

PROPOSED RULEMAKING

DEPARTMENT OF REVENUE

[61 PA. CODE CHS. 55 AND 60]

Sales and Use Tax; Lawn Care Services

The Department of Revenue (Department), under authority contained in section 270 of the Tax Reform Code of 1971 (TRC) (72 P. S. § 7270), proposes to amend § 55.6 (relating to lawn care services) and delete § 60.2 (relating to lawn care services) as set forth in Annex A. Section 270(a) of the TRC specifically provides that the Department is authorized and empowered to prescribe, adopt, promulgate and enforce, rules and regulations not inconsistent with Article II of the TRC (72 P. S. §§ 7201—7281.2) relating to tax for education, relating to any matter or thing pertaining to the administration and enforcement of the provisions of Article II and the collection of taxes, penalties and interest imposed by Article II.

Currently, the Department's interpretation of Act 1991-22 (72 P. S. §§ 7201(k)(17), (o)(15) and (j)) relating to lawn care services has been set forth as a pronouncement and codified at § 60.2. The Department has concluded that the issues relating to this service have evolved to the point where the Department can set forth its interpretation as a regulation. Therefore, in addition to proposing to add § 55.6, the Department is also proposing to delete the pronouncement relating to lawn care services which appears at § 60.2.

Section 55.6(a) sets forth definitions for administrative supplies, lawn and lawn care service. Subsection (b) provides that the sale at retail or use of lawn care services performed in this Commonwealth is subject to tax. Lawn care services became taxable October 1, 1991.

Subsection (c) provides examples of taxable lawn care services. Subsection (d) provides examples of services which are not taxable lawn care services. Subsection (e) provides that tax shall be imposed on the total charge for lawn care services. The failure to separately state charges for lawn care services from other nontaxable charges on the invoice requires the charging of tax on the total invoice amount.

Subsection (f) sets forth exclusions. Paragraph (1) provides an exemption if the lawn care services are purchased by qualified charitable organizations, volunteer fire companies, religious organizations and nonprofit educational institutions, except if used in an unrelated trade or business. The services are also excluded if purchased by the Federal government or its instrumentalities; or the Commonwealth or its instrumentalities; or subdivisions including public school districts. Paragraph (2) provides that the vendor of lawn care services may claim the resale exemption upon its purchase of tangible personal property that is transferred to the purchaser or a third party in the performance of the lawn care services. This subsection also provides examples of property that may be purchased exempt for resale when used in performing lawn care services and examples of property that are taxable when used in performing lawn care services.

Fiscal Impact

The Department has determined that the proposed amendments will have no significant fiscal impact on the Commonwealth.

Paperwork

The proposed amendments will not generate significant additional paperwork for the public or the Commonwealth.

Effectiveness/Sunset Date

The amendments will become effective upon final publication in the *Pennsylvania Bulletin*. The amendments will be monitored annually. No sunset date has been assigned.

Contact Person

Interested persons are invited to submit in writing comments, suggestions or objections regarding the proposed amendments to Anita M. Doucette, Office of Chief Counsel, Department of Revenue, Dept. 281061, Harrisburg, PA 17128-1061, within 30 days after the date of the publication of this notice in the *Pennsylvania Bulletin*.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of these proposed amendments on February 20, 1996, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Finance and the Senate Committee on Finance. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the agency in compliance with Executive Order 1982-2, "Improving Government Regulations." A copy of this material is available to the public upon request.

If IRRC has any objections to any portion of the proposed amendments, it will notify the Department within 30 days after the close of the public comment period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review of objections raised, prior to final publication of the amendments, by the Department, the General Assembly and the Governor.

ROBERT A. JUDGE, Sr.,

Secretary

Fiscal Note: 15-352. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 61. REVENUE

PART I. DEPARTMENT OF REVENUE

Subpart B. GENERAL FUND REVENUES

ARTICLE II. SALES AND USE TAX

CHAPTER 55. SERVICES

§ 55.6. Lawn care services.

(a) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

Administrative supplies—

(i) Tangible personal property which is consumed in one of the following manners:

(A) Used but not transferred by a vendor in the performance of this service.

(B) Transferred by a vendor to another party in connection with the performance of the vendor's services when the property is not a critical element of the service.

(ii) Examples of administrative supplies include sales invoices, receipts, contracts, estimate sheets, confirmations or other similar items.

Lawn—Any area covered with grass, including residential and nonresidential lawns, parks, golf courses, athletic fields and cemeteries.

Lawn care service—Providing services for lawn upkeep including fertilizing, mowing, trimming shrubbery or performing other lawn treatment services.

(b) *Scope*. The sale at retail or use of lawn care services performed in this Commonwealth is subject to tax. Lawn care services became taxable October 1, 1991.

(c) *Examples of taxable services*. The following are examples of taxable lawn care services:

- (1) Fertilizing lawns.
 - (2) Mowing, trimming, cutting or edging lawns.
 - (3) Dethatching lawns.
 - (4) Applying herbicides, insecticides or fungicides to lawns.
 - (5) Raking leaves or grass on lawns.
 - (6) Applying treatments for weed, pest, insect or disease control to lawns.
 - (7) Watering lawns.
 - (8) Applying lime to lawns.
 - (9) Reseeding, resodding or replacing lawns.
 - (10) Aerating lawns.
 - (11) Providing lawn evaluation, consultation or soil testing services on lawns, if purchased in conjunction with other lawn care services, regardless of whether the costs of the lawn evaluation, consultation or soil testing services are separately stated on the invoice.
 - (12) Overseeding lawns.
 - (13) Renovating lawns.
 - (14) Trimming or pruning shrubbery.
- (d) *Examples of nontaxable services*. The following are examples of services which are not taxable lawn care services:

- (1) Seeding, sodding or grass plugging new lawns.
- (2) Trimming, pruning or fertilizing trees.
- (3) Planting or removing shrubbery or trees.
- (4) Providing lawn evaluation, consultation or soil testing services, if not purchased in conjunction with other lawn care services.
- (5) Designing lawns or landscapes.
- (6) Applying herbicides or fungicides to shrubbery, trees, flowers or vegetables. The application of insecticides or other similar chemicals to shrubbery, trees, flowers or vegetables is a taxable pest control service.
- (7) Maintaining shrubbery, flower or vegetable beds, such as by mulching, tilling, weeding or fertilizing.

(e) *Purchase price*. Tax shall be imposed on the total charge for lawn care services. The failure to separately state charges for lawn care services from other nontaxable charges on the invoice requires the charging of tax on the total invoice amount.

(f) *Exclusions*.

(1) Lawn care services are exempt if purchased by qualified charitable organizations, volunteer fire companies, religious organizations and nonprofit educational institutions, except if used in an unrelated trade or business; the Federal government or its instrumentalities; or the Commonwealth, its instrumentalities or subdivisions, including public school districts. The manufacturing, mining, processing, public utility, farming, dairying, agriculture, horticulture or floriculture exclusion does not apply.

(2) The vendor of lawn care services may claim the resale exemption upon its purchase of tangible personal property that is transferred to the purchaser or a third party in the performance of the lawn care services. The vendor may also purchase lawn care services from another provider and subsequently resell the services to its customer. The vendor may not claim the resale exemption upon its purchase of administrative supplies or the purchase of other taxable services that it may use in the performance of its lawn care services.

(i) The following are examples of property that may be purchased exempt for resale when used in performing lawn care services:

- (A) Grass seed, plugs, sod, straw or mulching material, when purchased for use in an existing lawn.
- (B) Herbicides, insecticides, fungicides or other chemicals that are applied to lawns.
- (C) Fertilizers or lime applied to lawns.

(ii) The following are examples of property that are taxable when used in performing lawn care services:

- (A) Grass seed, plugs, sod, straw and mulching material purchased for use in creating a new lawn.
- (B) Mowers; edgers; or pruning, dethatching, aerating or mulching equipment.
- (C) Rakes, shovels or hoes.
- (D) Spray applicators.
- (E) Testing kits.
- (F) Lawn sweepers.
- (G) Shrubby or trees.
- (H) Administrative supplies.

CHAPTER 60. SALES AND USE TAX PRONOUNCEMENTS—STATEMENTS OF POLICY

§ 60.2. (Reserved).

(Editor's Note: As part of this proposal, the Department is proposing to delete the text of a statement of policy § 60.2 (relating to lawn care services) which appears at 61 Pa. Code pages 60-7—60-9, serial pages (200677)—(200679).)

