

Chapter 262-03 WAC

DEBARMENT AND TEMPORARY DISQUALIFICATION

WAC

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WAC 262-03-010 Promulgation. (This promulgation relates to WAC 262-03-010 through 262-03-090.)

I, Busse Nutley, chair, Washington State Housing Finance Commission, 1000 Second Avenue, Suite 2700, Seattle, Washington 98104-1046, after due notice as provided under chapter 34.05 RCW, and a public hearing held in Seattle, Washington on June 26, 1997, do hereby promulgate the following regulations relating to actions to debar or temporarily disqualify participants in commission programs where appropriate to further the commission's purposes and protect the public interest in doing business with responsible persons.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-010, filed 7/28/97, effective 8/28/97.]

WAC 262-03-020 Purpose. (1) It is in the public interest that the commission provide affordable housing, as well as nonprofit cultural and social service facilities, administer orderly programs, and maximize use of the bond financing and low income housing tax credit (LIHTC) programs. To protect this public interest, it is the policy of the commission to conduct business only with responsible persons.

(2) These regulations provide debarment and temporary disqualification procedures to implement this policy. To ensure that program participants receive notice and an opportunity to be heard in any debarment or temporary disqualification action against such participants, these regulations adopt RCW 34.05.482 through 34.05.494 relating to brief adjudicative proceedings. Where these regulations are inconsistent with these procedures for brief adjudicative proceedings, the provisions of RCW 34.05.482 through 34.05.494 govern.

(3) These procedures may be extended to any new program administered by the commission.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-020, filed 7/28/97, effective 8/28/97.]

WAC 262-03-030 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout WAC 262-03-010 through 262-03-090.

(1) "Affiliate." Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third person controls or has the power

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to control both. Indicia of control include, but are not limited to: Interlocking management or ownership, identity of interests among family members, shared facilities or equipment, common use of employees, or a business entity organized following the temporary disqualification or debarment of a person which has the same or similar management, ownership, professional contractors, or principal employees as the temporarily disqualified or debarred person, or any entity closely resembling or related to those outlined above whether or not either is a partnership, corporation, trust, or other legally defined person.

(2) "Covered transactions." These procedures apply to all persons who have participated, are currently participating, or may reasonably be expected to participate, in any commission program, including but not limited to the bond financing and LIHTC programs. For the purposes of these procedures, interactions with the commission with respect to any of such programs will be referred to as covered transactions. For example, covered transactions include applications, contracts, certifications, and reports with respect to commission programs.

(3) "Debarment" means an action taken by the debarment and disqualification officer in accordance with these procedures to exclude a person from participating in any covered transaction or limit such participation in any way that the debarment and disqualification officer deems appropriate for the period specified in the debarment order.

(4) "Debarment and disqualification officer" means the executive director of the housing finance commission or his or her designee.

(5) "Participant" means any person who submits a proposal for, enters into, or reasonably may be expected to enter into, a covered transaction. This term also includes any person who acts on behalf of, or is authorized to commit, a participant in a covered transaction.

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

(7) "Proposal" means a solicited or unsolicited bid, application, request, invitation to consider, or similar communication by or on behalf of a person presently involved in a commission program, seeking to participate in a commission program, or seeking to receive a benefit, directly or indirectly, under a commission program.

(8) "Respondent" means a person against whom a debarment or temporary disqualification action has been initiated.

(9) "Substantial and material noncompliance." A participant in a covered transaction is in substantial and material noncompliance if the participant has made a misstatement or omission, or has failed to comply with any requirement, term, condition, or obligation of the covered transaction and if the misstatement, omission, or failure is substantial and material.

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(10) "Temporary disqualification" means an action taken by the debarment and disqualification officer in accordance with these procedures that immediately excludes a person from participating in any covered transaction for a temporary period or limiting such participation in any way that the debarment and disqualification officer deems appropriate for a temporary period.

(11) "Professional contractors" includes but is not limited to consultants, attorneys, or law firms, accountants or accounting firms, architects, and engineers.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-030, filed 7/28/97, effective 8/28/97.]

WAC 262-03-040 Temporary disqualification of participants. (1) Any participant in any covered transaction may be immediately and temporarily disqualified from such participation:

(a) If the debarment and disqualification officer determines that adequate evidence exists to support a reasonable belief that the participant is in substantial and material non-compliance sufficient to be cause for debarment; and

(b) If the debarment and disqualification officer determines that immediate action is necessary to protect the public interest in doing business with responsible persons. Consistent with the commission's purposes, the public interest includes providing affordable housing, administering orderly programs, and maximizing use of the bond financing and LIHTC programs.

