

1088.0.0 DHS PARTICIPANT EXCLUSION RULE

1088.1.0 Purpose

1088.1.1 DHS shall conduct business only with responsible participants. Participants will be excluded from participation in DHS programs not as penalty, but rather to protect public funds, the integrity of publicly funded programs, and public confidence in those programs. It is also the intent of this policy to prevent excluded participants from substituting others, usually immediate family members, as surrogates to continue the practices that caused DHS to exclude the participant.

1088.1.2 Participant exclusion is a serious action that shall be used only in the State's best interests and for the protection of the public and DHS. DHS shall impose exclusion only in accordance with this rule.

1088.2.0 Substantive Rules

1088.2.1 Definitions:

- A. Administrative Adjudication - an adjudication conforming to the Administrative Procedure Act, codified as Ark. Code Ann. §25-15-201 *et seq.* Administrative adjudications must be limited to the extent necessary to avoid compromising any ongoing criminal investigation.
- B. Appropriation - the authority granted by the Arkansas General Assembly to expend public funds for specified purposes.
- C. Automatic Exclusion - exclusion imposed following and based upon a final adjudication of one or more acts or omissions described in 1088.2.3. Participants automatically excluded cannot have an administrative adjudication of the facts or law determined by the final adjudication.
- D. Civil Judgment - the disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for a wrongful act.
- E. Collateral Exclusion - exclusion from one program based upon a previous final exclusion from another program as provided in 1088.2.5.A and B.
- F. Common Ownership - when an entity, entities, an individual or individuals possess 5% or more ownership or equity in the participant.
- G. Control - where an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of a participant.
- H. DHS - the Arkansas Department of Human Services, including all divisions, offices, and units thereof.

- I. Director - the DHS Director or the Director's designee.
- J. Due Process - a full and fair opportunity to be heard, including the right to call and cross examine witnesses, as part of a civil, criminal, or administrative adjudication.
- K. Final Determination – Unless provided otherwise in federal law or regulation, a final determination exists when, with respect to a determination upon which the exclusion is based, the deadline to appeal that determination has passed or all appeals have been exhausted.
- L. Immediate Family Member - spouse; natural or adoptive parent, child, or sibling; step-parent, child, or sibling; father, mother, brother, sister, son or daughter-in-law; grandparent or grandchild.
- M. Nonconforming Commodities or Services - goods or services not in accordance with the obligations under the contract.
- N. Participant - a person or entity that is a party or is seeking to become a party to a contract, grant or agreement with DHS to furnish commodities or services to, on behalf of, or as a grantee or sub-grantee or recipient of DHS.
- O. Preponderance of the Evidence - proof of any nature that, when compared with that opposing it, leads to the conclusion that the fact in issue is more probably true than not.
- P. Related Party - a person or an entity associated or affiliated with, or which shares common ownership, control, or common board members, or which has control of or is controlled by the participant.
- Q. Temporary Exclusion - exclusion pending an investigation and adjudication (if the participant timely requests adjudication) imposed upon a finding that there is a reasonable basis to believe that one or more grounds for exclusion as specified in this rule exist.

1088.2.2 Application

This rule applies to all contracts, grants, and agreements between DHS and participants involving the expenditure of appropriated funds. The rights, obligations, and remedies created and imposed by this rule are in addition to any other laws and rules pertaining to contracts and grants.

1088.2.3 Causes for Exclusion

DHS shall automatically exclude a participant if the participant is the subject of final determination that the participant has wrongfully acted or failed to act with respect to, or has been found guilty, or pled guilty or *nolo contendere*, to any crime related to:

- A. Obtaining, attempting to obtain, or performing a public or private contract or subcontract
- B. Embezzlement, theft, forgery, bribery, falsification or destruction of records, any form of fraud, receipt of stolen property, or any other offense indicating moral turpitude or a lack of business integrity or honesty
- C. Dangerous drugs, controlled substances, or other drug-related offenses when the offense is a felony
- D. Federal antitrust statutes
- E. The submission of bids or proposals
- F. Any physical or sexual abuse or neglect when the offense is a felony

1088.2.4 DHS shall exclude participants for any of the following acts or omissions that are of a character regarded by the Director to be so serious as to justify exclusion:

