Division of Engineering and Buildings, the Deputy Director of DGS, and a representative of the Office of the Attorney General selected by the Deputy of the Government, Operations and Transactions Division, or a successor division. At any time one of these positions is vacant, the individual who is "acting" in the position may appoint a designee by providing written notice to the Director.

Contract – an agreement between the Contracting Entity and a Contractor.

Construction Related Professional Services - architecture, land surveying, landscape architecture and professional engineering.

Contracting Entity - a legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision of the Commonwealth.

Contractor(s) - An individual or firm that has entered into an agreement to provide professional services to the Commonwealth, which agreement may also include the provision of materials.

Debar or Debarred or Debarment- to exclude individuals or firms from contracting with state agencies from bidding for construction and construction related professional services, and serving as a Subcontractor with the Commonwealth, due to demonstrated irresponsibility or unreliability of the Contractor.

Director – the Director of DGS.

Enjoin or Enjoined or Enjoinment -to exclude a Contractor from bidding for construction and construction related professional services for specified periods of time in order to protect the Commonwealth from risks associated with awarding contracts to persons or firms which have exhibited an inability or unwillingness to fulfill the requirements of a current contract and to require the Contractor to focus on completing the obligations under the Contract before embarking on additional projects with the Commonwealth. Enjoinment does not relieve the Contractor of responsibility for existing obligations.

Project – All work necessary to complete the contract.

Project Schedule – the dates for completion of the Project as set forth in the Contract.

Reinstate or Reinstatement - a decision of the Committee to modify or suspend a Disqualification Action.

Small Business - a firm certified as "small" by the Virginia Department of Small Business and Supplier Diversity.

Subcontractor(s) – a person or entity that contracts with the Contractor in performing the work under the Contract.

Va. Code - the Code of Virginia (1950), as amended,

Vendor(s) - One who sells goods to the Commonwealth, which may also include the provision of services.

SECTION III. ENJOINMENT

The purpose of Enjoinment is to protect the Commonwealth from risks associated with awarding contracts to persons or firms that have exhibited an inability or unwillingness to fulfill the requirements of a

Contract, and to require the Contractor to allocate necessary resources to complete the obligations of the Contractor before starting additional projects with the Commonwealth.

The Enjoinment of a Contractor is also deemed to Enjoin any Affiliate with essentially the same operational management or draws from the same labor resource pool. Enjoinment of a Contractor applies to any successor company formed with the same resources, owners, or stockholders as the enjoined entity. Enjoined Contractors and their Affiliates may be disqualified from serving as a Subcontractor if the Committee determines that such work could adversely affect other work under contract to the Commonwealth.

Enjoinment will be issued when, in the opinion of the Commonwealth as confirmed by the Committee, the Contractor has failed to fulfill its obligations in the performance of a current contract. Enjoinment of a Contractor by the Committee is based on the authority granted in Va. Code§ 2.2-4321, as well as the general contracting power of the Commonwealth and the discretionary power of the Committee.

A. Reasons for Enjoinment

The Committee may Enjoin a Contractor or its Affiliates for any of the following reasons:

1. Failure to Meet Small Business Requirements

If the Contractor fails to submit information required by the Contract with regard to Small Business Subcontractors within the specified time frame, the Contractor and its Affiliates may be enjoined until the Commonwealth receives the submissions.

If a Contractor fails to meet its Small Business participation goals for any quarter of the Contract as shown on the Project Schedule, the Contractor may be Enjoined for up to sixty (60) days. Upon conformance with the Project Schedule, Enjoinment may be lifted at the discretion of the Committee.

Enjoinment in such a situation may be avoided if either of the following occurs:

- a. The Small Business is unable or unwilling to complete its portion of the work under a Contract, and the general Contractor shows reasonable effort to fulfill the other Small Business requirements.
- b. The Contracting Agency eliminates, or delays work on the Project Schedule that the Contractor planned to subcontract to a Small Business.

If, upon completion of the Contract, the Contractor has failed to meet the Small Business participation requirements, the Contractor and any Affiliates may be Enjoined by the Committee for up to ninety (90) days.

Enjoinment may be avoided if, prior to the Contracting Agency's request for Enjoinment, the Contractor submits documentation to the Contracting Agency indicating the reasons for failure to comply with the Small Business requirements. If the failure to comply was due solely to quantity under-runs or elimination of items subcontracted to Small Businesses, the Contractor must show that all feasible means were used to obtain the required participation, with the "all feasible means" requirement being determined by the Committee.

For projects that are subject to federal regulation, the Committee will not Enjoin a Contractor that has complied with the requirements of the Contract but failed to meet the Small Business goals of the

Project, when the Contractor has achieved a level of Small Business participation that is at least equal to the current federal requirements placed on the Commonwealth.

