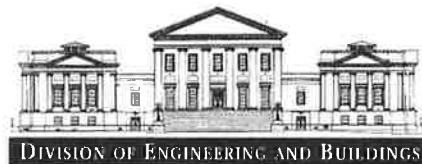




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Department of General Services ("DGS") Debarment and Enjoinment Procedures For Construction

Code of Virginia § 2.2-4321. Debarment.

Prospective contractors may be debarred from contracting for particular types of supplies, services, insurance, or construction, for specified periods of time. 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. Any debarment procedure may provide for debarment on the basis of a contractor's unsatisfactory performance for a public body.

The Director of DGS has authority to establish written procedures for debarment per Executive Order 88 (01).

I. PURPOSE

The purpose of these procedures is to specify the reasons and manner by which Contractors may be debarred or enjoined from projects for construction and related service with the Commonwealth of Virginia or its agencies ("Commonwealth"). A Contractor may be debarred or enjoined only under the circumstances and by the procedures outlined in this manual. Any action under these procedures should be taken after the Contracting Agency has first made a good faith effort to resolve the issue with the Contractor.

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 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 deemed to be 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 related professional and nonprofessional 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.

Contracting Agency – a legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision of the Commonwealth directly involved in construction procurement with respect to the project at hand.

Contractor – any qualified person, partnership, corporation, or other business entity seeking to bid on any construction contract let by the Commonwealth, or any person, partnership, corporation or other business entity who has entered into a contract to perform work or provide a service to the Commonwealth, including professional and nonprofessional services in conjunction with construction.

Debar – to exclude a Contractor from bidding for construction and related professional and non-professional services, and serving as a Subcontractor with the Commonwealth, due to demonstrated irresponsibility or unreliability of the Contractor. See Part IV. for the list of reasons for debarment.

Debarment Evaluation Committee (“Committee”) – a committee comprised of the Director of the Division of Engineering and Buildings, the Director of the Bureau of Capital Outlay Management, and the Section Chief of the Real Estate and Land Use Section of the Office of the Attorney General. At any time one of these positions is vacant, the individual who is “acting” in the position may appoint a designee.

Director – Director of the Department of General Services.

Enjoin – to exclude a Contractor from bidding for construction and related professional and non-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 current contractual obligations before embarking on additional projects with the Commonwealth. See Part III. for the list of reasons for enjoinder.

Reinstate – to modify or suspend debarment or enjoinder.

Small Business – a firm certified as “small” by the Virginia Department of Small Business and Supplier Diversity.

Subcontractor – an individual, partnership, corporation, or other business entity to which the prime Contractor sublets or proposes to sublet any portion of a contract. The Subcontractor may include any firm or person who provides on-site labor but does not include any firm or person who only furnishes or supplies materials for the project.

III. ENJOINMENT

“Enjoinment” as used in this section means action taken temporarily to exclude Contractors from participating in procurements and contracts for construction and related professional and non-professional services with state agencies for specified periods of time. Enjoinment does not relieve the Contractor of responsibility for existing obligations.

The purpose of enjoinment is 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 current contractual obligations before embarking on additional projects with the Commonwealth.

The enjoinment of a Contractor will result in the enjoinment of any Affiliate that has 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 progress schedule, enjoinment may be imposed for up to sixty (60) days. Upon conformance with the schedule, enjoinment may be lifted.

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, and the prime Contractor shows reasonable effort to fulfill the Small Business requirement otherwise.
- b. The Contracting Agency eliminates or delays work on the progress schedule that the Contractor had planned to sublet 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 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 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. The Committee will ultimately determine if the Contractor has met the contract requirements.

Exception: For projects subject to federal regulation, the Committee will not enjoin a Contractor that has complied with the contract requirements on all issues 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* requires all contracted work to be completed as scheduled. If a Contractor is delinquent in excess of 10% on the approved project schedule, enjoinment may be imposed. A Contractor's delinquency will be determined by comparing the monthly progress estimate to the latest approved 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 the Department, 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 defaulted 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 that specific contract.

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 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 and the General Conditions of the Construction Contract

In the event a Contractor fails to comply with the requirements of the *Construction and Professional Services Manual* and/or the *General Conditions of the Construction Contract* and the Contracting Agency decides not to exercise its right to terminate for cause under Section 41 of the General Terms and Conditions 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 problem and notify it that a failure to

correct the deficiencies within the time allotted will result in a request to the Committee as set forth in Part V, A below.

B. Punishment

Punishment for enjoinder will be the prohibition of bidding on Commonwealth construction 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.

Enjoinder shall commence upon notification, or upon expiration of any existing enjoinder, if later. If the Contractor corrects the underlying cause of enjoinder, enjoinder may be, but is not required to be, lifted (see Part V, C).

C. Process

See Part V, B-C.

IV. DEBARMENT

Debarment as used in this section means action taken to exclude Contractors from bidding for construction and related professional and non-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.

