

## CONCISE EXPLANATORY STATEMENT

**Subject:** Concise Explanatory Statement as required by RCW 34.05.325

**WAC:** Adoption of Chapter 200-305, “Debarment Procedures”

**REASON FOR ADOPTION:** The Department of Enterprise Services (DES) was directed under RCW 39.26.200 to establish the debarment process by rule. While the causes that can result in vendor debarment are provided in the statute the steps for ensuring vendors received due process was not.

DES received input from a panel of stakeholders which included higher education and the vendor community prior to beginning the drafting process. DES along with the Office of the Attorney General drafted the rules using the Administrative Procedures Act as the foundation.

DES held a Public Hearing for comments on March 18, 2013 in Olympia, Washington. Written comments were received before the hearing and the comment period was open until March, 25, 2013. Seventeen individuals attended the hearing, but none provided testimony. All comments received were written comments.

### ACCEPTED CHANGES ARE AS FOLLOWS:

WAC 200-305-010 - Definitions

**Comment: (1) Affiliate:** This is a circular definition and is very poor English. Try – “Affiliate” means a person or entity with a close relationship with another person or business entity.

(1) “Affiliate” means a person or business entity with a close bond or relationship with another person or business entity. The Relationship is often bound by friendship, family interest or legal agreement. For purposes of the procedure an affiliation exists if, directly or indirectly, either party 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 may include, but not be limited to:

- (a) Identity of interest among family members;
- (b) Interlocking management of ownership.

**Response:** DES agrees the definition as initially proposed was ambiguous; however, the recommended change did not provide the clarity needed. Therefore, DES has made the following changes:

(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.

**Comment:** (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.

**Response:** Change accepted.

WAC 200-305-030 Mitigating and Aggravating Factors

**Comment:** Consider revising the order here since the information following begins with **Aggravating factors**, moves to **Mitigating factors** and then to factors that could go either way depending of if the answer about action taken is yes or no.

**Response:** To align the content of the section with the title DES will change the title of the sections as follows: “**Aggravating and Mitigating Factors**”

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

**Response:** Change accepted.

## **THE FOLLOWING PROPOSED CHANGES ARE NOT ACCEPTED:**

### RCW 39.26.040 – Prohibition on certain contracts

**Comment:** I went through the proposed rules and commend everybody involved in their efforts to make contracting transparent and fair in Washington State. I had a comment on one portion of the proposed rule. It seems that this rule needed to include a term-period for this exclusion by specifying that a current volunteer or a prior volunteer within a year of volunteering cannot be eligible for contracts that relate in any way to the area focus of the volunteering committee.

**Response:** No change is required. The comment does not apply to the debarment process or rules being established. If the volunteer is not presently a volunteer, the RCW does not prohibit the State from entering into contracts with the volunteers.

### WAC 200-305-010 - Definitions

**Comment:** (5) “Contractor” means an individual or entity **which; when** awarded a contract with an agency to perform a service or provide goods. **Negotiates and executes the contract in good faith.**

**Response:** The proposed change is not needed to enhance clarity.

**Comment:** (7) “Covered transaction” means **the process of** submitting a bid, having a bid considered, entering into a state contract, or subcontracting on a state contract.

**Response:** The proposed change is not needed to enhance clarity.

**Comment:** (10) “Debarment order” means the final decision as written by the debarring official after reviewing the information and evidence presented.

**Response:** This change is not accepted. Debarment order does not need a definition. It is described in the rule so that no further definition is necessary.

**Comment:** (13)(a) An officer, director, owner, partner, principal investigator, or other person **who is in a position** within a bidder’s or contractor’s **entity** with management or supervisory responsibilities related to a covered transaction; or

**Response:** The proposed change is not needed to enhance clarity.

#### WAC 200-305-020 – Causes for Debarment

**Comment:** 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. (Which regulations? State or Federal?)**

**Response:** This phrase is taken directly from statute. Further description of this term is not necessary to have in rule, but will be included in the frequently asked questions document that is being drafted.

#### WAC 200-305-030 Mitigating and Aggravating Factors

**Comment:** (1) The actual or potential harm or impact that resulted or may result from **one or more of the causes specified in RCW 39.26.200** wrongdoing. **(Definition of wrongdoing)**

**Response:** The proposed change is not needed to enhance clarity.

#### WAC 200-305-040 - Referring a Person for Debarment

**Comment:** Will you accept an anonymous referral?

**Response:** Yes, the rule does not require a person to provide a name or contact information. This comment does not require a change to the rule. Information on procedures will be developed and available from DES upon implementation of the rule.

**Comment:** (2) The person submitting the referral ~~should~~ is expected to provide additional information if requested by the department.

**Response:** The proposed change is not needed to enhance clarity.

**Comment:** (4) provides that “The department will **notify the referring party** in writing and state whether the referral will be reviewed or rejected.” Not consistent with requirement (2)

**Response:** This is not inconsistent with the (2) provision requesting persons submitting referrals to provide additional information if requested. This subsection describes the agency's process for notifying the person submitting the referral of the agency's decision whether to review or reject the referral.