2. *Delinquency*

The *General Conditions of the Construction Contract* and the *A/E Contract for Professional Services* require all work under the Contract be completed as required by the Project Schedule. If a Contractor is delinquent in excess of 10% on the Project Schedule, the Contractor may be enjoined by the Committee. A Contractor's delinquency will be determined by comparing the monthly progress estimate to the Project Schedule. If the Contractor does not complete the necessary work to eliminate the discrepancy within thirty (30) calendar days or does not establish that the delinquency was attributable to conditions beyond the Contractor's control, the Contractor may be enjoined from bidding on other Commonwealth contracts until final acceptance of the Project.

3. *Unwillingness or Inability to Fulfill Contract*

In the event the winning bidder on an unbonded Contract notifies the Contracting Agency, prior to execution of the Contract by DGS, of the bidder's unwillingness or inability to fulfill the Contract, the bidder will be Enjoined from bidding on any unbonded contracts. A bidder who has never been Enjoined or sent a notice of default on an unbonded contract will not be Enjoined for the first occurrence; however, such a bidder will not be permitted to rebid or perform work on the contract found to be in default.

In the event that a bidder providing construction related professional services states an unwillingness or inability to fulfill the Contract, the bidder will be Enjoined from bidding.

4. *Commencing Construction Activities Prior to Issuance of a Building Permit*

In the event a Contractor commences construction activities on a Project prior to the issuance of a building permit by the appropriate building official, the Contractor may be Enjoined until such time as the violation is corrected and the unauthorized construction activities are ceased.

5. *Failure to Comply with the DGS Construction and Professional Services Manual, the General Conditions of the Construction Contract or the Terms and Conditions of the A/E Contract.*

In the event a Contractor fails to comply with the requirements of the *Construction and Professional Services Manual*, the *General Conditions of the Construction Contract* or the *Terms and Conditions of the A/E Contract*, and the Contracting Agency determines not to exercise its right to terminate for cause but believes that Enjoinment is appropriate under the circumstances, then the Contracting Agency will send notice to the Contractor of any deficiencies, give it a reasonable opportunity to correct the deficiencies and notify the Contractor that a failure to correct the deficiencies within the time allotted in the notice will result in a request to the Committee as set forth in Section V Part A of these Procedures.

6. *Wages Under Contracts for Public Works*

In the event a Contractor is reported by the Department of Labor and Industry or determined by a Court to have employed or to be employing any mechanic, laborer, or worker to perform work on a public contract for public works (as defined in Va. Code 2.2-432.1.3(A)) at a rate that is less than the prevailing wage rate established by the Department of Labor and Industry.

B. Consequences of Enjoinment

If a Contractor is Enjoined, the Contractor may, at the discretion of the Committee, be prohibited from bidding on Commonwealth construction contracts and construction related professional services contracts for a period not to exceed one year, at the discretion of the Committee. An enjoined Contractor may also be prohibited from serving as a Subcontractor if the Committee determines that such work could adversely affect other work under contract to the Commonwealth.

Enjoinment shall commence upon notification, or upon expiration of any existing Enjoinment, if later. If the Contractor corrects the underlying cause of Enjoinment, the Enjoinment may be, but is not required to be, lifted at the discretion of the Committee, pursuant Section V Part B of these Procedures.

SECTION IV. DEBARMENT

Debarment is the action taken by the Committee to exclude Contractors from bidding for construction and construction related professional services and serving as a Subcontractor with state agencies for specified periods of time. Debarment does not relieve the Contractor of responsibility for existing obligations under the terms of any Contract.

A. Purpose of Debarment; Affiliates

The purpose of Debarment is to protect the Commonwealth from risks associated with awarding contracts to persons or firms which have exhibited an inability or unwillingness to fulfill contractual requirements, and to protect (i) the Commonwealth's interests and to protect and (ii) the integrity of the Commonwealth's procurement process by preventing Contractors who have displayed improper conduct from participating in construction procurements for specific periods of time.

The Debarment of a Contractor is deemed to be a Debarment of any Affiliate. Debarment of a Contractor applies to any successor company formed with the same resources, owners, or stockholders as the debarred entity. Debarred Contractors and their Affiliates will be disqualified from serving as a Subcontractor with state agencies for specific periods of time.

Debarment will be issued when, in the opinion of the Commonwealth as confirmed by the Committee, the Contractor has failed to fulfill its obligations under a past Contract or in the performance of a current Contract. Debarment of a Contractor by the Committee is based on the authority granted in Va. Code§ 2.2-4321, as well as the general contracting power of the Commonwealth and the discretionary authority of the Committee.

