CHAPTER 858. PROCUREMENT AND CONTRACT MANAGEMENT
REQUIREMENTS FOR PURCHASE OF GOODS AND SERVICES FOR
VOCATIONAL REHABILITATION SERVICES

PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS
REGISTER. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS
SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE TEXAS REGISTER.

ON FEBRUARY 4, 2020, THE TEXAS WORKFORCE COMMISSION PROPOSED THE
RULES BELOW WITH PREAMBLE TO BE SUBMITTED TO THE TEXAS REGISTER.

Estimated Publication Date of the Proposal in the Texas Register: February 21, 2020
Estimated End of Comment Period: March 23, 2020

The Texas Workforce Commission (TWC) proposes the following new sections to Chapter 858,
relating to Vocational Rehabilitation Services Contract Management Requirement:

§858.1 and §858.2

TWC proposes amendments to the following sections of Chapter 858, relating to Vocational
Rehabilitation Services Contract Management Requirement:

§§858.3, 858.4, and §858.7 - 858.16

TWC proposes the repeal of the following sections of Chapter 858, relating to Vocational
Rehabilitation Services Contract Management Requirement:

§§858.1, 858.2, 858.5, and 858.6

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

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PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 858 rule change is to align the chapter with TWC’s
operation of the Vocational Rehabilitation (VR) services program. Texas Labor Code §351.002
transferred the administration of VR services from the Texas Department of Assistive and
Rehabilitative Services (DARS) to TWC, effective September 1, 2016.

To ensure continuity and avoid any impact on customers, the administrative rules shared by all
DARS programs were duplicated into Chapters 850, 857, and 858 of TWC’s rules upon transfer of
the programs. Because the rules established DARS’ administrative framework and served all DARS
programs, they overlap certain existing TWC administrative rules and contain references to programs
that were not transferred to TWC.
To streamline TWC rules and accurately reflect TWC’s program administration, several amendments are needed to integrate and align overlapping sections and update outdated terms and procedures to align with TWC’s current program operation. This will help to ensure the health and safety of VR customers, as well as help to ensure that Texans receive the best value for the expenditure of available public funds for VR services.

In keeping with the goal of protecting the health and safety of VR customers and ensuring that Texas receives the best value for the expenditure of available public funds for VR services, TWC understands that the VR services program is a recognized health and human services entity and the express authority for procuring goods and services through a noncompetitive process, referred to as an enrollment contract, transferred to TWC with the VR services function. The definition of an enrollment contract is found in Texas Administrative Code (TAC) 1 TAC §391.103(8).

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

TWC proposes the following amendments to Chapter 858:

§858.1. Purpose and Applicability
Section 858.1 is repealed because the language on purpose and applicability is unnecessary and inconsistent with TWC's current rulemaking framework.

§858.1. Definitions
New §858.1 updates and retains the applicable definitions from §858.2, which is currently proposed for repeal, to reflect TWC's current operation of the VR program.

§858.2. Definitions
Section 858.2 is repealed to accommodate reorganization of the subchapter.

§858.2. Noncompetitive Open Enrollment Solicitation
New §858.2 adds new language from the proposed repeal of Chapter 857, that authorizes the use of open enrollment solicitations.

§858.3. General Requirements for Contracting
Section 858.3 is amended to remove, update, combine, or add language and provisions accounted for in the standard terms and conditions of VR services contracts, the VR Standards for Providers on TWC's website, and TWC's contracting policies and procedures.

§858.4. Complaints
Section 858.4 is amended to add language specifying that TWC is the administrative agency for directing complaints and requiring contractors to verify that the information they provide to customers for directing complaints is current and accurate.
§858.5. Record Requirements
Section 858.5 is repealed; retention and production of contractor records is required and covered by TWC’s Financial Manual for Grants & Contracts Appendix K: Record Retention & Access Requirements.

§858.6. Access to Contractor Facilities and Records
Section 858.6 is repealed. Access to contractor records is required and covered by the Financial Manual for Grants & Contracts Appendix K: Record Retention & Access Requirements.

§858.7. Contract Monitoring
Section 858.7 is amended to update terminology and to highlight contractor responsibility regarding the monitoring and review of contracts under this chapter.

§858.8. Corrective Action Plan
Section 858.8 is amended to update terminology and to highlight contractor responsibility regarding a corrective action plan. Language has been added to require that the corrective action plan be acceptable to TWC and that contractors remedy all deficiencies or violations in a timely manner.

§858.9. Adverse Actions
Section 858.9 is amended to update terminology and to add language that includes substantiated claims of fraud against a contractor and failure to submit a corrective action plan as reasons for which TWC may impose adverse actions against a contractor. Language has been modified for clarity and consistency and to reflect TWC’s current operation of the VR services program.

§858.10. Debarment and Suspension of Contractors
Section 858.10 is amended to update terminology and clarify the general length of debarment. Subsection (d) has been modified to clarify when TWC may suspend contracts.

§858.11. Causes and Conditions of Debarment
Section 858.11 is amended to remove language stating that paragraph (3)(B) applies only to actions occurring after the effective date of these rules. Additionally, language has been updated for clarity and consistency with existing contract language and to reflect TWC’s current operation of the VR services program.

§858.12. Causes and Results of Suspension
Section 858.12(b) is amended to update terminology and to clarify the possible results of suspension. Additionally, language has been updated to reflect TWC’s current operation of the VR services program.

§858.13. Evidence for Debarment
Section 858.13 is amended to update terminology to reflect TWC's current operation of the VR services program.
§858.14. Notice for Debarment or Suspension
Section 858.14 is amended to update terminology to reflect TWC's current operation of the VR services program.

