

EO63 DRAFT

PROPOSED AMENDMENTS TO AUTHORITY DISQUALIFICATION, DEBARMENT AND SUSPENSION RULES N.J.A.C. 19:30-2.1 et seq.

This document is a draft for EO63 comment purposes only. Please excuse all typos and citations errors. The draft amendments to the existing debarment and disqualification rules are proposed to update the rules consistent with current Authority policies and procedures, which were last updated in 2010. The draft new rules are proposed to codify the Authority's suspension procedure in accordance with Executive Order 34 (Byrne) and Executive Order 189 (Kean).

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER 30. ADMINISTRATIVE RULES

SUBCHAPTER 2. DISQUALIFICATION, [/] DEBARMENT AND [CONFLICT OF INTEREST] SUSPENSION

19:30-2.1 Definitions

[(a)] For the purposes of this subchapter, the following words and terms shall have the following meanings.

"Affiliates" means persons having an overt or covert relationship such that any one of them directly or indirectly controls or has the power to control another. **When determining whether a person is an "Affiliate," the Authority may consider ownership, day-to-day control, voting rights, influence, membership in the board of directors, and responsibility over decisions.**

"Authority [project] contracting" means any arrangement giving rise to an obligation **supply any thing to or to perform any service for the Authority, other than by virtue of employment with the Authority, including, but not limited to, performing construction work in** connection with the construction of a project **undertaken by the Authority or** [financed with, and] paid for in whole or in part with Authority [assistance] **funds, including but not limited to** the service of architects, engineers, and professional planners.

"Authority financial assistance" means any loan, loan guarantee, grant, incentive, tax exemption or other financial assistance that is approved, funded in whole or in part, authorized, administered, or provided by the Authority to any person.

"Debarment" means an exclusion from **Authority** contracting [with the Authority and exclusion from Authority project contracting] on the basis of a lack of responsibility evidenced by an offense or inadequacy of performance for a reasonable period of time commensurate with the seriousness of the offense.

"Disqualification" means an exclusion from receiving Authority financial assistance, [or] from being a tenant **of the Authority** [in an Authority-financed project or Authority-owned project], **from supplying any thing or service or being a tenant of a person in connection with Authority financial assistance and the Authority retains the right to approve or disapprove the nature or quality of the goods, service, or lease or the persons who may supply the goods, perform the service, or enter into the lease, or from otherwise receiving a benefit from a program administered by the Authority.**

"Ethics Liaison Officer" means the Ethics Liaison Officer of the New Jersey Economic Development Authority.

"Person" means any natural person, company, firm, association, corporation, non-profit organization, or other entity.

"Suspension" means an exclusion from contracting with the Authority for a temporary period of time, pending the completion of an investigation or legal proceedings.

19:30-2.2 Causes for disqualification/debarment [of persons]

(a) The **members of the** Authority may [decline to give financial assistance, or approval as a tenant in any Authority-financed project or Authority-owned project, to] **disqualify or debar** any person [, or may debar a person from Authority project contracting] for any of the following causes:

1. Commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, or subcontract thereunder, or in the performance or such contract or subcontract;
2. Violation of the Federal Organized Crime Control Act of 1970, **Pub. L. 91-452; the Foreign Corrupt Practices Act , 15 U.S.C. §§ 78dd-1, et seq;** or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, perjury, false swearing, receiving stolen property, obstruction of justice, or any other offense indicating a lack of business integrity or honesty, **including but not limited to fraud;**
3. Violation of the Federal or State antitrust statutes, or of the Federal Anti-Kickback Act[; (], 18 U.S.C. 874[)];
4. Violation of any law governing the conduct of elections of the Federal Government, State of New Jersey, or of its political subdivisions;
5. Violation of the "Law Against Discrimination," [(P.L. 1945, c.169,) N.J.S.A. 10:5-1 et seq., [as supplemented by P.L. 1975, c.127,)] or of the act banning discrimination in public works employment, [(N.J.S.A. 10:2-1 et seq.)], or of the act prohibiting discrimination by industries engaged in defense work in the employment of persons therein [(c.114, L.1942], N.J.S.A. 10:1-10 et seq.);

