JULY 19, 1984

STATE OF MINNESOTA
COUNTY OF RAMSEY

BEFORE THE MINNESOTA
COMMISSIONER OF ADMINISTRATION

In the Matter of Proposed
Rules Relating to Debarment
and Suspension of Persons
From Bidding on Department of
Transportation Contracts

STATEMENT OF NEED
AND REASONABLENESS

The Commissioner of Administration, pursuant to Minnesota Statutes, section 14.23, presents facts establishing the need for and reasonableness of proposed rules relating to debarring and suspending certain persons from the award of contracts by the Minnesota Department of Transportation (Mn/DOT).

I. Statutory Authority

Laws 1984, Chapter 654, Section 8, directs the Commissioner of Administration to adopt rules relating to disqualifying persons convicted of contract crimes from receiving transportation department contracts.

> The commissioner of administration shall adopt rules to establish the standards and procedures by which a contractor who has been convicted of a contract crime, and its affiliates, will be disqualified from receiving the award of a state contract or from serving as a subcontractor or material supplier under a state contract. The rules shall apply to contracts let by the commissioner of transportation and to other contracts and purchases the commissioner of administration deems necessary and appropriate.

Minnesota Statutes, section 16.02, subdivision 4, provides that the Commissioner of Administration has the power and duty with respect to all agencies of the state to supervise and control the making of all contracts for buildings, highways, and other improvements. Section 16.08 provides in part

> All contracts and purchases made by or under the supervision of the commissioner or any state department or agency for which competitive bids are required shall be awarded to the lowest responsible bidder, taking into consideration conformity with the specifications, terms of delivery, and other conditions imposed in the call for bids. The commissioner shall have power to decide as to the lowest responsible bidder for all purchases. As to contracts other than for purchases, the head of the interested department or agency shall make the decision, subject to the approval of the commissioner.

The authority of the commissioner to adopt rules governing state contracts is found in Minnesota Statutes, section 16.05, which states;

> The commissioner shall have power, with the approval of the governor, to make and amend rules and regulations, not inconsistent with law, respecting any matter within the scope of the powers and duties conferred by sections 16.01 to 16.23, which rules and regulations shall have the force and effect of law; provided, that every such rule or regulation affecting any person or agency, other than a member of the department of administration, shall be filed with the secretary of state, and shall not take effect until so filed.

II. General Statement of Need and Reasonableness

The proposed rules establish a procedure to allow Mn/DOT to debar and suspend persons who bid or may bid for Mn/DOT contracts. This is a new subject for state rulemaking. Government contracts for which competitive bids are taken are normally awarded to the lowest responsible bidder. Minnesota Statutes, section 16.08, states, "All contracts...for which competitive bids are required shall be awarded to the lowest responsible bidder, taking into consideration conformity with the specifications, terms of delivery and other conditions imposed in the call for bids." The purpose of seeking competitive bids and awarding the contract to the lowest responsible bidder is to promote competition and to obtain the best possible commodity, service, public building or highway for the lowest possible cost. "The basic purpose of competitive bidding is to give to the public the benefit of the lowest obtainable price from a responsible contractor." Foley Bros., Inc. v. Marshall 266 Minn. 259, 123 N.W.2d 387, 391 (1963).

Competitive bidding is somewhat risky for contractors and suppliers as the results are unknown when the contractor is estimating his cost and attempting to determine how much work he will have in any given time period. Some contractors, dissatisfied with the unpredicability of competitive bidding, have engaged in a contract crime known as bidrigging. Bidrigging is the concerted activity of two or more bidders to determine by private agreement, the winning bidder of a public contract advertised for competitive bidding.

> Bidrigging on public contracts is by no means a recent phenomenon. As early as 1894, several manufacturers of cast iron pipes, including two Tennessee firms, were charged with engaging in a combination and conspiracy to fix the bids to government entities and others. Among the collusive arrangements was an agreement whereby certain bidders "reserved cities" for themselves. For unreserved cities, the successful bidder was determined by the "auction pool" operated by the conspirators. When the successful conspirator had been determined, "the other defendants put in bids at the public letting as high as a selected bidder requested in order to give the appearance of active competition between defendants." Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 219 (1899). "Highway Bid Rigging:

The Tennessee Experience", National Association of Attorneys General Antitrust Report, October, 1981, p.1.

Although price fixing, bidrigging or territorial allocations may occur in bidding on any kind of contract, bidrigging on airport and highway construction projects has recently been recognized as a national problem. The United States Department of Justice began investigating highway construction bidrigging in 1979. By March 1983 it had initiated 215 criminal prosecutions in 15 states. One hundred forty eight corporations and 164 individuals have pled guilty and fines of $44 million have been levied. The investigations and prosecutions are continuing. U.S. General Accounting Office, Actions Being Taken to Deal With Bid Rigging in the Federal Highway Program, Report to the Chairman. Committee on Public Works and Transportation, House of Representatives, May 23, 1983, p. 7. The Office of the Inspector General of the U.S. Department of Transportation also investigates antitrust violations and prosecutes offenders. As a result of bidrigging investigations conducted in 1983, that office obtained 100 indictments, 82 convictions and $11.7 million in fines. "Bid Rigging Enforcement Outlined", AASHTO Journal, February 24, 1984, p. 6. Contractors in Iowa and Nebraska have recently pled guilty to or been convicted of antitrust violations involving public construction projects. Lincoln, Nebraska Star, March 19, 1982. To date no prosecutions have occurred in Minnesota, although an officer of a Minnesota construction company pled guilty on March 4, 1983, in U.S. District Court for the Southern District of Iowa, to violating the Sherman Antitrust Act in bidding on a federally funded highway project in Iowa.

Antitrust violations raise the cost to the public of accomplishing construction projects because the normal competitive process is not allowed to operate. Instead the price is artificially established by the bidders who collude to determine who will do the work and the amount of the winning bid. Some states (North Carolina and Tennessee) have used ten percent of the contract award price as a measure of overcharges on rigged contracts. Thus, in many cases, where bids on public construction contracts have been rigged the public may have paid ten percent more than necessary. It has been reported that the Federal Highway Administration has noted that the cost of paving highways has dropped as much as 25 percent in states where bidrigging investigations have occurred. Tillet, "Bidrigging Costs States." State Government News, August, 1982, p. 7.

