

TITLE 25 INDIANA DEPARTMENT OF ADMINISTRATION

ARTICLE 1. SUPPLY DIVISION (REPEALED)

(Repealed by Indiana Department of Administration; filed Dec 15, 1981, 1:45 pm: 5 IR 245)

ARTICLE 1.1. STATE PROCUREMENT

NOTE: IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.

Rule 1. General Provisions

25 IAC 1.1-1-1 Definitions

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-1-29

Sec. 1. The requirements of IC 4-13.4 *[IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.]* do not apply to employment agreements. *(Indiana Department of Administration; 25 IAC 1.1-1-1; filed Dec 15, 1981, 1:45 pm: 5 IR 239; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 1.1-1-2 Competitive sealed bids; bid guarantee

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-2

Sec. 2. At the discretion of the Director, bidders may be required to submit, with their bid, a bid guarantee in the form of a certified check, a cashiers' check, or a bond acquired from a surety company authorized to do business in the State of Indiana. If such is required, the amount of the bid guarantee shall be specified in the Invitation to Bid. Bid guarantees will be returned to bidders, upon request, after an award has been made or the solicitation has been cancelled.

At the discretion of the Director, a successful bidder may be required to submit, after the award has been made, a performance guarantee in the form of a certified check, a cashiers' check, or a bond acquired from a surety company authorized to do business in the State of Indiana. If such is required, the amount of the performance guarantee and the time that it must be submitted shall be specified in the Invitation to Bid. Performance guarantees will be returned, upon request, at the successful completion of the contract. *(Indiana Department of Administration; 25 IAC 1.1-1-2; filed Dec 15, 1981, 1:45 pm: 5 IR 239; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 1.1-1-3 Competitive sealed bids; public inspection

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-2

Sec. 3. The following information shall be subject to public inspection after the contract award: (a) The invitation for bids; (b) A list of all vendors who received the invitation for bids; (c) The name and address of each bidder; (d) The amount of each bid; (e) A record showing the name of the successful bidder, the dollar amount of the bid, and the basis on which the award was made; (f) The entire contents of the contract file except for proprietary information which may have been included with a bid such as:

- (1) trade secrets,
- (2) manufacturing processes,
- (3) financial information not otherwise publically *[sic.]* available, or
- (4) other data which does not bear on the competitive goals of public procurement,

which was not required by the terms of the invitation for bids itself to be made available for public inspection. A bidder shall identify information which he proposes to remain confidential and bind it separately from the remainder of his bid.

Requests for public disclosure of information which a bidder has identified as proprietary shall be made to the Director in

writing. The Director shall examine the information to determine the validity of the bidder's request for confidentiality and shall inform the bidder of his decision, which decision shall become a part of the contract file. (*Indiana Department of Administration; 25 IAC 1.1-1-3; filed Dec 15, 1981, 1:45 pm: 5 IR 239; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-4 Competitive sealed bids; withdrawal

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-2

Sec. 4. Withdrawal of a bid shall be permitted before the exact date and hour for submission of bids, either by an agent of the bidder bearing proper authorization and identification who shall receive and sign for the unopened bid packet, or by the timely receipt of a certified letter or telegram from the bidder.

A bid already submitted may be modified by withdrawal of the bid as provided above and resubmission of the modified bid before the exact date and hour for submission of bids. The bid may also be modified by the timely receipt of a certified letter or telegram from the bidder.

Neither the staff nor the facilities of the department of administration shall be available to a bidder desiring to make modifications.

The Commissioner has the authority to cancel awards or contracts based on bid mistakes when he determines that such action is in the best interest of the state. Such action shall be supported by a written determination made by the Commissioner.

This rule [*this section*] shall also apply to competitive sealed proposals. (*Indiana Department of Administration; 25 IAC 1.1-1-4; filed Dec 15, 1981, 1:45 pm: 5 IR 239; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-5 Competitive sealed proposals; bid guarantee

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-4

Sec. 5. At the discretion of the Director, offerors may be required to submit, with their proposal, a proposal guarantee in the form of a certified check, a cashiers' check, or a bond acquired from a surety company authorized to do business in the State of Indiana. If such is required, the amount of the proposal guarantee shall be specified in the Request for Proposals (RFPs). Proposal guarantees will be returned to offerors, upon request, after the execution of the contract.

At the discretion of the Director, a successful offeror may be required to submit, after the award has been made, a performance guarantee in the form of a certified check, a cashiers' check, or a bond acquired from a surety company authorized to do business in the State of Indiana. If such is required, the amount of the performance guarantee and the time that it must be submitted shall be specified in the Request for Proposals. Performance guarantees will be returned, upon request, at the successful completion of the contract. (*Indiana Department of Administration; 25 IAC 1.1-1-5; filed Dec 15, 1981, 1:45 pm: 5 IR 240; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-6 Competitive sealed proposals; public inspection

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-4

Sec. 6. The following information shall be subject to public inspection after the contract award: (a) The request for proposals; (b) A list of all vendors who received the request for proposals; (c) The name and address of each offeror; (d) The amount of each offer; (e) A record showing the name of the successful offeror, the dollar amount of the offer, and the basis on which the award was made.

(f) The entire contents of the contract file except for proprietary information which may have been included with an offer such as:

- (1) trade secrets,
- (2) manufacturing processes,

(3) financial information not otherwise publically [*sic.*] available, or

(4) other data which does not bear on the competitive goals of public procurement, which was not required by the terms of the request for proposals itself to be made available for public inspection. An offeror shall identify information which he proposes to remain confidential and bind it separately from the remainder of his offer.

Requests for public disclosure of information which an offeror has identified as proprietary shall be made to the Director in writing. The Director shall examine the information to determine the validity of the offeror's request for confidentiality and shall inform the offeror of his decision, which decision shall become a part of the contract file.

After opening, but prior to the contract award, the following information shall be subject to public inspection: (a) the request for proposals; (b) a list of all vendors who received the request for proposals; (c) the name and address of each offeror. (*Indiana Department of Administration; 25 IAC 1.1-1-6; filed Dec 15, 1981, 1:45 pm: 5 IR 240; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-7 Competitive sealed proposals; clarification

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-4

Sec. 7. As provided for in the request for proposals, discussions may be conducted with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award, for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.

No discussions shall be held with an offeror whose proposal fails to meet a mandatory requirement of the RFP.

Discussions shall be held to: (a) promote understanding of the State's requirements and the offerors' proposals; and

(b) facilitate arriving at a contract that will be most advantageous to the State, taking into consideration price and other evaluation factors set forth in the RFP.

In conducting discussions, there must be no disclosure of any information derived from proposals submitted by competing offerors.

The only factors or criteria that may be used in the evaluation of proposals are those specified in the request for proposals. The requirements of the RFP shall not be altered.