[Pa.B. Doc. No. 96-290. Filed for public inspection March 1, 1996, 9:00 a.m.]

DEPARTMENT OF TRANSPORTATION

[67 PA. CODE CH. 457]

Prequalification of Bidders

The Department of Transportation (Department), Bureau of Construction and Materials (Bureau), under the authority contained in section 404.1 of the State Highway Law (36 P. S. § 670-404.1) proposes to amend Chapter 457 (relating to prequalification of bidders) as set forth in Annex A.

Purpose of Chapter 457

The purpose of Chapter 457 is to provide a procedure for processing and evaluating the capacity and qualifications of prospective bidders to perform highway project work in this Commonwealth; to provide a system to permit efficient operation of the contract program for highway projects; to minimize delays in the award of contracts after bids have been opened; and to assure the integrity, responsibility and competency of bidders.

Purpose of these Proposed Amendments

The purpose of the proposed amendments is to assure compatibility with the Contractor Responsibility Program as contained in Management Directive 215.9, dated July 17, 1990, and with Chapter 491 (relating to administrative practice and procedure); to include definitions for the terms "suspension" and "debarment"; to include additional reasons for suspension and debarment; to substitute the terms "contractor" and "subcontractor" or "contractor" for "prospective bidder," as appropriate; to include definitions for the terms "contractor" and "subcontractor"; to eliminate the existing appeal committee structure and to replace the structure with the Administrative Hearing Officer; to amend the cycle for prequalification to 2 years from 1 year; to assign umbrella certificates to parent companies and up to three subsidiaries, thus allowing applicants to bid through a wholly owned and controlled subsidiary as an alternative to separate and independent applications; to provide for clarification of the term "general contractor" and to provide acceptance of a review type of Financial Statement under certain conditions. These proposed amendments will provide for uniform, consistent and compatible application of the suspension/debarment process of contractors on a Statewide basis, and will ease the paperwork burden on contractors and the Department.

Preliminary drafts of these amendments have been provided to the Associated Pennsylvania Constructors Association (APC). The Department, on several occasions, met with APC to discuss and modify the draft amendments. Furthermore, an informal draft of these amendments was also submitted to the Federal Highway Administration (FHWA) for review and comment. Comments from the FHWA were generally technical in nature and the draft was modified accordingly. The Contractor Responsibility Program Committee (CRPC) was also contracted to resolve issues related to suspension and debarment that were of concern to the APC.

The CRPC is chaired by the Deputy Secretary for Comptroller Operations for the Office of the Budget and is comprised of representatives from the Department, the Department of General Services, the Office of the Budget and the Office of Inspector General. The CRPC was charged by the Governor with the formulation and admin-

istration of Management Directive 215.9, which applies to agencies under the Governor's jurisdiction. Management Directive 215.9, sets out the Commonwealth's Contractor Responsibility Program, which is to ensure that the Commonwealth's contractors are competent and responsible and that the contracting process is free of fraud, waste and abuse.

One major area of contention that has not been resolved was a request from APC to have one of the reasons for suspension or debarment changed from "violation of" to "conviction of." The CRPC was not agreeable to this request since agreement with this suggestion would indicate that suspension is the same as debarment. Further, the current wording provides the Commonwealth with the latitude to immediately address allegations of heinous conduct or particularly egregious wrongdoing by a contractor through an administrative investigation and review rather than requiring a conclusion to potentially lengthy criminal proceedings as a predicate to any Commonwealth action.

The most significant amendments include the following:

(1) Section 457.1 (relating to definitions) has been amended to include the addition and deletion of several definitions to accommodate amendments in the remaining sections. The additional definitions are "affiliates," "contractor," "debarment," "Department hearing officer," "subcontractor" and "suspension." Definitions that are to be deleted are "bidder," "Board of Review" and "prequalification committee." The incorporation of the term "affiliates" broadens the scope of the program and provides the Commonwealth with a remedy to situations where contractors seek to circumvent a suspension or debarment by shuffling assets between companies or simply starting new corporations. "Bidder" has been deleted and replaced by definitions of "contractor" and "subcontractor" to reflect that subcontractors are now separately prequalified. The definition of "debarment" fills a gap in the regulations in that it articulates the exact nature of this action and distinguishes its fixed term aspect from the temporary nature of a "suspension," as that term is now defined. The definition of "Department hearing officer" specifies who that person is and reflects the Department's effort to have a uniform hearing mechanism for all administrative matters rather than the two-tiered, prequalification appeals process now in place. The deleted definitions reflect the elimination of these bodies as part of the new process. In addition to the foregoing, the changes in the definitions achieve consistency with Management Directive 215.9. The changes also substantially reduce the potential for impermissible commingling of Department personnel between the prosecutorial and adjudicatory roles when a contractor appeals a prequalification action by having a hearing officer in lieu of the two multimember panels that exist under the current regulations.

(2) Section 457.3(d)(1)(i) (relating to general requirements) indicates that prequalification shall expire 18 months from the date of the contractor's balance sheet contained in the prequalification application when the balance sheet date is December 31, 1994, or earlier. The purpose of establishing this date is to provide for a cutoff date and implementation date between the existing regulations and the proposed regulations.

Section 457.3(d)(1)(ii) has been added to provide for prequalification certificates for prime contractors to expire 30 months from the date of the balance sheet as compared to the present 18 months. This change as noted in the proposed amendments will begin when the balance

sheet date is January 1, 1995, or thereafter. Since contractors will be required to apply on an average of every 2 years as compared to an average of once a year, savings in terms of money and paperwork will be realized by prime contractors, since financial statements will also be required only once every 2 years instead of once every year.

Section 457.3(d)(2)(i) provides for certificates for sub-contractors to expire 2 years from the date they are prequalified. Subcontractors will realize savings in paperwork since they will be required to submit applications once every 2 years as compared to the existing requirement of once a year. It is expected that the Department will realize some savings in paperwork.

Section 457.3(d)(3) has been replaced to provide for a 30-day time extension of a current certificate should the renewal certificate not be issued prior to expiration. This will allow contractors to continue bidding until the new certificate is issued since the present policy does not allow for any time extensions.

Section 457.3(h) has been replaced to include a requirement for out-of-State contractors to designate a resident agent. This amendment was added to allow for the timely coordination of essential documents from out-of-State firms. Submission of required and requested documents from out-of-State firms has proven, in some past situations, to be a time consuming process.

Section 457.3(i) has been added to require the Prequalification Office to retain records for a period of 3 years. This retention period allows the Department to compare records over this time period to determine if changes have occurred which could affect the applicant's prequalification status and to provide information that may be relative to other construction concerns. This addition documents the Department's policy concerning the retention of prequalification records.

Section 457.3(j) has been added to provide for the issuance of umbrella prequalification certificates to a parent company and as many as three subsidiaries/divisions. This addition provides for the combined group to apply for prequalification under a single application with a combined financial statement. Identical certificates would be issued to the parent and each designated subsidiary. Presently, a certificate is issued to each company individually based on its own individual credentials. Suspension or debarment would apply to all companies included under the umbrella certificate. With the addition of this provision, only one financial statement need be submitted for as many as four firms. Applicants should realize cost savings and paperwork savings. The Department will also realize some cost savings and paperwork savings since only one financial statement will be filed by the applicant and the Department will need to evaluate only one financial statement.

(3) Section 457.4(b)(3) (relating to statements to be furnished under oath) has been amended to require an applicant to provide an audited financial statement when the applicant's net working capital (assets minus liabilities) is in excess of \$50,000. It has been the Department's policy to require audited financial statements from applicants filing Part 1, Contractor's Financial Statement, since auditing standards require that audited financial statements include assurance from the applicant's accountant that an indepth examination, on a test basis, provides evidence supporting the amounts and disclosures in the financial statement. Review statements require limited testing to support the figures in the financial

statement. Section 457.4(b)(3) specifically reiterates that policy but also provides for acceptance of a review type of financial statement from applicants whose working capital does not exceed \$50,000. A number of contractors requested that the Department accept a review type of financial statement to allow contractors with lower net working capital to bid on low cost projects. This provision would allow these firms to be prequalified as prime contractors rather than just as subcontractors.

