



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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November 9, 2020

To: Members of the Ethics Commission

From: LeeAnn Pelham, Executive Director

Subject: **Agenda Item 4 – Discussion and Possible Action on Presentation by Controller’s Office on November 5, 2020 Report, “Preliminary Assessment: San Francisco’s Debarment Process.”**

Summary This item provides an opportunity for the Commission to hear a presentation by the Controller’s Office on the third in a series of Public Integrity Reports issued by that office.

Action Requested This informational item has been placed on the November 13 meeting agenda for the Commission’s discussion. No action is required.

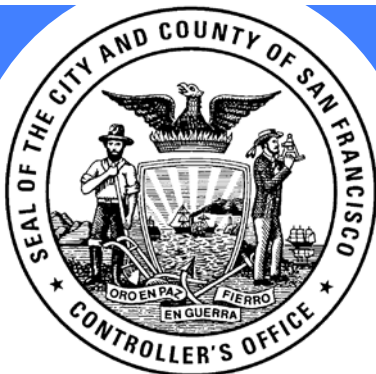
On November 5, the Controller’s Office issued the third in its series of Public Integrity Reports to assess City policies and processes in the wake of the City Attorney’s investigation stemming from alleged wrongdoing by former Public Works Director Mohammed Nuru. These reports have been conducted in consultation with the City Attorney’s Office to assess selected city policies and procedures to evaluate their adequacy in preventing abuse and fraud.

The Controller’s first assessment report, [Preliminary Assessment: San Francisco Public Works Contracting](#), was issued June 29, 2020. It presented the Controller’s findings and recommendations regarding conflicts of interest and governmental ethics laws and potential vulnerabilities in the City’s contracting and procurement processes. A presentation on that report was provided to the Ethics Commission by Controller’s Office Acting Director of Audits, Mark de la Rosa, as part of [Agenda Item 3 at the Commission’s July 10, 2020 regular meeting](#). On September 24, the Controller’s Office issued its second assessment report, [Preliminary Assessment: Gifts to Departments Through Non-City Organizations Lack Transparency and Create Pay-to-Play Risk](#). That report summarized gifts and support benefitting city departments from city contractors and building permit applicants and holders through non-city organizations, including what are known as “Friends of” organizations. A presentation on that report was provided to the Ethics Commission at its [October meeting](#).

To provide the Commission with an opportunity to discuss the Controller’s latest report, Mr. de la Rosa will present findings and recommendations at the Commission’s November 13 meeting under Item 4. A copy of the report is attached. Recommendations identified in these reports that relate to areas of the Commission’s jurisdiction are being incorporated into the Commission’s ongoing policy work and Staff will continue to remain in communication with that office to invite future presentations on future assessment reports that office releases.

Public Integrity Review

Preliminary Assessment: San Francisco's Debarment Process



CITY & COUNTY OF SAN FRANCISCO

Controller's Office

Assessment Summary

This preliminary review summarizes the debarment procedures of the City and County of San Francisco (City), changes to these procedures proposed by the Office of the City Attorney (City Attorney), and a comparison of the City's debarment process with that of the State of California (state) and with relevant provisions of federal law. This assessment was prompted by the criminal complaint against Balmore Hernandez, chief executive and vice president of AzulWorks, Inc. (AzulWorks), a city contractor, and the City Attorney's investigation of and debarment proceedings against AzulWorks. Additional reviews of other internal control processes will be released as our Public Integrity Review progresses. This assessment is the third in the series, is offered for public comment and review, and may be revised in the future as our work continues.

Highlights: Preliminary Findings

- City law provides that a contractor may be debarred when a guilty plea is entered for fraud against the government but does not provide for any action to be taken when a contractor is criminally charged for committing fraud against the government or for violating any city law.

Assessment Summary *(continued)*

- The City Attorney has proposed legislation that would amend city law to:
 - Clarify that a contractor* can be debarred for violating any provision of city law.
 - Allow the City to suspend contractors that are criminally charged.
 - Establish minimum qualifications for hearing officers.
 - Require that the names of suspended contractors, in addition to debarred contractors, are published on the Controller's website.
- The City's debarment procedures are consistent with those of the state and federal governments, except that the City's do not require an initial investigation (although, in practice, one occurs), and do not specify qualifications for debarment hearing officers.

* According to the San Francisco Administrative Code, Section 28.1(c), a contractor is any person or business entity who submits a qualification statement, proposal, bid, or quote, or who contracts directly or indirectly with the City.

Background on the Public Integrity Investigation

The City Attorney is leading the investigation into alleged wrongdoing by city employees and contractors outlined in criminal charges brought by the U.S. Attorney's Office against:

- Mohammed Nuru, former director of San Francisco Public Works
- Nick Bovis, owner of Lefty's Grill and Buffet and other restaurants
- Sandra Zuniga, former director of the Mayor's Office of Neighborhood Services
- Florence Kong, former member of the Immigrant Rights Commission
- Balmore Hernandez, chief executive and vice president of engineering firm AzulWorks, a company with large city contracts
- Wing Lok "Walter" Wong, building permit expediter and owner of several entities that do business with the City
- Alan Varella and Bill Gilmartin, officers of ProVen Management, Inc.

