

ORDINANCE NO. 06-5363

AN ORDINANCE OF THE CITY OF BILLINGS, PROVIDING THAT THE BILLINGS, MONTANA CITY CODE BE AMENDED BY ADDING A SECTION TO BE NUMBERED 13-505; PROVIDING FOR A PROCEDURE WHEREBY CITY CONTRACTORS CAN BE DEBARRED FROM BIDDING ON CITY CONTRACTS, ESTABLISHING AN EFFECTIVE DATE, AND PROVIDING A SEVERABILITY CLAUSE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

Section 1. That the Billings, Montana City Code be amended by adding a section to be numbered 13-308, to read as follows:

Section 13-505. Debarment of contractors.

(1) If a person commits an act, as defined in this ordinance, indicating that the person no longer merits the privilege of contracting with the city or participating in city projects, the city may begin proceedings under these rules to debar the person from bidding on or otherwise participating in city contracts or projects. The city will debar or suspend contractors which violate this ordinance, and will not do business with, or allow prime and subcontractors to do business with, on city-related projects, persons debarred or suspended by the federal government, by another state, or by an agency of Montana state government. A contractor who has been debarred by the city, the federal government, by another state, or by an agency of Montana state government may not participate in work, contracts or projects with the City. A person's decision to bid upon or accept contracts with the city, or otherwise participate in city contracts, is a voluntary acceptance of the provisions of these rules and their requirements.

(2) The city administrator has the authority to temporarily suspend a contractor from consideration for further contracts with the city if the city administrator has credible

evidence to believe that the contractor has engaged in activities that could lead to debarment from contract eligibility. Debarment applies both to a firm or an individual. In the case of a firm, it may be applied against any or all businesses in which a firm has involvement or over which it has ownership or control. In the case of an individual, debarment may be applied to and enforced against any and all businesses in which the individual has any level of interest, ownership or control. The causes for debarment include the following:

(a) submission of a false affidavit for Montana residency;

~~(b) contractor is not responsible because they do not have available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate capability to meet all contractual requirements to perform fully the contract requirements;~~

~~(c) contractor is not responsive because their bid fails to conform in all material respects to the invitation for bids or request for proposals;~~

(b) deliberate failure, without good cause, to perform in accordance with the specifications or within the time limit provided in a contract;

(c) contractor does not have a satisfactory record of integrity;

(d) contractor is not qualified legally to contract with the City;

(e) contractor has failed to supply any necessary information in connection with the inquiry concerning the responsibility;

(f) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts;

(g) failure to comply with the provisions of the Unemployment Insurance Law, Title 39, chapter 51, MCA;

(h) failure to comply with the provisions of the Workers' Compensation Act, Title 39, chapter 71, MCA;

(i) failure to pay the prevailing wage to any worker on any contract costing more than \$25,000 let for construction, heavy construction, highway construction or remodeling work;

or

(j) any other cause that the city administrator determines to be so serious and compelling as to affect responsibility as a City contractor, including debarment by another governmental entity.

(3) If there is credible evidence that any of the situations exist as set out in ~~(1)~~ (2), the city administrator shall mail a notice of suspension to the affected contractor or individual. The notice must state that:

(a) the suspension is for the period it takes to complete an investigation into possible debarment;

(b) bids or proposals will not be accepted from the suspended contractor and contracts will not be awarded to the suspended contractor during the period of suspension;

(c) the suspension is effective upon the date of issuance of the notice of suspension and, unless the suspension is terminated by the city administrator or a court, it will remain in effect for a period not to exceed 90 calendar days.

(4) If the city administrator's investigation confirms a cause for debarment, a notice will be served upon the contractor by certified mail, return receipt requested. The notice will include:

(a) the pertinent facts supporting the alleged cause for debarment and the city administrator's intent to remove the contractor from eligibility to contract with the city;

(b) the term of the debarment and to what extent affiliates are affected. The debarment will be for a specific period of time or until certain conditions are met, at the discretion of the city administrator; and

(c) notification of the contractor's right to a hearing on the matter with the city administrator, or designee, as hearing examiner, and of the contractor's right to appeal any adverse determination by the hearing examiner to the full City Council.

(5) A written request for hearing must be received by the city administrator from the contractor within 14 calendar days after the date of the mailing of the notice of debarment. Failure to timely request a hearing will constitute a waiver by the contractor of the opportunity for a contested case hearing and appeal and will result in the city administrator or city administrator's designee entering an order supporting the contractor's debarment from contracting with the city for a specified period of time or until certain conditions are met.

(6) Upon timely receipt of a written request for a hearing, the city administrator shall appoint a hearing examiner to hear the evidence in the matter and come to a determination as to whether the facts support the decision to debar the contractor from contracting with the city for a specified period of time or until certain conditions are met. A written notice appointing the hearing examiner shall be issued by the city administrator, and sent to the person requesting the hearing.

