

Notice of Rulemaking Hearing
Tennessee Department of Transportation
Civil Rights Division

There will be a hearing before the Tennessee Department of Transportation to consider the promulgation of new rules establishing the Construction Management Development Program pursuant to Tennessee Code Annotated § 4-3-2305. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, Tennessee Code Annotated § 4-5-204, and will take place in the Auditorium of the Main Administrative Building (Building "A") at the Tennessee Department of Transportation, Region III Office Complex, located at 6601 Centennial Boulevard, Nashville, Tennessee 37243-0360 at 4 p.m. CST on April 1, 2005 (Take Briley Parkway to Exit 26B, Centennial Boulevard West.)

Written comments will be considered if received by the close of business (4:30 p.m.) on April 1, 2005, in the Office of General Counsel, Tennessee Department of Transportation, Suite 300, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243-0326, or if received at the public rulemaking hearing on April 1, 2005.

Individuals with disabilities wishing to participate in these proceedings (or to review these filings) should contact the Department of Transportation to discuss any auxiliary aids or services needed to facilitate such participation. Such contact may be in person, by writing, telephone or other appropriate means, and should be made no less than ten (10) days prior to the public hearing (April 1, 2005) or the date the party intends to review such filings to allow time to provide such aid or service. Such contact may be made with the Department of Transportation's ADA Coordinator at Suite 400, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243-0327, or by telephone at (615) 741-4984.

For a copy of this notice of rulemaking hearing, contact: Brian R. Carroll, Tennessee Department of Transportation, Office of General Counsel, Suite 300, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243, telephone number (615) 741-2941.

Substance of Proposed Rules

New Rules

Chapter 1680-8-3
Construction Management Development Program

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1680-8-3-.01 Purpose. This rule implements a voluntary comprehensive Construction Management Development Program (CMDP) for Certified Small Businesses.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.02 Definition of Terms.

For the purpose of administering this program, the following definitions shall apply:

- (1) "Average Annual Gross Receipts" - means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.
- (2) "Bond Guarantee Program" or "BGP" - means a program in which the Tennessee Department of Transportation may act as a secondary surety for select Certified Small Businesses.
- (3) "Certification of Proficiency" - means a certificate awarded to Certified Small Businesses meeting the Minimum Curriculum Standards of Proficiency (See Rule 1680-8-3-.02(7) herein).
- (4) "Certified Small Business" - means a small business that has been approved by the Department as meeting the statutory criteria to participate (if selected by the Department) in the Construction Management Development Program (CMDP) and/or Bond Guarantee Program (BGP). A business meets the statutory criteria if the business (including its affiliates) is a certified disadvantaged business

enterprise (DBE) as defined by 49 CFR Part 26. Also, a business meets the statutory criteria if the business satisfies all the requirements of a disadvantaged business enterprise (DBE) as defined by 49 CFR Part 26 other than the requirement that the business is owned by socially and economically disadvantaged individuals as defined in 49 CFR Part 26.5.

- (5) "Construction Management Development Program" or "CMDP" - means an original program of instruction taught to groups of individuals who are owners of Certified Small Businesses to enhance, improve, or develop skills needed to successfully perform construction projects. This program may consist of classroom instruction and on-the-job instruction.
- (6) "Department" - means the Tennessee Department of Transportation.
- (7) "Minimum Curriculum Standards of Proficiency" - means established minimum requirements that a Certified Small Business owner must attain to demonstrate proficiency and capability regarding the instruction received through the classroom instruction portion of the CMDP.
- (8) "Small Business" - means a business (including its affiliates) that over the business's previous three fiscal years has had Average Annual Gross Receipts (See Rule 1680-8-3-.02(1) herein) not in excess of the business size limitations established in 49 CFR Part 26.65, or as any such limitation may be adjusted for inflation by the United States Secretary of Transportation as provided in 49 CFR Part 26.65.
- (9) "Small Business Development Program Office" - means the office of the Tennessee Department of Transportation that has the responsibility of monitoring and enforcing the Department's CMDP and BGP.
- (10) "Tennessee Department of Transportation Small Business Development Review Committee" - means the committee within the Tennessee Department of Transportation which renders final decisions of the Department on the CMDP and BGP.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.03 Construction Management Development Program Application.