§858.15. Appeals
Section 858.15(b) is amended to update terminology and to clarify that a notice of adverse action rendered by TWC is final for all purposes unless the contractor files an appeal not later than 28 calendar days after the date the initial adverse action is sent to the contractor. Additionally, language has been added giving TWC the discretion to grant a contractor's request for an extension of the period in which to file a notice of appeal of an adverse action upon showing of good cause. The term "appellant" has been replaced with the term "contractor."

§858.16. Request for Reconsideration
Section 858.16 is amended to update terminology and be consistent with changes in §858.15. The term "appellant" has been replaced with the term "contractor."

PART III. IMPACT STATEMENTS
Chris Nelson, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to individuals required to comply with the rules.

There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural communities as a result of enforcing or administering the rules.

Based on the analyses required by Texas Government Code §2001.024, TWC has determined that the requirement to repeal or amend a rule, as set forth by Texas Government Code §2001.0045, does not apply to this rulemaking. Additionally, Texas Labor Code §352.101 requires TWC's three-member Commission (Commission) to adopt rules necessary to integrate the VR programs, including recommending adopting rules to implement the integration. Therefore, the exception identified in §2001.0045(c)(9) also applies.

Takings Impact Assessment
Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the US Constitution or the Texas Constitution, §17 or §19, Article I; or an action that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect with the market value of the property as if the governmental action is in effect. The Commission completed a Takings Impact Analysis for the proposed rulemaking action under Texas Government Code §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to align Chapter 858 with TWC’s operation of the VR services program.

The proposed rulemaking action will not create any additional burden on private real property. The proposed rulemaking action will not affect private real property in a manner that would require compensation to private real property owners under the US Constitution or the Texas Constitution. The proposed rulemaking also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Government Growth Impact Statement
TWC has determined that during the first five years the proposed amendments will be in effect:
--the proposed amendments will not create or eliminate a government program;
--implementation of the proposed amendments will not require the creation or elimination of employee positions;
--implementation of the proposed amendments will not require an increase or decrease in future legislative appropriations to TWC;
--the proposed amendments will not require an increase or decrease in fees paid to TWC;
--the proposed amendments will not create a new regulation;
--the proposed amendments will not expand, limit, or eliminate an existing regulation;
--the proposed amendments will not change the number of individuals subject to the rules; and
--the proposed amendments will not positively or adversely affect the state’s economy.

Economic Impact Statement and Regulatory Flexibility Analysis
TWC has determined that the proposed rules will not have an adverse economic impact on small businesses or rural communities, as these proposed rules place no requirements on small businesses or rural communities.

Mariana Vega, Director, Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Cheryl Fuller, Director, Vocational Rehabilitation Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to update outdated terms and procedures to align with TWC's current VR
services program operation; to ensure the health and safety of VR customers; and to help ensure that Texans receive the best value for the expenditure of available public funds for VR services.

TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, TWC sought the involvement of the 28 Local Workforce Development Boards (Boards) in Texas. TWC provided the concept paper regarding these rule amendments to the Boards for consideration and review on June 14, 2018. TWC also conducted a conference call with Board executive directors and Board staff on June 22, 2018, to discuss the concept paper. During the rulemaking process, TWC considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Program Policy, Attn: Workforce Editing, 101 East 15th Street, Room 459T, Austin, Texas 78778; faxed to (512) 475-3577; or emailed to TWCPolicyComments@twc.state.tx.us. Comments must be received or postmarked no later than 30 days from the date this proposal is published in the Texas Register.

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301, 302, 351, and 352.
§858.1. Purpose and Applicability.

The purpose of this subchapter is to establish general contracting rules for consumer goods and services contracts with the Texas Department of Assistive and Rehabilitative Services (DARS).

§858.2. Definitions.

The following words and terms, when used in this subchapter have the following meanings, unless the context clearly indicates otherwise.

(1) Amendment—A formal revision or addition to a contract.

(2) Bid—An offer to contract with the state submitted in response to a bid invitation.

(3) Commissioner—The Chief Executive Officer of the Texas Department of Assistive and Rehabilitative Services.

(4) Contract—A promise, or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. It is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The term also encompasses the written document that describes the terms of the agreement. For state contracting purposes, it generally describes the terms of a purchase of goods or services from a vendor or service contractor; however, the term also encompasses grant arrangements.

(5) Contract Assignment—The transfer of contractual rights held by one party to another party.

(6) Contractor—An entity or person holding a written agreement with a purchasing entity to provide goods and services; or a recipient or sub-recipient holding a written agreement with a grantor or sub-recipient to carry out all or part of a program.
(7) Contract records--All financial and programmatic records, supporting
documents, papers, statistical data, or any other written or electronic materials
that are pertinent to each specific contract instrument.

(8) Corrective action plan--Specific steps to be taken by a contractor to resolve
identified deficiencies and/or to address concerns that the contracting agency
has regarding the contractor’s compliance with contract terms or other
applicable laws, rules, or regulations. The corrective action plan may also
focus on improving contractor performance (as it relates to service delivery,
reporting, and/or financial stability).

(9) DARS--The Texas Department of Assistive and Rehabilitative Services.

(10) DARS policies--For the purposes of this chapter only, the standards that DARS
provides to contractors that stipulate performance expectations for contractors
to provide goods or services under the contract.

(11) Effective date--The date of complete execution of the contract or the date upon
which the parties agree the contract takes effect.

(12) Entity--An association, organization, governmental or business body, or
existing body or class of persons that is chartered or organized for representing
the interest of persons.

(13) Grant--An award of financial assistance, including cooperative agreements, in
the form of money, property in lieu of money, or other financial assistance paid
or furnished by the state or federal government to an eligible grantee to carry
out a program in accordance with rules, regulations, and guidance provided by
the grantor agency.

