Rulemaking Hearing Rules
of the
Tennessee Department of Transportation
Construction Division

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JUL 2? 2006
STATE OF TENNESSEE
DEPARTMENT OF TRANSPORTATION

Chapter 1680-5-3
Prequalification of Contractors

New Rules

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1680-5-3-.01 Authority, Purpose and General Requirements.

(1) Legal Authority. – Section 54-5-117 of the Tennessee Code provides that bidders for construction contracts to be let and awarded by the Tennessee Department of Transportation shall be responsible and qualified under state law and any applicable regulations. It further empowers the Commissioner to adopt such reasonable regulations as the Commissioner deems proper for the qualification of bidders as to financial responsibility, experience, organization and equipment, the number of contracts, the aggregate of the contract amounts at the contract unit prices, the character of construction, the number of miles of construction each bidder or contractor may have under contract or construction at any given time, and/or any other matter which would in the Commissioner's judgment promote the best interests of the State of Tennessee in its highway construction, with the power to adopt such regulations being expressly not limited to the matters expressly mentioned in the statute.

(2) Purpose. – The purpose of these rules is to establish procedures and criteria by which the Department determines the responsibility and qualifications of prospective bidders and subcontractors to perform contracts or subcontracts for or related to the construction, improvement and/or maintenance of roads and bridges which are to be let, awarded and administered by the Department. In general, but without limiting any of the following rules, it is the intent of this chapter to govern the prequalification of bidders and subcontractors based on their demonstrated ability, experience and capacity to perform the work required; the quality and timeliness of their past work performance; their financial responsibility; and the integrity of their business practices.

(3) General Requirements.

(a) A prospective bidder or contractor must be prequalified by and in good standing with the Department prior to the issuance of a proposal form.

(b) A prospective subcontractor must be prequalified by and in good standing with the Department prior to being approved as a subcontractor.

(c) Nothing in this rule shall be construed to prohibit any person from requesting or obtaining a void proposal form for any purpose other than submitting a proposal to the Department.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.02 Definitions.

As used in these rules:

(1) "Affiliate" means a person that is in affiliation with another person or entity. Persons or entities are affiliates of each other and an affiliation exists if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The factors considered to determine control include, but are not limited to:

(a) Interlocking management or ownership;
(b) Identity of interests among family members;
(c) Shared facilities and equipment;
(d) Common use of employees; or
(e) A business entity which has been organized following the suspension, debarment or exclusion of a person or entity which has the same or similar management, ownership, or principal employees as the suspended, debarred or excluded person or entity.

(2) "Applicant" means any individual person, partnership, limited liability company, corporation, or other business entity, acting directly or through a duly authorized representative, that seeks to be prequalified by the Department as a bidder and/or subcontractor.

(3) "Award" means the formal acceptance of a proposal by the Department, subject to the Department's reservation of a right to cancel the award of a contract at any time prior to the execution of the contract by all parties.

(4) "Bid" means the submission of a proposal to perform road, bridge or related work under a contract to be let by the Department.

(5) "Bidder" means any individual person, partnership, limited liability company, corporation or other business entity, acting directly or through a duly authorized representative, that seeks or may seek to submit a proposal and enter into a contract to perform work for the Department.

(6) "Chief Engineer" means the Chief of the Department's Bureau of Engineering, or any Department employee authorized to act on his/her behalf.

(7) "Civil judgment" means the disposition of a civil action by any court of competent jurisdiction, whether by verdict, decision, settlement, stipulation, other disposition which creates a civil liability for the complained of wrongful acts.

(8) "Commissioner" means the Commissioner of the Tennessee Department of Transportation.

(9) "Contractor" means a bidder to whom the Department has awarded a contract and with whom the Department has executed and entered into a contract for the performance of work pertaining to the construction, improvement and/or maintenance of roads or bridges.

(10) "Conviction" or "convicted" means:

(a) A judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, including a plea of nolo contendere; or

(b) Any other resolution that is the functional equivalent of a judgment, including probation before judgment and deferred prosecution. A disposition without the

participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.

(11) "Day" means a calendar day; provided, however, that if the last day for completing any action under these rules falls on a Saturday, Sunday or legal holiday when the Department is closed for business, the day for completing the action shall be the following business day.

(12) "Department" means the Tennessee Department of Transportation.

(13) "Director of Construction" means the Director of the Construction Division of the Tennessee Department of Transportation, or such person as may be authorized to act on behalf of the Director of Construction in the performance of responsibilities under these rules.

(14) "Enforcement Order" means a final administrative or judicial order, including any order on appeal, which contains a finding of a violation of the Federal Water Pollution Control Act, the Tennessee Water Quality Control Act, or any other State's water quality control act. The term "enforcement order" does not include administrative notices of violation or equivalent actions that are not subject to appeal.

(15) "Equipment" means all machinery, apparatus, and tools necessary for the proper construction and acceptable completion of the project, plus the necessary repair parts, tools, and supplies for upkeep and maintenance.

