

PROPOSED ORDER OF THE DEPARTMENT OF ADMINISTRATION CREATING RULES

The Wisconsin Department of Administration proposes to create Chapter Adm 24 relating to debarment, suspension and ineligibility of Department of Administration contractors.

SUMMARY OF PROPOSED RULE

Statute interpreted: Sections 16.85 and 16.855(15) Stats.

Statutory authority: Sections 16.004(1) and 16.855(15), Stats.

Explanation of statutory authority: The Department is responsible for the supervision of all engineering, architectural services, and construction work performed by, or for, the state in the construction and acquisition of new buildings and improvements, and additions to existing buildings, pursuant ss. 16.85 and 16.855, Wis. Stats. Section 16.855(15), Wis. Stats., further authorizes the Department to adopt rules to implement the advertising and award of contracts for construction projects.

Related statutes or rules: Chapters Adm 20 and 21, Wisconsin Administrative Code.

Plain language analysis: The Department solicits bids from, awards contracts to and approves subcontracts with only responsible businesses and individuals according to procedures specified in Chapters Adm 20 and 21. The proposed rule establishes the policies and procedures for the debarment and suspension of contractors that have either had past contract performance problems, or have committed offenses under the law. For example, criminal offenses in connection with a public contract, violation of an antitrust statute relating to bids, theft, forgery, false statements and obstruction of justice. Debarment and suspension are appropriate means to effectuate this policy.

Summary of, and comparison with, existing or proposed federal regulation: Subpart 9.4 of Title 48 of the Federal Acquisition Regulations prescribes policies and procedures governing debarment and suspension of contractors for cause by federal government agencies. These regulations also provide for the listing of contractors debarred, suspended, proposed for debarment and declared ineligible, and sets forth the consequences of this listing.

Comparison of Similar Rules in Adjacent States:

Illinois, Iowa, Michigan and Minnesota all provide for the debarment and/or suspension of a contractor by statute, rule or policy. All of these states utilize procedures similar in design to proposed rule Adm 24. It is noteworthy that all these adjacent states have adopted debarment/suspension procedures under the auspices of their procurement laws, rather than under their state building program laws, as proposed Adm 24 does. However, all, with the possible exception of Iowa (with whom we were unable to confirm the practice), debar and suspend building construction contractors using their procurement debarment procedures.

Illinois

Illinois provides for suspension of errant contractors through its administrative code. (Title 44, subtitle B; chapter XXI; Part 1400 of the Illinois Administrative Code.)

Illinois has a separate debarment process specifically any contractor, including building contractors, who disregard their obligations under the Prevailing Wage Act. Suspensions may not be imposed without a due process hearing. The Illinois Code provides suspension sanctions for a number of bidding- and contract-related actions, similar to those listed under the Department's proposed rule in sections Adm 24.05(2) and 24.06(2). Illinois suspensions may be for an indefinite period of time.

Minnesota

Minnesota enacted its suspension/debarment rule in its administrative code as well. (Chapter 1230 of the Minnesota Administrative Rules.) Minnesota also requires a due process hearing for suspension and debarment, with a list of causes also similar to those in proposed rule Adm 24. Minnesota has no specific term limit on either its suspensions or debarments.

Iowa

Iowa also provides for a suspension/debarment procedure through its administrative code. (11-Chapter 105.18(2), Iowa Administrative Code.) Suspension or debarment may occur without a hearing, but the contractor may request a hearing through an appeal process. The offending contractor is allowed a time to cure the alleged cause before actual suspension/debarment is imposed. Suspensions may be up to one year; debarments have no limit.

Michigan

Michigan has adopted a debarment procedure by written policy, not by statute or rule. (Debarment Policy; Purchasing Operations; Department of Management and Budget.) Its policy does not provide for a suspension, but does provide for an administrative hearing upon request. Again, the list of causes is similar to Illinois, Minnesota and the Department's proposed rule. Debarment is not to exceed 8 years with the policy specifically noting that 3 years is the usual maximum.

