

Title 27. Transportation

Chapter V. Arkansas Department of Transportation, State Highway Commission

Subchapter B. Design and Construction

Part 96. Rules for Suspension and Debarment of Contractors for Collusion or Other Unethical Behavior

Codification Notes. This part as promulgated prior to codification into the Code of Arkansas Rules provided as follows:

"MINUTE ORDER

WHEREAS it is the practice of the Arkansas State Highway Commission to secure competitive sealed bids prior to awarding maintenance and construction contracts for work on the State Highway System;

WHEREAS the Arkansas State Highway Commission is vested with the obligation to enter into such contracts with the lowest responsible bidder and the authority to reject any and all bids;

WHEREAS the Arkansas State Highway Commission is aware that a federal grand jury has been impanelled in this State to investigate allegations of collusion, bid rigging, and other anti-competitive behavior by otherwise pre-qualified highway contractors and that other investigations of a similar nature are ongoing in other states;

WHEREAS the Arkansas State Highway Commission believes that participation by any firm or individual in such conduct disqualifies any contractor from being considered as a responsible contractor in this state;

WHEREAS the Arkansas State Highway Commission believes that the competitive sealed bid process will be best protected, and the public interest in securing the lowest responsible bid best served, by formal procedures and guidelines for the suspension and debarment of highway contractors who have engaged in anti-competitive practices.

THEREFORE, the Director of Highways is instructed to take all steps necessary to implement the attached SUSPENSION AND DEBARMENT OF CONTRACTORS FOR COLLUSION OR OTHER UNETHICAL BEHAVIOR.

Date Passed: May 10, 1984"

Subpart 1. Generally

27 CAR § 96-101. Purpose.

(a) This part embodies the policies and procedures employed by the State Highway Commission regarding the suspension and debarment of contractors in instances where there is reason to believe that a contractor has engaged in conduct undermining the competitive bidding process.

(b) This part reflects policies which seek to protect the interests of the citizens of the State of Arkansas generally, and the commission particularly, in the award of contracts to firms and individuals who can qualify as the lowest responsible bidders.

(c) Among these interests are:

- (1) Open competition in bidding;
- (2) Integrity in business practices; and
- (3) Skillful performance of public contracts.

(d) This part is to be construed broadly in order to effectuate these purposes.

Authority. Arkansas Code § 27-65-107.

27 CAR § 96-102. Definitions.

As used in this part:

(1)(A) "Affiliate" means any business entity which is closely connected or associated with another business entity so that one (1) entity controls or has the power to control the other entity either directly or indirectly, or a third party which has the power to control or controls both, or one (1) business entity which has been so closely allied with another business entity through an established course of dealings, including

but not limited to the lending of financial wherewithal, engaging in joint ventures, etc., as to cause a reasonable belief that the two (2) firms operate as a single entity.

(B) "Affiliate" also means any agent or employee of a contractor or affiliate;

(2) "Bidding crime" means any act prohibited by state or federal law committed in any jurisdiction involving fraud, conspiracy, collusion, lying, or material misrepresentation with respect to bidding on any public or private contract;

(3) "Commission" means the State Highway Commission;

(4) "Contractor" means any person, partnership, corporation, or other business entity which is eligible to bid or desires to bid on construction or supply work let by the State Highway Commission;

(5) "Debarment" means a disqualification from contracting with the State Highway Commission, participating in the bidding on State Highway Commission contracts, subcontracting on State Highway Commission contracts, or supplying material, equipment, labor, or personal services in the performance of State Highway Commission contracts because of a lack of responsibility of the contractor; and

(6) "Suspension" means a disqualification from contracting with the State Highway Commission, participating in the bidding on State Highway Commission contracts, subcontracting on State Highway Commission contracts, or supplying material, equipment, labor, or personal services in the performance of State Highway Commission contracts for a period not to exceed forty-five (45) days because of a perceived lack of responsibility of the contractor.

Authority. Arkansas Code § 27-65-107.

27 CAR § 96-103. Suspension.

(a) The Director of State Highways and Transportation may suspend a contractor and/or its affiliates from bidding on State Highway Commission contracts, participating in the bidding on commission contracts, subcontracting on commission contracts, or supplying material, equipment, labor, or personal services for a period not to exceed

forty-five (45) days for any of the following reasons indicating conduct injurious to the competitive bidding process:

(1) Conviction of a contractor or affiliate of a bidding crime resulting from a jury or bench trial, any pleading of guilty or nolo contendere by a contractor or affiliate to a bidding crime, any admission of conduct constituting a bidding crime by any contractor or affiliate, any testimony by a contractor or affiliate, whether or not protected by a grant of immunity, in any jurisdiction, to conduct constituting a bidding crime;

(2) Conviction of a contractor or affiliate of any offenses indicating a lack of moral or ethical integrity as may reasonably be perceived to relate to, or reflect upon, the business practices of the company;

(3) Any other cause affecting responsibility as a commission contractor of a serious and compelling nature;

(4) Debarment of a contractor or affiliate by some other state or federal agency for substantially any of the reasons listed above; or

(5) Participation by a contractor or affiliate in any conduct which has the effect of evading or undermining the sanctions imposed on a suspended or debarred contractor.

(b)(1) Any contractor or affiliate suspended for the reasons set out above shall be notified in writing of such suspension.

(2) Such notice will be by registered mail and shall include the dates of suspension and the general reasons necessitating the suspension.

(3) If the commission will seek debarment of the contractor or affiliate, the notice shall also include that fact, along with any reasons for debarment if different, or additional to, the reasons for suspension, and inform the contractor of a cut-off date for the development of the administrative record by the assigned hearing officer.