(16) "General prequalification" means a prequalification to bid on and perform work for the Department as a contractor or subcontractor within approved work classifications that is not limited as to the amount or number of contracts.

(17) "Limited prequalification" means a prequalification to bid on and perform work for the Department as a contractor or subcontractor within approved work classifications that is limited as to the amount and/or number of contracts or a prequalification to participate in Department contracts only as a subcontractor.

(18) "Prequalification" or "prequalified" means the status of having been determined to be responsible and qualified to bid on and perform road or bridge work under a contract or subcontract with the Department.

(19) "Prequalification application" means the information submitted by an applicant on a completed prequalification questionnaire or other forms developed by the Department and such other information as the Department may request the applicant to provide in order to determine whether the applicant is to be prequalified as a bidder or subcontractor.

(20) "Prequalification Committee" means the committee of the Department with authority to hear and make a recommendation to the Commissioner for decision on any appeal of a prequalification decision by the Director of Construction as provided in these rules, and whose members may include the following employees of the Department, as determined by the Commissioner:

(a) The Chief Engineer, who shall preside over the committee;
(b) The Assistant Chief Engineer for Operations;
(c) The Chief of Administration;
(d) The Transportation Director for any Region of the Department (as selected by the Chief Engineer);
(e) The Director of the Civil Rights Division; and/or
(f) Other employees of the Department as the Commissioner may from time to time designate.

(21) "Prequalification Office" means the unit of the Department under the direction of the Director of Construction that is assigned to administer the prequalification program and perform responsibilities pertaining to the prequalification of bidders and subcontractors and evaluation of contractors as provided in these rules.

(22) "Proposal" means the offer of a bidder on a prescribed proposal form to perform work under a contract with the Department at the prices quoted in the proposal form.

(23) "Proposal form" means the approved form on which the Department requires bidders to submit proposals to the Department.

(24) "Subcontractor" means any individual person, partnership, limited liability company, corporation, or other business entity, acting directly or through a duly authorized representative, that has entered or may seek to enter into a contract with a contractor to perform some part of the work under a contract with the Department; provided, however, that this definition of subcontractor does not include any such person or business entity that only provides or delivers materials to a contractor or subcontractor performing work under a contract with the Department.

(25) "Surety" means a company authorized to guarantee a bidder's proposal and a contractor's performance and payment obligations under a contract and which is authorized to do business in the State of Tennessee.

(26) "Work classification" means a category of work pertaining to the construction, improvement and/or maintenance of roads and bridges, or related work, as the Department may identify such categories of work in the prequalification questionnaire or other prequalification forms developed by the Prequalification Office.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.03 Prequalification Office.

(1) Duties. – The Prequalification Office shall have the primary responsibility for administering the Department's prequalification program. The duties of the Prequalification Office shall include the development of a prequalification questionnaire and other prequalification forms; the designation of work classifications; the development and administration of a contractor performance evaluation program; the review and evaluation of prequalification applications; the determination of an applicant's prequalification status; the modification, revocation or temporary disqualification of a bidder's or subcontractor's prequalification status; and the performance of such other responsibilities pertaining to the prequalification of bidders and subcontractors as the Department may determine.

(2) Composition. – The Prequalification Office shall consist of the Director of Construction and such other employees of the Department as the Director of Construction may direct or request to assist in the administration of the prequalification program. The Director of Construction shall oversee the Prequalification Office.

(3) Audits and Investigations. – The Prequalification Office may perform or request other employees of the Department to perform audits or investigations concerning any information requested of or submitted by any applicant for prequalification or any other matter within the scope of these rules. Information and/or documents obtained by the Department in the course of an audit or investigation may be kept confidential to the extent authorized or required by law.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.04 Application for Prequalification.

(1) General Information and Requirements.

(a) To apply for prequalification, an applicant must submit a prequalification application to the Prequalification Office at the following address:

Tennessee Department of Transportation
Construction Division, Prequalification Office
Suite 700, James K. Polk Building
505 Deaderick Street
Nashville, Tennessee 37243

The prequalification application must be hand delivered to the Prequalification Office or mailed by certified, overnight or other mailing whereby the date of receipt can be verified by the Department. The mailing address of the Prequalification Office may be subject to change without amendment of these rules.

(b) The prequalification application shall include, without limitation, a completed prequalification questionnaire and other forms that may be developed by the Prequalification Office. The prequalification questionnaire or other forms may be requested by contacting the Prequalification Office in writing at the address indicated above, by telephone at (615) 741-2414, or via the Construction Division's website at www.tdot.state.tn.us/construction. The telephone number or website address of the Construction Division may be subject to change without amendment of these rules.

(c) The prequalification application must be signed by an owner, partner, officer, or other authorized representative of the applicant having authority to sign contracts or other legal documents on behalf of the applicant. Such person shall certify the accuracy of the information provided in the prequalification application, and the signature of such person shall be notarized.

(d) The same prequalification questionnaire or other forms must be completed whether an applicant wishes to be prequalified as a bidder or as a subcontractor or both.

(e) As received in the ordinary course of business, a prequalification application will not be considered confidential except as may be otherwise required by law.

