



## Legislation Text

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**File #:** Ord 11-120, **Version:** 1

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Amending Chapter 185 of the Legislative Code to move debarment determinations from the City Council to the Department of Human Rights and Equal Employment Opportunity.

### **THE COUNCIL OF THE CITY OF SAINT PAUL DOES ORDAIN:**

#### Section 1

Chapter 185 of the Saint Paul Legislative Code is hereby amended to read as follows:

#### **Sec. 185.01. - Definitions.**

For the purposes of this chapter, the following words and phrases shall have the meanings set forth in this section, except where the context clearly indicates that a different meaning is intended:

*Affiliate:* Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third person controls or has the power to control both. Evidence of control includes, but is not limited to, interlocking management or ownership; identity of interests among family members; shared facilities and equipment; common use of employees; or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership or principal employees as the suspended or debarred person.

*City* means the City of Saint Paul and the housing and redevelopment authority of the City of Saint Paul, Minnesota.

*Covered transactions* shall mean and include any contract under city procurement programs to which the city is a party for the performance of construction, repair or the furnishing of goods and shall further include those contracts for professional services and labor. "Covered transactions" include contracts between a contractor and a subcontractor even if the subcontractor has no formal agreement with the city. "Covered transactions" shall also include those transactions specifically designated by the U.S. Department of Housing and Urban Development in such agency's regulation governing debarment and suspension and other construction projects not handled through a city procurement program but which are financed or economically supported in whole or in part by city funds or property.

*Debarment* shall mean an action taken by the ~~council~~ city in accordance with this chapter to exclude a person from participating in covered transactions. A person so excluded is "debarred."

*Debarment proceeding* shall mean an action taken that could lead to debarment, whether or not debarment is the sanction imposed by the ~~council~~ city.

*Department* shall mean the department of human rights and equal economic opportunity.

*Hearing examiner* shall mean an individual or panel appointed by the Director to preside as a neutral factfinder at hearings requested by a participant to challenge proposed debarments.

*Notice* shall mean a written communication served in person or sent by first-class mail to the last-known address of party, its identified counsel, its agent for service of process, or any partner, officer, director, owner or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five (5) days after being properly sent to the last address known by the city.

*Participant:* Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant. This term includes a subcontractor who is not a party to the original contract but is hired as part of a covered transaction.

*Person:* Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except foreign governments or foreign governmental entities, public international organizations, foreign government-owned or controlled entities, and entities consisting wholly or partially of foreign governments or foreign government entities.

*Preponderance of evidence:* Proof by information or testimony that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

*Principal:* Officer, director, owner, partner, key employee or other person within a participant with primary management or supervisory responsibilities, or a person who has a critical influence on or substantive control over a covered transaction, regardless of whether or not employed the principal is employed by the participant.

*Proposal:* A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit directly or indirectly, in or under a covered transaction.

*Respondent:* A person against whom a debarment or suspension action has been initiated.

*Suspension:* An action taken in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal or debarment proceedings as may ensue. A person so excluded is "suspended."

## **Sec. 185.02. - Applicability.**

This chapter applies to all persons who have participated, are currently participating or may reasonably be expected to participate in "covered transactions."

## **Sec. 185.03. - Effect of action.**

(a) Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from covered transactions as either participants or principals throughout the operations of the city for the period of their debarment or suspension. Accordingly, no employee or agent of the city shall enter into covered transactions with such debarred or suspended person during such period, except as permitted pursuant to section 185.03(b).

(b) Notwithstanding the debarment or suspension of any person, city and participants may continue covered transactions in existence at the time the person was debarred or suspended. A decision as to the type of termination action, if any, to be taken of an existing covered transaction should be made only after thorough review to ensure the propriety of the proposed action.

