

**RULES
OF
TENNESSEE DEPARTMENT OF TRANSPORTATION
CONSTRUCTION DIVISION**

**CHAPTER 1680-5-1
CONTRACTOR DEBARMENT AND SUSPENSION**

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1680-5-1-.01 GENERAL INFORMATION.

- (1) How is this chapter written?
 - (a) This chapter uses a “plain language” format to make it easier for the general public and business community to use. The paragraph headings and text, often in the form of questions and answers, must be read together. This chapter is substantially similar to and follows the same format as U.S. Department of Transportation rules governing debarment and suspension of contractors in 49 CFR Part 29.
 - (b) Pronouns used within this chapter, such as “I” and “you,” change from rule to rule depending on the audience being addressed. The pronoun “we” always is the Tennessee Department of Transportation.

- (2) Do terms in this chapter have special meanings?

This chapter uses terms throughout the text that have special meanings. Those terms are defined in Rule 1680-5-1-.02 of this chapter.

- (3) What does this chapter do?

This chapter adopts a system of debarment and suspension for the Department. It also provides for reciprocal exclusion of persons who have been excluded under Federal law or the laws of other states.

- (4) What is the purpose of the debarment and suspension system?

- (a) To protect the public interest, the Department ensures the integrity of state programs by conducting business only with responsible persons.
- (b) The Department uses the debarment and suspension system to exclude from Department programs persons who are not presently responsible.
- (c) An exclusion is a serious action that may be taken only to protect the public interest.

- (5) How does an exclusion restrict a person’s involvement in covered transactions?

With the exceptions as may be allowed by law, a person who is excluded by the Department or any Federal agency may not:

- (a) Be a participant in any covered transaction; or

(Rule 1680-5-1-.01, continued)

- (b) Act as a principal of a person participating in any covered transaction.
- (6) May we grant an exception to let an excluded person participate in a covered transaction?
 - (a) The debarring or suspending official may grant an exception permitting an excluded person to participate in a particular covered transaction. If the debarring or suspending official grants an exception, the exception must be in writing and state the reason(s) for deviating from the policy.
 - (b) An exception granted for an excluded person on one covered transaction does not extend to other covered transactions.
 - (c) A debarring or suspending official may grant exceptions and make written determinations under this section.
- (7) Does an exclusion affect a person's eligibility for transactions with the Federal government or other states?

Yes, as may be determined by the appropriate state or Federal agency.

- (8) Am I obligated to disclose to the Department information regarding exclusion or circumstances that may constitute cause for debarment?

Yes, the Department's proposals shall require each bidder to state whether or not such bidder or its proposed subcontractors, or any principals of the bidder or its proposed subcontractors—

- (a) Have been or currently are suspended, debarred or otherwise excluded from transacting business with any federal, state, or other governmental authority; or
- (b) Have been convicted of or been found liable in a civil judgment for the commission of any of the causes of debarment identified in Rule 1680-5-1-.05, subparagraph (1)(a) and (1)(b) below.
- (9) How do I know if a person is excluded?

Check the Department website and Excluded Parties List System ("EPLS") to determine whether a person is excluded. The U.S. General Services Administration maintains the EPLS and makes it available, as detailed in 49 CFR Part 29, Subpart E. When a Federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the Federal agency enters the information about the excluded person into the EPLS.

- (10) What is the intent of this chapter?

Department bidding laws, particularly T.C.A. §§ 54-5-117 and 118, along with other State and Federal laws, charge the Commissioner to protect the public trust, funds, and interest by ensuring that the Department transacts business only with responsible contractors. Toward that end, this chapter sets out standards and procedures for the suspension and debarment of irresponsible contractors. The standards are paramount and are intended to ensure that the Department transacts business only with responsible contractors.

