

Chapter 200-305 WAC

DEBARMENT PROCEDURES

WAC

200-305-010	Definitions.
200-305-020	Causes for debarment.
200-305-030	Aggravating and mitigating factors.
200-305-040	Referring a person for debarment.
200-305-050	Review.
200-305-060	Notice of recommended debarment.
200-305-070	Request for a hearing on recommended debarment.
200-305-080	Hearing on recommended debarment.
200-305-090	Final decision.
200-305-100	Effect of a debarment order on the contractor and affiliate.
200-305-110	Effect of a debarment order on state agencies.
200-305-120	Relief from a debarment order.
200-305-130	Delivery to the department.

WAC 200-305-010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise:

(1) "Affiliate" means a person in a business relationship who either directly or indirectly controls or has the power to control the other or a third party controls or has the power to control both. Factors used to determine control include:

- (a) Interlocking management or ownership;
- (b) Identity of interests among family members;
- (c) Shared facilities and equipment;
- (d) Common use of employees; or

(e) A business entity organized following the debarment or proposed debarment of a person which has the same or similar management, ownership, or principal employees as the person that was debarred or proposed for debarment.

(2) "Agency" means any state office or activity of the executive and judicial branches of state government, including state agencies, departments, offices, divisions, boards, commissions, institutions of higher education as defined in RCW 28B.10.016, and correctional and other types of state institutions.

(3) "Bid" means an offer, proposal, or quote for goods or services in response to a solicitation issued for such goods or services by the department or an agency of Washington state government.

(4) "Bidder" means an individual or entity who submits a bid, quotation, or proposal in response to a solicitation issued for such goods or services by the department or an agency of Washington state government.

(5) "Contractor" means an individual or entity awarded a contract with an agency to perform a service or provide goods.

(6) "Conviction" means:

(a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of *nolo contendere*; or

(b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation

(4/17/13)

of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

(7) "Covered transaction" means submitting a bid, having a bid considered, entering into a state contract, or subcontracting on a state contract.

(8) "Debar" means to prohibit a contractor, individual, or other entity from submitting a bid, having a bid considered, or entering into a state contract during a specified period of time as set forth in a debarment order.

(9) "Debarring official" means the director of the department of enterprise services or the director's designee.

(10) "Department" means the department of enterprise services.

(11) "Director" means the director of the department of enterprise services.

(12) "Person" means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.

(13) "Principal" means:

(a) An officer, director, owner, partner, principal investigator, or other person within a bidder or contractor with management or supervisory responsibilities related to a covered transaction; or

(b) A consultant or other person, whether or not employed by the bidder or contractor, who:

(i) Is in a position to handle state funds;

(ii) Is in a position to influence or control the use of those funds; or

(iii) Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.

(14) "Service" for any delivery required under this chapter means personal delivery, delivery by US postal mail service, electronic mail delivery, or delivery by other reasonable commercially acceptable means of delivery.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-010, filed 4/17/13, effective 5/18/13.]

WAC 200-305-020 Causes for debarment. The director may debar a contractor based on a finding of one or more of the causes specified in RCW 39.26.200. A debarment may include any affiliate of the contractor if specifically named and given notice of the proposed debarment pursuant to this chapter. The director may also debar a contractor or affiliate for any other cause the director determines to be so serious and compelling as to affect responsibility as a state contractor, including debarment by another governmental entity for any cause listed in regulations.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-020, filed 4/17/13, effective 5/18/13.]

WAC 200-305-030 Aggravating and mitigating factors. The following are the mitigating and aggravating fac-

[Ch. 200-305 WAC p. 1]

tors that the reviewing official and debarring official may consider in determining whether to debar and the length of the debarment period.

(1) The actual or potential harm or impact that resulted or may result from the wrongdoing.

(2) The frequency of incidents and/or duration of the wrongdoing.

(3) Whether there is a pattern or prior history of wrongdoing.

(4) Whether the contractor or affiliate has been excluded or disqualified by an agency of the federal government or has not been allowed to participate in state or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this rule.

(5) Whether the contractor or affiliate has entered into an administrative agreement with a federal agency or a state or local government that is not government-wide but is based on conduct similar to one or more of the causes for debarment specified in this rule.

(6) Whether the contractor or affiliate has accepted responsibility for the wrongdoing and recognizes the seriousness of the misconduct that led to the cause for debarment.

(7) Whether the contractor or affiliate has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and has made or agreed to make full restitution.

(8) Whether the contractor or affiliate has cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the reviewing official or debarring official may consider when the cooperation began and whether the contractor or affiliate disclosed all known pertinent information.

(9) The kind of positions held by the individuals involved in the wrongdoing.