(2) Information Required in the Prequalification Application.

An applicant's prequalification application shall provide the following information, at a minimum, and such additional information as the Prequalification Office may request:

(a) Name, Contact Information, and Business Organization. – The application shall identify the applicant's full legal name; the applicant's business address, telephone number, facsimile number, and electronic mail address, if available, and the application shall identify the legal form of the applicant's business organization, e.g., whether the applicant is a sole proprietorship, a general partnership, a limited partnership, a limited liability company, a corporation, or some other form of organization.

(b) Partners, Owners, Officers, and Authorized Representatives. – The application shall identify:

1. The names and addresses of each individual person or business entity that is a partner or owns ten percent (10%) or more of the applicant, including any partner or owner that is acting under an assumed name;

2. The names and addresses of all officers of the applicant, if applicable; and

3. The names and addresses of all persons who are authorized to act on behalf of the applicant to sign proposals and contracts with the Department.

(c) Affiliations. – The application shall identify:

1. The names and addresses of all affiliates of the applicant; and

2. For each partner, owner, officer, and authorized representative identified in accordance with subparagraph (b) above, the application shall identify whether such partner, owner, officer, or authorized representative owns ten percent (10%) or more, or is a partner, officer, or authorized representative, of any other firm that has been prequalified or is an applicant for prequalification by the Department, and if so the nature of such ownership or interest in the other firm or firms shall be described.

(d) Business Relationships of Immediate Family Members. – For each partner, owner, officer, and authorized representative identified in accordance with subparagraph (b) above, the application shall identify whether any immediate family member of such partner, owner, officer, or authorized representative owns ten percent (10%) or more, or is a partner, officer, or authorized representative, of any other firm that has been prequalified or is an applicant for prequalification by the Department, and if so the nature of such ownership or interest in the other firm or firms shall be described. For the purposes of this subparagraph, the term "immediate family member" means a spouse, mother, father, son, daughter, brother, or sister (including step, half, and adoptive relationships).

(e) Applicant's Fiscal Year. – The application shall identify the beginning and ending dates for the applicant's fiscal year.

(f) Type of Prequalification Requested. – The application shall identify whether the applicant is seeking a general or limited prequalification.

(g) Work Classifications. – The application shall identify the work classification(s), as defined in the prequalification questionnaire or other prequalification forms developed by the Prequalification Office, for which the applicant seeks to be prequalified by the Department.

(h) Work Experience. – The application shall furnish information regarding:

1. The applicant's experience as a firm in performing work within the work classification(s) for which the applicant seeks prequalification, including, without limitation, identification of the project; the owner of the project; the type of work performed, whether as the contractor or a subcontractor; the amount of the contract; whether the contract was completed on time; whether the contract was terminated for cause; whether liquidated damages or disincentives were assessed against the applicant under the contract; and any other information concerning the work experience of the applicant that the Prequalification Office may request or that the applicant may provide;

2. The work experience of the applicant's key administrative and supervisory personnel, including employees who will provide field supervision of the work, in the work classification(s) for which the applicant seeks prequalification from the Department, if requested by the Prequalification Office; and

3. References, if requested by the Prequalification Office.

(i) Equipment. – The application shall identify equipment that the applicant has available to perform the work required in the work classification(s) for which the applicant seeks prequalification. The applicant shall indicate whether the equipment is owned, leased, or otherwise accessible, and if not owned the applicant shall identify the owner or source of the equipment, including whether the owner or source of the equipment is a firm that has been prequalified or is an applicant for prequalification by the Department.

(j) Surety. – The application shall identify any surety company, and the local agent thereof, if applicable, that the applicant may use as a surety for the performance of any contract with the Department.

(k) Financial Responsibility.

1. With respect to:

   (i) The applicant, or
   (ii) Any affiliate of the applicant (as identified in accordance with subparagraph (c) above),

2. The application shall state whether the applicant or affiliate has within the past five (5) years:

   (i) Filed for bankruptcy;
   (ii) Defaulted on or failed to complete any public contract or had such contract terminated for cause;
   (iv) Had a surety take over payment or performance obligations of any public contract; or
   (v) Had any liens, claims or stop work orders filed against it on any public contract.

(l) Suspension, Debarment or Other Exclusion; Indictments, Criminal Convictions, Civil Judgments, and Enforcement Orders. – The application shall state whether the applicant, any affiliate of the applicant identified in accordance with subparagraph (c) above, or any partner, owner, officer, or authorized representative of the applicant identified in accordance with subparagraph (b) above is currently or within the past five (5) calendar years has been:

1. Denied prequalification and/or suspended, debarred or otherwise excluded from bidding on or participating in any public contract by the Department or other agency of the State of Tennessee, by any agency of the United States Government, or by any agency of any other state or any local government (provided, however, that this provision does not apply to any denial of prequalification for bidding on a particular project based on a restrictive special prequalification such as is provided for in Rule 1680-5-3-.09 of this Chapter);

2. Convicted of, currently under indictment for, or held liable in a civil judgment for:

(i) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(ii) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(iv) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects such person's or entity's present responsibility;

3. Convicted of or currently under indictment for any criminal violation of the Federal Water Pollution Control Act, as provided in 33 U.S.C. § 1319(c), or as it may be amended; convicted of any criminal violation of the Tennessee Water Quality Control Act, as provided in T.C.A. §§ 69-3-115(b) and (c), or as either may be amended; or convicted of any criminal violation of any other state's water quality or water pollution control act; and/or

4. Received an enforcement order finding a violation of the Federal Water Pollution Control Act, the Tennessee Water Quality Control Act, or any other state's water quality or water pollution control act.

