Chapter DWD 294

DEBARMENT OF PUBLIC WORKS CONTRACTORS

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Note: Chapter DWD 294 was rendered without effect as a result of the revision of s. 66.0903, Stats., and the revision of s. 103.49, Stats., and its renumbering to s. 16.856, Stats., by 2015 Wis. Act 55.

Note: Chapter Ind 94 was renumbered chapter ILHR 294 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1996, No. 484. Chapter ILHR 294 was renumbered chapter DWD 294 under s. 13.93 (2m) (b) 1., Stats., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, September, 1997, No. 501.

DWD 294.01 Applicability. (1) SCOPE OF CHAPTER. This chapter:

(a) Prescribes certain policies and procedures governing the debarment of contractors from contracts involving any state agency or local governmental unit.

(b) Sets forth the treatment to be accorded to debarred contractors.

(c) Prescribes the procedures to be used to inform state agencies, local governmental units and the general public of the contractors that have been declared ineligible to perform work on public works projects.

(2) POLICY. (a) Every state agency or local governmental unit shall solicit bids from, negotiate with, award contracts to, and approve or allow subcontracts with only responsible contractors. Debarment is an appropriate means to effectuate this policy.

(b) Debarment is a serious action imposed only to protect the public interest.

History: Cr. Register, August, 1987, No. 380, eff. 9–1–87; am. (1) (a), (c) and (2) (a), Register, July, 2000, No. 535, eff. 8–1–00.

DWD 294.02 Definitions. In this chapter:

(1) "Consolidated list" means a list compiled and maintained by the department which contains the names, addresses and other pertinent information as required by this chapter of all contractors that have been debarred under this chapter within a 3 year period from the date of publication.

(2) "Construction business" means:

(a) Any business engaged in erecting, constructing, remodeling, repairing, demolishing, altering, painting or decorating buildings, structures, or facilities; and

(b) Any business engaged in the delivery of mineral aggregate or the transporting of excavated material or spoil as provided by s. 66.0903 (4) or 103.49 (2m), Stats.

(3) "Contractor" means any individual or legal entity in a construction business involved on a public works project, including its responsible officers, directors, members, shareholders, or partners, irrespective of the name by which the group is designated, provided that any officer, director, member, shareholder, or partner is vested with the management of the affairs of the individual or legal entity.

(4) "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 a *nolo contendere plea.*

(5) "Debarment" means action taken by the department under s. DWD 294.05 to exclude a contractor from performing work, either as a prime contractor or subcontractor, for any state agency or local governmental unit for a specified period. A contractor so excluded is"debarred."

(6) "Department" means the Wisconsin department of workforce development.

(7) "Designated representative" means a designee of the secretary who is authorized to conduct a debarment hearing and who may be authorized to issue debarment decisions pursuant to this chapter.

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

(9) "Local governmental unit" has the meaning given in s. 66.0903 (1) (d), Stats.

(10) "Secretary" means the secretary of the Wisconsin department of workforce development or an authorized representative or designee.

(11) "State agency" has the meaning given in s. 103.49 (1) (f), Stats.

History: Cr. Register, August, 1987, No. 380, eff. 9–1–87; correction in (5) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; am. (2) and (5), r. and recr. (3), (9) and (11), Register, July, 2000, No. 535, eff. 8–1–00; correction in (2) (b) and (9) made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.

DWD 294.03 List and records of debarred contractors. (1) LIST. (a) The department shall compile and maintain a current consolidated list of all debarred contractors.

(b) The department shall use the consolidated list to ensure that every state agency or local governmental unit does not solicit bids from, negotiate with, award contracts to, and approve or allow subcontracts with listed contractors, except as otherwise provided in s. DWD 294.05.

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

(a) Name and address of each debarred contractor.

(b) Cause for each debarment and the date each cause occurred.

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

(d) Effective and termination dates of the debarment.

History: Cr. Register, August, 1987, No. 380, eff. 9–1–87; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; am. (1) (b), Register, July, 2000, No. 535, eff. 8–1–00.