Mn/DOT has a strong interest in avoiding contracting with persons or firms that have been convicted of antitrust violations. It cannot trust that the bid from such a firm is an honest and accurate estimate of the cost of the advertised work or that the contractor will deal honestly with Mn/DOT. Other contract related offenses such as fraud, embezzlement, bribery, filing false documents and forgery also show a lack of integrity and responsibility on the part of a business.

The state has a duty to protect its funds and a vested interest in dealing only with the most responsible contractors. Minnesota Statutes, section 16.08, specifically directs the commissioner to award contracts and purchases to the lowest responsible bidder. (emphasis added) In fiscal year 1983, construction contracts totalling $272.7 million were awarded. In 1984, the total will be $403.6 million. Mn/DOT engages in a large volume of contracting that it must protect from the inflation that results from anti-competitive activities and from the danger and the economic risk posed by irresponsible bidders.

One of the important issues Mn/DOT must face in awarding public contracts is how to deal with persons and businesses that have been accused, indicted or convicted of bidrigging, other antitrust violations or other contract crimes indicating a lack of business integrity or honesty. This issue may arise with respect to businesses convicted locally of antitrust and other contract related offenses, or with respect to businesses that wish to bid on state contracts, to serve as subcontractors or to supply materials in Minnesota that have been convicted of contract related crimes in other states. For the reasons stated above Mn/DOT should not deal with such businesses.

Mn/DOT can protect its public contracts from irresponsible and dishonest persons by employing procedures known as suspension and debarment. Debarment is the formal disqualification, after a hearing, of a business or individual from the award of a contract funded in whole or in part by government funds, and from the opportunity to serve as subcontractor or material supplier. Debarment is intended to protect the integrity of the state's competitive bidding process. It is based on the theory that an individual or firm that violates the bidding laws or engages in contract related crimes is not trustworthy and should not be the recipient of state contracts for some specified period of time. Suspension is temporary (no more than 60 days) and allows the state to cease dealing with a business while it holds a hearing or begins the hearing process.

Debarment and suspension are protective in nature. The United States government procurement process has provided for administrative debarment and suspension of general application to federal contractors since 1928. Calimari, The Aftermath of Gonzalez and Horne on the Administrative Debarment and Suspension of Government Contractors, 17 N. England L. Rev. 1137, 1141 (1982). Most federal agencies have been enforcing some form of debarment, suspension or non-responsibility determination procedure for more than thirty years. The U.S. Department of Transportation has its own procedure for debarring irresponsible highway construction contractors who seek federally-aided contracts. The U.S. D.O.T. regulations prohibit awarding federally-aided highway construction contracts to persons who have been debarred by a federal agency. 49 C.F.R. Part 29 (1984).

The states have also addressed this problem. Twenty four states have laws or rules that permit or require debarment or disqualification of non-responsible bidders. Eight states have begun to develop debarment and suspension rules since it has become evident that there is widespread collusive activity in the highway construction business. Some states (Nebraska, Virginia and New Jersey) debar or suspend prospective bidders upon charge, indictment, or statement of a co-conspirator. In other states (Maryland, North Carolina) debarment occurs only after conviction or civil judgment.

The existence of a debarment procedure also protects the competitive bidding process by discouraging collusive activities. Some states feel that the threat of debarment and loss of ability to bid on or receive state contracts is a greater deterrent to collusive activity than the threat of a large fine or jail sentence.

Minnesota does not have a formal procedure for identifying and then debarring or suspending businesses convicted of antitrust or contract related offenses. In order to meet the statutory requirement that contracts be awarded to the lowest responsible bidder, Mn/DOT must have a procedure which provides for suspension and debarment of irresponsible businesses under certain specified circumstances. Mn/DOT

needs a procedure for application to wholly state funded contracts and for situations in which the Federal Highway Administration has not yet acted or has not provided due process to the business in question.

The case law shows that there are circumstances which justify the government's refusal to deal with certain bidders. However, that decision must be reached fairly and in accordance with the requirements of due process.

A contractor has no absolute right to do business with the government. See Perkins v. Lukens Steel Co., 310 U.S. 113, (1940); Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C.Cir. 1964); Trap Rock Industries, Inc., v. Kohl, 59 N.J.471, 284 A.2d 161 cert. denied, 405 U.S. 1065 (1972). However, the administrative suspension or denial of the right to bid or contract with the government directs the power of the government at a particular person and also may have serious economic consequences for a contractor. Several federal cases have held that due process requires that before a business may be denied the right to bid or contract, certain procedural safeguards must be observed, including notice of the grounds for debarment and an opportunity for some type of hearing. See Peter Kiewit Sons' Co., v. U.S. Army Corps of Engineers, 534 F. Supp. 1139, 1153, (D.D.C.1982); Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1271 (D.C.Cir. 1972).

These proposed rules will establish a procedure to protect Mn/DOT from dealing with dishonest and irresponsible contractors and will provide due process for persons proposed to be suspended and debarred.

III. Need and Reasonableness of the Proposed Rules.

Minnesota Rule 1230.3000 Scope.

These rules will apply to all Mn/DOT contracts. The definition of "Mn/DOT contract" is explained in the section on definitions. The authorizing statute, Laws 1984, Ch. 654, section 8, requires that the rules apply to all contracts let by the Commissioner of Transportation.

Minnesota Rule 1230.3100 Definitions.

Subpart 1. Scope.

Subpart 2. "Administrative law judge." "Administrative law judge" is defined to make the definition consistent with state law. Minnesota Statutes, section 14.50, provides that all hearings of state agencies require to be conducted under the Minnesota Administrative Procedure Act must be conducted by an administrative law judge assigned by the Chief Administrative Law Judge. It is intended that all hearings resulting from administration of these rules will be conducted according to the Minnesota Administrative Procedure Act.

Subpart 3. "Business." This word is defined to encompass all the various organizations and entities which might be formed to do business as a contractor, subcontractor or material supplier for Mn/DOT. It permits a shorthand reference to all the possible forms of business organizations.

Subpart 4. "Commissioner." "Commissioner" means the Commissioner of the Department of Administration. This is defined for the convenience of people using the rules and to simplify the reference to the Commissioner of Administration.

Subpart 5. "Contract crime." "Contract crime" is defined to include a variety of crimes related to making and performing contracts. It is reasonable to restrict the definition and the application of these rules to convictions for crimes related to contracting because that is the activity the state must protect through these rules. Any crime committed to enable the defendant to obtain a contract or to affect or influence the award or performance of a contract, shows that the defendant does not act responsibly where contracts are concerned. All the offenses listed in the definition could be committed in making or performing a contract.