(c) The city shall not enter into, renew or extend covered transactions with any person or affiliate who is debarred or suspended. ~~Extensions shall include change orders to contracts already in effect unless specific~~

~~written authorization for the change order has been granted by the council.~~

(d) No affiliate, participant, person, principal or Respondent who has been debarred or suspended in accordance with this chapter may receive the benefits from any contract where the city is a funding source for the contract through an intermediary so long as the period of debarment or suspension is in effect. The department shall cause language to be inserted in the bids or contract forms to reflect this provision.

(e) No affiliate, participant, person, principal or Respondent shall be awarded any contract if, after being debarred or suspended and within six (6) months thereafter, it reconstitutes itself in such a way as to avoid the effect of debarment or suspension. Such a determination will be made by the department applying the standards set forth concerning evidence of control as set forth in the definition of affiliate.

#### **Sec. 185.04. - Causes for debarment.**

(a) Debarment or suspension may be imposed upon any person or participant in accordance with the provisions of this chapter for the actions or inaction of the person or participant or for the actions or inaction of a subcontractor in connection with a covered transaction. Debarment or suspension may also be imposed upon a subcontractor regardless of whether they are in a direct contractual relationship with the city. Debarment or suspension may be imposed for:

(1) Conviction of or civil judgment for: the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain or performing a public or private agreement or transaction; violation of federal or state antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging; embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; a violation of Minnesota consumer protection statutes, or any other ~~offense~~ civil or criminal violation indicating a lack of business integrity or business honesty, including loss or lack of required licensure, that seriously and directly affects the present responsibility of a person.

(2) Material violation of the terms of a covered transaction, public agreement or other transaction, such as a willful failure to perform in accordance with the terms of one or more public agreements or transactions; a history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(3) A procurement or nonprocurement debarment by any federal, state or local agency.

(4) Knowingly doing business with a debarred or suspended person in connection with a covered transaction, except as permitted in section 185.03(b).

(5) Violation of a material provision of a voluntary exclusion agreement entered into or of any settlement of a debarment or suspension action.

(6) Violation of any federal or state law or city ordinance regulating hours of labor and wages including but not limited to: minimum wage standards, chapter 82 of the Saint Paul Administrative Code and any other prevailing wage standards, chapter 98 of the Saint Paul Administrative Code and any other living wage standards, the Federal Davis Bacon Act, Minnesota Statute § 116J (relating to business subsidies), discrimination in wages standards, or child labor standards.

(7) Violation of:

- a. Chapter 183 of the Saint Paul Legislative Code;
- b. Chapter 84 of the Saint Paul Administrative Code; or
- c. Any federal, state or local rules, regulations, laws or agreements regarding discrimination in employment, vendor outreach goals, civil rights, affirmative action, equal employment opportunity, conflict of interest, or nondiscrimination.

(8) Violation of a labor peace agreement or project labor agreement.

(9) Any serious or compelling causes that are related to a person or participant's fitness to enter into or successfully perform a covered transaction with the city.

(b) Suspension may be applied for any of the causes identified in this section when immediate action is necessary to protect the public interest.

~~Sec. 185.05. — Review required.~~

~~The department shall monitor all contracts for compliance with all applicable terms. If an investigation reveals that a person or participant has violated a relevant federal, state or local law or failed to meet a term of the contract, the department shall notify that person or participant in writing of the noncompliance and provide a reasonable amount of time to gain compliance. Failure to comply within the given time may result in a debarment proceeding.~~

Sec. 185.06 05. - Debarment proceeding process.

(a) *Notice and hearing requirements.* In any case where the council city ~~may or~~ intends to consider a debarment, the person or participant having a covered transaction with the city shall be given notice and an opportunity to be heard as provided herein. ~~The council may consider such debarment when recommended by the department.~~

(b) *Notice:* If the department determines that cause exists to commence a debarment under section 185.04, the department, or the city attorney's office on behalf of the department, shall issue a notice of the proposed proceedings to the person or participant having a covered transaction with the city. The notice shall advise the person or participant of the following:

