

TRANSMITTAL SHEET FOR
NOTICE OF INTENDED ACTION

Control 355 Department or Agency: Department of Finance
Rule No. 355-4-6
Rule Title: Authority to Resolve Protests; Debarment and Suspension; Authority to Resolve Contract Controversies

New Amend Repeal Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety? No

Is there a reasonable relationship between the state's police power and the protection of the public health, safety, or welfare? N/A

Is there another, less restrictive method of regulation available that could adequately protect the public? N/A

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? No

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the proposed rule? N/A

Are all facets of the rulemaking process designed solely for the purpose of, and so they have, as their primary effect, the protection of the public? No

Does the proposed action relate to or affect in any manner any litigation which the agency is a party to concerning the subject matter of the proposed rule? No

Does the proposed rule have an economic impact? No

If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of Section 41-22-23, Code of Alabama 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been proposed in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama 1975, and that it conforms to all applicable filing requirements of the Administrative Procedure Division of the Legislative Services Agency.

Signature of certifying officer *Jacob Hargrett*

Date 3/21/22

REC'D & FILED

MAR 21 2022

APA-2

Department of Finance

NOTICE OF INTENDED ACTION

AGENCY NAME: Alabama Department of Finance

RULE NO. & TITLE: 355-4-6 Authority to Resolve Protests; Debarment and Suspension;
Authority to Resolve Contract Controversies

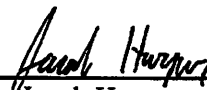
INTENDED ACTION: To propose a new rule.

SUBSTANCE OF PROPOSED ACTION: The new rule implements the new Alabama procurement law, enacted Act 2021-296. The rule sets the process for resolving protest, resolving contract controversies, and the debarring and suspending of contractors.

TIME, PLACE, MANNER OF PRESENTING VIEWS: A public hearing will be held only if requested by an interested party. A written request shall be submitted to the agency contact person listed below. Interested persons may present their view in writing to the contact person listed below.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE: The Department of Finance, Legal Division will accept comments or requests for a hearing no later than May 5, 2022 at 5 p.m.

CONTACT PERSON AT AGENCY: Jacob Harper, Department of Finance, Legal Division, 600 Dexter Avenue, Suite E-309, Montgomery, AL 36130, Phone 334-242-4520 or Jacob.Harper@finance.alabama.gov.



Jacob Harper

**State of Alabama
Department of Finance
Administrative Code**

**Chapter 355-4-6
Authority to Resolve Protests; Debarment and Suspension;
Authority to Resolve Contract Controversies**

Table of Contents

355-4-6-.01	Authority to Resolve Protested Solicitations and Awards.
355-4-6-.02	Authority to Debar or Suspend.
355-4-6-.03	Authority to Resolve Contract and Breach of Contract Controversies.
355-4-6-.01	<u>Authority to Resolve Protested Solicitations and Awards.</u>

(1) Definitions.

(a) Interested party means a bona fide actual or prospective bidder or offeror that may be aggrieved by the solicitation or award of a contract or by the protest.

(b) Protestor means any bona fide actual or prospective bidder or offeror who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.

(2) Filing of Protest.

(a) When Filed. Protests shall be made in writing to the Chief Procurement Officer within 14 days after the protestor knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Chief Procurement Officer. Protests filed after the 14-day period shall not be considered.

(b) Subject of Protest. Protestors may file a protest on any phase of solicitation or award including but not limited to specifications preparation, bid solicitation, or award. Protestors may also protest the disclosure of information marked confidential in the bid or offer if the

disclosure provided a party with an unfair competitive advantage.

(c) Form. To expedite handling of protests, the envelope should be labeled "Protest." The written protest shall include as a minimum the following:

1. the name and address of the protestor and the email address of the protestor's representative;
2. appropriate identification of the procurement, and, if a contract has been awarded, its number;
3. a statement of the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided; and
4. supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

(3) Requested Information; Time for Filing.