(7) The person against whom debarment is being considered has the right to be accompanied, represented and advised by counsel, and to appear in person or by or with counsel. Counsel will not be provided by or at the expense of the city.

(8) Service of notice and later documents for the hearing will be complete and effective when made upon a person, or his counsel, if he has counsel.

(9) A notice of hearing shall be sent by the hearing examiner to the person requesting the administrative hearing. The notice shall include:

(a) A statement of the date, time, and location of the hearing;

(b) A reference to the provisions of the violation(s) involved;

(c) A short, understandable statement of the matters asserted; and

(d) A statement advising the party of its right to be represented by legal counsel at the hearing.

(10) The hearing examiner shall not engage in communications with any party or their counsel except upon notice and opportunity for all parties to participate.

(11) For hearings:

(a) The city shall record any hearing conducted and maintain a record of the proceedings.

The record shall include:

(i) the initial determination of the city administrator;

(ii) the written request for a hearing;

(iii) the appointment of the hearing examiner;

(iv) the notice of hearing;

(v) the evidence offered to, or considered by, the hearing examiner;

(vi) any objections and rulings thereon;

(vii) all matters placed on the record at the hearing;

(viii) all briefs or memoranda submitted by the parties; and

(ix) any transcript made of the proceedings.

(b) The hearing examiner presiding over the hearing shall have the powers and duties ~~may~~ to: administer oaths or affirmations; issue subpoenas; provide for the taking of testimony by

deposition; regulate the course of hearings, including setting the time and place for continued hearings and fixing the time for filing of briefs or other documents; and direct parties to appear and confer to consider simplification of the issues by consent of the parties.

(c) Discovery will be available to the parties in accordance with Rules 26, 28 through 37 (except Rule 37(b)(1) and 37(b)(2)(d)) of the Montana Rules of Civil Procedure in effect as of the date of the adoption of these rules. Provided that: all references in the Montana Rules of Civil Procedure to a "court" are considered to refer to the city; all references to the use of subpoena power are considered to refer to the power in these rules; references to "trial" are considered to refer to the hearing; all references to "plaintiff" are considered to refer to a "party"; all references to "clerk of court" are considered to refer to the hearing examiner.

(i) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the hearing examiner, the refusal to obey the hearing examiner's order shall be enforced as provided by law.

(ii) If a party seeking discovery from the city believes he has been prejudiced by a protective order issued by the hearing examiner under Rule 26(c), Montana Rules of Civil Procedure, or, if the hearing examiner refuses to make discovery, the party may petition the District Court, Thirteenth Judicial District for the County of Yellowstone, for review of the intermediate action of the hearing examiner.

(e) The usual order of presentation at a hearing shall be:

(i) Argument and the submission of evidence and testimony on behalf of the city;

(ii) Argument and the submission of evidence and testimony from the party requesting the hearing; and

(iii) The introduction of rebuttal evidence and testimony by the city.

(f) The hearing may be continued with recesses as determined by the hearing examiner.

(g) Evidence introduced at the hearing may be received in written form or oral testimony given under oath or affirmation. Parties have a right to cross-examine all persons testifying at a hearing.

(i) The hearing examiner may consider hearsay evidence for the purpose of supplementing or explaining other evidence. A decision should not ordinarily be based wholly upon hearsay evidence, however, circumstances in some cases may require it (i.e., debarment based on a prior debarment in another jurisdiction), at the discretion of the hearing examiner.

(ii) Judicially noticed facts are not hearsay.

(iii) Fraudulent, criminal or other seriously improper conduct of any individual (officer, director, shareholder, partner, employee, or other individual associated with a person) may be imputed to the person when the conduct occurred in connection with the individual's performance of duties for or on behalf of the person, or with the person's knowledge, approval, or acquiescence. The person's acceptance of the benefits derived from the conduct will be evidence of such knowledge, approval or acquiescence.

(iv) The hearing examiner's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

(v) Exhibits shall be marked and the markings shall identify the party offering the exhibit. Exhibits shall be preserved by the hearing examiner as part of the administrative record.

(h) Objections to offers of evidence must be made at the time of the offer and shall be noted in the administrative record. A hearing examiner may rule on evidentiary objections at the

time of the hearing, after receipt of oral or written argument by the parties, or at the time of entry of the proposed decision.

(i) The person must present all potential and available grounds to contest the debarment, and failure to raise an issue before the hearing examiner will waive that issue's consideration on any appeal or potential judicial review.

(j) The city's burden of proof for the hearing will be a preponderance of the admissible evidence presented. That is proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(k) After the hearing and any required post-hearing briefs and submissions, the hearing examiner shall enter a proposed decision, which shall be served on all parties by certified mail, return receipt requested, to their designated agent. The proposed decision shall contain findings of fact and conclusions of law supported by the administrative record, and recommend a proposed action to the city administrator.