Subpart 6. "Contractor." This word is defined so that persons using the rules will know that when the word "contractor" is used in these rules it has a specific meaning.

Subpart 7. "Debar." The word "debar" is defined so that people will know what the word means. The definition of "debar" is the meaning commonly understood by people who are familiar with the process of debarment as it occurs in relation to government procurement. The definition is similar to that in federal procurement regulations ("...to preclude a contractor from government contracting..." Office of Federal Procurement Policy, Policy Letter 82-1, Appendix A, 47 Federal Register 28854, 28858) and to definitions used by some states in their debarment rules. This definition of the word "debar" does not prevent a person from bidding on a Mn/DOT contract but prevents the person from being awarded a Mn/DOT contract or from serving as a subcontractor or material supplier under an awarded Mn/DOT contract.

Some states prohibit debarred persons from bidding on state contracts (Maryland, South Carolina, North Carolina, Nebraska, Iowa). Virginia and Texas prohibit debarred persons from contracting with the state (same as award). In some cases, a person who has been convicted of a contract-related offense, but not yet debarred by the federal government or by Minnesota or another state, may wish to bid on a Mn/DOT contract. Mn/DOT is not harmed by allowing a convicted person or business to bid, for a bid has no binding effect. If the bidder is not the lowest responsible bidder, Mn/DOT need not concern itself immediately about whether the contractor is responsible, but can hold the hearing in due time. If the bidder is the lowest bidder and has been previously convicted of a contract-related offense, Mn/DOT must then hold a debarment hearing if the bidder has not already been debarred.

Subpart 8. "Mn/DOT contract." "Mn/DOT contract" is defined according to the simplest legal definition of contract. It is defined in a way which limits the application of these rules to contracts that will be awarded by Mn/DOT and for which competitive bids are required by law or for which competitive bids are taken at the option of the agency. It is reasonable to restrict the application of the rules to Mn/DOT contracts for which competitive bids are or may be taken because other contracts can be negotiated between Mn/DOT and the contractor or supplier. Mn/DOT is not obliged to make an award or deal with any particular bidder when it contracts by negotiation and, therefore, can reject applicants who are deemed not responsible.

Subpart 9. "Person." "Person" is defined to include natural persons and business corporations, associations and any other organizations or entities which might wish to contract with the state.

Subpart 10. "Principal." "Principal" is defined to permit a shorthand reference to a number of individuals.

Subpart 11. "Suspend." "Suspend" is defined to mean a temporary disqualification from being awarded a Mn/DOT contract or from serving as a subcontractor or material supplier under an awarded Mn/DOT contract. The word suspend is needed to define the status of those against whom department proceedings are being prepared, but who are not yet debarred from contracting with Mn/DOT or from serving as a subcontractor or supplier. It denotes a pending debarment proceeding.

Minnesota Rule 1230.3200 Grounds for Debarment.

The grounds for debarment were drawn from several sources: A Policy Letter issued by the U.S. Office of Federal Procurement Policy, The American Bar Association Model Procurement Code, the American Bar Association Statement of Principles for the Debarment and Suspension Reform Act and from federal case law.

Policy Letter No. 82-1 of the U.S. Office of Management and Budget, Office of Federal Procurement Policy, 47 Fed. Reg. 28854, (1982) (to be codified at 48 Code of Federal Regulations Subpart 9.4 as of October 1, 1984) became effective August 30, 1982, and applies to federal agencies and persons who contract directly with agencies of the federal government. It resulted from study of federal debarment procedures by the Senate Subcommittee on Oversight of Government Management. Hearings before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs. 97th Cong. 1st Sess. (March 11, 12, 1981). The Policy Letter sets forth U.S. government agency-wide policies and procedures for debarment and suspension of U.S. government contractors and provides for a consolidated list of administrative debarments and suspensions. It also establishes certain due process safeguards for contractors.

The federal Policy Letter established three basic grounds for debarment: 1) conviction of or civil judgment for a variety of contract or business related offenses (the Minnesota rules will adopt these grounds); 2) serious violation of the terms of a governmental contract; 3) and any other cause of so serious a nature that it affects the contractor's present responsibility (Paragraph 7.2). The federal rationale for adoption of these grounds is stated in the comments section of the Policy Letter, 47 Fed. Reg. 28854, 28856:

> The objective of Appendix A (The Policy Letter text) is to assure that Government agencies do not deal with non-responsible business concerns. The concept of business responsibility is one which is well understood in the Government contracting community. Evidence of a contractor's lack of responsibility in the past may be considered when determining whether or not a contractor is presently responsible. The implication in the comments that the determination of responsibility covers something other than present responsibility is an unwarranted reading of the Policy Letter.
>
> These commentors were also concerned that debarment would be used to punish contractors for past transgressions. Debarment is not a form of punishment

for Government contractors; it is a procedure which must be available to the Government in order to protect its interests from non-responsible contractors.

The American Bar Association Section of Public Contract Law studied the question of debarment and suspension for one year. The result of that study was a statement of 36 Principles that it proposed as a Debarment and Suspension Reform Act to be enacted by Congress. The Principles were accompanied by a background report which evaluated current federal practice (this was prior to the adoption of Federal Policy Letter 82-1) and federal case law and explained the rationale for each Principle. The recommended Principles and the report were adopted by the ABA House of Delegates in January, 1982. American Bar Association Section of Public Contract Law, Proposed Debarment and Suspension Reform Act, January, 1982. The ABA proposal would have provided more procedural safeguards for government contractors than the Federal Policy Letter, and it proposed the creation of an independent board to hear debarment cases, taking the hearing out of the debarring agency.

The rationale for the ABA debarment and suspension proposal was offered by George M. Coburn and Milton Eisenberg, both members of the ABA Section of Public Contract Law, Special Committee on Debarment:

> The ABA proposal would strengthen the authority of the government to protect itself from these irresponsible persons by providing a firm legislative foundation for administrative debarments and suspensions. It also would ensure that decisions to debar and suspend are based on reliable evidence and follow fair procedures, thereby making them less vulnerable to subsequent attack in the courts. Finally, the implementation of such a proposal would provide positive incentives to contractors and others to remedy deficiencies in performance, conduct, or management if they want to continue to participate in the competitive procurement process and in various federal assistance programs.
>
> Both the ABA proposal and the OFPP Policy Letter proceed from the premise that while debarments and suspensions are necessary in appropriate cases, they are considered to have a "drastic" impact, that they should be considered remedial and not punitive in nature, and that they should be imposed for no longer than is necessary to protect the government's interest.... Both also recognize that the government must be able to protect itself from fraudulent and incompetent contractors as well as from others participating in federal programs. Finally, both acknowledge that the procedures for suspension and debarment must afford fundamental fairness to those affected. Coburn and Eisenberg, "Debarment, Suspension Methods Stir Controversy," Legal Times (Wash., D.C.), Aug. 23, 1982, p. 14.