(2) By way of example but not limitation, the debarment and disqualification officer may presume that the participant is in substantial and material noncompliance and that immediate action is necessary to protect the public interest where:

(a) The participant is delinquent in payment of any fees due under any commission program, including the LIHTC program;

(b) The participant has failed to meet any deadline under any commission program, including the LIHTC program;

(c) The participant has failed to comply with the terms, conditions, or obligations of one or more covered transactions;

(d) The participant has made material misstatements or omissions in proposals or any other communication to the commission;

(e) A state or other governmental agency reports that the participant is in substantial and material noncompliance in other jurisdictional programs; or

(f) The participant has supplied insufficient or incomplete information in conjunction with any commission program.

(3) Any decision by the debarment and disqualification officer to temporarily disqualify a participant is discretionary; however, no decision will be based on unsupported allegations. The existence of adequate evidence of substantial and material noncompliance does not necessarily require that the person be temporarily disqualified. The debarment and disqualification officer may consider the seriousness of the participant's acts or omissions as well as any mitigating factors to determine whether temporary disqualification is necessary to protect the public interest.

(4) If debarment or legal proceedings are not initiated by the commission or the debarment and disqualification officer

within twelve months after the date of the temporary disqualification notice, the temporary disqualification will be terminated.

(5) If the debarment and disqualification officer determines that temporary disqualification in accordance with subsections (1) or (2) of this section is appropriate, the debarment and disqualification officer will notify the respondent by personal service or certified mail of the temporary disqualification and the reasons therefor. Notice of temporary disqualification will include:

(a) A statement of the nature of the temporary disqualification action;

(b) A short and plain statement of, and the reasons for, the temporary disqualification action; and

(c) Information about the administrative review, hearings and appeals processes available to respondent pursuant to WAC 262-03-070 through 262-03-090.

(6) The temporary disqualification is effective immediately upon the respondent's receipt of the notice. Upon notification, the respondent will be entitled to the procedures set forth in WAC 262-03-070 through 262-03-090.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-040, filed 7/28/97, effective 8/28/97.]

WAC 262-03-050 Proposal to debar. (1) If the debarment and disqualification officer determines that cause for the respondent's debarment can be established by a preponderance of the evidence, the debarment and disqualification officer may initiate proceedings pursuant to this section. Upon the decision to initiate proceedings pursuant to this section, the debarment and disqualification officer will notify the respondent of its proposal to debar by personal service or certified mail.

(2) The notice will inform the respondent that debarment is being considered, the effect of a debarment, and the reasons for the proposed debarment. The notice will also include information about the administrative review, hearings and appeals processes available to the respondent pursuant to WAC 262-03-070 through 262-03-090.

(3) A proposal to debar may, but need not, be preceded by a temporary disqualification. A proposal to debar by itself will not have any immediate effect on the respondent's status as a participant in any commission program.

(4) Upon notification of the commission's proposal to debar, the respondent will be entitled to the procedures set forth in WAC 262-03-070 through 262-03-090.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-050, filed 7/28/97, effective 8/28/97.]

WAC 262-03-060 Debarment. (1) If the debarment and disqualification officer determines, by a preponderance of the evidence, that the respondent has committed any act, or made any omission, that constitutes substantial and material non-compliance, the debarment and disqualification officer may issue an order of debarment.

(2) By way of example but not limitation, the debarment and disqualification officer may presume that the participant is in substantial and material noncompliance if:

(a) The participant is delinquent in payment of any fees due under any commission program, including the LIHTC program, and payment of the delinquent amount has been

demanding via certified mail to the last known address of the participant;

(b) The participant has failed to meet any deadline under any commission program, including the LIHTC program;

(c) The participant has failed to comply with the terms, conditions or obligations of one or more covered transactions;

(d) The participant has made material misstatements or omissions in proposals or any other communication to the commission.

(e) A state or other governmental agency reports that the participant is in substantial and material noncompliance in other jurisdictional programs; or

(f) The participant has supplied insufficient or incomplete information in conjunction with any commission program.

(3) An order of debarment disqualifies the respondent from participating in any commission program for the period specified in the order. The debarment term will be commensurate with the seriousness of the cause(s) but generally the debarment period should not exceed three years from the date that the debarment order is issued. Consideration may be given for any period of temporary disqualification already completed by the respondent.

(4) Debarment of a person under this section constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions, or other organizational elements or to specific types of transactions. The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment pursuant to subsection (5) of this section and an opportunity to oppose the debarment pursuant to WAC 262-03-070 through 262-03-090. For the purposes of WAC 262-03-070 through 262-03-090, any named affiliate will be considered a respondent.

