

**1088.0.0 DHHS PARTICIPANT EXCLUSION RULE**

**1088.1.0 Purpose**

1088.1.1 DHHS shall conduct business only with responsible participants. Participants will be excluded from participation in DHHS programs not as penalty, but rather to protect public funds, the integrity of publicly funded programs, and public confidence in those programs.

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 DHHS. DHHS 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 1088.2.3.1 below. 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 1088.2.3.4 below.
- 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. DHHS - the Arkansas Department of Health and Human Services, including all divisions, offices, and units thereof.

- I. Director - the DHHS 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 and 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 DHHS to furnish commodities or services to, on behalf of, or as a grantee or sub-grantee or recipient of DHHS.
- 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 - an immediate family member or 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 DHHS 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

- 1088.2.3.1 DHHS 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

1088.2.3.2 DHHS shall exclude each participant upon learning that within the past year the participant was debarred, terminated, suspended, or otherwise excluded from being a participant 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.

1088.2.3.3 DHHS 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. Deliberate failure, without good cause, to perform in accordance with the requirements 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 DHHS required under any contract or grant
- D. Substitution of commodities or services without prior written approval of DHHS

- 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 DHHS, 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.

1088.2.3.4 Effect of Exclusion: Exclusion applies to all participants, related parties, and the heirs and assigns of the participants and related parties. Excluded participants may not receive appropriated funds except to the extent such funds are for proper charges approved before the date of exclusion and provided that any payments are limited to the amount by which the proper charges exceed the amount of any indebtedness to DHHS.

1088.2.3.5 DHHS shall maintain a list of excluded participants. Upon being listed as an excluded participant, the participant cannot continue as a party to any DHHS contract or grant, and is ineligible to submit proposals, bids, or applications to DHHS for the term of the exclusion.

1088.2.3.6 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 DHHS 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.

### **1088.3.0 Procedural Rules**

1088.3.1 DHHS 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 DHHS 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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