Section 457.4(b)(5) has been amended to clarify that lines-of-credit must be designated in the name of the applicant. This proposed amendment was included because, in the past, a number of firms have submitted lines-of-credit in the name of one of their affiliates or subdivisions. Since each applicant, whether a single applicant or an applicant with subsidiaries or divisions, is assigned prequalification based on its own merits and credentials, and not that of another company, this has become an area of concern. A line-of-credit accepted in a name other than the applicant's would distort the financial capacity of the applicant. This proposed amendment will also be applicable to the umbrella certificate concept discussed in previous paragraphs, that is, the line-of-credit will be required to be in the name of the entity or applicant.

Section 457.4(c)(3) has been amended to require several additional statements to be furnished by the prospective bidder. These are included under § 457.4(c)(3)(i)—(xviii), and will be required to be furnished under oath, as are existing statements in this section. These statements request information related to the organization and experience of the applicant and provide the Department with the capability to evaluate the credentials of an applicant with respect to classification and responsibility.

(4) Section 457.5(a) (relating to classification) has been amended to include modification to the classification codes. These classification codes are categories of work that are described in Publication 408, Pennsylvania Department of Transportation Specifications, and are listed under § 457.5(a). Classification codes establish the type of work upon which an applicant will be eligible to bid. Included in these proposed amendments are some name changes to the classification codes, the addition of Codes J1, Concrete Median Barrier; Q, Maintenance and Protection of Traffic; and V, Steel Painting (High Performance), and the deletion of Code W, Electrical and Code X, Plumbing. Code J1 was added due to the substantial increase in the installation of concrete median barrier on Department projects. Code Q was added due to legal considerations of assuring that maintenance and protection of traffic is performed in accordance with Department standards. Code V was added due to new products and techniques involved in the painting of steel bridges. The electrical and plumbing codes were deleted since the Department's related electrical work is incorporated under Code P (Highway/Sign Lighting, Signal Control) and the related plumbing work is associated with Code H (Drainage, Water Main, Storm Sewer).

Section 457.5(e) has been amended to allow for an applicant to be considered as a general highway contractor if he has been assigned classifications of C, Excavation and Grading; F, Bituminous Pavement or G, Rigid Pavement; H, Drainage, Water Main, Storm Sewers; and S, Cement Concrete Structures (All Types). This will eliminate the review for the 50% classification requirement, which requires that the bidder has been classified and eligible to bid on a minimum of 50% of the total bid price of the work items listed in the proposal, under

§ 457.8(a) (relating to certification of classification and capacity) at the time of bidding, if bidder is the low bidder. Bidders not prequalified for 50% of the total bid price will be excluded and rejected.

Section 457.5(f)(1) has been amended to establish an unlimited maximum capacity rating at \$500 million. The maximum capacity rating is the dollar amount which designates the quantity of work which a prospective bidder will be eligible to bid. This rating, although not previously specified in these regulations, was set at \$100 million. The \$100 million limit was established several years ago by the Bureau. The \$500 million limit has been established to accommodate for inflation since financial capacities have increased by approximately the same rate in that time period. The Department anticipates minimal risk with contractors whose financial capacity exceeds \$500 million since financial capacity is a measure of their working capital, equipment, borrowing capacity and work performance.

Section 457.5(f)(5) has been added to obtain additional financial documentation from a contractor when the current liabilities are greater than the current assets for 2 consecutive fiscal years. The section also allows the Department to prequalify the contractor to perform work only as a subcontractor if the Department still considers the contractor's financial status to be questionable after evaluation of the additional documentation.

Section 457.5(f)(6) has been added to allow the Department to reduce the maximum capacity rating or to reject the application for applicants who have been determined by the Department's accountant to have a negative working capital. This policy has been implemented to assure that applicants are fiscally responsible.

(5) Section 457.6 (relating to appeals procedure) is proposed to be amended to require that classification appeals will be held in conformity with the Department's rules of administrative practice and procedure in Chapter 491. Requests for classification hearings must be filed with the Administrative Docket Clerk of the Department, thus eliminating the first step of the present Prequalification Committee appeal structure, the Prequalification Committee hearing. Presently, appeals, classification, suspension, debarment, and the like, are first heard by the Prequalification Committee. Section 457.6 now provides an informal meeting as the first step in the appeal process. This will allow the Deputy Secretary for Highway Administration and the Director of the Bureau to become involved with highway construction problems related to prequalification prior to the initiation of the formal appeal process. Presently, the Bureau Director is designated as the Chairperson of the Prequalification Committee and the Deputy Secretary for Highway Administration is designated as a voting member of the Board of Appeal and do not become involved until an appeal is received. Classification appeals are intended primarily to include issues dealing with assignment of classification codes and maximum capacity ratings as discussed in § 457.5. This procedural change to the present appeal process assures consistency with Chapter 491. In accordance with Chapter 491, a filing fee of \$100 will be required for a classification hearing. The reason for the filing fee is to defray the costs of the proceeding.

Section 475.7 (relating to duties of the Board of Review) is proposed to be deleted thus eliminating the Board of Review in the appeal process. As noted in the preceding paragraph, appeals to the Department's Administrative Docket provide for consistency with Department regulations. Also, if applicants are not satisfied with the

determination of the Department hearing officer, they may appeal to Commonwealth Court. Due process should be assured through the three step process of informal review, Administrative Docket Clerk and Commonwealth Court.

Section 457.11 (relating to audit of contractor or subcontractor records) is proposed to be amended to allow the Department to review the records of the contractor that may substantiate information in the prequalification application, and to audit other records that may concern issues on construction projects, such as, payments to subcontractors.

Section 457.13 (relating to suspension or debarment) is proposed to be amended to include additional reasons for suspension or debarment. These additions are detailed in § 457.13(a)(1)—(13) and deal primarily with violations of Federal or State laws concerning antitrust statutes, campaign contributions, the environment, wage standards, labor standards and discrimination in employment. False claims have also been added as a specified reason for sanction as has the failure to cooperate with State agencies performing their investigative or review functions. This proposed amendment promotes compatibility with the Contractor Responsibility Program and provides consistency of Statewide implementation in dealing with suspension and debarment of contractors. The changes also lend specificity and definition to the types of conduct for which a contractor may be sanctioned. This is absent from the current regulations which use a bullet point approach. For example, "unsatisfactory past performance" is by itself under the current regulations. The proposed amendment, while not unduly restricting the Department's latitude, provides specific parameters and instances of how and why a contractor's performance may be deemed unsatisfactory. This heightened specificity clearly benefits contractors by promoting consistency and minimizing their susceptibility to subjective application of the terminology. The changes proposed do not, for the most part, increase a contractor's overall exposure to sanction. As a matter of policy, the conduct specified in the new criteria was all subject to sanction under the "Other valid reason or cause" standard of present § 457.13(10) (relating to suspension or debarment). By being more specific, there is simply less ambiguity and less likelihood of a contractor defending against a sanction on the basis that the contractor was not on notice that conduct, such as not cooperating with the Inspector General, was considered subject to sanction.

(6) Section 457.14 (relating to joint venture bids), is proposed to be retitled "Debarment appeals procedure," and is further amended to provide a process for an appeal of a suspension or debarment to be commenced by filing with the Department's Administrative Docket Clerk. This proposed amendment promotes compatibility with the Department rules of administrative practice and procedure, thus assuring consistency Department-wide in providing an appeal process to contractors who have been suspended or debarred. An informal meeting with the Department prior to a formal hearing with the Department hearing officer is included. This will allow for the Director of the Bureau to become involved prior to the formal appeal process, something which the Department believes will promote settlements and resolution of disputes short of actual litigation. Presently, as Chairperson of the existing Prequalification Committee, this Bureau Director can not be involved until the appeal actually reaches the Prequalification Committee because it would constitute an impermissible commingling of his activities. The new procedure also permits the formerly precluded

involvement of the Deputy Secretary for Highway Administration and the Chief Engineer, Highway Administration, both of whom are currently on the Board of Review. This will promote informal resolution of disputes and minimize the potential for improper commingling in the adjudicative process.

One feature of the new procedures likely to engender controversy is that they do permit a suspension without a formal hearing. This is consistent with Management Directive 215.9. As noted in the discussion in previous paragraphs regarding the proposed additional definitions, the Department needs the ability to react immediately to extraordinary circumstances. For example, if a contractor is building bridges or other structures and is discovered to be using substandard materials, there is an instant and severe potential for danger to the traveling public. The Department needs to be able to suspend and investigate that contractor before the contractor continues work or obtains any more jobs. The immediate and potentially severe hazard to the public constitutes exigent circumstances which, combined with the Department's obligation for prompt followup and the contractor being allowed to respond and be heard within a short time after the suspension permits such an action prior to a hearing. And, since a suspension is not a final order and, hence, not an adjudication for the purposes of 2 Pa.C.S. § 101 (relating to definitions), a hearing under 2 Pa.C.S. § 504 (relating to hearing and record), is not required before a suspension can become effective.

