

**TITLE 1            GENERAL GOVERNMENT ADMINISTRATION**  
**CHAPTER 4       STATE PROCUREMENT**  
**PART 7            SUSPENSION OR DEBARMENT OF BIDDERS, OFFERORS OR CONTRACTORS**

**1.4.7.1            ISSUING AGENCY:** General Services Department - State Purchasing Division.

[1.4.7.1 NMAC - N, 08-30-13]

**1.4.7.2            SCOPE:** Applicability. This regulation affects all user agencies procuring contracts, other than professional services, through the state purchasing agent, all contractors obtaining or attempting to obtain contracts through the state purchasing agent and all suspensions or debarments by the secretary of contractors from consideration for award of contracts.

[1.4.7.2 NMAC - Rp, GSD 87-602.2.0, 08-30-13]

**1.4.7.3            STATUTORY AUTHORITY:** This regulation is based on 13-1-177 through 13-1-180 NMSA 1978.

[1.4.7.3 NMAC - N, 08-30-13]

**1.4.7.4            DURATION:** Permanent.

[1.4.7.4 NMAC - N, 08-30-13]

**1.4.7.5            EFFECTIVE DATE:** August 30, 2013, unless a later date is cited at the end of a section.

[1.4.7.5 NMAC - N, 08-30-13]

**1.4.7.6            OBJECTIVE:** Purpose. The purpose of this regulation is to protect the state from risks associated with awarding contracts to persons having exhibited an inability or unwillingness to perform faithfully contracts awarded to them by the state; and protect substantial state interests and the integrity of the state's procurement process by establishing a procedure whereby persons determined to have displayed improper conduct can be suspended or debarred from doing business with the state. It is not the purpose of the regulation to impose punishment upon persons for any acts or omissions. There shall be no suspension, debarment, or discrimination of any kind against any person because that person has complained or protested, formally or informally, the state's procurement processes or decisions.

[1.4.7.6 NMAC - Rp, GSD 87-602.1.0, 08-30-13]

**1.4.7.7            DEFINITIONS:**

A. "Contractor" means any bidder, offeror or construction contractor, excluding contractors for professional services, who have been awarded or are seeking award of one or more contracts through the state purchasing agent under the provisions of the Procurement Code. "Contractor" includes individuals, joint ventures, corporations and all other business entities.

B. "Debarment" means a final order of the secretary that denies a contractor the right to bid or offer to enter into a contract, other than a contract for professional services, with the state purchasing agent. The period of debarment specified in an order of debarment shall be for no less than three months and for no more than three years. A debarment period shall begin on the day the contractor receives notice of the final order of debarment and shall automatically expire no later than the end of the term specified in the order.

C. "Hearing" means an examination (proceeding) of the issue before the hearing officer, whether the issues are of law or fact. When the hearing officer determines that the contested issues are only of law, the examination need not include oral argument of the parties or their counsel or an evidentiary proceeding.

D. "Participants to a debarment or suspension proceeding" means the state purchasing agent, user agency (if any) and contractor.

E. "Party" means the contractor who is the subject of a determination under Subsection A of 1.4.7.9 NMAC.

F. "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or other legal or commercial entity. As used in this rule, the terms "person", "bidder", "offeror" and "contractor" include principals, officers, directors, owners, partners and managers of the person, bidder, offeror or contractor.

G. "Procurement Code" means 13-1-28 through 13-1-199 NMSA 1978.

H. "Professional services" means the services of architects, archeologists, engineers, land surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, and researchers and persons and businesses providing similar services.

I. "Secretary" means the secretary of the general services department. The secretary is the governing authority of the state purchasing agent.

J. "State purchasing agent" means the director of the state purchasing division, general services department.

K. "Suspension" means a final order of the secretary that denies a contractor the right to bid or offer to enter into a contract, other than a contract for professional services, with the state purchasing agent. An order of suspension shall not exceed three months, provided that the suspension may be longer pursuant to Paragraph (3) of Subsection D of 1.4.7.9 NMAC. A period of suspension shall begin on the day the contractor receives notice of the final order of suspension and shall automatically expire no later than the end of the suspension specified in the order.