6. Violation of any laws governing hours of labor, minimum wage standards, prevailing wage standards, discrimination in wages, or child labor;
7. Violation of any law governing the conduct of occupations or professions of regulated industries;
8. Violation of any law which may bear upon a lack of responsibility or moral integrity;
9. Any other cause of such serious and compelling nature as may be determined by the Authority to warrant disqualification [for assistance] or debarment, [from contracting with the Authority or from Authority project contracting] **including but not limited to, intentional misrepresentation of material information or intentional failure to disclose material information, including such conduct as may be prescribed by the laws or contracts enumerated in this section even if such conduct has not been or may not be prosecuted as violations of such laws or contracts;**
10. Debarment by any department, agency, or instrumentality of the State or Federal government;
11. Violation of any of the following prohibitions on vendor activities representing a conflict of interest, or failure to report a solicitation as set forth in (a)11ii below:
 - i. No person shall pay, offer to pay, or agree to pay, either directly or indirectly, any fee, commission, compensation, gift, gratuity, or other thing of value of any kind to any Authority officer or employee or special Authority officer or employee, as defined by N.J.S.A. 52:13D-13b and -13e, with which such person transacts or offers or proposes to transact business, or to any member of the immediate family as defined by N.J.S.A. 52:13D-13i, of any such officer or employee, or partnership, firm, or corporation with which they are employed or associated, or in which such officer or employee has an interest within the meaning of N.J.S.A. 52:13D-13g.
 - ii. The solicitation of any fee, commission, compensation, gift, gratuity or other thing of value by any Authority officer or employee or special Authority officer or employee from any person shall be reported in writing by the person to the Attorney General and the Ethics Liaison Officer.
 - iii. No person may, directly or indirectly, undertake any private business, commercial or entrepreneurial relationship with, whether or not pursuant to employment, contract or other agreement, express or implied, or sell any interest in such person to, any Authority officer or employee or special Authority officer or employee having any duties or responsibilities in connection with the purchase, acquisition or sale of any property or services by or to the Authority, or with any person, firm or entity with which he or she is employed or associated or in which he or she has an interest within the meaning of N.J.S.A. 52:13D-13g. Any relationships subject to this subsection shall be reported in writing to the Authority Ethics Liaison Officer and the State Ethics Commission, which may grant a waiver of this restriction upon application of the Authority officer or employee or special Authority officer or employee upon a finding that the present or proposed relationship does not present the potential, actuality or appearance of a conflict of interest.

iv. No person shall influence, or attempt to influence or cause to be influenced, any Authority officer or employee or special Authority officer or employee in [his or her] **the individual's** official capacity in any manner which might tend to impair the objectivity or independence of judgment of the officer or employee.

v. No person shall cause or influence, or attempt to cause or influence, any Authority officer or employee or special Authority officer or employee to use, or attempt to use, [his or her] **the individual's** official position to secure unwarranted privileges or advantages for the person or any other person.

(b) The provisions in (a)11 above shall not be construed to prohibit an Authority officer or employee or special Authority officer or employee from receiving gifts from or contracting with persons under the same terms and conditions as are offered or made available to members of the general public subject to any guidelines the State Ethics Commission may promulgate, **including but not limited to the Uniform Code of Ethics as promulgated in accordance with the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq.**

19:30-2.3 Conditions affecting [the] disqualification/debarment [of a person(s)]

(a) The following conditions shall apply concerning disqualification/debarment:

1. The existence of any of the causes set forth in N.J.A.C. 19:30-2.2(a) shall not necessarily require that a person be disqualified/debarred. In each instance, the decision to disqualify/debar shall be made within the discretion of the Authority unless otherwise required by law, and shall be rendered in the best interests of the Authority.
2. All mitigating factors shall be considered in determining the seriousness of the offense or inadequacy of performance, and in deciding whether disqualification/debarment is warranted.
3. The existence of a cause set forth in N.J.A.C. 19:30-2.2(a)1 through 8 shall be established upon the rendering of a final judgment, [or] conviction, **or decision** including a guilty plea or a plea of nolo contendere by a court of competent jurisdiction or by an administrative agency empowered to render such judgment, **conviction, or decision**. In the event an appeal taken from such judgment, [or] conviction, **or decision** results in reversal thereof, the disqualification/debarment shall be removed upon the request of the disqualified/debarred person unless other cause for disqualification/debarment exists.
4. The existence of a cause set forth in N.J.A.C. 19:30-2.2(a)9 and 11 shall be established by evidence which the Authority determines to be clear and convincing in nature.
5. Debarment for the cause set forth in N.J.A.C. 19:30-2.2(a)10 shall be proper, provided that one of the causes set forth in N.J.A.C. 19:30-2.2(a)1 through 8 was the basis for debarment by the original debarring agency. Such debarment may be based entirely on the record of facts obtained by the original debarring agency, or upon a combination of such facts and additional facts.