(14) Memorandum of Understanding (MOU)--A written document evidencing the
understanding or agreement of two or more parties regarding the subject matter
of the agreement. Because the underlying agreement may or may not be legally
binding and enforceable in and of itself, a memorandum of understanding may
or may not constitute a contract. It is generally considered a less formal way of
evidencing an agreement, and is ordinarily used in state government only
between or among state agencies or other government entities. The term is
used interchangeably with "memorandum of agreement."

(15) Program--DARS activities designed to deliver services or benefits provided by
statute.

(16) Subcontract--A written agreement between the original contractor and a third
party to provide all or a specified part of the goods, services, work, and/or
materials required in the original contract.
§858.1 Definitions.

In addition to the definitions contained in §800.2 of this title, the following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Amendment--A formal revision or addition to a contract.

(2) Bid--An offer to contract with the state submitted in response to a bid invitation.

(3) Contract--A written agreement between the Agency and a contractor by the terms of which the contractor agrees to provide goods or services, by sale or lease to or for the Agency for Vocational Rehabilitation (VR) customers.

(4) Contract records--All financial and programmatic records, supporting documents, papers, statistical data, or any other written or electronic materials that are pertinent to each specific contract instrument.

(5) Contractor--An individual holding a written contract.

(6) Corrective action plan--Specific steps to be taken by a contractor to resolve identified deficiencies and/or to address concerns that the contracting agency has regarding the contractor's compliance with contract terms or other applicable laws, rules, or regulations. The corrective action plan may also focus on improving contractor performance (as it relates to service delivery, reporting, and/or financial stability).

(7) Debarment--The termination of the ability to continue an existing contract, to receive a new contract, to participate as a contractor or subcontractor, to provide goods or services to Agency Vocational Rehabilitation (VR) customers either directly or indirectly while working for an Agency contractor, or to make a bid, offer, application, or proposal for an Agency contract.

(8) Effective date--The date of complete execution of the contract or the date upon which the parties agree that the contract takes effect.

(9) Individual--Any individual, corporation, partnership, association, unit of government, or legal entity, however organized, or any portion thereof.

(10) Program--Agency activities that are designed to deliver services or benefits provided by statute.

(11) Respondent--An individual against whom the Agency has initiated a debarment or suspension action.
(12) Subcontract--A written agreement between the original contractor and a third party to provide all or a specified part of the goods, services, work, and/or materials required in the original contract.

(13) Suspension--The temporary discontinuance of a contractor's authorization to conduct business with the Agency.

§858.2. Noncompetitive Open Enrollment Solicitation.

General. The Agency may acquire goods or services through a noncompetitive open enrollment solicitation and enter into enrollment contracts with qualified contractors.

(1) An open enrollment solicitation must be conducted in an open and fair manner that reasonably provides interested, qualified contractors with an equal opportunity to obtain a contract or do business with the Agency.

(2) The Agency may consider past performance when determining whether to award a contract to an applicant.

§858.3. General Requirements for Contracting.

(a) To contract with DARS the Agency for VR goods and services, the contractor must:

(1) meet eligibility requirements for contracting;

(2) if applicable, have and maintain the appropriate license(s);

(3) submit all documents and information required by DARS;

(4) comply with all applicable DARS and Texas Health and Human Services Commission rules and policies and terms of the contract with DARS;

(5) comply with all local, state, and federal regulations that apply to the contract;

(6) be authorized by law or the Secretary of State to conduct business in the state of Texas;

(7) certify in writing that the contractor's taxes due to the state of Texas are current;

(1)(8) ensure that:

(A) staff members providing services are competent, professionally ethical, and qualified for positions held. Qualifications of staff members must meet all qualification requirements established by state Agency policy and regulations. The contractor must ensure that
all staff members meet minimum qualifications; at application and throughout the term of the contract;

staff credentials supporting those qualifications must be on file at the time of hire and maintained throughout the term of the contract; and

staff credentials must be made available to DARS Agency staff members upon request;

provide for such fiscal control and fund accounting as may be necessary to ensure proper disbursement and accounting of funds provided by DARS Agency and in accordance with DARS Agency policies; and maintain financial and other contract records according to recognized fiscal and accounting practices such as the Generally Accepted Accounting Principles (GAAP);

maintain accurate and complete records and prepare and distribute reports according to or before the terms effective date of the contract that the contractor has and will maintain adequate operating funds for conducting business;

ensure that any contractor facility in which services are provided is:

such that the safety and health of the staff and consumers is protected; and

accessible to individuals receiving services and complies with the requirements of the Architectural Barriers Act of 1968, the Uniform Federal Accessibility Standards, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act;

have adequate operating funds available for conducting business on the effective date of the contract;

have adequate staff to provide services on the effective date of the contract;

notify DARS and HHSC the Agency in writing of changes to contact information according to the requirements of the contract. Unless otherwise specified in the contract, the contractor must notify DARS and HHSC the Agency:

within 10 calendar days after any address change, including of the location of the contractor's office, physical address, or mailing address;
(B) immediately of any change in administrator or director; and

(C) within seven working days of any change in the contact telephone number designated in the contract; and

(6)(15) report any suspected violation of rules or laws to the appropriate investigative authority. This includes reporting abuse, neglect, and exploitation issues to the Texas Department of Family and Protective Services (DFPS) or to the appropriate Texas Department of Aging and Disability Services (DADS) licensing staff. To the Agency any abuse, neglect, or exploitation.

(b) To provide services, a contractor must maintain adequate:

(1) funding for provision of services; and

(2) staff for the provision of services.

(b)(c) A contractor or potential contractor may not offer, give, or agree to give a DARS an Agency employee anything of value.

(c)(d) A contractor or potential contractor applicant may not engage in any activity that presents a real or apparent conflict of interest and must provide written attestation that no real or apparent conflicts of interest exist before execution of a contract with the Agency.