- (1) All businesses seeking admission to the Construction Management Development Program shall complete and submit an Application for Construction Management Development Program (CMDP) and an Application for Small Business Certification to the Tennessee Department of Transportation/Civil Rights Office, Small Business Development Program, Suite 1800, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243-0347 (See Rule 1680-8-3-.12

herein). The Department may request additional information, if needed, from the applicant.

- (2) The CMDP applicant may also request exemption from the classroom and on-the-job instruction (See Rule 1680-8-3-.09 herein).
- (3) Only those businesses that have been certified (as a Certified Small Business) by the Department as meeting the statutory criteria may be eligible to participate in the CMDP. A business meets the statutory criteria if the business is a certified disadvantaged business enterprise (DBE) as defined by 49 CFR Part 26. Also, a business meets the statutory criteria if the business satisfies all the requirements of a disadvantaged business enterprise (DBE) as defined by 49 CFR Part 26 other than the requirement that the business is owned by socially and economically disadvantaged individuals as defined in 49 CFR Part 26.5.
- (4) The Small Business Development Program Office shall make a preliminary finding as to the eligibility of each applicant.
- (5) Preliminary findings shall be subject to approval of the Tennessee Department of Transportation Small Business Development Review Committee, which shall render the final Department decision in each case.
- (6) The Small Business Development Program Office shall advise each applicant whom, in its opinion, is ineligible for certification of its preliminary finding by certified mail, return receipt requested. Reasons shall be given as to why admission cannot be granted.
- (7) The applicant shall then have fifteen (15) days after receipt of notice to request in writing an appeal to the Tennessee Department of Transportation Small Business Development Review Committee, which may reverse or uphold the Small Business Development Program Office's preliminary finding in its final decision.
- (8) Should the applicant not appeal within the fifteen (15)-day period, then the preliminary finding of the Small Business Development Program Office shall become the final decision of the Tennessee Department of Transportation Small Business Development Review Committee.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.04 Needs Assessment.

- (1) After determination of eligibility, the Department may conduct a needs assessment of the Certified Small Business. The purpose of the assessment is to:

- (a) Determine the areas of strengths and weaknesses of the applicant in terms of proficiency and capability in performing on highway construction and transportation support related projects.
 - (b) Identify those applicants who should receive exemption from the CMDP because of demonstrated satisfactory project performance. This determination may be based on evaluation of the applicant on the scoring system in this Rule (See Rule 1680-8-3-.09 herein) using the following sources:
 - 1. Needs assessment report;
 - 2. Application;
 - 3. Document(s) accompanying application;
 - 4. Interviews with applicant;
 - 5. Interviews with Department staff familiar with the applicant's work;
 - 6. Review of applicant's past performance record from Department records and references; and
 - 7. Any other reports or information that inform about the applicant's performance and capacity.
 - (c) Determine the specific courses for which the applicant should register to improve skills and correct weaknesses or deficiencies.
 - (d) Identify areas of need for technical assistance through on-the-job training.
- (2) After completion of the needs assessment, each applicant will be notified in writing of the findings and recommendations.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.05 Eligibility for the Construction Management Development Program.

- (1) Participants in the CMDP will consist of those Certified Small Businesses that have obtained a needs assessment by the Department (if the Department chooses to conduct such assessment) and have been admitted to the program. This program may consist of two primary components: classroom instruction and on-the-job instruction.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.06 Enrollment Procedures for the Construction Management Development Program.

- (1) To enroll in the CMDP, each applicant shall submit a completed application form (See Rule 1680-8-3-.03 (1) herein) to the Department along with the appropriate application fee as may be set by the Department.
 - (a) The Department shall forward written notification to the educational institution conducting the classroom instruction to advise of the applicant's approval to register. It will be the applicant's responsibility to complete registration and pay registration fees as may be required by the institution.
 - (b) Each institution conducting classroom instruction will submit completed registration information to the Department.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.07 Classroom Instruction.