19:30-2.4 Procedures; period of disqualification/debarment

(a) [When the Authority seeks to disqualify/debar a person or his affiliates,] **The decision to proceed with a disqualification/debarment of a person(s) or their affiliate(s) shall be made by the Authority in an open public meeting.**

(b) **Once the Authority has made a decision to proceed with disqualification/debarment,** the person(s) or [persons] **their affiliate(s)** shall be furnished with a written notice [stating that]:

1. [Disqualification/debarment is being considered] **Stating that the Authority has made the decision to proceed with disqualification/debarment of the person(s) or their affiliate(s);**

2. [The] **Setting forth the** reasons for the [proposed] disqualification/debarment; [and]

3. [An] **Indicating that such party will be afforded an** opportunity for a hearing [will be afforded to such person or persons] if the hearing is requested in writing and the request is received by the Authority within seven days from the date of personal delivery or the date of receipt of the mailing of such disqualification/debarment notice; **and**

4. Stating that if the party does not request such hearing, the disqualification/debarment shall go into effect immediately upon the expiration of the time specified in paragraph 3. above.

(c) All such hearings shall be conducted in accordance with the provisions of the Administrative Procedure Act, [() N.J.S.A. 5[4]2:14B-1 et seq.().] Where any Federal or State department, agency or instrumentality has already imposed debarment upon a party, the Authority may also impose a similar debarment without affording an opportunity for a hearing, provided the Authority furnishes notice of the proposed similar debarment to that party, and affords that party an opportunity to present information in [his] **the party's** behalf to explain why the proposed similar debarment should not be imposed in whole or in part.

(d) Disqualification/debarment shall be **for** a reasonable, definitely stated period of time which as a general rule shall not exceed five years. Disqualification/debarment for an additional period shall be permitted provided that notice thereof is furnished, and the party is afforded an opportunity to present information in [his] **the party's** behalf to explain why the additional period of disqualification/debarment should not be imposed.

(e) Except as otherwise provided by law, a disqualification/debarment may be removed or the period thereof may be reduced in the discretion of the Authority, upon the submission of a good faith application under oath, supported by documentary evidence, setting forth substantial and appropriate grounds for the granting of relief, such as newly discovered material evidence, reversal of a conviction, [or] judgment, **or decision**, actual change of ownership, management or control, or the elimination of the cause or causes for which the disqualification/debarment was imposed.

[(f) A disqualification/debarment may include all known affiliates of a person, provided that each decision to include an affiliate is made on a case-by-case basis after giving due regard to all relevant facts and circumstances.]

[(g) The offense or inadequacy of performance of an individual may be imputed to a person with whom he is affiliated, where such conduct was accomplished within the course of his official duty or was effected by him with the knowledge or approval of such person.]

19:30-2.5 Conditions for suspension

(a) The Authority may suspend a person for any of the causes in N.J.A.C. 19:30-2.2. Suspension shall be imposed only upon approval of the members of the Authority and the Attorney General, except as otherwise provided by law.

(b) The existence of any cause for suspension shall not require that a suspension be imposed, and a decision to suspend shall be made at the discretion of the members of the Authority and of the Attorney General and shall be rendered in the best interests of the Authority and the State.

(c) Suspension shall not be based upon unsupported accusation, but upon adequate evidence that cause exists or upon evidence adequate to create a reasonable suspicion that cause exists.

(d) In assessing whether adequate evidence exists, consideration shall be given to the amount of credible evidence which is available, to the existence or absence of corroboration as to important allegations, and to inferences which may properly be drawn from the existence or absence of affirmative facts.