Mr. Bovis and Mr. Wong have pled guilty to schemes to defraud the City using bribery and kickbacks. Mr. Wong admitted to conspiring with Mr. Nuru and other unnamed city officials since 2004. Both are now cooperating with the ongoing federal investigation. Mr. Hernandez has pled guilty and will cooperate. Ms. Kong has pled guilty to providing bribes to Mr. Nuru.

Background on the Public Integrity Investigation *(continued)*

The City Attorney has focused its investigation on misconduct by current and former city employees and any remedies for specific decisions or contracts tainted by conflicts of interest or other legal or policy violations.

On July 14, 2020, the City Attorney moved to debar AzulWorks, Inc., from contracting with the City for five years, which is the maximum duration allowed under city law. AzulWorks entered into a stipulated suspension until the time a verdict is entered in Hernandez's criminal matter. The agreement prohibits AzulWorks from bidding on city contracts during that time and allows the City Attorney to pursue debarment once the criminal matter is resolved.

The City Attorney has sponsored legislation, now being considered by the Board of Supervisors, that would amend the Administrative Code to allow the City to suspend anyone (and their related businesses) upon the filing of criminal charges. If the amendments are enacted into law, the City will be able to suspend individuals and businesses charged with crimes from bidding on or receiving city contracts.

Criminal Complaint Against Mr. Hernandez

The FBI affidavit in support of the criminal complaint states that Mr. Hernandez provided bribes to Mr. Nuru to influence and reward Mr. Nuru in connection with his help steering city business to, or resolving conflicts encountered in connection with city contracts and approvals for, Mr. Hernandez, his associates, and his firm, AzulWorks.

Between late 2016 and the end of 2018, allegedly Mr. Hernandez supplied labor and materials in excess of \$250,000 to Mr. Nuru to build a home and make related improvements at Mr. Nuru's vacation property in Lodoga, California. Mr. Hernandez also allegedly paid for a January 2020 hotel stay valued at over \$2,000 for Mr. Nuru and several lavish meals often costing in excess of \$1,000 each. In exchange, Mr. Nuru allegedly provided inside information about city contracts and approvals, resulting in a multimillion-dollar contract for which AzulWorks had submitted an allegedly unqualified bid.

City Debarment Provisions

Debarment is “administrative determination against a potential bidder, or contractor declaring such potential bidder or contractor **irresponsible and disqualified from participating in a competitive process for city contracts or from entering into city contracts** for a period specified in the debarment order.” (San Francisco Administrative Code, Section 28.1(D))

A contractor shall be debarred upon a finding of **willful misconduct** with respect to any city bid, request for qualifications, request for proposals, purchase order and/or contract. (San Francisco Administrative Code, Section 28.3)

City Debarment Provisions *(continued)*

Willful misconduct may include, but is not limited to:

- Submission of false information in response to an advertisement or invitation for bids or quotes, a request for qualifications, or a request for proposals.
- Failure to comply with the terms of a contract or with provisions with the Administrative Code.
- Pattern and practice of disregarding or repudiating terms or conditions of city contracts.
- Failure to abide by rules and/or regulations adopted pursuant to the San Francisco municipal codes.
- Submission of false claims.
- Verdict, judgment, settlement, stipulation, or plea agreement establishing the contractor's violation of civil or criminal law against any government entity relevant to the contractor's ability or capacity to honestly perform under or comply with the terms and conditions of a city contract.
- Collusion in obtaining award of any city contract, or payment or approval thereunder.

(San Francisco Administrative Code, Section 28.3)

San Francisco's Debarment Process Is Similar to Those of the State and Federal Governments.

Preliminary Finding

San Francisco requires five of the six debarment procedure steps used by the state and federal governments.

- San Francisco's debarment procedures are consistent with those of the State of California and federal government, except the City's do not require an investigation* as the initial step.

* Although not required by the City's debarment procedures, the City Attorney states that, in practice, an investigation occurs before the City institutes debarment proceedings.

Comparison of San Francisco's Debarment Process

The City's debarment procedures include five of the six basic steps required by the state and federal governments.

Required Procedure	SF	State	Federal
1. Alleged violation is investigated.	Not Required	✓	✓
2. Notice of proposal or initiation of administrative debarment is issued.	✓	✓	✓
3. Contractor has an opportunity to respond to notice of administrative debarment and request a hearing.	✓	✓	✓
4. Hearing officer or debarring official is appointed and hearing is conducted.	✓	✓	✓
5. Hearing officer or debarring official makes a determination and can recommend a term of debarment.	✓	✓	✓
6. If contractor is suspended or debarred, notice is issued to all awarding entities and contractor is added to an excluded entity list or database.	*	✓	✓

* The City publicly posts a debarred contractor list.

Comparison of Debarment Periods

Preliminary Finding

San Francisco's debarment period of up to five years is similar to those found elsewhere.

The City's debarment period of up to five years is consistent with that of the state and federal government.

