

CITY OF BALTIMORE

SHEILA DIXON, Mayor



DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

April 1, 2009

The Honorable Chairman Kraft and Members of the
Judiciary and Legislative Investigations Committee
Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202



Re: City Council Bill 08-0214 {Illegal Dumping – Penalties – Enforcement}

Dear Chairman Kraft and Members of the Committee:

At the bill hearing for City Council Bill 08-0214, you asked the Law Department to respond to the following questions:

- 1) Whether the Mayor and City Council can, through this bill, make every person entering into a contract with the City purchase a performance bond that would include the cost of replacing the person if the person is convicted of illegal dumping; and
- 2) Whether the Mayor and City Council can, through this bill, prohibit every person who is convicted of illegal dumping from entering into another contract with the City for a certain number of years.

Question 1

I have consulted with the Law Department's Chief Solicitor of Contracts, and regarding the first question, we must advise against requiring a performance bond in an amount that would cover costs of replacing a person if that person is convicted of illegal dumping, because: (1) this is likely over-reaching; (2) such a requirement could be an illegal restraint against trade; and (3) problems would ensue with the bonding company pursuant to bonding laws.

The City rarely holds any person in default of a contract unless the person breached a material term of the contract. Similarly, the performance bond that is secured with the bonding company is for the performance of a contract. A conviction for illegal dumping is not related to the performance of the contract itself. Pursuant to bonding practice, when the contractor defaults, the surety must decide whether to forfeit the penal sum of the bond or complete the contract. The surety has three options:

*Comments /
amends*

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(1) it can force the contractor to complete the contract; (2) it can pay the City the unused amount of the bond; or (3) it can hire a third party to complete the contract. In short, the City would not recover the amount of the performance bond in order to hire a replacement contractor. The course of action would be completely decided by the bonding company, who would take over the contract upon a breach of a material term of the contract.

Additionally, if our agreement with the bonding company were to provide that an illegal dumping conviction, which is not a material term of the contract and also related to its performance, were an item that transferred the contract to the bonding company, bonding companies will be very unlikely to bond City contracts. This would be an onerous term for bonding companies to approve.

Furthermore, most City contracts do not carry performance bonds. Construction contracts, some purchasing contracts, and some services contracts do, while architecture and engineering, some purchasing, and some services contracts do not. A better solution would be to apply the bill's existing "no dumping clause" language to every demolition, landscaping, grass-cutting, or other contract generating waste or debris.

Question 2

In order to prohibit every vendor who is convicted of illegal dumping from entering into another contract with the City for a certain number of years, the City's debarment law (City Code Article 5, section 40) would have to be amended. A suggested amendment is below.

Conclusion

While the Law Department strongly advises against requiring a performance bond in an amount that would cover costs of replacing a person if that person is convicted of illegal dumping, a legally sufficient alternative is to apply the bill's existing language to all demolition, landscaping, grass-cutting, and other contracts generating waste or debris. The City Council may amend the City's debarment law in order to prohibit every vendor who is convicted of illegal dumping from entering into another contract with the City for a certain number of years.

Amendments

Amendment No. 1

On page 7, in line 2, after "Every" insert "DEMOLITION CONTRACT, LANDSCAPING CONTRACT, GRASS-CUTTING CONTRACT, OR OTHER CONTRACT GENERATING WASTE OR DEBRIS".

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Amendment No. 2

On page 6, after line 26, insert

“SUBTITLE 40. DEBARMENT FROM CITY CONTRACTS

§ 40-7. VIOLATIONS OF OTHER LAWS.

(A) JUDGMENTS.

THE BOARD MAY DEBAR A PERSON FROM ENTERING INTO A CONTRACT WITH THE CITY IF THAT PERSON, OR A PRINCIPAL OF THAT PERSON, OR ANY OTHER PERSON SUBSTANTIALLY INVOLVED IN THAT PERSON’S CONTRACTING ACTIVITIES:

(8) HAS BEEN CONVICTED WITHIN THE PRECEDING OF A VIOLATION OF TITLE 7 {“WASTE CONTROL”}, SUBTITLE 6 {“PROHIBITED DISPOSAL”}, OF THE BALTIMORE CITY CODE HEALTH ARTICLE. THE DEBARMENT SHALL ONLY BE EFFECTIVE FOR A MAXIMUM OF _____ YEARS FROM THE DATE OF CONVICTION.”.

Please feel free to contact me if you have any further questions.

Sincerely,



Deepa Bhattacharyya
Assistant Solicitor

cc: City Council President Rawlings-Blake
Angela C. Gibson, Mayor’s Legislative Liaison
George Nilson, City Solicitor
Elena DiPietro, Chief Solicitor
Ashlea Brown, Assistant Solicitor
Hilary Ruley, Assistant Solicitor