

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
ICE Policy System

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DIRECTIVE TITLE: DEBARMENT OF FEDERAL CONTRACTORS FOR UNLAWFUL EMPLOYMENT OF UNDOCUMENTED ALIENS

1. **PURPOSE.** The purpose of this policy directive is to provide Immigration and Customs Enforcement (ICE) offices with policy guidance on the procedures for referring federal contractors that have violated provisions relating to the unlawful employment of undocumented aliens for possible debarment. Contractors or subcontractors subject to a debarment order are prohibited from soliciting or receiving federally-funded contracts for a period of one year; debarment may be extended for additional periods of one year, if continuing violations are found.
 - 1.1. **SCOPE.** This Directive provides guidance for all ICE employees and applies specifically to the ICE Office of Investigations (OI), the Office of the Principal Legal Advisor (OPLA), the Office of Acquisitions (OAQ) and all ICE program offices involved in any debarment proceeding.
2. **AUTHORITIES/REFERENCES.**
 - 2.1. 8 U.S.C. §§ 1324(a) and 1324(b), Unlawful Employment of Aliens and Unfair Immigration-Related Employment Practices (2007).
 - 2.2. 22 C.F.R. 18 Employment Eligibility Verification.
 - 2.3. 48 CFR Part 9, subpart 9.4, Debarment, Suspension and Ineligibility
 - 2.4. Exec. Order No. 12989 of February 13, 1996, as further amended by Exec. Order No. 13465 of June 6, 2008, Economy and Efficiency in Government Procurement Through Compliance with Certain Immigration and Nationality Act Provisions and Use of an Electronic Employment Eligibility Verification System.
 - 2.5. Exec. Order No. 13286 Amendments of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security (February 28, 2003).

- 2.6. Homeland Security Acquisition Manual, Subchapter 3009.4, Debarment, Suspension, and Ineligibility (2003).
3. **SUPERSEDED/CANCELLED POLICY/SUMMARY OF CHANGES.** There is no existing ICE policy covering debarment procedures.
4. **BACKGROUND.** Executive Order 12989, amended by Exec. Order 13286 and further amended by Executive Order 13465, provides for the debarment of federal contractors or subcontractors who have not complied with certain alien employment provisions of the Immigration and Nationality Act. This order is designed to promote economy and efficiency in Federal Government procurement. Stability and dependability are important elements of economy and efficiency. A contractor whose workforce is less stable will be less likely to produce goods and services economically and efficiently than a contractor whose workforce is more stable. It is the policy of the executive branch to enforce fully the immigration laws of the United States, including the detection and removal of illegal aliens and the imposition of legal sanctions against employers that hire illegal aliens. Because of the worksite enforcement policy of the United States and the underlying obligation of the executive branch to enforce the immigration laws, contractors that employ illegal aliens cannot rely on the continuing availability and service of those illegal workers, and such contractors inevitably will have a less stable and less dependable workforce than contractors that do not employ such persons. Where a contractor assigns illegal aliens to work on Federal contracts, the enforcement of Federal immigration law imposes a direct risk of disruption, delay, and increased expense in Federal contracting. Such contractors are less dependable procurement sources, even if they do not knowingly hire or knowingly continue to employ unauthorized workers.

Contractors that adopt rigorous employment eligibility confirmation processes are much less likely to face immigration enforcement actions, because they are less likely to employ unauthorized workers, and they are therefore generally more efficient and dependable procurement sources than contractors that do not employ the best available measures to verify the work eligibility of their workforce. It is the policy of the executive branch to use an electronic employment eligibility verification system because, among other reasons, it provides the best available means to confirm the identity and work eligibility of all employees that join the Federal workforce. Private employers that choose to contract with the Federal Government should meet the same standard.

5. **DEFINITIONS.**

- 5.1. **Contractor.** Any individual or other legal entity that: (1) directly or indirectly (for example, through an affiliate) submits offers for, or is awarded, or reasonably may be expected to submit offers for or be awarded a Government contract including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or (2) conducts business, or reasonably may be expected to conduct business, with the Government as an

agent or representative of another contractor.