- (1) Classroom instruction may include instruction in project planning methods for identifying manpower, equipment, and financial resource needs; bookkeeping; project scheduling; state bidding and bonding requirements; state and federal tax requirements; strategies for obtaining loans and surety bonding; and techniques for negotiating and drafting joint venture agreements.
- (2) The Department may establish a classroom curriculum.
- (3) The Department may establish classes, course requirements, and class testing requirements.
- (4) Conduct of Classroom Instruction.
 - (a) The Department shall approve the number of courses and types of courses that shall compose a complete program of instruction by trade or profession for Certified Small Businesses desiring admission to the BGP. Satisfactory completion of the classroom curriculum shall be required of all applicants for the BGP that have not received exemption from the CMDP.
 - (b) Curriculum Standards. The Department shall approve the program of courses established by the educational institutions and/or private sector firms for specific trade and professional groups that must be successfully completed (to meet Minimum Curriculum Standards of Proficiency) in

order to receive a Certification of Proficiency for each definitive group. Those groups may include:

1. General contractors, highway construction; and
 2. Special trade/professional contractors including asphalt paving, building, construction/modification, concrete, miscellaneous, drainage, earthwork, erosion control, fencing, guardrail, landscaping, painting, steel, traffic control, trucking, architecture, business and financial management, consultants, and materials supply.
- (5) Follow-up of Classroom Instruction. Participants who desire to take additional classroom instruction may be permitted to do so without paying an additional application fee, but all course registration fees shall have to be paid.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.08 On-the-Job Instruction.

- (1) On-the-job instruction shall also be known as technical assistance. The instruction may include the following areas: setting up the job site; cash flow method; project scheduling; making quantity take-offs and cost estimating; reading plans and specifications; Department procedures on payments; quality assessment and control methods; and bid preparation methods.
- (2) Initiating Procedure. As a result of the needs assessments or classroom instruction, areas of deficiency may be identified for which technical assistance may be appropriate. Any participant in the CMDP may also request technical assistance in any area of training provided as part of the program.
- (3) Technical Assistance Plans.
 - (a) Upon receipt of a technical assistance request from a participant, the Department may review the request and develop a technical assistance plan. That plan may contain the following information:
 1. Approach to resolving the problem;
 2. The type of training required to resolve the problem;
 3. The number of technical assistance days estimated to resolve the problem; and
 4. Cost of assistance.

- (b) The Department may submit a plan to the participant after receiving the request for technical assistance. Upon payment of the required fee, the Department may assign a contractor who has volunteered to participate, a consultant, or a Department employee to provide the technical assistance at the participant's place of business or job-site.
- (c) Upon completion of a needs assessment (if the Department chooses to conduct one) that identifies areas of needed technical assistance -- the Department may review the information and develop a technical assistance plan to address the identified needs. That plan may contain the following information:
 - 1. Approach to resolving the problem;
 - 2. The type of training required to resolve the problem;
 - 3. The number of technical assistance days estimated to resolve the problem; and
 - 4. Cost of assistance.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.09 Exemption from the Construction Management Development Program.

- (1) The Small Business Development Program Office may determine exemption from the classroom and on-the-job training based on evaluation of the applicant's project performance through comparison with the Minimum Curriculum Standards of Proficiency. It shall be the responsibility of the applicant to provide evidence of the following criteria. Evaluation shall be based on the following scoring system:

- (a) Administration and Management of Business -- Maximum 15 Points.

The applicant shall provide adequate evidence that it:

- 1. Holds all relevant licenses and meets all other legal requirements regarding the Certified Small Business;
- 2. Shows capability to develop an overall business plan;
- 3. Maintains an adequate credit history;
- 4. Maintains adequate staff and employees required to carry out the work associated with the Certified Small Business;

5. Maintains a payroll system set up to feed accurate and complete information into the job costing system;
6. Is able to generate accurate financial statements in accordance with generally accepted accounting principles; and
7. Has policies and procedures regarding timely billing and collection from customers.

(b) Bidding/Estimates – Maximum 20 Points.

The applicant shall provide adequate evidence that it:

1. Has an understanding to implement all requisite steps in the preparation of Department bids; and
2. Has competence in accurately estimating project costs.

(c) Contract Negotiating and Knowledge – Maximum 15 Points.

The applicant shall provide adequate evidence that it:

1. Has an understanding of contract terms concerning the rights, obligations, and liabilities for Small Businesses;
2. Has an understanding of the basic elements of Department contracts; and
3. Has an ability to adequately negotiate, draft, and interpret subcontracts.

(d) Project Planning – Maximum 20 Points.

The applicant shall provide adequate evidence that it:

1. Has capability in scheduling and phasing the work of a project and in allocating labor to timely complete the project;
2. Has skill in developing schedules for ordering and assuring delivery of materials and equipment and hiring of work force; and
3. Has knowledge of the reports and other paperwork required by the Department and/or the prime contractor.