(e) Reasonable suspicion of the existence of a cause described in N.J.A.C. 19:30-2.2(a)1 through 8 may be established by the rendering of a final judgment, conviction, or decision by a court or administrative agency of competent jurisdiction, by grand jury indictment, or by evidence that such violations of civil or criminal law did in fact occur.

(f) A suspension invoked by any department, agency, or instrumentality of the State or Federal government for any of the causes described in N.J.A.C. 19:30-2.2 may be the basis for the imposition of a concurrent suspension by the Authority, which may impose such suspension without the approval of the Attorney General.

(g) Reasonable suspicion of the existence of a cause may be established by findings or allegations in a final judgment, conviction, or decision by a court or administrative agency of competent jurisdiction, in a grand jury indictment, or other result whether or not the person is a defendant in the legal proceeding.

19:30-2.6 Procedures; period of suspension and scope of suspension

(a) The decision to suspend a person(s) or their affiliate(s) shall be made by the Authority in an open public meeting.

(b) The Authority may suspend a person or their affiliate(s), provided that within 10 days after the effective date of the suspension, the Authority provides such party with a written notice:

1. Stating that a suspension has been imposed and its effective date;

2. Setting forth the reasons for the suspension to the extent that the Attorney General determines that such reasons may be properly disclosed;

3. Stating that the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue; and

4. Indicating that, if within 60 days of the date of such notice, legal proceedings are not commenced in which such person is a defendant or the suspension is not removed, the person or their affiliate(s) will be given a statement of the reasons for the suspension and an opportunity for a hearing if they so request, or, if the Attorney General determines that such reasons may not be properly disclosed, a statement declining to give such reasons and setting forth the Authority's position regarding the continuation of the suspension. Such hearing shall be an informal hearing conducted by the Authority and not subject to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. The Chief Executive Officer may designate an employee of the Authority to serve as a hearing officer and make a recommendation to the members of the Authority. The Authority, or the hearing officer, may conduct the hearing based solely on written submissions or require an in-person hearing. Where a suspension by any department, agency, or instrumentality of the State or Federal government has been the basis for suspension by the Authority, the Authority shall note the fact as a reason for suspension.

(c) A suspension shall not continue beyond 18 months from its effective date unless civil or criminal action regarding the alleged violation has been initiated, or unless debarment/disqualification action has been commenced. Whenever prosecution or debarment/disqualification action has been initiated, the suspension may continue until the legal proceedings are completed.

[19:30-2.7 Chief Executive Officer to implement regulation

The Chief Executive Officer is authorized to take all necessary action to implement and administer the provisions of this subchapter.]

19:30-2.7. Affiliates

(a) A disqualification, debarment, or suspension may include all known affiliates of a person, provided that each decision to include an affiliate is made on a case-by-case basis after giving due regard to all relevant facts and circumstances.

(b) The offense, failure, or inadequacy of performance of a natural person may be imputed to another person with whom the natural person is affiliated, where such conduct by the natural person was accomplished within the course of the natural person's official duty or was effectuated by the natural person with the knowledge or approval of such other person.

19:30-2.[5]8 Notice to Attorney General and Treasurer

Insofar as practicable, prior notice of any proposed **disqualification**, debarment, or suspension shall be given to the Attorney General and the State Treasurer. The Authority shall [supply to] **promptly notify** the State Treasurer [a list] of all persons having been **disqualified**, debarred, or **suspended** in accordance with the procedures prescribed herein.

19:30-2.9 The extent of debarment, disqualification, or suspension

The exclusion of a person by virtue of debarment, disqualification, or suspension shall extend to all agreements, contracts, and subcontracts within the control or jurisdiction of the Authority. When it is determined by the Authority to be essential to the public interest and upon filing of a finding thereof with the Attorney General, an exception from total exclusion may be made with respect to a particular agreement, contract, or subcontract.

19:30-2.[6]10 Authority discretion

Nothing contained in this subchapter is intended to limit the discretion of the Authority [or the members] in determining eligibility for financial assistance or eligibility of tenants, or in refraining from contracting with any person. The purpose of this subchapter is to provide notice of certain offenses or failures which may result in disqualification, [for assistance or] debarment, or **suspension**. Project applicants, tenants, and contractors must meet any other applicable standards and policies.