

Notice of Rulemaking Hearing
Tennessee Department of Transportation
Construction Division

There will be a hearing before the Tennessee Department of Transportation to consider the promulgation of new rules governing the prequalification of bidders for construction contracts with the Department of Transportation pursuant to Tennessee Code Annotated § 54-5-117 and § 4-3-2303. 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 (take Briley Parkway to Exit 26B, Centennial Boulevard West) at 1:00 p.m. CST on Monday, November 21, 2005.

Written comments will be considered if received by the close of business (4:30 p.m.) on November 21, 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 November 21, 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 (November 21, 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: John Reinbold, 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 1680-5-3
Prequalification of Contractors

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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 amount of 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 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, 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.

- (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 require 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 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.

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 required or requested of or submitted by any applicant for prequalification or any other matter within the scope of these rules.

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 or information that may be developed or requested 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 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.

(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 require:

- (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 require;
 - 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; Bonding Capacity.** – 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. The Prequalification Office may require the applicant to document its maximum current or potential bonding capacity.
- (k) **Financial Responsibility.**
 - 1. With respect to:
 - (i) The applicant,
 - (ii) Any affiliate of the applicant (as identified in accordance with subparagraph (c) above), or
 - (iii) Any business firm (whether or not such firm as been prequalified or is seeking prequalification by the Department) in which a partner, owner, officer, or authorized representative of the applicant (as identified in accordance with subparagraph (b) above) is or was a partner, owner (of at least a 10% interest), officer, or authorized representative,

2. The application shall state whether the applicant, affiliate, or such business firm 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; 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) 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;
 2. Convicted of 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 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 control act.
- (m) Additional Information; Examination of Records and Accounts. – The Department reserves the right to request additional information to clarify and/or verify any information submitted in an applicant's prequalification application and to examine the applicant's records and accounts. The applicant shall be deemed to have

consented to the Department's right to examine its records and accounts by submitting a prequalification application to the Department.

- (3) Submission of Prequalification Application – Timing and Effect.
 - (a) The prequalification application must be submitted to and received by the Prequalification Office at least twenty-one (21) 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 or requested information has been received and evaluated.
- (4) Requirements for Reporting Changes in Prequalification Application.
 - (a) A prequalified bidder or subcontractor shall promptly notify the Prequalification Office of any material change in the information provided to the Department with the applicant's prequalification application.
 - (b) For the purposes of reporting changes under this paragraph, a material change in the applicant's prequalification application includes, at a minimum, any change in the information provided under paragraph (2) of this rule.
 - (c) Failure to notify the Prequalification Office of any material change in the applicant's prequalification application information at least twenty-one (21) days prior to any bid letting or request for approval as a subcontractor, as applicable, 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 require for the purpose of evaluating whether the applicant is responsible and qualified to perform 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, 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.
- (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 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) 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 may 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.
 - (c) 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 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 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.

- (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) Any change in the applicant’s or any affiliate’s prequalification information (as is required to be reported under Rule 1680-5-3-.04 above) that pertains to the applicant’s or any affiliate’s qualifications or responsibility, including without limitation any change in the firm’s work experience, key personnel, available equipment, environmental record, financial responsibility, or business integrity;
 - (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.** – 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 above.
- (4) **Appeal.** – A prequalified bidder or subcontractor who has been temporarily disqualified or who has had its prequalification status modified, revoked or restricted 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.

1680-5-2-.08 Appeals.

- (1) **Grounds for Appeal.** – In accordance with these rules, an applicant for prequalification or a prequalified bidder or subcontractor whose prequalification status has been adversely affected may appeal any decision by the Director of Construction that:
 - (a) Determines the applicant's prequalification status, as provided in Rule 1680-5-3-.05;
 - (b) Modifies, revokes or restricts an existing prequalification held by the prequalified bidder or subcontractor, as provided in Rule 1680-5-3-.07;
 - (c) Temporarily disqualifies a prequalified bidder or subcontractor, as provided in Rule 1680-5-3-.07; or
 - (d) 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 thirty (30) 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. 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 recommendations for his/her 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 thirty (30) 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 and not subject to any further administrative appeal.
- (5) Reservation. – The informal appeal procedure established herein and other proceedings established in these rules are not, nor are they required to be conducted as, contested case proceedings under Tennessee Code Annotated § 4-5-102(3). It is the intent of these rules, consistent with considerations of fundamental fairness, to provide for the just, speedy and inexpensive determination of matters before the Prequalification Office, the Prequalification Committee, and the Commissioner. 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.

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 the work classification(s) as identified in the advertisement for the project.
 - (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 make a separate written request to the Prequalification Office to request approval of the joint venture. Each request must be signed by an authorized representative of each respective firm.
 - (b) Each bidder participating in a joint venture must be separately prequalified by the Department.
 - (c) At least one of the bidders participating in a joint venture must be prequalified in the work classification(s) applicable to the project.
- (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.

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
Commissioner
Tennessee Department of Transportation

Subscribed and sworn to before me this the 29th day of September, 2005.

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 30 day of Sept., 2005.

Riley C. Darnell
Secretary of State

By:

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