(m) Additional Information.

1. The Department reserves the right to request additional information and documentation to clarify and/or verify any information submitted in an applicant's prequalification application.

2. The applicant may submit an audited financial statement, documentation of its maximum bonding capacity, or other financial information for the Prequalification Office to consider.

3. Additional information and/or documents requested by the Department or submitted by the applicant and received by the Department may be kept confidential to the extent authorized or required by law.

(3) Submission of Prequalification Application – Timing and Effect.

(a) The prequalification application must be submitted to and received by the Prequalification Office at least fourteen (14) days prior to:

1. The date for opening bids for any project on which the applicant wishes to submit a proposal to the Department, if the applicant is seeking to be prequalified as a bidder; or

2. The date on which the applicant requests approval as a subcontractor under any contract awarded by the Department, if the applicant is seeking to become prequalified as a subcontractor.

(b) The act of submitting a prequalification application with the Department does not authorize the applicant to submit a bid or begin work as a contractor or subcontractor. It is the responsibility of the applicant to become prequalified before obtaining a proposal form to bid on a project or requesting to be approved by the Department as a subcontractor. The Department reserves the right to deny a prequalification application or return the prequalification application and postpone a determination of prequalification status until all required information has been received and evaluated.

(4) Requirements for Reporting Changes in Prequalification Application.

(a) If any of the following information provided in the applicant's prequalification application changes, the applicant shall notify the Prequalification Office in writing of such change prior to the submission of any bid or request for approval as a subcontractor , and in any event within not less than thirty (30) days after the change has occurred:

1. The applicant's name, contact information and business organization, as required under subparagraph (2)(a) of this Rule;

2. The names of the partners, owners, officers, and authorized representatives of the applicant, as required under subparagraph (2)(b) of this Rule;

3. The affiliates of the applicant and the associated business interests of the applicant's partners, owners, officers and authorized representatives, as required under subparagraph (2)(c), parts 1 and 2, of this Rule;

4. The suspension, debarment, exclusion, indictment or criminal conviction of the applicant, an affiliate of the applicant, or a partner, owner, officer or authorized representative of the applicant, as required under subparagraph (2)(l) of this Rule.

(b) Failure to notify the Prequalification Office of any change in the applicant's prequalification application information prior to any bid letting or request for approval as a subcontractor, or within thirty (30) days after such change has occurred, as required under subparagraph (4)(a) of this Rule, may result in the temporary disqualification of a prequalified bidder or subcontractor and/or such further action as the Department may deem appropriate in accordance with these rules.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.05 Determination of Prequalification Status.

(1) Review of Applications.

(a) All applications for prequalification, including applications for the renewal of prequalification, shall be submitted to the Prequalification Office as provided in Rule 1680-5-3-.04 above.

(b) The Prequalification Office will review each prequalification application for completeness. Incomplete applications will be returned to the applicant for additional information without a determination of the applicant's prequalification status.

(c) The Prequalification Office will review each completed prequalification application and such additional information as the Prequalification Office may request or the applicant may provide for the purpose of evaluating whether the applicant is

responsible and qualified to perform work within the work classification(s) for which the applicant seeks prequalification. The evaluation will be made in consideration of:

1. The amount, variety and quality of the applicant's prior work experience, including the prior work experience of the applicant's key personnel, if requested;

2. The availability to the applicant of the equipment needed to perform the work required in such work classification(s);

3. The Department's performance evaluations of the applicant, if available;

4. The financial responsibility of the applicant, the applicant's affiliates, and any business firms with which any partner, owner, officer, or authorized representative is or has been associated;

5. The business integrity and responsibility of the applicant, the applicant's affiliates, and any partner, owner, officer, or authorized representative of the applicant;

6. The environmental record of the applicant, the applicant's affiliates, and any partner, owner, officer, or authorized representative of the applicant;

7. The completeness and accuracy of the applicant's prequalification application; and

8. Any other information the Prequalification Office may have requested, received or examined with respect to the applicant's responsibility and qualifications.

(2) Determination of Prequalification Status.

Based on the Prequalification Office's review and evaluation of the applicant's prequalification application, the Director of Construction shall either:

(a) Deny the applicant's request for prequalification in any or all of the work classification(s) for which the applicant seeks to be prequalified, or

(b) Approve the applicant's request for prequalification in any or all of the work classification(s) for which the applicant seeks to be prequalified. An approved prequalification may be either general or limited, as follows:

1. General Prequalification. – An applicant that obtains an approved general prequalification will be eligible to submit a proposal for contract and perform work as a contractor or subcontractor under any Department contract pertaining to the construction, improvement and/or maintenance of roads and bridges that is within the applicant's approved work classification(s).

