If a contractor bribes government officials with cash, prostitutes, and Cuban cigars, or is found guilty of crimes associated with an environmental catastrophe, public agencies need to move quickly to ensure the integrity of the procurement process. Suspension and debarment of contractors is one mechanism used to avoid contractors who cannot be trusted to perform successfully, ethically, or in accordance with law and public policy.

The Virginia Public Procurement Act (VPPA) authorizes debarment “from contracting for particular types of supplies, services, insurance or construction, for specified periods of time.” Public entities are required to establish written debarment procedures and may also establish their own administrative appeals procedures. Counties, cities, and towns may even adopt alternative policies and procedures and exempt their procurements from the VPPA, provided that such procedures are “based on competitive principles” and are “generally applicable” to the governing body’s procurements. Thus, the debarment system in Virginia is decentralized. The result is a patchwork of rules for contractors and their counsel to navigate.

CAUSES AND EFFECTS OF SUSPENSION AND DEBARMENT

State agencies, institutions, and local governments have authority under the VPPA to establish grounds for debarment. Public entities in Virginia uniformly authorize debarment for

SUSPENSION and DEBARMENT RULES in Virginia Public Procurement

By EDMUND M. AMOROSI and DANIEL H. RAMISH
crimes relating to contracts or bidding and for violations of federal or state law that demonstrate a lack of business integrity. Public entities also consistently permit reciprocal debarment, i.e., debarment on the basis of a contractor’s debarment by another state or federal agency. Contractors should be aware that the VPPA explicitly permits debarment for “unsatisfactory performance for a public body.” Agency policies and procedures sometimes authorize concurrent action to initiate debarment proceedings when a contractor is not performing satisfactorily on a contract or has defaulted.

Many public entities authorize debarment for a broad array of causes, including for nonperformance of a contract as contemplated by the statute. The Department of General Services (DGS) has issued procedures for its Division of Purchases and Supply (DPS) and for construction, both of which specify many grounds for debarment. The DPS Vendor’s Manual, which applies to acquisition of nontenotechnology goods and nonprofessional services, lists at least 19 separate grounds, including criminal convictions and procurement fraud, but also violations of anti-discrimination provisions, failure to pay reprocurement costs after a default, noncompliance with the federal E-Verify program, antitrust violations, and failure to disclose conflicts of interest. DGS procedures also allow debarment for performance-related reasons, including breach of a contract with a state agency or failure to honor a bid. Finally, DGS includes a catch-all authorizing debarment for “any cause indicating that the individual or firm is not a responsible [contractor or vendor].”

Like DGS, local governments permit debarment for a variety of causes. For example, Fairfax County’s Purchasing Resolution and the City of Richmond’s municipal code provide for contract performance-related debarments and reserve broad latitude for nonperformance-related debarments.

Some public entities specify more limited causes for debarment, however. The Virginia Department of Transportation (VDOT) Commonwealth Transportation Board (CTB) has promulgated a Debarment and Suspension Policy, set forth in state regulation and available at the Department’s Construction Division offices and online. CTB provides narrower grounds for debarment for crimes related to bidding or moral or business integrity and for reciprocal debarments.

The duration and scope of debarment are prescribed by statute and the debarring entity. Public entities typically exclude contractors for a minimum of 90 days to up to three years at the discretion of the debarring official, although some grounds for debarment have mandatory durations. For example, the DPS Vendor’s Manual requires a three-year debarment for criminal convictions involving public contracting, a judgment finding a violation of federal or state antitrust laws, or a conviction of any offenses indicating a lack of moral or business integrity. Debarment does not affect a contractor’s obligations to perform contracts already awarded.

In addition to debarment, some Virginia entities also provide for “suspension” (also termed “enjoinment”). Suspensions may be for the same or different causes as debarments, are typically of shorter duration (e.g., not in excess of a year), and entities may also provide for a summary process to institute suspension.

Beyond losing the opportunity to compete for work with public bodies in Virginia, debarred contractors could be excluded from public contracts in other jurisdictions, so-called reciprocal debarments. Contractors could even be debarred from federal government contracting if debarred in Virginia. Virginia publishes a list of suspended and debarred contractors on the eVA website. Some individual Virginia public entities also publish their own, independent lists.

**PROCESS FOR DEBARMENT**

Debarment proceedings can be triggered by numerous sources, such as agency referrals, indictments, news reports, and competitors. The VPPA mandates that public bodies notify contractors in writing of their debarment. Before issuing a written determination, public bodies must notify the contractor in writing of the results of the evaluation, disclose the factual support for the determination, and then allow the contractor to inspect any relevant documents, if the contractor timely requests access within five business days of receipt of the notice. Following receipt of such notice, contractors have 10 business days to submit rebuttal information to the debarring entity. The public entity then has five days to issue a final written determination of disqualification or ineligibility.