B. Reasons for Debarment

The Committee may Debar a Contractor or its Affiliates for any of the following reasons:

1. Performance related causes

- a. Breach (including anticipatory breach) of contract with the Commonwealth.
- b. Stating an unwillingness or inability to honor a binding bid. A mere request to withdraw a bid, which does not otherwise state an unwillingness or inability to perform, is not a cause for Debarment.
- c. Falsifying or misrepresenting manufacturer's specifications in order to appear responsive to a solicitation.

- d. A determination by the Commonwealth, with the concurrence of the Committee, that a Contractor has used abusive or obscene language or a threatening manner toward Commonwealth personnel during the performance of their duties or as a result of the performance of their duties.
- e. Action taken by the Commonwealth to recover the Contractor's bid or performance bond.
- f. Delaying construction completion by failing to correct the installation of material, equipment, and construction that the Contracting Agency has determined in writing does not conform to the requirements of the drawings and specifications.
- g. Stating an unwillingness or inability to perform services required by the Contract for Professional Services or as directed by any Commonwealth employee exercising official responsibility for a construction procurement.

2. Non-performance related causes

- a. Proof of involvement in any criminal offense involving public contracting. Examples include, but are not limited to, bribery as defined in Va. Code § 18.2-447 and knowingly making a false statement in regard to collusion on a solicitation as defined in Va. Code § 18.2-498.4 and Debarment may occur if any of the following results:
 - Conviction
 - plea of guilty or nolo contendere
 - public admission by a co-conspirator
 - incriminating Contractor testimony that is protected by a grant of immunity.

Involvement in any of the above by any officer, director, owner, partner, agent, or related business entity of a Contractor shall constitute grounds for the Debarment of the Contractor. Additionally, improper conduct of the Contractor may be fully imputed to any individuals having control over the affairs of Contractor.

- b. Conviction of any offenses indicating a lack of moral, ethical, or business integrity.
- c. Conferring or offering to confer any gift, gratuity, favor, or advantage, present or future, upon any employee of a state agency who exercises any "official responsibility" for a "procurement transaction" as those terms are defined in Va. Code § 2.2-4368. It is not necessary that the offer be accepted by the employee, or that the offer is made with intent to influence the employee in an official act. Extending to any Commonwealth employee exercising official responsibility for a procurement transaction any discount or privilege not available to all Commonwealth employees is considered to be offering an advantage.
- d. Failing to disclose a condition constituting a conflict of interest by any officer, director, owner, or partner of the Contractor in a contract or purchase order awarded by any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision of the Commonwealth as defined in Va. Code, § 2.2-3120.
- e. Sale, under nonemergency conditions, of building materials, supplies, or equipment for any building or structure constructed by or for the Commonwealth by an independent Contractor employed to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association, or corporation in which such architect or engineer has a personal interest as provided by Va. Code §§ 2.2-4374 and 2.2-3101).

- f. Sale, under nonemergency conditions, of building materials, supplies or equipment for any building or structure constructed by or for the Commonwealth by any person who has provided or is currently providing design services specifying a sole source for such materials, supplies, or equipment to be used in such building or structure to the independent Contractor employed by the Commonwealth to furnish architectural or engineering services in which such person has a personal interest as defined in Va. Code §§ 2.2-4374 and 2.2-3101.
- g. Sale of goods or services to the Commonwealth when such sale is prohibited by any Debarment then in effect. Court judgment finding a violation of either federal or state antitrust laws.
- h. Court judgment finding a violation of either federal or state antitrust laws.
- i. Failure to pay re-procurement costs pursuant to the termination of a Contract as a result of a default by the Contractor.
- j. Failure to comply with the Terms and Conditions of the A/E Contract related to Design Errors and/or Omissions including failure to pay the amount due as a result of the errors or omissions of the vendor.
- k. Enjoinment pursuant to Section III. Part A-4 of these Procedures may be converted to Debarment at the discretion of the Committee if the Contractor continues with construction work on a project for which a proper building permit has not been issued by the building official after being notified to stop work.

3. Other Reasons

- a. An individual or firm that has been determined to be not a responsible Vendor by the Committee.
- b. Another state or federal agency has debarred that Contractor or any of its Affiliates for any reason.
- c. Should any manufacturer commit any of the acts described above, bids offering material, equipment, or supplies manufactured by that firm may be rejected even though the bid is submitted by a Contractor in good standing.
- d. Failure to notify the Contracting Agency of the Contractor's conviction of any Bidding Crime or Debarment following prequalification. Any Contractor currently prequalified to bid on projects with the Commonwealth shall notify the Contracting Agency which prequalified it within thirty (30) calendar days of being convicted of any Bidding Crime or being Debarred by another state or federal agency. The same applies to any Contractor who has previously bid or performed business to supply services, materials, or equipment.