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 the Commonwealth's interests and 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 will result in the 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 power of the Committee.

A. Reasons for Debarment

The Committee may debar a Contractor or his 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 owner has determined in writing does not conform to the requirements of the drawings and specifications.

2. Non-performance related causes

a. Proof of involvement in any criminal offense involving public contracting. Examples include, but are not limited to, bribery (*Code of Virginia*, § 18.2-447) and knowingly making a false statement in regard to collusion on a solicitation (*Code of Virginia*, § 18.2-498.4) and debarment may occur if any of the following result:

- 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 a firm may be fully imputed to any individuals having control over the affairs of the firm.

- 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 the *Code of Virginia*, § 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 (*Code of Virginia*, § 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 (*Code of Virginia*, §§ 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 *Code of Virginia*, §§ 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.

h. Court judgment finding a violation of either federal or state antitrust laws.

i. Failure to pay re-procurement costs pursuant to a contract termination for default.

j. Enjoinment as described in section III.A-4 may be converted to debarment 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. Any cause indicating that the individual or firm is not a responsible Contractor.

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 in this section 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 judicial determination of violations listed above is not necessary for debarment to occur except for those violations described in subparagraphs 2.a., 2.b., and 2.h.

B. Punishment

Punishment for debarment will be the prohibition of bidding on Commonwealth construction and related professional and non-professional contracts, and serving as a Subcontractor for a period of ninety (90) days to three (3) years, at the discretion of the Debarring Committee except as follows. The debarment for subparagraphs 2.a., 2.b., and 2.h. of Section A shall be for a period of three (3) years. The debarment for subparagraph 2.i. of Section A shall be for a period of one year or until the re-procurement costs are paid or until the contract breach is resolved, 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, debarment may be, but is not required to be, lifted (see Part V, D).

C. Process

See Part V, B-C.

V. DEBARMENT AND ENJOINMENT NOTIFICATION AND APPEAL PROCEDURE

A. How to Submit a Debarment or Enjoinment Request

Debarment and enjoinment can be initiated by the Committee or through any Contracting Agency who makes a request in writing to the 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; cite the specific "reason(s) for debarment or enjoinment" as identified above in paragraphs IIIA and/or IVA.
- (e) The 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, VA 23219

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

- (b) Via email:
DEBInfo@dgs.virginia.gov

(c) Via facsimile:
804-371-7934

B. Process

(*Code of Virginia*, § 2.2-4357). Any bidder, offeror, or contractor refused permission to participate, or disqualified from participation, in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the Commonwealth shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five (5) business days after receipt of the notice.

Within ten (10) business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Committee shall issue its written determination of disqualification or ineligibility based on all information in the possession of the Committee, including any rebuttal information, within five (5) business days of the date the Committee received such rebuttal information.

If the evaluation reveals that the bidder, offeror, or contractor should be allowed permission to participate in the public contract, the Committee shall cancel the proposed disqualification action (debarment or enjoinder). If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the Committee shall so notify the bidder, offeror, or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten (10) days after receipt of the notice by instituting legal action as provided in the *Code of Virginia*, § 2.2-4364.

If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, applicable state law or regulations, the sole relief shall be restoration of eligibility.

C. Reinstatement

Except as otherwise provided at law or in these procedures, the Committee in its sole discretion may lift or suspend a debarment or enjoinder at any time if it is in the best interest of the Commonwealth. A debarred or enjoined Contractor can apply for reinstatement at any time in writing to the Committee citing actions taken to remedy the reason for debarment or enjoinder or to prevent recurrence of the situation that caused the debarment or enjoinder action to be taken and otherwise indicating that lifting or suspending the debarment or enjoinder would be in the best interest of the Commonwealth. Examples of actions that the Committee may take into consideration include, but are not limited to:

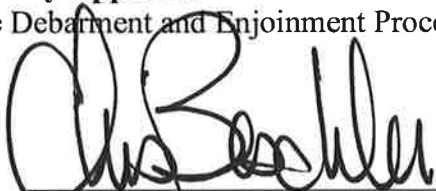
1. The degree of culpability of the Contractor.
2. Whether a lengthy debarment or enjoinder will protect the Commonwealth.

3. Restitution by the debarred or enjoined Contractor to the Commonwealth for any perceived overcharges or other damages resulting from a Bidding Crime. (Restitution may indicate an acknowledgement by the Contractor of the wrongfulness of his acts and may indicate a sincere desire to improve future conduct.)
4. Cooperation by the debarred Contractor with the Commonwealth, the United States, and/or other sovereign bodies in the investigation of Bidding Crimes, including a full and complete account of the Contractor's involvement.
5. Disassociation with the individuals and firms that have been 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 debarment or enjoinder is scheduled to end within this sixty (60) day period, then no action by the Committee is necessary.

VI. Policy Approval

These Debarment and Enjoinment Procedures For Construction are approved by:



Christopher L. Beschler
Director, Department of General Services

6-29-2016

Date