(12) The city administrator shall within 30 days review the proposed decision and enter the hearing examiner's final decision. The city administrator may accept, reject or modify the proposed decision. The city administrator's final decision shall contain findings of fact and conclusions of law, and shall be mailed to the parties by certified mail, return receipt requested.

(13) The sole method of appeal of the city administrator's decision is as follows:

(a) The city administrator's decision is final unless appeal is made to the commission. An appeal may only be made if it is submitted to the city administrator in writing, and only if received by the city administrator's office no later than 10 calendar days after date of mailing of the final decision to the designated agent of the appealing party. If delivery of the final

decision is refused or for any other reason not able to be delivered to the designated agent (i.e., returned as undeliverable, addressee moved and left no forwarding address, etc.), the decision will be final and the 10-day appeal period will begin to toll on the date the certified letter is returned to the city administrator's office.

(14) The contractor may appeal any adverse determination by the hearing examiner to the full city council which shall review the administrative record of the proceedings and its findings and conclusions only. The council will determine whether or not the findings and conclusions are supported by that record. The council's review will not be a de novo hearing, nor will it receive written briefs from a party except on the issue of whether or not the findings and conclusions are supported by the administrative record. The council will not hear oral argument or testimony, or receive any evidence that was not presented in the hearing. The council may affirm, reject or modify the city administrator's decision. If the council determines that the record does not support the findings and conclusions, it may refer the matter back to the city administrator for any action the council deems appropriate and directs.

The council's determination shall be final.

(15) Debarment is distinct from a finding of nonresponsibility. The city has the authority and ability in its discretion to find a person nonresponsible for purposes of disallowing a bid on a project or contract, or prohibiting a person from otherwise participating in a project or contract (e.g., as a subcontractor, supplier, etc.) without conducting debarment proceedings.

(16) If debarred by the federal government or any Montana government agency, a person may not bid on or otherwise participate in any city project or contract in any capacity (prime contractor, subcontractor, supplier, etc.), including as a separate contractor for a utility to

relocate utilities required by a city project, until after the completion of the entire debarment period, whether or not the city debar the person. Debarment proceedings may proceed even if the person ceases doing business during the proceedings.

(17) If a person is debarred by any agency of the federal government for any period, the city may debar it for a period up to that set by the federal government without need for further debarment proceedings. The only evidence required in a debarment hearing in a case based on an existing debarment will be a certified copy of an order, agency letter or other final action declaring the debarment in the other jurisdiction. That will not prevent the person from presenting evidence to dispute the proposed debarment or its length. If the person is debarred by a branch or agency other than of the Montana or federal government (i.e., another state, a county, etc.), or if the city may wish a debarment period exceeding that set by the other Montana agency or the federal government, the city must hold debarment proceedings before increasing the debarment period.

~~(18) If debarred by the federal government or any Montana government agency, a person may not bid on or otherwise participate in any city project or contract in any capacity (prime contractor, subcontractor, supplier, etc.), including as a separate contractor for a utility to relocate utilities required by a city project, until after the completion of the entire debarment period, whether or not the city debar the person. Debarment proceedings may proceed even if the person ceases doing business during the proceedings.~~

~~(19) If a person is debarred by any agency of the federal government for any period, the city may debar it for a period up to that set by the federal government without need for further debarment proceedings. The only evidence required in a debarment hearing in a case based on an existing debarment will be a certified copy of an order, agency letter or other final~~

~~action declaring the debarment in the other jurisdiction. That will not prevent the person from presenting evidence to dispute the proposed debarment or its length. If the person is debarred by a branch or agency other than of the Montana or federal government (i.e., another state, a county, etc.), or if the city may wish a debarment period exceeding that set by the other Montana agency or the federal government, the city must hold debarment proceedings before increasing the debarment period.~~

~~(18) A person planning to bid on or participate in a city contract or work, or who has already bid on or is participating in a city contract or work, must immediately notify the city administrator in writing of any debarment or suspension against it, or of any debarment or suspension proceedings pending against it in any jurisdiction.~~

~~(19) Projects or contracts already awarded to a person at the time it is debarred will not be affected, except that a bid may be rejected, or contract award rescinded, if a person submits the bid or is awarded the contract after the date on which it was debarred.~~

~~(20) The city shall maintain a list of debarred contractors on its website at <http://ci.billings.mt.us/>.~~

Section 2. EFFECTIVE DATE. This ordinance shall be effective thirty (30) days after second reading and final adoption as provided by law.

Section 3. REPEALER. All resolutions, ordinances, and sections of the City Code inconsistent herewith are hereby repealed.

Section 4. SEVERABILITY. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provisions or application, and, to this end, the provisions of this ordinance are declared to be severable.

PASSED by the City Council on first reading this 27th day of March, 2006.

PASSED, ADOPTED and APPROVED on second reading this 10th day of April, 2006.

CITY OF BILLINGS

By _____
RON TUSSING, Mayor

ATTEST:

By _____
MARITA HEROLD, CMC/AAE City Clerk