After identification of the responsible offeror whose proposal appears to be the most advantageous to the State, the State will enter into contract preparation activities with the offeror. If at any time the contract preparation activities are judged to be ineffective, the State may cease all activities with that offeror and begin contract preparation activities with the next highest ranked offeror. This process may continue until a completed contract is executed. The State reserves the right to cease all contract preparation activities at any time and to reject all proposals if such action is determined by the Commissioner to be in the best interest of the State. (*Indiana Department of Administration; 25 IAC 1.1-1-7; filed Dec 15, 1981, 1:45 pm: 5 IR 240; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-8 Competitive sealed proposals; determination (Repealed)

Sec. 8. (*Repealed by Indiana Department of Administration; filed Feb 25, 1994, 10:00 a.m.: 17 IR 1518*)

25 IAC 1.1-1-9 Small purchases

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-5

Sec. 9. All purchases for which the amount of the ultimate expenditure is estimated not to exceed the amount set out in IC 4-13.4-5-5(a) [*IC 4-13.4 was repealed by P.L. 49-1997, SECTION 86, effective July 1, 1998.*] may be made either upon competitive sealed bids or in the open market, at the discretion of the Director. If made in the open market, a manually signed quote must be secured and shall be filed with the requisition. If practicable, two or three quotes shall be secured, but failure to do so shall not prevent the purchase from being made. (*Indiana Department of Administration; 25 IAC 1.1-1-9; filed Dec 15, 1981, 1:45 pm: 5 IR 241; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-10 Sole source procurement

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-6

Sec. 10. (a) The signature of the governor on a contract satisfies the requirements of this section for the governor's written approval.

(b) In instances where the compatibility of equipment, accessories or replacement parts is the paramount consideration, a contract may be awarded without formal competition when the Commissioner states in writing his determination that there is only one (1) source which meets the agency's reasonable requirements, on the basis of a written justification submitted by the head of the state agency desiring to procure such supplies.

(c) In the case of high technology supplies, or a combination of supplies and services, such as word processing systems, a contract may be awarded without formal competition when the commissioner states in writing his determination that there is only one (1) source which meets the agency's reasonable requirements, on the basis of a specific written recommendation by the data processing division of the department of administration, developed as the result of a formal analysis of the state agency's needs undertaken by the division which meets the criteria established by the division, including cost factors.

(d) In the case of services not to exceed fifty thousand dollars (\$50,000), a contract may be awarded without formal competition when the Commissioner states in writing his determination that there is only one (1) source which meets the agency's reasonable requirements, on the basis of a written justification submitted by the head of the state agency desiring to procure such services.

(e) A contract may be awarded for a supply or service without competition in other instances when the Commissioner states in writing his determination that there is only one (1) source for the required supply or service. (*Indiana Department of Administration; 25 IAC 1.1-1-10; filed Dec 15, 1981, 1:45 pm: 5 IR 241; filed Jul 5, 1983, 3:22 pm: 6 IR 1371; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-11 Emergency procurements

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-7

Sec. 11. An emergency condition is a situation which creates a threat to the public health, welfare or safety such as may arise by reason of floods, epidemics, riots, equipment failures, or such other reason as may be proclaimed by the Governor, or determined by the Commissioner. The existence of such conditions create an immediate and serious need for supplies or services that cannot be met through normal procurement methods, and the lack of which would seriously threaten: (1) the functioning of state government; (2) the preservation or protection of property; or (3) the health or safety of any person.

Any state agency may make emergency procurements of up to \$1,500 for the repair of moveable equipment without prior Department of Administration approval when an emergency condition, as defined above, arises and the need cannot be met through normal procurement methods. Whenever practical, however, approval by the Commissioner or Director shall be obtained prior to the procurement. Emergency procurements of \$1,500 or more require the prior approval of the Commissioner or Director, either in writing or orally followed by written confirmation.

The procurement procedure used shall be selected to assure that the required supplies or services can be procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained. The agency head shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. Such determination shall be sent promptly to the Director. (*Indiana Department of Administration; 25 IAC 1.1-1-11; filed Dec 15, 1981, 1:45 pm: 5 IR 241; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-12 Procurement by federal supply service schedules

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-7

Sec. 12. (a) "Procurement" from federal supply service schedules includes buying, purchasing, renting, leasing, or otherwise acquiring any supplies or services.

(b) Any vendor listed on the current federal supply service schedules who is willing to make those prices available to the State for a fixed period of time shall make this availability known to the Director by filing with him a form available from the Procurement Division and receiving an identifying number.

(c) In the event the Commissioner determines in writing that it is advantageous to the State's interests in efficiency and economy to procure an agency's request for specified supplies or services from federal supply service schedules rather than to conduct a competitive procurement, the Director shall select from the schedules the available (as specified above) vendor whose supplies or services best meet the agency's criteria and offer the best value to the State and shall enter into a contract with said vendor to meet the agency's request.

(d) In the event no appropriate vendor has filed with the Division, the Director may contact up to three scheduled vendors whose supplies or services best meet the agency's criteria and offer the best value to the State and invite them to file. The Director shall make his selection from the vendors who file pursuant to this request within a specified period of time. In the event no vendor files, a selection process other than IC 4-13.4-5-8 [*IC 4-13.4-5-8 was repealed by P.L. 14-1996, SECTION 8, effective July 1, 1996.*] shall be used.

(e) In making a selection among vendors listed on the schedules on any basis other than price, the Director shall justify his selection in writing. (*Indiana Department of Administration; 25 IAC 1.1-1-12; filed Dec 15, 1981, 1:45 pm: 5 IR 242; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-13 Cancellation or rejection of solicitations

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-5-9; IC 4-13.4-6-1

Sec. 13. (a) Prior to opening, a solicitation may be cancelled in whole or in part when the Commissioner or Director determines in writing that such action is in the best interest of the State for reasons including, but not limited to:

- (1) The State no longer requires the supplies or services;
- (2) The State no longer can reasonably expect to fund the procurement;
- (3) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.

When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses which have received a solicitation.

The notice of cancellation shall: (a) identify the solicitation, and (b) cite the reason for cancellation.

The reason for cancellation shall be made part of the procurement file and shall be available for public inspection.

(b) After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Commissioner or the Director determines in writing that such action is in the State's best interest for reasons including but not limited to:

- (1) The supplies or services being procured are no longer required;
- (2) Ambiguous or otherwise inadequate specifications were part of the solicitation;
- (3) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (4) All otherwise acceptable bids or proposals received are at clearly unreasonable prices;
- (5) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;

A notice of rejection shall be sent to all businesses which submitted bids or proposals.

The reason for rejection shall be made part of the procurement file and shall be available for public inspection.

(c) After opening but prior to award, individual bids or proposals may be formally rejected when the Director or Commissioner makes a written determination that:

- (1) The business that submitted the bid is nonresponsive pursuant to IC 4-13.4-6-1 [*IC 4-13.4 was repealed by P.L. 49-1997, SECTION 86, effective July 1, 1998.*].
- (2) The bid is not responsive in that it does not conform in all material respects to the requirements of the solicitation.
- (3) The supply or service offered is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternatives or other acceptability criteria set forth in the solicitation.

The determination shall be made a part of the contract file. (*Indiana Department of Administration; 25 IAC 1.1-1-13; filed Dec 15, 1981, 1:45 pm: 5 IR 242; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-14 Qualifications and duties of bidders, offerors, and prospective contractors; determination of nonresponsible bidder

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-6-1

Sec. 14. (a) Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the State;
- (5) supplied all requested information in connection with the inquiry concerning responsibility.

This section shall not prevent the Director from establishing additional responsibility standards for a particular procurement, provided that they are set forth in the solicitation.

(b) The prospective contractor shall supply information requested by the Director concerning the responsibility of such contractor. If the contractor fails to supply the requested information, the Director shall base the determination of responsibility upon any available information or may find the prospective contractor nonresponsible if such failure to respond is unreasonable.

(c) The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

- (1) evidence that the contractor possesses such items;
 - (2) acceptable plans to subcontract for such items; or
 - (3) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the items.
- (d) Before awarding a contract, the Director must be satisfied that the prospective contractor is responsible.