The ground for debarment proposed by the ABA in Principle 4 was a "...determination that there is a substantial and continuing risk that in obtaining or performing government contracts...such person will not substantially perform all material obligations and requirements..." The Principle stated that an obligation could be considered material if it related to "honest and fair dealing".

The comments to this Principle explained the specific kind of conduct that would require debarment:

> Throughout the Statement of Principles, the Committee has made clear its belief that in cases involving allegations of fraud or criminal conduct, the Board should generally wait for and defer to the results of a criminal trial, assuming the government seeks criminal penalties as well as its debarment remedy. Thus, the Committee expects that the Board will treat criminal convictions for fraud, embezzlement, forgery, bribery, and other offenses indicating a lack of business integrity or business honesty, or convictions for violations of federal or state antitrust laws, or other offenses relating to obtaining or performing contracts as prima facie evidence to support debarment. Comment to Principle No. 4., ABA Proposed Debarment and Suspension Reform Act.

Those are among the grounds proposed in these rules.

The ABA Model Procurement Code, (1975) Section 9-102, specifies that causes for debarment or suspension include...

> (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
>
> (b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a (State) contractor;
>
> (c) conviction under state or federal antitrust statutes arising out of the submission of bids or proposals.

The grounds for debarment in these proposed rules, are based primarily on these three models and on the rationales which support them.

Minnesota is required to award competitive contracts to the lowest, responsible bidder. The state may not award a contract to a bidder who is not responsible. "Under this statute, (referring to Minnesota Statutes, section 16.08) public officials charged with the duty of awarding public contracts on competitive

bids must award the bid to the lowest responsible bidder." Foley, at 390, (emphasis added). Although there are Minnesota cases which hold that contracts must be awarded to the lowest responsible bidder, there are no Minnesota cases construing the word "responsible".

The North Dakota Supreme Court construed a statute which required that certain contracts be advertised and let after such advertisement, only to the lowest responsible bidder. The Court stated:

> The mandate of the statute is not (as appellant assumes) that the contract shall be let to the "lowest bidder"; the mandate is that the contract shall be let to the "lowest responsible bidder." If the Legislature had intended that the contract should in every case be let to the lowest bidder, it would doubtless have said so. What the Legislature did say was that the school board should let the contract to the "lowest responsible bidder...The term "responsible", as used in the statute, means something more than mere financial responsibility. It means responsibility as regards the duty to be assumed by the contractor by the particular contract under consideration, and includes all the various elements that bear on that question, such as the integrity of the bidder and his skill, ability, and capacity to perform that particular work (citations omitted). Ellingson v. Cherry Lake School District, 55 N.D.141, 212 N.W. 773, 775, (1927).

The Supreme Court of New Jersey in directly addressing the question of what is required by the term "responsible" stated:

> The relevancy of moral responsibility is evident. It heads off the risk of collusive bidding. It assures honest performance. It meets the citizen's expectation that his government will do business only with men of integrity. The question then is whether under the circumstances of these cases the Commissioner could reasonably believe it was not in the best interest of government to deal with these contractors until the criminal allegations were resolved in some manner. Cf. Arthur Venneri Co., supra, 29 N.J. at 402, 149 A.2d 228.
>
> We need hardly labor the point that the charges of bribery contained in the indictments would, if established, reveal a lack of moral responsibility for doing business with the State. That the charges do not relate to the performance of a government contract is of no moment; it could not be supposed that a man who would bribe law enforcement officers would bribe no one else. Trap Rock Industries, Inc., 284 A.2d at 166.

The grounds for debarment described in Minnesota Rule 1230.3200 provide specificity to the determination of whether a bidder is responsible. Since responsibility embraces moral responsibility, integrity and honesty, it stands to

reason that conviction of contract related crimes evidences a lack of moral standards, integrity and honesty. Conviction of the violations of law proposed as grounds in these rules offers compelling evidence that a contractor cannot be trusted to enter into or perform a government contract in a manner that is consistent with and protects the interest of the public. The establishment of one or more of the grounds for debarment described in this part will be evidence of the lack of moral responsibility of the contractor. These are reasonable grounds for refusing to deal with a contractor. Mn/DOT cannot rely on the integrity or honesty of a bidder who has been convicted of fraud, antitrust violations, embezzlement, making false statements or filing false documents.

The grounds for debarment are fair. They clearly describe the situations in which a business would be subject to debarment. Each offense which is listed in the grounds is evidence of dishonesty and lack of reliability and integrity of the bidder. The application of the rule is limited to offenses which occur in connection with contractual matters because that is the governmental activity sought to be protected by these rules.

The grounds are further limited by the requirement that there be a conviction. The conviction establishes the persons and businesses subject to debarment. It also establishes the non-responsibility that is presumed in the enumeration of these offenses, beyond a reasonable doubt in the case of criminal defendants. This removes discretion from the administrative agencies and assures uniformity of treatment. Some states provide for debarment upon indictment, charge, admission made out of court, statement of co-conspirator or upon "adequate" evidence of commission of the kinds of offenses that are listed in these grounds. Under these rules no debarment would be sought in Minnesota prior to the conviction of the business or any of the principals in the business.

The following activities have been judicially recognized as grounds for debarment: attempt to bribe law enforcement officer, Trap Rock Industries, Inc., 284 A.2d 161 and 304 A.2d 193; bribery of state officials, Polyvend v. Puckorius, 77 111. 2d 287, 395 N.E. 2d 1376, app. dismd. 444 U.S. 1062 (1980); plea of guilty to misuse of official inspection certificates, Gonzalez v. Freeman, 334 F.2d 570 (D.C.Cir. 1964) statute authorized debarment, but court reversed for failure of agency to observe procedural requirements; excessive charges, Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C.Cir. 1980) reasoned basis for determination of lack of integrity, but debarment reversed for failure to give notice of determination; giving gratuities to navy personnel, Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C.Cir. 1972); violation of overtime pay laws on government contract, Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C.Cir. 1961); failure to pay property taxes for four years, Community Economic Development Corp., Inc. v. United States, 577 F. Supp. 425 (D.D.C. 1983).

