

810 CMR: DIVISION OF CAPITAL ASSET MANAGEMENT

810 CMR 5.00: CONTRACTOR DEBARMENT PROCEDURES UNDER M.G.L. c. 149, § 44C

Section

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5.01: Scope and Purpose

810 CMR 5.00 establishes a procedure by which contractors whose actions show a lack of integrity can be excluded from public contracting.

5.02: Definitions

As used in 810 CMR 5.00, the following words and phrases shall have the meanings set forth:

Affiliates - two entities one of which either directly or indirectly controls or has the power to control the other, or when a third party controls or has the power to control both.

Contractor - any person or entity that has furnished or seeks to furnish goods or services under contract with a public agency or with an individual or entity under contract with a public agency relating to the acquisition, planning, design, construction, demolition, installation, repair or maintenance of any capital facility. Contractors subject to 810 CMR 5.00 shall include, but shall not be limited to general contractors, subcontractors, materials suppliers and vendors, and suppliers of architectural, engineering, construction management, testing, land surveying and consultant services. Employees of a public agency who furnish goods or services in the course of their employment shall not be subject to 810 CMR 5.00.

Debarment - an exclusion from public contracting or subcontracting for a reasonable, specified period of time not to exceed five years commensurate with the seriousness of the offense.

Deputy Commissioner - the Deputy Commissioner of the Division.

DCPO - the Division of Capital Planning and Operations.

Public Contract - any contract for the furnishing of goods or services to any public agency relating to the acquisition planning, design, construction, demolition, installation, renovation, repair or maintenance of any capital facility.

5.03: Grounds for Debarment

(1) Conviction or final adjudication by a court or administrative agency of competent jurisdiction of any of the following offenses:

- (a) a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
- (b) a criminal offense involving embezzlement, theft, forgery, bribery falsification or destruction of records, receiving stolen property or any other offense indicating a lack of business integrity or business honesty which seriously and directly affects the contractor's present responsibility as a public contractor;
- (c) a violation of state or federal antitrust laws arising out of the submission of bids or proposals;
- (d) a violation of state or federal laws regulating campaign contributions;

5.03: continued

- (e) a violation of any state or federal law regulating hours of labor, prevailing wages, minimum wages, overtime pay, equal pay or child labor;
 - (f) a violation of any state or federal law prohibiting discrimination in employment;
 - (g) repeated or aggravated violation of any state or federal law regulating labor relations or occupational health or safety.
- (2) Clear and convincing evidence as determined by the Deputy Commissioner of the commission of any of the following acts:
- (a) willful supplying of materially false information or willful failure to disclose significant information incident to obtaining or attempting to obtain or performing any public contract or subcontract;
 - (b) willful failure to comply with the record-keeping and accounting requirements set forth in M.G.L. c. 30, § 39R;
 - (c) repeated and willful failure to comply with state laws or regulations;
 - (d) a record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more public contracts, provided that such failure to perform or unsatisfactory performance has occurred within a reasonable period of time preceding the determination to debar and provided further that such failure to perform or unsatisfactory performance was not caused by factors beyond the contractor's control;
 - (e) any other cause affecting the responsibility of a contractor which the deputy commissioner determines to be of such serious and compelling nature as to warrant debarment.