(e) If a bidder or offeror is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the Commissioner or Director and shall be made part of the contract file. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. (*Indiana Department of Administration; 25 IAC 1.1-1-14; filed Dec 15, 1981, 1:45 pm; 5 IR 243; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-15 Cost or pricing data; contractor certification

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-6-3; IC 4-13.4-9-1

Sec. 15. Except in cases: (a) where the contract price is based on adequate price competition;

(b) where the contract price is based on established catalog prices or market prices;

(c) where the contract prices are set by law or rule; or

(d) where the Director makes a determination that these requirements may be waived and the reasons for the waiver are stated in writing;

the following requirements shall apply.

An offeror submitting a competitive sealed proposal must submit cost or pricing data which he certifies is accurate, complete and current as of a mutually agreed date prior to the date of the pricing of any contract awarded pursuant to a Request for Proposals, where the total contract price is expected to exceed \$50,000.

A proposed sole source contractor must submit cost or pricing data which he certifies is accurate, complete and current as of a mutually agreed date prior to the date of the pricing of any contract awarded pursuant to the sole source provisions of the law, where the total contract price is expected to exceed \$25,000.

A contractor who wishes to obtain a change order or modification pursuant to IC 4-13.4-9-1 [*IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.*] must submit cost or pricing data which he certifies is accurate, complete and current as of a mutually agreed date prior to the date of the pricing of any change order or contract modification, whenever the original contract price exceeds \$50,000 and the amount of the change order or contract modification is expected to exceed \$5,000.

The Director may require the submission of certified cost or pricing data prior to contract award in cases where only one

qualified bid is received in response to an invitation for bids. (*Indiana Department of Administration; 25 IAC 1.1-1-15; filed Dec 15, 1981, 1:45 pm: 5 IR 243; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-16 Types of contracts; prohibited contracts

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-7-1; IC 4-13.4-9-1

Sec. 16. (a) Any type of contract not otherwise prohibited by law, except a cost plus a percentage of cost contract, may be used. However, a firm fixed price contract is preferred; any other type of contract may be used only when the director or commissioner determines that such use is in Indiana's best interest. Any solicitation shall include notice of the contract terms and conditions.

(b) The following are among the factors which may be considered in selecting contract type:

- (1) The type or complexity of the supply or service being procured.
- (2) The difficulty of estimating performance costs such as the inability of Indiana to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise establish clearly the requirements of the contract.
- (3) The administrative costs to both parties.
- (4) The degree to which Indiana must provide technical coordination during the performance of the contract.
- (5) The effect of the choice type on the amount of compensation to be expected.
- (6) The stability of material or commodity market prices or wage levels.
- (7) The urgency of the requirement.
- (8) The length of contract performance.
- (9) Federal requirements.

(c) A contract may contain an option for renewal or extension of its terms, without modification, for a specified period of time.

However:

- (1) exercise of the option is at the sole discretion of Indiana and not subject to agreement or acceptance by the contractor;
- (2) notice of such provision must be included in any solicitation; and
- (3) such renewal or extension must be approved by the commissioner and the state budget director.
- (d) A contract for rental or lease may contain an option to purchase. However:
 - (1) exercise of the option is at the sole discretion of Indiana and not subject to agreement or acceptance by the contractor;
 - (2) provision of such option must be part of any solicitation;
 - (3) a means of computing the cost of the item to Indiana at fixed intervals, should it exercise its option, which is no more than the actual resale or fair market value of the item at the time of exercising the option, must be part of the agreement;
 - (4) Indiana must have the right to cancel the lease or rental agreement, at fixed intervals, without penalty; and
 - (5) exercise of the option to purchase must be subject to the approval of the commissioner and the state budget director.
- (e) A using agency may not enter into an installment sales contract unless the contract contains the following:
 - (1) A contract clause that permits the department to cancel the contract if the budget director makes a written determination that funds are not appropriated or otherwise available to support continuation of the contract.
 - (2) Other contract terms that the commissioner may require.
- (f) As used in this section, "quantity purchase agreement" includes the following:
 - (1) A contract for an indefinite amount of specific supplies or services to be furnished at a specific time, or as ordered, that establishes a fixed price per unit.
 - (2) A contract for supplies or services to furnish all the actual requirements of a designated using agency or agencies, or a determinable part of the actual requirements (such as a percentage), during a specified period of time.
- (g) Indiana may enter into an indefinite quantity contract if:
 - (1) the director determines it appropriate;
 - (2) an approximate quantity or the best information available as to quantity is stated in the solicitation; and
 - (3) the term of the contract is specified.
- (h) Indiana may enter into a requirements contract if:
 - (1) the director determines it appropriate;

(2) an approximate quantity or the best information available as to quantity is stated in the solicitation;

(3) the term of the contract is specified; and

(4) use of this type contract is limited to instances where actual requirements can be reasonably estimated.

(i) A solicitation for an indefinite quantity contract or a requirements contract and the resultant contract may reserve the right to Indiana to separately meet requirements of the using agency or agencies.

(j) The vendor for a quantity purchase agreement may be selected by means of an invitation for bids, request for proposals, or in any other manner not prohibited by law.

(k) Price adjustments in quantity purchase agreements will be permitted only:

(1) under the terms and conditions specified in the solicitation; and

(2) if the adjustment is computed by a rule, method, or formula specified in the agreement.

(l) Upon the termination of a quantity purchase agreement, the director may reaward the agreement to the vendor quarterly, semiannually, or annually, without further competition, if the vendor consents to the same prices as the original award. A quantity purchase agreement may not be extended unless notice of it was part of the solicitation. No reaward may extend the total period of the agreement with the vendor beyond a two (2) year term.

(m) The director shall make every effort to ensure that no more quantity purchase orders than are reasonably necessary for the efficient operation of the governmental bodies affected thereby are in effect at any one (1) time. Although this does not preclude the issuance of more than one (1) quantity purchase order for any specific item, effort shall be made to specify the governmental agency, geographic location, etc. for which each is applicable so that there is little or no overlap. (*Indiana Department of Administration; 25 IAC 1.1-1-16; filed Dec 15, 1981, 1:45 p.m.: 5 IR 244; filed Jul 5, 1983, 3:22 p.m.: 6 IR 1371; filed May 13, 1987, 11:55 a.m.: 10 IR 2262; filed Jul 26, 1988, 4:10 p.m.: 11 IR 4070; filed Apr 17, 1991, 3:00 p.m.: 14 IR 1710; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-17 Modification and termination of contracts for supplies and services; contract clauses

Authority: IC 4-13.4-3-1

Affected: IC 4-13.4-9-1

Sec. 17. A fixed price contract with price adjustment provides for variation in the contract price under special conditions defined in the contract. The formula or other basis by which adjustment in contract price can be made shall be specified in the solicitation and resulting contract. Adjustment allowed may be upward, downward, or both. Examples of special conditions for which contract adjustments provisions may be permitted by the Director to be included in a fixed price contract include changes due to rapid and substantial price fluctuations, which can be related to an accepted index (such as contracts for gasoline, heating oils, and dental gold alloy). (*Indiana Department of Administration; 25 IAC 1.1-1-17; filed Dec 15, 1981, 1:45 pm: 5 IR 245; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-1-18 Specifications; inspections, tests, and preparations for delivery

Authority: IC 4-13.4-3-1; IC 4-13.4-4-1

Affected: IC 4-13.4-4

Sec. 18. Specifications shall, to the extent practicable, emphasize the functional or performance requirements of an agency's procurement of supplies or services. Using agencies shall include as part of their purchase requisition the supply or service specification or description and all requirements for inspecting, testing or preparing a service or supply item for delivery. The following procedures governing the preparation, maintenance and utilization of specifications, unless otherwise prescribed by the director, are to be used in the procurement of supplies and services for governmental use.