4. Judicial determination

- a. A judicial determination of violations listed Section IV Part B Subparts 2.a., 2.b., and 2.h of these Procedures is not necessary for Debarment to be determined by the Committee.
- b. Consequences for Debarment

Debarment of a Contractor may, at the discretion of the Committee, be prohibited from bidding on Commonwealth construction and construction related professional contracts and serving as a Subcontractor for a period of ninety (90) days to three (3) years except as follows:

-Debarment pursuant to Section A Subparts 2.a., 2.b., and 2.h. shall be for a period of three (3) years.

-The Debarment pursuant to Section A Subpart 2.i. shall be for a period of one (1) year or until the re-procurement costs are paid or until the default under the Contract is resolved at the discretion of the Committee, whichever is longer.

Debarment shall commence upon notification, or upon expiration of any existing Debarments, if later. If the Contractor corrects the underlying cause of Debarment, the Debarment may be, but is not required to be, lifted pursuant to Section V, Part D of these Procedures.

V. NOTICE OF COMMITTEE FOR DISQUALIFICATION ACTION; REINSTATEMENT

A. How to Submit a Debarment or Enjoinment Request

Any Disqualification Action should be undertaken only after the Contracting Agency has first made a good faith effort to resolve the issue with the Contractor. Debarment and Enjoinment requests can be initiated by the Committee or through any Contracting Agency who makes a request in writing to the DGS Director of the Division of Engineering and Buildings.

A request for Debarment or Enjoinment must be in writing and state:

- a. That a request for either Debarment or Enjoinment is being submitted.
- b. The Contracting Agency involved in the dispute.
- c. The Contract number and other identification of the Contract; include the date of award, date of notice to proceed, and the current Contract completion date.
- d. The basis for the Debarment or Enjoinment action; the specific "reason(s) for debarment or injunction" as identified above in paragraphs IIIA and/or Section IV Part A of these Procedures.
- e. The Contracting Agency's attempts to address the issues with the Contractor (ensure that supporting documents, emails, etc., are provided).
- f. The relief sought.

The request must be submitted to:

- a. Via mail or hand delivery:

Director, Division of Engineering and Buildings
1100 Bank Street, Suite 506
Richmond, Virginia 23219

- b. Via email: capout@dgs.virginia.gov

A request may be sent via e-mail, but it will only be considered as a valid method for submitting a request if the message is acknowledged by the recipient.

B. Reinstatement

Except as otherwise provided at law or in these Procedures, the Committee in its sole discretion may lift or suspend a Disqualification Action at any time if it is in the best interests of the Commonwealth. A

Debarred or Enjoined Contractor may apply for Reinstatement at any time in writing to the Committee citing actions taken to remedy the reason for Disqualification Action or to prevent recurrence of the situation that caused the Disqualification Action to be taken and otherwise indicating that lifting or suspending the Disqualification Action as determined by the Committee is in the best interests of the Commonwealth. Examples of actions that the Committee may take into consideration include, but are not limited to:

1. The degree of culpability of the Contractor.
2. Whether a lengthy Disqualification Action protects the Commonwealth.
3. Restitution to the Commonwealth by the Contractor subject to the Disqualification Action for any perceived overcharges or other damages resulting from a Bidding Crime supporting an acknowledgement by the Contractor of the wrongfulness of circumstances leading to the Disqualification Action and an indication of the need to improve future performance, to the satisfaction of the Committee.
4. Cooperation with the Commonwealth by the Contractor subject to the Disqualification Action, the United States, and/or other sovereign bodies in the investigation of Bidding Crimes, including a full and complete account of the involvement of the Contractor.
5. Disassociation with the individuals and firms involved in a Bidding Crime.

If the Committee determines that a hearing on the matters presented is appropriate, then the hearing will take place within sixty (60) days following receipt of the request for reinstatement. If the Disqualification Action is scheduled to end within this sixty (60) day period, then no action by the Committee is necessary.

SECTION VI. APPROVAL BY THE GOVERNOR:

Pursuant to Va. Code § 2.2-4321.1 and as the official designee of the Governor of Virginia, as authorized and designated by Executive Order No. 88 (01), dated December 21, 2001, I hereby approve these procedures, on behalf of, and in the stead of the Governor of Virginia.

DEPARTMENT OF GENERAL SERVICES

By: Joseph E. Damico
It's: Director

9/27/23

Date