Summary of factual data and analytical methodologies:

The proposed rules were drafted by Department staff in the Legal Services Office and the Division of State Facilities Development based upon similar rules adopted in 1983 by the Wisconsin Department of Transportation as Chapter Trans 504, as well as the rules from the adjacent states referenced above.

Effect on Small Business:

This rule is intended to address potential issues encountered by the Department of Administration's Division of State Facilities as it manages building contracts for the State of Wisconsin. The small businesses involved would be expected to include small building contractors and their subsidiaries and affiliates, as well as developers and other firms involved in the design and construction of state facilities.

The Department lacks salary and other necessary data to estimate the comparable costs incurred by private sector contractors in defending themselves during these proceedings. However, the staff time involved would be approximately the same as that required of the DOA staff attorney and staff. Differences in cost would be a function of the billing rate of the private sector legal counsel.

Based upon limited information from the WisDOT, and upon this Department's experience with problematic contractors, it is anticipated that no more than 6 suspensions or debarments will occur annually, making the impact on small businesses as a class negligible. The impact will be felt only on individual contractors, and then only due to their own contractual and legal behavior. In all cases, the Department will fund the cost of fact-finding hearings with no provision to recover those costs from the contractors involved.

Agency Contact Person:

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Place where comments are to be submitted and deadline for submission:

Comments may be submitted to the agency contact person that is listed above until the date given in the upcoming notice of public hearing. The deadline for submitting comments and the notice of public hearing will be posted on the Wisconsin Administrative Rules website at: <http://adminrules.wisconsin.gov> after the public hearing is scheduled.

TEXT OF RULE:

SECTION 1. Chapter Adm 24 is created to read:

ADM 24
DEBARMENT, SUSPENSION AND INELIGIBILITY OF
DEPARTMENT OF ADMINISTRATION CONTRACTORS

Adm 24.01 Scope and policy. (1) SCOPE OF CHAPTER. This chapter:

(a) Prescribes certain policies and procedures governing the debarment and suspension of contractors from contracts pursuant to subchapter V, Chapter 16 of the Wisconsin Statutes.

(b) Provides for the listing of suspended or debarred contractors and subcontractors, and of contractors declared ineligible for department engineering-related contracts.

(c) Sets forth the treatment accorded contractors listed as debarred, suspended, or ineligible.

(2) POLICY. (a) The department shall solicit bids from, award contracts to, and approve subcontracts with only responsible, qualified business entities and individuals. Debarment and suspension are appropriate means to effectuate this policy.

(b) Debarment and suspension are serious actions imposed only to protect the public interest, not for punishment.

Adm 24.02 Definitions. In this chapter:

(1) "Adequate evidence" means information sufficient to support a reasonable belief that a particular act or omission has occurred.

(2) "Affiliate" means a business entity or individual having a relationship whereby one directly or indirectly controls or can control the other or whereby a third business entity or individual directly or indirectly controls or can control the subject business entity or individual.

(3) "Consolidated list" means a list compiled and maintained by the department and containing the names of contractors that have been debarred or suspended under this chapter or that have been declared ineligible under statute, rule, order or legal authority other than this chapter.

(4) "Contractor" means any individual or any legal entity, including its officers and directors, which submits bids or proposals for, or is awarded or may reasonably be expected to submit bids or proposals for or be awarded a department contract. This definition includes any subcontractor of a contractor that conducts business with the

department as an agent or representative of a contractor and any individual or legal entity that conducts business with the department as an agent or representative of a contractor.

(5) "Conviction" means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea and includes a conviction entered upon *nolo contendere* plea.

(6) "Debarment" means action taken by the department under s. Adm 24.05 to exclude a contractor from contracting with the department and from department-approved subcontracting for a specified period. A contractor so excluded is "debarred."

(7) "Department" means the Wisconsin department of administration.

(8) "Hearing examiner" means a designee of the secretary who is authorized to conduct a fact-finding hearing and to prepare written findings of fact and who may be authorized to issue debarment and suspension decisions pursuant to this chapter.

