

DEBARMENT FAQs

What is the purpose of being able to debar a contractor?

The City would use the sanction of debarment as a tool to ensure that it conducts its procurement activities with "responsible" contractors.

The debarment process is to protect the City from fraud, waste and abuse by using a tool to avoid doing business with non-responsible contractors.

What are the causes for Debarment?

- **Fraud with Public Contract** - Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public contract.
- **Business-related Crime** - A conviction of, or plea of guilty or nolo contendere to, a civil judgment for, or a public admission to, a crime or offense related to business of the contractor or affecting the responsibility of the contractor.
- **Theft, Forgery or Tax Evasion** - Commission of embezzlement, theft, forgery, bribery, collusion, falsification, perjury, destruction of records, making false statements, tax evasion, violating Federal Criminal Tax laws or receiving stolen property.
- **Lack of Business Integrity** - Commission of any offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a contractor.
- **Ethics Violation** – Failure to disclose to City violation of federal, state or local law involving fraud, conflict of interest, bribery, ethics or gratuity violation or failure to disclose overpayment on City contract.
- **Contract Violation** - Violation of the terms of a contract so serious as to justify debarment.
- **Safety Violations** – Serious or repetitive safety violations, which may be evidenced by violations of the OSHA Standards, worker's compensation claims, personal injury lawsuits or the safety record of any entity.
- **Indebtedness to the City.**
- **Debarred by Other Entity** - Placement on a state or federal debarment list or other similar list or undergoing a process of review that had the effect of excluding a contractor from contracting with the governmental entity for any length of time, provided the procedures for placement on the debarment list or exclusion process afforded the contractor any form of due process.
- **Unsubstantiated Lawsuit** – Filing a lawsuit against the City if the City Attorney reasonably determines it is unsupported by the evidence or filed in bad faith or for an improper purpose.
- **Repetitive, Unsubstantiated Claims** – Filing repetitive claims if the City Attorney reasonably determines the claim is unsupported by the evidence or made in bad faith or with intent to harass or delay a city project.

- **Other Compelling Reason** - Any other cause of such a serious or compelling nature that it affects the present responsibility of a contractor.

Would the City debar a contractor as a penalty for bad conduct?

No. The serious nature of debarment requires that it be imposed only in the public interest for the City's protection and not for punishment.

But isn't the City going to be looking at a contractor's past conduct and past performance to decide whether to debar the contractor?

Yes, but the consideration in imposing this sanction is the contractor's "present and likely future responsibility" and not the mere fact that the contractor has engaged in proscribed activity.

Is it going to be easy for the City to debar a contractor?

No. Because debarment is so severe a sanction, the City bears a heavy burden in establishing a cause for debarment.

What is the City's burden to debar a contractor?

The City may debar a contractor premised on a "preponderance of the evidence."

Preponderance of the evidence means the greater or superior weight of the evidence. This preponderance is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence.

If a contractor has committed an action that is cause for debarment, does that mean the contractor will be debarred?

No. The existence of a cause for debarment does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors must be considered in making any debarment decision. The ordinance clearly indicates that debarment is discretionary and is not to be an automatic consequence of a recognized cause for debarment.

What can a contractor do if they receive a notice of proposed debarment and want to present their side of the story?

A contractor who receives a notice of proposed debarment may submit argument in opposition, including any additional information that may raise a genuine dispute over the material facts. In actions where the proposed debarment is not based upon a conviction or judgment and the contractor's submission is found to raise a dispute over facts material to the debarment, the ordinance requires the City to afford the contractor an additional opportunity to submit

documentary evidence, appear with counsel, present witnesses, and confront any person the City presents as part of a case for debarment.

Does the City have to provide notice of its reasons for the debarment?

Yes. There are several notice requirements in the ordinance, including required notice to the contractor when the contractor is proposed for debarment, as well as when the Director has made a final determination.

Does the City prepare a written summary or findings of fact?

Yes. Unless based upon a conviction or civil judgment, the City prepares, or has prepared, written findings of fact in conjunction with its debarment decision.

When is debarment inappropriate?

Debarment is inappropriate when the contractor can establish by a preponderance of the evidence that, notwithstanding any past non-responsible conduct, he no longer constitutes a business risk.

When would a Director decide not to debar a contractor that has done something that can get him debarred?

The Director may refuse to debar a contractor that has committed an act that is cause for debarment where the administrative record and any evidence presented by the contractor shows, by a preponderance of the evidence, that his subsequent behavior is presently responsible.

