

CHAPTER 457. PREQUALIFICATION OF BIDDERS

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Authority

The provisions of this Chapter 457 issued under the State Highway Law (36 P. S. §§ 670-101—670-1002), unless otherwise noted.

Source

The provisions of this Chapter 457 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133, unless otherwise noted.

Cross References

This chapter cited in 67 Pa. Code § 449.4 (relating to exceptions to Department specifications).

§ 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.

Source

The provisions of this § 457.1 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 11, 1979, effective April 14, 1979, 9 Pa.B. 1308; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective April 12, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial pages (122929) to (122930).

§ 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.

Source

The provisions of this § 457.2 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective April 12, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial pages (122930) to (122931).

Notes of Decisions

This section cloaks the Department of Transportation with broad powers to ensure integrity of government contractors, and where estimator responsible for antitrust violation which occurred 5 years earlier was not removed until contractor received letter of suspension, Department did not abuse its discretion. *Latrobe Road Construction, Inc. v. Department of Transportation*, 527 A.2d 214 (Pa. 1987); appeal denied 536 A.2d 1335 (Pa. 1987).

§ 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 ser-

vice of complaints, subpoenas and other legal documents on behalf of the contractor or subcontractor, its officers, employees or owners. The contractor or subcontractor shall notify the Department immediately if there is a change in the name or address, or both, of the resident agent. Failure to do so could result in suspension of prequalification.

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

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

Source

The provisions of this § 457.3 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 11, 1979, effective April 14, 1979, 9 Pa.B. 1308; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective April 12, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial pages (122931) to (122932).

§ 457.4. Statements to be furnished under oath.

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

(1) The Contractor's Financial Statement, Form 4300, Part 1: Organization and Experience Statement Form 4300, Part 2, and Affirmative Action Statement Form 4300, Part 3 shall be the documents used in determining qualifications of an applicant and capacity to bid upon contract work undertaken by the Department. From the information provided, the Department will establish whether the applicant is entitled to be prequalified and receive a rating which will determine his maximum capacity and classifications of work on which he shall be eligible to bid.

(2) Questions shall be answered fully and the information requested be properly presented. The Department will return incomplete forms for completion or correction. This action will delay review of submittal by an applicant and the assignment of ratings.

(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 floor, Forum Place, 555 Walnut Street, Harrisburg, Pennsylvania 17101-1900. They shall be mailed or delivered to the Prequalification Office at this above address.

(5) At the option of the applicant, the submission of Contractor's Financial Statement, Form 4300, Part 1, may be omitted and in lieu thereof, the applicant will be assigned a maximum capacity as specified in § 457.5(f)(2) (relating to classification). An applicant exercising this option shall be considered eligible to perform work only as a subcontractor.

(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.

(2) No financial statement may be accepted which has been prepared by a certified public accountant, public accountant or foreign accountant who is directly connected with or has a financial interest in the business of the contractor submitting the statement.

(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.

(6) Applicants shall make certain their line-of-credit statements contain no restrictive qualifications and are valid for the entire prequalification period. In cases where these statements expire before the prequalification expiration date the capacity rating shall be correspondingly reduced when line-of-credit statements expire, unless renewed or extended.

(7) No line of credit statements will be considered when applicant elects to exercise the option specified in subsection (a)(5).

(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.

(2) The attention of the contractor is particularly invited to the section of the form in which inquiries are made relative to the work classifications desired. The applicant shall indicate his desires on classifications of work for which a rating is sought. As a general rule classifications may not be assigned in excess of those requested.

(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.

(ii) A statement as to organization which shall develop the adequacy of such organization, including key personnel, to undertake a project in the classification desired.

(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.

(iv) A statement which shall give an accurate and complete record of work done in the past 5 years, as a contractor of record, or an approved subcontractor, giving the names of projects undertaken, the types of work, the locations, the contract price and the name of the principal engineer in charge for the contracting agency.

(v) A statement which shall list in detail liens, stop notices or claims filed against the contractor on any project within the past 5 years. This statement shall also disclose failures to complete a contract or contracts, and penalties imposed by reason of a contract undertaken and adjudicated noncompliance with pertinent statutes within the 5-year period. The prospective bidder shall explain the items.

(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.

(4) Equipment owned or otherwise available to the contractor shall be an important consideration in determining ratings, particularly for some categories of work. In some cases, ownership or control of specific items of equipment may be a prerequisite. It is important, therefore, that the descriptive information requested shall be given, especially for major equipment items. Equipment which is still serviceable, even though fully depreciated, shall be included.