Additional information may be requested by any of the parties. Failure of any party to comply expeditiously with a request for information, as determined by the Chief Procurement Officer, may result in resolution of the protest without consideration of any information which is untimely filed pursuant to such request.

(4) Stay of Procurements During Protest.

When a protest has been timely filed and before an award has been made, the Chief Procurement Officer or the head of a Purchasing Agency shall make no award of the contract until the protest has been settled unless the Chief Procurement Officer makes a written determination, after consulting with the head of the Using Agency or the head of the Purchasing Agency, that the award of the contract without delay is necessary to protect substantial interests of the State.

(5) Decision by the Chief Procurement Officer.

A decision on a protest shall be made by the Chief Procurement Officer as expeditiously as possible after receiving all relevant, requested information.

(6) Effect of Judicial or Administrative Proceedings. If an action concerning the protest has commenced in court, the Chief Procurement Officer shall not act on the protest but refer the protest to the Attorney General. After consulting with the Attorney General, the Chief Procurement Officer may proceed with a solicitation or award of a contract in accordance with Code of Ala. § 41-4-161(f). This Section shall not apply where a court requests, expects, or otherwise expresses interest in the decision of the Chief Procurement Officer or the head of a Purchasing Agency.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-161

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-6-.02 **Authority to Debar or Suspend.**

(1) Application.

This Rule applies to all debarments or suspensions of persons from consideration for award of contracts imposed by the Chief Procurement Officer.

(2) Suspension.

(a) Initiation. After consultation with the affected Using Agency and, where practicable, the contractor or prospective contractor who is to be suspended, and upon written determination by the Chief Procurement Officer that probable cause exists for debarment as set forth in Code of Ala. 1975 § 41-4-162, a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall state that:

1. the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but not for a period in excess of three months;

2. bids or proposals will not be solicited from the suspended person, and, if they are received,

they will not be considered during the period of suspension; and

3. if a hearing has not been held, the suspended person may request a hearing in accordance with Rule 355-4-6-.02(4) (Request for Hearing).

(b) Effect of Decision. A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be ended by the Chief Procurement Officer but otherwise shall only be ended when the suspension has been in effect for three months or a debarment decision takes effect.

(3) Initiation of Debarment Action.

Written notice of the proposed debarment action shall be sent by certified mail or other method that allows a return receipt, with return receipt requested, to the contractor or prospective contractor. This notice shall:

(a) state that debarment is being considered;

(b) set forth the reasons for the action;

(c) state that if the contractor or prospective contractor so requests a hearing will be held, provided such request is received by the Chief Procurement Officer within ten days after the contractor or prospective contractor receives notice of the proposed action; and

(d) state that the contractor or prospective contractor may be represented by counsel.

Such notice shall also be sent to the affected Using Agency. The affected Using Agency is that agency that has used the supplies or services supplied by the contractor. If more than one affected Using Agency is involved the Chief Procurement Officer may designate one or more representatives to be consulted in respect to this action.

(4) Request for Hearing.

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the Chief Procurement Officer proposing the action within ten days of receipt of notice of the proposed

action under Subsection (3) (Initiation of Debarment Action). If no request is received within the ten day period, a final determination may be made as set forth in Subsection (8) (Determination of Hearing Officer; Final Decision) after consulting with the affected Using Agency.

(5) Notice of Hearing.

If a hearing is requested, the Chief Procurement Officer may appoint a hearing officer to conduct the hearing and recommend a final decision. The hearing officer shall send a written notice of the time and place of the hearing. Such notice shall be sent by certified mail or other method that allows a return receipt, with return receipt requested, and shall state the nature and purpose of the proceedings. Copies shall be sent to the Using Agency.

(6) Authority of Hearing Officer.