L. "Unsatisfactory performance" means a record of poor performance or default on one or more contracts for construction, services (other than professional services) or tangible personal property including, but not limited to, overshipments, undershipments, providing damaged or defective goods, making unauthorized substitutions, billing errors or service deficiencies. The term includes negligent or intentional failure, without good cause, to perform in accordance with the specifications or time limits provided in a contract, or a history of failure to perform or of poor performance in accordance with the terms of one or more contracts unless the failure to perform or the poor performance was caused by acts beyond the control of the contractor.

M. "User agency" means any state agency or agencies, including, but not limited to, departments, divisions, bureaus, boards, commissions and any other subdivision of the state of New Mexico that:

(1) received or were designated to receive any benefit, including, but not limited to, supplies, services or construction, pursuant to a contract which is the basis of any proposed suspension or debarment action; and

(2) initiated the grievance that led to issuance of a determination of probable cause under Subsection A of 1.4.7.9 NMAC or is determined to have had an integral role in the events which form the basis for the suspension or debarment action; such determination shall be made by the hearing officer or state purchasing agent; no agency of state government shall be a participant to a suspension or debarment proceeding unless designated as a participant pursuant to this section; only a user agency designated as a participant shall be entitled to notices required by this regulation.

[1.4.7.7 NMAC - Rp, GSD 87-602.5.0, 08-30-13]

**1.4.7.8 POLICY:** The policy of this regulation is to provide reasonable notice and require a fair hearing prior to any debarment of any contractor from consideration for award of contracts.

[1.4.7.8 NMAC - Rp, GSD 87-602.4.0, 08-30-13]

#### **1.4.7.9 DEBARMENT OR SUSPENSION - PROCEDURES:**

A. Initiation: The state purchasing agent or a central purchasing agent or a central purchasing office, after reasonable notice to the person involved, shall have authority to recommend to the governing authority of a state agency or a local public body the debarment of a person for cause from consideration for award of contracts, other than contracts for professional services. The debarment shall not be for a period of more than three years. The authority to debar shall be exercised by the governing authority of a state agency or a local public body in accordance with the following rules. The state purchasing agent and user agency and all employees thereof are not parties to the proceedings, but shall be participants as set forth in Subsection D of 1.4.7.7 NMAC.

B. Debarment procedures.

(1) Notice to the contractor: The state purchasing agent or his designee shall cause written notice of the proposed debarment to be sent by certified mail, return receipt requested, to the contractor. The notice shall contain the following statements:

(a) the action contemplated is for debarment;

(b) the maximum time period of the debarment is three years (also give the recommended maximum time of debarment, if less than three years);

(c) the reasons for the action, which shall include a summary of the contractor's conduct to which the action relates and a listing of any contracts related to such conduct;

(d) the action is brought pursuant to the provisions contained in 13-1-177 through 13-1-180 NMSA 1978 and the regulations promulgated thereunder;

(e) sufficient facts exist, unless rebutted, to support the proposed debarment and that the GSD secretary shall proceed to debar unless contractor requests, in writing, a hearing within 15 consecutive calendar days from the day contractor receives the notice of the proposed action;

(f) the address where contractor's request for hearing shall be sent, and the name of the person to whom the request shall be sent; and

(g) the contractor may be represented throughout the proceeding by an attorney licensed to practice law in the state of New Mexico.

(2) Failure to request hearing on debarment: If the contractor fails to deliver a written request for a hearing to the person designated pursuant to Subparagraph (f) of Paragraph (1) of Subsection B of 1.4.7.9 NMAC within the 15 days required in Subparagraph (e) of Paragraph (1) of Subsection B of 1.4.7.9 NMAC, a final determination shall be made, pursuant to the requirements of Subsection E of 1.4.7.9 NMAC.

(3) Hearing officer appointment: Where a timely request for hearing is received, the state purchasing agent may appoint a hearing officer to conduct the hearing and recommend a final decision to the state purchasing agent. If no hearing officer is appointed, the state purchasing agent shall act as the hearing officer. In such instance, the hearing officer's recommendation and the state purchasing agent's recommendation to the secretary shall be one and the same.

(4) Notice of hearing: When hearing is requested under Subparagraph (e) of Paragraph (1) of Subsection B of 1.4.7.9 NMAC, the hearing officer shall send written notice to the contractor of the time and the place of the hearing. The hearing shall be held within no sooner than five days and no later than 60 days after the contractor receives notice of the hearing unless continued by the hearing officer for good cause. Failure to hold a timely hearing shall result in dismissal of the contemplated action. The state purchasing officer may renew the proposed action against the contractor by following all procedures of 1.4.7.9 NMAC of these regulations if such refiling is otherwise timely.