(5) As a general condition, applicants shall possess and have available, appropriate and sufficient equipment to perform the contemplated work, or have current assets sufficient to purchase or lease the necessary equipment.

(6) Arrangements, such as valid rental agreements, and status as owner, majority stockholder or officer in an equipment company, may be considered. The arrangements shall be reported and explained.

(7) The equipment listed as being owned by the contractor in the Contractor's Organization and Experience Statement, Form 4300, Part 2, shall be identical with a similar list of equipment in the Contractor's Financial Statement, Form 4300, Part 1. If these lists differ, an explanation of the difference shall be included in the application.

(8) It will facilitate the processing of the rating of the contractor if the equipment is listed by type; that is, shovels together, pavers together and so forth, by age and condition.

(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 relevency of information).

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

Source

The provisions of this § 457.4 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended August 8, 1975, effective August 9, 1975, 5 Pa.B. 2035; amended April 13, 1979, effective April 14, 1979, 9 Pa.B. 1308; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial pages (122932) to (122936).

Notes of Decisions

In determining compliance with 67 Pa. Code § 457.4(e), which requires a complete statement of a contractor's convictions, the word "conviction" is to be accorded the popular meaning rather than the technical meaning, and thus a conviction exists upon a finding of guilty by the court even though sentencing has not yet been imposed. *E. Smalis Painting Co. v. Department of Transportation*, 452 A.2d 601 (Pa. Cmwlth. 1982).

Cross References

This section cited in 67 Pa. Code § 457.3 (relating to general requirements); 67 Pa. Code § 457.5 (relating to classification); and 67 Pa. Code § 457.17 (relating to notification).

§ 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
	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

WORK	CODE	SECT.	CLASSIFICATION
	J1	600	CONCRETE MEDIAN BARRIER
	K	600	CURBS, SIDEWALKS, INLETS, MANHOLES, ETC.
	L	600	SLAPJACKING-SUBSEALING
ROADSIDE DEVELOPMENT	M	800	LANDSCAPING
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

WORK	CODE	SECT.	CLASSIFICATION
	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).

Authority

The provisions of this § 457.5 amended under section 404.1 of the State Highway Law (36 P. S. § 670-404.1).

Source

The provisions of this § 457.5 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended August 8, 1975, effective August 9, 1975, 5 Pa.B. 2035; amended April 13, 1979, effective April 14, 1979, 9 Pa.B. 1308; through August 12, 1983, effective August 13, 1983, 13 Pa.B. 2490; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798; amended April 13, 2007, effective April 14, 2007, 37 Pa.B. 1650. Immediately preceding text appears at serial pages (227766) to (227768) and (314779).

Notes of Decisions

Protest Untimely

Bidder should have known of all pertinent facts giving rise to his bid protest on the date he filed his bid because he knew which classification codes he was prequalified to bid on, as well as the codes the Department of Transportation had assigned to work items involved in the project that he believed were incorrectly classified; therefore, since Bidder's protest was filed more than 7 days after he filed his bid, the protest was untimely. *Cummins v. Department of Transportation*, 877 A.2d 550, 554—555 (Pa. Cmwlth. 2005).

Cross References

This section cited in 67 Pa. Code § 457.3 (relating to general requirements); and 67 Pa. Code § 457.4 (relating to statements to be furnished under oath).

§ 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:

Commonwealth of Pennsylvania, Department of Transportation,
Administrative Docket Clerk, Commonwealth Keystone Building,
400 North Street, 9th Floor, Harrisburg, Pennsylvania 17120-0096.

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

Source

The provisions of this § 457.6 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798; amended September 2, 2011, effective September 3, 2011, 41 Pa.B. 4772. Immediately preceding text appears at serial page (326842).

§ 457.7. [Reserved].**Source**

The provisions of this § 457.7 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; reserved April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial page (122940).

§ 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.

Source

The provisions of this § 457.8 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 13, 1979, effective April 14, 1979, 9 Pa.B. 1308; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial pages (122940) to (122941).

Cross References

This section cited in 67 Pa. Code § 457.9 (relating to false certification with bid).

§ 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.

Source

The provisions of this § 457.9 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial pages (122941) to (122942).

§ 457.10. 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.

