

AUSTIN CITY CLERK
POSTING DATE/TIME

2010 APR 2 09 09 19

RULE NO.: R2010-PO-1

NOTICE OF RULE ADOPTION

ADOPTION DATE: April 2, 2010

By: Byron E. Johnson, CPM, Purchasing Officer
Purchasing Office

The Purchasing Officer of the Purchasing Office has adopted the following rule. Notice of the proposed rule was posted on 2/10/2010. Public comment on the proposed rule was solicited in the 2/10/2010 notice. This notice is issued under Chapter 1-2 of the City Code. The adoption of a rule may be appealed to the City Manager in accordance with Section 1-2-10 of the City Code as explained below.

EFFECTIVE DATE OF ADOPTED RULE

A rule adopted by this notice is effective on 4/2/2010.

BRIEF EXPLANATION OF ADOPTED RULE

The proposed rule adopts procedures required to administer and enforce Article VII, "Finance" of the Austin City Charter, and Chapters 2-9A, 2-9B, 2-9C and 2-9D of the City Code. The proposed rule sets forth the Purchasing Office procedures to place a vendor on probation, or to suspend or to debar a vendor for cause from consideration for award of contracts or from acting as a subcontractor, subconsultant, or supplier under future City contracts.

TEXT OF ADOPTED RULE

The adopted rule contains no changes from the proposed rule. A copy of the complete text of the adopted rule is available for public inspection and copying at the following locations. Copies may be purchased at the locations at a cost of ten cents per page:

Purchasing Office located at 124 W. 8th Street, 3rd Floor, Austin, Texas 78701

Office of the City Clerk, City Hall, located at 124 West 8th Street, Austin, Texas.

SUMMARY OF COMMENTS

The Purchasing Office did not receive comments regarding the rule adopted in this notice.

AUTHORITY FOR ADOPTION OF RULE

The authority and procedure for adoption of a rule to assist in the implementation, administration, or enforcement of a provision of the City Code is provided in Chapter 1-2 of the City Code.

APPEAL OF ADOPTED RULE TO CITY MANAGER

A person may appeal the adoption of a rule to the City Manager. **AN APPEAL MUST BE FILED WITH THE CITY CLERK NOT LATER THAN THE 30TH DAY AFTER THE DATE THIS NOTICE OF RULE ADOPTION IS POSTED. THE POSTING DATE IS NOTED AT THE END OF THIS NOTICE.** If the 30th day is a Saturday, Sunday, or official city holiday, an appeal may be filed on the next day which is not a Saturday, Sunday, or official city holiday.

An adopted rule may be appealed by filing a written statement with the City Clerk. A person who appeals a rule must (1) provide the person's name, mailing address, and telephone number; (2) identify the rule being appealed; and (3) include a statement of specific reasons why the rule should be modified or withdrawn.

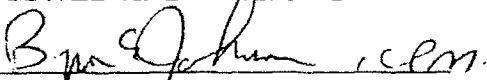
Notice that an appeal was filed will be posted by the city clerk. A copy of the appeal will be provided to the City Council. An adopted rule will not be enforced pending the City Manager's decision. The City Manager may affirm, modify, or withdraw an adopted rule. If the City Manager does not act on an appeal on or before the 60th day after the date the notice of rule adoption is posted, the rule is withdrawn. Notice of the City Manager's decision on an appeal will be posted by the city clerk and provided to the City Council.

On or before the 16th day after the City Clerk posts notice of the City Manager's decision, the City Manager may reconsider the decision on an appeal. Not later than the 31st day after giving written notice of an intent to reconsider, the City Manager shall make a decision.

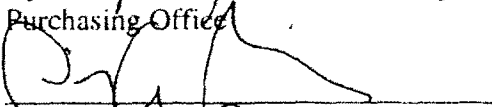
CERTIFICATION BY CITY ATTORNEY

By signing this Notice of Rule Adoption (R2010-PO-1), the City Attorney certifies that the City Attorney has reviewed the rule and finds that adoption of the rule is a valid exercise of the Director's administrative authority.