- (1) That a debarment is being considered;
- (2) The reasons or causes for proposed action in terms sufficient to put the person or participant on notice of the conduct or transaction(s) upon which it is based;
- (3) The proposed sanction;
- (4) That the person or participant is entitled to a hearing before action is taken by the council department;
- (5) That the person or participant can choose to admit or deny the allegations giving rise to the debarment proceeding.
  - a. ~~If the person or participant wishes to admit the allegations, then the person may request a public hearing before the council to address the appropriate penalty. In~~

~~that case, the council is not bound by the Department's recommended sanction and may deviate upward or downward from the recommended sanction consistently with the presumptive penalties. If the person or participant wishes to admit the allegations but contest the proposed sanction, he/she may submit information to mitigate the penalty to the department and the director or his/her designee shall respond within 7 calendar days as to whether the information has changed the proposed sanction.~~

b. If the person or participant wishes to deny the allegations giving rise to the debarment proceeding, then the person must request a hearing before a hearing examiner.

c. ~~Failure to request a hearing~~ respond in writing within fifteen (15) working days of the notice of proposed debarment proceeding, shall be deemed an admission of the allegations and acceptance of the proposed penalty. ~~In that event, the matter shall be placed on the consent agenda for council approval of the proposed penalty.~~

(c) Upon receipt of a written request from a person or participant (Respondent), the department shall arrange a hearing before a hearing examiner appointed by the council or retained by contract with the city for that purpose. The person or participant shall be provided an opportunity to present evidence and argument as well as meet adverse testimony or evidence by reasonable cross-examination and rebuttal evidence. The hearing examiner may in its his/her discretion permit other interested persons the opportunity to present testimony or evidence or otherwise participate in such hearing.

Sec. 185.07 06. - Hearing before hearing examiner.

(a) The hearing examiner shall hear all evidence as may be presented on behalf of the city and the R espondent, and shall present to the council department written findings of fact and conclusions of law together with a recommendation regarding the appropriate sanction.

(b) The Respondent may represent themselves ~~himself~~ or choose to be represented by another.

(c) Record; evidence. The hearing examiner shall receive and keep record of such proceedings, including testimony and exhibits, and shall receive and give weight to evidence, including hearsay evidence, which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.

(d) The city must prove the cause for a debarment by a preponderance of the evidence. If the action is based upon a criminal conviction, a civil judgment arising out of Respondent's ~~it~~ normal business affairs or debarment by a federal or state agency or another municipality, the standard shall be deemed to have been ~~made met~~ through introduction of evidence of the conviction, judgment or debarment. The Respondent has the burden of proof for establishing mitigating circumstances.

Sec. 185.08 07. - ~~Hearing before council.~~ Final Determination by Department.

(a) The council department shall consider the evidence contained in the record, the hearing examiner's recommended findings of fact and conclusions, and shall not consider any factual testimony not previously submitted to and considered by the hearing examiner. ~~After receipt of the hearing examiner's findings, conclusions, and recommendations, the council shall provide the respondent an opportunity to present oral or written arguments alleging error on the part of the examiner in the application of the law or interpretation of the facts, and to present argument. Upon conclusion of that hearing, and after considering the record, the examiner's findings and recommendations, together with such additional arguments presented at the hearing, the council shall determine what, if any, sanction shall be taken, which action shall be by resolution. The council~~ department may accept, reject or modify the findings, conclusions and recommendations of the

hearing examiner.

(b) ~~Council Department action, resolution to contain findings.~~ Where the ~~council department~~ orders debarment or other sanction with respect to a person or participant, the ~~resolution by which such action is taken~~ department director or his/her designee shall issue an order which shall contain its findings and determination. The ~~council order~~ may adopt all or part of the findings, conclusions and recommendations of the hearing examiner, and incorporate the same ~~it in~~ its resolution imposing the debarment or other sanction order but must make findings and conclusions to support modification or rejection.