(d)(e) Pursuant to Texas Government Code §572.054(b), certain Agency employees: A former DARS employee may not represent or receive compensation from any person individual concerning any contractual matter in which the former employee participated during his or her employment with the state.

(e)(f) The Agency may choose not to enter into a contract:

(1) when, in DARS's the Agency's opinion, the contractor, potential contractor, or a controlling party has a documented, unsatisfactory history in contracting with DARS the Agency or with another health and human services state agency;

(2) if the contractor or potential contractor:

(A) subcontracts any direct care services without specific authorization from DARS and HHSC the Agency; and/or

(B) assigns or transfers the contract without the Agency's prior written approval of DARS and HHSC.

(f) The Agency may obtain criminal history information from the Texas Department of Public Safety and may use this information in awarding and administering Agency
contracts. When the Agency uses the information, the terms and conditions of use are included in the affected contracts.

(g) DARS or HHSC assigns the effective date of a contract. Goods or services purchased or reimbursed by the Agency may be inspected or monitored at the discretion of the Agency.

(h) Goods or services purchased or reimbursed by DARS may be inspected or monitored at the discretion of DARS or HHSC.

(i) The Agency may require corrective action, suspend consumer referrals, remove or reassign active customers to other contractors for services and/or impose an adverse action against a contractor for failure to comply with the terms of the contract and/or DARS or HHSC Agency rules, policies, and procedures.

(j) A contractor must participate in orientation relating to DARS and HHSC Agency contract requirements before providing goods or services under a contract for the first time.

(k) A contractor shall ensure that any facility in which services are provided includes among the staff members, or shall obtain the services of, people individuals able to communicate in the native language of applicants and consumers, recipients of service, and other eligible individuals who have limited English speaking ability and ensure that appropriate modes of communication are used for all consumers, proficiency.

(l) Contractors that provide vocational rehabilitation services shall take affirmative action to employ and advance in employment qualified individuals with disabilities.

§858.4. Complaints.

Upon request from the consumer a customer, the contractor must notify provide the consumer of customer with the appropriate name, mailing address, and telephone number of DARS for the purpose of directing to direct complaints to the Agency. The contractor must verify that the name, mailing address, and telephone number it provides to the customer are current and correct.

§858.5. Record Requirements.

(a) The contractor must maintain all financial and contract-related records:

(1) according to recognized fiscal and accounting practices such as Generally Accepted Accounting Principles (GAAP); and
(2)—in accordance with the DARS or HHSC contract requirements, rules, policies and procedures.

(b) When required by DARS or HHSC, the contractor must use the official DARS form to document services delivered.

(c) The contractor must maintain all records about the services provided to individuals in programs administered by DARS as required under each contract from the date the services were provided. If litigation or claim involving these records is still ongoing at the conclusion of the required time the contract specifies to maintain the records, the contractor must maintain the records until all litigation or claims are resolved.

(d) The contractor must maintain all work papers and records supporting information reported on cost reports, budgets, or other cost surveys for the duration stated in the contract after the end of the fiscal year in which the services were provided. If litigation or claim involving these records is still ongoing at the conclusion of the required time the contract specifies to maintain the records, the contractor must maintain the records until all litigation or claims are resolved.

§858.6. Access to Contractor Facilities and Records.

(a) Contractors must allow DARS and HHSC and all appropriate federal and state agencies or their representatives access to contractor facilities to examine and copy contract records and supporting documents about services provided. The contractors and subcontractors must make the records available at reasonable times and for reasonable periods.

(b) If a contractor is terminating business operations, the contractor must ensure that:

(1)—records are stored and accessible; and

(2)—someone is responsible for adequately maintaining the records.

§858.7. Contract Monitoring.

(a) Any service purchased or reimbursed by DARS—the Agency may be monitored at the discretion of DARS or HHSC—the Agency.

(b) DARS and HHSC—the Agency may conduct compliance monitoring reviews of the contractor's services to determine if the contractor is in compliance with the contract and with program rules and requirements. These reviews are conducted at the location where the contractor is providing the services unless DARS or HHSC—the Agency specifies a different location. DARS and HHSC—the Agency shall assess contractor performance based on contract standards.
(c) **The Agency may expand a compliance monitoring review period or any requested review sample at any time.** During the monitoring review, the contractor must provide:

1. adequate working space for reviewing the records;
2. every record DARS or HHSC requests for review; and
3. copies, or access for DARS and HHSC staff to make needed copies, of documents.

(d) During the monitoring review, DARS or HHSC may:

1. review a sample of consumer records to determine the contractor's compliance with contract requirements;
2. interview consumers and staff members;
3. observe consumers and staff members;
4. consult with others, as appropriate; and
5. conduct other activities, as appropriate.

(e) DARS or HHSC may expand a compliance monitoring review period or the review sample at any time.

(f) DARS and HHSC also conduct fiscal monitoring, which is the review of documentation that supports the contractor’s billing, as it exists at the time the DARS or HHSC staff reviews the billing documentation. DARS or HHSC may recoup payment if the service delivery documentation does not support the contractor’s billing.

(g) **The Agency** DARS and HHSC may conduct a fiscal monitoring review:

1. in conjunction with a compliance monitoring review;
2. independent of a compliance monitoring review;
3. when a contract is terminated;
4. as a result of a complaint; or
5. at other times, as DARS or HHSC the Agency considers necessary.

(h) Fiscal monitoring is designed to ensure that:
(1) DARS received the goods or services paid for;

(2) The total amount paid by DARS was allowable under the contract; and

(3) The contractor maintained the financial records and internal controls necessary to adequately account for claims under the contract.

(e) The DARS and HHSC Agency may use sampling methods in monitoring and auditing contracts.

(f) The contractor has the burden of proof in establishing entitlement to payments made under the contract.