REVIEWED AND APPROVED


Byron E. Johnson, CPM Purchasing Officer
Purchasing Office

Date: 03/30/2010

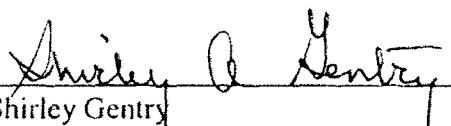

David Allen Smith
City Attorney

Date: 4/1/10

This NOTICE OF ADOPTION was posted on a central bulletin board at City Hall on the following date and time:

Date: 4/2/2010

Time: 9:19 A.m.


Shirley Gentry
City Clerk

City of Austin Purchasing Office

Probation, Suspension, and Debarment Rules for Vendors

1.1 Authority, Purpose, and Applicability

- 1.1.1 These rules are implemented pursuant to Article VII, "Finance," of the Austin City Charter, and Chapters 2-9A, 2-9B, 2-9C and 2-9D of the City Code.
- 1.1.2 Probation, Suspension, and Debarment procedures are used when a Vendor engages in misconduct or malfeasance in connection with a procurement or the performance of a City contract. Malfeasance includes a Vendor's activity or conduct that indicates the Vendor's lack of integrity or responsibility to provide goods or services to the City.
- 1.1.3 These rules are intended to establish procedures to place a Vendor on Probation, or to Suspend or to Debar a Vendor for just cause from consideration for award of contracts or from acting as a subcontractor, subconsultant, or supplier under future City contracts.
- 1.1.4 These rules apply to all actions related to the City's Probation, Suspension and Debarment Program, which is administered by the Purchasing Office.

1.2 Definitions

- 1.2.1 "Affiliate" means a person or entity is an affiliate of another person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity. In determining affiliation, the City shall consider all appropriate factors, including common ownership, common management, and contractual relationships.
- 1.2.2 "Debarment" is the process of excluding a Vendor from consideration for future awards as a responsible Vendor on City contracts or from acting as a subcontractor, subconsultant, or supplier under future City contracts for specific reasons for a period not to exceed five (5) years. The Purchasing Officer may extend the debarment decision to include affiliates of the Vendor, if they are specifically named and given written notice of the proposed debarment and an opportunity to respond.
- 1.2.3 "Hearings Officer" is an experienced and qualified individual, appointed by the City's Purchasing Office to conduct an investigation or administrative hearing.
- 1.2.4 "MBE/WBE Procurement Program Ordinance and Rules" is the Minority-Owned and Women-Owned Business Enterprise Procurement Program and Rules of City Code Chapters 2-9A, 2-9B, 2-9C, and 2-9D of the City Code.
- 1.2.5 "Offer" is a Vendor's response to a solicitation that includes an invitation for bid, a request for proposal, a request for qualification statements, or a request for quotation.

City of Austin Purchasing Office
Probation, Suspension, and Debarment Rules for Vendors

- 1.2.6 “Probation” means a specified period of time within which the Vendor must correct any non-compliance issues. Vendors may submit Offers during the probationary period. Probation shall not normally be for a period of more than nine (9) months, however, it may be for a longer period, not to exceed one (1) year, depending on the circumstances. If the City determines the Vendor has failed to perform satisfactorily or has violated the MBE/WBE Procurement Program Ordinance and Rules during the probation period, the City may proceed with suspension.
- 1.2.7 “Purchasing Office” refers to the Purchasing Office or designee in the Financial and Administrative Services Department of the City.
- 1.2.8 “Suspension” is the process of excluding a Vendor from consideration of future awards as a responsible Vendor on City contracts or from acting as a subcontractor, subconsultant, or supplier under future City contracts for specific reasons for period not to exceed two (2) years. Offers received from Vendors during the suspension period will not be considered for award. The Purchasing Officer may extend the suspension decision to include affiliates of the Vendor if they are specifically named and given written notice of the proposed suspension and an opportunity to respond.
- 1.2.9 “Vendor” means any individual or legal entity that submits offers for or is awarded, a City contract. The term includes suppliers, contractors, consultants, subcontractors, subconsultants, affiliates, and successors in interest.