2. Limited Prequalification. – Based on an applicant's request and/or limitations in an applicant's work experience, equipment, prior work performance, financial responsibility and/or other factors evaluated by the Prequalification Office, the Director of Construction may approve only a limited prequalification. An applicant that obtains an approved limited prequalification will be eligible to submit a proposal for contract only up to a maximum bid amount and/or the applicant may be restricted in the number and/or aggregate amount of Department contracts it will be eligible to perform

as a contractor at any given time, or the applicant may be restricted to participate only as a subcontractor, as determined by the Director of Construction.

3. Waiver. – The Director of Construction may waive any restriction(s) established in a limited prequalification on a project-by-project basis. A request for waiver of a limited prequalification must be submitted to the Director of Construction at least fourteen (14) days prior to the date for opening bids for any project on which the applicant wishes to submit a proposal to the Department. Denial of a request for a waiver is not appealable under this chapter.

(c) Determination of Affiliations. – Based on the information provided in the prequalification application and such additional information as the Department may request or the applicant may provide, the Director of Construction shall also make a determination as to whether an applicant shall be deemed an affiliate of another applicant or of a previously prequalified bidder or subcontractor.

(3) Reservations. – Notwithstanding the foregoing or any other provision of this chapter, the Department reserves the right:

(a) To modify, revoke or restrict a general or limited prequalification or temporarily disqualify a prequalified bidder or subcontractor, as provided in these rules;

(b) To suspend, debar or otherwise exclude a prequalified bidder, contractor or subcontractor, as provided in the Department's rules governing contractor debarment and suspension, Chapter 1680-5-1, which shall not be appealable under this chapter; and/or

(c) To establish more restrictive special prequalification requirements in the proposal form for a particular project, which shall not be appealable under this chapter;

(4) Notice of Prequalification and Affiliation Status.

(a) A decision to deny prequalification or to limit an applicant's prequalification status shall be delivered to the applicant in a written notice signed by the Director of Construction. The written notice shall document the reason(s) for denying a prequalification request in whole or part and/or the reason(s) for issuing a limited prequalification instead of a general prequalification.

(b) A determination that an applicant shall be deemed an affiliate of another applicant or of a previously prequalified bidder or subcontractor shall be delivered to the applicant in a written notice signed by the Director of Construction. The written notice shall document the reason(s) for finding that the applicant is in affiliation with such other person or entity.

(c) Delivery of the written notice may be made in the original via certified or overnight mail or hand delivery, or delivery may be made by copy sent via facsimile or electronic mail, if available (in which case the original shall also be sent by regular mail). The notice will be deemed to have been received by the applicant as of the date the notice is delivered to the applicant's place of business by any one of these methods, whichever is earliest.

(d) All approved prequalifications will be posted on the Construction Division's website at www.tdot.state.tn.us/construction. The website address of the Construction Division may be subject to change without amendment of these rules.

(5) Appeals. – The determination of an applicant's prequalification or affiliation status may be appealed to the Commissioner by following the appeal procedure established in Rule 1680-5-3-.08 below.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.06 Effective Term and Renewal of Prequalification.

(1) Effective Term.

(a) A prequalification approved under these rules shall be effective for twelve (12) months from the end of the applicant's preceding fiscal year.

(b) Any prequalification approved prior to the effective date of these rules shall remain in effect until the expiration date indicated on such prequalification.

(c) A prequalified bidder or subcontractor will have a three-month grace period after the expiration date for its existing prequalification within which to apply for renewal of its prequalification. The existing prequalification will remain in effect during this grace period, subject to the reservations in paragraph (3) of this rule below.

(2) Renewal of Prequalification.

A prequalified bidder or subcontractor may request the renewal of its prequalification for an additional term by submitting a prequalification application to the Prequalification Office as provided in Rule 1680-5-3-.04 above. The determination of the applicant's prequalification status upon renewal shall be made as provided in Rule 1680-5-3-.05 above.

(3) Reservations. – Notwithstanding the foregoing or any other provision of this chapter, the Department reserves the right to modify, revoke or restrict a general or limited prequalification or to temporarily disqualify a prequalified bidder or subcontractor, as provided in these rules. The Department also reserves the right to establish more restrictive special prequalifications for any particular project and/or the right to suspend, debar or otherwise exclude a prequalified bidder, contractor or subcontractor, as provided in the Department's rules governing contractor debarment and suspension, Chapter 1680-5-1, and any such decision shall not be appealable under this chapter.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.07 Modification, Revocation and Disqualification.

(1) Authority of Director of Construction. – For good cause, the Director of Construction may modify, revoke or restrict a general or limited prequalification, or the Director of Construction may temporarily disqualify a prequalified bidder or subcontractor, as follows:

(a) Upon the request of an applicant and additional information received, the Director of Construction may modify a prequalification to make it less restrictive by, for example, changing a limited to a general prequalification, changing the restrictions of a limited prequalification, or adding a work classification. The Director may require an applicant to complete and submit a new prequalification application in support of a request for modification of an existing prequalification.