(k) The contractor must provide the same accommodations for fiscal monitoring as related to compliance monitoring.


The Agency, if requested by the Agency, the contractor must prepare and implement a corrective action plan to address and remedy all deficiencies or violations in a timely manner in response to findings of deficiencies by DARS or HHSC Agency or other federal or state oversight authorities. The corrective action plan must be negotiated to the satisfaction of DARS and HHSC. DARS or HHSC Agency may accept a corrective action plan as accepted.

§858.9. Adverse Actions.

(a) DARS or HHSC Agency may impose an adverse action when the contractor fails to follow the terms of the contract or fails to comply with DARS or HHSC Agency rules, policies, and procedures. DARS or HHSC Agency may impose adverse actions for reasons including, but not limited to:

(1) DARS’ or HHSC’s Agency’s determination that one or more customers’ health and safety has been or is jeopardized;

(2) the contractor’s failure to submit an acceptable written corrective action plan as requested by the Agency or failure to comply with its accepted corrective action plan;

(3) the contractor’s failure to follow an agreed-upon audit resolution payment plan;

(4) the contractor’s failure to submit an acceptable cost report, if applicable;

(5) the contractor’s failure to comply with the contract or program requirements;
(6) the contractor's failure to maintain a current required license or the contractor allowing the expiration of any required license, if applicable;

(7) the contractor's relocation to a new facility address that does not have the appropriate license, if applicable;

(8) the contractor's exclusion from contracting with DARS, the Agency or any health and human services program, or the federal government; or;

(9) debarment or exclusion from a federal program;

(10) a validated report(s) or reports of abuse, neglect, or exploitation when the perpetrator is an owner, employee, or volunteer who has direct access to consumers, customers is the perpetrator of, or enables, the abuse, neglect, or exploitation of a customer;

(11) substantiated claims of fraud against a contractor; and

(12) any other cause of so serious or compelling a nature that it affects the contractor's ability to perform under the contract or presents an imminent risk of harm to or liability for the Agency.

(b) Types of The Agency may take the following adverse actions may include:

(1) Recoup money that the contractor owes as a result of overpayments or other billing irregularities. Recoupment. DARS or HHSC collects money the contractor owes as the result of overpayments or other billing irregularities.

(2) Place a vendor hold on Vendor hold. DARS or HHSC withholds the contractor's contract payments. DARS or HHSC may put one or all of the contractor's contracts on vendor hold. The vendor hold is which must be released when DARS or HHSC the Agency determines that the contractor has resolved the issue or issues causing the hold; reason(s) for the hold. In addition to the reasons listed in subsection (a) of this section, DARS or HHSC may place a vendor hold on the contractor's contract(s):

(A) to recoup overpayments made to the contractor; or

(B) to recover any audit exceptions assessed against the contractor.

(3) Deny all or part of a claim Denial of claim. DARS or HHSC denies payment in whole or part for a claim filed within program time limits.

(4) Direct the contractor to suspend or terminate a subcontractor's participation in the provision of goods or services. Suspension of subcontractor's participation or payments; termination of subcontract. DARS or HHSC directs a contractor
to suspend a subcontractor’s participation, suspend a subcontractor’s payments, or terminate a subcontract.

(5) **Terminate a contract for cause before its expiration date.** Involuntary contract termination. DARS or HHSC may terminate a contract for cause by citing the contractor’s failure to comply with the terms of the contract or with DARS or HHSC rules, policies, and procedures.

(6) **Suspend the contractor’s right to conduct business with the Agency.** Suspension. DARS or HHSC temporarily suspends the contractor’s right to conduct business with DARS. The causes for and conditions of suspension are described in §392.323 of this subchapter (relating to Causes and Conditions of Suspension).

(7) **Debar the contractor’s right to contract or conduct business with the Agency, in any capacity, for a specified period of time.** Debarment. DARS or HHSC does not allow a contractor to conduct business with DARS, in any capacity, for a certain period of time. The causes for and conditions of debarment are described in §392.321 of this subchapter (relating to Causes and Conditions of Debarment).

(8) **Take any other less severe action or actions, which the Agency determines necessary to ensure the contractor’s compliance with the underlying contract, after considering the circumstances of a particular case.**

§858.10. **Debarment and Suspension of Current and Potential Contractor Rights Contractors.**

(a) Debarment and suspension apply to contracts. Requirements in this section apply to all types of contracts with DARS.

(b) Debarment shall be imposed for a period commensurate with the seriousness of the cause(s). Generally, debarment should not exceed three years, except for violations of 41 USC Chapter 81 Drug Free Workplace. If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period. The Agency may extend the debarment for an additional period, if the Agency determines that an extension is necessary to protect the Agency’s interest. However, a debarment may not be extended solely upon the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the same procedures to impose an initial debarment shall be followed to extend the debarment. Debarment is the termination of rights to continue an existing contract, to receive a new contract, to participate as a contractor or manager, to provide goods or services to DARS consumers either directly or indirectly while working for a DARS or HHSC contractor, or to make a bid, offer, application, or proposal for a DARS or HHSC contract. The debarment is for a specified time.
commensurate with the seriousness of the violation, the extent of the violation, prior
impositions of sanctions or penalties, willingness to comply with program rules and
directives, and other pertinent information. Generally, debarment does not exceed six
years. Where conditions warrant, a longer period may be imposed.

(c) A suspension is in effect until an investigation, hearing or trial is concluded and the
Agency determines the contractor’s future ability to contract or subcontract with the
Agency. Suspension is the temporary suspension of a contractor’s or potential
 contractor’s rights to conduct business with DARS or HHSC. A suspension is in
effect until an investigation, hearing, or trial is concluded and DARS can make a
determination about:

(1) the contractor’s future right to contract or subcontract; or

(2) a potential contractor’s future right to have DARS or HHSC consider its offer,
bid, proposal, or application.