1.3 Causes for Probation and Suspension or Debarment

If conditions exist that warrant Probation, Suspension, or Debarment, the Purchasing Officer, after reviewing all supporting evidence, may notify and place a Vendor on Probation and/or notify the Vendor of possible Suspension or Debarment and provide an opportunity to protest.

- 1.3.1 The causes for Probation include the following:
 - 1.3.1.1 The Vendor’s failure to perform according to the specification or scope of work in a contract;
 - 1.3.1.2 The Vendor’s failure to comply with the terms and conditions of a contract (e.g. failure to honor contract pricing, delivery terms, insurance requirements, the Living Wage requirement, etc.); and
 - 1.3.1.3 The Vendor’s violation under the MBE/WBE Procurement Program Ordinance and Rules applicable for probation.

City of Austin Purchasing Office
Probation, Suspension, and Debarment Rules for Vendors

- 1.3.2 The causes for Suspension include substantial evidence of the following:
- 1.3.2.1 Commission of fraud or a criminal offense in connection with obtaining; attempting to obtain; or performing a public contract or subcontract;
 - 1.3.2.2 Violation of Federal or State Anti-Trust statutes relating to the submission of offers;
 - 1.3.2.3 Commission of embezzlement, theft, forgery, bribery, collusion, falsification or destruction of records, making false statements, tax evasion, violating Federal Criminal Tax laws or receiving stolen property;
 - 1.3.2.4 Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a contractor or subcontractor;
 - 1.3.2.5 The Vendor's unexcused material breach of the terms and conditions of one (1) or more City contracts;
 - 1.3.2.6 The Vendor's violation under the MBE/WBE Procurement Program Ordinance and Rules applicable for suspension;
 - 1.3.2.7 The Vendor's failure to perform satisfactorily during a probationary period;
 - 1.3.2.8 Suspension of the Vendor or its principals by the Federal Government;
 - 1.3.2.9 The Vendor's suspension by another governmental entity under such facts and circumstances which indicate that the Vendor is not a responsible contractor;
 - 1.3.2.10 The Purchasing Officer may upon adequate evidence also suspend a Contractor for any other cause which indicates the contractor is not a responsible contractor; and
 - 1.3.2.11 The Vendor's repeated worker safety violations.

City of Austin Purchasing Office
Probation, Suspension, and Debarment Rules for Vendors

- 1.3.3 The causes for Debarment include the following:
 - 1.3.3.1 The Vendor's conviction of a crime or the entry of a civil judgment for
 - 1.3.3.1.1 Violation of Federal or State Antitrust statutes relating to the submission of offers;
 - 1.3.3.1.2 Commission of embezzlement, theft, forgery, bribery, collusion, falsification, perjury, or destruction of records, making false statements, tax evasion, violating Federal Criminal Tax laws or receiving stolen property;
 - 1.3.3.1.3 Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly indicates that the Vendor is not a responsible contractor; and
 - 1.3.3.1.4 A criminal offense incident to obtaining or attempting to obtain a public contract or subcontract, or in the performance of such contract or subcontract
 - 1.3.3.2 The Vendor's violation of public contract or subcontract provisions deemed to be serious as to justify Debarment actions such as:
 - 1.3.3.2.1 A history of failure to perform, or willful failure to perform or of unsatisfactory performance on one or more contracts or subcontracts without good cause;
 - 1.3.3.2.2 Causing a threat to the public health and safety through willful misconduct or gross negligence; and
 - 1.3.3.2.3 Repeated worker safety violations of such seriousness as to indicate that the Vendor is not a responsible contractor.
 - 1.3.3.3 The Vendor's making an intentional or in bad faith material misrepresentation in an Offer or during the course of the performance of a contract;

City of Austin Purchasing Office
Probation, Suspension, and Debarment Rules for Vendors