(9) "Ineligible" means excluded from contracting with the department and, if appropriate, from department-approved subcontracting, under statute, rule, order or legal authority other than this chapter.

Note: Examples of reasons for ineligibility are wage-rate violations, civil rights violations and deficient progress.

(10) "Indictment" includes an indictment for a criminal offense, an information or any other filing by a competent authority charging a criminal offense that results in finding probable cause to believe a felony has been committed and in binding the defendant over for trial.

(11) "Judgment" means a judgment in a civil action by any court of competent jurisdiction.

(12) "Secretary" means the secretary of the department or an authorized representative or designee.

(13) "Suspension" means action taken by the department under s. Adm 24.06 to exclude a contractor from contracting with the department or from department-approved subcontracting temporarily pending the completion of an investigation or of a debarment decision-making proceeding. A contractor so excluded is "suspended."

Adm 24.03 List and records of debarred and suspended contractors. (1) LIST. (a) The department shall compile and maintain a current, consolidated list of debarred, suspended and ineligible contractors.

(b) The department shall use the consolidated list to ensure that it does not solicit offers from, award contracts to, or consent to subcontract with listed contractors, except as otherwise provided in this chapter.

(2) RECORDS. The department shall maintain records relating to each debarred or suspended contractor. Records shall contain the following:

(a) Names and addresses of all debarred or suspended contractors.

(b) Cause or causes for each debarment or suspension.

(c) Any limitations on or deviations from the normal effect of debarment or suspension.

(d) Effective date of the debarment or suspension and, in the case of a debarment, the contract termination date.

Adm 24.04 Treatment of listed contractors. (1) EFFECT. (a) The department may not knowingly solicit bids from, award contracts to, renew an existing contract with, or consent to subcontracts with a debarred or suspended contractor, unless the secretary determines, in writing, that a compelling reason for such dealing with the contractor exists.

(b) The department shall not enter a contract with an ineligible contractor and, if applicable, shall exclude ineligible contractors from subcontracts under the conditions and for the period set forth in the applicable statutes, rules, orders or legal authorities. The department may not knowingly solicit bids from, award contracts to, renew an existing contract with, or consent to subcontract with these contractors except in accord with the applicable statutes, rules, orders or legal authorities.

(2) CURRENT CONTRACT CONTINUATION. (a) Notwithstanding the listing of a contractor, the department may continue contracts or subcontracts in existence at the time the contractor was debarred or suspended, unless the secretary determines that contract termination is in the public interest.

(b) Contract termination decisions under sub. (2) (a), if any, may be made only after review by and consultation with both department contracting personnel and department legal counsel to assure the propriety of the proposed contract termination.

(c) The department shall not renew existing contracts or subcontracts with debarred or suspended contractors, unless the secretary determines and states in writing a compelling reason for the contract renewal or extension.

(3) SUBCONTRACT RESTRICTIONS. When a debarred or suspended contractor is proposed as a subcontractor for any subcontract subject to department approval, the department may not give approval unless the secretary determines and states in writing a compelling reason for the approval.

Adm 24.05 Debarment. (1) GENERAL. (a) The department may, in the public interest, debar a contractor for any of the causes contained in sub. (2), using the procedures in sub (3). The existence of a cause for debarment as specified in sub. (2), however, shall not necessarily require that a contractor be debarred; the seriousness

of any contractor's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

(b) Debarment of a contractor constitutes debarment of all divisions or other organizational elements of the debarred contractor, unless the debarment is explicitly limited to specific divisions, organizational elements or commodities.

(c) The department may extend the debarment to include any affiliates of a debarred contractor, if the affiliates are specifically named and are given written notice of the proposed debarment and an opportunity to respond pursuant to sub. (4).

(d) When no suspension is in effect pursuant to s. Adm 24.06 at the time the department contemplates debarment of a contractor, no contracts shall be awarded to, and no subcontracts shall be approved for, the contractor, pending a debarment decision by the department.

