

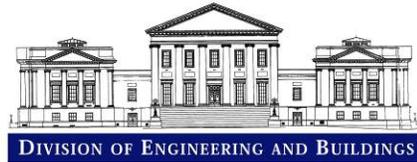
DEB Notice 091010 – Debarment and Enjoinment Procedures for Construction

Effective: August 26, 2010

Attached are the Department of General Services (DGS) Debarment and Enjoinment Procedures for Construction.



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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 Commonwealth.

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

I. PURPOSE

The purpose of this manual is to establish procedures by which contractors may be debarred or enjoined from construction projects with the Commonwealth of Virginia or its agencies acting in their individual capacity (“Commonwealth”). A contractor may be debarred or enjoined only under the circumstances and by the procedures outlined in this manual. Any action taken on behalf of the Commonwealth as a whole, as opposed to an action by an agency or other individual component of the Commonwealth, shall be taken only by the Department of General Services, acting by and through its Division of Engineering and Buildings.

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.

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.

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. A contractor could also function or seek to function as a subcontractor, materials supplier, or equipment supplier for any contract used in any construction or maintenance project. This person, partnership, corporation or other business entity must be legally authorized to conduct business in the Commonwealth.

Debar – to disqualify from contracting 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 Senior Assistant Attorney General for the Real Estate and Land Use Section of the Office of the Attorney General

Debarring Official – the Committee in initial proceedings and the Director of the Department of General Services in appeals proceedings.

Director – Director of the Department of General Services.

Enjoin – to impose bidding restrictions on the contractor.

Reinstate – to modify or suspend debarment or enjoinder.

Small, Women-, and Minority-owned Businesses (“SWaM”) – a business with 250 or fewer employees or average gross receipts of \$10 million or less averaged over the previous three years; a business at least 51% owned by one or more women; a business at least 51% owned by one or more minority individuals; and/or a business at least 51% owned by one or more service disabled veterans. See the *Code of Virginia*, § 2.2-4310 for additional requirements on such businesses, as part of the Commonwealth’s procurement initiative.

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 person who provides on-site labor but does not include any person who only furnishes or supplies materials for the project.

III. ENJOINMENT

The Commonwealth may enjoin a contractor from bidding on construction projects. Enjoinment 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. 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. Enjoined contractors and their affiliates will be disqualified from performing work as subcontractors if the Committee determines that such work could adversely affect other work under contract to the Commonwealth. Enjoinment of a contractor by the Committee is based on the contracting power of the Commonwealth and the discretionary power of the Committee.

To avoid enjoinment, the contractor must comply with both the DGS Construction and Professional Services Manual and the General Conditions of Construction Contract.

A. Reasons for Enjoinment

1. Failure to Meet SWaM Requirements

The DGS *Construction and Professional Services Manual* establishes guidelines for the use of SWaM firms for subcontracting. If the contractor fails to submit the required information as described in this section within the specified time frame, he and his affiliates may be enjoined until the Commonwealth receives the submissions.

If a contractor fails to meet his SWaM participation goals for each 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 SWaM firm is unable or unwilling to complete his portion of the work, and the prime contractor shows reasonable effort to fulfill the SWaM requirement otherwise.
- b. The Commonwealth eliminates or delays work on the progress schedule that the contractor had planned to sublet to a SWaM firm.

If the contractor fails to meet the SWaM participation requirements upon completion of the project, the contractor and any affiliates may be enjoined for up to ninety (90) days.

Enjoinment may be avoided if, prior to enjoinment, the contractor submits documentation to the Commonwealth 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 SWaMs, 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.

If the Committee determines that the contract requirements were not met, the contractor may request an appearance before the Director. The contractor must explain to the Director how all feasible means were used to meet the SWaM participation requirements. Enjoinment will begin upon the contractor's failure to request a hearing or upon the Director's final decision.

Exception: For projects subject to federal regulation, the Committee will not enjoin a firm that has complied with the contract requirements on all issues but failed to meet the SWaM goals of the project, when the contractor has achieved a level of SWaM 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 he does not establish that the delinquency was attributable to conditions beyond his control, he 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 Commonwealth, 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 for a period determined by the Debarring Official beginning with the date of the bidder's notice to the Department. 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.

B. Punishment

Punishment for enjoinment will be the prohibition of bidding on Commonwealth construction contracts for a period not to exceed one year. If the contractor corrects the underlying cause of enjoinment, enjoinment may be, but is not required to be, lifted

C. Process

See Part IV, E-G for the notification, appeal, and reinstatement procedures.

IV. DEBARMENT

Debarment as used in this section means action taken to exclude individuals or firms from contracting for construction and related professional and non-professional services 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 individuals or firms who have displayed improper conduct from participating in DGS construction procurements for specific periods of time.

Debarment of a contractor applies to any successor company formed with the same resources, owners, or stockholders as the debarred entity.

Any contractor currently prequalified to bid on projects with the Commonwealth shall notify the Director 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. Failure to do so is a serious offense, which alone could result in debarment.

A. Reasons for Debarment

The Committee, may debar a contractor or his affiliates for any of the following reasons. The Committee may also debar a contractor or his affiliates if another state or federal agency has debarred that contractor or any of its affiliates for any reason.

1. Performance related causes

a. Breach (including anticipatory breach) of contract with the Commonwealth.