(4) Within ten (10) days of receipt of the notice, the contractor or affiliate may also request a hearing at which time the contractor or affiliate can challenge the factual or legal predicate of the debarment or present any evidence pertinent to the debarment.

Authority. Arkansas Code § 27-65-107.

27 CAR § 96-104. Debarment.

(a) The State Highway Commission may after thirty (30) days' notice debar a contractor and/or its affiliates from bidding on commission contracts for any of the following reasons:

(1) Conviction of a contractor or affiliates of a bidding crime resulting from a jury or bench trial, any plea of guilty or nolo contendere by a contractor or affiliate, any admission of conduct constituting a bidding crime by a contractor or affiliate, any testimony, whether or not protected by a grant of immunity, in any jurisdiction, to conduct constituting a bidding crime;

(2) Conviction of any offences indicating a lack of moral or ethical integrity as may reasonably be perceived to relate to, or reflect upon, the business practices of the company;

(3) Any other cause affecting responsibility as a commission contractor of a serious and compelling nature;

(4)(A) Debarment by some other state or federal agency for substantially any of the reasons listed above.

(B) Debarment for this reason will be for the duration of the original debarment; or

(5) Participation in any conduct which has the effect of evading or undermining the sanctions imposed on a suspended or debarred contractor.

(b)(1)(A) If the contractor or affiliate has not been subject to a prior suspension and therefore has not received notice under 27 CAR § 96-103(b), the contractor or affiliate will be notified in writing of such pending debarment.

(B) Such notice will be by registered mail and shall include the general reasons necessitating the debarment as well as notifying the contractor or affiliate of a cut-off date for the development of the administrative record by the assigned hearing officer.

(C) Within ten (10) days of the receipt of the notice, the contractor or affiliate may also request a hearing at which time the contractor or affiliate can challenge the factual or legal predicate of the debarment or present any evidence pertinent to the debarment.

(2)(A) The hearing officer shall be appointed by the Director of State Highways and Transportation.

(B) The hearing, if requested, will be held in accordance with the requirements for administrative adjudications under the Arkansas Administrative Procedure Act, Arkansas Code § 25-15-201 et seq.

(3)(A) The decision of the hearing officer will be final and will be effective when rendered.

(B) The commission shall review the decision of the hearing officer based upon the record developed at the administrative hearing at its next regular meeting after the decision becomes effective.

(c) Debarment shall be for a period of thirty-six (36) months.

(d)(1) At the discretion of the commission, a debarment may be lifted or suspended at any time if it is in the public interest to do so.

(2) Any mitigating circumstances may be considered in the decision to impose or lift or suspend debarment and may include, but shall not be limited to:

(A) The degree of culpability of the contractor or affiliate;

(B) Whether under the facts and circumstances of the case a lengthy debarment will serve as a protection to the state;

(C) Restitution by the debarred contractor or affiliate to the state for any perceived overcharges or other damages resulting from a bidding crime;

(D) Cooperation by the debarred contractor or affiliate with the state and the United States and/or other sovereign body in the investigation of bidding crimes, including a full and complete account of the contractor's or affiliate's particular involvement therein; and

(E) Disassociation with individuals and firms that have been involved in a bidding crime.

(e)(1) The commission recognizes that the passage of time alone may not necessarily cure a contractor's lack of responsibility.

(2) Accordingly, the commission, in its discretion, may direct the director to appoint a hearing officer and to hold a hearing no later than fifteen (15) days prior to the last day of the term of the debarment and require the contractor to show cause why the debarment should not continue.

(3) Upon the report of the hearing officer, the commission may, in its sole discretion, determine that the contractor has failed to demonstrate that he or she meets the standard of a responsible bidder, then the commission may continue the debarment for up to twelve (12) additional months.

(4)(A) The same show cause requirement of this section shall apply to the added period of debarment and should the commission determine another hearing is necessary, and the contractor at the next hearing fails to demonstrate to the sole satisfaction of the commission that he or she meets the standard of responsibility, another period of up to twelve (12) months debarment may be imposed by the commission.

(B) The same procedures and provisions shall continue for each successive extension of the original debarment until such a time as the commission has determined the contractor meets the criteria of a responsible bidder.

Authority. Arkansas Code § 27-65-107.

27 CAR § 96-105. Rules applicable to debarment.

(a) For purposes of debarment, the illegal or improper conduct of an individual may be fully imputed to the business firm with which he or she is or was associated or by whom he or she is or was employed where that conduct was engaged in within the course of his or her employment or with knowledge or approval of the business firm or thereafter ratified by it.

(b) Debarment of a contractor in no way affects existing contractual obligations of the contractor to the Arkansas Department of Transportation or the State Highway Commission.

(c) If the commission finds that inquiry into and review of any debarment would not be in the public interest because such action may impede, hinder, or delay federal or state investigations into a bidding crime, such inquiry may be delayed until those investigations are concluded.

(d)(1) Any contractor currently qualified to bid by the commission on its contracts shall have a duty to notify the commission if it is convicted of any bidding crime within thirty (30) days thereafter.

(2) Failure to do so is a serious and compelling offense sufficient to result in debarment in and of itself.

(e) This part is supplementary and is not to be construed as repealing, or being repealed by, any other regulations, rule, contract specification, etc., unless explicit reference is made thereto.

Authority. Arkansas Code § 27-65-107.

27 CAR § 96-106. Notice to contractor.

A copy of this part shall be mailed to each prequalified contractor and to each contractor heretofore debarred or suspended.

Authority. Arkansas Code § 27-65-107.