(a) Specification preparation: (1) Using agencies may prepare and submit individual agency specifications for the procurement of supplies and services. These specifications are subject to procurement division approval and acceptance for use in public purchasing procedures.

(2) Common or general use specifications are to be prepared by the procurement division for all agency use. Wherever practical, agencies shall use specifications developed by the procurement division.

(3) Any specifications developed and used by the United States government or its agencies may be used by the procurement division in the procurement of supplies.

(b) Maintenance of specifications: (1) The procurement division shall maintain a central file of common or general use specifications for all state agency use. Agencies may submit general use specifications to the director for approval and subsequent utilization for the procurement of supplies or services that may be awarded on individual competitive sealed bids, regularly scheduled class bids, or all state agency quantity purchase awards.

(2) Any agency preparing specifications for its use shall maintain a central file of specifications which the division and other agencies may utilize in the procurement of supplies and services.

(c) Specification content: (1) All specifications shall contain the description of the physical or functional characteristics or the nature of a supply or service procurement. This description may also include, with reasonable particularity, the kind, quantity and quality of all materials, equipment goods and supplies to be purchased.

(2) The following types of specifications, and those prescribed by the director from time to time, may be used by the division and agencies in the procurement of supplies and services:

(A) Design-type (also physical or technical)—A description of materials or components to be used, and dimensions to be adhered to, in a detailed, precise manner.

(B) Functional—A description of performance characteristics to be met, without prescribing exactly how they are to be accomplished.

(C) Brand name or equivalent—A specification which uses one (1) or more manufacturer's names or catalogue numbers to describe the standard of quality, performance or other characteristics needed to meet the state agencies requirements, and which provides for the submission of equivalent products.

(D) Common or general use—Those specifications developed and maintained by the division for use by all agencies for recurring procurement needs where the characteristics of supplies or services, as commercially produced or provided, remain relatively stable, although the frequency or volume of procurements may vary.

(3) A specification may provide alternate description of supplies or services where two (2) or more design, functional or performance criteria will satisfactorily meet the state's procurement requirements.

(4) A specification may include a description of any requirement for inspecting, testing or preparing a supply or service for delivery.

(5) To the extent practical, a specification should not include any solicitation or contract term or condition such as a requirement for time or place of bid opening, time of delivery, payment, liquidated damages or qualification of bidders.

(d) Inspection and testing: (1) All supplies and services provided to the state are subject to the division's inspection and testing requirements at all times before, during or after manufacture or delivery. All such inspection and testing requirements may be established as part of individual bid solicitations or as part of operational procedures developed by the director. Those operational procedures may also allow for reasonable charges assessed to supplying vendors to recover costs of inspections or testing as required by the division.

(2) Vendors shall furnish, without additional charges, all reasonable facilities and assistance for the safe and convenient inspections and tests required by the division.

(3) The division shall have the right to reject and return at the vendor's expense, or to require at vendor's expense, the correction or replacement of supplies or services which are defective or do not conform with solicitation or purchase order requirements. All rejection shall be held at the vendor's expense and risk, including all transportation and handling costs, until returned to the vendor or corrected by the vendor. (*Indiana Department of Administration; 25 IAC 1.1-1-18; filed Nov 21, 1983, 4:29 pm; 7 IR 320; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 2. Indiana Business Definition, Certification, and Enforcement (Repealed)

(*Repealed by Indiana Department of Administration; filed Jul 11, 1996, 8:50 a.m.: 19 IR 3290*)

Rule 3. United States Manufactured Product Definition, Policy, Certification, and Enforcement

25 IAC 1.1-3-1 General provisions

Authority: IC 4-13-1-4; IC 4-13-1-7

Affected: IC 4-13.4-2-10

Sec. 1. IC 4-13.4-2-10 [*IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.*] allows a preference

to promote the purchase of products manufactured in the United States. (*Indiana Department of Administration; 25 IAC 1.1-3-1; filed Aug 30, 1994, 2:25 p.m.: 18 IR 6; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-3-2 “Components” defined

Authority: IC 4-13-1-4; IC 4-13-1-7

Affected: IC 4-13.4-2-10

Sec. 2. As used in this rule, “components” means those articles, materials, and supplies incorporated directly into the products. (*Indiana Department of Administration; 25 IAC 1.1-3-2; filed Aug 30, 1994, 2:25 p.m.: 18 IR 6; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-3-3 “United States” defined

Authority: IC 4-13-1-4; IC 4-13-1-7

Affected: IC 4-13.4-2-10

Sec. 3. As used in this rule, “United States” means the United States, its possessions, Puerto Rico, and any other place subject to its jurisdiction, but does not include trust territories. (*Indiana Department of Administration; 25 IAC 1.1-3-3; filed Aug 30, 1994, 2:25 p.m.: 18 IR 6; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-3-4 “United States manufactured product” defined

Authority: IC 4-13-1-4; IC 4-13-1-7

Affected: IC 4-13.4-2-10

Sec. 4. As used in this rule, “United States manufactured product” means either of the following:

- (1) An unmanufactured product mined or produced in the United States.
- (2) A product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds fifty percent (50%) of the cost of all its components. (In determining if a product is manufactured in the United States, only the product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of a foreign origin of the same class or kind for which determinations have been made in accordance with section 5(a)(3) or 5(a)(4) of this rule are treated as United States manufactured. Scrap generated, collected, and prepared for processing in the United States is considered United States manufactured.

(*Indiana Department of Administration; 25 IAC 1.1-3-4; filed Aug 30, 1994, 2:25 p.m.: 18 IR 6; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-3-5 Policy

Authority: IC 4-13-1-4; IC 4-13-1-7

Affected: IC 4-13.4-2-10

Sec. 5. (a) The statute requires that only United States manufactured products be acquired for public use, except articles, materials, and supplies as determined by the commissioner or designee:

- (1) for use outside the United States;
- (2) for which the cost would be unreasonable;
- (3) for which the preference would be inconsistent with the public interest; or
- (4) that are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(b) For purposes of determining unavailability, the items listed in Federal Acquisition Regulation 25.108 (48 CFR 25.108) are presumed to be not reasonably available. However, the commissioner or designee reserves the right to determine an item to be available for a particular bid, request for proposal, or other acquisition procedure. (*Indiana Department of Administration; 25 IAC 1.1-3-5; filed Aug 30, 1994, 2:25 p.m.: 18 IR 6; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.1-3-6 Certification

Authority: IC 4-13-1-4; IC 4-13-1-7

Affected: IC 4-13.4-2-10

Sec. 6. (a) Any business which makes an offer, a proposal, or a bid for the purpose of seeking the preference in IC 4-13.4-2-10 *[IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.]* shall certify under the penalties of perjury that it is offering United States manufactured products within the meaning of section 4 of this rule. The certification will be made on forms provided by the department and approved by the commission on public records.

(b) The director may presume the representations contained in the certification are true, thereby qualifying the business for the United States manufactured products preference. However, this presumption may be rebutted under section 7 of this rule or if the director has reason to question the representations contained in the certification.