Pursuant to T.C.A. §§4-5-217 and 219, this chapter sets out formal and informal procedures for suspension and debarment. Since suspension and debarment proceedings are not contested cases pursuant to T.C.A. §4-5-102(3), application of the Uniform Administrative Procedures Act (UAPA), T.C.A. §4-5-101, et seq., and the Uniform Rules of Procedure (URP) is not required by law; nevertheless, this chapter adopts the procedures set out in the UAPA and the URP for use in debarment proceedings at the Department. This procedure is in excess of that which is constitutionally

(Rule 1680-5-1-.01, continued)

required and is not intended to originate any new protected interest. The Commissioner finds that the URP must be modified as set out herein to reflect that a contractor's protected interest does not rise to the level that would require a contested case hearing and to promote a just, speedy, and inexpensive determination. All proceedings will be conducted by Department personnel.

Indeed, these rules shall be construed to secure a just, speedy, and inexpensive determination. Where necessary and appropriate, reference should be made first to the plain language of this chapter in accord with the rules of construction; second, to T.C.A. §§4-3-2303, 4-4-103, and 54-5-117 and the various other State laws governing bidding and contracting with the Department; and third, to the various Federal laws governing bidding and contracting with the Department, including the Federal rules governing suspension and debarment upon which these rules are based.

Authority: T.C.A. §4-3-2303 and 54-5-117. **Administrative History:** Original rule filed October 17 1980; effective December 1, 1980. Repeal and new rule filed January 8, 1988; effective April 27, 1988. Repeal and new rule filed February 4, 2005; effective April 20, 2005.

1680-5-1-.02 DEFINITIONS.

- (1) "Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.
- (2) "Affiliate" means a person that is in affiliation with another person or persons. Persons are affiliates of each other and an affiliation exists if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The factors we use to determine control include, but are not limited to:
 - (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 which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.
- (3) "Agent or representative" means any person who acts on behalf of, or who is authorized to commit, a participant in a covered transaction.
- (4) "Civil judgment" means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts, or a final determination of liability under the Program Fraud Civil Remedies Act of 1988, 31 U.S.C. §§ 3801–3812.
- (5) "Commissioner" means the Commissioner of the Department of Transportation.
- (6) "Conviction" means:
 - (a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(Rule 1680-5-1-.02, continued)

- (b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.
- (7) “Covered transactions” means the submission of a bid or proposal to the Department, entering into a contract with the Department, subcontracting on a Department project at any level, or any of the above on a local government project funded in whole or part with Department funds. **These rules govern only whether a person may submit a bid, enter into a contract, or participate as a subcontractor. Whether and to what extent a debarment or suspension affects a contract or subcontract in effect at the time of the debarment or suspension is not addressed in these rules but shall be governed by applicable contract provisions and/or law.**
- (8) “Debarment” means an action taken by a debarring official to exclude a person from participating in covered transactions. A person so excluded is debarred.
- (9) “Debarring official” means an agency official who is authorized to impose debarment. A debarring official is either:
 - (a) The Commissioner; or
 - (b) An individual or individuals designated by the Commissioner.
- (10) “Department” means the Tennessee Department of Transportation.
- (11) “Excluded or exclusion” means:
 - (a) That a person is prohibited from being a participant in covered transactions whether the person has been suspended, debarred, or voluntarily excluded; or
 - (b) The act of excluding a person.
- (12) “Excluded Parties List System” or “EPLS” means the list maintained and disseminated by the U.S. General Services Administration containing the names and other information about persons who are debarred, suspended or otherwise excluded under Federal law.
- (13) “Indictment” means an indictment for a criminal offense. A presentment, information, or other filing by a competent authority charging a criminal offense shall be given the same effect as an indictment.
- (14) “Ineligible or ineligibility” means that a person is prohibited from being a participant in covered transactions because of an exclusion.
- (15) “Initiating Official” means the official designated by the Commissioner who is authorized to initiate the suspension and/or debarment process.
- (16) “Legal proceedings” means any criminal proceeding or any civil judicial proceeding, including a proceeding under the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801–3812, to which the Federal Government or a State or local government or quasi-governmental authority is a party. The term also includes appeals from those proceedings.
- (17) “Notice” means a written communication served in person, sent by certified mail or its equivalent, or sent electronically by e-mail or facsimile; provided, however the Notice of Hearing described in Rule 1680-5-1-.05(4)(c) shall be served as described in said rule.