(c) Imposition of costs. The ~~council department~~ may impose upon any Respondent some or all of the costs of a contested hearing before an independent hearing examiner. The costs of a contested hearing include, but are not limited to, the costs of the ~~administrative law judge or independent~~ hearing examiner, stenographic and recording costs, copying costs, city staff and attorney time for which adequate records have been kept, rental of rooms and equipment necessary for the hearing, and the cost of expert witnesses. The ~~council department~~ may impose all or part of such costs in any given case if the position, claim or defense of the Respondent was frivolous, arbitrary or capricious, made in bad faith, or made for the purpose of delay or harassment.

Sec. 185.09 8 . - Debarment period; other sanction.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). A debarment shall not exceed three (3) years. If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period. The department shall recommend a sanction based upon appropriate aggravating and mitigating circumstances such as:

- (1) The potential for harm or imminent threat to public health;
- (2) The extent of deviation from contractual or regulatory requirements;
- (3) The degree of willfulness or negligence;
- (4) The history of noncompliance or compliance;
- (5) The demonstration of good faith efforts to correct a violation;

(b) All suspensions shall be for a temporary period pending the completion of an investigation and such legal or debarment proceedings as may ensue. A suspension shall become effective immediately upon issuance of the notice specified in section 185.06(c) including notice that a suspension is required to protect the public interest.

~~(c) The council may renew an existing debarment for an additional period if the council determines, upon recommendation of the department, that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of section 185.06 shall be followed to extend the debarment.~~

~~(d) A person or participant may request the council to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be made to the department in writing and supported by documentation and shall not be submitted earlier than six (6) months after the final decision to debar. In no event may more than one (1) such request be submitted within any twelve-month period. The department shall make a report and recommendation to the council at a public hearing regarding the request for reversal or reduction. The burden shall be on the person or participant to prove the facts that substantiate the basis for reversal of the debarment, and that reversal of the debarment is necessary to prevent an unreasonable exclusion. The council shall issue its decision by resolution explaining the basis for the grant or denial of a reversal or reduction. The council may grant such a request for reasons including, but not limited to:~~

- ~~(1) Reversal of the conviction or civil judgment upon which the debarment was based;~~
- ~~(2) Bona fide change in ownership or management;~~
- ~~(3) Elimination of other causes for which the debarment was imposed; or~~
- ~~(4) Other reasons the council deems appropriate.~~

**Sec. 185.10 09 . - Debarment records.**

All documents and other data assembled pursuant to this chapter shall be handled and retained by the department or city clerk in accordance with applicable local and state data retention policies.

**Sec. 185.1110. - Business licensing.**

(a) Whenever a debarment action is completed against a participant who is also a holder of a business license from the city, the department shall transmit a copy of the written debarment decision along with copies of the materials assembled during the debarment process record to the city license inspector. Within ten (10) working days of receipt of the decision and the materials, the license inspector shall determine whether to commence an adverse license hearing. Any such adverse hearing initiated shall be handled in accordance with section 310.05 of the Legislative Code.

(b) Any adverse action taken by the city concerning the license of any person based on the breach of contractual responsibilities shall be referred to the department for a determination as to whether debarment proceedings hereunder should be commenced.

**Sec. 185.12. - Presumptive penalties for certain violations.**

(a) *Presumptive penalties for certain violations.* The purpose of this section is to establish a standard by which the city council determines the length of debarment. These penalties are presumed to be appropriate for every case; however the council may deviate therefrom in an individual case where the council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so. When deviating from these standards, the council shall provide written reasons that specify why the penalty selected was more appropriate.