(c) Whether the United States manufactured product preference is offered shall be stated in each invitation for bid, request for proposal, or other acquisition procedure.

(d) The decision to grant the United States manufactured product preference shall be at the sole discretion of:

(1) the director of procurement of the department or designee; or

(2) the commissioner or designee.

(Indiana Department of Administration; 25 IAC 1.1-3-6; filed Aug 30, 1994, 2:25 p.m.: 18 IR 6; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

25 IAC 1.1-3-7 Enforcement

Authority: IC 4-13-1-4; IC 4-13-1-7

Affected: IC 4-13.4-2-10

Sec. 7. (a) If, prior to award, the commissioner or designee determines the business does not qualify for the United States manufactured product preference, the commissioner or designee may do any of the following in any combination deemed appropriate:

(1) Declare the business nonresponsible and bar it from doing business with the state for a specified period, not exceeding two (2) years.

(2) Require the business to reimburse the state for the costs incurred due to rebidding of the contract.

(b) If, after the award, the commissioner or designee determines the business does not qualify for the United States manufactured product preference, the commissioner or designee may do any of the following in any combination deemed appropriate:

(1) Cancel the contract.

(2) Declare the business nonresponsible and bar it from doing business with the state for a specified period, not exceeding two (2) years.

(3) Require the business to reimburse the state for the amount incurred due to rebidding of the contract.

(c) The sanctions in subsections (a) and (b) in no way limit what actions could be taken through appropriate civil or criminal statutes.

(d) Any applicant for the United States manufactured product preference who is dissatisfied with the decision rendered concerning sanctions may, within fifteen (15) days after receiving such notification, request in writing a reconsideration of that decision and submit additional written evidence bearing on the sanction. The commissioner or designee will consider any such request within forty-five (45) days of receipt thereof. A written decision will be issued. *(Indiana Department of Administration; 25 IAC 1.1-3-7; filed Aug 30, 1994, 2:25 p.m.: 18 IR 7; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

ARTICLE 1.5. SMALL BUSINESS PROCUREMENTS AND PROJECTS

Rule 1. Definitions

25 IAC 1.5-1-1 Application of definitions

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5; IC 4-13.6

Sec. 1. (a) Unless indicated otherwise, all words in 25 IAC 1.5 have the meanings specified in IC 4-13-13.5 [*IC 4-13-13.5 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.*], IC 4-13.4 [*IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.*], or IC 4-13.6.

(b) The definitions in 25 IAC 1.5-1 apply throughout 25 IAC 1.5. (*Indiana Department of Administration; 25 IAC 1.5-1-1; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-2 "Construction business" defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5-2

Sec. 2. "Construction business" means a business that derives its principal source of income from the participation in the erection of buildings, facilities, structures, bridges, overpasses or highways. (*Indiana Department of Administration; 25 IAC 1.5-1-2; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-3 "Director" defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5; IC 4-13.6

Sec. 3. "Director" means the director of the procurement division in relation to a procurement under IC 4-13.4 [*IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.*] and means the director of the public works division in relation to a public works project under IC 4-13.6. (*Indiana Department of Administration; 25 IAC 1.5-1-3; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-4 "Employee" defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5-2

Sec. 4. "Employee" means any individual employed by a business full-time, part-time or temporarily. (*Indiana Department of Administration; 25 IAC 1.5-1-4; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-5 "Manufacturing business" defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5-2

Sec. 5. "Manufacturing business" means a business that derives its principal source of income from the sale of goods made from raw, unfinished materials, as distinguished from the final product. (*Indiana Department of Administration; 25 IAC 1.5-1-5; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-6 "Offer" defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5

Sec. 6. "Offer" means a response to a solicitation. (*Indiana Department of Administration; 25 IAC 1.5-1-6; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-7 “Retail business” defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5-2

Sec. 7. “Retail business” means a business that derives its principal source of income from the sale of supplies to the ultimate consumer. (*Indiana Department of Administration; 25 IAC 1.5-1-7; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-8 “Service business” defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5-2

Sec. 8. “Service business” means a business that derives its principal source of income from the sale of useful artistic, educational, intellectual, literary, or scientific labor from which no necessary tangible commodity is derived. (*Indiana Department of Administration; 25 IAC 1.5-1-8; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-9 “Small business” defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5-2

Sec. 9. “Small business” means a business that:

- (1) is independently owned and operated;
- (2) is not dominant in its industry; and
- (3) meets the restrictions imposed by 25 IAC 1.5-3-1.

(*Indiana Department of Administration; 25 IAC 1.5-1-9; filed Jul 17, 1985, 11:48 am: 8 IR 1697; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-10 “Small business procurement” defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5

Sec. 10. “Small business procurement” means a procurement limited to small businesses under 25 IAC 1.5. (*Indiana Department of Administration; 25 IAC 1.5-1-10; filed Jul 17, 1985, 11:48 am: 8 IR 1698; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-11 “Small business project” defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5

Sec. 11. “Small business project” means a public works project limited to small businesses under 25 IAC 1.5. (*Indiana Department of Administration; 25 IAC 1.5-1-11; filed Jul 17, 1985, 11:48 am: 8 IR 1698; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 1.5-1-12 “Solicitation” defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5; IC 4-13.6-5

Sec. 12. “Solicitation” means:

- (1) any procedure authorized under IC 4-13.4-5 [*IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.*] by which a procurement may be made, whether by invitation to bid, request for proposals or other procedure; or

(2) an invitation to bid on a public works project under IC 4-13.6-5.

(Indiana Department of Administration; 25 IAC 1.5-1-12; filed Jul 17, 1985, 11:48 am; 8 IR 1698; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

25 IAC 1.5-1-13 “Wholesale business” defined

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5-2

Sec. 13. “Wholesale business” means a business that derives its principal source of income from sales to retailers, other merchants, or industrial, institutional or commercial users who will use the goods for resale or business use. *(Indiana Department of Administration; 25 IAC 1.5-1-13; filed Jul 17, 1985, 11:48 am; 8 IR 1698; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

Rule 2. Policies

25 IAC 1.5-2-1 Purpose

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5

Sec. 1. The purpose of 25 IAC 1.5-2 is to implement the public policy of the state of Indiana, expressed in IC 4-13-13.5 *[IC 4-13-13.5 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1998.]*, so that a fair proportion of state government's total purchases and contracts for supplies and services is placed with small businesses. *(Indiana Department of Administration; 25 IAC 1.5-2-1; filed Jul 17, 1985, 11:48 am; 8 IR 1698; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 1.5-2-2 Applicability of other law

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 2. The provisions of IC 4-13.4 *[IC 4-13.4 was repealed by P.L.49-1997, SECTION 86, effective July 1, 1997.]*, IC 4-13.6, 25 IAC 1.1, 25 IAC 1.5 and other applicable law shall otherwise govern small business procurements and small business projects. *(Indiana Department of Administration; 25 IAC 1.5-2-2; filed Jul 17, 1985, 11:48 am; 8 IR 1698; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

Rule 3. Procedures

25 IAC 1.5-3-1 Qualification as small business

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13-13.5-2

Sec. 1. (a) For purposes of determining whether a business is a small business, all affiliates of the business will be considered as part of the business.

(b) Whenever reference is made to a number of employees in this section, the number shall mean the average number of employees that the business had during its most recently completed fiscal year.

(c) A business is not a small business if it fails to meet the following restrictions:

(1) For a construction business: average gross annual receipts for the current and three (3) previous fiscal years is *[sic.]* four million dollars (\$4,000,000) or less.