(Rule 1680-5-1-.02, continued)

- (18) "Participant" means any person who submits a proposal or bid for or who enters into a covered transaction, including an agent or representative of a participant.
- (19) "Person" means any individual, corporation, partnership, association, unit of government, or legal entity, however organized.
- (20) "Preponderance of the evidence" means proof by information that, compared with information opposing it, leads to the conclusion that the fact at issue is more probably true than not.
- (21) "Principal" means:
- (a) An officer, director, owner, partner, principal investigator, or other person within a participant with management or supervisory responsibilities related to a covered transaction; or
 - (b) A consultant or other person, whether or not employed by the participant, who:
 - 1. Is in a position to handle State funds;
 - 2. Is in a position to influence or control the use of those funds; or
 - 3. Occupies a technical or professional position capable of substantially influencing the development or outcome of an activity required to perform the covered transaction.
- (22) "Respondent" means a person against whom the Department has initiated a debarment or suspension action.
- (23) "Suspending official" means an agency official who is authorized to impose suspension. The suspending official is either:
- (a) The Commissioner; or
 - (b) An individual or individuals designated by the Commissioner.
- (24) "Suspension" means an action taken by a suspending official that immediately prohibits a person from participating in covered transactions for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended.
- (25) "Suspension Review Officer" means the Commissioner or his designee that reviews any objections to a suspension.
- (26) "Voluntarily excluded" means the status of a person who has agreed to a voluntary exclusion.
- (27) "Voluntary exclusion" means a person's agreement to be excluded under the terms of a settlement between the person and one or more agencies.

Authority: T.C.A. § 4-3-2303 and 54-5-117. **Administrative History:** Original rule filed October 17, 1980; effective December 1, 1980. Repeal and new rule filed January 8, 1988; effective April 27, 1988. Repeal and new rule filed February 4, 2005; effective April 20, 2005.

1680-5-1-.03 GENERAL PRINCIPLES RELATING TO SUSPENSION AND DEBARMENT ACTIONS.

- (1) How do suspension and debarment actions start?

(Rule 1680-5-1-.03, continued)

When the Department receives sufficient information from any source concerning a cause for suspension or debarment, we will investigate it and/or refer it to the appropriate agencies. We will refer the question of whether to suspend or debar a person to our designated initiating official for consideration, if appropriate. This individual shall not be the suspending or debarring official.

- (2) What procedures does the Department use in suspension and debarment actions?

In deciding whether to suspend or debar a person, we will handle the actions as informally as practicable, consistent with principles of fundamental fairness.

- (a) For suspension actions, the Department will use the procedures described in Rule 1680-5-1-.04.
- (b) For debarment actions, the Department will use the procedures described in Rule 1680-5-1-.05.

- (3) How does the Department notify a person of a suspension or debarment action?

- (a) The initiating official sends a written notice to the last known street address, facsimile number, or e-mail address of—
 - 1. The person or identified counsel; or
 - 2. The person's agent for service of process, or any partners, officers, directors, owners, or joint venturers.
- (b) The notice is effective if sent to any of these persons.

- (4) Do Federal and State agencies coordinate suspension and debarment actions?

Yes, when a Federal agency or the Department has an interest in a suspension or debarment, the agencies may consider designating one agency as the lead agency for making the decision. Suspension or debarment of a person by the appropriate Federal authority or another state shall apply to all covered transactions subject to exceptions as may be granted by the Commissioner in writing. Any exceptions by the Commissioner on debarment and suspension imposed by an appropriate Federal authority can only be granted on projects without federal aid.

- (5) What is the scope of a suspension or debarment?

If you are suspended or debarred, the suspension or debarment is effective as follows:

- (a) Your suspension or debarment constitutes suspension or debarment of you from all covered transactions, unless the suspension or debarment decision is limited—
 - 1. By its terms to one or more specifically identified individuals, divisions, or other organizational elements; or
 - 2. To specific types of transactions.
- (b) Any affiliate of a person may be included in a suspension or debarment action if the suspending or debarring official—
 - 1. Officially names the affiliate in the notice (the affiliate may be added later by an amended notice); and

(Rule 1680-5-1-.03, continued)

2. Gives the affiliate the type of opportunity to object to the action as described in Rule 1680-5-1-.04 for suspension and Rule 1680-5-1-.05 for debarment.