If the Department were to investigate a contractor's responsibilities under the debarment process and even if the Director were to recognize that a contractor's role in a particular act, for example, the criminal act of committing fraud, was unjustifiable and evinced a serious lack of responsibility at the time of the transgression, the Director may find cause to nevertheless decide that, when viewed in light of the contractor's conduct since his criminal activity, the proposed debarment would constitute a penalty and would not be necessary to protect the public interest.

Let's say I've been debarred. What happens?

- Offers will not be solicited from, contracts will not be awarded to, existing contracts will not be renewed or otherwise extended for, and subcontracts requiring City approval will not be approved for you by any City department.

- You may neither conduct business with the City as an agent or representative of other contractors or subcontractors nor may you act as an individual surety to other City contractors.
- No City department may enter into, renew or extend a contract with you.
- Your name will be placed on the Excluded Parties List (EPL).
- Your affiliation with or relationship to any organization doing business with the City will be carefully examined to determine the impact of those ties on the responsibility of that organization as a City contractor or subcontractor.

How do I refer a contractor for Debarment?

The Department will establish procedures and processes, including procedures and processes for referrals.

The procedures, processes, and the contact person to whom referrals may be sent will be posted on the Department’s webpage within a reasonable amount of time after passage of the ordinance.

Who decides if a contractor will be proposed for debarment?

The Director of the Department of Engineering Services or designee will decide whether a contractor will go through the Debarment process.

Who refers contractors for Debarment?

Most referrals are expected to come from the Department’s own staff.

What will the City do to make sure the process for debarment and referrals is not susceptible to abuse?

The Department will set up an internal group or committee to review and coordinate requests for referrals.

All requests for referring a contractor for debarment will be carefully screened to weed out those requests for referral that appear to be groundless, punitive, discriminatory, or based on apparent prejudice.

Only serious and legitimate cases will be proposed for debarment.

Can’t a contractor refer another contractor to keep a competitor from bidding a project?

No. A contractor is **not** going to be able to use the debarment process to try to refer a competitor for debarment in order to keep that contractor from bidding a city project.

Can a contractor be debarred or referred for debarment for failing to perform on a contract or for poor performance on a contract?

A contractor is **not** going to be proposed for debarment or debarred in order to punish the contractor for a single failure to perform on a city contract. If a contractor fails to perform or performs poorly on a given contract, the City must make use of the contractual remedies already available under the contract language.

A contractor's serious contract violations and continued failure to perform can be evidence, however, that could go toward supporting a case for debarment or a contractor's present responsibilities.

The process cannot be used to punish contractors for their past conduct. It can only be used for purposes of protecting the public interest by contracting only with responsible contractors.

Can a Director's decision to debar a contractor be appealed?

Yes. A contractor can appeal a decision to the Executive Director of Public Works, then to the Assistant City Manager for Public Works and Utilities, and then to the City Manager or designee.

Does the Department of Engineering Services and the Director of Engineering Services basically decide a contractor's fate when it comes to debarment? As a contractor, why should I feel I will be given a fair shake?

No. There are several safeguards in the ordinance that ensure that a contractor will receive a fair shake, due process, an independent review, and the opportunity to appeal.

Where does the ordinance provide for an independent review?

The ordinance provides for an independent review under Section 41-107(d), which states that, unless based upon a conviction or civil judgment, the Director will refer matters involving disputed material facts to an independent third party or consultant for findings of fact.

What if the Director feels like disregarding the findings of fact?

The Director may reject the independent findings **only** after they have been determined to be arbitrary and capricious or clearly erroneous.

What comments from contractors have been worked into the ordinance?

All of the comments received by the City and the City's response are posted on the Engineering website at <http://engineercc.com>

Why does this ordinance look so different from the first draft version?

Many changes were made to the ordinance to simplify it and to work in the various comments staff received from contractors and from City Council.

What is the biggest change?

The ordinance no longer provides authority or procedures to suspend a contractor.

Why did you take out suspension?

The City will be able to handle the types of cases that suspension was intended to handle through other processes and procedures.

What is the section titled “Responsibility” in Article II all about?

The City has to award to the lowest responsible bidder on most public works contracts. The section regarding responsibility simply codifies the normal course of business process that the City must go through for its procurements and awards for public works contracts.

Engineers are associated with providing services in connection with public works projects. Will engineers and other professional service providers be debarred under this ordinance?

No. This ordinance does not apply to professional services contracts.

Why would engineers be exempt from debarment?

Professional services contracts are exempt from competitive bidding process. Professional service providers do not "bid" on city projects in response to a bid invitation as construction contractors do.

Professional service contracts must be awarded to the *most highly qualified* service provider in accordance with Chapter 2254 of the Texas Government Code and cannot be awarded to the lowest responsible bidder.