(e) Project Performance – Maximum 30 Points.

The applicant shall provide adequate evidence that it:

1. Maintains a system of project monitoring that includes job-site inspections by management as well as periodic reporting from its project superintendent;
2. Maintains a field monitoring and reporting system to warn of any deviations from project schedule or cost overruns;
3. Has capability to maintain an updated and accurate job costing system;
4. Maintains a system for dealing with change orders; including requiring written change order and method for calculating prices to cover the changes; and
5. Has knowledge of project closeout procedures.

(f) TOTAL MAXIMUM POINTS: 100.

- (2) The Small Business Development Program Office shall assign the score that is most representative of the Certified Small Business's proficiency.
- (a) For scores 85 and above, the Certified Small Business may be exempt from the CMDP. However, the exempted Certified Small Business may enroll in the CMDP if so desired by that applicant.
 - (b) For scores under 85, the Certified Small Business may be enrolled in the CMDP if obtaining a Certification of Proficiency is desired.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.10 Certification of Proficiency.

- (1) Each Certified Small Business participant must satisfactorily complete each component of the classroom training in order to meet the minimum standard of proficiency or receive exemption to apply and potentially gain admission to the BGP. The Certified Small Business may be awarded a Certification of Proficiency upon successful completion of the classroom component and completion of all required technical assistance training or upon receipt of exemption.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.11 Revocation.

- (1) The Department's acceptance of a Certified Small Business in the CMDP may be revoked if the Department finds the business no longer meets the requirements of a Certified Small Business.
- (2) A Certified Small Business's participation in the CMDP may be revoked if the Department finds the business willfully made a false, deceptive, or fraudulent statement in any document submitted to the Department.
- (4) Prior to revoking a Certified Small Business's participation in the CMDP, written notice shall be sent from the Small Business Development Program Office explaining why the Department's acceptance of the Certified Small Business in the CMDP shall be revoked. The Certified Small Business shall have fifteen (15) days to respond to the deficiencies. If the Certified Small Business does not respond or if the Certified Small Business's explanation is not sufficient, then the Certified Small Business shall be advised by certified mail, return receipt requested, of the preliminary finding of ineligibility for retention of participation in the CMDP. Reasons shall be given for the preliminary finding.
- (5) The Certified Small Business shall then have fifteen (15) days after receipt of notice to submit a written appeal to the Tennessee Department of Transportation Small Business Development Review Committee, which may reverse or uphold the Small Business Development Program Office's preliminary finding in its final decision.
- (6) Should the Certified Small Business not appeal within the fifteen (15)-day period, then the preliminary finding of the Small Business Development Program Office shall become the final decision of the Tennessee Department of Transportation Small Business Development Review Committee.
- (7) No application fee or registration fee shall be refunded upon revocation.

Authority: T.C.A. § 4-3-2305.

1680-8-3-.12 Forms.

- (1) The following listed forms are hereby incorporated by reference and made a part of the Rules of the Department:
 - (a) Application for Construction Management Development Program (CMDP).
 - (b) Application for Small Business Certification.
 - (c) Technical Assistance Request Form.

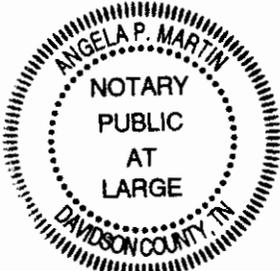
(2) Copies of these forms are to be obtained from the Tennessee Department of Transportation/Civil Rights Office, Small Business Development Program, Suite 1800, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243-0347.

Authority: T.C.A. § 4-3-2305.

I certify that this is an accurate and complete representation of the intent and scope of rulemaking proposed by the Tennessee Department of Transportation.

Gerald F. Nicely
Gerald F. Nicely
Commissioner
Tennessee Department of Transportation

Subscribed and sworn to before me this the 31st day of January, 2004. 2005



Angela P. Martin
Notary Public

My Commission Expires on the 22nd day of March, 2008.

The notice of rulemaking set out herein was properly filed in the Department of State on the 31 day of Jan., 2004. 2005

Riley C. Darnell
Riley C. Darnell
Secretary of State

By: M. M. [Signature]

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