(5) Debarment hearing procedures.

(a) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. However, in no event shall the hearing officer be required to adhere to formal rules of evidence or procedure. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the participants may be regarded and used as evidence at the hearing. The participants may stipulate the testimony that would be given by a witness as if the witness were present. The hearing officer may require evidence in addition to that offered by the participants.

(b) A hearing shall be recorded but need not be transcribed except at the request and expense of the party or participant requesting the transcription. In the event of multiple requests for transcriptions, cost of transcription shall be borne equally by those making the requests. In addition to the recording, a record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

(c) Opening and closing statements may be made by the participants at the discretion of the hearing officer.

(d) Witnesses shall testify under oath or affirmation. All witnesses may be cross-examined.

(e) Hearing requirement. The hearing officer and the parties may require a final hearing before the hearing officer. The hearing officer may define the scope of such hearing and limit presentation to evidentiary, legal matter or summation of the case.

(f) The hearing officer shall make a final recommendation to the state purchasing agent within 30 days after the record is closed in the examination.

(g) A copy of the determination of debarment shall be mailed to the last known address on file with the state purchasing agent or central purchasing office, by first class mail, within three business days after issuance of the written determination or transmitted electronically within three business days after issuance of the written determination.

C. Authority of the hearing officer in a debarment procedure: the hearing officer may, among other things:

(1) conduct hearings and hold informal conferences in person or by telephone, to settle, simplify or establish the issues in a proceeding or to consider other matters that may aid in the expeditious disposition of the proceeding either by request of the participants or as required by the hearing officer;

- (2) require participants to state their positions with respect to the various issues in the proceeding, including requiring the submission of briefs on any issues in the proceedings;
- (3) require participants to produce for examination those relevant witnesses and documents under their control and permit or prohibit discovery;
- (4) rule on motions and other procedural matters;
- (5) regulate the course of the proceedings, procedural schedules and the conduct of participants therein;
- (6) receive, rule on, exclude, or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or repetitious;
- (7) fix time limits for submission of written documents;
- (8) impose appropriate sanctions against any participant or person failing to obey a directive under these procedures, which sanctions may include, but not be limited to:
  - (a) refusing to allow the non-complying participant to support or oppose designated claims or defenses, or prohibiting that participant from introducing evidence when such evidence is the subject of or related to the non-compliance;
  - (b) excluding all testimony of an unresponsive or evasive witness; and
  - (c) expelling any participant or person from further participation in the hearing;
- (9) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of official or administrative notice.

D. Suspension procedures.

(1) The state purchasing agent or a central purchasing office, after consultation with the using agency, may suspend a person from consideration for award of contracts if the state purchasing agent or central purchasing office, after reasonable investigation, finds that a person has engaged in conduct that constitutes cause for debarment pursuant to 13-1-178 NMSA 1978.

(2) The state purchasing agent or his designee shall cause written notice of the determination of suspension to be sent by certified mail, return receipt requested, to the contractor. The notice of suspension shall contain the following statements:

- (a) the action is a suspension of the contractor;
- (b) the maximum time period of the suspension is three months (also give the recommended maximum time of suspension if less than three months), provided that the suspension may be longer pursuant to Paragraph (3) of Subsection D of 1.4.7.9 NMAC in which case the notice of suspension will state this condition;
- (c) the reasons for the action, which shall include a summary of the contractor's conduct to which the action relates and a listing of any contracts related to such conduct;
- (d) the action is brought pursuant to the provisions contained in 13-1-177 through 13-1-180 NMSA 1978 and the regulations promulgated thereunder; and
- (e) the sufficient facts that exist to support the suspension, and that the GSD secretary has suspended the person.

(3) Suspension based upon a criminal offense. If a person has been charged with a criminal offense that would be a cause for debarment pursuant to 13-1-178 NMSA 1978, the suspension shall remain in effect until the criminal charge is resolved and the person is debarred or the reason for the suspension no longer exists.

