

GO COMMITTEE #4
October 13, 2015

MEMORANDUM

October 9, 2015

TO: Government Operations and Fiscal Policy Committee
FROM: Linda Price, Legislative Analyst
SUBJECT: Update - County Debarment and Suspension Process

The Government Operations and Fiscal Policy Committee will discuss the County's policies and procedures for debarment and suspension of contractors with Cherri Branson, Director, Office of Procurement. There are currently no contractors on the list of debarred contractors and the County has not debarred or suspended any contractors under these rules.

The County Debarment and Suspension procedures are outlined in the Procurement Regulations §11B.00.01.18, which is attached at © 1-4. Procurement defines a debarment as an exclusion for cause by the Director of firms or individuals from eligibility to participate in a procurement action. The Director must determine the length of time the contractor is to be debarred. The Director may suspend a person from consideration for award of contracts if there is probable cause for debarment. The Procurement Regulations stipulate that a suspension must not be for more than six months.

Reasons for Debarment include the following:

- Conviction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;
- Conviction of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, kickbacks or any other offense indicating a lack of business integrity;
- Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- Violation of County contract provisions of a character which is regarded by the Director to be so serious as to justify debarment action, which may include:

- deliberate failure without good cause to perform under the specifications or within the time limits provided in the contract; or
- a record of failure to perform or of unsatisfactory performance under the provisions of one or more contracts; however, failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor are not a basis for debarment;
- Violation of the ethical standards set forth in Chapter 11B or Chapter 19A of the Code; or
- Any other serious cause the Director determines to be so compelling as to affect the competency or integrity of a potential contractor, including debarment by another public entity.

The Procurement Regulations require that the Director maintain a list of debarred persons and dates of debarment. It is notable that there are no debarments or suspensions on record. **The Committee may wish to get more information on why no contractors have been debarred or suspended under the Regulations.** Have there been issues that have impaired enforcement or have efforts to pursue debarment been terminated or settled? If so, for what reasons? **Additionally, the Committee may wish to explore whether changes to the Regulations or Code are needed to improve the debarment and suspension process.**

11B.00.01.18 Debarment and Suspension

18.1 Debarment

18.1.1 After consulting with the Using Department and the County Attorney, the Director may debar a person from consideration for award of contracts, for a length of time to be determined by the Director. The length of time should not be less than the time which would be expected to include one or more solicitations for the type of work being provided by the debarred person. The debarment time imposed by the Director is not limited by the debarment time imposed by another public entity.

18.1.2 The Director must maintain a list of debarred persons and corresponding dates of debarment.

18.1.3 The Director may debar a person for any of the following reasons:

18.1.3.1 Conviction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

18.1.3.2 Conviction of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, kickbacks or any other offense indicating a lack of business integrity;

18.1.3.3 Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

18.1.3.4 Violation of County contract provisions of a character which is regarded by the Director to be so serious as to justify debarment action, which may include:

(a) deliberate failure without good cause to perform under the specifications or within the time limits provided in the contract; or

(b) a record of failure to perform or of unsatisfactory performance under the provisions of one or more contracts; however, failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor are not a basis for debarment;

18.1.3.5 violation of the ethical standards set forth in Chapter 11B or Chapter 19A of the Code; or

18.1.3.6 any other serious cause the Director determines to be so compelling as to affect the competency or integrity of a potential contractor, including debarment by another public entity.

18.1.4 The Director must send a notice of proposed debarment to the person whom the Director proposes to debar. The notice must inform the person of:

18.1.4.1 the factual basis constituting probable cause for debarment; and

18.1.4.2 the right, within 10 days, to provide written reasons why the person should not be debarred and, if desired, to request a hearing.

18.1.5 After reviewing the record, the Director determines whether there are disputes of material fact.

18.1.5.1 If the Director determines there are no genuine disputes of material facts, the Director must issue a decision on the debarment.

18.1.5.2 If the Director determines there are genuine disputes of material facts, the Director must conduct a hearing and may designate a hearing officer to take evidence and to make proposed findings to the Director.

18.1.6. The Director must send a copy of a recommended determination and finding to the CAO. The CAO may approve, revise, or remand the Director's recommended decision based on the record. If the CAO takes no action within 5 working days after receiving the Director's decision, the decision of the Director becomes the final decision of the CAO.

18.1.7 The final decision must be mailed to the person who was subject to the debarment proceeding.

18.1.8 A determination by the Director or the CAO not to debar a person does not preclude the Director from finding the person not responsible in the context of a specific solicitation.

18.2 Suspension

18.2.1 If the Director initiates debarment proceedings, the Director may suspend a person from consideration for award of contracts. The suspension may not exceed 6 months.

18.2.2 The Director must send a notice of proposed suspension to the person whom the Director proposes to suspend. The notice must inform the person of the right to provide written reasons why the person should not be suspended.

18.2.3 A person who receives a notice of proposed suspension must provide written reasons opposing the suspension within 10 days after the Director issues the notice of proposed suspension.

18.2.4 After reviewing any material supplied by the person, the Director must make a determination and finding regarding the suspension.

18.2.5 The Director must send a copy of the recommended determination and finding to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes the final decision of the CAO.