Persons and Entities Affected

These proposed amendments will affect highway contractors involved in bidding on Department projects. These proposed amendments will also affect subcontractors performing work for prime contractors.

Fiscal Impact

These proposed amendments will not require the expenditure of additional funds by either the Commonwealth or local municipalities. These proposed amendments will reduce costs for applicants filing audited financial statements since they will be required to file on an average once every 2 years as compared to the present requirement of an average of once a year. Additionally, applicants with working capital of less than \$50,000 will not be required to complete audited financial statements to be prequalified as prime contractors. This should provide a cost savings for smaller firms. No additional costs other than a filing fee for classification appeals are required. These additional costs will be minimal while at the same time these amendments will promote compatibility with the Commonwealth's Contractor Responsibility Program and Chapter 491. These proposed amendments will impose additional reporting requirements on the affected persons relating to contractor integrity and responsibility. There should also be some reduction of recordkeeping as a consequence of the extension of time for prequalification application renewals, the acceptance of a review statement and the issuance of umbrella certificates to parents and their subsidiaries/divisions.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Department submitted a copy of these proposed amendments on February 16, 1996, to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Transportation Committees. In addition to submitting these proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory

Analysis Form prepared by the agency in compliance with Executive Order 1982-2, "Improving Government Regulations." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed amendments, it will notify the Department within 30 days of the close of the public comment period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the regulations, by the Department, the General Assembly and the Governor of objections raised.

Sunset Provisions

The Department is not establishing a sunset date for these regulations since these regulations are needed to administer provisions required under section 404.1 of the State Highway Law. The Department, however, will continue to monitor these regulations for their effectiveness.

Contact Person

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed amendments to Joseph A. Filippino, P.E., Director, Bureau of Construction and Materials, Room 1212B, Transportation and Safety Building, Harrisburg, PA 17120 within 30 days of the publication of this notice of proposed rulemaking in the *Pennsylvania Bulletin*.

Contact Person

Fred N. Starasinic, P.E., Contract Management Division, Bureau of Construction and Materials, Harrisburg, PA 17120, (717) 787-3733.

Fiscal Note: 18-318. No fiscal impact; (8) recommends adoption.

BRADLEY L. MALLORY,
Secretary

Annex A

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

Subpart B. NONVEHICLE CODE PROVISIONS

ARTICLE III. HIGHWAYS

CHAPTER 457. PREQUALIFICATION OF BIDDERS

§ 457.1. Definitions.

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

* * * * *

Affiliates—Business entities or individuals whose relationship is such that either directly or indirectly, one controls or can control the other; or a third controls or can control both; or a similar arrangement exists between business entities or individuals.

[Bidder] Contractor—An individual, firm, partnership, corporation, other entity or joint venture limited to three participants, unless indicated otherwise, submitting a proposal for the work contemplated and acting directly or through an authorized representative.

[Board of Review—A board consisting of the Deputy Secretary for Highway Administration, who shall act as chairman, the Chief Counsel, Comptroller of the Department and Deputy Secretary for

Administration, or their designees. The Chief Engineer, Highway Administration, shall be the Secretary of the Board as a nonvoting member, and shall keep a complete record of proceedings and decisions before the Board. Tie votes shall be resolved by the Secretary of Transportation.]

Debarment—Action taken by the Department to prohibit a contractor, subcontractor or individual from contracting with or participating in contracts with the Department for a specified period. It shall include all divisions or other organizational elements of a contractor or subcontractor unless limited by its terms to specific divisions or organizational elements. Debarment may apply to any affiliates or other individual or entity associated with the contractor, subcontractor or individual if they are specifically named and given written notice of the debarment and an opportunity to appeal.

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Department hearing officer—The person designated by the Commonwealth to preside over appeals involving classification of prequalification codes or debarment.

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[Prequalification committee—The prequalification committee of the Department. This committee shall consist of the Director of the Bureau of Construction and Materials who shall act as chairman, the Assistant Comptroller of the Department, an attorney assigned to the Office of Chief Counsel, the Director of the Equal Opportunity Bureau and any other person designated by the Secretary to administer the regulations, and procedures set forth in this chapter.]

* * * * *

Subcontractor—An individual, firm, partnership, corporation or other entity whose participation in the work contemplated is through a contract or other arrangement with a contractor.

Suspension—Action taken by the Department to temporarily prohibit a contractor, subcontractor or individual from contracting with or participating in contracts with the Department. It may be for a period of up to 3 months, pending the completion of an investigation which could lead to debarment or legal proceedings. The period of suspension may be extended for good cause. A suspension shall include all divisions or other organizational elements of a contractor or subcontractor unless limited by its terms to specific divisions or organizational elements. Suspension may apply to any affiliates or other individual or entity associated with the contractor, subcontractor or individual if they are specifically named and given written notice of the suspension.

§ 457.2. Purpose.

(a) This chapter is designed to implement [the provisions] of the act of September 20, 1961 (P. L. 1529, No. 649) (36 P. S. § 670-404.1) by providing a method and manner, determined to be desirable by the Secretary, for the processing and evaluation of the capacity and qualifications of [prospective bidders] contractors and subcontractors to perform highway project work in this Commonwealth.

(b) The following basic policy shall govern the classification and prequalification of [prospective highway] contractors and subcontractors:

* * * * *

(3) To assure the integrity, responsibility and competence of bidders.

§ 457.3. General requirements.

* * * * *

(c) [Prequalification rating] **Application processing.** [To permit the Department to determine and establish a prequalification rating, bidders shall be notified that a maximum of 15 working days may elapse before prequalification forms submitted may be fully processed, but that errors or omissions on any of the forms may increase the amount of time required for processing.] The Department will attempt to expedite the processing of an application if the applicant notifies the [prequalification officer] Prequalification Office in writing [, at the time the application is submitted] at least 10 working days prior to the bid opening that the applicant is a prospective bidder on an advertised project.

(d) **Expiration.** Expiration shall be as follows:

(1) **Prime contractors.** A certificate will be issued to prime contractors who have been prequalified indicating the expiration date of their prequalification. The expiration date will be established in accordance with the balance sheet date.

(i) **Form 4300, Part 1—Filed.** Prequalification unless withdrawn or suspended by the Department, shall expire 18 months from the date of the contractor's balance sheet contained in the prequalification application, when the balance sheet date is December 31, 1996, or earlier.

(ii) **Prequalification, unless withdrawn or suspended by the Department, shall expire 30 months from the date of the contractor's balance sheet contained in the prequalification application when the balance sheet date is January 1, 1997, or thereafter, except that an 18 month expiration period will be assigned when required, to provide for an even year expiration date for those with a certificate alpha prefix of A through K and an odd year expiration date for those with a certificate alpha prefix of L through Z.**

(2) **Subcontractors.** A certificate will be issued to subcontractors who have been prequalified indicating the expiration date of their prequalification. The expiration date will be established in accordance with the date of issuance of the certificate.

[(2)] (i) **Form 4300, Part 1—Not filed.** Prequalification shall expire [one year] 2 years from the date of issuance of the [notice or] certificate of prequalification for applicants who elect to exercise the option specified in § 457.4(a)(5) (relating to statements to be furnished under oath).

* * * * *

(3) **Expiration date.** The expiration date will be indicated on the certificate of prequalification. [There will be no extension of prequalification under any circumstances.] The expiration date of a current certificate will be automatically extended 30 days if the renewal certificate is not issued prior to expira-

tion, provided the renewal application has been received by the prequalification officer at least 30 days prior to the current expiration date and the applicant has not been notified in writing otherwise for due cause.

* * * * *

(h) [*Questionnaires.* Prospective bidders shall submit Prequalification Questionnaires, as provided in this section at least once every year or on such other intermediate occasions as may be deemed necessary by either the bidder or the Department.] *Resident agent.* Out-of-State contractors and subcontractors as a part of prequalification shall designate a resident agent who is identified by name and address, and who is authorized by the contractor or subcontractor to accept service of complaints, subpoenas and other legal documents on behalf of the contractor or subcontractor, its officers, employees or owners. The contractor or subcontractor shall notify the Department immediately if there is a change in the name or address, or both, of the resident agent. Failure to do so could result in suspension of prequalification.