Practitioners should review a public body’s regulations because the procedures differ. In some instances, municipalities may even be authorized to deviate from the statutory requirements. DGS procedures mirror the VPPA. The VDOT CTB debarment policy provides for a hearing before the commissioner. The CTB also has discretion to reinstate a contractor, if doing so is in the public interest. The Federal Acquisition Regulation (FAR) prescribes specific criteria for determining present responsibility in federal procurement. A contractor challenging a proposed debarment in Virginia might find the FAR criteria helpful if attempting to demonstrate that it is a responsible bidder.

**ADMINISTRATIVE AND JUDICIAL REVIEW**

Debarment is final under the VPPA unless the debarred contractor “appeals the decision within ten days after receipt of the notice [of debarment] by invoking administrative procedures … if available, or in the alternative by instituting legal action … .” Contractors cannot challenge a debarment in court until after the public entity issues its written decision to debar. Courts have held that contractors must file challenges within 10 days following the written decision, whether pursuing an administrative appeal or filing a judicial appeal. The Supreme Court of Virginia has held that the filing periods are an integral part of the substantive cause of action.

If a public entity establishes an administrative appeals process, such process is required to “provide for a hearing before a disinterested person or panel,” who must not
be an employee of the governmental entity. Contractors must be afforded “the opportunity to present all pertinent information,” after which a written decision must be issued containing findings of fact. Contractors are not required to pursue administrative appeals before taking legal action, but if they elect the administrative route, then they must exhaust it before instituting legal action, unless the debarring entity agrees otherwise. If there is no administrative appeals process within a particular agency, then the contractor would proceed directly to a judicial appeal.

Either contractors or public entities may appeal from an administrative determination by filing an action in circuit court within 30 days. Courts will not set aside factual findings unless they are fraudulent, arbitrary or capricious, so grossly erroneous as to imply bad faith, or not based on the stated prequalification criteria (if applicable); however, legal determinations are not “final.” The VPPA provides that the standard of review for debarments is to determine whether they are arbitrary and capricious, contrary to applicable state law or regulation or the Virginia Constitution, and consistent with the solicitation and prequalification requirements. The VPPA provides that the only remedy available to a contractor that overturns a debarment is restoration of eligibility to participate in public contracts. Courts outside Virginia have identified potential consequences of an improper debarment, such as damage to reputation and loss of creditworthiness, but have provided no remedy to date.

Public entities may circumscribe administrative or judicial remedies in solicitations or contracts. Courts have upheld such restrictions, unless they directly conflict with the VPPA.

CONSIDERATIONS

When faced with a potential debarment, counsel for contractors and public bodies alike should consult the rules specific to the public entity and the VPPA. The grounds for debarment among Virginia public entities are similar but there are also variations to consider. The VPPA provides due process for contractors facing debarment. Contractors and their counsel need to be aware of the short filing deadlines because failing to meet them could result in an untimely action, even if the contractor’s case is otherwise meritorious. Because Virginia case law on debarment is sparse, counsel may wish to refer to decisions of the federal courts for guidance. When facing debarment, contractors need to assess their status as a responsible bidder. Contractors should consider mitigation measures to demonstrate their responsibility if challenging a debarment. Proactive engagement with the agency is often a good approach.

Endnotes

1. The authors acknowledge helpful comments provided by John S. Pachter of Smith Pachter McWhorter PLC and Melissa A. Roy of Williams Mullen. Any errors remain those of the authors.
4. VA. Code §§ 2.2-4300 to -4377. The General Assembly recodified the VPPA in 2001; before that date it was codified at §§ 11-35 to -80. Note that certain entities and procurements are exempt from the VPPA. See VA. Code § 2.2-4343.
5. VA. Code § 2.2-4321.
6. Id.; VA. Code § 2.2-4365.
7. VA. Code § 2.2-4343(A)(10).
8. VA. Code § 2.2-4321. Although not referred to as debarment, the VPPA prohibits state agencies from contracting with nongovernmental sources that fail to collect and remit state sales taxes under a separate process administered by the Department of Taxation. See Va. Code § 2.2-4321.1.
10. See id. A public entity may provide for reciprocal debarment based on grounds it recognizes or may permit debarment when another agency debarred a prospective contractor for any reason. Compare Richmond, Va., Code § 21-128(5) (Feb. 7, 2019) (providing for reciprocal debarment only based on the specified causes) with Commonwealth of Va. Dep’t of Transp. (VDOT), Debarment and/or Suspension Policy IV (C), http://www.virginiadot.org/projects/resources/Exhibit_D_debarment_procedures.pdf [hereinafter VDOT Policy] (permitting reciprocal debarment when debarred by another federal or state agency “for any reason”).

Edmund M. Amorosi is the managing member of Smith Pachter McWhorter PLC, where he practices government contract and construction law. Before joining the law firm in Northern Virginia, he served as a law clerk to the Honorable Loren A. Smith on the U.S. Court of Federal Claims. He joined the VBA in 2002 and is Vice Chair of the VBA Construction and Public Contracts Law Section.
Daniel H. Ramish is an associate attorney with Smith Pachter McWhorter PLC in Tysons Corner. His practice focuses on government contracts and construction and white-collar law matters. Before joining the firm, he worked as in-house counsel for a Virginia environmental remediation and construction contractor.