- 1.3.3.4 The Vendor's violation of the Anti-lobbying and Procurement Provision of the City Code more than once in a three (3) year period;
 - 1.3.3.5 The Vendor's violation under the MBE/WBE Procurement Program Ordinance and Rules applicable for debarment;
 - 1.3.3.6 Debarment of the Vendor or its principals by the Federal Government;
 - 1.3.3.7 Debarment by another governmental entity, if that debarment is based upon causes consistent with this provision, and that the governmental entity has written procedures in place that are sufficient to afford due process; and
 - 1.3.3.8 The Purchasing Officer may upon adequate evidence also debar a Vendor for any other cause of so serious or compelling a nature that it affects the present responsibility of a Vendor, contractor or subcontractor.
- 1.3.4 Exceptions: The City may contract with suspended or debarred Vendors in the following circumstances:
- 1.3.4.1 The City Manager determines in writing that there is a compelling reason for such action;
 - 1.3.4.2 The Contract is necessary due to a public emergency or calamity;
 - 1.3.4.3 The Contract is necessary to preserve or protect the public health or safety of the municipality's residents; or
 - 1.3.4.4 The goods or services to be procured are available from only one (1) source.

1.4 General Guidelines

1.4.1 Notice of Probation and Possible Suspension or Debarment

- 1.4.1.1 Before a Vendor is placed on probation, suspended, or debarred, the Purchasing Officer shall provide written notice to the Vendor. The notice to the Vendor shall be sent in any written form, including facsimile transmission or email, and by certified mail, return receipt requested, and shall include:

- 1.4.1.1.1 A statement that the Vendor will be placed on probation, possible suspension, or debarment and the identifying solicitation or contract number, if applicable;

City of Austin Purchasing Office
Probation, Suspension, and Debarment Rules for Vendors

- 1.4.1.1.2 A description of the facts that are the reason for probation or possible suspension or debarment;
 - 1.4.1.1.3 A copy of these Rules;
 - 1.4.1.1.4 In the case of Probation, a statement that the Purchasing Officer has determined that the probationary period commences upon the effective date in the notice;
 - 1.4.1.1.5 A statement that Offers may be solicited from the Vendor when the Vendor is placed on Probation and that any Offers submitted will be considered; however, award may be conditioned upon satisfactory Vendor performance during the probationary period;
 - 1.4.1.1.6 A statement that Offers will not be solicited from the Vendor if the Vendor is Suspended or Debarred and that any Offers submitted by the Vendor to the City will not be considered for award during the Suspension or Debarment period;
 - 1.4.1.1.7 The length of time the Vendor is on Probation or the length of time the Vendor may be Suspended or Debarred; and
 - 1.4.1.1.8 Information regarding the right to protest a possible Suspension or Debarment, provided the protest is received by the Purchasing Officer within ten (10) calendar days after the Vendor has received notice of possible Suspension or Debarment.
- 1.4.2 Opportunity to Protest
- 1.4.2.1 The Purchasing Officer has the authority to settle or resolve a protest of a possible suspension or debarment.
 - 1.4.2.2 If a written protest is not received from the Vendor within ten (10) calendar days of the Vendor's receipt of notice of possible suspension or debarment, then the Purchasing Officer's decision shall be final and conclusive.
 - 1.4.2.3 If the Vendor does not submit a timely written request to protest, the Vendor waives the right to protest the possible suspension or debarment.

City of Austin Purchasing Office
Probation, Suspension, and Debarment Rules for Vendors

- 1.4.2.4 The Vendor's request to protest must be concise and presented logically and factually. The request must include at a minimum:
 - 1.4.2.4.1 The Vendor's name, address, telephone number, fax number, and point of contact;
 - 1.4.2.4.2 The identifying number of the solicitation or contract, if applicable; and
 - 1.4.2.4.3 A detailed statement of the factual grounds for the protest, including copies of relevant documents.
- 1.4.2.5 In the case of Suspension, when the City receives a timely protest, the Purchasing Officer will determine whether the grounds for the protest substantiate a hearing. If the Purchasing Officer decides that the grounds substantiate a hearing, the Purchasing Officer will schedule a hearing. If the Purchasing Officer determines that the grounds are insufficient, the City will notify the Vendor of that decision in writing.
- 1.4.2.6 In the case of Debarment, when the City receives a timely protest there will be a Hearing.