Minnesota Rule 1230.3300 Liability of Individual Imputed to Business.

Minnesota Rule 1230.3300 imputes the illegal conduct of an individual to his business if the conduct occurred in the course of employment and with the knowledge or acceptance of the business. In Trap Rock Industries, Inc., 304 A.2d 193, the corporation was debarred as a result of the bribery conviction of the majority stockholder and the court upheld the debarment. A business can act only through its principals. This rule prevents a business from allowing an employee or principal to violate antitrust or other laws, benefit from those acts, fire the employee, and claim that the business had nothing to do with the illegal activity. A business reflects the character of the people giving it direction. This rule prescribes the link between the determination of the guilt of a principal and the effect on the

business. When an officer, agent or employee acts within the scope of his duties his knowledge is imputable to the corporation. Brooks Upholstering Company, Inc. v. Aetna Insurance Company, 276 Minn. 257, 149 N.W. 2d 502 (1967).

Minnesota Rule 1230.3400 Debarment Procedure.

Proposed Minnesota Rule 1230.3400 requires debarment when one or more of the grounds enumerated in this rule are established after an administrative hearing or opportunity for hearing conducted under Minnesota Statutes, Chapter 14. This rule is necessary to make the debarment procedure conform to Minnesota Statutes, section 14.57, which requires the initiation of contested case proceedings whenever required by law. Minnesota Statutes, section 14.58, requires that parties to a contested case be afforded an opportunity for hearing after reasonable notice. Deprivation of the right to seek award of government contracts has been held to require notice of the suspension or debarment, a statement of the charges or grounds, and the opportunity to respond to the charges in the case of a debarment. Horne Bros., Inc., at 1271; Old Dominion Dairy Products, Inc., at 968 and 969. Reliance on the contested case procedures of Chapter 14 and the rules of the Office of Administrative Hearings under Minnesota Rules 1400.5200 - 1400.8500 will satisfy the requirements for due process.

Minnesota Rule 1230.3500 Term of Debarment.

Minnesota Rule 1230.3500 requires the Administrative Law Judge to recommend and the Commissioner of Transportation to establish the term of debarment. It provides that the term of debarment depends on the seriousness of the grounds, whether restitution has been made to the state, whether the debarred person cooperated in civil or criminal lawsuits and the state's need to preserve the competitive bidding process. These conditions are necessary because making restitution and cooperating in civil or criminal lawsuits provide evidence of a person's willingness to comply with the law. They indicate the good faith of the debarred person and are reasonable measures of the debarred person's attitude toward the requirements of the law. These criteria are similar to the criteria adopted by other states. Tennessee adopted the position that it would recommend to the Federal Highway Administration that it lift the debarments of firms involved in bidrigging in Tennessee when the firm made restitution for overcharges, made full disclosure of bidrigging activities and cooperated in the ongoing antitrust investigation. (National Association of Attorneys General Antitrust Report, October, 1981, p. 9) It saw the term of debarment as being related to the willingness of the debarred business to cooperate with the state.

The term of debarment must be left to the discretion of the department. The Commissioner is the person best qualified to establish the debarment period. The Department of Transportation will have the information about the conviction and will have presented it at the hearing. The agency will be able to judge the seriousness of the offense and will know, through the Attorney General's or other prosecutor's office, whether or when restitution is made and whether the debarred business or individual has cooperated in the enforcement of the law. In cases where the violation was not serious, or a guilty individual has been purged from the business, the agency could impose a very brief debarment because the debarred individual or business has shown a desire to comply with the law and will not represent a continuing threat to the integrity of the state's contracting function.

The courts have rarely ruled on the appropriateness, or means of establishing the term of debarment. In general, agencies have discretion to determine when to debar and for what period of time as long as the requirements of procedural due process are observed and the reasons for debarment are those permitted by law or regulation. In Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976), the court remanded the case to the debarring officer for the Department of Defense for a review of the debarment. In that case, the plaintiff was debarred for three years as a result of a conviction indicating lack of business integrity. When the debarment was imposed, the plaintiff had already been suspended for a period of 29 months, and had paid a settlement to the government. At the debarment hearing he presented evidence of present good character and of the prior suspension and restitution. Because the debarring officer did not state his reasons for the additional three year debarment, the case was remanded. In cases where the court found the debarment reasonable, the period of debarment has not been scrutinized. Copper Plumbing & Heating Co., 290 F.2d 368 (D.C.Cir. 1961) 3 years; Polyvend, 395 N.E. 2d 1376, apparently permanent; Trap Rock Industries, Inc. v. Kohl, 63 N.J. 1, 304 A.2d 193 (1973) 5 years.

It is difficult to equate a specific period of time with a cure of the grounds that led to debarment. It is reasonable to select a maximum period and then establish the term based on the criteria in Minnesota Rule 1230.3500. The agency must determine, after a hearing, a reasonable period of debarment that does not exceed three years. In Copper Plumbing & Heating Co. v. Campbell, the court considered whether a three year debarment imposed by the Comptroller General at the request of the Department of Labor was penal. The debarment had been imposed as a result of violations of the Eight Hour Laws (wage laws). The court concluded that the three year debarment was not penal but was..."a regulation for affectuating compliance, and furthering the public policy represented by the labor acts." Copper Plumbing & Heating Co., at 372. Having found that the debarment was authorized, the court allowed the three year debarment.

Minnesota Rule 1230.3600 Debarment Based on Affiliation.

Subpart 1. Conviction of Business Imputed to Individual.

Subpart 1. imputes the conviction or liability of a debarred business to an individual who participated in, knew of, or should have known of the illegal conduct. An individual's acceptance of, participation in, or failure to discover such conduct when he is in any position in which he can control, influence, manage or direct the business makes him liable for failing to question or object to the illegal conduct.

Subpart 2. Debarment Required.