(d) The Agency may suspend a contractor’s contract if the Agency suspects that grounds
may exist for debarment.

(e) For purposes of both debarment and suspension of contractual rights, DARS or
HHSC may impute the conduct of an individual, corporation, partnership, or other association to the contractor, potential contractor, or the
responsible entity of the contractor or potential contractor with whom the individual,
corporation, partnership, or other association is employed or otherwise associated.
Even though the underlying conduct may have occurred while an
individual, corporation, partnership, or other association associated with the contractor or potential contractor, suspension of contractual
denial or debarment may be imposed. Remedial actions taken by the responsible
officials of the contractor or potential contractor are considered in determining
whether either suspension of contractual rights or debarment is warranted.

§858.11. Causes and Conditions of Debarment.

(a) The Agency may—DARS or HHSC may remove contractual rights from an individual, a
corporation, a partnership, or a division of a contractor or legal entity for
causes including the following:

(1) Being adjudicated as guilty, pleading guilty, pleading nolo contendere, or
receiving a deferred adjudication in a criminal court relating to:

(A) Obtaining, attempting to obtain, or performing a public or
private contractor contract or subcontract;
(B) Engaging in embezzlement, theft, forgery, bribery, falsification or destruction of records, fraud, receipt of stolen property, making false statements or claims, tax evasion, or any other offense indicating moral turpitude or a lack of business integrity or honesty;

(C) Use or possession of dangerous drugs, controlled or illegal substances, or other drug-related offense;

(D) Violating federal antitrust statutes arising from submitting bids or proposals;

(E) Committing an offense involving physical or sexual abuse or neglect; or

(F) Committing an offense involving the direct support or promotion of human trafficking.

(2) Being debarred from contracting by any unit of the federal government or any state government;

(3) Violating DARS or HHSC contract provisions, including failing to perform according to the terms, conditions, and specifications, or within the time limit(s) specified, in a DARS or HHSC contract, including, but not limited to, the following:

(A) Failing to abide by applicable federal and state statutes, rules, regulations, policies, and procedures, such as those regarding persons with disabilities and those regarding civil rights;

(B) Having a record of failure to perform or of unsatisfactory performance according to the terms of one or more contracts or subcontracts, if that failure or unsatisfactory performance has occurred within five years preceding the determination to debar. This subparagraph applies only for actions occurring after the effective date of these rules. Failure to perform and unsatisfactory performance includes, but are not limited to, the following:
(i) **Failing**-to correct contract performance deficiencies after receiving written notice about them from DARS, HHSC, the Agency or its authorized agents;

(ii) **Failing**-to repay or make and follow through with complete arrangements satisfactory to DARS or HHSC, the Agency to repay identified overpayments or other erroneous payments, or assessed liquidated damages or penalties;

(iii) **Failing**-to meet standards that are required for licensure or certification, or that are required by state or federal law, DARS or HHSC Agency rules or standards incorporated in contracts, or Agency policy concerning DARS contracts contractors;

(iv) **Failing**-to execute contract amendments required by DARS or HHSC, the Agency;

(v) **Billing**-for services or merchandise goods not provided to the customer;

(vi) submitting cost reports containing costs not associated with or not covered by the contract or DARS rules and instructions. Intent to increase individual or statewide rates or fees by submitting unallowable costs must be shown for a single cost report, but intent may be inferred when a pattern of submitting cost reports with unallowable costs is shown;

(vii) submitting a false report or misrepresentation which, if used, may increase individual or statewide rates or fees;

(viii) **Charging** customers charging consumer or patient fees contrary to DARS or HHSC Agency rules or policy;

(ix) **Failing**-to notify and reimburse DARS, the Agency or its agents for services DARS, that the Agency paid for when the contractor received reimbursement from a liable third party;
(ix) (x) **Failing** to disclose or make available, upon demand, to DARS or its representatives (including appropriate federal and state agencies) records that the contractor is required to maintain;

(xi) (xii) **Violating** the Texas Human Resources, Government, or Labor Code provisions applicable to the contract or any rule or regulation issued under the referenced Code(s).

(4) **Submitting** an offer, bid, proposal, or application that contains a false statement or misrepresentation or omits pertinent facts or documents that are material to the procurement;

(5) **Engaging** in an abusive or neglectful practice that results in or could result in death or injury to the consumer served by the contractor;

(6) **Knowingly** and willfully using a debarred person or legal entity as an employee, independent contractor, or agent to perform associated with any service provided in performance of a contract with DARS or HHSC.

(7) Failure to pay a substantial debt or debts, including disallowed costs and overpayments, owed to any federal or state agency instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor’s legal and administrative remedies have been exhausted; or

(8) Any other cause of a serious or compelling nature that affects a contractor’s present or future ability to perform under the contract or that presents an imminent risk of harm to or liability for the Agency;

(b) In accordance with terms specified by DARS or HHSC, individuals, parts of entities, and entities that have been debarred may not:

(1) receive a contract;

(2) be allowed to retain a contract that has been awarded before debarment;
(3) bid or otherwise make offers to receive a contract or subcontract;

(3)(4) participate as a vendor in DARS Agency programs that do not require the contractor individual to sign a contract or agreement;

(5) either personally or through a clinic, group, corporation, or other association, bill to or receive payment from DARS for any services or supplies provided by the debarred entity on or after the effective date of the debarment. Additionally, DARS will not pay for any services ordered, prescribed, or delivered by the debarred entity for DARS recipients after the date of debarment. No costs associated with a debarred entity, including the salary, fringe, overhead, payments to, or any other costs associated with an employee, owner, officer, director, board member, independent contractor, manager, or agent who was debarred may be included in a DARS cost report or any other document that will be used to determine an individual payment rate, a statewide payment rate, or a fee; or

(4) provide goods or services to Agency customers either directly or indirectly while working for an Agency contractor; or

(5) either directly or through an intermediary, bill to or receive payment from the Agency for any services or supplies provided by the debarred individual on or after the effective date of the debarment. The Agency will not pay for any services ordered, prescribed, or delivered by the debarred individual to Agency customers after the date of debarment. No costs associated with a debarred individual, including the salary, fringe benefits, overhead, payments to, or any other costs associated with an individual who was debarred may be included in an Agency cost report or any other document that will be used to determine an individual payment rate, a statewide payment rate, or a fee. Nothing in this provision shall be construed in a manner that would prevent a debarred individual, who is also a VR customer, from receiving VR services as a VR customer.