(i) *Records retention period.* The Prequalification Office will retain the contractor's or subcontractor's prequalification forms and related file at least 3 years from the expiration date of the certificate. If a certificate is not issued, the file shall be retained at least 3 years from the date the forms are received.

(j) *Subsidiaries.* Applicants who desire to bid through a wholly owned and controlled subsidiary may, as an alternative to separate and independent applications, apply for the prequalification of a parent organization and no more than three wholly owned construction related subsidiaries, under a single application with a combined financial statement. Identical certificates will be issued to the parent and each designated subsidiary, the combined group being considered an entity for purposes of performance evaluation and workload assessment. The parent and each designated subsidiary, jointly and severally, shall meet the requirements and conditions specified in this chapter for person, bidder, contractor or applicant. A division or other operating unit within a parent organization will be considered in the same manner as a subsidiary. A suspension or debarment will apply to the entity being prequalified.

§ 457.4. Statements to be furnished under oath.

(a) *Generally.* The following procedures shall be followed in making a statement:

* * * * *

(3) [**Two sets**] One set of each form shall be sent to each applicant[. **One original**] which shall be returned to the Department. [**The second set shall be for the use of the contractor.**]

(4) A complete set of application forms may be acquired from the Prequalification [**Officer**] Office, **Bureau of Construction and Materials**, Contract Management Division, Department of Transportation, Harrisburg, Pennsylvania 17120. They shall be mailed or delivered to

the Prequalification [**Officer**] Office at [**the above**] this address.

* * * * *

(b) *Contractor's Financial Statement, Form 4300, Part 1.* This part will be reviewed by the Office of Comptroller. The following procedures shall be followed in completing Form 4300, Part 1:

(1) Each applicant, whether a corporation, copartnership or individual, shall complete the applicable parts of Form 4300, Part 1, Contractor's Financial Statement, and shall submit the statement as part of [**his**] the application for prequalification. The form provides for balance sheet data with supporting schedules and follows closely the standard and accepted form generally used in presenting an adequate financial report, and shall show all assets and liabilities, including verification of lines of credit extended by banks. This form or statement shall include certification, **rendered with an opinion**, by a certified public accountant, public accountant [,] or foreign accountant registered in accordance with The C.P.A. Law (63 P. S. §§ 9.1—9.16b) as to the financial condition of the prospective [**bidder**] contractor. Financial statements prepared in states other than the Commonwealth will not be accepted unless they include certification by a certified public accountant.

* * * * *

(3) An applicant shall provide an audited financial statement when the applicant's net working capital is in excess of \$50,000. A review type of financial statement is acceptable only when the applicant's net working capital does not exceed \$50,000. If the net working capital is negative, or if the maximum capacity rating as calculated in § 457.5(f) exceeds \$4 million, a review type of statement is not acceptable and an audited financial statement will be required. Financial statements shall be current. A financial statement which is received by the prequalification officer later than 9 months after the balance sheet date may not be accepted. Financial statements received more than 6 months after the balance sheet date shall include an assurance by the accountant that there are no material changes in the financial condition of the applicant since the balance sheet date. For significant changes in a contractor's financial status which occur subsequent to the balance sheet date and which adversely affect the contractor's financial condition, the Department has the right to reevaluate the contractor's financial statement and to adjust the assets, liabilities, line-of-credit and book value of equipment, and consequently, the assigned maximum capacity rating, or to reject the statement outright.

(4) Financial statements shall be reviewed by the **prequalification accountant** in accordance with current accounting concepts as published by the American Institute of Certified Public Accountants. Accordingly, adjustments in the treatment of assets or liabilities may be made by the **Department** as deemed necessary. On major adjustments, the applicant shall receive advance written notice thereof.

(5) Line-of-credit statements, if submitted from banks for the purpose of establishing financial qualifications in determining rating, shall be furnished on Department forms included in Form 4300, Part 1. A line-of-credit statement is not required for prequalification. **The line-**

of-credit shall be designated in the name of the firm applying for prequalification.

* * * * *

(c) *Contractor's Organization and Experience Statement, Form 4300, Part 2.* This part will be reviewed by the Contractor Evaluation Engineer. The following procedures shall be followed in completing Form 4300, Part 2:

(1) The information and data to be submitted on Form 4300, Part 2, Contractor's Organization and Experience Statement is largely self-explanatory. Each applicant [**prospective bidder**] (contractor) shall be assigned a rating which will designate the classifications of work upon which he shall be eligible to bid. Thus the Department will establish the maximum amount of work which a qualified [**bidder**] contractor may have under contract and incomplete at any one time and beyond which no further work will be awarded him. This total amount of work, or maximum capacity rating, shall be a flat sum determined in accordance with the formula [**set forth**] in § 457.5.

* * * * *

(3) Each [**prospective bidder**] contractor and subcontractor shall furnish, under oath, the following statements:

(i) A statement as to plant and equipment, which shall give complete details as to type, age and condition. If equipment is leased, the applicant shall list the owner by the name of the organization or individual from whom the equipment is leased at the time of balance sheet date.

* * * * *

(iii) A statement as to prior and current experience of the contractor, his principal officers and key employes which shall show the number of years the [**prospective bidder**] contractor has been engaged in the contracting business and shall further disclose generally his experience over that period.

* * * * *

(vi) A statement [**setting forth other relevant, pertinent and material facts that may justify the rating desired**] indicating how many years the organization has been in business as a contractor under its present business name.

(vii) A statement indicating the number of years of experience in highway construction work the organization has.

(viii) A statement indicating whether the organization ever failed to complete any work awarded to it.

(ix) A statement indicating whether any officer or partner of the organization has ever been an officer

or partner of some other organization that failed to complete a construction contract.

(x) A statement indicating if any officer or partner of the organization has ever failed to complete a construction contract performed in his own name.

(xi) A statement indicating whether the organization has ever been denied prequalification in this Commonwealth or another state under its name or another name.

(xii) A statement indicating whether the organization has ever been disqualified or removed from a bidding list in this Commonwealth or another state under its name or another name.

(xiii) A listing indicating the construction experience of the officers and management personnel, including superintendents of the organization.

(xiv) A listing of affiliated or subsidiary organizations and companies.

(xv) A listing of organizations, individuals, or both, who have a financial interest of 10% or more in the company.

(xvi) A listing of the persons having a financial interest in the organization, and who also have a financial interest in another organization prequalified or eligible to bid in this Commonwealth or another state.

(xvii) A listing of other organizations or individuals who control or influence the bidding of the company.

(xviii) A statement indicating misdemeanor convictions involving moral turpitude, conviction of a bidding crime and other felony convictions of the contractor, as well as the contractor's directors, partners, principal officers and key employes.

(xix) A statement setting forth other relevant, pertinent and material facts that may justify the rating desired.

* * * * *

[(e) Complete statement of misdemeanor convictions involving moral turpitude and felony convictions of the contractor, as well as the contractor's directors, principal officers and key employes.]

§ 457.5. Classification.

