

Office of Superintendent of Schools
Board Meeting of November 20, 2002

November 18, 2002

Merrett R. Stierheim, Superintendent of Schools

**SUBJECT: PROPOSED PROMULGATION OF A NEW BOARD RULE: INITIAL
READING 6Gx13- 3F-1.023, CONTRACTOR DEBARMENT
PROCEDURES**

COMMITTEE: LEGISLATIVE RELATIONS AND POLICY DEVELOPMENT

This item is submitted for consideration by the Board to promulgate a new rule to establish procedures for debarring contractors (including vendors, consultants, subcontractors and subconsultants) from doing business with the Board, who are convicted of a criminal offense (be it a felony or misdemeanor).

At the October 23, 2002 Board meeting, extensive discussion was held concerning the various ranges for the period of debarment. The current ranges reflect and are consistent with Section 287.133(2)(a) Florida Statute.

Attached are the Notice of Intended Action and the proposed new rule.

Authorization of the Board is requested for the Superintendent to initiate rulemaking proceedings in accordance with the Administrative Procedure Act for the promulgation of new Board Rule 6Gx13- 3F-1.023, Contractor Debarment Procedures.

RECOMMENDED: That The School Board of Miami-Dade County, Florida, authorize the Superintendent to initiate rulemaking proceedings in accordance with the Administrative Procedure Act to promulgate new Board Rule 6Gx13- 3F-1.023, Contractor Debarment Procedures.

**Replacement
A-4**

NOTICE OF INTENDED ACTION

THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA announced on November 20, 2002, its intention to promulgate new Board Rule 6Gx13- 3F-1.023, Contractor Debarment Procedures, at its meeting of January 15, 2003.

PURPOSE AND EFFECT: To establish procedures to ensure that the Board solicits offers from, award contracts to, and consent only to subcontracts with responsible contractors.

SUMMARY: This rule implements the intent of the Board to debar contractors that are convicted or indicted for criminal offenses, be they felony or misdemeanor, by any court of competent jurisdiction; that are debarred by a state or a federal agency; or for any other cause of so serious or compelling in nature that it affects the responsibility of contractors in performing work contracted by the Board.

SPECIFIC LEGAL AUTHORITY UNDER WHICH RULEMAKING IS AUTHORIZED 1001.41(1)(2); 1001.42(22); 1001.43(10), F.S.

LAW IMPLEMENTED, INTERPRETED, OR MADE SPECIFIC: 287.133 F.S.

IF REQUESTED, A HEARING WILL BE HELD DURING THE BOARD MEETING OF January 15, 2003, which begins at 1:00 p.m., in the School Board Auditorium, 1450 N.E. Second Avenue, Miami, Florida 33132. Persons requesting such a hearing or who wish to provide information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by Section 120.541(1), F.S., must do so in writing by December 18, 2002, to the Superintendent of Schools, Room 912, at the same address.

ANY PERSON WHO DECIDES TO APPEAL THE DECISION made by The School Board of Miami-Dade County, Florida, with respect to this action will need to ensure the preparation of a verbatim record of the proceedings, including the testimony and evidence upon which the appeal is to be based. (Section 286.015, Florida Statutes).

A COPY OF THE PROPOSED RULE is available for inspection and copying at cost by the public in the Citizen Information Center, Room 158, 1450 N.E. Second Avenue, Miami, Florida 33132.

Originator: Mr. Paul R. Philip
Supervisor: Mr. Merrett R. Stierheim
Date: November 18, 2002

Contracts and Documents**CONTRACTOR DEBARMENT PROCEDURES****A. Purpose of Debarment**

1. The School Board of Miami-Dade County, Florida (hereafter referred to as the Board) solicits offers from, award contracts to, and consent only to subcontracts with responsible contractors. To effectuate this policy, the debarment of contractors from doing business with the Board may be undertaken.
2. The serious nature of debarment requires that this sanction be imposed only when it is in the best interest of the Board and for protection of the public, and not for purposes of punishment. Debarment shall be imposed in accordance with the procedures contained in this Board rule.
3. Debarment is intended as a remedy in addition to, and not in substitution of, the evaluation of the responsibility of Board bidders and contractors, and the rejection of Board bidders or the termination of contractors based on findings of non-responsiveness and non-responsibility on a case by case basis.