5.04: Procedure for Debarment

- (1) Any public agency or interested party may propose to DCPO the debarment of a contractor for causes set forth in 810 CMR 5.03(1). Information and documentation as required by DPCO general counsel must be submitted by the public agency or party seeking the debarment.
- (2) DCPO may undertake to debar a contractor, for cases set forth in 810 CMR 5.03, based upon its direct experience with that contractor, upon the request of a public agency with such direct experience, or referral from any law enforcement or regulatory agency, or on credible information submitted by any interested party.
- (3) The Deputy Commissioner may conduct informal hearings between public agencies, the contractor, and any other parties with information concerning the reasons asserted in support of the debarment, to determine if sufficient facts exist which, if proven, would justify a debarment. All mitigating facts and circumstances will be considered in determining if debarment should be sought, including but not limited to whether the accusation is timely, if there is a pattern of improvement in performance, and whether the contractor has made restitution, if applicable.
- (4) The contractor to be debarred may be an individual, a partnership, a corporation, or any other entity. An affiliate may be debarred on the same facts and in the same proceedings only if it is named and given notice and an opportunity for a hearing.
- (5) The Deputy Commissioner will send notice by certified mail return receipt requested, to the contractor at his last known address, stating the reasons for and the proposed duration of the debarment, and setting forth the contractor's right to request a hearing. Such a request in writing must be received by the Deputy Commissioner within 14 calendar days of the contractor's receipt of the notice of debarment.
- (6) The contractor shall be ineligible to bid on public work or to be awarded a contract from the date that he is given notice of debarment until the proceedings are concluded.

5.04: continued

(7) If no hearing is requested within 14 calendar days, as provided above, a notice imposing debarment and stating the specific period thereof will be sent to the contractor by certified mail, return receipt requested.

(8) A hearing, if requested, will be held before the Deputy Commissioner or his designee within 30 days of the contractor's request, unless the Deputy Commissioner grants an extension upon request of the contractor or the DCPO general counsel. The hearing will be conducted in accordance with the Rules and Administrative Procedures issued under M.G.L. c. 30A, §§ 9 through 11.

(9) The Deputy Commissioner or his designee will issue findings, and a written decision imposing debarment for a specific period of time, or a decision that debarment should not be imposed. The decision shall be sent at once to the contractor by certified mail, return receipt requested.

(10) Notice of debarment will be given to the Central Register in the following form:

CENTRAL REGISTER DEBARRED CONTRACTORS LIST

St. 1980, c. 579 gives the Division of Capital Planning and Operations the authority to debar certain contractors for a period of up to five years "to protect the integrity of the public contracting process." No public owner may solicit or accept bids or proposals from a debarred contractor, nor may any debarred contractor contract for work in any capacity on a public construction project during the period of debarment.

1. Name and Address
2. Statutory Reference
3. Duration and Termination Date

(11) A decision that debarment should not be imposed will automatically terminate suspension as provided in 810 CMR 5.04(6). The contractor may request that notice of the decision be given to the Central Register.

5.05: Term of Debarment

(1) A debarment shall be for a definite period of time, determined by the Deputy Commissioner, as necessary, to protect the integrity of the public contracting process in the particular instance. A debarment may not exceed five years.

(2) The period of time shall be commensurate with the seriousness of the offense.

(3) Elements to consider in determining the duration of debarment includes but are not limited to the following:

- (a) Does the offense relate to product quality or workmanship?
 1. Does the offense affect the life and safety of others?
 2. Does the unsatisfactory performance affect the usefulness of the project?
- (b) Does the offense bear upon business integrity?
 1. Is the offense a contract violation?
 2. Is the offense a statutory violation?
 3. Is the offense a violation of a rule or regulation?
 4. Is the offense a criminal violation?

(4) Elements to consider in mitigation include, but are not limited to:

- (a) Has the contractor admitted liability and made restitution?
- (b) What weight does the offense carry in relation to the total public owner/contractor relationship?
- (c) Was it a first offense?
- (d) Has the contractor taken steps to ensure that the offense will not recur?

5.06 Removal of Debarment or Reduction in Term

- (1) A contractor may at any time request the Deputy Commissioner to remove the debarment, or to reduce the period of debarment, imposed under 810 CMR 5.00. If such request is denied, the contractor may not resubmit for 30 days after the date of denial.
- (2) The Deputy Commissioner will consider evidence submitted by the contractor as grounds for such relief, such as new evidence, bona fide change of ownership or management, or elimination of the cause for which debarment was imposed.
- (3) If the Deputy Commissioner at his discretion determines to remove the debarment, or to diminish the period thereof, notice shall be sent to the contractor, and published in the Central Register.

REGULATORY AUTHORITY

810 CMR 5.00: M.G.L. c. 149, § 44C