- (6) May the Department impute conduct of one person to another?

For purposes of actions taken under these rules, we may impute conduct as follows:

- (a) Conduct imputed from an individual to an organization.

We may impute the fraudulent, criminal, or other improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with an organization, to that organization when the improper conduct occurred in connection with the individual's performance of duties for or on behalf of that organization, or with the organization's knowledge, approval or acquiescence. The organization's acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

- (b) Conduct imputed from an organization to an individual, or between individuals.

We may impute the fraudulent, criminal, or other improper conduct of any organization to an individual, or from one individual to another individual, if the individual to whom the improper conduct is imputed either participated in, had knowledge of, or reason to know of the improper conduct.

- (c) Conduct imputed from one organization to another organization.

We may impute the fraudulent, criminal, or other improper conduct of one organization to another organization when the improper conduct occurred in connection with a partnership, joint venture, joint application, association or similar arrangement, or when the organization to whom the improper conduct is imputed has the power to direct, manage, control or influence the activities of the organization responsible for the improper conduct. Acceptance of the benefits derived from the conduct is evidence of knowledge, approval or acquiescence.

- (7) May the Department reach an agreement on a debarment or suspension action?

Yes, we may reach an agreement with a person on a debarment or suspension action at any time if we determine it is in the best interest of the State.

- (8) May such an agreement include a voluntary exclusion?

If we reach an agreement with you in which you agree to be excluded, it is called a voluntary exclusion and has the described effect.

- (9) Do Federal agencies know if the Department agrees to a voluntary exclusion?

Yes, and any agency or person may contact us to find out the details of a voluntary exclusion.

- (10) May I challenge an action taken under these rules based on the process followed?

A person may not challenge any final action taken under these rules based upon the Department's failure to follow any technical requirement of these rules unless and to the extent that the Department's failure amounts to a failure of fundamental fairness such that the person is deprived of due process of law as may be required by constitutional law.

(Rule 1680-5-1-.03, continued)

Authority: T.C.A. §§4-3-2303 and 54-5-117. **Administrative History:** Original rule filed October 17, 1980; effective December 1, 1980. Repeal filed January 8, 1988; effective April 27, 1988. Repeal and new rule filed February 4, 2005; effective April 20, 2005.

1680-5-1-.04 SUSPENSION.

- (1) When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this rule, the suspending official may impose suspension only when that official determines that:

- (a) There exists an indictment, conviction, civil judgment, or other official findings by Federal, State or local governmental bodies that determine factual and/or legal matters, or other adequate evidence to suspect, an offense listed under Rule 1680-5-1-.05, Subparagraph (1)(a) or (1)(b); or
- (b) There exists adequate evidence to suspect any other cause for debarment listed under Rule 1680-5-1-.05, Subparagraphs (1)(c) through (1)(e); and
- (c) Immediate action is necessary to protect the public interest.

- (2) What does the suspending official consider in issuing a suspension?

- (a) The initiating official shall provide to the suspending official a request to suspend with supporting evidence.
- (b) In determining the adequacy of the evidence to support the suspension as provided by the initiating official, the suspending official considers how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. During this assessment, the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents.
- (c) An indictment, conviction, civil judgment, or other official findings by Federal, State, or local governmental bodies that determine factual and/or legal matters, constitutes adequate evidence for purposes of suspension actions.
- (d) In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. For example, the suspending official may infer the necessity for immediate action to protect the public interest either from the nature of the circumstances giving rise to a cause for suspension or from potential business relationships or involvement with a program of the Federal Government.

- (3) When does a suspension take effect?

A suspension is effective when the suspending official signs the decision to suspend.

- (4) What notice does the suspending official give me if I am suspended?