Subpart 2. states the circumstances in which Mn/DOT must debar businesses that are owned, managed, directed, controlled, or influenced by former principals of debarred businesses. This requirement is necessary to prevent a person who has been debarred, or who is or was a principal in a debarred business from starting another business under a new name, from joining another business to escape the effect of debarment or from buying another business will bid on Mn/DOT contracts under his influence or control. A business over which a debarred person exercises control or influence presents the same problem with respect to lack of responsibility as a debarred business. This problem arises particularly where there is interlocking control or management of businesses, where an individual who is an officer,

director, owner, partner or manager of a debarred business serves in one of those capacities in another business. The debarred person's acceptance, promotion, participation in, or negligence in failing to discover conduct which leads to grounds for debarment in one company raises serious questions about the integrity and responsibility of any other business over which he exerts control or influence. Because the rule requires debarment of a business in which an officer, director, partner, principal or employee or shareholder engaged in management is convicted of a contract related crime, all businesses that that person controls, directs, manages or influences must be debarred. If the business did not bear the consequences of the illegal acts of the principal or of the principal's failure to prevent or correct illegality, there would be no reason for the persons in control of a business to assure that all activities of the business were undertaken in conformance with the law.

That this is true has been recognized by several courts. In Stanko Packing Company, Inc. v. Bergland, 489 F. Supp. 947 (D.D.C. 1980), the court considered whether there was substantial evidence of the plaintiff's affiliation with another supplier which had been debarred to justify debarring the plaintiff. The plaintiff was in the meat packing business and its president and two of its directors were partners in another meat packing firm that had been debarred. The Debarring Officer noted that the individuals had management responsibilities in both firms. The plaintiff was debarred even though all three of the officers denied participation in the illegal acts of the other firm. The debarment was based on the interlocking management relationships between plaintiff and the other company and the evidence of violations of the Federal Meat Inspection Act by the other company over which plaintiff's president and directors exercised control.

A recent Illinois case, Polyvend, Inc. v. Puckorius, 77 Ill 2d 287, 32 Ill Dec. 872, 395 N.E. 2d 1376 (1979), upheld a law which provided that where an official, agent or employee of a business entity committed or attempted bribery of an officer or employee of the state on behalf of the business entity and pursuant to the direction or authorization of a responsible official of the business, the business would be charged with the conduct. In that case, Stoltz, president of Polyvend, had pleaded guilty to bribery while serving as president of another company which was the sole owner of Polyvend. Subsequently, the two companies merged and Stoltz, who apparently held the controlling interest in Polyvend, signed a bid as president. The plaintiff argued that the law which barred Polyvend from receiving the contract because its president had committed a crime while he was president of Polyvend's parent corporation was an unconstitutional bill of attainder. The court, in upholding the application of the law to Polyvend said:

> ...A bill of attainder has been defined as "a legislative act which inflicts punishment without a judicial trial." United States v. Lovett (1946), 328 U.S. 303, 315, 90 L.Ed. 1252, 1259, 66 S.Ct. 1073, 1078. We do not think that section 10.1 of the Illinois Purchasing Act can be called a bill of attainder. There clearly was a judicial determination of guilt concerning a controlling shareholder and official of the corporation when Stoltz was convicted of bribery in 1974. The legislative act, section 10.1, simply attributed his guilt to the corporation. This is no different than any other civil or criminal provision which holds a corporation responsible for the acts of

its officials. The only way a corporation can act is through its officers, directors and employees.

A similar problem was addressed by the United States Supreme Court in DeVeau v. Braisted (1960), 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109. In that case, union officials and others challenged the constitutionality of a section of the New York Waterfront Commission Act which provided that no person could solicit or receive dues on behalf of any waterfront union if an officer of such union had been convicted of a felony. As a result of the Act, the International Longshoremen's Association was denied dues solicitation and collection privileges because of an officer's conviction of a felony 36 years earlier. The court, considering the claim that the Act was unconstitutional as a bill of attainder and as an ex post facto law, stated:

"Finally, S 8 of the Waterfront Commission Act is neither a bill of attainder nor an ex post facto law.... Clearly, S 8 embodies no further implication of appellant's guilt than are contained in his 1920 judicial conviction;.... The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation.... The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much needed scheme of regulation of the waterfront...." (Emphasis added.) (363 U.S. 144, 160, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109, 1120.)

Similarly, section 10.1 (of the Illinois Purchasing Act) was devised as a much needed regulation of government procurement policies and cannot be said to constitute a bill of attainder.... Polyvend, Inc. v. Puckorius, at 1382-1383.

The Office of Federal Procurement Policy, Policy Letter No. 82-1, section 7.1(b) extends a debarment to all divisions of a business unless the order specifically limits it to certain divisions. The debarring official may extend the debarment to include affiliates if they are named in the notice and given an opportunity to respond to the proposed debarment. The definition of "affiliate" bears on the ability of one company to control another or of a third company to control both companies. The federal regulation is similar to proposed Minnesota Rule 1230.3600, Subpart 2. C.

The ABA Proposed Debarment and Suspension Reform Act also addressed the scope of debarment. Principle number 8 provides that the scope of the debarment should be no broader than necessary to protect the governmental interests at stake. However, the Committee proposed that upon satisfactory proof the Debarment Board could debar

or suspend persons who control, are controlled by or are under common control with the person (business) debarred or suspended by the Board. The Comment to Principle number 8 explained the reason for this as follows:

> Decentralization of management by divisions or plants may make company-wide debarments unfair and unnecessary in some cases. The Committee believes that the Board should be given discretion to limit a debarment or suspension to some administrative unit of a company where that is appropriate...
>
> On the other hand, the Board should also have discretion to extend the effect of its debarment order to persons related to the debarred or suspended party where an agency can show that such broader relief is necessary. For example, where an individual is debarred because of fraudulent conduct, he should not be able to avoid the effect of the Board's order by the expedient of seeking contracts through his wholly-owned corporation.

Proposed Principle number 9 would allow the Debarment Board to allow an agency to refuse a specific contract, grant, loan or other assistance to a person who employs in a significant decision-making capacity, is associated with (as in a joint venture) or is controlled by, a debarred or suspended person. "The Board shall issue an order granting such authority unless it finds that the debarred or suspended person will not materially participate in or benefit from such a contract, grant, loan or other assistance."

The Comment to the Principle states that an agency should be allowed to refuse to deal with persons who employ in a significant decision-making capacity, join in a joint venture, or are controlled by a debarred or suspended person. The ABA proposal addresses situations where a debarred person goes to work for or joins in business with a business that has not been debarred. It proposes that the government not deal with those companies unless it can impose conditions on the business that exclude the debarred person from participation in the contract in question.