Source

The provisions of this § 457.10 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 13, 1979, effective April 14, 1979, 9 Pa.B. 1308; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial page (122942).

§ 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.

Source

The provisions of this § 457.11 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 13, 1979, effective April 14, 1979, 9 Pa.B. 1308; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial page (122942).

§ 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.

Source

The provisions of this § 457.12 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial page (134719).

§ 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.

Source

The provisions of this § 457.13 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 11, 1979, effective April 14, 1979, 9 Pa.B. 1308; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial page (134719).

Notes of Decisions

Discretion

Department of Transportation did not abuse its discretion in imposing 3-year suspension which prevented contractor from bidding on government contracts, where it was discovered that contractor had been convicted of violation of Federal anti-trust laws in regard to bid on Department of Transportation contract, despite dismissal of employe responsible for violation, which action was taken after suspension letter was received. *Latrobe Road Construction, Inc. v. Department of Transportation*, 527 A.2d 214 (Pa. Cmwlth. 1987); appeal denied 536 A.2d 1335 (Pa. 1987).

Due Process

The procedures of § 457.13 providing for notice of suspension and a “reply,” but never an actual hearing, violate due process. *Balfour Beatty Construction Co. v. Department of Transportation*, 783 A.2d 901 (Pa. Cmwlth. 2001).

Exhaustion of Administrative Remedies

Because the contractor claims that the Department’s regulations violate constitutional due process requirements, the expertise of the Secretary is not required and there is no need to exhaust administrative remedies before filing an appeal to court. The parties’ arguments with respect to notice and timing of filing administrative appeals are therefore moot. *Balfour Beatty Construction Co. v. Department of Transportation*, 783 A.2d 901 (Pa. Cmwlth. 2001).

Management Directive

Management directive relied on by Department of Transportation to debar contractor due to criminal charges brought against two former employees based on actions outside scope of their employment lacked full force and effect of law and was unenforceable; directive was only an internal procedural directive and not a regulation and was contrary to statute and regulations that set forth debarment procedures. *Schuylkill Products v. Dept. of Transportation*, 962 A.2d 1249, 1254 (Pa. Cmwlth. 2008).

Nature of Notice

A notice of suspension or debarment is not in the nature of a rule to show cause. Unlike a rule to show cause, it does not contain a notice that allegations may be deemed admitted if not challenged. *Balfour Beatty Construction Co. v. Department of Transportation*, 783 A.2d 901 (Pa. Cmwlth. 2001).

Reply to Suspension Notice

The failure to file a reply to a notice of suspension within 21 days does not preclude the contractor from seeking review of the suspension. Section 457.13(h) permits a contractor to submit information to the Department, but does not require it. Even in the absence of a reply, the Department is to continue its investigation. *Balfour Beatty Construction Co. v. Department of Transportation*, 783 A.2d 901 (Pa. Cmwlth. 2001).

Cross References

This section cited in 67 Pa. Code § 457.16 (relating to sublettings); and 67 Pa. Code § 459.3 (relating to permit application procedure).

§ 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:

Commonwealth of Pennsylvania, Department of Transportation, Administrative Docket Clerk, Commonwealth Keystone Building, 400 North Street, 9th Floor, Harrisburg, Pennsylvania 17120-0096. Chief Counsel, 9th floor, 555 Walnut Street, Harrisburg, Pennsylvania 17101-1900.

(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.

Source

The provisions of this § 457.14 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended April 11, 1979, effective April 14, 1979, 9 Pa.B. 1308; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798; amended September 2, 2011, effective September 3, 2011, 41 Pa.B. 4772. Immediately preceding text appears at serial pages (342982) and (288363).

§ 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.

Source

The provisions of this § 457.15 adopted September 21, 1973, effective September 22, 1973, 3 Pa.B. 2133; amended November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial page (134720).

Cross References

This section cited in 67 Pa. Code § 457.5 (relating to classification).

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§ 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).

Source

The provisions of this § 457.16 adopted November 28, 1980, effective November 29, 1980, 10 Pa.B. 4470; amended April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798. Immediately preceding text appears at serial pages (134720) to (134721).

Cross References

This section cited in 22 Pa. Code § 457.5 (relating to classification); and 22 Pa. Code § 457.8 (relating to certification of classification and capacity).

§ 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.

Source

The provisions of this § 457.17 adopted April 11, 1997, effective July 1, 1997, 27 Pa.B. 1798.

[Next page is 459-1.]