

ORDINANCE NO. 10626 (N.S.)

AN ORDINANCE AMENDING THE SAN DIEGO COUNTY CODE OF ADMINISTRATIVE ORDINANCES ARTICLE XXIII, DEPARTMENT OF PURCHASING AND CONTRACTING, ADDING SECTIONS 429 THROUGH 429.15 DEBARMENT AND SUSPENSION OF BIDDERS OR CONTRACTORS OR SUBCONTRACTORS

The Board of Supervisors of the County of San Diego ordains as follows:

Section 1. The Board of Supervisors finds and determines that the amendments made by this ordinance are intended to implement a process for suspending and debarring contractors for egregious conduct.

Section 2. Article XXIII, Sections 429 through 429.15 of the San Diego County Administrative Code is added as follows:

SEC. 429 Debarment and Suspension

- (a) In order to promote integrity in the County's contracting processes and to protect the public interest, the County shall only do business with responsible Persons who do not have recurring non-performance or other egregious behavior.
- (b) Sections 429 through 429.15 set forth the grounds for Suspension and/or Debarment of a Person contracting or seeking to contract with the County.

SEC. 429.1 Definitions

For purposes of Sections 429 through 429.15:

"Adequate Evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliate" means:

- (a) the assignee, successor, subsidiary, or parent company, of another Person; or,
- (b) a Controlling Stockholder of a Person; or,
- (c) a Person who has the same or similar Management of the Debarred corporate or other legal entity; or,

- (d) a Person who directly or indirectly controls, or has the power to control, another Person, or is directly or indirectly controlled by another Person. Indicators of control include interlocking Management or ownership, identity of interests among Relatives, shared facilities and equipment, and common use of employees; or,
- (e) a business entity that has the same or similar Management, ownership or principal employees as the Contractor that was Debarred, Suspended or proposed for Debarment, or the Debarred Person or the business entity operates in a manner designed to evade the application of Sections 429 through 429.15 or to defeat the purpose of these Sections.

“Contract” means any written agreement between the County and a Person for public works, goods, services, or franchise.

“Contractor” means a Person who: contracts or has contracted with the County to provide public works, goods, services, or franchise; directly or indirectly, such as through an Affiliate, submits or may be reasonably expected to submit offers, bids, proposals, information, or qualifications for a Contract or subcontract under a Contract; is awarded a Contract; conducts business or reasonably may be expected to conduct business with the County as an agent or representative of another Person; or otherwise seeks award of a County Contract. The term Contractor includes a Subcontractor, vendor, franchisee, consultant, or any of their respective officers, directors, shareholders, partners, managers, employees, or other individuals associated with the Contractor, Subcontractor, consultant, or vendor.

“Controlling Stockholder” means a stockholder who:

- (a) owns more than 25% of the voting stock of a corporation; or,
- (b) notwithstanding the number of shares that the stockholder owns, has the power to direct or control the direction of the Management or policies of a corporation.

“Debar” or “Debarment” means an action taken by the County or other public entity that results in a Contractor being prohibited from any of the following: bidding on, proposing on, or otherwise offering to perform work on a Contract; being awarded a Contract; or performing work on a Contract for a defined period of time. A Contractor subject to such prohibition is Debarred.

“Department” means a County department acting through the department director or designee.

“Director of the Department of Purchasing and Contracting” means the County of San Diego Director of the Department of Purchasing and Contracting or his or her designee.

“Independent Hearing Officer” means a person who has been appointed as a County Hearing Officer pursuant to Article XXXIII of the San Diego County Code of Administrative Ordinances.

“Management” means the officers, partners, owners, foremen, or other individuals responsible for a corporate or other legal entity’s financial and operational policies and practices.

“Person” means a natural person as well as a body of persons or an entity (such as a corporation) considered as having many of the rights and responsibilities of a natural person and including but not limited to the capacity to sue and be sued. In addition, if a Person is a corporate or other legal entity, it includes individuals who constitute the Person’s Management.

“Preponderance of the Evidence” means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

“Prime Contractor” means a Person who enters into a Contract directly with the County.

“Relative” means:

- (a) an individual related by consanguinity within the third degree as determined by the common law; or,
- (b) a spouse; or,
- (c) an individual related to a spouse within the third degree as determined by the common law; or,
- (d) an individual in an adoptive relationship within the third degree as determined by the common law; or
- (e) any individual considered to be “family” in commonly used and understood terms of the word.