(2) For a manufacturing business: the number of its employees is one hundred (100) or less.

(3) For a retail business: average sales and receipts for the current and three (3) previous fiscal years is *[sic.]* five hundred thousand dollars (\$500,000) or less.

(4) For a service business: average sales for the current and three (3) previous fiscal years is *[sic.]* five hundred thousand dollars (\$500,000) or less and the number of its employees is twenty-five (25) or less.

(5) For a wholesale business: annual sales for its most recently completed fiscal year is [sic.] four million dollars (\$4,000,000) or less.

(Indiana Department of Administration; 25 IAC 1.5-3-1; filed Jul 17, 1985, 11:48 a.m.: 8 IR 1698; filed Nov 3, 1988, 9:20 a.m.: 12 IR 526; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

25 IAC 1.5-3-2 Designation of small business procurements and projects

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13.6-5

Sec. 2. (a) The director may, with the approval of the commissioner, require the procurement to be a small business procurement or that the project be performed as a small business project.

(b) The director shall not recommend to the commissioner that a procurement be a small business procurement or that a public works project be a small business project unless there is a reasonable expectation that at least two (2) responsible small businesses are capable of submitting an offer at a fair and reasonable price. *(Indiana Department of Administration; 25 IAC 1.5-3-2; filed Jul 17, 1985, 11:48 am: 8 IR 1699; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 1.5-3-3 Notification of designation

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13.6-5

Sec. 3. When the director makes a small business procurement or designates a public works project as a small business project, the solicitation shall indicate that the procurement or the project is limited to small businesses. *(Indiana Department of Administration; 25 IAC 1.5-3-3; filed Jul 17, 1985, 11:48 am: 8 IR 1699; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 1.5-3-4 Certification as a small business

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13.6-5

Sec. 4. (a) Any business which makes an offer in the case of a small business procurement or in the case of a small business project shall certify that it is a small business within the meaning of 25 IAC 1.5.

(b) The director shall presume the representations contained in the small business certification submitted by an offeror are true, thereby qualifying the offeror as a small business. However, this presumption may be rebutted under 25 IAC 1.5-4-1, under 25 IAC 1.5-4-2 or if the director has reason to question the representations contained in the certification.

(c) The director may require a business which submits an offer as a small business to provide information the director considers necessary to demonstrate that the business is a small business. *(Indiana Department of Administration; 25 IAC 1.5-3-4; filed Jul 17, 1985, 11:48 am: 8 IR 1699; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 1.5-3-5 Awards

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13.6-5

Sec. 5. (a) The director shall make an award to the small business which has submitted the lowest priced offer if:

(1) the business is responsive and responsible; and

(2) the offer is reasonable in the judgment of the director.

(b) If either of the criteria set out in subsection (a) is not met, the director may:

(1) make an award to the small business that has made the next lowest priced offer and that satisfies both criteria set out in subsection (a); or

(2) cancel the solicitation as a small business procurement or a small business project.

(c) If the director does not make an award under this section, then the procurement may be made or the public works project performed without limitation to small businesses. *(Indiana Department of Administration; 25 IAC 1.5-3-5; filed Jul 17, 1985, 11:48*

a.m.: 8 IR 1699; filed Nov 3, 1988, 9:20 a.m.: 12 IR 526; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

25 IAC 1.5-3-6 Acceptance of procedures and sanctions

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13.6-5

Sec. 6. A solicitation under 25 IAC 1.5 shall state that businesses submitting offers as small businesses will accept all procedures and possible sanctions provided in 25 IAC 1.5-4 and that the provisions of 25 IAC 1.5 are incorporated by reference into any contract awarded under 25 IAC 1.5. *(Indiana Department of Administration; 25 IAC 1.5-3-6; filed Jul 17, 1985, 11:48 am: 8 IR 1699; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

Rule 4. Compliance

25 IAC 1.5-4-1 Challenge of small business status—prior to award

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13.6-5

Sec. 1. (a) After offers are opened, and prior to award, any person may submit information to the commissioner regarding the qualifications as a small business of the business which would be awarded a contract under 25 IAC 1.5.

(b) If the commissioner determines that the information provided has some foundation, the commissioner may:

- (1) hold a hearing to determine whether the business qualifies as a small business;
- (2) cancel the solicitation as a small business procurement or a small business project; or
- (3) act under both subsection (b)(1) and subsection (b)(2).

(c) If the commissioner does not cancel the solicitation as a small business procurement or small business project, the commissioner shall not award a contract until a determination is made on the merits of the case.

(d) If after a hearing under subsection (b), the commissioner determines the business which would be awarded a contract under 25 IAC 1.5 does not qualify as a small business, the commissioner may impose the following sanctions in any combination deemed appropriate:

- (1) the offer of the business shall be rejected;
- (2) the bid bond of the business shall be forfeited;
- (3) the business shall not be permitted to submit an offer for the same supplies, services or public works project if the solicitation is cancelled and subsequently opened to all businesses generally; or
- (4) the business shall be barred from doing business with the state of Indiana for a specified period, not exceeding two (2) years.

(Indiana Department of Administration; 25 IAC 1.5-4-1; filed Jul 17, 1985, 11:48 am: 8 IR 1700; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

25 IAC 1.5-4-2 Challenge of small business status—after award

Authority: IC 4-13-1-7; IC 4-13.6-3-1

Affected: IC 4-13.6-5

Sec. 2. (a) After a contract has been awarded, any person may submit information to the commissioner regarding the qualifications as a small business of the business which has been awarded the contract.

(b) If the commissioner determines that the information has some foundation, the commissioner may hold a hearing to determine whether the business qualified as a small business at the time of the award.

(c) Until a determination is made on the merits of the case, the department shall presume that the business qualified as a small business at the time of award and the business shall be permitted to continue performance of the contract without prejudice until a determination is made on the merits of the case.

(d) If after a hearing under subsection (b), the commissioner determines that a business to which a contract has been awarded under 25 IAC 1.5 did not qualify as a small business at the time the award was made, the commissioner may impose the following

sanctions in any combination deemed appropriate:

- (1) the business will pay the state of Indiana an amount, determined by the commissioner, not greater than ten percent (10%) of the amount of the offer made by the business or such an amount shall be deducted from any amounts due the business under the contract;
- (2) the contract with the business shall be cancelled;
- (3) the business shall not be permitted to submit an offer for the same supplies, services or project if the contract is cancelled, and a new solicitation is made for the same supplies, services or project; or
- (4) the business shall be barred from doing business with the state of Indiana for a specified period, not exceeding two (2) years.