(2) CAUSES FOR DEBARMENT. The secretary may debar a contractor for any one or more of the following causes:

(a) Conviction, civil judgment or admission of:

1. Fraud, collusion or any criminal offense in connection with obtaining, attempting to obtain or performing a public contract or subcontract;

2. Violation of any federal or state antitrust statute relating to the submission of bids or proposals;

3. Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property or obstruction of justice; or

4. Any other offense indicating a lack of business integrity or of business honesty which offense seriously and directly affects the responsibility of the contractor or subcontractor.

(b) Violation of the terms of any government contract or subcontract when that violation is so serious as to justify debarment, including:

1. Willful failure to perform in accordance with a contract; or

2. A history of failure to perform or of unsatisfactory performance of one or more contracts.

(c) Any other cause that is so serious or compelling that it affects the responsibility of a contractor or subcontractor.

(d) Debarment for any of the above causes listed in pars. (a) through (c) by another state or federal entity.

(3) PROCEDURES FOR DEBARMENT. (a) *Referral.* Department and other state

employees having information appropriate for department consideration under this section shall promptly report that information to the secretary.

(b) *Decision-making process; fact finding.*

1. The debarment decision-making process shall be as informal as practicable, consistent with fundamental due process of law principles. The debarment decision-making process shall permit contractors and any specifically named affiliates to submit information and arguments in opposition to a proposed debarment. The department may require that a contractor's opposition be submitted in writing or may permit an oral presentation in person or through a representative.

2. Whenever a proposal to debar is based upon a conviction, judgment or debarment by another state or federal entity for any of the causes listed in sub. (2), the department need not conduct a fact-finding hearing.

3. Whenever a proposal to debar is not based upon a conviction, judgment, admission or debarment by another state or federal entity, and if the department finds that the contractor's opposition raises a genuine dispute over facts relevant to the proposed debarment, the department shall conduct a fact-finding hearing. A department hearing examiner shall:

a. Permit the contractor to appear with counsel, to submit documents, to present witnesses and to confront and cross-examine any person the department presents;

b. Ensure that a transcript of the hearing is prepared and made available to the contractor at a reasonable cost, unless the contractor and the department mutually waive the transcript requirement; and

c. Act in accord with and have the authority provided by s. [227.46](#), Stats.

(4) NOTICE OF PROPOSAL TO DEBAR. The department shall initiate a debarment proceeding by informing the involved contractor and any specifically named affiliate by certified mail return receipt requested. The mailed notice shall state:

(a) That the department is considering a debarment;

(b) The reasons for the proposed debarment in terms sufficient to notify the contractor of the conduct or transaction upon which debarment is proposed;

(c) The cause or causes under sub. (2) that the department relies upon for the proposed debarment;

(d) That the contractor may submit, within 15 days of the date of the department's mailed notice, a written response providing information or argument in opposition to the proposed debarment;

(e) The department's procedures governing debarment decision-making as specified in sub. (5);

(f) The potential effect of the proposed debarment as provided under s. Adm 24.04; and

(g) That pending a debarment decision, no contract will be awarded to, and no subcontracts will be approved for, the contractor.

(5) DEPARTMENT'S DEBARMENT DECISION. (a) In debarment actions based upon a conviction, judgment, or admission or upon debarment by another state or federal entity for any of the causes listed in sub. (2) or in debarment actions in which no dispute exists over facts relevant to the proposed debarment, the secretary shall make a debarment decision based upon the information in the administrative record, including any submission made by the affected contractor. If no suspension is in effect under s. Adm 24.06, the debarment decision shall be made within 30 days after the secretary receives the last written response providing information or argument in opposition to the proposed debarment as provided for in sub. (4)(d).

(b) In debarment actions in which a fact-finding hearing is necessary under sub. (3)(b) 3., the designated hearing examiner shall prepare written findings of fact, and the secretary or designee shall render a debarment decision based upon those written findings of fact. A cause for debarment must be established by a preponderance of the evidence. The debarment decision shall be made after the conclusion of the proceedings with respect to the disputed facts.