E. Recommendation of state purchasing agent and comment period. Final order. Appeal. The state purchasing agent shall prepare a written recommendation on whether to suspend or debar. The recommendation shall be sent to the secretary, contractor, and the user agency. When the contractor has submitted a timely response pursuant to Subparagraph (e) of Paragraph (1) of Subsection B of 1.4.7.9 NMAC, the contractor and the user agency shall have 10 days from the date of receiving the recommendation to file comments with the secretary. There shall be no administrative appeal from the recommendation to the secretary. The secretary shall issue a final order after expiration of the 10 day comment period. If the comment period does not apply, the secretary shall issue a final order after receipt of the recommendation. Both the state purchasing agent's recommendation and the secretary's final order shall recite the reasons for debarment and shall recite the evidence relied upon in making the determination for debarment. When the secretary's final order adopts all aspects of the state purchasing agent's recommendation, the final order may incorporate the recommendation by reference and attach it to the order. When suspension or debarment is recommended or ordered, the length of the suspension (not to exceed three months, unless suspension is made pursuant to 13-1-178 NMSA 1978 and Paragraph (3) of Section D of 1.4.7.9 of this regulation) or debarment (not to exceed three years) and the reasons for such action shall be set forth. The final order shall inform the debarred contractor of the contractor's right to judicial review pursuant to 13-1-179 and 13-1-

183 NMSA 1978. The secretary's final order shall be the final determination for purposes of the time limits for seeking judicial review under 13-1-183 NMSA 1978. Notice of debarment or suspension shall be mailed by certified mail, return receipt requested, to contractor upon issuance of the secretary's final order. The state purchasing agent and user agency shall be given a copy of the final order upon its issuance by the secretary.

F. Effect of suspension or debarment decision.

(1) A debarment or suspension shall take effect upon receipt of the final order by the contractor. The contractor shall remain suspended or debarred until a court of competent jurisdiction or the secretary orders otherwise, or until the debarment or suspension period, as specified in the final order, expires. The secretary may order the suspension or debarment reduced or ended only as provided in Subsection I of 1.4.7.9 NMAC.

(2) Any business entity which must hold a state license as a prerequisite for award of a contract (which is subject to the provisions of this regulation) shall also be suspended or debarred, as the case may be, if the holder of such license is a suspended or debarred contractor and the business entity holds no other license.

(3) Debarments and suspensions shall apply to all contracts subject to the authority of the state purchasing agent, regardless of the subject matter of future contracts.

G. Causes for debarment or suspension.

(1) The causes for debarment or suspension must occur within three years of the date final action on a procurement is taken. For purposes of this section, Subsection G of 1.4.7.9 NMAC, the date final action is taken on a procurement is the date the contract with the contractor is fully executed and contractor is authorized to proceed with his performance of the contract, in accordance with the terms of the contract.

(2) Those causes include, but are not limited to, the following:

(a) criminal conviction of a bidder, offeror or contractor for commission of a criminal offense related to obtaining unlawfully or attempting to obtain a public or private contract or subcontract, or related to the unlawful performance of such contract or subcontract;

(b) civil judgment against a bidder, offeror or contractor for a civil violation related to obtaining unlawfully or attempting to obtain a public or private contract or subcontract, or related to the unlawful performance of such contract or subcontract;

(c) conviction of a bidder, offeror or contractor under state or federal statutes related to embezzlement, theft, forgery, bribery, fraud, falsification or destruction of records, making false statements or receiving stolen property or for violation of federal or state tax laws;

(d) conviction of a bidder, offeror or contractor under state or federal antitrust statutes relating to the submission of offers;

(e) criminal conviction against a bidder, offeror or contractor for any other offense related to honesty, integrity or business ethics;

(f) civil judgment against a bidder, offeror or contractor for a civil violation related to honesty, integrity or business ethics;

(g) civil judgment against a bidder, offeror or contractor pursuant to the Unfair Practices Act;

(h) violation by a bidder, offeror or contractor of contract provisions, as set forth in this paragraph, of a character that is reasonably regarded by the state purchasing agent or a central purchasing office to be so serious as to justify suspension or debarment action, including:

(i) willful failure to perform in accordance with one or more contracts; or

(ii) a history of failure to perform or of unsatisfactory performance of one or more contracts; provided that this failure or unsatisfactory performance has occurred within a reasonable time preceding the decision to impose debarment; and provided further that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

(i) any other cause that the state purchasing agent or a central purchasing office determines to be so serious and compelling as to affect responsibility as a contractor; or

(j) for a willful violation by a bidder, offeror or contractor of the provisions of the Procurement Code.