“Subcontractor” means:

- (a) a Person who contracts directly with a Prime Contractor but not directly with the County; or,

- (b) any Person under contract with a Prime Contractor or another Subcontractor to provide any form or type of public work, good, service, and/or franchise to the County.

“Suspend(ed)” or “Suspension” means the Debarment of a Contractor for a temporary period of time pending the completion of an investigation and any proceedings before an Independent Hearing Officer and any appeals therefrom.

The term “state” shall mean any state that is a part of the United States of America and the District of Columbia.

SEC 429.2 Scope

- (a) Sections 429 through 429.15 establish procedures for determining whether a Contractor is to be Debarred, Suspended, or both, and set forth the grounds for Debarment and Suspension.
- (b) Sections 429 through 429.15 provide that a list of Debarred and Suspended Persons is to be created and maintained by the Department of Purchasing and Contracting. It further delineates the consequences of a Person’s Debarment and Suspension.
- (c) The Director of the Department of Purchasing and Contracting shall adopt procedures and processes to implement Sections 429 through 429.15, including procedures for the conduct of Debarment hearings, Suspension meetings, and appeals.

SEC. 429.3 Suspension While Debarment Proceedings are Pending

- (a) The Director of the Department of Purchasing and Contracting may Suspend a Contractor pending a Debarment decision if the Director of the Department of Purchasing and Contracting determines that Adequate Evidence of one of the grounds for Debarment listed in section 429.5 exists.
- (b) The Director of the Department of Purchasing and Contracting shall, within three business days’ of issuing a notice of Suspension, provide a Suspended Contractor with an opportunity to appeal the Suspension at an informal meeting.
- (c) The Director of the Department of Purchasing and Contracting shall notify the Contractor of the Suspension in accordance with section 429.4.

- (d) The Suspension is effective until the Independent Hearing Office makes a final decision on the proposed Debarment.

SEC. 429.4 Notices Required Under Sections 429 through 429.15

- (a) Notice shall be by any of the following methods:
 - (1) Personal delivery with service effective on the date of delivery; or,
 - (2) Certified mail to the address provided by the Contractor, postage prepaid, return receipt requested. Simultaneously, the same notice may be sent by regular mail. If a notice that is sent by certified mail is returned unsigned, then service shall be deemed effective five calendar days after mailing by regular mail, provided the notice that was sent by regular mail is not returned.
- (b) Proof of delivery of notice shall be made by the certificate of any officer or employee of the County or by declaration under penalty of perjury of any Person over the age of eighteen years. The proof of delivery shall show that delivery was accomplished in conformity with this section.
- (c) The failure of any Person to receive any notice served in accordance with this section shall not affect the validity of any Debarment proceedings.

SEC. 429.5 Grounds for Debarment

- (a) Grounds for Permanent Debarment
 - (1) A judgment, settlement, stipulation, plea agreement, final conviction, including a plea of nolo contendere, or final unappealable civil judgment, on any of the grounds listed below, constitutes grounds for permanent Debarment of the Contractor, or the Affiliate of the Contractor, who is subject to the judgment, settlement, stipulation, plea agreement, final conviction, or final unappealable civil judgment:
 - (A) under any local, state, or federal law or regulation for embezzlement, theft, bid rigging, perjury, forgery, bribery, falsification or destruction of records, conspiracy, collusion, misappropriation of public money, false claims, or receiving stolen property; or,
 - (B) any offense, action, or inaction indicating a lack of business integrity or business honesty; or,

- (C) for commission of a criminal offense arising out of obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.
 - (2) A Fair Political Practices Commission enforcement order against a Contractor, either following a hearing or by stipulation, imposing a penalty for a violation of California Government Code sections 84300(c) or 84301.
 - (3) The Contractor has engaged in any corrupt practice in bidding, award, administration, or performance of a Contract.
 - (4) The Person has committed an act or omission so serious or compelling in nature that it affects the present responsibility of the Contractor to be awarded a Contract or to participate as a Subcontractor.
- (b) The following are grounds for Debarment for a period of no less than two years:
- (1) The Contractor forfeited a surety bond, bid bond, performance bond, or any surety contract bond, or a surety or insurance provider was required to perform all or a portion of the Contractor's work.
 - (2) Violation of a local, state, or federal law or regulation applicable to a contract other than those identified in section 429.5(a)(1).
 - (3) The Contractor used substandard materials, or has failed to furnish or install materials in accordance with Contract requirements, even if the discovery of the defect is subsequent to acceptance of the work and expiration of the warranty, if such defect is because of intentionally deficient or grossly negligent performance of the Contract.
 - (4) The Contractor represents or submits materially false information to the County pertaining to:
 - (A) the Contractor's qualifications or certifications as a Local Business, Small Business, Veteran Owned Business, or Disabled Veteran Business;