DWD 294.04 Treatment of listed contractors. (1) EFFECT. No state agency or local governmental unit may knowingly solicit bids from, negotiate with or award contracts to, and approve or allow subcontracts with a debarred contractor, except as otherwise provided in s. DWD 294.05.

(2) REVIEW. Prior to any of the procurement actions enumerated in sub. (1), with respect to a particular bidder, offeror or proposed subcontractor, every state agency or local governmental unit shall review the consolidated list. If a bidder, offeror or proposed subcontractor is listed, it may not be awarded a contract or allowed to participate as a subcontractor, except as otherwise provided in s. DWD 294.05.

(3) INADVERTENTLY AWARDED CONTRACTS OR SUBCONTRACTS. (a) If the department learns that a debarred contractor is employed

on a public works project, it shall require the state agency or local governmental unit to terminate the employment of the contractor, except as otherwise provided in s. DWD 294.05.

(b) Contract termination decisions shall be made only after review by and in consultation with the state agency or local governmental unit purchasing personnel, department legal counsel and designated representative, and affected contractors to assure the propriety of the proposed contract termination.

History: Cr. Register, August, 1987, No. 380, eff. 9–1–87; corrections made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; am. Register, July, 2000, No. 535, eff. 8–1–00.

DWD 294.05 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), shall not always require that a contractor be debarred. The seriousness of a contractor's acts or omissions, past compliance history, attitude and any other mitigating factors shall be considered in making any debarment decision.

(b) Debarment of a contractor constitutes a debarment of all divisions or other organizational elements of the contractor that are engaged in construction business activities, unless the debarment is explicitly limited to specific divisions or organizational elements. The department shall determine whether a debarment shall apply to a contractor affiliated with a debarred contractor. A corporation is an affiliate of another corporation if substantially the same group of persons owns and manages the 2 corporations.

(c) A contractor may not be debarred from performing work on a project that is being bid or negotiated if a written or oral offer to perform work for another contractor was received or accepted before the name of the contractor making the offer initially appeared on the consolidated list.

(d) A contractor may not be debarred from completing any work on a project if the contract for the work was awarded to the contractor prior to the date that the name of the contractor initially appeared on the consolidated list.

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

(a) A conviction or civil judgment of a Wisconsin court, a finding of any Wisconsin state agency or local governmental unit, a finding of the department or an admission of:

1. Failing to pay an employe the proper prevailing wage rate determined for a public works project.

2. Failing to pay an employe at least 1.5 times the proper hourly basic rate of pay for all hours worked in excess of the prevailing hours of labor determined for a public works project.

3. Inducing any employe to give up, waive or return any part of the proper prevailing wage rate determined for a public works project.

4. Falsifying, deliberately destroying, or failing to keep required payroll records on a public works project.

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

(b) *Decision–making process.* 1. The debarment decision–making process shall be as informal as practical, consistent with fundamental fairness principles. The process shall permit contractors to request a hearing before the department. If a request for a hearing is received by the department, then a hearing shall be afforded to the requesting party.

2. The hearing shall be conducted by a designated representative and shall:

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

b. Ensure that an accurate written summary or tape recording of the hearing is prepared or taken and made available to the contractor, if one is requested before the hearing.

(4) NOTICE OF PROPOSAL TO DEBAR. The department shall initiate a debarment proceeding by notifying the involved contractor by certified mail to its last known address. The mail notice shall state:

(a) The department is considering a debarment;

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

(c) The contractor may submit, within 20 calendar days from the date of receipt of the department's mailed notice, a written response or argument in opposition to the proposed debarment;

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

(e) The potential effect of the proposed debarment as provided under s. DWD 294.04; and

(f) The contractor may request a hearing before the department within the period provided for in par. (c).

(5) DEPARTMENT'S DEBARMENT DECISION. (a) The designated representative shall issue a proposed findings of fact and order within 60 calendar days after the department received the last written response providing information or arguments in opposition to the proposed debarment as provided for in sub. (4) (c) or within 60 calendar days after a hearing has been held as provided for in sub. (4) (f). Any party to the action may request a copy of the proposed findings of fact and order and appeal it within 20 calendar days from the date of issuance by requesting, in writing, an opportunity to present oral or written arguments to the designated representative.