B. Definitions

1. *Affiliates* mean business concerns, organizations, or individuals that directly or indirectly, (a) either control or have the power to control the other, or (b) a third party controls or has the power to control both. Indicia of control include, but are 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 by a debarred entity, individual, or affiliate following the debarment of a contractor that has the same or similar management, ownership, or principal employees as the contractor that was debarred or suspended.
2. *Civil judgment* means a judgment or finding of a civil offense by any court of competent jurisdiction.
3. *Contractor* means any individual or other legal entity that:
 - a) submits offers for or is awarded, or reasonably may be expected to submit offers for, or to be awarded, directly or indirectly (e.g., through an affiliate), a Board contract

- for construction or for procurement of goods or services including professional services, or
- b) conducts business, or reasonably may be expected to conduct business, with the Board as an agent, surety, representative, or subcontractor (at any tier) of another contractor.
 - c) for the purposes of this section, the terms "vendor" and "consultant" have the same meaning as "contractor." "Subconsultant" has the same meaning as "subcontractor."
4. *Conviction* means a judgment or conviction of a criminal offense, be it a felony or misdemeanor, by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of nolo contendere.
 5. *Debarment* means the action taken to exclude a contractor or subcontractor from Board contracting and Board approved subcontracting for a reasonable, specified period, as provided in section L. *Period of Debarment*, below; a contractor so excluded is debarred.
 6. *Debarment Committee* means the body that is responsible for imposing debarment for the Board.
 7. *Indictment* means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.
 8. *Legal proceeding* means any civil judicial proceeding to which the Board is a party or any criminal proceeding. The term includes appeals from such proceedings.
 9. *List of debarred contractors* means a list compiled, maintained and distributed by the Division of Business Development and Assistance that contains the names of contractors, debarred under the procedures of this Board rule.
 10. *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.
 11. *Superintendent* means the Board's Superintendent of Schools.
 12. *Days* mean calendar days.

- C. List of debarred contractors
1. The Division of Business Development and Assistance is charged with the implementation of this Board rule and shall:
 - a) compile and maintain a current consolidated list ("List") of all contractors and subcontractors that are debarred by the Board, and such list shall be public record and shall be available for public inspection and dissemination;
 - b) revise and distribute the list and issue supplements, to the Board, the Superintendent of Schools and to all Board departments;
 - c) maintain records relating to each debarment, in accordance with internal retention procedures;
 - d) establish procedures to provide for the effective use of the list, including the internal distribution, thereof, to ensure that departments do not solicit offer from, award contracts to, or consent to subcontract with contractors on the list; and
 - e) respond to inquiries concerning contractors and subcontractors that are listed as debarred from doing business with the Board.
 2. The list of debarred contractors and subcontractors shall indicate the:
 - a) name and address of all debarred contractors and subcontractors in alphabetical order,
 - b) name and telephone number of the department and the contact person that recommended initiation of the debarment action,
 - c) cause for the debarment action, as is further described, herein, or other statutory or regulatory authority,
 - d) effect of the debarment,
 - e) beginning and termination date of the debarment,
 - f) contractor's certificate of competency, license or registration number, when applicable,
 - g) qualifier of the contractor, when applicable, and

- h) name of the office that is responsible for maintaining the list of debarred contractors and subcontractors.

D. Effects of debarment

Debarred contractors are excluded from receiving contracts, and departments of the Board shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the Superintendent, in order to avoid an immediate and serious danger to the public health, safety or welfare, determines that an emergency exists that justifies such action, and obtains approval from the Board. Debarred contractors are also excluded from conducting business with the Board as agents, representatives, partners and associates of other contractors, subcontractors or individual sureties.

E. Continuation of current contracts

1. Commencing on the adoption date of this Board rule, all proposed Board contracts for construction, or the procurement of goods and services, including professional services, shall reference this Board rule and specify that debarment may constitute grounds for termination of any existing Board contract.
2. The debarment shall take effect in accordance with the notice provided by the Superintendent pursuant to section K. Notice of Debarment Committee's Decision, below, except that if a continuing contract or subcontract is in existence at the time the contractor was debarred, the debarment period shall commence upon the conclusion of the contract, absent termination, thereof, and in the interim the debarred contractor shall not enter into any Board contracts.
3. Current Board contracts may not be renewed or otherwise extended or consent given to subcontracts with debarred contractors, unless the Superintendent, in order to avoid an immediate and serious danger to the public health, safety or welfare, determines that an emergency exists that justifies the renewal or extension, or for an approved extension due to delay or time extension for reasons beyond the contractor's control, and such action is approved by the Board.

4. No further work shall be awarded to a debarred contractor in connection with a continuing or miscellaneous construction contract, or a continuing or miscellaneous contract for goods or services, including professional services, or similar contract, where the work is divided into separate discrete groups and the Board's refusal or denial of further work under the contract will not result in a breach of such contract.

F. Restrictions on subcontracting

1. When a debarred contractor is proposed as a subcontractor for any subcontract, the department shall not consent to a subcontract with such contractor unless the Superintendent, in order to avoid an immediate and serious danger to the public health, safety or welfare, determines that an emergency exists that justifies such consent, and the Board approves such decision.
2. The Board shall not be responsible for any increases in project costs or other expenses incurred by a contractor as a result of the Board's rejection of a proposed subcontractor, pursuant to subsection F. 1. above, provided that the subcontractor was debarred prior to bid opening or opening of proposals.