- (B) the Contractor's qualifications or certifications to perform the specified work;
 - (C) County's prequalification or eligibility process;
 - (D) the Contractor's statement of gross income submitted as part of the procurement process; or
 - (E) an application for payment or invoices for services.
- (5) The Contractor has been found by a court of competent jurisdiction, arbitrator, or through a settlement agreement to have engaged in unlawful discrimination in employment.
 - (6) The Contractor violates a material provision of any settlement or agreement in lieu of a County Debarment action.
- (c) The following are grounds for Debarment for period of no less than one year:
 - (1) The Contractor made two or more claims to seek relief from its bid based on computational or other errors in a bid to the County within a two-year period.
 - (2) The Contractor, on at least two instances within the immediately preceding three years prior to the date on which the County initiates the Debarment proceeding, did not meet the standard of care or performance standards in an awarded Contract(s).
 - (3) The Contractor, on at least two instances within the immediately preceding three years prior to the date on which the County initiates the Debarment proceeding, did not complete work within the time prescribed in an awarded Contract(s).

SEC. 429.6 Debarment Proceedings before an Independent Hearing Officer

- (a) Upon recommendation for Debarment of a Contractor from a Department, with the concurrence from the Director of the Department of Purchasing and Contracting, the Clerk of the Board of Supervisors shall appoint an Independent Hearing Officer consistent with and in the same manner as set forth in section 16.103 of the San Diego County Code of Regulatory Ordinances.

- (b) The Independent Hearing Officer shall hear all recommendations that include one or more grounds for Debarment and/or Suspension.
- (c) The Independent Hearing Officer shall determine by a Preponderance of the Evidence whether there are sufficient grounds for Debarment and the length of time of the Debarment. Based on the evidence presented by all parties, the Independent Hearing Officer may increase, decrease, or accept the Department's recommendation regarding the length of Debarment. The Independent Hearing Officer, however, may not reduce the length of a permanent Debarment if the hearing officer determines a violation identified in section 429.5(a) occurred, or impose less than the length of Debarment specified in section 429.5(b) and (c).
- (d) The Independent Hearing Officer shall have the authority set forth in section 16.104(a) and (b), will conduct the hearing consistent with the provisions set forth in section 16.105, and will render a decision following the procedures set forth in section 16.106(a), (c), (d), and (e), of the San Diego County Code of Regulatory Ordinances.
- (e) The Independent Hearing Officer decision on Debarment shall be in writing and is final pursuant to section 16.106 of the San Diego County Code of Regulatory Ordinances.
- (f) The failure of a Person recommended for Debarment to appear at a Debarment hearing after notice under section 429.4 may constitute a waiver of that Person's right to contest the Debarment recommendation. If the Independent Hearing Officer determines that the Person has waived the right to contest the Debarment under this subsection the Department's recommendation shall become final.

SEC. 429.7 Imputation of Knowledge and Conduct

- (a) The fraudulent, criminal, or other serious misconduct of any officer, director, shareholder, partner, employee, or other individuals associated with a Contractor may be imputed to the Contractor when the conduct occurred in connection with the individual's performance of duties for, or on behalf of, the Contractor, or with the Contractor knowledge, approval, or acquiescence. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

- (b) The fraudulent, criminal, or other serious misconduct of a Contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the Contractor who participated in, knew of, or had reason to know of, the Contractor's conduct.
- (c) The fraudulent, criminal, or other serious misconduct of one Contractor participating in a joint venture or similar arrangement may be imputed to other participating Contractors if the conduct occurred for, on approval of, or acquiescence of, these Contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

SEC. 429.8 Judicial Review

The procedure for judicial review of a final Debarment decision shall be governed by California Code of Civil Procedure section 1094.6.