(6) provide goods or services to DARS consumers either directly or indirectly while working for a DARS contractor.

(c) A single occurrence of a violation may result in debarment or suspension. Debarment may be applied against an individual, a corporation, a partnership, a division of a contractor, or an entire legal entity, or a specified part of a legal entity.

(d) Even a single occurrence of a violation may result in debarment or suspension if it is severe. Other adverse actions may be taken if the violation is isolated or less severe.
§858.12. Causes and Conditions of Suspension.

(a) The Agency DARS or HHSC may suspend a contractor's or potential contractor's contractual rights on contract whenever DARS or HHSC finds that there is a reasonable basis to believe that grounds for debarment exist.

(b) Suspension may be imposed immediately will result in one or more of the following DARS' or HHSC's notification to a contractor or potential contractor. In addition, suspension may be imposed on a potential contractor if the contractor has an outstanding indictment or DARS or HHSC has information about an offense that is grounds for indictment:

(b)–The conditions of suspension are:

(1) The Agency DARS or HHSC may withhold payments, wholly or partly, to the affected contractor during the period of suspension.

(2) The Agency DARS or HHSC may refuse to accept a bid, offer, application, or proposal from, or to award a contract to, the affected potential contractor during the period of suspension.

(3) The Agency DARS or HHSC may remove existing customers referred from or cease referrals of additional consumers referring customers to a suspended entity contractor and may transfer existing consumers customers to other contractors.

(c) If DARS or HHSC the Agency determines that the underlying reasons for suspension have been resolved in favor of the contractor, DARS or HHSC respondent, the Agency must, if applicable:

(1) pay the withheld payments for any services that were provided during the suspension and that met the terms of an existing contract; and

(2) resume contract payments and consumer customer referrals.

(d) If DARS or HHSC the Agency determines that the underlying reasons for the suspension have not been resolved in favor of the contractor, DARS or HHSC institute respondent, the Agency shall institute debarment proceedings.

(e) In accordance with terms specified by DARS or HHSC, individuals and entities the Agency, an individual whose contractual rights have contract has been placed in suspension may not:

(1) receive a contract;

(2) submit an offer, bid, application, or proposal for a contract; or
(3) provide goods or services to DARS or HHSC consumers, Agency customers either directly or indirectly while working for a DARS or an Agency contractor.

§858.13. Evidence for Debarment or Suspension.

The sufficiency of evidence required depends on the cause of the suspension or debarment. In making a debarment decision, the Agency may consider the following factors:

(1) If there is evidence that the contractor or potential contractor has been found guilty, pleaded guilty, pleaded no contest, or received a deferred adjudication in criminal court relating to an activity prohibited in this chapter, that is sufficient evidence to suspend or debar. If the decision that caused debarment is reversed on appeal, the contractor must provide written proof of the reversal to have its contract rights restored. DARS or HHSC restores contract rights unless the contractor is also debarred or suspended on other grounds.

(2) If the cause is debarment from contracting by any unit of the federal government or any unit of a state government, it is sufficient to offer official notice from the other state or federal agency that the entity has been debarred. The notice may be addressed to either DARS or HHSC.

(3) Other causes of debarment or suspension may be established by evidence of failure to meet contracting terms or standards, including evidence of the severity or recurrence of violations of performance requirements:

(1) The actual or potential harm or impact that results or may result from the wrongdoing.

(2) The frequency of incidents and/or duration of the wrongdoing.

(3) Whether there is a pattern or history of wrongdoing.

(4) Whether an individual is or has been disqualified by an agency of the federal government or has not been allowed to participate in state or local contracts or assistance agreements based on conduct similar to one or more of the causes for debarment specified in this part.

(5) Whether and to what extent the individual planned, initiated, or carried out the wrongdoing.

(6) Whether the individual accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct that led to the cause for debarment.
(7) Whether the individual paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigatory or administrative costs incurred by the government, and has made or agreed to make full restitution.

(8) Whether the individual cooperated fully with the government agencies during the investigation and with any court or administrative action. In determining the extent of cooperation, the Agency may consider when the cooperation began and whether the individual disclosed all pertinent information known to the individual.

(9) Whether the wrongdoing was pervasive within the individual's organization.

(10) The types of positions held by the individuals involved in the wrongdoing.

(11) Whether the individual's organization took appropriate corrective action or remedial measures.

(12) Whether the individual's principals tolerated the offense.

(13) Whether the individual brought the activity cited as a basis for the debarment to the attention of the appropriate Agency representative in a timely manner.

(14) Whether the individual fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the Agency.

(15) Whether the individual had effective standards of conduct and internal control systems in place at the time the questioned conduct occurred.

(16) Whether the individual took appropriate disciplinary action against the individuals responsible for the activity that constitutes the cause for debarment.

(17) Whether the individual had adequate time to eliminate the circumstances within the individual's organization that led to the cause for the debarment.

(18) Other factors related to the contractor's required performance under the contract that the Agency determines are appropriate to the circumstances of a particular case.

§858.14. Notice for Debarment or Suspension.