Contractors shall not be liable for any excess cost if the failure to perform arises out of any act of war, order of legal authority, strikes, act of God, or other unavoidable causes not attributed to their fault or negligence. Failure of a contractor's source to deliver is generally not considered to be an unavoidable cause. Weather related delays are not generally considered acts of God absent a strong showing of extreme and unusual variations from weather events that reasonably could have been anticipated from a review of historical weather conditions and other information. The burden of proof rests with the contractor.

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.

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 DEB or any other agency 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.

3. Other reasons

- a. Any cause indicating that the individual or firm is not a responsible contractor.
- b. 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.

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. Debarment Period

Debarment shall be for a period of ninety (90) days to three (3) years, at the discretion of the Debarring Official, 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.

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 by anyone who makes a request 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 agency or institution of the Commonwealth involved in the dispute
- (c) The contract number and other identification of the contract
- (e) The basis for the debarment or enjoinment action
- (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. Initial 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 Commonwealth shall issue its written determination of disqualification or ineligibility based on all information in the possession of the Commonwealth, including any rebuttal information, within five (5) business days of the date the Commonwealth 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 Commonwealth shall cancel the proposed disqualification action (debarment or enjoinment). If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the Commonwealth 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 initiating an appeal in writing to the Director or other disinterested person in accordance with Section B below or by instituting legal action as provided in the *Code of Virginia*, § 2.2-4364.

If the Director finds that debarment proceedings would not be in the public's best interest because they may hinder federal or state investigations into a bidding crime, the proceedings may be delayed until those investigations are concluded. Any delay of the proceedings shall be made after written notice and an opportunity for a hearing is given to the contractor.

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. Appeals Process

1. An appeal to the Director of DGS must be initiated by the filing of a notice of appeal within the time limits prescribed in Section A above. If the Director is not a disinterested person within the meaning of §2.2-4365, then the Director shall appoint or arrange for the appointment of such a disinterested person to hear the appeal. It is not sufficient that notices of appeal be postmarked within the time limits. The appeal must actually be delivered within the time limits. **The Director shall make all decisions regarding the timeliness of the filing and receipt of any appeals. All decisions regarding the timeliness of the filing and receipt of any appeals to the Director shall be final and not subject to further appeal.** Notice of an appeal to the Director will be considered timely if the transmission is received in full within the time limits prescribed in Section A above. The original hard copy must be promptly submitted. The appealing party assumes whatever risks are inherent in the selected method of delivery.

2. The notice of an appeal must be in writing and state:

- (a) That an appeal is being filed
- (b) The agency or institution of the Commonwealth involved in the dispute
- (c) The decision from which the appeal is being taken
- (d) The contract number and other identification of the contract
- (e) The basis for the appeal
- (f) The relief sought

3. The notice must be submitted to:

(a) Via mail or hand delivery:
Director, Department of General Services
1100 Bank Street, Suite 420
Richmond, Virginia 23219

With a copy to:
Director, Division of Engineering and Buildings
1100 Bank Street, Suite 506
Richmond, VA 23219

Notice of an appeal sent via e-mail or facsimile is only considered as a valid method for giving notice when the message is acknowledged by the recipient.

(b) Via email:
directorsofficemail@dgs.virginia.gov

With a copy to:
DEBInfo@dgs.virginia.gov

(c) Via facsimile:
804-371-8305 and 804-371-7934

4. The Director may waive errors or a lack of complete information in the contents of the notice of appeal in the interest of justice if the notice is sufficient to make known the nature of the appeal and the contract involved. The Director may not waive the requirement that the appeal be filed within the prescribed time limits.

5. All proceedings in the appeal shall comply with the requirements of § 2.2-4365. Unless mutually agreed upon otherwise, the appeals hearing will be held no later than thirty (30) working days after the Director has received the notice of an appeal. If the appealing contractor does not receive a written decision concerning debarment or enjoinment within ten (10) days of the hearing, the appealing contractor should assume the appeal was denied.

6. Any party to the administrative procedure, including the public body, shall be entitled to institute judicial review as provided in the *Code of Virginia*, § 2.2-4364 if such action is brought within thirty (30) days of receipt of the written decision.

D. Reinstatement

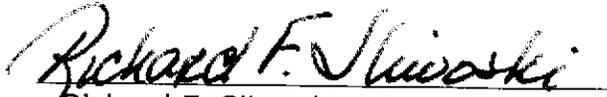
Except as otherwise provided at law or in these procedures, the Committee in its sole discretion may lift or suspend a debarment or enjoinder at any time if it is in the best interest of the Commonwealth. A debarred or enjoined individual or firm can apply for reinstatement at any time in writing to 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:

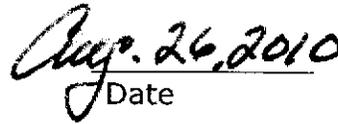
1. The degree of culpability of the contractor.
2. Whether a lengthy debarment or enjoinder will protect the Commonwealth.
3. Restitution by the debarred or enjoined contractor to the Commonwealth for any perceived overcharges or other damages resulting from a bidding crime. (Restitution may indicate 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 60 day period, then no action by the Committee is necessary.

VI. POLICY APPROVAL

These Debarment and Enjoinment Procedures For Construction are approved by:


Richard F. Sliwoski, PE
Director, Department of General Services


Date