(Indiana Department of Administration; 25 IAC 1.5-4-2; filed Jul 17, 1985, 11:48 am: 8 IR 1700; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

ARTICLE 2. PUBLIC WORKS DIVISION

Rule 1. Scope of Activities

25 IAC 2-1-1 New construction requisitions; public works division's duties

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1-3; IC 4-13-1-4

Sec. 1. The Public Works Division is responsible for the approval and processing of all requisitions and project requests for all new construction by the State and some field control over such construction as needed. Such control shall not extend to the Indiana Department of Highways and Division of Transportation, facilities under the jurisdiction of the State Fair Board, the State Armory Board, and other Commissions or Boards created by law to operate separately or the facilities at the state supported Colleges and Universities. These duties include: (1) making "on site" investigations to ascertain the physical need for the proposed project as well as the judgment of its economic justification, (2) making recommendations for the selection of architects and engineers to do the design of projects where the project is too large or complicated to be performed by the State, (3) designing and writing the specifications for projects, (4) supervising the advertising and bidding of contracts for construction, (5) analyzing the bids and making a bid report with recommendations as to award of contracts, (6) composing and administering contracts with the successful contractors, (7) making periodic visits to the major construction projects, and conferring with the Designer regarding progress and approval of construction, (8) approving all payments to contractors, (9) making a final inspection of the construction, and (10) accepting the construction on behalf of the State. *(Indiana Department of Administration; Public Works Division Sec A,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 1; filed Feb 3, 1982, 1:05 pm: 5 IR 508; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-1-2 Public works division duties; building rehabilitation, alteration, repair; preventive maintenance program

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1-3; IC 4-13-1-4

Sec. 2. The Division also performs the technical engineering tasks involved in the rehabilitation, alterations and repair of buildings owned by the State, except those structures exempted under Section 1 [25 IAC 2-1-1] above, acting in a staff function in furnishing technical advice to the several institutions in this work. Whenever such rehabilitation, alteration, demolition or repair require the services of outside designers and contractors, the Division performs the necessary functions of obtaining outside Designer services as set out in the preceding section (25 IAC 2-1-1). It also is responsible for the administration of a continuing preventive maintenance program for all State owned buildings except those structures exempted under Section 1 [25 IAC 2-1-1] above, and has the authority to authorize emergency parts and supplies, initiate remedial programs of construction or service contracts whenever needed to ensure an adequate preventive maintenance program. The Division is not intimately involved with, but will be available to aid the Natural Resources Department, the Indiana State Police and the Department of Highway in the implementing and administering of their respective preventive maintenance programs. *(Indiana Department of Administration;*

Public Works Division Sec A,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 1; filed Feb. 3, 1982, 1:05 pm: 5 IR 508; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

Rule 2. Definitions

25 IAC 2-2-1 Definitions

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1-3; IC 4-13-1-4; IC 4-13.6

Sec. 1. The following words and phrases, as used in these rules and regulations [25 IAC 2] shall have the following meaning:

- (a) "Department" means the Indiana Department of Administration created by IC 4-13-1.
- (b) "Commissioner" means the Commissioner of the Department of Administration.
- (c) "Division" means the Division of Public Works, Indiana Department of Administration.
- (d) "Operating Department" means the unit of government that will be responsible for the operation, maintenance and use of structure, equipment or apparatus being contracted for.
- (e) "Director" means the Director of Public Works Division of the Department of Administration.
- (f) "Bid Officer" means the representative of the Division in responsible charge of the bid opening.
- (g) "Bid" means a sealed proposal to construct or perform services as set out in the information to bidders.
- (h) "Bidder" means a supplier or contractor who submits offers to construct or perform services for the Department.
- (i) "Approved Bidder" means a bidder who is certified with the Department in accord with the rules and regulations as promulgated by the prequalification certification board.
- (j) "Certification Board" means the prequalification certification board as established by IC 4-13-7 [Repealed by P.L.24-1985, SECTION 25.].
- (k) "Contract Designer" means any Architect, Engineer or other professional under contract with the State to perform certain consultant or design services for the State.
- (l) "State Designer" means any Architect, Engineer or other professional or technician performing certain design services for the State while within the employ of the State.
- (m) "Contractor" means any firm supplying construction or other services to the State under a direct contract with the State.
- (n) "Subcontractor" means any firm supplying construction or other services to the Contractor under a contract with said Contractor.
- (o) "Inspector" means an employee of the Division having the responsibility of inspecting State Construction Projects.
- (p) "Designer" means any Architect, Engineer, Surveyor or other professional who by formal training and/or registration are otherwise legally authorized to perform services and design work for the State and may be either a contract or state designer.
- (q) "Professional Contractual Service" means a professional firm who by formal training, registration or are otherwise legally authorized by the manufacturer or supplier to perform maintenance or repair services on complicated or specialized equipment or controlled systems.
- (r) "Project Manager" means Public Work's professional assigned to coordinate projects.
- (s) "Executive Secretary" means secretary for Certification Board.

(Indiana Department of Administration; Public Works Division Sec B; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.2; filed Feb 3, 1982, 1:05 pm: 5 IR 509; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

Rule 3. Approved Designer List and Selection of Designer

25 IAC 2-3-1 List of prequalified designers

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 1. The Division shall maintain a list of prequalified Designers, composed of Architects, Engineers, Surveyors, and other professionals who by an application to the Certification Board have expressed an interest in furnishing their services for proposed State work. *(Indiana Department of Administration; Public Works Division Sec C, 1; filed Feb 29, 1972, 4:10 pm: Rules and Regs.*

1973, p.2; filed Feb 3, 1982, 1:05 pm: 5 IR 509; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

25 IAC 2-3-2 Application for prequalification; approval as precondition for selection

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 2. A Designer desiring to do design work for the Division must, as an act prior to being considered for such services, apply to the State Certification Board, supply all of the pertinent information required by that Board and obtain prequalification approval of said Board. The designer must keep said prequalification current as set out in these rules and regulations [25 IAC 2]. (*Indiana Department of Administration; Public Works Division Sec C,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.2; filed Feb 3, 1982, 1:05 pm: 5 IR 509; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-3-3 Selection procedure for contract designers; qualifications; limitations on subcontractors

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 3. For any project which the Director determines that the assignment of a contract designer is required, the head of the interested facility requesting the project shall be asked to submit his recommendations to the Director and the Director shall recommend at least three who qualify in classification of work and are currently in good standing with the State Certification Board, and the Commissioner shall select a Contract Designer for negotiating a contract for the proposed design work. Such negotiations will be predicated upon a showing that his personnel availability and work in progress will warrant that the work contemplated can be done in a timely manner. The Contract Designer shall not subcontract any of the contracted design work, considered to be part of the prime contract work, except those functions normally subcontracted in similar circumstances, and such proposed subcontract professionals shall be subject to the same prequalifications as the Contract Designer and must be approved for such subcontract design work by the Director prior to use. Approval of a Contract Design firm shall only be considered where a sufficient number of the personnel of said firm shall have valid professional qualification and requisites to ensure intimate, competent control over all facets of the design work under consideration as evidenced by professional registration. (*Indiana Department of Administration; Public Works Division Sec C,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.3; filed Feb 3, 1982, 1:05 pm: 5 IR 510; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-3-4 Fee proposals for design work; selection procedure for alternate contract designer

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-11.1

Sec. 4. Director shall recommend to the Commissioner the fee proposed for the professional work. In making his fee proposal for this design work, the Director shall consider the project as a whole considering its location, complexity, need for expediency, and the aid to be given by the State in the design and control of construction. The various points considered in reaching the fee, be it a percentage of eventual cost or as a firm figure, shall be reflected in the design contract itself. If after a review of the project and negotiations as to scope and fee, an agreement is not reached, then the director shall report such circumstances to the Commissioner and he shall decide whether to continue the negotiations or contact another Designer from the Recommendation List. (*Indiana Department of Administration; Public Works Division Sec C,4; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.3; filed Feb 3, 1982, 1:05 pm: 5 IR 510; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-3-5 Supervision of designer contracts

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 5. The Director shall be responsible for seeing that all points of the Designer contract are adhered to administratively. Should the designer fail to so adhere to the contract to any significant degree, the Director shall inform the Commissioner and/or Attorney General of this fact and request guidance in the successful promulgating of the design contract. (*Indiana Department of*