G. Debarment

1. The debarment procedures shall be in accordance with applicable laws, statutes, ordinances, codes and rules, at the state and federal level.
2. The Debarment Committee (hereafter referred to as the Committee) may, in the best interest of the Board and for protection of the public, debar a contractor for any of the causes listed in this Board rule, using the procedures that are outlined, below. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred. The seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision.
3. Debarment constitutes debarment of all officers, principals, directors, shareholders owning or controlling ten (10) percent or more of the stock, partners, qualifiers, divisions or other organizational elements of the debarred

contractor, unless the decision to debar is limited by its terms to specific divisions, organizational elements, or commodities. The Committee's decision includes any existing affiliates of the contractor, if they are (1) specifically named and (2) given written notice of the proposed debarment and an opportunity to respond. Future affiliates, associates or employees of the contractor are subject to a pre-existing debarment decision.

4. A contractor's debarment shall apply to all Board contracts or subcontracts for construction and for the procurement of goods or services, including professional services.

H. Causes for debarment

1. The Committee may debar a contractor for a conviction or civil judgment for:
 - a) commission of a fraud or a criminal offense in connection with obtaining, attempting to obtain, performing, or making a claim upon any public entity contract or subcontract, or a contract or subcontract funded in whole or in part with public funds;
 - b) violation of federal or state antitrust statutes relating to the submission of offers;
 - c) commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - d) commission of any other payment or performance related offense that seriously and directly affects the completion of one (1) or more contracts or the performance of the completed building, or project, or the delivery of goods and services; and
 - e) filing a lawsuit against the Board that a court determines to be frivolous or filed in bad faith.
2. The Committee may debar a contractor, based upon a preponderance of the evidence for:

- a) defaulting or breaching and failing to cure on a Board contract or subcontract, or a contract or subcontract funded in whole or in part by Board funds, such as willful and or negligent failure to perform in accordance with the terms of one (1) or more contracts; or the failure to perform, or unsatisfactory performance of one (1) or more contracts;
- b) violating a Board rule that lists debarment as a potential penalty; and
- c) any other cause of so serious or compelling in nature that it affects the responsibility of a Board contractor or subcontractor in performing Board work.

I. Debarment procedures

1. Investigation and referral

- a) The Superintendent, or designee, shall designate the Office of Management and Compliance Audits, the Office of the Inspector General, or the Miami-Dade Schools Police Department to promptly investigate and prepare written reports concerning a proposed debarment, and prepare written requests to the Division of Business Development and Assistance for the debarment of contractors that may be subject to any of the causes listed above. The investigating office will present evidence that supports the proposed debarment to the Committee.
- b) The Division of Business Development and Assistance shall:
 - (1) convene and serve as staff to the Committee, and
 - (2) coordinate the debarment hearing
- c) The Committee shall consist of the following individuals:

- (1) One (1) community representative appointed by the Superintendent of Schools, to serve for a two (2) year period
- (2) Chief Financial Officer, Financial Affairs
- (3) Chief Business Officer, Business Operations
- (4) Associate Superintendent, School Operations
- (5) Administrative Director, Facilities Operations and Legislative Support
- (6) Assistant Superintendent, Bureau of Procurement and Materials Management
- (7) Director, Business Development and Assistance, will act as Committee Chair

2. Notice of proposed debarment

The Division of Business Development and Assistance, on behalf of the Committee, shall issue a notice of proposed debarment by certified mail, return receipt requested, or hand delivered, and fax, advising the contractor and any specifically named affiliates that:

- a) debarment is being considered;
- b) the reasons and causes for the proposed debarment in terms sufficient to put the contractor on notice of the conduct or transaction(s) upon which it is based;
- c) that a hearing shall be conducted before the Committee on a date and time not less than twenty (20) days after service of the notice;
- d) that the contractor may be represented by an attorney, present documentary evidence, and verbal testimony, and cross-examine witnesses presented against it; and
- e) the potential effect of an actual debarment.

3. Contractor or subcontractor defense

The contractor or subcontractor shall reply to the notice of debarment with a list of the defenses, to the Division of Business Development and Assistance, which the contractor intends to present at the hearing, within fourteen (14) days of receipt of the notice.

4 Discovery

All parties may make a public records request under Chapter 119 of Florida Statutes.

5. Evidence

Hearsay evidence shall be admissible at the hearing, but shall not form the sole basis for initiating a debarment procedure or the sole basis of any determination of debarment.

6. Procedure for Recording Hearing

The hearing shall be transcribed and recorded by use of a court reporter, and at the expense of the Board. Copies of the transcript shall be furnished at the expense and request of the requesting party.