- A. Refusal or knowing failure, without good cause, to comply with applicable requirements (including requirements contained or incorporated in statutes, rules, contracts, or purchase orders) or within the time provided in the contract or grant
- B. Failure to perform or unsatisfactory performance, provided that the failure to perform or unsatisfactory performance beyond the control of the contractor or grantee shall not be considered to be a basis for exclusion
- C. Failure to post any surety bond, or to provide similar guarantees acceptable to DHS required under any contract or grant
- D. Substitution of commodities or services without prior written approval of DHS
- E. Failure to cure nonconforming commodities or services within the lesser of a reasonable time, or the time specified in the contract or in a corrective action plan
- F. Refusal to accept a contract or grant awarded in accordance with the request for proposal or invitation for bid
- G. Making material misrepresentations or failing to make representations when required or when a reasonable person would naturally have been expected to affirm or deny the existence of a material fact
- H. Collusion or collaboration with any bidder, proposer, or applicant in the submission of any proposal, bid, or grant application for the purpose of lessening or reducing competition
- I. Failure to submit to or to supply an audit as required by federal or state law or rule

- J. Failure or refusal, after request by DHS, to supply records related to the contract, proposal, bid, or application
- K. Any act or omission that causes or materially contributes to placement of a lien upon the assets of the State
- L. Conviction related to the use of illegal drugs, controlled substances, or other drug-related offenses when the offense is a misdemeanor
- M. Any physical or sexual abuse or neglect when the offense is a misdemeanor
- N. Submitting, without good cause, a bill or claim for payment exceeding the amount to which the participant is entitled
- O. Failure to make repayment arrangements acceptable to the Department to repay any funds owed the Department, or failure to strictly adhere to the terms of any agreed-to repayment arrangements.
- P. Failure to comply with professional standards of care or conduct applicable to the service provided.
- Q. Failure to comply with standards or requirements relating to any license, permit, certification, other publicly granted authority, or accreditation needed to provide any service funded in whole or in part with public funds.
- R. Failure to fully and accurately make any disclosures required by contract, federal or state law or rule.
- S. Transaction of business in knowing contravention of an exclusion imposed under this rule.

1088.2.5 Mandatory Exclusion:

- A. DHS shall exclude a participant that is presently subject to debarment, suspension, or other exclusion by any unit of the federal government or any unit of a state government, if the debarment, suspension, or exclusion was imposed after an opportunity for due process, and if federal law does not expressly prohibit collateral exclusion under the circumstances. Exclusion shall be concurrent with the period of debarment, suspension, or exclusion imposed by the federal or state government.
- B. DHS shall exclude a participant upon learning that within the past year the participant was terminated for cause by any unit of the federal government or any unit of a state government, provided that the debarment or exclusion was imposed after an opportunity for due process, and provided that federal law does not expressly prohibit collateral exclusion under the circumstances. The term of exclusion shall be determined under section 1088.2.9.

- 1088.2.6 Persons and Entities Excluded: In addition to excluded participants, exclusion applies to:
- A. All the participant's related parties, and the heirs and assigns of the participants and related parties.
 - B. The participant's immediate family members in order to prevent continued wrongdoing via a surrogate. Generally, immediate family members will be excluded from participation in any entity to which the excluded participant was a related party, any successor entity, or a start-up entity in the same or a similar program.
- 1088.2.7 Effect of Exclusion: Excluded participants may not receive appropriated funds except to the extent such funds are for proper charges approved before the date of exclusion. Payments are limited to the amount by which the proper charges exceed the amount of any indebtedness to DHS.
- 1088.2.8 DHS shall maintain a list of excluded participants. Upon being listed as an excluded participant, the participant cannot continue as a party to any DHS contract or grant, and is ineligible to submit proposals, bids, or applications to DHS for the term of the exclusion.
- 1088.2.9 Term of Exclusion: The term of the exclusion shall be set after consideration of the nature and seriousness of the wrongful act or omission warranting exclusion, the length of time since any wrongful act or omission warranting exclusion, and the goals and purposes underlying this rule. The term of exclusion must be stated in the exclusion determination. Exclusion shall be for not less than one year and at least until all appropriated funds, costs, and penalties owed to DHS by the participant are paid in full and the participant meets all contract or grant requirements as well as all applicable requirements in federal rules and laws. Exclusion of immediate family members and related parties shall run concurrently not to exceed five years.
- 1088.3.0 Procedural Rules**
- 1088.3.1 DHS must prove the act or omission upon which the exclusion is based by a preponderance of the evidence. The participant must prove the elements of any defense by a preponderance of the evidence.
- 1088.3.2 Administrative due process shall be accomplished via existing DHS processes for appeals by participants.
- 1088.3.3 If a participant is entitled to an administrative hearing, the hearing must be held within a reasonable time after temporary exclusion, and before any exclusion other than a temporary exclusion.

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