

This rule was filed as: 18 NMAC 28.4.

TITLE 18 TRANSPORTATION AND HIGHWAYS
CHAPTER 28 HIGHWAY CONTRACTING AND BIDDING
PART 4 DEBARMENT AND SUSPENSION OF CONTRACTORS

18.28.4.1 ISSUING AGENCY: New Mexico State Highway and Transportation Department
P. O. Box 1149 Santa Fe, New Mexico 87504-1149 (505) 827-5320.
[Recompiled 11/16/01]

18.28.4.2 SCOPE: All agencies, the general public and highway construction contractors.
[Recompiled 11/16/01]

18.28.4.3 STATUTORY AUTHORITY: NMSA 1978, Sections 13-1-28 et seq., 13-1-177, 13-1-178, 13-1-179, 13-1-180, 67-3-1 et seq., 67-3-43, 57-1-1 et seq.; 15 USCS Section 1, et seq., as amended; New Mexico State Highway Commission Policy 92-6, approved 04-16-92.
[Recompiled 11/16/01]

18.28.4.4 DURATION: Permanent.
[Recompiled 11/16/01]

18.28.4.5 EFFECTIVE DATE: March 15, 1999, unless a later date is cited at the end of a section or paragraph.
[Recompiled 11/16/01]

18.28.4.6 OBJECTIVE: This rule embodies the policies and procedures to be employed by the Department regarding the debarment or suspension of bidders, offerors, and contractors in instances where there is cause to believe that they lack the necessary qualities of moral and/or ethical integrity. These policies and procedures are intended to protect the interests of the citizens of the State of New Mexico. Among these protected interests are open competition in bidding, impartiality in the selection of contractors, integrity in business practices and skillful performance of public contracts. The overriding purpose of this rule is to provide safeguards for maintaining a procurement system of quality and integrity.
[Recompiled 11/16/01]

18.28.4.7 DEFINITIONS:

- A. “Bidder” One who submits or is eligible to submit a bid to the Department in response to an invitation for bids.
- B. “Contractor” Any business having a contract with the New Mexico State Highway and Transportation Department. The term includes prime contractors; subcontractors and suppliers; and further includes the affiliates of contractors, as well as the individual officers and directors of corporate contractors.
- C. “Debarment” A determination of ineligibility to be a bidder, offeror or contractor on Department highway construction projects for a period not less than three months nor more than three (3) years, in conformance with the procedures set forth in this rule.
- D. “Department” The New Mexico State Highway and Transportation Department.
- E. “Offeror” One who submits or is eligible to submit a proposal to the Department in response to a Request for Proposals.
- F. “Secretary” The Secretary of the New Mexico State Highway and Transportation Department or designee.
- G. “Suspension” A determination of ineligibility to be a bidder, offeror or contractor on Department highway construction projects for a period not to exceed three (3) months, in conformance with the procedures set forth in this rule.

[Recompiled 11/16/01]

18.28.4.8 CAUSES FOR DEBARMENT OR SUSPENSION: The causes for debarment or suspension occurring within three years of a procurement include but are not limited to the following:

A. Conviction of a bidder, offeror or contractor for commission of a criminal offense related to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

B. Conviction of a bidder, offeror or contractor under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records or receiving stolen property;

C. Conviction of a bidder, offeror or contractor under state or federal antitrust statutes arising out of the submission of bids or proposals;

D. Violation by a bidder, offeror or contractor of contract provisions, as set forth in this subsection, of a character which is reasonably regarded by the Department to be so serious as to justify suspension or debarment action:

(1) Willful failure to perform in accordance with one or more contracts, provided that this failure has occurred within a reasonable time preceding the decision to impose debarment (or suspension); or

(2) A history of failure to perform, or of unsatisfactory performance of, one or more contracts, provided that this failure or unsatisfactory performance has occurred within a reasonable time preceding the decision to impose debarment and provided further that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment (or suspension).

E. Any other cause occurring within three years of a procurement which the Department determines to be so serious and compelling as to affect responsibility as a contractor; and

F. A willful violation by a bidder, offeror or contractor of the provisions of the Procurement Code within three years of a procurement.

[Recompiled 11/16/01]

18.28.4.9 PROCEDURE

A. Notice of Proposed Suspension or Debarment:

(1) The Secretary may issue a Notice of Proposed Suspension or Notice of Proposed Debarment to any bidder, offeror, or contractor.

(2) Such notice shall be in writing and sent to the bidder, offeror, or contractor at its last known address by certified mail and shall contain at a minimum the following information:

(a) That the Department is contemplating debarment or suspension of the named bidder, offeror or contractor;

(b) The reasons such action is being contemplated by the Department;

(c) The proposed duration for the suspension or debarment of the named bidder, offeror or contractor;

(d) That the bidder, offeror or contractor may request a hearing before the Secretary prior to a final determination by the Department on the proposed suspension or debarment;

(e) That such a request for hearing must be directed to the Secretary in writing within ten (10) days of receipt of the Notice of Proposed Suspension or Notice of Proposed Debarment;

(f) That if a request for hearing is not received by the Secretary within ten (10) days of receipt of the Notice by the bidder, offeror, or contractor, a period of suspension or debarment up to and including the period proposed in the Notice shall be made final and shall be imposed; and

(g) The specific effect such final determination will have on pending and future contracts and relations between the Department and the affected bidder, offeror or contractor.

B. Hearing:

(1) Any affected bidder, offeror, or contractor receiving a Notice of Proposed Suspension or Notice of Proposed Debarment may, within ten (10) days of receipt of the Notice, request in writing a hearing before the Secretary on the proposed suspension or debarment. Such written request must be directed to the Secretary.