The hearing officer, in the conduct of the hearing, has the power, among others, to:

(a) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;

(b) require parties to state their positions with respect to the various issues in the proceeding;

(c) require parties to produce for examination those relevant witnesses and documents under their control;

(d) rule on motions, and other procedural items on matters pending before such officer;

(e) regulate the course of the hearing and conduct of participants therein;

(f) receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(g) fix time limits for submission of written documents in matters before such officer;

(h) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:

1. refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

2. excluding all testimony of an unresponsive or evasive witness; and

3. expelling any party or person from further participation in the hearing;

(i) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice; and

(j) administer oaths or affirmations.

(7) Hearings Procedures.

(a) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.

(b) A hearing may be recorded but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

(8) Determination of Hearing Officer; Final Decision. The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the Chief Procurement Officer. Copies shall also be sent to the contractor or prospective contractor and the affected Using Agency. The contractor or prospective contractor shall have five days to file comments upon the hearing officer's determination. The Chief Procurement Officer may request oral argument. After consultation with the affected Using Agency, the Chief

Procurement Officer shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment (not to exceed three years), the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of its rights to administrative review under Code of Ala. 1975, § 41-4-163 regarding Legal and Contractual Remedies.

If the Chief Procurement Officer acts as hearing officer under this section, he or she shall prepare a written determination of his or her findings. Such determination shall be sent to the contractor or prospective contractor and the affected Using Agency. The contractor or prospective contractor shall have five days to file comments upon the determination. After consultation with the affected Using Agency, the Chief Procurement Officer shall either affirm his or her original decision or issue a written amended decision. The Chief Procurement Officer's determination and amended decision, if any, shall recite the evidence relied upon.

(9) Effect of Debarment Decision.

A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until the Chief Procurement Office or Director of Finance orders otherwise or until the debarment period specified in the decision expires.

(10) Maintenance of List of Debarred and Suspended Persons. The Chief Procurement Officer shall maintain and update a list of debarred and suspended persons. The list shall be available to all agencies and political subdivisions of the State. Such list shall be available to the public in accordance with this Code and the Alabama Open Records Act.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-162

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-6-.03 **Authority to Resolve Contract and Breach of Contract Controversies.**

(1) General.

It is the State's policy to try to resolve all controversies by mutual agreement without litigation. In the event of any dispute between the State and a contractor, senior officials of both parties shall meet and engage in a good faith attempt to resolve the dispute. Should that effort fail, and the dispute involves the payment of money, a contractor's sole remedy is the filing of a claim with the Board of Adjustment of the State of Alabama. For all other disputes arising under the terms of a contract which are not resolved by negotiation, the dispute will be resolved by the Chief Procurement Officer or head of a Purchasing Agency and his or her decision on the dispute will be final. The procedures to be followed for the resolution of disputes shall be prescribed by the Chief Procurement Officer and will depend on the complexity of the matter.

(2) Chief Procurement Officer or Head of a Purchasing Agency's Decision.

(a) Before issuing a final decision, the Chief Procurement Officer or head of a Purchasing Agency shall:

1. review the facts pertinent to the controversy; and
2. secure any necessary assistance from legal, fiscal, and other advisors.

(b) Final Decision. The Chief Procurement Officer or head of a Purchasing Agency shall immediately furnish a copy of the decision to the contractor by a method that provides evidence of receipt, and include in the decision:

1. a description of the controversy;
2. a reference to pertinent contract provisions;
3. a statement of the factual areas of agreement or disagreement; and

4. a statement of the Chief Procurement Officer or head of a Purchasing Agency's decision, with supporting rationale.

(c) Failure to Timely Issue Final Decision. If the Chief Procurement Officer or head of a Purchasing Agency does not issue a written decision within 120 days, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

(d) Payments of Amounts Found Due. The amount determined payable pursuant to the decision, less any portion already paid, should be paid without delay. Such payment shall be without prejudice to the rights of either party.

(3) Controversies Involving State Claims Against the Contractor.

All controversies involving claims asserted by the State against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Chief Procurement Officer or the head of a Purchasing Agency, as applicable.

(4) Disputes Clause.

All contracts entered into under the State Procurement Code shall include a statement that disputes shall be resolved by utilizing the dispute resolution procedures set forth in this Rule.