(b) The Director of Construction may revoke or restrict a prequalification by, for example, terminating a general or limited prequalification in any particular work classification(s), changing a general prequalification to a limited prequalification, or

imposing additional restrictions on a limited prequalification in any particular work classification(s).

(c) The Director of Construction may temporarily disqualify a prequalified bidder or subcontractor by suspending the privilege of bidding on Department contracts or becoming an approved subcontractor until the conditions resulting in the temporary disqualification have been remedied, as determined by the Director of Construction; provided, however, that the duration of a temporary disqualification under this Rule shall not exceed one hundred and twenty (120) days without giving the prequalified bidder or subcontractor notice of a proposed continuation of the disqualification and an opportunity to appeal a decision to continue the disqualification, as provided in Paragraphs (3) and (5) of this Rule.

(2) Factors to Consider. – In making a decision to modify, revoke or restrict a prequalification or temporarily disqualify a prequalified bidder or subcontractor (hereinafter referred to as the "applicant"), the Director of Construction may consider any of the following facts or information:

(a) The Department's performance evaluations of the applicant, if available;

(b) New information concerning the financial responsibility or business integrity of the applicant, affiliates of the applicant, and/or partners, owners, officers or authorized representatives of the applicant;

(c) The applicant or any affiliate has made false, deceptive or fraudulent statements in its prequalification application;

(d) The applicant or any affiliate has failed to complete, defaulted on or had any contract with the Department terminated for cause;

(e) The applicant or any affiliate has existing incomplete contracts with the Department on which it is behind schedule to such an extent that it might hinder or prevent prompt completion of any additional contracts with the Department;

(f) The applicant or any affiliate has a record of defective workmanship or the use of improper materials on any contract or subcontract with the Department;

(g) The applicant or any affiliate has a record of non-compliance with other Department contract requirements, including without limitation the submittal of required documents;

(h) The applicant or any affiliate has a record of non-compliance with applicable federal, state or local laws, regulations or ordinances, including without limitation laws, regulations or ordinances relating to workplace safety, environmental protection, equal opportunity employment and contracting, disadvantaged business enterprise program requirements, employee wage and hour requirements, or the prompt payment of subcontractors;

(i) The applicant or any of its affiliates owes money to the Department; and/or

(j) Any other information the Prequalification Office may have requested, received or examined with respect to the applicant's responsibility and qualifications.

(3) Notice of Proposed Revocation or Temporary Disqualification; Pre-Decision Meeting; Compliance Agreements.

(i) Before taking action to revoke or restrict a prequalification, temporarily disqualify a prequalified bidder or subcontractor, or continue a temporary disqualification, as provided in Subparagraphs (1)(b) and (1)(c) of this Rule, the Director of Construction shall provide the prequalified bidder or subcontractor with written notice of the proposed action, including a brief statement of the reasons for the proposed action.

(ii) The notice shall provide a representative of the bidder or subcontractor with an opportunity to have a pre-decision meeting with the Director of Construction to discuss the proposed action and present information that might influence the Director's decision. If requested, the pre-decision meeting shall be held within fourteen (14) days after receipt of the notice of proposed action, unless the Director of Construction consents to an extension of time. The discussion shall be informal, and the participation of persons other than the Director of Construction and a representative of the bidder or subcontractor shall be at the discretion of the Director of Construction.

(iii) At the pre-decision meeting, the bidder or subcontractor may choose to present and discuss a proposed compliance agreement as a remedy in lieu of the revocation or temporary disqualification proposed by the Director of Construction. Acceptance of any proposed compliance agreement shall be subject to the approval of the Commissioner.

(4) Notice of Decision. – Notice of any modification, revocation, restriction or temporary disqualification shall be provided in writing in the same manner as notice of a denial or limitation of prequalification status under Rule 1680-5-3-.05, Paragraph (4), above.

(5) Appeal. – A prequalified bidder or subcontractor who has been temporarily disqualified, has had its prequalification status revoked or restricted, or has been denied a requested modification of its prequalification status may appeal such decision to the Commissioner by following the appeal procedure established in Rule 1680-5-3-.08 below.

(5) Reservations. – Notwithstanding the foregoing or any other provision of this chapter, the Department reserves the right to establish more restrictive special prequalifications for any particular project and/or the right to suspend, debar or otherwise exclude a prequalified bidder, contractor or subcontractor, as provided in the Department's rules governing contractor debarment and suspension, Chapter 1680-5-1, and any such decision shall not be appealable under this chapter.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.08 Appeals.