(5) The order of debarment will be served on the respondent by personal service or certified mail. It will include notification of the effect of debarment and the reasons debarment has been ordered as well as information about the administrative review, hearing and appeals processes available to respondent pursuant to WAC 262-03-070 through 262-03-090.

(6) Upon receipt of an order of debarment, the respondent will be entitled to the procedures set forth in WAC 262-03-070 through 262-03-090.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-060, filed 7/28/97, effective 8/28/97.]

WAC 262-03-070 Debarment and disqualification procedures. (1) Within thirty days of receipt of notice of temporary disqualification, of a proposal to debar, or of an order of debarment, a respondent may submit to the commission, in person or in writing, personally or through a representative, any information or argument in opposition to debarment and/or disqualification. This information may dispute the debarment and disqualification officer's formal, written findings of substantial and material noncompliance, identify any remedial measure or mitigating factors, or both.

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(2) If, within thirty days of receipt of the information submitted pursuant to subsection (1) of this section, the commission or its designee(s) determine that there is a dispute regarding one or more material facts, the commission will appoint a hearing officer to hold a hearing in accordance with WAC 262-03-080 and authorize the hearing officer to grant appropriate relief upon review. Such hearing will take place within ninety days of the receipt of the information submitted pursuant to subsection (1) of this section and the respondent will receive no less than seven days' advance written notice indicating the time and place for the hearing.

(3) If, within twenty days of receipt of the information submitted pursuant to subsection (1) of this section, the commission or its designee(s) determine that there is no dispute regarding any material facts, the commission or its designee(s) will issue a written order without appointing a hearing officer and without holding a hearing on the matter. The order will include a brief statement of the commission or its designee(s) reasons for the determination and a statement of the availability of hearings and appeals procedures and time limits pursuant to WAC 262-03-080 and 262-03-090.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-070, filed 7/28/97, effective 8/28/97.]

WAC 262-03-080 Hearing procedures. (1) Any hearing pursuant to WAC 262-03-070(2) will be conducted by the hearing officer appointed by the commission.

(2) The respondent may personally appear at the hearing, appear through a duly authorized representative and/or be represented by legal counsel. The respondent, representative or legal counsel will be given a full opportunity to submit and respond to papers and pleadings, to present evidence and argument, and to conduct cross-examination of witnesses.

(3) Following the hearing, the hearing officer will determine the facts by a preponderance of the evidence, issue written findings of fact, and issue a written order. The order will include a brief statement of the hearing officer's findings and order and a statement about the availability and time limits of appeals procedures pursuant to WAC 262-03-090.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-080, filed 7/28/97, effective 8/28/97.]

WAC 262-03-090 Appeals procedures. Any order issued pursuant to WAC 262-03-070(3) or 262-03-090(3) may be appealed to the full commission in accordance with the following procedures:

(1) The appeal must be in writing, signed, and received by the chair of the commission no later than ten business days after the respondent receives an order pursuant to WAC 262-03-070(3) or 262-03-080(3).

(2) The appeal must describe why the respondent believes the order pursuant to WAC 262-03-070(3) or 262-03-080(3) is erroneous, identify information in the record that the respondent would like the commission to consider, and specify a desired remedy. The commission will not entertain any claim on appeal that has not first been asserted under WAC 262-03-070 or 262-03-080. An order issued pursuant to WAC 262-03-070(3) or 262-03-080(3) will be presumed to be correct and the respondent has the burden of showing that the order is not supported by substantial evidence.

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(3) The commission will schedule a meeting or set aside time during a scheduled meeting to hear appeals. Respondents appealing will receive at least seven days' advance written notice of the time and place of this meeting. The respondent may personally appear at the meeting, appear through a duly authorized representative and/or be represented by legal counsel. The respondent, representative or legal counsel will be given an opportunity to present oral argument to the commission. No witnesses may be examined.

(4) The commission will issue an appeals decision or a statement specifying the date that a decision will be issued, after hearing oral arguments, if any, but within forty-five days after receipt of the appeal. Any commission appeals decision announced orally will be confirmed in writing. The commission's written decision is a final order that is binding on the respondent and other parties. The decision will include notice that judicial review may be available.

(5) Judicial review of any final order of the commission is governed by RCW 34.05.570. In accordance with RCW 34.05.534, any person seeking judicial review first must exhaust the administrative remedies set forth in these procedures.

[Statutory Authority: Chapter 43.180 RCW. 97-16-019, § 262-03-090, filed 7/28/97, effective 8/28/97.]