Written notices of suspension or debarment must include the following, as applicable:

(1) the grounds for the action;
(2) the length of the debarment;

(3) the conditions that might cause a suspension to be released;

(4) a statement explaining the effect of the suspension or debarment; and

(5) a statement as to whether the suspension or debarment is in effect for all Agency contracts throughout DARS or just for a particular Agency contract DARS program.

§858.15. Appeals.

(a) A contractor has the right to appeal any initial adverse action imposed by the Agency under §858.9 of this chapter by hand delivery, mail, common carrier, facsimile (fax) transmission, or other method approved by the Agency in writing DARS. A contractor shall only submit an appeal by hand delivery, mail, or common carrier to the Agency as directed on the Contractor Notice of Appeal Rights (VR 1309). An appeal sent by unapproved methods or to a different address will not be considered by the Agency as a valid appeal.

(b) The Agency's initial adverse action is final for all purposes unless the contractor files an appeal not later than 28 calendar days after the date on which the initial adverse action is mailed, sent by electronic mail, or sent by facsimile to the contractor. The timeliness of an appeal is subject to the rules and procedures set out in the Unemployment Insurance rules at 40 TAC Chapter 815, except to the extent that such sections are clearly inapplicable or contrary to provisions set out under the Chapter 858 rules or the contract between the parties. To appeal an adverse action, the contractor, referred to in this subchapter as the appellant, must ensure that DARS receives a written request for an appeal within 30 days of the contractor's receipt of the notice of adverse action.

(c) The appellant must ensure that the request for an appeal:

(1) clearly states that the purpose of the letter is to appeal DARS' adverse action;

(2) is received by DARS at the address provided in the notice of adverse action letter;

(3) is received by DARS according to time frames provided in this section; and

(4) includes all required information and documentation as outlined in this section.

(c)(d) To be considered, the appeal must include the following:
(1) A statement of facts describing how an Agency decision, action, or inaction by DARS deviated from contract terms, published policy, or state or federal laws or regulations;

(2) The appellant’s contractor’s claim, including pertinent contract sections;

(3) A statement of the issue(s) or issues in dispute;

(4) A brief statement about why DARS’ decision the Agency's initial adverse action is wrong;

(5) Copies of evidence or documentation supporting the appeal; and

(6) The action requested.

(d) The contractor may supplement its appeal after being perfected but before the Agency rendering a decision on the merits.

(e) In the request for an appeal letter, the appellant may also request a meeting with DARS. This request should include a description of any special accommodations needed for the appellant, witnesses, or representatives. At the meeting, the appellant:

(1) may be represented by a person of his or her selection; and

(2) will be provided with an opportunity to present evidence and information to support his or her position.

(e) As part of the appeal, the contractor may also request a meeting with the Agency. Whether a meeting will be granted is at the Agency’s discretion. The meeting request should include a description of any special accommodations needed for the contractor, witnesses, or representatives. At the meeting, the contractor may:

(1) be represented by an individual of the contractor's selection; and

(2) present evidence and information to support the contractor's position.

(f) The Agency will notify the contractor whether its appeal has been perfected and has met the requirements in subsection (c) for consideration on its merits. If the appeal does not meet the requirements of this chapter, DARS will notify the appellant that their request for an appeal will be denied because it did not meet requirements, and the initial adverse action will be the Agency’s final decision.

(g) An Agency appeal decision DARS provides a written decision to the appellant within 30 days after conclusion of the meeting, or if no meeting is held, within 45 days after the date DARS receives the appeal, appeal decision is
mailed, unless the appropriate DARS representative extends the time the contractor files a written request for reconsideration before that date.

§858.16. Request for Reconsideration.

(a) The contractor After DARS issues a decision on an appeal, the appellant may submit in writing a request for reconsideration following the Agency’s issuance of the appeal decision by hand delivery, mail, common carrier, facsimile (fax) transmission, or other method approved by the Agency in writing:

(1) A request for reconsideration shall only be hand delivered, mailed, or sent by common carrier to the Agency as directed on the Contractor Notice of Rights (VR 1309). A request for reconsideration sent by unapproved methods or to a different address will not be considered a valid request for reconsideration by the Agency.

(2) The timeliness of a request for reconsideration is subject to the rules and procedures set out in the Unemployment Insurance rules at Chapter 815 of this title, except to the extent that such sections are clearly inapplicable or contrary to provisions set out under these Chapter 858 rules or the contract between the parties.

(b) An appellant may submit a request for reconsideration only if the appellant’s request for an appeal met the requirements set out in §392.329 of this subchapter (relating to Appeals).

(e) Requests for reconsideration must be addressed to the DARS commissioner and must be received by DARS within 20 days after the date DARS issues the decision on the appeal.

(d) The DARS commissioner may designate a representative(s) to receive the request for reconsideration and issue a decision on behalf of DARS.

(b)(e) A request for reconsideration shall not be granted unless each of the following three criteria are met:

(1) there is a clearly state that the purpose of the letter is to request reconsideration offering of new evidence, which was not presented as part of DARS’ decision on the original appeal pursuant to §858.15 of this chapter;

(2) there is a compelling reason why the evidence was not presented earlier specifically point out any errors in the appeal decision; and

(3) there is a specific explanation of how consideration of the evidence would change the outcome of the decision specify all relief requested; and
(4) state all reasons why the relief should be granted.

(c) The Agency’s decision on the request for reconsideration is the final decision of the Agency. DARS issues a decision on the request for reconsideration no later than 45 days after receipt of the request for reconsideration. The decision may affirm, reverse, or modify the adverse action previously imposed by DARS.

(g) The decision on the request for reconsideration is the final decision of DARS. However, if the contractor believes DARS breached the contract, the contractor may pursue further action according to Government Code, Chapter 2260.