After deciding to suspend you, the suspending official immediately sends you a Notice of Suspension advising you—

- (a) That you have been suspended;

(Rule 1680-5-1-.04, continued)

- (b) That your suspension is based on—
 - 1. An indictment, conviction, civil judgment or other official findings by Federal, State or local governmental bodies that determine factual and/or legal matters;
 - 2. Other adequate evidence that you have committed irregularities which seriously reflect on the propriety of further State dealings with you; or
 - 3. Conduct of another person that has been imputed to you, or your affiliation with a suspended or debarred person;
 - (c) Of any other irregularities in terms sufficient to put you on notice without disclosing the evidence of the State or Federal government;
 - (d) That your suspension is for a temporary period pending the completion of an investigation or resulting legal or debarment proceedings;
 - (e) Of the provisions of this rule governing suspension; and
 - (f) Of the effect of your suspension from participation in covered transactions.
- (5) How may I contest a suspension?

If you as a respondent wish to contest a suspension, you or your representative must provide the suspending official with information in opposition to the suspension. You may do this orally or in writing, but any information provided orally that you consider important must also be submitted in writing for the official record.

- (6) How much time do I have to contest a suspension?
- (a) As a respondent, in order to contest the suspension you must object in writing and must either send, or appear and present, the information and argument to the suspending official within 30 days after you receive the Notice of Suspension. All information submitted by the respondent must be in writing.
 - (b) We consider the notice to be received by you—
 - 1. When delivered, if we mail or hand deliver the notice to the last known street address;
 - 2. When delivered, if we send the notice by facsimile; or
 - 3. When delivered, if we send the notice by e-mail.
- (7) What information must I provide to the suspending official if I contest a suspension?
- (a) In addition to any information and argument you believe is important or otherwise relevant, as a respondent your submission to the suspending official must identify—
 - 1. Specific facts that contradict the statements contained in the Notice of Suspension (a general denial being insufficient to raise a genuine dispute over facts material to the suspension);
 - 2. All existing, proposed, or prior exclusions and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies;

(Rule 1680-5-1-.04, continued)

3. All criminal and civil proceedings not included in the Notice of Suspension that grew out of facts relevant to the cause(s) stated in the notice; and
 4. All of your affiliates.
 - (b) If you provide false information, the Department may seek further civil or administrative action against you, as appropriate. Law enforcement officials may take criminal action against you.
 - (c) Your objections and any challenge described in paragraph (8) below, shall be decided by a Suspension Review Officer.
 - (d) The Suspension Review Officer must issue a written decision within forty-five (45) days after receipt of your objection.
- (8) Under what conditions do I get an additional opportunity (i.e., a hearing) to challenge the facts on which the suspension is based?
- (a) You as a respondent will not have an additional opportunity (hearing) to challenge the facts if the Suspension Review Officer determines that—
 1. Your suspension is based upon an indictment, conviction, civil judgment, or other finding by a Federal, State, or local governmental body for which an opportunity to contest the facts was provided;
 2. Your presentation in opposition contains only general denials to information contained in the Notice of Suspension;
 3. The issues raised in your presentation in opposition to the suspension are not factual in nature, or are not material to the suspending official's initial decision to suspend, or the official's decision whether to continue the suspension; or
 4. On the basis of advice from the U.S. Department of Justice, an office of the United States Attorney, or the Tennessee Attorney General that substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced by conducting such fact-finding.
 - (b) You will have an additional opportunity to challenge the facts (i.e. a hearing) if the Suspension Review Officer determines that—
 1. The conditions in subparagraph (8)(a) of this rule do not exist; and
 2. Your presentation in opposition raises a genuine dispute over facts material to the suspension.
 - (c) If you have an opportunity to challenge disputed material facts under this paragraph, the Suspension Review Officer must immediately schedule additional proceedings to resolve those facts.
- (9) Are suspension hearings formal?
- (a) Suspension hearings will be conducted in a fair and informal manner. The Department may use flexible procedures to allow you to present matters in opposition. In so doing, the Department

(Rule 1680-5-1-.04, continued)

is not required to follow formal rules of evidence or procedure in creating an official record upon which the official will base a final suspension decision.