(1) Grounds for Appeal. – In accordance with these rules, an applicant for prequalification or a prequalified bidder or subcontractor may appeal a decision by the Director of Construction that:

(a) Determines the applicant's prequalification or affiliation status, as provided in Rule 1680-5-3-.05;

(b) Denies a requested modification of an existing prequalification status, as provided in Rule 1680-5-3-.07, Subparagraph (1) (a);

(c) Revokes or restricts an existing prequalification held by the prequalified bidder or subcontractor, as provided in Rule 1680-5-3-.07, Subparagraph (1)(b);

(d) Temporarily disqualifies a prequalified bidder or subcontractor, as provided in Rule 1680-5-3-.07, Subparagraph (1)(c); or

(e) Is otherwise expressly appealable under these rules.

(2) Filing of Appeal; Timing and Content.

(a) A request for appeal under these rules must be filed with and received by the Director of Construction, with a copy to the Chief Engineer, no later than fourteen (14) days after delivery to the applicant or prequalified bidder or subcontractor of the adverse decision being appealed. For good cause shown, the Director of Construction may grant a written request for an extension of time, not to exceed an additional fourteen (14) days, within which to file the appeal.

(b) Failure to file a request for appeal within the time allowed will result in a denial of the appeal without any hearing.

(c) The appeal shall be in writing and shall contain:

1. A detailed statement of the reasons why the appellant believes the Director of Construction's decision was erroneous, improper and/or not in the best interest of the Department;

2. A statement of the relief requested (i.e., a statement of the decision the appellant believes the Commissioner should make on appeal); and

3. Any documentation of evidence that the appellant reasonably believes will support its appeal.

(3) Informal Hearing Before the Prequalification Committee.

(a) Upon receiving a request for appeal as provided in the paragraph above, the Director of Construction will promptly notify the Chief Engineer, who shall schedule an informal hearing before the Prequalification Committee.

(b) The hearing should, if possible, be scheduled to occur within fourteen (14) days after the date on which the appeal was filed. The Chief Engineer shall notify the appellant of the date, time and place for the hearing. For good cause shown, the Chief Engineer may allow for a continuance of the hearing to a later date.

(c) For good cause shown, the Chief Engineer may, but is not required to, stay the decision of the Director of Construction that is the subject of the appeal if:

1. The decision was to revoke or restrict an existing prequalification or to temporarily disqualify a prequalified bidder or subcontractor; and

2. The Chief Engineer determines that it is in the public interest to preserve the status quo pending a hearing and decision on the appeal.

(d) The hearing before the Prequalification Committee shall be held at the time and place set by the Chief Engineer, and the Chief Engineer shall preside. A quorum of the Prequalification Committee, consisting of a majority of the members of the Committee, shall be sufficient to conduct the hearing.

(e) The hearing will be conducted in an informal manner. A court reporter will be present to create a record of the proceedings, but the Committee may use flexible

procedures to hear evidence and argument presented by the appellant and the Prequalification Office. Formal rules of evidence and civil procedure will not be required. At the discretion of the Chief Engineer, the Committee may hear statements from and question witnesses at the hearing and/or take written statements, and the Committee may consider relevant written documentation that the appellant or the Prequalification Office may wish to present. Both the appellant and the Department may have the assistance of legal counsel in conducting the hearing.

(f) The Chief Engineer may continue the hearing and reconvene the Prequalification Committee at a later date, if necessary for a full and fair consideration of the appeal.

(4) Commissioner's Decision. – Upon consideration of the evidence and argument presented at the informal hearing, the Prequalification Committee shall advise the Commissioner and make a recommendation for decision, but the decision shall be the Commissioner's alone. The Commissioner shall give the appellant written notice of the decision, and the reasons therefore, within fourteen (14) days after the close of the Prequalification Committee's informal hearing, unless the time is extended by the Commissioner for good cause. Notice of the decision may be sent by regular mail or other reliable means of delivery. The Commissioner's decision shall be final.

(5) Inapplicability of Uniform Rules of Procedure. – In accordance with Tennessee Code Annotated §§ 4-5-217 and 4-5-219, these rules establish informal administrative procedures for making and appealing the Department's prequalification decisions. Because prequalification decisions and proceedings are not contested cases under Tennessee Code Annotated § 4-5-102(3), application of the Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies ("Uniform Rules"), Rules of the Tennessee Department of State, Administrative Procedures Division, Chapter 1360-4-1, is not required by law. The Commissioner further finds that application of the Uniform Rules would be unduly burdensome and would hinder the ability of the Department to make timely and effective decisions concerning the persons or entities with which it may conduct business. It is the intent of these rules, therefore, that the informal administrative procedures established herein will provide for the just, speedy and inexpensive determination of matters before the Prequalification Office, the Prequalification Committee, and the Commissioner and that these rules will allow the Department to take timely and effective remedial action to ensure that it conducts business with responsible and qualified contractors and subcontractors. The procedures established in these rules are subject to amendment as the Commissioner may determine to be in the best interest of the Department, and nothing in these rules shall be construed to create any vested right to any particular process established herein.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.09 Special Prequalification Requirements.

(1) Reservation of Right to Establish Special Prequalification Requirements. – Notwithstanding any other provision in this chapter, the Department reserves the right to establish special or additional prequalification requirements for bidders and/or subcontractors on a project-by-project basis whenever, in the judgment of the Department, such special or additional prequalification requirements are in the best interest of the Department because of the project's size, scope, schedule, complexity, environmental sensitivity or any other special circumstance related to the project.