(b) If a timely appeal is filed, the designated representative shall hold a hearing or review the written arguments on why the proposed order should be modified or reversed. The designated representative shall issue a findings of fact and final order within 30 calendar days of the receipt of the last argument filed.

(c) If a timely appeal is not filed, the designated representative shall issue a findings of fact and final order within 20 calendar days after the appeal period expires.

(6) NOTICE OF DEBARMENT DECISION. (a) If a debarment is imposed, the department shall promptly notify the contractor by certified mail to its last known address, of 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 and termination dates.

(b) If debarment is not imposed, the department shall give prompt notice of that fact to the contractor by certified mail to its last known address.

(7) PERIOD OF DEBARMENT. (a) Debarment shall be for a period commensurate with the seriousness of the cause or causes for debarment. Debarment shall not exceed 3 years. Debarment begins on the date the department issues its notice of debarment, or on the date of final disposition by a court of competent jurisdiction, whichever is later.

(b) 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 the 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 the debarment was imposed.

(c) A contractor may not request the department to terminate or reduce the period or extent of a debarment until full restitution of any unpaid wages has been made to all employes.

History: Cr. Register, August, 1987, No. 380, eff. 9−1−87; correction in (4) (e) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; am. (2) (a) (intro.), 4., (3) (b) 2. b. and (5), Register, July, 2000, No. 535, eff. 8−1−00.

DWD 294.06 Notification to state agencies and local governmental units. (1) The department shall notify all state agencies and local governmental units of the names of all debarred contractors by providing them with a copy of the most current consolidated list available at the same time that the department issues a prevailing wage rate determination to them.

(2) Local governmental units exempted from applying to the department for prevailing wage rate determinations, pursuant to s. 66.0903 (6), Stats., and all state agencies shall be sent a copy of the most current consolidated list at least quarterly, if any addition or deletion was made to the most current list.

Note: Section 66.0903 (6) was repealed by 2011 Wis. Act 32, removing exemptions for local governmental units. Sub. (2) will be repealed by future rulemaking.

History: Cr. Register, August, 1987, No. 380, eff. 9−1−87; am. Register, July, 2000, No. 535, eff. 8−1−00; correction in (2) made under s. 13.93 (2m) (b) 7., Stats., Register, July, 2000, No. 535.

DWD 294.07 Distribution of consolidated list to the general public. To ensure that the general public is kept fully informed of the names of the debarred contractors, the department shall supplement the notification requirements provided under s. DWD 294.06 by distributing a copy of the current consolidated list, using a variety of methods including, but not limited to, the use of the state newspaper, press releases and the periodicals of associations that have members who are affected by, or are interested in, the information on the list.

History: Cr. Register, August, 1987, No. 380, eff. 9−1−87; correction made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484.

DWD 294.08 Disclosure of ownership of other construction business that failed to observe prevailing wage law. On the date a contractor submits a bid to or completes negotiations with a state agency or local governmental unit, the contractor shall disclose the name of any other construction business which the contractor, or a shareholder, officer, or partner of the contractor, owns or has owned within the preceding 3 years only if both of the following apply:

(1) The contractor, or a shareholder, officer or partner of the contractor, presently owns or has owned, within the preceding 3 years, at least a 25% interest in the other construction business; and

(2) The department has determined that the other construction business failed to pay the prevailing wage rate or at least 1.5 times the hourly basic rate of pay for hours worked in excess of the prevailing hours of labor to any employe at any time within the preceding 3 years.

Note: "Disclosure of Ownership," form ERD−7777, may be obtained at no charge from the Department of Workforce Development, Equal Rights Division, P.O. Box 8928, Madison, WI 53708 or the DWD web site at http://www.dwd.state.wi.us/er/pdfforms.htm.

History: Cr. Register, August, 1987, No. 380, eff. 9−1−87; r. and recr. (1) (a), Register, October, 1990, No. 418, eff. 11−1−90; am. (intro.), Register, July, 2000, No. 535, eff. 8−1−00.