- (b) You as a respondent or your representative must submit any documentary evidence you want the Department to consider.
- (10) How is the hearing conducted?
- (a) If a hearing is conducted—
 1. The proceeding shall be heard by a Suspension Review Officer.
 2. You may present witnesses and other evidence, and confront any witness presented; and
 3. The Suspension Review Officer, who shall not be the initiating or suspending official, must prepare written findings of fact for the record.
 - (b) A transcribed record of the hearing must be made. If you want a copy of the transcribed record, you may purchase it.
- (11) What does the Suspension Review Officer consider in deciding whether to continue or terminate my suspension?
- (a) The Suspension Review Officer bases the decision on all information contained in the official record. The record includes—
 1. All information in support of the suspending official's initial decision to suspend you;
 2. Any further information and argument presented in support of, or opposition to, the suspension; and
 3. Any transcribed record of the hearing.
- (12) When will I know whether the suspension is continued or terminated?
- The Suspension Review Officer must make a written decision whether to continue, modify, or terminate your suspension within forty-five (45) days after your receipt of the Notice of Suspension. The Suspension Review Officer may extend that period for good cause.
- (13) How long may my suspension last?
- (a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.
 - (b) The suspending official may extend the 12 month limit under subparagraph (13)(a) of this rule for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, the Tennessee Attorney General's Office, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under subparagraph (13)(a) of this rule.
 - (c) The suspending official must notify the appropriate officials under subparagraph (13)(b) of this rule of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

(Rule 1680-5-1-.04, continued)

Authority: T.C.A. §§4-3-2303 and 54-5-117. **Administrative History:** Original rule filed October 17, 1980; effective December 1, 1980. Repeal filed January 8, 1988; effective April 27, 1988. Repeal and new rule filed February 4, 2005; effective April 20, 2005.

1680-5-1.05 DEBARMENT.

- (1) What are the causes for debarment?

The Department may debar a person for—

- (a) Conviction of or civil judgment for—
1. Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
 2. Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
 3. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or
 4. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;
- (b) Conviction of any criminal violation of the Federal Water Pollution Control Act, as provided in 33 U.S.C. § 1319(c), or as it may be amended, or conviction of any criminal violation of the Tennessee Water Quality Control Act, as provided in T.C.A. §§ 69-3-115(b) and (c), or as either may be amended; or
- (c) Serious violations of the terms of a contract or grant such as—
1. A willful failure to perform in accordance with the terms of one or more public contracts or grants;
 2. A history of failure to perform or of unsatisfactory performance of one or more contracts or grants; or
 3. A willful violation of a statutory or regulatory provision or requirement applicable to a contract or grant, including without limitation violations of statutory or regulatory provisions or requirements under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., and the Tennessee Water Quality Control Act, T.C.A. § 69-3-101 et seq.;
- (d) Any of the following causes:
1. A debarment or similar action by any Federal agency, another state or other governmental authority;
 2. Using a suspended or debarred subcontractor on a covered transaction; provided, however, this shall not apply if the covered transaction began before the debarment or suspension;

(Rule 1680-5-1-.05, continued)

3. Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any State agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;
 4. Violation of a material provision of a voluntary exclusion agreement or of any settlement of a debarment or suspension action;
 5. Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or
- (e) Any other cause of so serious or compelling a nature that it affects your present responsibility, which includes but is not limited to a finding by the debarring official based on a preponderance of the evidence that a person committed any action described in subparagraph (1)(a) of this rule.
- (2) What notice does the initiating official give me if I am proposed for debarment?