(10) Whether the contractor or affiliate took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.

(11) Whether the contractor or affiliate brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.

(12) Whether the contractor or affiliate has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the reviewing official or debarring official.

(13) Whether the contractor or affiliate had effective standards of conduct and internal control systems in place at the time the wrongdoing occurred.

(14) Whether the contractor or affiliate has taken appropriate disciplinary action against the individuals responsible for the activity that constitutes the cause for debarment.

(15) Other factors appropriate to the circumstances of a particular case.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-030, filed 4/17/13, effective 5/18/13.]

WAC 200-305-040 Referring a person for debarment. (1) Any person may file a referral for debarment with the department. The referral must be in writing. The referring

party may complete the department's debarment referral form. The referral should include the following information:

(a) The name and contact information of the person submitting the referral;

(b) The specific facts supporting the request for debarment, including the dates and locations for all events upon which the referral is made;

(c) The cause or causes specified in RCW 39.26.200(2) upon which debarment may be based that the referring party believes are supported by the facts presented; and

(d) The name of the contractor and any affiliates the referring party believes should be subject to debarment.

(2) The person submitting the referral should provide additional information if requested by the department.

(3) The department will make an initial assessment of the submittal. If the department determines that the facts as presented, if true, support a debarment, the department will conduct a review to substantiate the allegations. Otherwise, the department will reject the referral.

(4) The department will notify the referring party in writing and state whether the referral will be reviewed or rejected.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-040, filed 4/17/13, effective 5/18/13.]

WAC 200-305-050 Review. (1) If the department accepts a debarment referral and conducts a review, the department will notify the contractor and affiliates in writing.

(2) The notice must:

(a) State the applicable cause(s) for debarment and the factual allegations supporting each cause in terms sufficient to put the contractor and affiliates on notice of the specific reasons for the review;

(b) Identify the statutory and administrative code provisions addressing debarment;

(c) Request a written response to the allegations including any documents that support the response, and state that failure to respond will result in the department making a decision without the recipient's input; and

(d) State the effects of a debarment order.

(3) At the conclusion of the review, the reviewing official will issue a report that includes the following information:

(a) Facts found by the reviewing official;

(b) Whether the facts support debarment; and

(c) Either a recommendation that the referral be dismissed with no further action taken or that a debarment order be issued, including the duration of the debarment.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-050, filed 4/17/13, effective 5/18/13.]

WAC 200-305-060 Notice of recommended debarment. (1) If, based on the review, the reviewing official determines that the facts support debarment the reviewing official shall notify the affected contractor and affiliates. The reviewing official shall cause service of the notice of recommended debarment on the affected contractor and affiliates. The notice shall include the following information:

(a) Date when the recommended debarment takes effect;

(b) Each cause for the recommended debarment and the facts that the reviewing official found that support each cause;

(c) The period of the recommended debarment;

(d) How the recommended debarment will impact either the contractor or affiliates or both;

(e) Either the contractor or affiliates or both may request a hearing in accordance with WAC 200-305-070 to dispute the recommended debarment or the recommended debarment period. The notice shall state that if no hearing is requested within thirty days of the date of issuance of the notice, the debarring official shall issue a final, unappealable debarment order; and

(f) The recommended debarment order will not go into effect until the resolution of the hearing in accordance with WAC 200-305-080.

(2) In the event either an affected contractor or affiliate or both does not request a hearing, the reviewing official will provide the report and recommendation to the debarring official, who may issue a final debarment order. The order shall include the effective date of the debarment order.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-060, filed 4/17/13, effective 5/18/13.]

WAC 200-305-070 Request for a hearing on recommended debarment. Either the contractor or affiliate or both may request a hearing on the recommended debarment. The request must be filed with the director within thirty days after the date the reviewing official issued the notice of recommended debarment. The person requesting the hearing must also serve a copy of the request on the reviewing official.

The request for hearing must be in writing and must specify:

(1) The name of the person requesting the hearing and the person's contact information; and

(2) The items, facts or conclusions in the notice of recommended debarment that the requestor contests.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-070, filed 4/17/13, effective 5/18/13.]

WAC 200-305-080 Hearing on recommended debarment. (1) The director may hear the appeal personally or may delegate the authority to hold the hearing and draft a proposed decision to another person or to an administrative law judge pursuant to chapter 34.12 RCW. The reviewing official, on behalf of the department, shall be the petitioner in the hearing, and the contractor and affiliates shall be the respondents.

(2) The reviewing official shall have the burden of proving the basis for the cause for debarment and the debarment period as set forth in the notice for recommended debarment.