(6) NOTICE OF DEPARTMENT DECISION. (a) If debarment is imposed, the department shall promptly notify the contractor and any affiliates involved by certified mail return receipt requested. The notice shall contain the following:

1. Reference to the notice of proposed debarment that initiated the action under sub. (4);
2. Reasons for debarment; and
3. Period of debarment, specifying the effective date.

(b) If debarment is not imposed, the department shall give prompt notice of that fact to the contractor and any affiliates involved by certified mail return receipt requested.

(7) PERIOD OF DEBARMENT. (a) Debarments shall be for a period commensurate with the seriousness of the cause or causes for debarment. Generally, debarment shall not exceed 3 years. If suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(b) After the department imposes a debarment period upon a contractor, the department may extend that period if it determines that an extension is necessary to protect the public interest. However, an extension may not be based solely on the facts

and circumstances upon which the initial debarment was based. Any extension proposed shall follow the procedures in sub. (3) above.

(c) The department may terminate a debarment or may reduce the period or extent of a debarment, upon the contractor's request, for reasons considered appropriate by the department, such as:

1. Newly discovered relevant evidence;
2. Reversal of the conviction or judgment upon which debarment was based;
3. A bona fide change in ownership or management of the contractor; or
4. Elimination of the cause or causes for which debarment was imposed.

(8) IMPUTED CONDUCT. (a) The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of the contractor's knowledge, approval or acquiescence.

(b) The fraudulent, criminal or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee or other individual associated with the contractor who participated in, knew of or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement or with the knowledge, approval or acquiescence of those contractors. Acceptance of the benefits derived from the conduct shall be evidence of the contractor's knowledge, approval or acquiescence.

Adm 24.06 Suspension. (1) GENERAL. (a) The department may, in the public interest, suspend a contractor for any of the causes contained in sub. (2), using the procedures in sub. (3).

(b) Suspension is to be imposed only on the basis of adequate evidence of one or more of the causes set out in sub. (2), pending completion of investigation or legal proceedings, when immediate action is necessary to protect the public interest. In assessing the adequacy of the evidence, the department may consider: the amount of available information, the credibility of that information, whether important allegations are corroborated, and what reasonable inferences can be drawn. The department's assessment may include examination of available basic documents such as: contracts, inspection reports and correspondence.

(c) Suspension of a contractor constitutes suspension of all divisions or other

organizational elements of the suspended contractor, unless the suspension is explicitly limited to specific divisions, organizational elements or commodities.

(d) The department may extend the suspension to include any affiliates of a suspended contractor if the affiliates are specifically named and are given written notice of the proposed suspension and an opportunity to respond.

(2) CAUSES FOR SUSPENSION. (a) The department may suspend a contractor whenever it finds adequate evidence that the contractor has engaged in one or more of the following:

1. Fraud, collusion or any criminal offense in connection with obtaining, attempting to obtain or performing a public contract or subcontract;

2. Violation of any federal or state antitrust statute relating to the submission of bids or proposals;

3. Embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property or obstruction of justice; or

4. Any other offense indicating a lack of business integrity or of business honesty, seriously and directly affecting the responsibility of the contractor or subcontractor.

(b) An indictment for any of the causes set forth in par. (a) may constitute adequate evidence for suspension.

(c) The department may suspend a contractor whenever it finds adequate evidence of any other cause of so serious or compelling a nature that it affects the responsibility of a contractor or subcontractor.

(d) The department may suspend a contractor based upon a suspension or debarment imposed by another state or federal entity for any of the causes in par. (a), (b) or (c).

(3) PROCEDURES FOR SUSPENSION. (a) *Referral.* Department employees and all other persons having information appropriate for department consideration under this section shall promptly report that information to the secretary.

(b) *Decision-making process; fact-finding.*

1. The suspension decision-making process shall be as informal as practicable, consistent with fundamental due process of law principles. The suspension decision-making process shall permit contractors and any specifically named affiliates to submit information and arguments in opposition to a proposed debarment. The department may require that a contractor's opposition be submitted in writing or may permit an oral presentation in person or through a representative.