After consideration of the causes in paragraph (1) above of this rule, if the Department proposes to debar you, the initiating official shall send you a Notice of Proposed Debarment, pursuant to Rule 1680-5-1-.03, paragraph (3), advising you—

- (a) That the Department intends to debar you and that the debarment shall go into effect on a date certain (no less than thirty (30) days from receipt of notice) unless you object to the debarment in writing within thirty (30) days after you receive the Notice of Proposed Debarment and request a hearing prior to the debarment effective date. The notice shall clearly state the location and individual who is to receive the objection.
 - (b) Of the reasons for proposing to debar you in terms sufficient to put you on notice of the conduct or transactions upon which the proposed debarment is based;
 - (c) Of the provisions of this rule governing debarment;
 - (d) Of the effect of your debarment from participation in covered transactions; and
 - (e) Of your opportunity to contest the proposed debarment by requesting a hearing described in the Administrative Procedures Act, T.C.A. §4-5-301, et seq., as provided in paragraph (4) below.
 - (g) We consider the Notice of Proposed Debarment to be received by you—
 1. When delivered, if we mail or hand deliver the notice to the last known street address;
 2. When delivered, if we send the notice by facsimile; or
 3. When delivered, if we send the notice by e-mail.
- (3) When does a debarment take effect?
- (a) A debarment is not effective until the debarring official issues a decision.
 - (b) In the event you do not object and request a hearing to contest the debarment, the debarring official may issue a Debarment Order based on the information in paragraph (2) above that goes into effect upon the date specified in the Debarment Order.

(Rule 1680-5-1-.05, continued)

- (c) If you object in accordance with paragraph (2) above, then you have the opportunity to participate in a contested case hearing described in the Administrative Procedures Act before the debarring official issues any Order.
- (4) How do I oppose a debarment?
- (a) If you as a respondent wish to contest a proposed debarment, you must provide the Department with an objection to the debarment and a request for hearing. This objection and request for hearing must be submitted in writing to the Department within thirty (30) days after you receive the Notice of Proposed Debarment.
 - (b) If you submit a timely objection to the debarment and request a hearing, then the Department shall conduct a contested case hearing like that described in the Administrative Procedures Act, T.C.A. §4-5-301 et seq. and as required by these rules.
 - (c) The proceeding shall be conducted by official(s) of the Department designated by the Commissioner who shall issue a final order as described in T.C.A. §4-5-314. This individual or group of individuals is referred to as the debarring official. An administrative judge or hearing officer shall preside over the hearing as provided in T.C.A. §4-5-301(b).
 - (d) The Department shall serve a Notice of Hearing as described in T.C.A. §4-5-307 within fifteen (15) days of receipt of your objection to the debarment. You shall file an answer within fifteen (15) days of receipt of the Notice of Hearing.
 - (e) All discovery, pre-hearing conferences, briefs and motions must be complete within sixty (60) days of filing the answer.
 - (f) The proceeding hearing itself shall be held as described in the Uniform Rules of Procedures for Hearing Contested Cases Rule 1360-4-1-.01 with a final order being entered by the Department officials hearing the case.
 - (g) Any judicial review of a final order shall be in accord with T.C.A. §4-5-323.
- (5) Are debarment proceedings formal?
- (a) Debarment proceedings are conducted in a fair and informal manner as described in this rule and the Administrative Procedures Act.
 - (b) You or your representative must submit any documentary evidence you want the debarring official to consider.
- (6) What does the debarring official consider in deciding whether to debar me?
- (a) The debarring official may debar you for any of the causes allowed by this rule. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating or aggravating factors set forth below.
 - (b) The debarring official bases the decision on all information contained in the official record. The record includes—
 1. All information in support of the initiating official's proposed debarment;
 2. Any further information and argument presented in support of, or in opposition to, the proposed debarment; and

(Rule 1680-5-1-.05, continued)

3. Any transcribed record of fact-finding proceedings.
- (7) What is the standard of proof in a debarment action?
 - (a) In any debarment action, the Department must establish the cause for debarment by a preponderance of the evidence.
 - (b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.
 - (8) Who has the burden of proof in a debarment action?
 - (a) The Department has the burden to prove that a cause for debarment exists.
 - (b) Once a cause for debarment is established, you as a respondent have the burden of demonstrating to the satisfaction of the debarring official that you are presently responsible and that debarment is not necessary.

- (9) What factors may influence the debarring official's decision?