H. Deferment of proceedings: The hearing officer may defer debarment proceedings pending final disposition of a related claim or dispute if he finds:

(1) that the cause of the action brought against the contractor is related to a good faith claim or dispute pending before a state agency, the state purchasing agent, or on judicial appeal; and

(2) a delay in the proceedings will not be prejudicial to the public interest.

I. Termination or modification of suspension or debarment.

(1) Any contractor suspended or debarred under this regulation may petition the state purchasing

agent to shorten or terminate the suspension or debarment. The petition shall show good cause for the requested relief.

(2) A contractor's request for modification or termination of a suspension or debarment must be supported by good cause shown, including documentation providing reasons for such modification or termination, including, but not limited to:

- (a) bona fide change in ownership and management of the business; or
- (b) elimination or mitigation of cause for which the suspension or debarment was imposed; or
- (c) compliance with terms that were set forth in the suspension or debarment order.

(3) Procedure: The state purchasing agent shall admit or deny review of the petition. If review is allowed, the petition shall be reviewed pursuant to the procedures described in Subsection C of 1.4.7.9 NMAC.

(4) Upon termination of a suspension or debarment, a contractor suspended or debarred under this regulation shall automatically be reinstated with full contracting rights without further written notice by the secretary, hearing officer or state purchasing agent.

(5) Appeal: A petition for termination or modification of a final order of debarment shall not be treated as a motion for reconsideration and shall not stay the running of time in which a contractor has to appeal, under the provisions of 13-1-183 NMSA 1978, a final order issued pursuant to Subsection E of 1.4.7.9 NMAC. The secretary's final order on the petition for termination or modification of an order of debarment shall be the final determination for purposes of the time limits for seeking judicial review under 13-1-183 NMSA 1978, where there is a denial or partial denial of such petition.

J. Maintenance of list of suspended and debarred contractors: The state purchasing agent shall maintain and update a list of debarred and suspended contractors. The list shall reflect all modifications and terminations of debarments and suspensions. All purchasing agencies, political subdivisions of the state and the public shall be supplied with this list upon request. The state purchasing agent may charge a reasonable fee for the expense of copying and mailing such list. The state purchasing agent shall send updates of this list to all user agencies and political subdivisions of the state as the state purchasing agent deems necessary.

[1.4.7.9 NMAC - Rp, GSD 87-602.6.0, 08-30-13]

#### **1.4.7.10 CONTINUATION OF CURRENT CONTRACTS – RESTRICTIONS ON SUBCONTRACTING:**

A. Notwithstanding the debarment, suspension or proposed debarment of a person, a state agency or local public body may continue contracts or subcontracts in existence at the time that the person is debarred, suspended or proposed for debarment unless the governing authority of the state agency or local public body directs otherwise.

B. Unless the governing authority of a state agency or local public body issues a written determination based on compelling reasons holding otherwise, a person that has been debarred or suspended or whose debarment has been proposed shall not, after the date that the person is debarred, suspended or proposed for debarment:

(1) incur financial obligations, including those for materials, services and facilities, unless the person is specifically authorized to do so under the terms and conditions of the person's contract; or

(2) extend the duration of the person's contract by adding new work, by exercising options or by taking other action.

C. Unless pursuant to a written authorization based on the compelling reasons of the governing authority of a state agency or local public body, the state purchasing agent or a central purchasing office shall not consent to enter into a subcontract subject to the Procurement Code with a person that has been debarred, suspended or proposed for debarment.

D. A person that has entered into a contract subject to the Procurement Code shall not subcontract with another person that has been debarred, suspended or proposed for debarment without the written authorization of the state purchasing agent or a central purchasing office. A person that wishes to subcontract with another person that has been debarred, suspended or proposed for debarment shall make a request to the applicable state agency or local public body that includes the following information:

- (1) the name of the proposed subcontractor;
- (2) information about the proposed subcontractor's debarment, suspension or proposed debarment;
- (3) the requester's compelling reasons for seeking a subcontract with the proposed subcontractor;

and

- (4) a statement of how the person will protect the interests of the state agency or local public body

considering the proposed subcontractor's debarment, suspension or proposed debarment.  
[1.4.7.10 NMAC - N, 08-30-13]

**HISTORY OF 1.4.7 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives:

GSD 87-602 Suspension or Debarment of Bidders, Offerors or Contractors, 03/13/1987.

**History of Repealed Material:**

GSD 87-602, Suspension or Debarment of Bidders, Offerors or Contractors, filed 03/13/1987 - Repealed effective 08-30-2013.