(2) The Secretary shall schedule the date, time and place of a hearing and furnish this information to the affected bidder, offeror or contractor in a written Notice of Hearing.

(3) The Secretary shall arrange for a court reporter to transcribe the proceedings at the hearing. The Department shall bear the cost of the appearance of such court reporter; however, any party requesting a transcript of the proceedings from the court reporter shall bear the cost thereof.

(4) At the hearing, the affected bidder, offeror or contractor may be represented by counsel, may speak on its own behalf and may present witnesses and offer evidence. Neither the technical rules of evidence, nor the requirements of the Administrative Procedures Act, NMSA 1978, Section 12-8-1 et seq., shall apply. The

affected bidder, offeror, or contractor at the hearing shall have the opportunity to confront witnesses and rebut documentation relied upon by the Department as supporting the proposed suspension or debarment. Counsel for the Department may likewise present witnesses, offer evidence, confront witnesses, and rebut documentation offered by the affected bidder, offeror or contractor.

(5) If the affected bidder, offeror or contractor does not request a hearing within the time limits set forth herein, it shall be deemed to have waived the opportunity for a hearing, and a Final Determination of Debarment or Suspension shall be issued in conformance with the requirements of this rule.

C. Final Determination on Suspension or Debarment:

(1) No bidder, offeror or contractor shall be debarred except by means of a written Final Determination of Suspension or Final Determination of Debarment issued by the Secretary.

(2) The Final Determination shall:

(a) State the reasons for the action taken;

(b) If adverse to the bidder, offeror or contractor, inform the debarred or suspended bidder, offeror or contractor of its rights to judicial review pursuant to NMSA 1978, Sections 13-1-179 and 13-1-183, of the Procurement Code; and

(c) State, with specificity, how pending or future contracts with the bidder, offeror or contractor shall be treated.

(3) Upon rendering the Final Determination the Secretary shall mail a copy of the Final Determination to the affected bidder, offeror or contractor.

(4) The Final Determination issued by the Secretary constitutes final agency action, and there shall be no right to further appeal to the State Highway Commission or to any other extra-judicial administrative authority by a debarred or suspended bidder, offeror or contractor.

[Recompiled 11/16/01]

18.28.4.10 GENERAL REQUIREMENTS:

A. This rule applies to all personnel and organizations of the Department, and to those with whom it deals, either directly or indirectly.

B. The Secretary may institute suspension or debarment proceedings in conformance with this rule according to the nature and seriousness of the offense. The Secretary may propose the maximum period of debarment or suspension or any period up to the maximum as he determines by the exercise of his discretion.

C. The Department's determination to impose debarment or suspension does not require a court finding, conclusion or judgment of failure to perform or unsatisfactory performance as a predicate or justification to take debarment or suspension action.

D. Nothing in this rule precludes the Secretary from entering into a written agreement with the affected bidder, offeror or contractor fixing the terms and conditions of a Final Debarment or Suspension.

E. Any action or proposed action taken by the Department with respect to debarment or suspension does not preclude referral to the New Mexico Attorney General, to a New Mexico District Attorney and/or to the United States Department of Justice for further review and appropriate action. Any proceedings instituted by these agencies are independent of those pursued by the Department. A settlement between the Department and an affected bidder, offeror or contractor on the terms of its suspension or debarment shall not affect actions taken by the New Mexico Attorney General, District Attorneys or United States Department of Justice.

F. A Final Determination of Debarment or Suspension may be suspended at any time by the Secretary if in the best interests of the Department and the public.

G. In the event of an investigation being conducted by another agency, the Secretary may, in his sole discretion, delay any further debarment or suspension action pending the outcome of the investigation.

H. The illegal or improper conduct of an individual may be fully imputed to the business firm with which he is or was associated or by whom he is or was employed where that conduct was engaged in within the course of his employment or with the knowledge, approval or subsequent ratification of the business firm.

I. Debarment or suspension of a bidder, offeror or contractor in no way affects its obligations to the state under existing contracts. The Department may, at its option, void any contracts currently in force with any debarred contractor and either require its bonding company to perform or re-advertise and relet the project. This option, however, does not exist in the case of suspension of bidders, offerors, or contractors.

J. Any bidder, offeror or contractor shall have the affirmative duty to report to the Secretary any cause for debarment or suspension under Section 8 of this rule within thirty (30) days of its occurrence. Failure to provide such notice is a serious and compelling offense sufficient in and of itself to result in suspension or debarment.

K. Any state agency personnel determined to be involved in a violation shall be subject to the applicable state personnel disciplinary rules and criminal laws.

L. The names and addresses of any and all bidders, offerors, and contractors suspended or debarred pursuant to these procedures shall be forwarded by the Secretary to the Federal Highway Administration, the Attorney General for the State of New Mexico, and the American Association of State Highway and Transportation Officials.

[Recompiled 11/16/01]

HISTORY OF 18.28.4 NMAC:

Pre-NMAC History: The material in this Part was derived from that previously filed with the State Records Center and Archives under: SHD Rule 82-5, New Mexico State Highway Commission Procedures for Administrative Action to be Taken by the Chief Highway Administrator in the Event of Bidding Irregularities, filed 7/30/82; SHD Rule 83-3, New Mexico State Highway Commission Procedure for Debarment of Contractors, filed 10/28/83; and SHTD Rule 92-2, New Mexico State Highway and Transportation Department Rule on Debarment of Contractors, filed 4/2/93.

History of Repealed Material: [RESERVED]