(a) The [**prospective bidder**] contractor or subcontractor shall be classified according to the type of work and amount of work for which his experience and financial capacity will qualify him to bid. The types of work, as described in Department of Transportation Specifications, Publication 408, are listed as follows:

WORK	CODE	SECT.	CLASSIFICATION
EARTHWORK	A	200	CLEARING & GRUBBING
	B	200	BUILDING DEMOLITION
	C	200	EXCAVATING & GRADING
BASE COURSE	D	300	[P.C.C.] RIGID BASE COURSE
	E	300	FLEXIBLE BASE COURSE

WORK	CODE	SECT.	CLASSIFICATION
PAVEMENT	F	400	BITUMINOUS PAVEMENT
	[H] F1	400	BITUMINOUS PAVEMENT PATCHING [MANUAL] AND REPAIR
	G	500	RIGID PAVEMENT
	G1	500	RIGID PAVEMENT PATCHING & REPAIR
INCIDENTAL CONSTRUCTION	H	600	DRAINAGE, WATER MAIN, STORM SEWER
	J	600	[GUARD] GUIDE RAIL, STEEL MEDIAN BARRIER, FENCES
	J1	600	CONCRETE MEDIAN BARRIER
	K	600	CURBS, SIDEWALKS, INLETS, MANHOLES, ETC.
	L	600	SLABJACKING-SUBSEALING
ROADSIDE DEVELOPMENT	M	800	LANDSCAPING
	N		REST AREA STRUCTURES, [() BUILDINGS [, ETC]
TRAFFIC ACCOMMODATIONS [&] AND CONTROL	O	900	PAVEMENT MARKINGS
	P	900	[HWY] HIGHWAY/SIGN LIGHTING, SIGNAL CONTROL
	Q	900	MAINTENANCE AND PROTECTION OF TRAFFIC
	R	900	SIGN PLACEMENT (POST/STRUCTURE MOUNTED)
	R1	900	SIGN STRUCTURES
STRUCTURES	S	1000	CEMENT CONCRETE STRUCTURES [(ALL TYPES)]
	S1	1000	[METAL PLATE & CONCRETE BOX] CULVERTS & [SHORT] SINGLE SPAN [BRIDGE] BRIDGES TO 80 FT
	S2	1000	REPAIR [&] AND REHABILITATION OF STRUCTURES
	S3	1000	MODIFIED CONCRETE DECK OVERLAYS
	T	1050	ERECTION (STRUCTURAL MEMBERS)
	[H] T1	1018	BRIDGE REMOVAL
	U	1005	PILE DRIVING
	V	[1060] 1070	STEEL PAINTING (HIGH PERFORMANCE)
	V1	1071	STEEL PAINTING (CONVENTIONAL)
MISCELLANEOUS	[W]		[ELECTRICAL]
	[X]		[PLUMBING]
	Y		OTHERS

* * * * *

(c) The classifications of work listed in subsection (a) may be further **[broken down] defined** by the Contract Management Division, if needed, to provide for additional types of specialties generated with expanded programs.

(d) **[Each prequalified contractor shall be recognized as a general contractor eligible to bid on projects in which the types of work for which he is classified constitute the major portion of the project. This section does not apply to contractors**

exercising the option as specified in § 457.4(a)(5) (relating to statements to be furnished under oath.)] Each prequalified contractor shall be eligible to bid on projects in which the types of work for which he is classified constitute at least 50% of the project.

(e) Each **[prospective bidder] contractor or subcontractor** shall be classified for one or more types of work in accordance with his adequacy of plant and equipment, organization, prior experience, record of construction and other pertinent, relevant and material facts

which may affect the classification. A contractor or subcontractor who has been assigned classifications of excavation and grading; bituminous pavement or rigid pavement; drainage, water mains, storm sewers; and cement concrete structures (all types) will be considered a general highway contractor. A proposal from a contractor with a general highway contractor designation need not be reviewed for the 50% classification requirement unless specialty items predominate. The [prospective bidder] contractor or subcontractor shall be assigned an ability factor and given a capacity rating which will designate the quantity of work upon which he will be eligible to bid. The Prequalification [Officer] Office shall give notice of the classification and rating.

(f) The [Maximum Capacity Rating] maximum capacity rating shall be a flat sum determined as follows:

(1) [When the contractor files the Contractor's Financial Statement, Form 4300, Part 1, the] The formula, $Q = F (C+1/2L+1/2E)$, shall be used to determine [his] the maximum capacity rating. A contractor whose maximum capacity exceeds \$500 million as determined by this formula, will be considered to have unlimited financial capacity.

(2) When the contractor elects to exercise the option as specified in § 457.4(a)(5), [he] the contractor shall be assigned in lieu of the Contractor's Financial Statement, Form 4300, Part 1, a flat sum factor of \$50,000; and the formula $Q = F(\$50,000)$ shall be used to determine [his] the maximum capacity rating.

* * * * *

(5) If the maximum capacity rating (Q) is a positive number, a certificate as a prime contractor will be issued. If the contractor has had a negative working capital for 2 consecutive fiscal years, the Department will request additional documentation to support the contractor's financial capabilities even if the maximum capacity rating (Q) is a positive number as a result of a line of credit or book value of equipment, or both. If the Department still considers the contractor's financial status to be questionable, the Department will prequalify the contractor to perform work only as a subcontractor.

(6) If the net working capital (C) is a negative amount, the Department has the right to reduce the qualification amount or to reject the application.

(g) The qualification amount, determined by the applicable formula in subsection (f) shall establish the maximum capacity rating of the applicant. Award of contract shall be restricted to [his] the assigned maximum capacity rating less monetary value of [his] the uncompleted contract and subcontract work [, whether with the Department or another governmental agency, person or entity, including subcontracts, except as permitted] under § [457.15] 457.16 (relating to sublettings.)

[(h) However, a prime contractor whose work classifications will enable him to perform at least 50% of the original total contract price, may perform with his own forces another part of the contract for which he has no work classification.]

§ 457.6. [Appeals] Classification appeals procedure.

The following procedures apply [at a hearing before the Prequalification Committee] to classification appeals:

(1) *Informal meeting.* A [prospective bidder] contractor or subcontractor dissatisfied with his classification may submit, in writing, a request [a hearing in writing] for an informal meeting to the Prequalification Office within 10 working days after receipt of notice of prequalification [, disqualification, suspension] or denial thereof or other related action of the [Prequalification Officer before the Prequalification Committee] Department. At the [hearing] meeting, which [should] will be scheduled by the Department within 30 days after receipt of a request therefor, [he] the contractor or subcontractor may present further evidence with respect to [his] financial responsibility, organization, plant and equipment or experience and other relevant facts, as might tend to justify a different classification or other determination by the [Prequalification Officer] Department.

(2) *Notification of determination/formal classification hearing.* After hearing the additional evidence, the [Prequalification Committee shall, by appropriate ruling,] Department will change or retain the classification within 10 working days after the [hearing] meeting and [shall] will notify, in writing, the [prospective bidder] contractor or subcontractor, accordingly. A contractor or subcontractor, if dissatisfied with the determination of the Department following the informal meeting, may, within 10 working days of the mailing date of the determination, request in writing a formal classification hearing setting forth the reasons therefor.

(3) A contractor or subcontractor may, at its option, forgo the informal meeting described in paragraph (1) and directly appeal the classification determination of the Department by requesting in writing a formal classification hearing setting forth the reasons therefor, within 10 working days after receipt of notice of prequalification or denial thereof or other related action of the Department.

(4) Classification hearings will be held in conformity with 1 Pa. Code Part II (relating to general rules of administrative practice and procedure) as supplemented by Chapter 491 (relating to administrative practice and procedure). As set forth in § 491.4 (relating to institution of proceedings), requests for classification hearings, and other papers relating to the case, shall be filed with the Administrative Docket Clerk at the following address:

Secretary of Transportation, Administrative Docket Clerk, c/o Office of Chief Counsel, 521 Transportation and Safety Building, Harrisburg, Pennsylvania 17120.

Under § 491.5 (relating to filing fee), a filing fee in the required amount shall accompany a request for a classification hearing.

§ 457.7. [Duties of the Board of Review] (Reserved).

[The prospective bidder, if dissatisfied with the ruling of the Prequalification Committee, may, within 10 working days subsequent to the ruling, request a hearing before the Board of Review, whereupon the Board shall act as follows:

(1) The Board shall hold a hearing within 30 days after receipt of a request therefor, at which the prospective bidder and his representatives shall be entitled to be heard and to submit additional evidence that they may have.

(2) The Board shall review the evidence presented on behalf of the prospective bidder touching upon his responsibility as a contractor and shall furnish to the Prequalification Committee, within 10 working days of the hearing, its decision changing or retaining the appealed classification.

(3) A decision of the majority of the Board shall be the decision of the Board.]

§ 457.8. Certification of classification and capacity.

(a) Bids will be accepted only from [prospective bidders] contractors who have [been assigned a classification and capacity rating] a current prequalification certificate in accordance with [the provisions of] this chapter. [Under no circumstances will bids be accepted from bidders who have not been prequalified.] In those cases where either the bidder does not have adequate current prequalification capacity rating, as required by subsection (b) or the types of work, on which the [bidder] contractor has been classified and eligible to bid, do not constitute over 50% of the total bid price, the bid will be excluded and rejected. Items noted in the proposal as specialty items may be excluded.