- 5.2. Debarring Official.** The Head of Contracting Activity (HCA) or the official designated by the HCA to manage the Office of Suspension and Debarment and the debarment process with delegated authority to debar a contractor for failure to comply with INA employment provisions.
- 5.3. Excluded Parties List System (EPLS).** EPLS is an electronic, web-based system that identifies those parties excluded from receiving federal contracts, certain subcontracts, and certain types of federal financial and non-financial assistance and benefits. The EPLS keeps the user community aware of administrative and statutory exclusions across the entire government, suspected terrorists, and individuals barred from entering the United States. Users are able to search, view, and download both current and archived exclusions. The system is managed by the General Services Administration and is available at <http://www.epls.gov/>.
- 5.4. Federal Acquisition Regulations (FAR).** The regulations codified at 48 C.F.R. that provide uniform policies of the Federal government for purchasing supplies and services. Policy on debarment, suspension and ineligibility is found in Part 9.4 of the FAR.
- 5.5. Head of Contracting Activity (HCA).** Head of the Contracting Activity for ICE is the official who has overall responsibility for managing the contracting activity, the Director of the Office of Acquisition Management. This person also has debarring authority and may re-delegate that authority to the Debarring Official or retain it at his or her discretion.
- 5.6. Homeland Security Acquisition Manual (HSAM).** The Department of Homeland Security policy implementing the FAR.
- 5.7. Subcontractor.** Subcontractor means any supplier, distributor, vendor or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.
- 6. POLICY.**
- 6.1.** It is the policy of the executive branch to contract only with providers that do not knowingly employ unauthorized alien workers and that have agreed to utilize an electronic employment verification system designated by the Secretary of Homeland Security to confirm the employment eligibility of their workforce. To effectuate that policy ICE shall initiate debarment proceedings for federal contractors or subcontractors that have failed to comply with the provisions of the INA prohibiting the unlawful employment of aliens. All such cases will be referred to the Debarring Official, as there is no discretion in this regard, in accordance with the procedures outlined in this directive.

- 6.2. A referral for debarment review shall be prepared in accordance with the procedures set forth in Section 8 of this Directive and any additional guidance provided by the Worksite Enforcement Unit (WSE) Unit Chief. A referral for debarment review shall document uniformly the unique factors in each individual case in accordance with the requirements of this Directive. Such a referral may include recommendations and supporting analysis appropriate for consideration by the Debarring Official based on the facts of the individual case.
- 6.3. The Debarring Official may debar the contractor or an organizational unit thereof based on the referral provided by the WSE Unit Chief, reflecting noncompliance with the INA employment provisions.
- 6.4. No ICE personnel shall enter into any settlement agreement pertaining to a contractor or an organizational unit thereof which removes the ability to debar such a contractor or an organizational unit without first coordinating with the Debarring Official.
- 6.5. Conviction of federal or state criminal charges, as well as administrative misconduct unrelated to the INA employment provisions, may form the bases of debarment requests in accordance with the Federal Acquisitions Regulation (FAR) § 9.406-2.

7. RESPONSIBILITIES.

- 7.1. **Worksite Enforcement Unit Chief** is responsible for initiating the debarment process within ICE; tracking, and supervising the progress of debarment referrals. WSE Unit Chief is also responsible for assessment of employer compliance with INA employment provision following debarment referrals and at the conclusion of any debarment imposed.
- 7.2. **ICE SAC Offices** are responsible for conducting investigations of employers and federal contractors suspected of employing undocumented aliens; and for preparing all memoranda, reports, and forms and appropriate documentation of determinations made by the SAC with regard to their referral for possible debarment in the circumstances provided in section 8.1. In addition, SAC Offices shall conduct follow-up investigations as necessary.
- 7.3. **Head of Contracting Activity (HCA)** has authority to debar delegated from the Secretary of the Department of Homeland Security and may retain this authority or re-delegate that authority to an individual known as the Debarring Official at his or her discretion.
- 7.4. **Office of Acquisition Management (OAQ)** is responsible for the debarment process and for examining the requests for determination to determine if acquisition issues need to be addressed and recommending to ICE management or

particular ICE components any revisions to the program that would improve related enforcement activities and/or the debarment process.

- 7.5. Office of Suspension and Debarment (OSD)**, as part of the OAQ, is responsible for reviewing investigations, making decisions whether to debar a particular contractor, and ensuring that all appropriate notifications are made. The Office is also responsible for tracking, monitoring and overseeing the progress of debarment referrals and for maintaining statistics on debarment referrals and determinations.
- 7.6. Office of the Principal Legal Advisor (OPLA)** is responsible for reviewing, and providing legal advice with regard to debarment documents and the related results of worksite enforcement investigations to ensure legal sufficiency. In addition, OPLA must advise ICE offices and employees involved in the debarment process of changes and modifications to the program that are required in order to comply with new or related legal requirements.
- 7.7. The Debarring Official** is responsible for managing the debarment process and the activities of the OSD. In addition, the Debarring Official shall determine the necessary and appropriate reporting requirements for all components involved in the debarring process.