Type of Violation	Appearance			
	1st	2nd	3rd	4th
(1) Criminal conviction or civil judgment	6 month debarment	One year debarment	Two year debarment	Three year debarment
(2) Material or repeat violation of agreement	6 month debarment	One year debarment	Two year debarment	Three year debarment
(3) Debarment by another jurisdiction	Length of debarment imposed			
(4) Doing business with debarred person	6 month debarment	One year debarment	Two year debarment	Three year debarment
(5) Violation of voluntary exclusion agreement or debarment settlement agreement	One year debarment	Three year debarment		
(6) Violation of hours of wage or other labor standards	6 month debarment	One year debarment	Two year debarment	Three year debarment

(7) Violation of regulations or contractual terms regarding discrimination, vendor outreach, civil rights, affirmative action	6 month debarment	One year debarment	Three year debarment	Three year debarment
(8) Violation of labor peace or project labor agreement	6 month debarment	One year debarment	Two year debarment	Three year debarment
(9) Other serious or compelling causes	6 month debarment	One year debarment	Two year debarment	Three year debarment

(b) *Violations occurring after the date of the notice of hearing.* Violations occurring after the date of the notice of hearing that are brought to the attention of the department prior to the hearing date before an administrative law judge (or before the council in an uncontested facts hearing) may be added to the notice(s) by stipulation if the person or participant admits to the facts, and shall in that case be treated as though part of the "1st appearance." In all other cases, violations occurring after the date of the formal notice of hearing shall be dealt with as a "2nd appearance" before the council. The same procedures shall apply to a second, third or fourth appearance before the council.

(c) *Subsequent appearances.* Upon a second, third or fourth appearance before the council by a particular person or participant, the council shall impose the presumptive penalty for the violation or violations giving rise to the subsequent appearance without regard to the particular violation or violations that were the subject of the first or prior appearance.

(d) *Computation of time.*

(1) If a person, participant or affiliate appears before the council for any violation where that violation has occurred within two (2) years after the first appearance of the same person, participant or affiliate for a violation listed in paragraph (a) above, the current appearance shall be treated as a second appearance for the purpose of determining the presumptive penalty.

(2) If a person, participant or affiliate has appeared before the council on two (2) previous occasions for violations and if said person, participant or affiliate again appears before the council for a violation and if the current violation occurs within five (5) years of the violation that gave rise to the first appearance before the council, then the current appearance shall be treated as a third appearance for the purpose of determining presumptive penalty.

(3) If a person, participant or affiliate has appeared before the council on three (3) previous occasions, each for violations listed and if said person, participant or affiliate again appears before the council for a violation, and if the current violation occurred within seven (7) years of the violation that gave rise to the first appearance, then the current appearance shall be treated as a fourth appearance for the purpose of determining the presumptive penalty.

(4) Any appearance not covered by subsections (1), (2) or (3) above shall be treated as a first appearance. In case of multiple violations in any appearance, the date to be used to measure whether two (2), five (5) or seven (7) years have elapsed shall be the date of the violation last in time at the first appearance, and the date of the violation first in time at any subsequent appearance.

Sec. 185.4311. - List of records of debarred contractors.

(1) *List:* The department shall compile, maintain and publish a current consolidated list of all debarred contractors to ensure that the city does not solicit or accept bids from, negotiate with, award contracts to, and



approve or allow subcontracts with listed contractors. Persons or participants with contracts awarded by the city shall ensure that no subcontracts are issued to debarred contractors.

(2) *Records:* The department shall maintain records relating to each debarred contractor. These records shall contain the name and address, cause for debarment and the date each cause occurred, any limitations or deviations from the normal effect of the debarment, and the effective and termination dates of the debarment.

Sec. 185.44 12. - Additional penalties.

Nothing in this section shall preclude the enforcement of provisions of this chapter in any court of competent jurisdiction by any appropriate form of civil action, including seeking to enjoin any continued violation and seeking to compel obedience by issuing an order to correct violations.

Sec. 185.45 13. - Severability.

If any section or any portion of a section of this chapter shall be declared unconstitutional, invalid or inoperative, in whole or in part, by any court of competent jurisdiction, the remaining sections and all portions thereof not declared unconstitutional, invalid or inoperative shall remain in full force and effect, and no such determination shall invalidate the remaining sections or portions of sections of this chapter.

## Section 2

This ordinance shall take effect and be in force thirty (30) days following its passage, approval and publication.