1.4.3 Hearing

The purpose of the hearing is to give the Vendor an opportunity to present its case; it is not a formal adversarial proceeding. The hearing is not subject to the Open Meetings Act.

1.4.3.1 If the Vendor submits a timely written protest, and in the case of suspension the Purchasing Officer decides that the grounds are sufficient, the Purchasing Officer will notify the user department and Law Department. The hearing shall be scheduled within thirty (30) calendar days after the Purchasing Officer received the request. The Purchasing Officer shall send written notice by certified mail, return receipt requested, facsimile, or electronic mail of the time and place of the hearing to the Vendor at the Vendor's last known address provided to the City by the Vendor. The notice will include a statement that the Vendor may be represented by counsel and may present evidence and testimony to support the factual grounds for the Vendor's protest. A copy of this written notice will also be sent to the user department and Law Department.

1.4.3.2 Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. The weight to be attached to witness

City of Austin Purchasing Office
Probation, Suspension, and Debarment Rules for Vendors

testimony and documents presented in any particular form will be at the discretion of the Purchasing Officer or designee (e.g. Hearings Officer).

- 1.4.3.3 The following individuals from the City may attend the hearing:
 - 1.4.3.3.1 representatives from the department that requested the solicitation or purchase;
 - 1.4.3.3.2 Purchasing Office staff;
 - 1.4.3.3.3 Law Department staff; and
 - 1.4.3.3.4 other appropriate City staff as determined by the Purchasing Officer.
- 1.4.3.4 The Purchasing Officer may appoint an independent Hearing Officer to conduct the hearing and to provide a written decision on the protest.
- 1.4.3.5 If the Purchasing Officer appoints an independent Hearing Officer to conduct the hearing, then
 - 1.4.3.5.1 the independent Hearing Officer shall provide a written hearing decision to the Purchasing Officer and Vendor no later than ten (10) business days after the date of the hearing;
 - 1.4.3.5.2 the Purchasing Officer shall determine on the basis of the Hearing Officer's decision whether to maintain, deny, or modify the Hearing Officer's decision no later than the 15th business day after the date of the hearing; and
 - 1.4.3.5.3 the Purchasing Officer shall send a written notice of his decision to the Vendor no later than five (5) business days after the date of the decision. A copy of this written notice will also be sent to the user department and Law Department.
- 1.4.3.6 If the Purchasing Officer conducts the hearing, the Purchasing Officer shall:
 - 1.4.3.6.1 make a decision no later than the 15th business day after the date of the hearing; and

City of Austin Purchasing Office
Probation, Suspension, and Debarment Rules for Vendors

1.4.3.6.2 shall send a written notice of the Purchasing Officer's decision to the Vendor no later than five (5) business days after the date of the decision. A copy of this written notice will also be sent to the user department and Law Department.

1.4.4 Final Decision

1.4.4.1 The Purchasing Officer's decision on a protest or a hearing is final and binding on the Vendor.

1.4.4.2 When a protest is filed, the City usually will not make an award until a decision on the protest is made. However, the City will not delay a contract award if the City Manager or the Purchasing Officer determines that:

1.4.4.2.1 the City urgently requires the goods, supplies, or services to be purchased; or

1.4.4.2.2 failure to make an award promptly will unduly delay delivery or performance.

1.4.4.3 In the instances described under paragraph 1.4.4.2, the Purchasing Officer shall notify the Vendor and make every reasonable effort to resolve the protest before the award.

1.4.4.4 After the final Probation, Suspension, or Debarment determination takes effect, the Vendor shall remain on probation, suspended, or debarred until the period specified in the decision expires.

1.4.4.5 The Purchasing Officer shall maintain and update a list of Vendors placed on Probation, Debarred and/or Suspended.

1.5 Relationship of Actions

Probation, Suspension, and Debarment are independent actions that may be taken and are not necessarily part of a successive disciplinary progression.