(3) The hearing shall be conducted in accordance with the Administrative Procedure Act, chapter 34.05 RCW and to the extent not covered in this chapter, by the uniform procedural rules in chapter 1-08 WAC.

(4) If the director presides over the hearing, the director shall issue a final decision in writing that includes findings of fact, conclusions of law, and, if appropriate the debarment period. The director shall cause service of the final decision on all parties.

(4/17/13)

(5) If the director's delegate or an administrative law judge presides over the hearing, she or he shall issue a proposed decision that includes findings of fact, conclusions of law and if appropriate the debarment period. The proposed decision shall also include instructions on how to file objections and written arguments or briefs with the debarring official. Objections and written arguments and briefs must be filed within twenty (20) days from the date of receipt of the proposed decision.

(6) The parties shall agree to the method of service, as defined in WAC 200-305-010(14) for the proposed decision.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-080, filed 4/17/13, effective 5/18/13.]

WAC 200-305-090 Final decision. (1) The debarring official shall review the proposed decision in accordance with the Administrative Procedure Act, chapter 34.05 RCW and any objections, written arguments and briefs timely filed by the parties. The debarring official may:

(a) Allow the parties to present oral arguments;

(b) Allow the parties to submit additional information in circumstances so warrant; or

(c) Remand the matter to the delegate or administrative law judge for further proceedings;

(2) The debarring official shall issue a final decision that adopts in whole or in part, modifies or rejects the proposed decision. If the decision is to issue a debarment order, the debarment becomes effective on the date specified in the debarment order, but in no event will the debarment order go into effect sooner than five (5) days from the date issued.

(3) The debarring official shall cause service of the final decision on all parties. Either the contractor or affiliate or both may file a petition for review of the final decision to superior court. If neither the contractor nor affiliate appeals within the period set by RCW 34.05.542, the debarring official's decision is conclusive and binding on all parties. The appeal must be filed within 30 days from service of the final decision.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-090, filed 4/17/13, effective 5/18/13.]

WAC 200-305-100 Effect of a debarment order on the contractor and affiliate. The effects of a debarment order on the contractor and affiliate are:

(1) A debarred contractor and affiliate is ineligible to be a participant in any covered transaction or act as a principal of a person participating in any covered transaction as defined in WAC 200-305-010(7).

(2) Debarment constitutes debarment of all divisions or other organizational elements of the debarred person, unless the debarment decision is limited by its terms to specific divisions, organizational elements, or commodities.

(3) A person's debarment shall be effective in every agency, unless the director states in writing the compelling reasons justifying continued business dealings between an agency and the debarred person.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-100, filed 4/17/13, effective 5/18/13.]

WAC 200-305-110 Effect of a debarment order on state agencies. The effects of a debarment order on state agencies are:

(1) Agencies shall not permit debarred persons to participate in covered transactions, unless the debarring official determines in writing that there is a compelling reason to do so.

(2) If the period of debarment expires or is terminated prior to award, the contracting officer may, but is not required to, consider a debarred persons bid.

(3) Notwithstanding debarment, agencies may continue contracts or subcontracts in existence at the time the person was debarred unless the debarring official determines otherwise.

(4) Agencies shall not add new work, exercise options, or otherwise extend the duration of current contracts or orders for debarred persons, unless the debarring official makes a written determination of the compelling reasons for doing so.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-110, filed 4/17/13, effective 5/18/13.]

WAC 200-305-120 Relief from a debarment order.

(1) A debarred contractor or affiliate may request that the debarring official grant relief from the final debarment order or reduce the time period or scope of the final debarment order.

(2) The debarring official may reduce or terminate the debarment based on:

(a) Newly discovered material evidence;

(b) A reversal of the conviction upon which debarment was based;

(c) A bona fide change in ownership or management;

(d) Elimination of other causes for which the debarment was imposed; or

(e) Other reasons the debarring official finds appropriate.

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-120, filed 4/17/13, effective 5/18/13.]

WAC 200-305-130 Delivery to the department. (1)

Any notice, objection or information that is required or allowed by these rules may be delivered to:

Department of Enterprise Services
1500 Jefferson Street SE
Olympia, WA 98504-1466
Attn: Office of the Director

(2) Or, mailed, by certified mail, return receipt requested to:

Department of Enterprise Services
Office of the Director
1500 Jefferson Street SE
MS: 41466
Olympia, WA 98504-1466

(3) Or, electronically mailed to Department of Enterprise Services at the following e-mail address:
director@des.wa.gov

[Statutory Authority: RCW 39.26.200 and 43.19.011. WSR 13-09-069, § 200-305-130, filed 4/17/13, effective 5/18/13.]