Jurisdiction	Debarment Period	Factors That Determine Duration
San Francisco	Up to 5 years	Not specified
State	1 to 5 years	Severity and frequency of the violation(s)
Federal	1 to 5 years	Severity of the violation(s)

Comparison of Contractor Suspension

Preliminary Finding

Unlike the federal government, the City and the state cannot suspend contractors.

- In contrast, the federal government can suspend a contractor for up to 18 months as a remedy short of debarment. The reasons a contractor may be suspended under federal law are similar to those for debarment such as a contractor is under indictment and/or subject to ongoing civil or criminal litigation. Generally, a suspension lasts only for the duration of the federal agency's investigation, but it may be extended for the duration of any legal proceedings related to the misconduct.
- A suspension is appropriate when a federal government agency, upon adequate evidence, determines that a contractor committed certain offenses. Not only does federal regulation include "indictment" as a ground for suspension, the federal government can immediately suspend an indicted contractor.
- The City Attorney proposed [legislation](#) in August to amend the San Francisco Administrative Code, and if approved, **the City will be able to suspend a contractor** from public contracts or grants if it has been indicted or charged in a civil, criminal, or administrative matter, and debarment may follow.

Comparison of Administrative Costs or Penalties

Preliminary Finding

Although the City does not require debarred contractors to pay administrative costs or other penalties, the City can pursue claims against contractors under state law or bring other civil actions.

- Neither the City, state, nor federal government requires a debarred contractor to pay all of the administrative costs of the debarment process or punitive penalties, although at least one exception exists at the state level.*
- Remedies are available to the City, depending on the type of violation committed. Just as the federal government can pursue penalties against contractors under the False Claims Act or the Foreign Corrupt Practices Act, the City could pursue claims against a contractor under the California False Claims Act or bring other civil actions against the contractor, such as an unfair business practices lawsuit.
- If a contractor is found guilty of a criminal fraud against the government, the contractor may be liable to repay the profit it made on any such contract.

* When the state advertises a contractor's period of debarment and reason for debarment in construction industry publications, the debarred contractor can be made to pay the cost of the advertising up to \$5,000.

Comparison of Hearing Officer Qualifications

Preliminary Finding

Unlike the federal and state governments, the City does not specify the minimum qualifications of its hearing officers.

- In contrast, the federal government specifies that debarring or suspending officials are either a **federal agency head** or a **designee authorized by the agency head**.
- The state government requires that its hearing officers be either an:
 - **Attorney** employed by the Division of Labor Standard's Office of the Director - Legal Unit.
 - **Attorney or administrative law judge** employed by the Department of Industrial Relations and have been admitted to practice law in the state for at least five years before appointment.

Comparison of Debarment and Suspension Lists

Preliminary Finding

Consistent with requirements for the federal and state governments, San Francisco publicly lists contractors it has debarred but should add suspended contractors.

- The U.S. General Services Agency administers a web-based application, the System for Award Management (SAM), to track debarred and suspended contractors (in the categories of procurement and non-procurement) and to maintain contractor exclusion records.
- The U.S. Department of Health & Human Services' Office of Inspector General Exclusions List includes only debarred healthcare providers, but they are also listed on SAM.
- The website of California's Department of Industrial Relations, Division of Labor Standards Enforcement, lists debarred and suspended public works contractors and subcontractors, as seen [here](#).
- The Controller's Office is required to post a current list of debarred contractors, available [here](#), and submit a report to the Board of Supervisors. The legislation sponsored by the City Attorney would require the Controller's Office to also post a list of suspended contractors.

Recommendation

Given the findings in this preliminary assessment, we offer the following preliminary recommendation. We will continue to refine this recommendation as the investigation and review continues and will consider feedback we receive in the review process.

1. **To be consistent with what the federal and state governments require, and as proposed by the Office of the City Attorney, the Board of Supervisors should amend the San Francisco Administrative Code to add:**
 - a) **Suspension to its debarment procedures.**
 - b) **Minimum qualifications for debarment hearing officers, such as that a hearing officer must be a licensed attorney.**
 - c) **A requirement for a public listing of suspended city contractors.**

Completed and Upcoming Public Integrity Reporting

Our Public Integrity Review, performed in consultation with the City Attorney, will continue to assess selected city policies and procedures to evaluate their adequacy in preventing abuse and fraud. Completed, current, and future assessments and reports address the following topics:

1. [San Francisco Public Works Contracting](#) (report issued on June 29, 2020)
2. [Gifts to Departments Through Non-City Organizations Lack Transparency and Create “Pay-to-Play” Risk](#) (report issued on September 24, 2020)
3. Ethical Standards for Procurement Processes of the Airport Commission and other city commissions
4. Citywide Ethics Reporting Requirements
5. The Department of Building Inspection’s policies and practices to award permits
6. A final report on the topics covered in this preliminary assessment

Additional reviews and assessments will be determined and performed as the City Attorney’s investigation proceeds.

Any questions or comments?

Contact us at... ben.rosenfield@sfgov.org
todd.rydstrom@sfgov.org
mark.p.delarosa@sfgov.org