(b) In order that the [Secretary] Department may have the necessary information to pass upon the ability of a [bidder] contractor to satisfactorily complete a project, [bidders] contractors shall submit with their proposal a certification of capacity to do the particular work. If the contractor desires credit for subcontracted items of work on the particular project, [he] the contractor shall include the names of the subcontractors in the proposal. Subcontractors so named shall have the necessary capacity and classification. In making this certification, the [bidder] contractor shall certify that [his] the current qualification amount, less amount of uncompleted work which includes subcontracts except as permitted by § [457.15] 457.16 (relating to sublettings) [he] the contractor has under contract is sufficient to cover the amount of [his] the proposal. The making of a false certification shall constitute cause for rejection of the proposal of the [bidder] contractor.

(c) The [Secretary] Department may reject a bid at any time prior to the actual awarding of a contract if, in his judgment, the best interest of the Commonwealth will be promoted thereby, or if there have been developments subsequent to prequalification [and classification], which, in the opinion of the Secretary would affect the responsibility of the [bidder] contractor. In addition to the right of the Secretary to reject, a bid may be rejected if it appears that after the [prospective bid-

der] contractor was prequalified [and classified], [he] the contractor was [,] declared in default on a project, [his] or prequalification was suspended or withdrawn by the Department, or a major change occurred in the management of [his] the contractor's firm. Before taking the action, the [Secretary shall] Department will as soon as possible notify the [bidder] contractor and give [him] the contractor an opportunity to present additional information to the [Secretary or the Board of Review or both] Department.

§ 457.9. False certification with bid.

If a [bidder] contractor makes a false certification with regards to § 457.8(a) or (b), or both (relating to certification of classification and capacity), the [bidder] contractor shall pay to the Department as liquidated damages an amount equal to 5% of the total amount of the bid or [he] the contractor may be disqualified from bidding on future work for [a period of] 90 days, or both, as deemed appropriate. [Should] If the [bidder fail] contractor fails to make the payment within 30 days of notification, the [bidder] contractor shall be disqualified for [a period of] 1 year. An application for renewal of prequalification will not be considered by the Department until the [bidder] contractor makes payment. In lieu of the assessment of liquidated damages or disqualification, or both, the Secretary[, at his discretion,] may issue a warning to the [bidder] contractor making a false certification when the infraction is the first offense of the [bidder] contractor.

§ 457.11. [Subcontractors] Audit of contractor or subcontractor records.

(a) [Contractors proposing to engage in State highway work as subcontractors shall comply with the provisions of this chapter in regard to prequalification classification.

(b) No contractor engaged in State highway work under a contract with the Department may be permitted to sublet any part of the construction work to be performed under the terms of that contract to a subcontractor who has not been prequalified and classified in conformity with the provisions of this chapter except for those types of work excluded under § 457.5(b) (relating to classification) and who will exceed his current maximum capacity rating by accepting this new work.

(c) Sub-contracting will not normally be permitted; however, if special conditions warrant, sub-contracting may be allowed if approved by the Secretary.

(d) Subcontractors, named in the bid proposal may not be replaced without the approval of the Department.]

The Department reserves the right, upon 10 days notice to the contractor or subcontractor, to review records of the contractor or subcontractor either as part of a random periodic review or as part of a specific inquiry. These records would include records that substantiate information in Parts 1, 2 and 3 of the prequalification application.

§ 457.12. False statements in [**questionnaire**] **prequalification application** or at hearing.

A [**person**] **contractor, subcontractor or individual** who knowingly makes or causes to be made, a false, deceptive or fraudulent statement on the [**questionnaire**] **prequalification application** required to be submitted or [,] in the course of a hearing held under this chapter may be temporarily **suspended** or **may be debarred for a set period** or permanently [**disqualified**] from bidding on or **participating in** State **supervised or funded** highway construction work [**under the supervision of the Secretary**].

§ 457.13. Suspension or [**disqualification**] **debarment**.

(a) *Reasons for suspension or debarment.* The [**Secretary**] **Department** may temporarily suspend or [**disqualify**] **may debar, for a set period or permanently,** a [**prospective bidder, previously prequalified,**] **contractor, subcontractor or individual** from bidding on [**future**] or **participating in** State **supervised or funded** highway construction work for any of the following reasons:

- [(1) **Unsatisfactory past performance.**
 - (2) **Failure to complete the work or project in accordance with the specifications and contract.**
 - (3) **Being declared in default on prior work or project.**
 - (4) **Failure to refund any overpayment.**
 - (5) **Bribing or giving gratuities to Department employees.**
 - (6) **Unlawful or improper activities that render the prospective bidder unacceptable.**
 - (7) **Debarment by Federal or State authorities.**
 - (8) **Unbalancing bids.**
 - (9) **Failure to submit documents or forms as required by the contract.**
 - (10) **Other valid reason or cause.]**
- (1) **Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements or receiving stolen property.**
 - (2) **Commission of fraud or a criminal offense or other improper conduct or knowledge or approval of, or acquiescence in these activities by a contractor or an affiliate, officer, employe or other individual or entity associated with either obtaining, attempting to obtain or performing a public contract or subcontract. The contractor's acceptance of the benefits derived from the conduct shall be deemed evidence of knowledge, approval or acquiescence.**
 - (3) **Violation of Federal or State antitrust statutes.**
 - (4) **Violation of a State or Federal law regulating campaign contributions.**
 - (5) **Violation of a State or Federal environmental law.**

(6) **Violation of a State or Federal law regulating hours of labor, minimum wage standards or prevailing wage standards; discrimination in wages; or child labor violations.**

(7) **Violation of the Worker's Compensation Act (77 P. S. §§ 1—1041.4).**

(8) **Violation of a State or Federal law prohibiting discrimination in employment.**

(9) **Suspension or debarment by the Commonwealth or an agency thereof or an agency of another state or by an agency or department of the Federal government.**

(10) **Three or more occurrences when a contractor has been declared ineligible for a contract.**

(11) **Unsatisfactory performance including failure to comply with the terms of a Commonwealth contract or subcontract including:**

(i) **Willful failure to perform in accordance with the terms of one or more contracts, or a history of failure to perform, or of unsatisfactory performance of one or more contracts, or offering unbalanced bids.**

(ii) **Failure to complete the work in the time frame specified in the contract.**

(iii) **Being declared in default on prior work or project.**

(iv) **Failure to submit documents, information or forms as required by contract.**

(v) **Making false statements or failing to provide information or otherwise to cooperate with the contracting agency, the Office of State Inspector General or other Commonwealth authorities.**

(vi) **Discrimination in violation of laws or regulations in the conduct of business as a contractor.**

(12) **Providing false or misleading information to the Office of State Inspector General, Office of the Budget, the Department of the Auditor General, the Office of Attorney General, the Treasury Department, the Board of Claims, or other tribunal or court, the Department of Transportation, or a representative of an agency as part of any investigation, audit, program review, prequalification statement of certification, contract bids or proposals, contractor applications or claims for payment. This information includes: financial statements nondiscrimination forms; affidavits or statements of compliance with prevailing wage statutes; product descriptive literature and documents submitted in connection with claims for payment made or litigation against Commonwealth agencies.**

(13) **Other acts or omissions indicating a lack of skill, ability, capacity, quality control, business integrity or business honesty that seriously and directly affects the present responsibility of a contractor including any basis for debarment or suspension set forth in the Commonwealth's Contractor Responsibility Program, Management Directive 215.9.**

(b) *Substantial evidence.* **The filing of criminal charges or initiation of legal proceedings for any of the reasons in subsection (a)(1)—(8) may constitute substantial evidence for suspension.**

(c) *Debarment based on criminal conduct.* **Debarment solely on the basis of any of the reasons in**

subsection (a)(1)—(8) shall be based on a conviction or plea of guilty or no contest in a court of law or a finding, ruling or adjudication of guilt for noncompliance by a court of law, commission, board or administrative body. It is not required that the appeals process be completed or that a sentence or other penalty be imposed.

(d) *Effect of appeal.* The filing of an appeal does not constitute a basis for delay or postponement of a suspension/debarment action.

(e) *Suspension for criminal conduct.* If a contractor, subcontractor or individual is suspended because of the filing of criminal charges or initiation of legal proceedings for other applicable reasons in subsection (a)(1)—(8) and there has been no conviction or ruling sufficient to justify debarment within the suspension period, the Department may, if appropriate, based on all of the relevant facts, initiate debarment proceedings.

(f) *Denial or nonrenewal.* Denial of prequalification or refusal to renew prequalification for any of the reasons in this section shall constitute a suspension or debarment for the purposes of this chapter. The Department will advise the contractor in writing accordingly.