ABA Principal number 9 is similar to this proposed rule. The rule would allow Mn/DOT to refuse to award a contract to a business in which a debarred person exercises control. This is a reasonable restriction that protects Mn/DOT by allowing it to decline to risk its contracts with businesses subject to the control or influence of persons who lack moral responsibility and integrity.

Subpart 3. Procedure.

Subpart 3. requires that persons debarred under this section be provided the due process notice and hearing required by Minnesota Statute, Chapter 14.

Subpart 4. Duration.

Subpart 4. provides that the length of the debarment of the second business shall be the same as the debarment imposed on the former principal or business. The former principal of a debarred business in effect takes the taint of the violation

with him to the new business. The debarment would be based on the same conduct as that considered in the first debarment and the term of debarment would be based on the considerations described in proposed Minnesota Rule 1230.3500. As both the conduct under scrutiny and the elements considered in determining the duration of debarment will be the same as those considered in the debarment of the former principal's business, it is reasonable to impose the same term of debarment. This also prevents persons from avoiding the effect of a debarment by working for or starting a new business.

Minnesota Rule 1230.3700 Debarment Limitation.

Minnesota Rule 1230.3700 provides that no person may be debarred for more than 3 years for grounds arising out of conduct which gave rise to the debarment. This is intended to impose a limit on the length of any one debarment. The period of 3 years was selected because that is the maximum period of debarment recommended by the ABA Section of Public Contract Law in its Proposed Debarment and Suspension Reform Act. (Principle number 7). Other states that have adopted debarment regulations have adopted a three year limit. As a general principle, a debarment should be no longer than is necessary to assure that the integrity of the government contracting process is no longer threatened. A limit of 3 years is reasonable because it is difficult to determine exactly when any particular wrongdoing or illegal activity has been cured. Rather than require a debarred person to return to the hearing process with evidence of having cured any illegal activity or with evidence of present good faith, the debarment will automatically terminate 3 years after imposition or sooner if a shorter debarment was imposed. The comments to the ABA Proposed Debarment and Suspension Reform Act state that the ABA committee agreed on a maximum 3 year term for debarment including any period for which suspension was imposed, even though some members of the committee felt that a longer term, such as five years, would be more appropriate. A government agency could seek a renewal of the debarment at the end of that 3 year period if it believed that continued debarment was necessary, but it could not rely on the same grounds for which debarment had previously been imposed. The ABA Committee felt that a continuing violation should be regarded as a new ground for debarment.

Policy Letter 82-1 issued by the Office of Federal Procurement Policy also allows a debarment to run up to 3 years depending on the seriousness of the cause.

Minnesota Rule 1230.3800 Effective Date of Debarment.

Minnesota Rule 1230.3800 provides that the debarment takes effect on the date of mailing of the order by Mn/DOT. This is a reasonable provision because it gives notice of the effective date of the debarment order. It establishes a date that can be ascertained by examining the receipt of mailing by certified mail. It provides certainty as to the effective date of the order and is consistent with the rule that service by mail is complete upon placing the item to be served in the mail (See Minnesota Rule 1400.5100, Subp. 4 and Minnesota Rule 1400.8200.).

Minnesota Rule 1230.3900 Termination of Debarment or Award During Debarment.

Minnesota Rule 1230.3900 provides that the Commissioner of Transportation may terminate a debarment by order, or award a state contract to a debarred or suspended person when that person is the sole supplier of a material or service required by the state, when the Commissioner of Transportation determines that an emergency exists as defined in Minnesota Statutes, section 161.32, subdivision 3, or when the

Commissioner of Administration determines that an emergency exists as defined in Minnesota Statutes, section 16.06, subdivision 2.

The Comment to the ABA Proposed Debarment and Suspension Reform Act, Principle number 6, Effect of Debarment or Suspension Order, suggests that a debarred or suspended person may be awarded a grant or contract if the agency head determines that there is a compelling need for the product or services and states the reason therefore, and if either reasonable steps are being taken to cure the debarment, or the agency is seeking alternative sources. The Comment states that the Committee intended the exceptions to be made on a case by case basis depending on the need of the government.

> ...for example, the fact that a contractor may be indispensable for one type of contract may not excuse an exception for other contracts with the same agency where alternative sources of supply are available. The Committee further intends that the determination of the agency head...to continue to do business with a debarred or suspended firm should be final and conclusive and not subject to court challenge.

The government has a strong interest in having available to it the service or materials that it needs for the performance of any state contract. If the only contractor or supplier who can provide a particular service or material has been debarred or suspended the government must be able to deal with him under conditions that it may negotiate.

It is reasonable to allow the Commissioner of Transportation discretion to purchase from a debarred person who is the sole supplier of a material needed by the state. In that case, the Commissioner would negotiate the contract and would have control over the terms. Minnesota Statutes, section 161.32, subdivision 3, defines emergency as "...a condition on a trunk highway that necessitates immediate work in order to keep such highway open for travel." When the Commissioner of Transportation determines that there is an emergency it is reasonable to allow him to terminate a debarment or to hire a debarred or suspended person when it is necessary to keep a road open and there is no alternative. If there is no time to advertise for bids and select the lowest responsible bidder and a debarred or suspended contractor is located nearby or available for work, it would be necessary to employ the debarred person. The need of the state to keep the road open would be the paramount consideration in such a case.

It is important for Mn/DOT to be able to make exceptions to enable it to respond to unforeseen circumstances that call for immediate action in the public interest. This is the basis for the Commissioner's determination under section 16.06 that an emergency exists which requires acting outside normal procedures.

Minnesota Rule 1230.4000 Continuation of Contracts.

This section provides that contracts in existence at the time of debarment or suspension shall not be terminated by the debarment or suspension. This is a reasonable provision that protects both the contractor and the state by assuring that contracts that have already been made will not be disrupted by a subsequent debarment. It is in the interest of the public to allow completion of contracts on which work has begun. However, Minnesota Rule 1230.1200 permits the Director of

Procurement of the Department of Administration to cancel purchases when the contractor agrees, the contract was obtained illegally, or the contractor fails to deliver.

Minnesota Rule 1230.4100 Prohibitions.