This paragraph lists the mitigating and aggravating factors that the debarring official may consider in determining whether to debar you and the length of your debarment period. The debarring official may consider other factors if appropriate in light of the circumstances of a particular case. The existence or nonexistence of any factor, such as one of those set forth in this paragraph, is not necessarily determinative of your present responsibility. In making a debarment decision, the debarring official may but is not required to consider the following factors:

- (a) The actual or potential harm or impact that results or may result from the wrongdoing.
- (b) The frequency of incidents and/or duration of the wrongdoing.
- (c) Whether there is a pattern or prior history of wrongdoing. For example, if you have been found by another Federal agency or a State agency to have engaged in wrongdoing similar to that found in the debarment action, the existence of this fact may be used by the debarring official in determining that you have a pattern or prior history of wrongdoing.
- (d) Whether you are or have been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this rule.
- (e) Whether you have entered into an administrative agreement with a Federal agency or a State or local government that is not governmentwide but is based on conduct similar to one or more of the causes for debarment specified in this rule.
- (f) Whether and to what extent you planned, initiated, or carried out the wrongdoing.
- (g) Whether you have accepted responsibility for the wrongdoing and recognize the seriousness of the misconduct that led to the cause for debarment.
- (h) Whether you have paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.

(Rule 1680-5-1-.05, continued)

- (i) Whether you have cooperated fully with the government agencies during the investigation and any court or administrative action. In determining the extent of cooperation, the debarring official may consider when the cooperation began and whether you disclosed all pertinent information known to you.
 - (j) Whether the wrongdoing was pervasive within your organization.
 - (k) The kind of positions held by the individuals involved in the wrongdoing.
 - (l) Whether your organization took appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.
 - (m) Whether your principals tolerated the offense.
 - (n) Whether you brought the activity cited as a basis for the debarment to the attention of the appropriate government agency in a timely manner.
 - (o) Whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.
 - (p) Whether you had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.
 - (q) Whether you have taken appropriate disciplinary action against the individuals responsible for the activity which constitutes the cause for debarment.
 - (r) Whether you have had adequate time to eliminate the circumstances within your organization that led to the cause for the debarment.
 - (s) Other factors that are appropriate to the circumstances of a particular case.
- (10) How long may my debarment last?
- (a) If the debarring official decides to debar you, your period of debarment will be based on the seriousness of the cause(s) upon which your debarment is based. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.
 - (a) In determining the period of debarment, the debarring official may consider the factors in paragraph (9) of this rule above. If a suspension has preceded your debarment, the debarring official must consider the time you were suspended.
- (11) When do I know if the debarring official debars me?
- (a) The debarring official must make a written decision whether to debar within ninety (90) days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.
 - (b) The debarring official sends you written notice, pursuant to Rule 1680-5-1-.03, paragraph (3), that the official decided, either—
 - 1. Not to debar you; or

(Rule 1680-5-1-.05, continued)

2. To debar you. In this event, the notice—
 - (i) Refers to the Notice of Proposed Debarment;
 - (ii) Specifies the reasons for your debarment;
 - (iii) States the period of your debarment, including the effective dates; and
 - (iv) Advises you that your debarment is effective for all covered transactions with the Department.

(12) May I ask the debarring official to reconsider a decision to debar me?

Yes, as a debarred person you may ask the debarring official to reconsider the debarment decision or to reduce the time period or scope of the debarment.

(13) What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on—

- (a) Newly discovered material evidence;
- (b) A reversal of the conviction or civil judgment upon which your debarment was based;
- (c) A bona fide change in ownership or management;
- (d) Elimination of other causes for which the debarment was imposed; or
- (e) Other reasons the debarring official finds appropriate.

(14) May the debarring official extend a debarment?

- (a) Yes, the debarring official may extend a debarment for an additional period, if that official determines that an extension is necessary to protect the public interest.
- (b) However, the debarring official may not extend a debarment solely on the basis of the facts and circumstances upon which the initial debarment action was based.
- (c) If the debarring official decides that a debarment for an additional period is necessary, the debarring official must follow the applicable procedures of this rule, to extend the debarment.

Authority: T.C.A. §§4-3-2303 and 54-5-117. **Administrative History:** Original rule filed February 4, 2005; effective April 20, 2005.