J. Debarment Committee Decision

1. Committee actions

a) In actions based upon a criminal conviction or civil judgment, or in which there is no genuine dispute over material facts, the Committee shall make a decision on the basis of all the undisputed material information in the record, including any undisputed material information submitted by the contractor.

b) Where actions are based on disputed evidence the Committee shall decide what weight to attach to evidence of record, judge the credibility of witnesses, and base its decision on the preponderance of the evidence standard.

2. In the event that the contractor fails (1) to appear at the debarment hearing or (2) to present competent proof

under affirmation of oath through persons with knowledge of the contractor's performance, the contractor shall be presumed to be non-responsive and non-responsible and subject to debarment.

3. The Committee's decision shall be based on the vote of a majority of the members of the Committee. The Committee's decision shall be made within twenty (20) days after conclusion of the hearing, unless the committee extends this period for good cause.
4. The Committee's decision and findings shall be in writing and shall include the committee's factual findings, the principal causes of debarment as enumerated in this Board rule, identification of the contractor or subcontractor and all affiliates affected by the decision, and the specific term, including the duration, of the debarment.

K. Notice of Debarment Committee's Decision

1. If the Committee decides to recommend debarment, the Division of Business Development and Assistance shall give the contractor or subcontractor and any affiliates involved written notice by certified mail, return receipt requested, or hand delivered, within twenty (20) days of the decision, specifying the reasons for debarment and including a copy of the Committee's written decision, stating the period of debarment including effective dates; and advising that the debarment covers all Board contracts, and subcontracts requiring Board consent for construction and for the procurement of goods or services, including professional services, and the debarment will be recommended for action by the Board, through the Superintendent of Schools.
2. If debarment is not recommended by the Committee, the Division of Business Development and Assistance shall notify the contractor or subcontractor and any affiliates involved, by certified mail, return receipt requested, or hand delivered, within twenty (20) days of the decision.
3. All decisions of the Committee shall be final and shall be effective on the date of Board approval. A recommendation by the Committee to debar may be appealed pursuant to 120.57, F.S., and in accordance

with School Board Rule 6Gx13- 8C-1.064. Adjudicatory Proceedings.

L. Period of debarment

1. The period that debarment is imposed shall be in accordance with the guidelines. Debarment shall be for a period commensurate with the seriousness of the cause(s), and where applicable, within the guidelines set forth below, but in no event shall exceed three (3) years.
2. The following guidelines in the period of debarment shall apply except where the Committee determines that there are mitigating or aggravating circumstances that justify deviation:
 - a) for commission of an offense as described in subsection H. 1. a., three (3) years;
 - b) for commission of an offense as described in subsection H. 1. b., three (3) years;
 - c) for commission of an offense as described in subsection H. 1. c., three (3) years;
 - d) for commission of an offense as described in subsection H. 1. d., up to three (3) years;
 - e) for commission of an offense as described in subsection H.1. e., up to three (3) years;
 - f) for commission of an offense as described in subsection H. 2. a. or b., up to three (3) years;
 - g) for commission of an offense as described in subsection H. 2. c., up to three (3) years.
3. The period of debarment may be reduced, upon the contractor's written request to the Division of Business Development and Assistance for the following reasons:
 - a) newly discovered material evidence;
 - b) reversal of the conviction or civil judgment upon which the debarment was based;

- c) bona fide change in ownership or management;
 - d) elimination of other causes for which the debarment was imposed; or
 - e) other good cause shown that the Committee deems appropriate and in the best interest of the Board as documented by the Committee.
4. The debarred contractor's written request shall contain the reasons for requesting a reduction in the debarment period. The Committee shall have thirty (30) days from receipt of such request to submit a written response, thereto. The decision of the Committee regarding a request made under this subsection is final.

M. Scope of debarment

1. The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, agent, employee, or other individual 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's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct may be evidence of such knowledge, approval or acquiescence.
2. The fraudulent, criminal, or other seriously improper conduct 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.
3. The fraudulent, criminal or other seriously improper conduct of any subcontractor associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the subcontractor's performance of duties for or on behalf of the contractor and the contractor had knowledge of, approved of, or acquiesced in this conduct. The contractor's acceptance of benefits derived from the conduct shall be evidence of such knowledge, approval or acquiescence.

4. The fraudulent, criminal, or other seriously improper conduct of one (1) contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct may be evidence of such knowledge, approval or acquiescence.

Specific Authority: 230.22(2);230.23(22);1001.41(1)(2);1001.42(22);1001.43(10),
F.S.

Law Implemented. Interpreted or Made Specific: 287.133, F.S.

History THE SCHOOL BOARD OF MIAMI-DADE, COUNTY FLORIDA
New: