

RULES AND REGULATIONS

Title 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CHS. 3, 5 AND 7—9]

Tuberculosis and Brucellosis Testing and Documentation Requirements for Cattle, Goats and Bison

The Department of Agriculture (Department) amends Chapters 3, 5 and 7—9 to relieve this Commonwealth's animal production industry of unnecessary test requirements restricting the intrastate transportation and marketing of cattle, goats and bison, and the products of these animals.

Section 1702 of The Administrative Code of 1929 (71 P. S. § 442) makes it the duty of the Department to take measures to prevent, control and eradicate diseases of animals. The proposed version of these amendments was published at 26 Pa.B. 3837 (August 10, 1996), and cited sections 2, 3 and 9 of the act of April 17, 1929 (P. L. 533, No. 236)(3 P. S. §§ 342, 343 and 349) as statutory authority. Those statutory provisions were repealed by section 2 of the act of July 11, 1996 (P. L. 561, No. 100) which created 3 Pa.C.S. §§ 2301—2389 (relating to Domestic Animal Law) (act). The act became effective on September 9, 1996. The act: (1) requires the Department to monitor this Commonwealth's domestic animal population for the presence of transmissible diseases of animals, 3 Pa.C.S. § 2327 (relating to disease surveillance and detection); (2) identifies tuberculosis and brucellosis as dangerous transmissible diseases, 3 Pa.C.S. § 2321(a)(12) and (38) (relating to dangerous transmissible disease); (3) authorizes the Department to establish and enforce quarantines, prevent or otherwise restrict the transportation of suspect animals into or within this Commonwealth, 3 Pa.C.S. § 2329 (relating to quarantine); and (4) empowers the Department to regulate in this area, 3 Pa.C.S. § 2382 (relating to regulations). The foregoing comprises the statutory authority for these amendments.

Tuberculosis and brucellosis are dangerous transmissible diseases of cattle, goats and bison and are also communicable to humans. The loosening of restrictions and requirements for the intrastate transportation of cattle, goats and bison is justified by the decreased risk posed by these diseases. In recent years, incidents of tuberculosis or brucellosis in cattle have become increasingly infrequent. The Department is satisfied that its ongoing disease monitoring efforts and the Federal requirements with respect to the interstate shipment of cattle, goats and bison are adequate to detect, isolate and eradicate any outbreaks of tuberculosis or brucellosis in these animals.

These amendments will also allow the Department to redirect its resources to address more imminent threats to the health of this Commonwealth's animal population.

Comments

Notice of proposed rulemaking was published at 26 Pa.B. 3837 and provided for a 30-day public comment period.

Comments were received from the Independent Regulatory Review Commission (IRRC), the House Committee

on Agriculture and Rural Affairs (House Committee), Representative Sheila Miller and a private individual.

IRRC, the House Committee and the private individual commentator offered the recommendation that the Department decide whether to use the term "buffalo" or "bison" in these amendments and revise the amendments to use the term consistently throughout. IRRC also suggested this revision extend to other regulatory sections not addressed in the proposed rulemaking.

The Department responds that the term "bison" is more appropriate than "buffalo." The final-form regulations have been revised at §§ 3.151, 9.5 and 9.6 (relating to general provisions; animals to be tested (cattle, goats and bison); and animals not to be tested) to consistently use this term.

As for IRRC's suggestion that other regulatory sections be revised to consistently use the term preferred by the Department, the Department responds that this change will be forthcoming. The act accomplished a wide-sweeping modernization of the Department's statutory authority with respect to domestic animals. That act allows the Department to continue to use and enforce its current animal health regulations to the extent they are not inconsistent with the act, 3 Pa.C.S. § 2382(b), the Department plans a systematic updating of its animal health regulations over the next 2 years. The Department will ultimately revise its animal health regulations to consistently use the term "bison" rather than "buffalo."

The House Committee requested clarification that the phrase "identified by an official ear tag or other unique identification device" in proposed § 3.151(a) allows the Department only to approve—but not mandate—identification devices other than official ear tags. IRRC repeated this request, and suggested proposed § 3.151(a) be revised for greater clarity and that this Preamble clearly reflect the Department's position on this subject.

The Department responds that the act at 3 Pa.C.S. § 2323(a) makes it the responsibility of the Department to establish identification standards for domestic animals. Currently, an ear tag will suffice, in most cases, to accurately identify a diseased or contaminated animal as described in § 3.151. A National effort is underway, though, to develop and implement electronic forms of identification that may be superior and preferable to current ear tag technology. For this reason, the Department declines to limit its authority to subsequently require some technologically or economically superior form of unique identification device, or both, for animals. This type of a device would benefit both the Department and this Commonwealth's animal production industry.

IRRC also offered comments with respect to §§ 7.4 and 9.4 (relating to identification of cattle; and identification of animals). Neither of these sections were proposed for amendment by the Department. IRRC recommended these sections be revised so that substantially the same language appeared in each. IRRC also suggested these sections reference the fact that cattle, goats and bison that have been tested for tuberculosis and brucellosis receive an ear tag. At the conclusion of its comment, IRRC recommended its concerns be addressed in a future rulemaking.

The Department agrees that further revisions are necessary with respect to its animal health regulations. As stated, the Department will conduct a top-to-bottom

review of its animal health regulations over the next 2 years, in order to address changes in statutory authority brought about by the recent act. That statute has revised, modernized and strengthened the Department's authority with respect to domestic animals. The Department will consider IRRC's comment as it prepares the extensive regulatory revisions necessitated by the act.

Representative Sheila Miller offered support for the Department's proposed elimination of tuberculosis and brucellosis testing requirements for the intrastate shipment of cattle, goats and bison. The Representative expressed concern, though, over the Department's proposed revision of § 3.151(a), which would delete the identification exemption for feeder steers, spayed heifers and cattle, goats or bison transported for immediate slaughter. Representative Miller expressed apprehension that this deletion may impose undue additional costs and recordkeeping requirements on the beef industry. In addition, the Representative asked whether this requirement might result in a single animal receiving multiple ear tags as it moves from owner-to-owner, and whether/how this required identification trail will be enforced by the Department.

The Department responds that current regulations in §§ 5.47 and 5.49 (relating to slaughter animals; and feeder cattle) are not affected by this final rulemaking and will continue to require that slaughter cattle and feeder cattle have a sales tag that clearly identifies the animal or a USDA Market Cattle Inspection Program backtag, or both, that clearly identifies the animal. The revision of § 3.151(a) will not impose a new identification requirement on feeder cattle, spayed heifers and cattle going directly to slaughter. These animals will continue to remain exempt from identification requirements under § 3.151 unless they are diseased, contaminated or shipped for exhibition purposes.

Fiscal Impact

Commonwealth

These amendments will impose no costs and have no fiscal impact on this Commonwealth, other than to free financial resources to be redirected as necessary to address the identification, containment and eradication of other dangerous transmissible diseases of animals in this Commonwealth.

Political Subdivisions

These amendments will impose no costs and have no fiscal impact upon political subdivisions.

Private Sector

These amendments will decrease costs and paperwork requirements previously imposed upon the private sector. In particular, producers of cattle, goats and bison will be relieved of the cost of testing animals for tuberculosis or brucellosis prior to intrastate shipment. These costs are not readily measurable.

General Public

These amendments will impose no costs and have no fiscal impact upon the general public.

Paperwork Requirements

These amendments will not result in an appreciable increase in paperwork.

Contact Person

Further information is available by contacting the Department of Agriculture, Attention: Phillip DeBok,

D.V.M., Bureau of Animal Industry, 2301 North Cameron Street, Harrisburg, PA 17110-9408.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on July 31, 1996, the Department submitted a copy of the notice of proposed rulemaking to IRRC and to the Chairpersons of the House and Senate Standing Committees on Agriculture and Rural Affairs for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were deemed approved by the House Committee on February 18, 1997, were deemed approved by the Senate Committee on February 18, 1997, and were approved by IRRC on February 20, 1996, in accordance with section 5(c) of the Regulatory Review Act.

Findings

The Department of Agriculture finds that:

(1) Public notice of intention to adopt the amendments encompassed by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240)(45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2

(2) A public comment period was provided as required by law and that the comments received were considered.

(3) The modifications that were made to these final-form regulations in response to comments received do not enlarge the purpose of the proposed amendments.

(4) The final-form regulations meet the requirements of Executive Order 1996-1, "Regulatory Review and Promulgation."

(5) The adoption of the final-form regulation in the manner provided by this order is necessary and appropriate for the administration of the authorizing statutes.

Order

The Department, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 7 Pa. Code Chapters 3, 5, 7, 8 and 9, are amended by amending §§ 3.1, 5.1, 5.45, 8.26 and 9.34 and by deleting §§ 3.152—3.158 and 7.53 to read as set forth at 26 Pa.B. 3837 and by amending §§ 3.151, 9.5 and 9.6 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order, 26 Pa.B. 3837 and Annex A to the Office of General Counsel and the Office of Attorney General for approval as required by law.

(c) The Secretary of the Department shall certify this order, 26 Pa.B. 3837 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

CHARLES C. BROSIUS,
Secretary

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 1215 (March 8, 1997).)

Fiscal Note: Fiscal Note 2-106 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 7. AGRICULTURE

PART I. BUREAU OF ANIMAL INDUSTRY

CHAPTER 3. HEALTH REQUIREMENTS FOR IMPORTATION AND INTRASTATE TRANSPORTATION OF ANIMALS

Subchapter I. INTRASTATE TRANSPORTATION OF CATTLE, GOATS AND BISON

§ 3.151. General provisions.

(a) *Identification required.* Cattle, goats and bison transported within this Commonwealth described in subsections (b) and (c) shall be identified by an official eartag or other unique identification device approved and recorded by the Department.

(b) *Diseased or contaminated animals.* Cattle, goats and bison affected with or exposed to diseases or disease agents determined by the Department to be dangerous and transmissible or hazardous to animal or human health shall, when transported within this Commonwealth, be accompanied by a permit issued by the Department.

(c) *Animals for exhibition.* Cattle, goats and bison transported within this Commonwealth for exhibition purposes shall meet the applicable requirements of this chapter and Chapters 5, 7, 8 and 9.

CHAPTER 9. CONTROL AND ERADICATION OF TUBERCULOSIS OF LIVESTOCK

Subchapter A. GENERAL PROVISIONS

§ 9.5. Animals to be tested (cattle, goats and bison).

(a) Individual plan for accreditation—test all animals over 24 months of age.

(b) Other tests—test animals regardless of age.

§ 9.6. Animals not to be tested.

Retests of tuberculin response cattle, goats and bison may not be conducted for 60 days following the last test because of desensitization. The exception is the retest of response animals by the comparative cervical test which can be done within 10 days of the previous caudal test by approved regulatory veterinarians only and if over 10 days then the comparative cervical test shall be conducted after 60 days.

[Pa.B. Doc. No. 97-548. Filed for public inspection April 11, 1997, 9:00 a.m.]

DEPARTMENT OF AGRICULTURE

[7 PA. CODE CH. 110]

Noxious Weeds

The Department of Agriculture (Department) adopts an amendment to § 110.1 (relating to noxious weed control list).

This amendment is made under authority of sections 3(b), 8 and 9 of the Noxious Weed Control Law (act) (3 P. S. §§ 255.3(b), 255.8 and 255.9) which, respectively, require the Department to establish a noxious weed control list, prescribe certain plants to be included on that

list and empower the Department to adopt regulations necessary to implement the provisions of the act.

The amendment deletes *Cichorium intybus* (commonly known as chicory or succory or blue daisy) from the noxious weed control list and adds *Lythrum salicaria* (commonly known as Purple Loosestrife) to that list. In accordance with the act, this amendment has been reviewed and approved by the Noxious Weed Control Committee, an administrative board of the Department.

Cichorium intybus has great potential as a forage crop, and farmers have shown increasing interest in growing it. By contrast, *Lythrum salicaria* is a nonindigenous wetland plant that thrives in the absence of the insects and diseases that controlled it in Europe and Asia. It clogs waterways, crowds-out native plant species and decreases the population of animals that are dependent upon native plant species for survival.

Comments

Notice of proposed rulemaking was published at 26 Pa.B. 1558 (April 6, 1996), and provided for a 30-day public comment period.

The Legislative Director of the Pennsylvania State Grange offered the only comment with respect to the proposed amendment. This comment reiterated that group's historic support for the Department's effort to add *Lythrum salicaria* to the noxious weed control list.

Neither the appropriate Standing Committees of the House and Senate nor the Independent Regulatory Review Commission (IRRC) offered comments on the proposed amendment.

The final version of this regulation is identical to the proposed version.

Fiscal Impact

Commonwealth

The final-form regulation will impose no costs and have no fiscal impact upon the Commonwealth.

Political Subdivisions

The final-form regulation will impose no costs and have no fiscal impact upon political subdivisions.

Private Sector

The final-form regulation will impose no costs and have no fiscal impact upon the private sector.

General Public

The final-form regulation may impose some costs upon the owner of land infested with *Lythrum salicaria* if the Secretary, under authority of section 5 of the act (3 P. S. § 255.5), declares the land to be in a weed control area and orders weed control measures on the landowner's part.

Paperwork Requirements

The final-form regulation will not result in an appreciable increase in paperwork.

Contact Person

Further information is available by contacting the Department of Agriculture, Bureau of Plant Industry, 2301 North Cameron Street, Harrisburg, Pa. 17110-9408, Attention: Lyle B. Forer.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 27, 1996, the Department submitted a copy of the notice of proposed rulemaking to

IRRC and to the Chairpersons of the House and Senate Standing Committees on Agriculture and Rural Affairs for review and comment. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments received, as well as other documentation.

In preparing this final-form regulation, the Department has considered the comments received from IRRC, the Committees and the public.

This final-form regulation was deemed approved by the House Committee on February 18, 1997, was deemed approved by the Senate Committee on February 18, 1997, and was deemed approved by IRRC on February 20, 1997, in accordance with section 5(c) of the Regulatory Review Act.

Findings

The Department finds that:

(1) Notice of intention to adopt the amendment encompassed by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240)(45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and that the comments received were considered.

(3) The regulation meets the requirements of Executive Order 1996-1, "Regulatory Review and Promulgation."

(4) The adoption of this final-form regulation in the manner provided by this order is necessary and appropriate for the administration of the authorizing statute.

Order

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 7 Pa. Code Chapter 110, are amended by amending § 110.1 to read as set forth in Annex A.

(b) The Secretary of Agriculture shall submit this order and Annex A, to the Office of General Counsel and to the Office of Attorney General for approval as required by law.

(c) The Secretary of Agriculture shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

CHARLES C. BROSIUS,
Secretary

Fiscal Note: Fiscal Note 2-95 remains valid for the final adoption of the subject regulations.

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 1215 (March 8, 1997).)

Annex A

TITLE 7. AGRICULTURE

PART V. PLANT INDUSTRY

CHAPTER 110. NOXIOUS WEEDS

§ 110.1. Noxious weed control list.

Under section 3(b) of the Noxious Weed Control Law (3 P. S. § 255.3(b)), the Noxious Weed Control Committee establishes the following noxious weed control list:

- (1) *Cannabis sativa*, commonly known as marijuana.
- (2) *Lythrum salicaria*, commonly known as purple loosestrife.
- (3) *Cirsium arvense*, commonly known as Canada thistle.
- (4) *Rosa multiflora*, commonly known as multiflora rose.
- (5) *Sorghum halepense*, commonly known as Johnson grass.
- (6) *Carduus nutans*, commonly known as musk thistle.
- (7) *Cirsium vulgare*, commonly known as bull thistle.
- (8) *Datura stramonium*, commonly known as jimson weed.
- (9) *Polygonum perfoliatum*, commonly known as mile-a-minute.
- (10) *Pueraria lobata*, commonly known as kudzuvine.
- (11) *Sorghum bicolor cv. drummondii*, commonly known as shattercane.

[Pa.B. Doc. No. 97-549. Filed for public inspection April 11, 1997, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 285]

Marking of ICW Containers

The Environmental Quality Board (Board) by this order amends the Department of Environmental Protection's (Department's) regulations governing municipal waste management, particularly infectious and chemotherapeutic waste, by amending Chapter 285 (relating to storage, collection and transportation of municipal waste). These amendments are set forth in Annex A.

This order was adopted by the Board at its meeting of December 17, 1996.

A. Effective Date

These amendments are effective immediately upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information, contact Ronald C. Hassinger, Chief, General Permits/Beneficial Use Section, Bureau of Land Recycling and Waste Management, Rachel Carson State Office Building, 14th floor, 400 Market Street, P. O. Box 8472, Harrisburg, PA 17105-8472, telephone: (717) 787-7381, or Marc A. Roda, Assistant Counsel, Bureau of Regulatory Counsel, Rachel Carson State Office Building, 9th floor, 400 Market Street, P. O. Box 8464, Harrisburg, PA 17105-8464, telephone: (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final rulemaking is available electronically through the Department's Website (<http://www.dep.state.pa.us>).

C. Statutory Authority

The final rulemaking is being made under the authority of sections 105 and 201 of the Solid Waste Manage-

ment Act (35 P.S. §§ 6018.105 and 6018.201); sections 1 and 4 of the Infectious and Chemotherapeutic Waste Disposal Act (35 P.S. §§ 6019.1 and 6019.4); and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20). Under sections 105 and 201 of the Solid Waste Management Act and sections 1 and 4 of the Infectious and Chemotherapeutic Waste Disposal Act, the Board has the power and duty to adopt rules and regulations concerning the storage, treatment, disposal and transportation of infectious and chemotherapeutic waste as are necessary to protect the public's health, safety and welfare, as well as protect the environmental resources of this Commonwealth. Section 1920-A of The Administrative Code of 1929 grants the Board the authority to promulgate rules and regulations that are necessary for the proper work of the Department.

D. *Background and Summary*

This final rulemaking revises the Department's regulations pertaining to marking and labeling of containers holding infectious and chemotherapeutic waste (ICW). Previously, generators and transporters of ICW had to mark containers, except for rigid fiberboard containers, by labeling and color coding (red for infectious and yellow for chemotherapeutic). Under these amendments rigid containers, whether or not made out of fiberboard, only have to be labeled. Nonrigid containers, that is bags, must still be color coded as well as labeled.

This rulemaking is in response to DeRoyal Industries Incorporated's (DeRoyal) August 1, 1995, petition to the Board. DeRoyal petitioned the Board to amend § 285.147(d) (relating to marking of containers) to allow an alternative to the requirement that ICW containers must be red or yellow in color. DeRoyal manufactures a product, a rigid-plastic container, which can be used for storing or transporting ICW. This product is marketed Nationally. DeRoyal contends that specially manufacturing containers to meet the Commonwealth's unique color coding requirements unnecessarily increases the cost of manufacturing the containers.

The Department is aware of another company that manufactures reusable, rigid nonfiberboard containers for storing and transporting ICW. This company also markets the containers Nationally. As a result, this company also has a similar problem of increased manufacturing costs due to compliance with the mandatory color coding requirements of § 285.147.

In addition to the business issues raised by the petition, the Department's ICW marking requirements have become more stringent than Federal requirements. When the Department's container color coding requirements were first promulgated in 1988, those requirements were consistent with industry practice at that time. However, since 1988 several changes have taken place at the Federal level, including rule changes at the United States Department of Labor's Occupational Safety and Health Administration (OSHA) and the United States Department of Transportation (USDOT). The regulations promulgated by these agencies are less stringent than the Department's regulations requiring color coding and labeling of ICW containers. OSHA is responsible for promulgating regulations setting standards for the protection of workers. Under OSHA's Bloodborne Pathogen Rule (29 CFR 1910.1030), infectious waste containers must either be labeled with the universal biological hazard symbol or colored red. The USDOT is responsible for promulgating regulations establishing standards for the safe transportation of hazardous materials. Under the USDOT regulations (49 CFR Part 173) containers of infectious sub-

stances to be transported must be marked with either an infectious substances label or, if the infectious material is a regulated medical waste, a biological hazard symbol. There is no requirement that the container be color coded.

In addition to the consistency issue, the Department's existing regulations concerning the marking of ICW containers have been in part preempted by the USDOT regulations. The USDOT regulations are promulgated under the Hazardous Materials Transportation Act (HMTA). The HMTA preempts State laws that are not substantively equivalent to USDOT regulations concerning the marking or labeling of containers. See 49 U.S.C.A. §§ 5101—5127.

As stated previously, the USDOT has promulgated standards for containers used to transport infectious substances, including regulated medical wastes. The USDOT's definition of infectious substance includes materials the Department defines as infectious waste. Both the USDOT and the Department require that infectious waste be transported in rigid containers. Since the USDOT's regulations do not require these containers to be color coded, the Department's existing regulations requiring rigid nonfiber board containers to be color coded are preempted.

Due to the foregoing concerns, the Department developed a proposed rulemaking that would have made color coding and labeling alternative methods of marking containers. This proposed rulemaking called for amending § 285.146(d) (relating to storage containers) to allow labeling as an alternative to color coding the container. The label will be the universal biological hazard symbol and the words "infectious and chemotherapeutic waste," as described in § 285.147(c).

This proposed rulemaking was submitted to the Solid Waste Advisory Committee (Committee) at its March 14, 1996, meeting. The Committee voted to recommend approval of the proposed amendments as they pertain to rigid containers. However, it was recommended that the regulations should continue to require that bags containing ICW be both color coded and labeled.

The Committee's recommendations are incorporated into the final rulemaking. Section 285.146 (relating to storage containers) is amended to make it clear that bags used as ICW containers be labeled and color coded, red for infectious and yellow for chemotherapeutic waste. The final-form regulations still authorize labeling of rigid containers which is substantially the same as Federal requirements. As a result, the Committee, at its September 12, 1996, meeting voted for the Department to proceed with the final rulemaking.

E. *Summary of Comments and Responses on the Proposed Rulemaking*

Notice of proposed rulemaking was published at 26 Pa.B. 2790 (June 15, 1996) and was followed by a 30-day public comment period. No public meetings or hearings were held.

Five persons and organizations commented on the proposed amendments during the comment period. The Independent Regulatory Commission (IRRC) also submitted comments.

The Department has prepared a "Comment and Response Document" summarizing and responding to the comments received by the Board. This document is available for review upon request from the contact persons identified in Section B of this Preamble.

Three of the six commentators strongly urged that color coded bags and containers should also be labeled according to the type of waste they hold. The commentators expressed concerns relative to the possible confusion that may arise when ICW containers/bags are only color coded. As an example, because some institutions utilize yellow colored bags/containers for radioactive waste, yellow bags/containers containing chemotherapeutic waste that are not also labeled may be mistaken for radioactive waste and managed improperly.

The Department agrees with the commentators. The final rulemaking leaves intact the current regulatory requirement of both color coding and labeling of bags used for infectious or chemotherapeutic waste storage. Section 285.146 is amended by adding a cross reference to the marking requirements in § 285.147.

The final rulemaking requires all rigid containers to be labeled. Color coding will not be an acceptable method of identifying these containers. This labeling requirement is being adopted in part to address the USDOT preemption issue previously discussed. Furthermore, the Department believes that requiring rigid containers to be labeled will ensure that the ICW will be properly managed.

The Department's previous regulations already exempted fiberboard boxes from the requirement to be color coded. The Department is not aware of any significant instances where fiberboard ICW containers were mishandled.

Two of the commentators were confused by the meaning of "(f)****" at the end of the proposed rulemaking. The Department's response explained that the use of the three asterisks is the designation used by the Legislative Reference Bureau to signify that no changes have been proposed to the existing regulatory language.

One commentator recommended that to ensure that the ICW was not disposed in a municipal landfill, that the ICW containers be color coded and labeled. For the reasons stated previously, the Department believes that the best approach is to require ICW bags to be color coded and only require labeling for rigid ICW containers.

The petitioner, DeRoyal, submitted comments supportive of the proposed amendments. The Department believes that the final rulemaking continues to satisfy the petitioner's objectives.

Finally, IRRC submitted a recommendation that the final-form regulations should make color coding an allowable supplemental method of identifying the ICW containers. This recommendation was based upon the fact that four commentators were concerned about making color coding an alternative to labeling.

The Department does not believe that IRRC's recommendation addresses the commentator's concerns. The Department agrees with the other commentators that ICW bags should be color coded as well as labeled. With respect to rigid containers, nothing in the final-form regulations prohibits the use of color coding in addition to labeling. However, given the USDOT preemption issue, the Department believes it is advisable to state that possibility in the final rule.

F. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost/benefit analysis of the final-form rulemaking.

Benefits

By amending §§ 285.146 and 285.147, companies that manufacture and Nationally market rigid containers for

the storage and transportation of ICW will be able to market the same container in this Commonwealth. This should reduce the cost of these containers in this Commonwealth.

Compliance Costs

These final amendments will not impose any new costs on individuals managing infectious and chemotherapeutic wastes.

Compliance Assistance Plan

The Department will provide compliance assistance by providing written notice to Pennsylvania licensed infectious and chemotherapeutic waste transporters and by providing notice to professional organizations including: The Hospital Association of Pennsylvania, Pennsylvania Veterinary Medical Association, Pennsylvania Medical Society and the Pennsylvania Dental Association.

Paperwork Requirements

No additional paperwork will be required as a result of this final rulemaking.

G. *Sunset Review*

These final-form regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 4, 1996, the Department submitted a copy of the proposed amendments to IRRC and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments, as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC and the public. These comments are addressed in the comment and response document and Section E of this Preamble. The Committees did not provide comments on the proposed rulemaking.

The final-form regulations were deemed approved by the House Environmental Resources and Energy Committee on February 24, 1997, and were deemed approved by the Senate Environmental Resources and Energy Committee on February 24, 1997. IRRC met on March 6, 1997, and approved the amendments in accordance with section 5(c) of the Regulatory Review Act.

I. *Findings*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and all comments were considered.

(3) These amendments do not enlarge the purpose of the proposal published at 26 Pa.B. 2790.

(4) These amendments are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

J. Order

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 285, are amended by amending §§ 285.146 and 285.147 to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form as required by law.

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This order shall take effect immediately upon publication.

(Editor's Note: The amendment of § 285.146, amended in this document, was not included in the proposal at 26 Pa.B. 2790.)

JAMES M. SEIF,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 1519 (March 22, 1997).)

Fiscal Note: Fiscal Note 7-298 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE VIII. MUNICIPAL WASTE

CHAPTER 285. STORAGE, COLLECTION AND TRANSPORTATION OF MUNICIPAL WASTE

Subchapter A. STORAGE OF MUNICIPAL WASTE

§ 285.146. Storage containers.

(a) Infectious and chemotherapeutic waste shall be placed in containers that are:

- (1) Leakproof.
- (2) Impervious to moisture.
- (3) Sufficient in strength to prevent puncturing, tearing or bursting during storage.

(b) In addition to the requirements of subsection (a), used sharps shall be stored in containers that are:

- (1) Rigid.
- (2) Tightly lidded.
- (3) Puncture resistant.

(c) In addition to the requirements of subsection (a), infectious waste fluids—quantities greater than 20 cubic centimeters—and chemotherapeutic waste fluids shall be stored in containers that are:

- (1) Break resistant.
- (2) Tightly lidded or tightly stoppered.

(d) When bags are used as the only storage container, double or multiple bagging shall be employed and the following requirements shall be met:

- (1) Upon packaging, the bags shall be securely tied.
- (2) The bag shall be constructed of material of sufficient single thickness strength to meet the following:
 - (i) The ASTM standard D1709-91, *Test Method for Impact Resistance of Polyethylene Film by the Free Falling Dart Method*, with an impact resistance of 165 grams or greater (Method A).
 - (ii) The ASTM standard D1922-89, *Propagation Tear Resistance of Plastic Film and Thin Sheeting by Pendulum Method*, with a tearing resistance, parallel and perpendicular to the length of the bag, of 480 grams.
 - (iii) If the standards in subparagraphs (i) and (ii) are modified by ASTM, the standard that is in effect on the date of manufacture of the bags shall be applied.

(3) Bags shall include one of the following certifications indicating that the ASTM standards have been met:

- (i) Each bag shall contain a printed certification by the manufacturer.
- (ii) The manufacturer may issue a certification letter to the infectious or chemotherapeutic waste generator and print a certification on each packaged lot of the bags.

(4) Bags used as containers shall have sufficient seam strength that is at least equal in resistance to tearing and equally impermeable as the other portions of the bag.

(5) Bags used as containers shall be yellow in color for each package of chemotherapeutic waste and red in color for each package of infectious waste and shall be labeled in accordance with § 285.147(c) (relating to marking of containers).

(e) Red or yellow containers shall contain colorants which are organic pigments with no heavy metal content.

(f) With the exception of persons who work at a small quantity generator's operation, where less than 220 pounds of infectious and chemotherapeutic waste is generated per month, persons packaging infectious or chemotherapeutic waste for offsite transportation shall wear:

- (1) Protective overalls.
- (2) Heavy gloves of neoprene or equivalent materials.

§ 285.147. Marking of containers.

(a) The outermost container for each package of infectious or chemotherapeutic waste for offsite transportation shall be labeled immediately after packing. The label shall be securely attached and shall be clearly legible. Indelible ink shall be used to complete the information on the label, and the label shall be at least 3 inches by 5 inches in dimension.

(b) The following information shall be included on the label:

- (1) The name, address and telephone number of the generator.
- (2) The date the waste was generated.
- (3) The name of the transporter and, if applicable, Department-issued infectious and chemotherapeutic waste transporter license number.

(c) The following information shall be printed on the outermost container or bag for each package of infectious or chemotherapeutic waste for either onsite movement or offsite transportation:

(1) The words "infectious waste" or "chemotherapeutic waste," whichever is applicable.

(2) The universal biohazard symbol that conforms to the design shown in regulations of the United States Occupational Safety and Health Administration at 29 CFR 1910.145(f)(8)(ii) (relating to specifications for accident prevention signs and tags).

(d) The labeling information specified in subsection (c) shall be fluorescent orange or orange-red in color, or predominately so, with a background of a contrasting color for infectious waste, and yellow in color, or predominately so, with a background of a contrasting color for chemotherapeutic waste.

(e) Stationary waste storage containers shall be lined with the appropriate colored bag for infectious or chemotherapeutic waste.

[Pa.B. Doc. No. 97-550. Filed for public inspection April 11, 1997, 9:00 a.m.]

Title 67—TRANSPORTATION

DEPARTMENT OF TRANSPORTATION

[67 PA. CODE CH. 457]

Prequalification of Prospective Bidders

The Department of Transportation (Department), Bureau of Construction and Materials adopts amendments to Chapter 457 (relating to prequalification of bidders) to read as set forth in Annex A.

Notice of proposed rulemaking was published at 26 Pa.B. 895 (March 2, 1996) with an invitation to submit written comments within 30 days of publication. Comments were received by the Department from three interested parties.

Comments Received

The Department received one written public comment and one verbal comment in addition to comments from the Independent Regulatory Review Commission (IRRC). The written comment was submitted by the Executive Vice President of the Associated Pennsylvania Constructors (APC). The verbal comment was received from a research analyst for the House of Representatives Transportation Committee.

Both comments were reiterated in a letter dated May 1, 1996, from the Executive Director of IRRC to the Secretary of the Department. This letter also addressed and referenced concerns related to the House Transportation Committee hearing held on October 19, 1995.

The letters from the APC and IRRC disagreed with the proposed amendment to § 457.5(f)(1) (relating to classification), which would have fixed unlimited financial capacity at \$500 million. Both the APC and IRRC indicated that this higher level would restrict competition and increase costs to the Commonwealth. They noted that bonding companies are particularly vigilant of the financial health and prospects of contractors before issuing performance and payment bonds required on construction projects.

Existing and past Department policy used \$100 million; however, this policy was not previously stated in the regulations. The Department has agreed to continue the existing policy and will retain the \$100 million limit as identifying firms with unlimited financial capacity. For

purposes of documenting existing policy, the modification to § 457.5(f)(1) will indicate that \$100 million will identify firms with unlimited financial capacity.

The comment received from the House research analyst questioned whether any changes were made to the regulations as a result of the House Transportation Committee hearing on October 19, 1995. This same comment was emphasized and expanded on by IRRC in its May 1, 1996, letter. Both also referenced Secretary Mallory's letter of November 28, 1995, to the Honorable Thomas W. Druce subsequent to the House Transportation Committee hearing on October 19, 1995. The concerns resulting from the House Transportation Committee hearing focused on construction contracts being performed on time so that people's lives are not disrupted and businesses not destroyed due to delays in road construction work. It was recommended that scheduling be integrated into the Past Performance Report as a major category to be evaluated.

The Department has agreed to revise the existing Past Performance Report to incorporate scheduling as a major category to be evaluated. Scheduling will be weighted at a minimum of 20% of the total overall rating. The Department plans to implement the revised Past Performance Report in February 1997, in time for the 1997 construction season. The Department's November 28, 1995, letter from Secretary Mallory to Representative Druce indicated this would be ready for the 1996 construction season. Unfortunately, the Department was overly optimistic in view of the time frame needed to update the Contract Computer Management System. Coordination with the Department district offices has been completed as to the types of questions to be included in the evaluation of scheduling, and it is anticipated that the final format to be inserted in the computer system will be completed by December.

The house research Analyst and IRRC also addressed initiatives the Department plans to undertake to assure timely completion of highway and bridge projects.

The initiatives the Department plans to undertake include the following concepts:

1. *Incentive/Disincentive Clause Application*—This concept provides incentives for completing a project ahead of schedule, and penalties for falling behind schedules. Of seven projects bid in the past using this concept, five resulted in incentive payments, and two resulted in disincentive payments.

2. *Cost Plus Time Method (A + Bx Concept)*—This concept involves time with an associated cost in the bid determination. The bid for award consideration is based on a combination of both the cost of contract items and the cost of time needed to complete the work. Of three projects bid in the past using this concept, two were considered successful, and one not so successful, since a sizeable claim was involved.

3. *Lane Rental Method*—This concept includes provisions in the bid proposal for a lane rental fee assessment. This fee is based on the estimated cost of delays to road users during that rental period, and is deducted from monthly progress payments. Major urban area projects are prime candidates for this approach.

4. *Design/Build Contracting*—This concept involves the identification of the end result parameters, and establishes the design criteria minimums. Prospective bidders develop design proposals that optimize their construction abilities. The proposals are rated by the contracting agency on factors such as design quantities, timeliness, management capability and cost. There is a

great deal of flexibility for innovations, but it also puts greater responsibility on the contractor.

5. *Alternate Design by Contractor*—This concept allows contractors to bid alternate structures in bridge projects. Approximately 5% have been bid this way in the past. The Department will continue this practice in the future.

6. *Use of Warranties*—This concept involves a shared effort between the Department and contractor organizations to form warranty specifications. The Department is presently evaluating the possibility of implementing this concept.

7. *Use of Critical Path Method (CPM) Scheduling*—This concept involves the development of mutually agreed-upon activity charts between the Department and the contractor. On construction projects where major traffic disruption is anticipated, a CPM schedule is required, so that disruption can be analyzed. Major rehabilitation projects are ideal candidates for CPM application. The Department has actively implemented this concept on several projects over the last few years.

8. *Road User Costs Determination*—This concept involves the application of road user costs including additional travel time (delay) due to reduced speeds through work zones or detours, or both, additional fuel costs due to reduced speeds through work zones or detours, or both, maintenance of traffic costs on the project, winter shut down time costs, and the like. These costs are used in determining the penalties or incentive amounts in highway and bridge contracts.

The Department will continue to emphasize the use of these alternatives in the future. Evaluation of these alternatives as to the benefits derived will also be completed as more of these alternatives are used.

Another comment submitted by both the House research analyst and IRRC, related to § 457.8(c) (relating to certification of classification and capacity), which allows for the rejection of bids if major changes have occurred that would affect the responsibility of a firm after it has been prequalified. The Department is reviewing the necessary legal and Legislative initiatives that can be taken to strengthen the enforcement of this section. Another comment submitted by both the House research analyst and IRRC, concerned the development of procedures to expedite the employment of a second contractor after a contractor has been declared in default. Due to the multitude and complexity of construction, design, legal and administrative issues involved in expediting construction in a default situation, the Department proposes to initiate a feasibility study to determine if a workable and practical solution can be developed. If a feasible resolution is considered a possibility, the Department will initiate a reengineering process to develop procedures to address this situation. This process would include personnel from the Bureau of Construction, the Bureau of Design, the Office of Chief Counsel and the Department's engineering districts, as well as individual contractors and possibly a surety firm. The processing by or through a surety is viewed as potentially the major impediment in revising the existing procedures.

IRRC also recommended that § 457.10 (relating to past performance report) be modified to indicate that the Department's review of a contractor's performance include timeliness of completing previous projects; a history of suspensions and fine assessments, including amounts, for lateness; and a history of issuance of any letters of concern. The Department has agreed to modify § 457.10 to reflect the inclusion of scheduling as a major component to be evaluated in the past performance report.

Additional Modifications to the Proposed Rulemaking

The final text of the regulations contains modifications which do not enlarge the scope of these regulations as originally proposed, and thus may be published as final rulemaking. The following represents a summary of the modifications:

1. Section 457.3(d)(3) (relating to general requirements) has been amended by capitalizing Prequalification Officer in the last sentence to provide consistency with the rest of the chapter.

2. Section 457.4(b)(3) (relating to statements to be furnished under oath) has been amended to include a hyphen in the word "line-of-credit" between of and credit. This is consistent with the hyphenation of this wording in the rest of the chapter.

3. Section 457.5(f)(1) (relating to classification) has been further amended by decreasing the threshold of unlimited financial capacity from \$500 million to \$100 million. Existing and past Department policy established the threshold for determining unlimited financial capacity of contractors at \$100 million, although this policy was never set forth in these regulations. Upon proposal of the \$500 million threshold, IRRC and the APC noted that this increase would restrict competition and increase costs to the Commonwealth. Since neither of these results were intended by the Department, the proposed \$500 million threshold has been decreased to \$100 million. This amendment will inform contractors of the Department's existing and continuing policy regarding unlimited financial capacity.

4. Section 457.8(c) (relating to certification of classification and capacity) has been amended to substitute the word "its" for "his" in the first sentence.

5. Section 457.8(c) has also been amended to substitute the word "Department" for "Secretary" in two places in the first sentence. These changes were made to provide consistency with similar substitutions throughout the chapter.

6. Section 457.9 (relating to false certification with bid) has been amended to substitute the word "Department" for "Secretary" in the last sentence. This change was made to provide consistency with similar substitutions throughout the chapter.

7. Section 475.10(b) (relating to past performance report) has been amended to clarify what the Department will consider when reviewing a contractor's past performance. The past performance report will include an evaluation of a contractor's attitude and cooperation, equipment, organization and management, scheduling and work performance. This amendment will alert contractors as to the criteria the Department will employ in developing a past performance report.

8. Section 457.13(c) (relating to suspension or debarment) has been amended to correct a typographical error. The word "by" has been replaced with the word "be" in the last sentence.

Purpose of these Amendments

The purpose of these amendments is to amend the existing regulations by incorporating provisions of the Contractor Responsibility Program as contained in Management Directive 215.9, dated July 17, 1990, and Chapter 491 (relating to administrative practice and procedure); by incorporating definitions for "suspension," "debarment," "contractor" and "subcontractor"; by including additional reasons for suspension and debarment; by

deleting the present appeal committees; by establishing an appeal process which includes an Administrative Hearing Officer; by providing an informal meeting as the first step in the classification appeals process; by deleting a no extension clause for prequalification expiration dates, and allowing for an extension of 30 days if a renewal certificate is not issued by the expiration date; by amending the cycle for prequalification to 2 years from 1 year; by assigning umbrella prequalification certificates to the parent company and three subsidiaries, and enforcement of suspension or debarment to the parent company and all subsidiaries prequalified under one umbrella certificate; by including a definition of "general contractor"; by acceptance of a review report for the financial statement under certain conditions; by clarifying that line-of-credit statements must be designated in the name of the applicant; by amending a number of classification codes to more accurately consider recent types of activities performed by the Department; by clarifying that the amount for an unlimited maximum financial capacity is \$100 million; and, by amending the past performance reports to include scheduling.

Persons and Entities Affected

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

Fiscal Impact

These amendments will not require the expenditure of additional funds by either the Commonwealth or local municipalities. These 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 the Department's Rules of Administrative Practice and Procedure. These 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 parent companies and their subsidiaries or divisions.

Regulatory Review

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

In preparing these final-form regulations, the Department has considered the comments received from the Commonwealth and the public.

These final-form regulations were deemed approved by the Committees on February 20, 1997, and were approved by IRRC on February 20, 1997, in accordance with section 5(c) of the Regulatory Review Act.

Sunset Provisions

The Department is not establishing a sunset date for these regulations since these regulations are needed to administer provisions required under the State Highway Law (36 P. S. §§ 670-101—670-1002). The Department, however, will continue to monitor these regulations for their effectiveness.

Contact Person

The contact person is Fred N. Starasinic, P.E., Contract Management Division, Bureau of Construction and Materials, 7th fl, Forum Place, 555 Walnut St., Harrisburg, PA 17120, (717) 787-3733.

Authority

These regulations hereby amended are amended under the authority contained in section 404.1 of the State Highway Law (36 P. S. § 670-401.1).

Findings

The Department finds that :

(1) Public notice of intention to amend the administrative regulations amended by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2 .

(2) The amendment of the regulations of the Department in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 67 Pa. Code Chapter 457, are amended by amending §§ 457.1—457.6, 457.8—457.16, by deleting § 457.7 and by adding § 457.17 to read as set forth in Annex A with ellipses referring to the existing text of the regulations.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of the Attorney General and the Office of General Counsel for approval as to legality as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin* with an effective compliance date of July 1, 1997.

BRADLEY L. MALLORY,
Secretary

(Editor's Note: The amendment of § 457.10 was not included in the proposal at 26 Pa.B. 895 (March 2, 1996).)

Fiscal Note: Fiscal Note 18-318 remains valid for the final adoption of the subject regulations.

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:

Act—The State Highway Law (36 P. S. §§ 670-101—670-1002).

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.

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.

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. The debarment will include all divisions or other organizational elements of a contractor or subcontractor unless limited by its terms to specific divisions or organizational elements. The debarment may apply to 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.

Department—The Department of Transportation of the Commonwealth.

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

Highway project—Work done by contract on or related to a State highway.

Letting—The day on which the bids for a highway project will be opened.

Prequalification Officer—The Department official who administers the regulations and procedures in this chapter.

Secretary—The Secretary of Transportation or a Deputy Secretary of Transportation.

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. The suspension will include all divisions or other organizational elements of a contractor or subcontractor unless limited by its terms to specific divisions or organizational elements. The 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 section 404.1 of the act (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 contractors and subcontractors to perform highway project work in this Commonwealth.

(b) The following basic policy governs the classification and prequalification of contractors and subcontractors:

(1) The institution of a system which will permit a more efficient operation of the contract program for highway projects.

(2) The minimization of delays in the awarding of contracts after bids have been opened.

(3) The assurance of the integrity, responsibility and competence of bidders.

§ 457.3. General requirements.

(a) *Proof of competence and responsibility.* Persons proposing to bid on work shall be required to establish proof of their competence and responsibility, as provided in this chapter, before being permitted to bid on the work, with the following exceptions:

(1) Miscellaneous work excluded under § 457.5(b) (relating to classification).

(2) Demolition work when the Department's estimate of costs for the same is less than \$25,000.

(b) *Submitting statements.* For the purpose of this section, each person shall submit statements, under oath, on the forms prescribed by the Department, which set forth the financial ability, adequacy of plant and equipment, organization, experience, equal employment opportunity, affirmative action program and related pertinent and material information necessary to establish competency and responsibility. The contractor may add the necessary extensions and supplementary information as attachments to the forms.

(c) *Application processing.* The Department will attempt to expedite the processing of an application if the applicant notifies the Prequalification Office in writing, 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 balance sheet date.

(i) *Form 4300, Part 1-Filed.* Prequalification unless withdrawn or suspended by the Department, expires 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) *Exception.* Prequalification, unless withdrawn or suspended by the Department, expires 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.

(i) *Form 4300, Part 1-Not filed.* Prequalification expires 2 years from the date of issuance of the 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).

(ii) *Part 1, Financial Statement.* After an applicant has been prequalified and elects to submit a Part 1, Financial Statement, either new or revised, the applicant shall submit a current Part 2 and Part 3.

(3) *Expiration date.* The expiration date will be indicated on the certificate of prequalification. The expiration date of a current certificate will be automatically extended 30 days if the renewal certificate is not issued prior to expiration, if 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.

(e) *Filing a statement.* The Department may request a contractor to file a new statement at any time deemed necessary, in which case the statement shall be filed within 30 days. Failure to comply may be grounds for disqualification or suspension.

(f) *Business through branch office.* Applicants who desire to do business in this Commonwealth through any of their branch offices shall indicate in the application forms the address of the branch office.

(g) *Contracting corporations.* Contracting corporations which are chartered in a state other than this Commonwealth and individuals or firms doing business under fictitious names shall register with and obtain a certificate from the Secretary of the Commonwealth authorizing them to do business in this Commonwealth, before an award of contract will be made.

(h) *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, employes 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) One set of each form shall be sent to each applicant which shall be returned to the Department.

(4) A complete set of application forms may be acquired from the Prequalification Office, Bureau of Construction and Materials, Contract Management Division, Department of Transportation, 7th fl, Forum Place, 555 Walnut Street, Harrisburg, Pennsylvania 17120. They shall be mailed or delivered to the Prequalification Office at this above 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 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 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 (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 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 in § 457.5.

* * * * *

(3) Each 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 employees which shall show the number of years the contractor has been engaged in the contracting business and shall further disclose generally his experience over that period.

* * * * *

(vi) A statement 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 employees.

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

* * * * *

(d) *Contractor's Affirmative Action Statement, Form 4300, Part 3.* This part will be reviewed by the Bureau of Equal Opportunity. The information requested in Form 4300, Part 3, shall be submitted in full to comply with 16 Pa. Code Chapter 49 (relating to contract compliance), the Federal Civil Rights Act of 1964, Presidential Executive Order No. 11246 as amended, and 41 CFR 60-60.4 (relating to confidentiality and relevancy of information).

§ 457.5. Classification.

(a) The 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	RIGID BASE COURSE

WORK	CODE	SECT.	CLASSIFICATION
	E	300	FLEXIBLE BASE COURSE
PAVEMENT	F	400	BITUMINOUS PAVEMENT
	F1	400	BITUMINOUS PAVEMENT PATCHING AND REPAIR
	G	500	RIGID PAVEMENT
	G1	500	RIGID PAVEMENT PATCHING & REPAIR
INCIDENTAL CONSTRUCTION	H	600	DRAINAGE, WATER MAIN, STORM SEWER
	J	600	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
TRAFFIC ACCOMMODATIONS AND CONTROL	O	900	PAVEMENT MARKINGS
	P	900	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
	S1	1000	CULVERTS & SINGLE SPAN BRIDGES TO 80 FT
	S2	1000	REPAIR AND REHABILITATION OF STRUCTURES
	S3	1000	MODIFIED CONCRETE DECK OVERLAYS
	T	1050	ERECTION (STRUCTURAL MEMBERS)
	T1	1018	BRIDGE REMOVAL
	U	1005	PILE DRIVING
	V	1070	STEEL PAINTING (HIGH PERFORMANCE)
	V1	1071	STEEL PAINTING (CONVENTIONAL)
MISCELLANEOUS	Y		OTHERS

(b) Miscellaneous work as determined by the Chief Counsel, as not within the purview of the act, will be excluded by the Deputy Secretary for Highway Administration from the requirements of this chapter. When this is done, the bid proposal shall so state.

(c) The classifications of work listed in subsection (a) may be further 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 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 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 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 Office shall give notice of the classification and rating.

(f) The maximum capacity rating shall be a flat sum determined as follows:

(1) The formula, $Q = F (C + 1/2L + 1/2E)$, shall be used to determine the maximum capacity rating. A contractor whose maximum capacity exceeds \$100 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), 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 the maximum capacity rating.

(3) The symbols used in the formula in paragraphs (1) and (2) shall have the following meaning:

- (i) Q = Maximum capacity rating.
- (ii) C = Net working capital.
- (iii) F = Assigned ability factor (1 to 15).
- (iv) L = Line-of-credit statements.
- (v) E = Book value of equipment.

(4) The following limitations apply to the terms in paragraph (3):

(i) Net working capital shall be current assets less current liabilities.

(ii) Current assets shall be easily negotiable assets that may readily be turned into cash.

(iii) Current liabilities shall be obligations due within a 1-year period.

(iv) A Line-of-Credit statement shall be the form, executed by a bank on page number 20 of the financial statement of the contractor.

(v) Book value of equipment shall be total cost less depreciation actually applied. This equipment factor shall include not only book value of company-owned equipment but also the book value of the contractor's share of equipment owned by a joint venture.

(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 the assigned maximum capacity rating less monetary value of the uncompleted contract and subcontract work under § 457.16 (relating to sublettings).

§ 457.6. Classification appeals procedure.

The following procedures apply to classification appeals:

(1) *Informal meeting.* A contractor or subcontractor dissatisfied with his classification may submit, in writing, a request for an informal meeting to the Prequalification Office within 10 working days after receipt of notice of prequalification or denial thereof or other related action

of the Department. At the meeting, which shall be scheduled by the Department within 30 days after receipt of a request therefor the contractor or subcontractor may present further evidence with respect to 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 Department.

(2) *Notification of determination/formal classification hearing.* After hearing the additional evidence, the Department will change or retain the classification within 10 working days after the meeting and will notify, in writing, the 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 forgo the informal meeting described at 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 all 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, 9th floor, Forum Place, 555 Walnut Street, Harrisburg, Pennsylvania 17120

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

§ 457.7. (Reserved).

§ 457.8. Certification of classification and capacity.

(a) Bids will be accepted only from contractors who have a current prequalification certificate in accordance with this chapter. In those cases when either the bidder does not have adequate current prequalification capacity rating, as required by subsection (b) or the types of work on which the 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) So that the Department may have the necessary information to pass upon the ability of a contractor to satisfactorily complete a project, 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, 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 contractor shall certify that the current qualification amount, less amount of all uncompleted work which includes subcontracts except as permitted by § 457.16 (relating to sublettings) the contractor has under contract is sufficient to cover the amount of the proposal. The making of a false certification shall constitute cause for rejection of the proposal of the contractor.

(c) The Department may reject a bid at any time prior to the actual awarding of a contract if, in its judgment, the best interest of the Commonwealth will be promoted thereby, or if there have been developments subsequent to prequalification, which, in the opinion of the Department would affect the responsibility of the contractor. In addition to the right of the Department to reject, a bid may be rejected if it appears that after the contractor was prequalified, the contractor was declared in default on a project, or prequalification was suspended or withdrawn by the Department, or a major change occurred in the management of the contractor's firm. Before taking the action, the Department will as soon as possible notify the contractor and give the contractor an opportunity to present additional information to the Department.

§ 457.9. False certification with bid.

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

§ 475.10. Past performance report.

(a) The Secretary may require the District Engineer, the Inspector General or other designee to submit a confidential past performance report on a contractor performing work for the Department.

(b) This report, and reports received from outside entities, shall be used in conjunction with the other past performance information for determining the past performance rating of the contractor which rating shall be considered in determining the classification of the contractor and his responsibility as a contractor. The past performance report shall include evaluation of a contractor's attitude and cooperation, equipment, organization and management, scheduling and work performance. Poor or unsatisfactory ratings for specific work classifications shall constitute justification for revoking classifications previously granted. A contractor who has an overall unsatisfactory rating on performance reports will not be prequalified. Reports shall be confidential.

§ 457.11. Audit of contractor or subcontractor records.

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 prequalification application or at hearing.

A contractor, subcontractor or individual who knowingly makes or causes to be made, a false, deceptive or fraudulent statement on the 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 from bidding on or participating in State supervised or funded highway construction work.

§ 457.13. Suspension or debarment.

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

(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 Workers' Compensation Act (77 P. S. §§ 1—2626).

(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 where 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, 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:

- (i) Financial statements.
- (ii) Nondiscrimination forms.
- (iii) Affidavits or statements of compliance with prevailing wage statutes.
- (iv) 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 affect the present responsibility of a contractor or any basis for debarment or suspension 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 set forth 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, employe or other individual or entity associated with the contractor, by certified mail, return receipt requested and regular mail that it has been:

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

(2) 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. 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. 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, 9th fl., Forum Place, 555 Walnut Street, 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.

§ 457.15. Joint venture bids.

(a) *Permissible combination.* A combination of contractors which combination shall be limited to three participants unless otherwise stated in the proposal, and each of whom is prequalified in accordance with 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.* 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 the participant's portion of the joint venture, or the bid will be rejected.

§ 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 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).

§ 457.17. Notification.

Contractors are required to notify in writing 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 (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. 97-551. Filed for public inspection April 11, 1997, 9:00 a.m.]