2. Whenever a proposal to suspend is not based upon an indictment or a

suspension or debarment imposed by another state or federal entity, and if the department finds that the contractor's opposition raises a genuine dispute over facts relevant to the proposed suspension, and if no determination is made on the basis of advice from the department of justice or other prosecuting official that substantial interests of the government in pending or contemplated legal proceedings based upon the same facts as the suspension would be prejudiced, the department shall conduct a fact-finding hearing. A department hearing examiner shall conduct the fact-finding hearing and shall:

a. Permit the contractor to appear with counsel, to submit documents, to present witnesses and to confront and cross-examine any person the department presents;

b. Ensure that a transcript of the hearing is prepared and made available to the contractor at a reasonable cost, unless the contractor and the department mutually waive the transcript requirement; and

c. Act in accord with and have the authority provided by s. [227.46](#), Stats.

(c) *Notice of suspension.* If suspension is imposed, the department shall promptly notify the contractor and any affiliates involved by certified mail return receipt requested. The notice shall state the following:

1. A decision to suspend has been made, and it was made based upon one or more of the causes enumerated in sub. (2), which cause or causes shall be sufficiently described to notify the contractor but shall not disclose government evidence unnecessarily.

2. The suspension is temporary pending the completion of an investigation and of whatever legal proceedings may follow.

3. The effect of the suspension as provided for under s. Adm 24.04 (1).

4. The contractor may submit within 15 days, or such lesser time as the department shall state, of the date of the department's certified mailing a written response providing information or argument in opposition to the suspension.

5. A fact-finding hearing to determine disputed relevant facts shall be conducted under par. (b), unless:

a. The suspension is based upon an indictment or upon a suspension or debarment imposed by another state or federal entity; or

b. A determination is made, on the basis of advice from the department of justice or another prosecuting official, that substantial interests of the government in pending or contemplated legal proceedings based upon the same facts as the suspension would be prejudiced.

6. If a fact-finding hearing is required, the department shall schedule a

hearing within 30 days after the secretary receives the last written response providing information or argument in opposition to the suspension, as provided for in subd. 4.

(d) *Department's suspension decision.*

1. In suspension actions based upon an indictment or a suspension by another state or federal entity for any of the causes enumerated in sub. (2), in suspension actions in which no dispute exists over facts relevant to the suspension or in suspension actions in which a fact-finding hearing to determine disputed relevant facts is denied on the basis of advice from the department of justice or other prosecuting official, the secretary shall make a decision based upon the information in the administrative record, including any submission made by the affected contractor. The suspension decision shall be made within 30 days after the secretary receives the last written response providing information or argument in opposition to the proposed suspension as provided in par. (c) 4.

2. In suspension actions in which a fact-finding hearing is necessary under par. (b) 2., the designated hearing examiner shall prepare written findings of fact, and the secretary or designee shall render a decision based upon those written findings of fact. The suspension decision shall be made as soon as can reasonably be done after the conclusion of the proceedings with respect to the disputed facts.

3. The department may modify, terminate or leave in effect a suspension for the reasons set forth in s. Adm 24.05(7)(c) for modifying or terminating a debarment.

4. A prompt written notice of the department's decision shall be sent to the contractor by certified mail return receipt requested.

(4) PERIOD OF SUSPENSION. (a) Suspension shall be for a temporary period pending completion of investigation and any following legal proceedings unless sooner terminated by the department or as provided in par. (b).

(b) A suspension shall not continue for more than 6 months from its effective date, unless civil or criminal action regarding the violation or debarment proceedings have been initiated. The suspension may continue until the legal proceedings or debarment proceedings are completed.

(5) SCOPE OF SUSPENSION. The scope of suspension shall be the same as that set forth for debarment in s. Adm 24.05(8).

SECTION 2. Effective date: The rules contained in this proposed order will take effect on the first day of the month commencing after the date of publication, pursuant to authority granted by s. 227.22(2) Stats.

Dated: May 27, 2010

Michael L. Morgan
Secretary of Administration