SEC. 429.9 Creation of List of Debarred and Suspended Contractors

Director of the Department of Purchasing and Contracting shall create, maintain, and make publicly available a list of the names, addresses, and applicable Debarment or Suspension commencement and expiration dates of all Debarred or Suspended Contractors.

SEC. 429.10 Effect of Debarment or Suspension

- (a) Contractors who have been Debarred or Suspended are excluded from submitting bids; submitting responses to requests for proposal, statement of qualifications, quotes or information; receiving Contract awards; executing Contracts; or participating in the forgoing as a Subcontractor, employee, agent or representative of another Contractor.
- (b) The County shall not award or approve the award of a contract or execute a contract under which a Debarred or Suspended Contractor is intended to participate as a Subcontractor or supplier.
- (c) A Prime Contractor shall not employ, subcontract with, or purchase materials or services from a Debarred or Suspended Contractor in support of or for use on a County contract.
- (d) The Director of the Department of Purchasing and Contracting shall report, as required by law, Debarments under this Division to the appropriate local, state, and federal agencies and authorities.

SEC. 429.11 Effect of Debarment or Suspension on an Affiliate

- (a) Affiliates that are Debarred or Suspended shall be subject to the same effects as stated for a Debarred or Suspended Contractor.
- (b) An Affiliate may appeal the County's determination that it is an Affiliate of the Contractor pursuant to the same hearing process for Debarments before an Independent Hearing Officer.

An Affiliate may not appeal the Debarment of any other Contractor underlying the Affiliate's Debarment.

SEC. 429.12 Effect of Debarment by Another Governmental Agency

The Director of the Department of Purchasing and Contracting may Debar a Contractor who has been Debarred by another governmental agency. The Debarment would last until the term of the Debarment by the other governmental agency expires. The decision of the Director of the Department of Purchasing and Contracting under this section shall be final, and not subject to a hearing before the Independent Hearing Officer.

SEC. 429.13 Liability for Increased Costs

Any Contractor who enters into a contract, either directly as a Prime Contractor or indirectly as a Subcontractor, during a period of Suspension or Debarment imposed upon that Contractor, shall be liable to the County for increased costs incurred as a result of replacing the Debarred or Suspended Contractor.

SEC. 429.14 Effect of Debarment or Suspension on Existing Contracts

The County shall not renew or otherwise extend the duration of current Contracts with Debarred or Suspended Contractors, unless the Director of the Department of Purchasing and Contracting states in writing compelling reasons for such renewal or extension.

SEC. 429.15 Agreement Not to Bid or Submit Proposals in Lieu of Debarment or Suspension

- (a) The Director of the Department of Purchasing and Contracting may offer a Contractor the opportunity to execute a written agreement not to bid or submit proposals or perform any work on contracts in lieu of the County pursuing Debarment or Suspension.
- (b) This agreement not to bid or submit proposals for contracts in lieu of the County pursuing Debarment or Suspension does not constitute a Debarment.

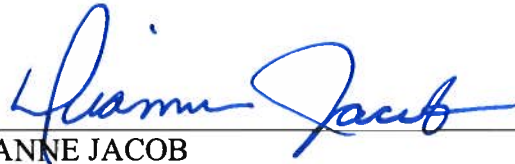
Meeting Date: 10/15/19 (19)

Section 3. This ordinance shall take effect and be in force thirty days after its passage, and before the expiration of fifteen days after its passage, a summary hereof shall be published once with the names of the members of this Board voting for and against it in The Daily Transcript, a newspaper of general circulation published in the County of San Diego.

APPROVED AS TO FORM AND LEGALITY
COUNTY COUNSEL

By: David J. Smith, Chief Deputy County Counsel

PASSED, APPROVED, AND ADOPTED by the Board of Supervisors of the County of San Diego this 15th day of October, 2019.



DIANNE JACOB
Chairwoman, Board of Supervisors
County of San Diego, State of California

The above Ordinance was adopted by the following vote:

AYES: Cox, Jacob, Gaspar, Fletcher, Desmond

ATTEST my hand and the seal of the Board of Supervisors this 15th day of October, 2019.

ANDREW POTTER
Clerk of the Board of Supervisors

By *e. Rodriguez*
Chrystal Rodriguez, Deputy



Ordinance No.: 10626 (N.S.)

Meeting Date: 10/15/19 (19)