8. PROCEDURES.

8.1. Determination that an Employer has not Complied With INA Employment Provisions

- 1) An OI SAC shall submit to the WSE Unit Chief a written notification that an employer has not complied with the employment provisions of the Immigration and Nationality Act (INA), specifically §§ 274A(a)(1)(A) or (a)(2), in the following circumstances:
 - a) Issuance of a Final Order (I-764), not subject to appeal, by the local Office of Chief Counsel (OCC) and SAC indicating that the employer has violated §§ 274A(a)(1)(A) or (a)(2);
 - b) Receipt of a final order issued by the Office of the Chief Administrative Hearing Officer (OCAHO), not subject to appeal, indicating that the employer has violated sections §§ 274A(a)(1)(A) or (a)(2); or
 - c) Where the employer has been convicted under:
 - i) INA § 274A(a)(1)(A), 8 U.S.C. § 1324a (a)(1)(A);
 - ii) INA § 274A(a)(2), 8 U.S.C. § 1324a (a)(2);
 - iii) INA § 274A(f)(1), 8 U.S.C. § 1324a (f)(1); or
 - iv) INA § 274(a)(3), 8 U.S.C. § 1324 (a)(3).

- 2) The written notification shall be in the form of a memorandum that provides the facts of the individual case and includes recommendations and supporting documents appropriate for consideration by the Debarring Official.
- 3) The notification shall reflect that the employer was found not to be in compliance with the relevant employment provisions of the INA; provide the factual basis and reasons for the determination; the location of the contractor's business; and any other information required by the WSE Unit Chief. The memorandum shall be signed by the OI SAC and forwarded expeditiously to the WSE Unit Chief.
- 4) If a Notice of Intent to Fine is resolved by settlement prior to a hearing required under INA 274A(e), 8 U.S.C. § 1324a(e), ICE may rely on any contractor admissions as to noncompliance with the employment provisions of the INA contained in the Negotiated Final Order or other settlement document as the bases for the proposed debarment.
- 5) The **WSE Unit Chief** shall review all information provided in the OI SAC's memorandum or notification and sign the memorandum or notification if he or she concurs. Once this review is complete the WSE Unit Chief will submit the memorandum or notification to OPLA for a legal sufficiency review.
- 6) The WSE Unit Chief will forward the notification and referral packet, including the legal sufficiency review, to the Debarring Official for disposition as appropriate.

8.2. The Debarment Process

- 1) The **Debarring Official** shall determine whether debarment is in the government's best interest. The existence of a cause for debarment does not require that the contractor be debarred. The Debarring Official shall consider the seriousness of the contractor's acts or omissions and any remedial or mitigating factors such as those contained at FAR 9.406-1(a). The Debarring Official shall consider the facts submitted in accordance with the applicable requirements of FAR 9.406-3 and manage the decision making process in accordance with the procedures outlined in the FAR. Should the Debarring Official determine that another agency should take the lead on the proposed debarment action, the Debarring Official will forward the proposed debarment documentation to that agency for its action. Should a contractor inquire on the status of a debarment process, the Debarring Official shall provide the contractor with a written response to that inquiry.
- 2) The Debarring Official shall make a decision, which includes providing a Notification of Final Decision to officials, in accordance with FAR procedures. The Debarring Official shall ensure the decision to debar is

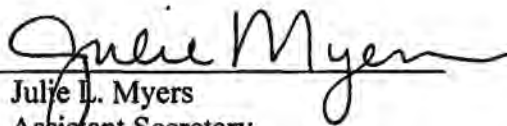
entered into the EPLS. The Debarring Official shall report debarments in the EPLS using the assigned reciprocal cause and treatment codes. The scope of the debarment generally should be limited to those organizational units of the contractor that are not in compliance with the INA employment provisions.

- 3) If debarment becomes an item discussed as part of a plea agreement in either an administrative or a criminal case, the OI SAC shall notify the WSE Unit Chief who, in turn, will notify the Debarring Official. The Debarring Official shall be consulted prior to any decision to remove debarment from consideration. In such an instance, the Debarring Official shall ensure that the settlement includes appropriate language, for example, that the employer agrees to take appropriate steps to resolve the underlying compliance issues and that ICE shall reinstitute debarment if the agreement is violated. The Debarring Official must be provided an opportunity to review and comment in any settlement pertaining to a contractor or an organizational unit thereof which removes the ability to debar such a contractor or an organizational unit thereof.
- 4) Ninety days before a debarment is to expire, the WSE Unit Chief shall request a review of the debarred entity by the relevant SAC Office to determine whether the debarment should be renewed or allowed to lapse. If the SAC review finds that the contractor's violations are still significant or egregious, or if there is no sign of compliance, the SAC shall immediately initiate an additional or new debarment referral in addition to investigating whether additional criminal and/or civil charges are appropriate. A debarment may be extended for additional periods of one year, based on a continuing violation.

9. **ATTACHMENTS.** DHS or ICE Referral for Debarment Review Form.

10. **NO PRIVATE RIGHT STATEMENT.** This Directive is an internal policy statement of ICE. It is not intended to, and does not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States; its departments, agencies, or other entities; its officers or employees; or any other person.

Approved



Julie L. Myers
Assistant Secretary

U.S. Immigration and Customs Enforcement