18.2.6 The final decision must be mailed to the person who was the subject of the suspension proceedings.

18.3 Hearing Procedures

18.3.1 Discovery

18.3.1.1 Each party to a debarment proceeding is entitled to obtain the following discovery regarding any matter, not privileged, which is relevant to the debarment proceeding:

18.3.1.2 Any time after the Director decides to conduct a hearing in the debarment proceeding, a party may serve another party with a request for production, inspection, and copying of documents or any tangible things. Within 30 calendar days after service, the party served must respond stating that inspection and copying will be permitted or stating the basis for any objection.

18.3.1.3 Any party may take depositions, upon oral examination, before an officer authorized to administer oaths at a place of examination, for the purpose of discovery or for use as evidence. The party desiring to take a deposition must serve a notice of deposition upon oral examination at least 7 days before the date of the deposition. A party must not take more than 5 depositions without leave of the hearing authority or agreement of the parties.

18.3.2 Pre-Hearing Report

Seven days prior to the commencement of the hearing, the parties to the debarment proceeding must submit a pre-hearing report to the hearing authority, with a copy to the other parties. Each pre-hearing report must:

18.3.2.1 Explain each ground or defense relied upon by the party;

18.3.2.2 List all issues not in dispute, facts stipulated, and facts to which the other party is requesting stipulation;

18.3.2.3 List each witness (except for rebuttal witnesses) to be called by the party and a summary of the facts to which the witness is expected to testify;

18.3.2.4 List each expert witness to be called and attach a copy of any report prepared by the expert witness. Unless contained in the expert's report, the party must provide:

(a) a complete statement of each opinion to be expressed;

(b) the basis and reason for each opinion;

(c) the data or other information considered by the expert in forming each opinion;

(d) the qualifications of the expert, including a list of all publications authored by the expert; and

(e) a list of each case in which the expert has testified as an expert within the preceding 4 years;

and

18.3.2.5 List each exhibit to be introduced by the party.

18.3.3 Hearing Procedures; Powers of Hearing Authority

18.3.3.1 If the Director designates a hearing officer, the hearing officer has all the authority granted in these regulations except to make a final agency decision.

18.3.3.2 Hearings are held at a time and place designated by the hearing authority in a written notice to the parties to the debarment proceeding. The hearing authority must provide written notice to the parties designating a time and place for the hearing. The hearing must be on the record and be open to the public, unless otherwise ordered by the hearing authority or as provided by law.

18.3.3.3 The hearing authority must arrange for a verbatim recordation of all testimony. The Director must pay for the recordation. A party requesting a transcript must bear the expense of the transcript. The hearing authority must maintain a record of the proceedings which consists of the verbatim recordation or transcript, exhibits, and the hearing authority's proposed findings of fact and recommendations.

18.3.3.4 A hearing authority must not consider an ex parte communication except as provided in the Montgomery County Public Ethics Law.

18.3.3.5 Each party may:

- (a) be represented by counsel authorized to practice law in Maryland;
- (b) file motions;
- (c) present evidence, including testimony and exhibits;
- (d) cross-examine witnesses; and
- (e) argue in support of its respective position.

18.3.3.6 Subject to the direction of the hearing authority, proceedings are informal. Although the hearing authority has full discretion to proceed in an orderly fashion, the following is the usual order for presentation of the debarment proceeding:

- (a) Opening statements (County first, person subject to debarment last);
- (b) Presentation of witnesses and documents (County first, person subject to debarment last); and
- (c) Closing argument (County first, person subject to debarment last).

18.3.3.7 The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence that is reliable in nature. The hearing authority must give effect to the rules of privilege recognized by law. The hearing authority may exclude incompetent, unreliable, irrelevant, or unduly repetitious evidence, or admit evidence at its own request. The hearing authority may question witnesses on any point.

18.3.3.8 The hearing authority may:

- (a) set any reasonable schedule for the hearing, motions, and presentation of evidence;
- (b) accept stipulations;
- (c) require the swearing of witnesses;
- (d) take official notice of commonly cognizable facts;
- (e) rule on motions;
- (f) subpoena and examine witnesses;
- (g) accept exhibits into the record;
- (h) administer oaths and affirmations;
- (i) grant or deny a request for a subpoena, including a subpoena duces tecum;
- (j) impose sanctions for failing to provide required discovery;

***Editor's note:** Exec. Reg. No. 23-07AM repeated paragraphs lettering (h) and (i), as follows, instead of (k) and (l).

(h) for good cause shown, keep the record open for receipt of additional evidence or submissions by the parties after the close of the hearing; and

(i) make any other ruling necessary to promote fairness or efficiency in the hearing process, including a recommended summary disposition of the debarment proceeding.

18.3.3.9 The burden of proof and the burden of persuasion with respect to the debarment proceeding is on the County.

18.3.3.10 The Director must prepare and submit to the CAO a written report containing proposed findings of fact and recommendations based on the record. A copy of the report must be forwarded to all parties.

(Administrative History: Reg. No. 27-03AM (Method 1), amended in part by Reg. No. 3-06 and Reg. No. 19-09AM; Dept.: Department of General Services; Supersedes: Reg. No. 15-94AM, amended in part by Reg. Nos. 30-97, which had a sunset date of August 1, 2001 that was extended to December 31, 2003 by 2001 L.M.C. ch. 35, and Reg. No. 25-99; which superseded Reg. Nos. 13-94E, 1-94AM, 2-93E, 56-93.)

See also **COMCOR 11B.65.01 Local Small Business Reserve Program**