(2) Notice. – The Department will give notice of any special prequalification requirements and procedures for bidders and/or subcontractors prior to the issuance of the proposal form for the project. Notice shall be given by publication in appropriate newspapers and/or publication on the Construction Division's website, as the Department may determine.

(3) Rejection of Ineligible or Non-Responsive Bidders or Subcontractors. – The Department reserves the right to refuse to issue a proposal form to any bidder, reject the proposal of any bidder, and/or decline to approve any subcontractor that does not, in the judgment of the Department, meet the special prequalification requirements.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

1680-5-3-.10 Bidding, Joint Ventures, and Affiliates.

In addition to any other provisions pertaining to the submission, opening and acceptance or rejection of bids that are contained in the Department's Standard Specifications for Road and Bridge Construction (and as amended or supplemented), the following bidding requirements are established in these prequalification rules.

(1) Bidding Procedure.

(a) To bid on any project advertised by the Department, the bidder must be prequalified in work classification(s) applicable to the project so as to be able to perform with its own forces at least thirty percent (30%) of the total original contract price (or such other amount of the contract as the proposal may require), including the cost of materials and manufactured products that are to be incorporated into the project but excluding specialty items.

(b) If the work of a project is not among the work classifications previously identified by the Prequalification Office in the prequalification questionnaire or other forms completed by applicants for prequalification, the Department's advertisement may solicit applications for prequalification in one or more new or project-specific work classifications, or the Department may waive prequalification requirements in whole or part.

(c) Unless suspended, debarred or otherwise excluded from participation in Department contracts, a prequalified bidder may request a proposal form or other bidding documents from the Department at any time prior to the opening of bids for the project on which the bidder may be interested in submitting a proposal.

(2) Joint Ventures.

(a) When two or more bidders wish to bid together as a joint venture, each bidder wishing to participate in the joint venture must provide a separate written notice to the Prequalification Office to confirm its intention to bid as a party to the joint venture. Each notice must be signed by an authorized representative of each respective firm. The notices must be received prior to the issuance of a proposal to the joint venture.

(b) Each bidder participating in a joint venture must be separately prequalified by the Department; provided, however, that if the joint venture has been formed as a single business entity for the purpose of bidding on a particular project, the joint venture must apply for prequalification as provided in these rules.

(c) The joint venturers together must be prequalified in work classification(s) applicable to the project so as to be able to perform with their own combined forces at least thirty percent (30%) of the total original contract price (or such other amount of the contract as the proposal may require), including the cost of materials and manufactured products that are to be incorporated into the project but excluding specialty items.

(3) Affiliates. – Affiliates of a bidder are prohibited from submitting separate proposals for contract on the same Department project. The Department will not issue a proposal form to more than one affiliated party on the same project.

(4) Reservation of Right to Reject Bids or Cancel Awards. – In addition to any provision regarding the rejection of bids or cancellation of awards in the Department's Standard Specifications for Road and Bridge Construction (and as amended or supplemented), the Department reserves the right to reject the bid of any bidder or to cancel the award of a contract to any bidder:

(a) Who is not prequalified in the applicable work classification(s) for the project, or whose bid exceeds the limitations of a limited prequalification;

(b) Who is the affiliate of any other bidder on the same project, as determined by the Prequalification Office;

(c) Who has been temporarily disqualified or has had its prequalification revoked as provided in these rules; or

(d) Who has been suspended, debarred, or otherwise excluded under the Department's rules governing contractor debarment and suspension, Chapter 1680-5-1, or under applicable Federal rules governing the suspension and debarment of contractors.

Authority: T.C.A. §§ 54-5-117 and 4-3-2303.

Legal Contact and/or party who will approve final copy for publication:

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Nashville, Tennessee 37243
(615) 741-2941

Contact for disk acquisition:

(Same as above)

Signature of the agency officer responsible for proposing these rules:

Gerald F. Nicely, Commissioner

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Tennessee Department of Transportation on the 7th day of July, 2006.

Further, I certify that the provisions of T.C.A. §4-5-222 have fully complied with, that these rules are properly presented for filing, a notice of rulemaking has been filed in the Department of State on the 30th

day of September, 2005, and such notice of rulemaking having been published in the October 15, 2005, issue of the Tennessee Administrative Register, and such rulemaking hearing having been conducted pursuant thereto on November 21, 2005.

John H. Reinbold
General Counsel

SHENEY TOLIVER
NOTARY PUBLIC AT LARGE
DAVIDSON COUNTY, TENN.

Subscribed and sworn to before me this 7th day of July, 2006.

Notary Public

My Commission Expires NOV. 25, 2006

My commission expires on the 25th day of November, 2006

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

Paul G. Summers
Attorney General and Reporter

The rulemaking hearing rules set out herein were properly filed in the Department of State on the 18 day of July, 2006, and will become effective on the 1 day of Oct, 2006.

Riley C. Darnell
Secretary of State

By: _____

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