(g) *Suspension procedure.* When a suspension is imposed against a contractor or an affiliate, the Department will immediately notify the contractor and any specifically named affiliate, officer, employee or other individual or entity associated with the contractor, by certified mail, return receipt requested and regular mail that:

(1) It has been suspended for an initial period of up to 3 months accompanied by a concise statement of the reasons for the suspension.

(2) It has been declared ineligible for Department contracting and subcontracting pending the completion of investigation and ensuing legal proceedings. During the suspension period, the contractor shall make available all relevant documents, records and information to investigators.

(h) *Reply to suspension.* A contractor, subcontractor or individual suspended by the Department may, within 21 days after the suspension mailing date, submit, in person, in writing, or through a representative, information in opposition to the suspension. Upon review of the information or the completion of an investigation, or both, the Department will notify the contractor, subcontractor or individual whether the suspension shall be continued or withdrawn or whether debarment proceedings will be initiated.

§ 457.14 [Joint venture bids] Debarment appeals procedure.

(a) *General provisions.* A contractor, subcontractor or individual debarred by the Department under § 457.13 (relating to suspension or debarment) may appeal the debarment in writing within 10 working days after the mailing date of the notice of debarment. The appeal shall set forth the basis therefor.

(b) *Conformity with administrative practice and procedures; requests for hearing.* Debarment hearings will be in conformity with 1 Pa. Code Part II (relating to general rules of administrative practice and procedure), as supplemented by Chapter 491

(relating to administrative practice and procedure). A filing fee is not required for a debarment hearing. As set forth in § 491.3 (relating to request for hearing), requests for debarment hearings and all other papers relating to the case shall be filed with the Department's Administrative Docket Clerk at the following address:

Secretary of Transportation, Administrative Docket Clerk, c/o Office of Chief Counsel, 521 Transportation and Safety Building, Harrisburg, Pennsylvania 17120.

(c) *Informal meeting.* A contractor, subcontractor or individual debarred by the Department may, after filing an appeal, request an informal meeting with the Department prior to the holding of a debarment hearing for the purpose of discussion of the debarment action or presentation of additional evidence which the contractor, subcontractor or individual may want the Department to take into consideration. Requests for informal meetings shall be made in writing to the Prequalification Office. The Department will issue, within 10 working days after an informal meeting, a written notification of whether it is withdrawing or modifying the debarment action. The contractor, subcontractor or individual may then, at his option, continue with, amend or withdraw the appeal.

(d) *Debarment by other agencies.* A contractor, subcontractor, supplier or individual debarred by the Commonwealth or an agency thereof under the Commonwealth's Contractor Responsibility Program as set forth in Management Directive 215.9 shall be subject to debarment by the Department without right of appeal.

[§ 457.14] § 457.15. Joint venture bids.

(a) *Permissible combination.* A combination of [bidders] contractors which combination shall be limited to three participants unless otherwise stated in the proposal, and each of whom is prequalified in accordance with [the provisions of] this chapter, shall be permitted to bid jointly. Equal proportionate amounts of joint-bid shall be charged against the maximum capacity rating of each participant in a joint venture, unless otherwise indicated by the bidders in their proposal.

(b) *Joint and several responsibility.* [In the event] If a joint venture proposal is submitted, it shall be considered to be a proposal by each of the joint participants, jointly and severally, for the performance of the entire contract as a joint venture in accordance with the terms and conditions of the proposal.

(c) *Minimum performance capability.* Each participant in a joint venture shall be capable of performing at least 50% of the original contract price of their portion of the joint venture, or the bid will be rejected.

[§ 457.15] § 457.16. Sublettings.

(a) *Credit.* The contractor shall be given credit for sublettings on Department and Pennsylvania Turnpike Commission projects to which he makes reference in his proposal form, providing the proposed subcontractors are currently prequalified with the Department. Additional sublettings by the prime contractor shall be permitted if prequalified [contractors] subcontractors are proposed following the opening of bids; but the prime contractor may not be given credit in his total volume of work for additional sublettings.

(b) Subletting to suspended, debarred or disqualified contractors or subcontractors prohibited. Contractors or subcontractors engaged in State highway work under a contract with the Department, or otherwise participating in State supervised or funded highway construction work, may not sublet any part of the construction work to be performed under the terms of that contract to any contractor or subcontractor who is suspended, debarred or otherwise disqualified from bidding on or participating in State highway construction work under § 457.13 (relating to suspension or debarment).

[§ 457.16] § 457.17. Notification.

Contractors **[shall be]** are required to **[promptly]** notify in writing **[this Department of significant changes affecting their capacity]** the Prequalification Office within 30 days when there is a corporate or affiliate change, or a reduction of more than 20% of their maximum capacity rating, or both, as well as changes of information required by § 457.4(b) and **[(e)] (c)(3)(xviii)** (relating to statements to be furnished under oath). Failure to make the notification shall be cause for suspension of prequalification.

[Pa.B. Doc. No. 96-291. Filed for public inspection March 1, 1996, 9:00 a.m.]

GAME COMMISSION

[58 PA. CODE CH. 139]

Seasons and Bag Limits for 1996-1997

The Game Commission (Commission), at its January 23, 1996, meeting, proposed the following amendments to 58 Pa. Code:

Amend § 139.4 (relating to seasons and bag limits for the license year) to provide dates for the 1996-1997 hunting license year.

This proposed amendment will have no adverse impact on the wildlife resources of this Commonwealth.

The authority for the proposal is 34 Pa.C.S. (relating to Game and Wildlife Code) (act).

The proposal was made public at the January 23, 1996, meeting of the Commission and comments on the proposal can be sent to the Executive Director of the Game Commission, 2001 Elmerton Ave., Harrisburg, PA 17110-9797, within 30 days of publication of this proposed rulemaking.

1. Introduction

The Commission at its January 23, 1996, meeting proposed changing § 139.4 to provide for seasons and bag limits for the 1996-1997 license year. These seasons and bag limits were proposed under sections 322(c)(1) and

2102(b)(1) of the act (relating to specific powers and duties; and regulations). Notable changes for the 1996-1997 year are the splitting of Turkey Management Area 1 into Areas 1A and 1B with different seasons in each, the creation of a special squirrel season for junior resident license holders and the starting of trapping season 1 week later.

2. Purpose and Authority

The Commission is required to set hunting and furtaking seasons and bag limits on an annual basis. Section 322 of the act specifically empowers the Commission to "... fix seasons ... and daily, season and possession limits for any species of game or wildlife." Section 2102(b) of the act mandates that the Commission promulgate regulations relating to seasons and bag limits. In order to encourage junior hunters, the Commission has decided to establish a special early squirrel season for junior resident license holders. In addition, because of the more developed nature of Erie and Crawford Counties, the Commission has decided to establish those counties as a separate Turkey Management Area (No. 1-B) with a fall season starting November 4, 1996. Finally, the proposed amendment involves the starting of trapping season on the traditional Thanksgiving, one week later than last year.

3. Regulatory Requirements

These proposed seasons and bag limits would establish when and where it is lawful to hunt and trap various game species and place limits on the numbers that can be legally taken.

4. Persons Affected

Persons wishing to hunt and trap in this Commonwealth would be affected by these seasons and bag limits.

5. Cost and Paperwork Requirements

The proposed new seasons and bag limits would not result in any additional cost either to the Commission or to hunters and furtakers.

6. Effective Dates

The provisions of § 139.4 will be in effect July 1, 1996, to June 30, 1997.

7. Contact Persons

For further information on the proposed changes, the contact person is James R. Fagan, Director, Bureau of Law Enforcement, 2001 Elmerton Avenue, Harrisburg, PA 17110-9797, (717) 783-6526.

(Editor's Note: The Commission is proposing to replace the existing text of § 139.4, which appears at 58 Pa. Code pages 139-3—139-10, serial pages (202759)—(202765), and replace it with the text in Annex A.)

DONALD C. MADL,
Executive Director

Fiscal Note: 48-92. No fiscal impact; (8) recommends adoption.

PROPOSED RULEMAKING

Annex A

TITLE 58. RECREATION

PART III. GAME COMMISSION

CHAPTER 139. SEASONS AND BAG LIMITS

§ 139.4. Seasons and bag limits for the license year.

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[Pa.B. Doc. No. 96-292. Filed for public inspection March 1, 1996, 9:00 a.m.]