Minnesota Rule 1230.4100, Subpart 1. prohibits Mn/DOT from awarding a contract to a debarred or suspended person and prohibits approval of a contract under which a debarred or suspended person would serve as contractor, subcontractor or material supplier. This provision states the effect of a debarment or suspension. After lack of responsibility is established Mn/DOT must not deal with those businesses: "All contracts and purchases made by or under the supervision of the commissioner or any state department or agency for which competitive bids are required shall be awarded to the lowest responsible bidder,..." Minnesota Statutes, section 16.08. It also prohibits the contractor from hiring debarred or suspended persons to perform Mn/DOT contracts.

A business that has been found not responsible does not change character as a result of being a subcontractor or supplier instead of a contractor. For many businesses, these activities are interchangeable; a business may serve as a contractor for one job and subcontract or sell supplies to the contractor on another job. In that case, the business, although not dealing directly with Mn/DOT could still have an affect on the performance of the contract. Mn/DOT is responsible for securing the timely, honest and proper completion of the contract. To do that it must prohibit its contractors from dealing with irresponsible businesses. If the rule did not apply to subcontractors and material suppliers it is likely that debarred contractors would become subcontractors so that they could evade the effect of the debarment.

Subpart 2. notifies contractors that they may not subcontract to, or purchase materials from, debarred or suspended persons.

Minnesota Rule 1230.4200 Suspension

Minnesota Rule 1230.4200, Subpart 1. provides that the Commissioner of Transportation shall suspend a person by order upon receiving notice or learning of a conviction for conduct described in Minnesota Rule 1230.3200 or upon learning of an affiliation described in Minnesota Rule 1230.3600, Subpart 2. The agency must commence debarment proceedings within 10 days of mailing the suspension order. The suspension order must be mailed by certified mail. This provision will protect the state from being required to award contracts to persons who may soon be debarred. Because the grounds for debarment are so narrow, a hearing for debarment will involve little more than evidence of the conviction and a determination that the person subject to debarment is the person who was convicted of the described conduct or to whom the conviction will be imputed. Therefore, when the commissioner learns of a conviction, it is extremely likely that debarment will follow. This is more than adequate evidence on which to base a suspension pending debarment. In the case of a business, the business will be suspended when the agency learns that one of the principals has been convicted for conduct described in Minnesota Rule 1230.3200.

To prevent the government from being required to deal with irresponsible contractors, it's necessary to suspend the person pending the debarment hearing. The business or individual subject to debarment is protected by the provision which

provides that no suspension may exceed 60 days. This limits the amount of time the contractor may be held in limbo pending the debarment proceeding.

One federal court has approved a 30 day suspension without a hearing and other courts have suggested that longer suspensions would be acceptable. In Horne Bros., Inc. v. Laird, at 1270, the court said:

> This procedure (the suspension) does not require that the suspended contractor be offered an opportunity to confront his accusers and to rebut the "adequate evidence" against him. Yet the suspension may be continued for eighteen months or more. While we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor, that cannot be sustained for a protracted suspension.

With respect to the reasonableness of suspension the court noted:

> A question of judgment is involved, but we note that no contractor may be suspended under the regulations unless there is "adequate evidence" of a dereliction. This can ordinarily be demonstrated without either tipping the Government's entire case, or even prematurely disclosing the identity of key witnesses. The "adequate evidence" showing need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. This is less than must be shown at the trial, but it must be more than uncorroborated suspicion or accusation. Horne Bros., at 1271.

Under these rules, the commissioner upon learning of a conviction or judgment for a contract related offense would have more than adequate evidence of the irresponsibility of the prospective contractor. At this point the interest of the state in dealing only with responsible businesses and the strong evidence of the business irresponsibility would outweigh any risk of wrongful suspension as a result of a 60 day suspension. The business would be notified of the grounds for suspension with the order for suspension. Within 10 days it would receive a notice of the charges and notice of the opportunity for hearing on debarment. These procedures are adequate to protect the due process rights of the business and to protect the state.

Other courts have noted that temporary suspensions may be warranted for a reasonable period of time pending an investigation. Old Dominion Dairy Products, Inc., at 966. One court would permit suspensions of 12 to 18 months during which the government might prepare its case if the suspension were based on adequate evidence, notice of the charges were provided to the contractor and the contractor was permitted to make at least a written response to the charges. Transco Security, Inc. of Ohio v. Freeman, 639 F.2d. 318, 324, (6th Cir.) cert. denied, 454 U.S. 820 (1981).

The provisions of the proposed suspension rule are necessary to protect the state. The rule is reasonable as it provides for notice to contractors, it assures that the effective date of the order can be determined and it limits the suspension to 60 days.

Minnesota Rule 1230.4300 Notice to Public.

Subpart 1. requires Mn/DOT to notify the Commissioner of Administration of each debarment and suspension. It is reasonable to notify her because she has final approval of all state contracts and is interested in the debarment and suspension determinations. She must also publish the weekly list of debarments and suspensions and cannot do so unless the information has been provided to her.

Subpart 2. requires the Commissioner of the Department of Administration to publish a list of debarred and suspended contractors. This is a reasonable requirement that will give other agencies notice of debarments and suspensions by Mn/DOT. Because debarred persons may not serve as subcontractors or material suppliers, it is necessary to publish a list of debarred and suspended persons to inform the contractors. This will enable contractors to avoid dealing with debarred and suspended persons.

IV. Small Business Considerations in Rulemaking.

Minnesota Statutes, section 14.115, requires an agency which proposes new rules to consider methods of reducing the impact of the rules on small businesses. Subdivision 2 lists five methods which must be considered. The agency's analysis follows:

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

The rule establishes no compliance or reporting requirements.

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

The rule establishes no schedules or deadlines for businesses.

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

The rule establishes no compliance or reporting requirements.

(d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and

The rule establishes no design or operational standards.

(e) the exemption of small businesses from any or all requirements of the rule.

These rules will affect only small businesses that have been convicted of contracted related offenses and which seek the award of state contracts. Minnesota Statutes, section 16.08, directs that contracts be awarded to the lowest responsible

bidder and, therefore, requires a determination of the responsibility of a bidder and consideration of any evidence of lack of responsibility. The commissioner must reject bids from bidders who are deemed not responsible. The law also requires that due process notice and opportunity to be heard be provided to persons who may be excluded from government contracting. These rules establish a procedure to provide due process to bidders. Exemption of small businesses from the requirements of these rules would also deprive them of due process. If the rules exempted irresponsible small businesses, Minnesota Statutes, section 16.08 would still require the commissioner to refuse to deal with those businesses. Therefore, small businesses cannot be exempted.