#### WAC 200-305-060 Notice of Recommended Debarment

**Comment:** (1)(e) 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 which may not be appealed in the process.

**Response:** The proposed change is not needed to enhance clarity.

#### WAC 200-305-070 Request for a Hearing on Recommended Debarment

**Comment:** **If a timely hearing is received, the recommended debarment order will not go into effect until the resolution of the hearing in accordance with WAC 200-305-080.** 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

**Response:** This change is repetitive and is not accepted. The proposed language is already provided in WAC 200-305-060 (1)f.

#### WAC 200-305-080 Hearing on Recommended Debarment

**Comment:** (1) The director may hear the appeal personally or may **assign a designee-by** delegating 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.

**Response:** The proposed change is not needed to enhance clarity.

**Comment:** (5) If the director's **designee** 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.

**Response:** The proposed change is not needed to enhance clarity.

#### WAC 200-305-100 Effect of a Debarment Order on the Contractor and Affiliate

**Comment:** Covered transaction – Based on the definition of covered transaction, which requires a bidding process, this contractor could be awarded a direct buy or sole source contract.

**Response:** No change is required. The contractor could not be awarded a contract because the definition of covered transaction includes “entering into a contract.” A debarred contractor cannot enter into a contract, including a direct buy or a sole source contract.

#### WAC 200-305-110 Effect of a Debarment Order on State Agencies

**Comment:** Does this have to be part of the original debarment order? Or can a request be made of the debarring official after the order is place? Example: Major IT project is nearing completion at the time of the debarment when it becomes known that one additional program must be developed to connect the document developer to the database

**Response:** No change is being requested, and no change is required. A request can be made of the debarring official after the debarment order is placed. It does not have to be part of the original debarment order. Please see WAC 200-305-110 (1).

#### General Comments

**Comment:** What is this about and how does it affect my company?

**Comment:** What are debarment rules?

**Comment:** Does this concern me?

**Response:** No change is being requested. In response to the three comments above, determining if the rules apply requires a case-by-case fact based analysis.

**Comment:** 1. Is there a duty upon state agencies to refer a contractor (if the agency is aware of a conviction, termination for cause, etc. against the contractor) to DES for debarment? 2. Will agencies have access to a debarment list for checking names of debarred contractors? 3. Is there a process agencies must follow when confirming whether a contractor is debarred? 4. Are agencies required to document their confirmation that a contractor is or is not on the debarment list?

**Comment:** I suggest language be included in debarment statements in procurement documents to the effect; if the contracted firm is debarred during the life of any contract issued the issuer will have the right to cancel the contract.

**Comment:** Interesting presentations today. Without procurement rules, there will be many new to government who will have little guidance on how to proceed. The people in attendance today can rely on past experience; as we retire, there may be some comfort in having rules to follow.

**Comment:** Is there any discussion about the use of subcontractors? And rules about the contracting with a Contractor who uses a subcontractor that was debarred?

**Response:** In response to the four comments above, information on procedures will be developed and available from DES upon implementation of the rule. In addition DES will provide guidance through training to assist agencies with understanding and implementation the rule. The comments above do not require changes to the rule.

**Comment:** Good morning Jack, I hope to be at the hearing but what I have seen so far is troubling. I submitted bids for several consulting positions and believe I would have been very helpful. I have experience with cannabis and corporate America. My bids were instantly disqualified as "Non Responsive". I believe I did not list enough experience in the selected field. I'm here if you need me. My concerns are two; research and marketing. I have a lot of experience in both. The WSLCB can not stop behaving as if they were regulating alcohol again. Alcohol is what they know and what they want back. I heard Pat Cole's interview on NPR the other day. That is a plan for failure. The research needs to begin yesterday, along with marketing the research plan. More marketing must start now to begin un-demonizing marijuana. If you don't believe me you should take a look at some of my research. This new substance doesn't seem so strange to the Control Board, who really don't even know what it looks like, and have been passing on the demonization for decades like the good citizens they are. Alcohol has the advantage of millenniums of legal consumption to learn from and regulate. Marijuana has zero. This initiative is going to be a lot different than we think, and every month we delay will cost the state millions. The application process to get on board is designed to discourage people like me, because I am honest about my experience. The WSLCB uses the same format they used with alcohol. The Medicinal Marijuana people have some experience, but they originate from a group that could be very embarrassing to elected State Officials. They also have a lot of money at

stake, which they will lose part of when the state takes over. They also lose control of what they consider "their industry". Medicinal people also know the WSLCB is clueless. Yet they seem to be the only advisors the state has right now. We need them but with more balance to offset their self-serving motivation. There are a lot of people out here like me who are deemed non responsive. They were disqualified like me and could get this job done like me. I even know many of them. Do I seem non responsive so far? Please; I want to help you make "Good" history. Thank you, John

**Response:** The above comments appear to address the bid evaluation process, not the debarment process. Comments are on non-responsiveness in proposal submittal and do not suggest changes to the debarment rule.