

**Superseded 5/12/2020**

**63G-6a-1303 Drug and alcohol testing required for state construction contracts.**

- (1) As used in this section:
- (a) "Contractor" means a person who is or may be awarded a state construction contract.
  - (b) "Covered individual" means an individual who:
    - (i) on behalf of a contractor or subcontractor provides services directly related to design or construction under a state construction contract; and
    - (ii) is in a safety sensitive position, including a design position that has responsibilities that directly affect the safety of an improvement to real property that is the subject of a state construction contract.
  - (c) "Drug and alcohol testing policy" means a policy under which a contractor or subcontractor tests a covered individual to establish, maintain, or enforce the prohibition of:
    - (i) the manufacture, distribution, dispensing, possession, or use of drugs or alcohol, except the medically prescribed possession and use of a drug; or
    - (ii) the impairment of judgment or physical abilities due to the use of drugs or alcohol.
  - (d) "Random testing" means that a covered individual is subject to periodic testing for drugs and alcohol:
    - (i) in accordance with a drug and alcohol testing policy; and
    - (ii) on the basis of a random selection process.
  - (e) "State executive entity" means:
    - (i) a state executive branch:
      - (A) department;
      - (B) division;
      - (C) agency;
      - (D) board;
      - (E) commission;
      - (F) council;
      - (G) committee; or
      - (H) institution; or
    - (ii) a state institution of higher education, as defined in Section 53B-3-102.
  - (f) "State construction contract" means a contract for design or construction entered into by a state executive entity.
- (2) Except as provided in Subsection (7), a state executive entity may not enter into a state construction contract unless the public construction contract requires that the contractor demonstrate to the state executive entity that the contractor:
- (a) has and will maintain a drug and alcohol testing policy during the period of the state construction contract that applies to the covered individuals hired by the contractor;
  - (b) posts in one or more conspicuous places notice to covered individuals hired by the contractor that the contractor has the drug and alcohol testing policy described in Subsection (2)(a);
  - (c) subjects the covered individuals to random testing under the drug and alcohol testing policy described in Subsection (2)(a) if at any time during the period of the state construction contract there are 10 or more individuals who are covered individuals hired by the contractor; and
  - (d) requires that as a condition of contracting with the contractor, a subcontractor:
    - (i) has and will maintain a drug and alcohol testing policy during the period of the state construction contract that applies to the covered individuals hired by the subcontractor;

- (ii) posts in one or more conspicuous places notice to covered individuals hired by the subcontractor that the subcontractor has the drug and alcohol testing policy described in Subsection (2)(d)(i); and
  - (iii) subjects the covered individuals hired by the subcontractor to random testing under the drug and alcohol testing policy described in Subsection (2)(d)(i) if at any time during the period of the state construction contract there are 10 or more individuals who are covered individuals hired by the subcontractor.
- (3)
  - (a) Except as otherwise provided in this Subsection (3), if a contractor or subcontractor fails to comply with Subsection (2), the contractor or subcontractor may be suspended or debarred in accordance with this chapter.
  - (b) A state executive entity shall include in a state construction contract:
    - (i) a reference to the rules described in Subsection (4)(b); or
    - (ii) if the applicable rulemaking authority has not made the rules described in Subsection (4)(b), a process that provides a contractor or subcontractor reasonable notice and opportunity to cure a violation of this section before suspension or debarment of the contractor or subcontractor in light of the circumstances of the state construction contract or the violation.
  - (c)
    - (i) A contractor is not subject to penalties for the failure of a subcontractor to comply with Subsection (2).
    - (ii) A subcontractor is not subject to penalties for the failure of a contractor to comply with Subsection (2).
- (4) An applicable rulemaking authority:
  - (a) may make rules that establish the requirements and procedures a contractor is required to follow to comply with Subsection (2); and
  - (b) shall make rules that establish:
    - (i) the penalties that may be imposed in accordance with Subsection (3); and
    - (ii) a process that provides a contractor or subcontractor reasonable notice and opportunity to cure a violation of this section before suspension or debarment of the contractor or subcontractor in light of the circumstances of the state construction contract or the violation.
- (5) The failure of a contractor or subcontractor to meet the requirements of Subsection (2):
  - (a) may not be the basis for a protest or other action from a prospective bidder, offeror, or contractor under Part 17, Procurement Appeals Board, or Part 18, Appeals to Court and Court Proceedings; and
  - (b) may not be used by a state executive entity, a prospective bidder, an offeror, a contractor, or a subcontractor as a basis for an action that would suspend, disrupt, or terminate the design or construction under a state construction contract.
- (6)
  - (a) After a state executive entity enters into a state construction contract in compliance with this section, the state is not required to audit, monitor, or take any other action to ensure compliance with this section.
  - (b) The state is not liable in any action related to this section, including not being liable in relation to:
    - (i) a contractor or subcontractor having or not having a drug and alcohol testing policy;
    - (ii) failure to test for a drug or alcohol under a contractor's or subcontractor's drug and alcohol testing policy;
    - (iii) the requirements of a contractor's or subcontractor's drug and alcohol testing policy;

- (iv) a contractor's or subcontractor's implementation of a drug and alcohol testing policy, including procedures for:
    - (A) collection of a sample;
    - (B) testing of a sample;
    - (C) evaluation of a test; or
    - (D) disciplinary or rehabilitative action on the basis of a test result;
  - (v) an individual being under the influence of drugs or alcohol; or
  - (vi) an individual under the influence of drugs or alcohol harming another person or causing property damage.
- (7) This section does not apply if the state executive entity determines that the application of this section would severely disrupt the operation of a procurement unit to the detriment of the procurement unit or the general public, including:
- (a) jeopardizing the receipt of federal funds;
  - (b) causing the state construction contract to be a sole source contract; or
  - (c) causing the state construction contract to be an emergency procurement.
- (8) If a contractor or subcontractor meets the requirements of this section, this section may not be construed to restrict the contractor's or subcontractor's ability to impose or implement an otherwise lawful provision as part of a drug and alcohol testing policy.