Administration; Public Works Division Sec C,5; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 3; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

25 IAC 2-3-6 Designer's duty to assure a bid within budget

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 6. Designer shall make every effort possible to ensure that the scope and cost of the project remains within the budget allocation. Where bids are over allocated funds and additional funds are not available, the Designer shall redesign, at no additional cost to the State, to bid within allocation or the project shall be abandoned at the option of the State. *(Indiana Department of Administration; Public Works Division Sec C,6; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.3; filed Feb 3, 1982, 1:05 pm: 5 IR 510; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

Rule 4. Approved Contractors List and Contractors Qualifications

25 IAC 2-4-1 List of prequalified contractors

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 1. The Division shall maintain a list of prequalified contractors who, by an application to the Certification Board of the Division have expressed an interest in contracting with the State to perform construction work within the financial and experience limits of their prequalification as set out in their current certificate. *(Indiana Department of Administration; Public Works Division Sec D,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 3; filed Feb 3, 1982, 1:05 pm: 5 IR 510; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-4-2 Application for prequalification approval as precondition to bidding

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 2. A Contractor desiring to so perform construction work for the Division must, as an act prior to being allowed to bid on projects with a valuation exceeding \$50,000, apply to the State Certification Board supplying all of the pertinent information required by that Board and obtain their prequalification approval, as set out in these rules and regulations [25 IAC 2] of the Public Works Division. A Contractor shall not be considered to have legally received plans on a particular project having a valuation exceeding \$50,000 without being currently qualified by said Board both in the classification of work involved and having the financial availability to do the work, said financial position being based on the criteria and formula as also set out in these rules and regulations [25 IAC 2]. *(Indiana Department of Administration; Public Works Division Sec D,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 4; filed Feb 3, 1982, 1:05 pm: 5 IR 511; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-4-3 Subcontractors' prequalification as precondition to starting work

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 3. Any subcontractor proposing to do work which has a valuation in excess of \$50,000 shall also be prequalified as set out in Section 2 [25 IAC 2-4-2] above before the prime contractor can start any work on the site. *(Indiana Department of Administration; Public Works Division Sec D,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.4; filed Feb 3, 1982, 1:05 pm: 5 IR 511; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-4-4 Limitation on subcontracting

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 4. Any prime contractor or subcontractor doing work for the State is required to complete at least (20%) twenty percent of the work, measured in dollars of the total contract price, with his own forces. (*Indiana Department of Administration; Public Works Division; 25 IAC 2-4-4; filed Feb 3, 1982, 1:05 pm: 5 IR 511; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 5. Solicitation of Bids

25 IAC 2-5-1 Projects less than \$500; criteria for bid exemption

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 1. (a) When the estimated cost of construction is less than five hundred dollars (\$500), contracts may be issued without taking competitive bids upon receipt of two or more offers from firms interested in the subject project.

(b) Competitive bids shall not be required for professional contractual services where no competition exist such as manufacturer representatives special expertise service on specialized equipment, and where rates or prices are fixed by law or ordinance or where purchases are made from the United States government or any agency, division or instrumentality thereof [*sic.*]. Competitive bids shall not be required for repair parts for machinery or equipment which can only be procured from the manufacturer of such machinery or equipment. (*Indiana Department of Administration; Public Works Division Sec E,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.4; filed Feb 3, 1982, 1:05 pm: 5 IR 511; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-5-2 Projects between \$500 and \$5,000; personal and general bid notices

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-3

Sec. 2. When the estimated cost of construction exceeds five hundred dollars (\$500) but less than five thousand dollars (\$5,000), sealed bids shall be solicited by posting a notice on the bulletin board in the office of the Commissioner and in office of Director at least seven working days preceding the date set for the opening of bids. The Division shall also contact contractors in the immediate area of the work involving them to consider bidding the project. (*Indiana Department of Administration; Public Works Division Sec E,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.4; filed Feb 3, 1982, 1:05 pm: 5 IR 511; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-5-3 Sealed bids awarded under IC 4-13.6-5; posted solicitation; wage scale limitation

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6-5; IC 5-16-1-3; IC 5-16-7-2

Sec. 3. When required under IC 4-13.6-5, sealed bids will be solicited by posting on a public bulletin board in the office of the director seven (7) days before the final date for submitting bids, and public notice shall be inserted at least once each week for two (2) successive weeks before the final date of submitting bids in one (1) newspaper of general circulation in Marion County, Indiana, and, if any part of the project is located in an area outside Marion County, Indiana, one (1) newspaper of general circulation in that area. A project may be listed with one (1) or more private bid service organizations. A prevailing wage scale shall be secured and such rates incorporated in every project, except those under 25 IAC 2-11 when time will not permit. The contractor shall post rates to be paid on the job on state premises and file with the Department of Administration, Public Works Division, Indiana Government Center-South, 402 West Washington Street, Room W467, Indianapolis, Indiana 46204-2743. (*Indiana Department of Administration; Public Works Division Sec E,3; filed Feb 29, 1972, 4:10 p.m.: Rules and Regs. 1973, p. 4; filed Feb 3, 1982, 1:05 p.m.: 5 IR 512; filed May 4, 1992, 9:30 a.m.: 15 IR 1906; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-5-4 Exception from bidding; emergency work

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-1.1; IC 36-1-12

Sec. 4. The Commissioner of the Department of Administration may authorize contracts to perform necessary work or construction in an emergency as described in Rule 11 [25 IAC 2-11] of this document without calling for bids under normal procedures. If the estimated cost is less than \$5,000, authorization for such emergency work may be given verbally by the Director. If the emergency is estimated to exceed \$5,000 in cost, then approval of the Commissioner shall be obtained prior to giving verbal approval. In either case the award shall be confirmed in writing with copies filed with the Director and Department as provided under Rule 11 [25 IAC 2-11] of these rules. (*Indiana Department of Administration; Public Works Division Sec E,4; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.4; filed Feb 3, 1982, 1:05 pm: 5 IR 512; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-5-5 Scope and design of project commensurable with allocation

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-3

Sec. 5. It shall be the intent of the Division, Designer and operating unit to make every effort in the scope and design of the project to ensure that the low bid will be within the allocation prior to soliciting bids in order to preclude the bidders from expending efforts and costs to formulate bids with little possibility of being awarded and in so doing divulging their bid to others prior to a possible rebid. (*Indiana Department of Administration; Public Works Division Sec E,5; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p. 4; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 6. Receipt and Acceptance of Bids

25 IAC 2-6-1 Receipt of bids; time requirement

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-2-1

Sec. 1. All bids shall be received prior to the appointed bid opening time, in the office of the Director and shall be dated and time stamped showing the time and date of receiving the bid. (*Indiana Department of Administration; Public Works Division Sec F,1; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p. 5; filed Feb 3, 1982, 1:05 pm: 5 IR 512; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-6-2 Bid preparation and submittal requirements

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-3

Sec. 2. Bids shall be contained in a sealed envelope with attached blue label as supplied by the Division or marked as specified and/or supplied by the Designer. It shall be plainly marked as a bid with job and time identification clearly stated. (*Indiana Department of Administration; Public Works Division Sec F,2; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.5; filed Feb 3, 1982, 1:05 pm: 5 IR 512; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-6-3 Bidder's prequalification review by executive secretary; bid acceptance conditions

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 3. The Executive Secretary of the Certification Board or his/her designate shall, immediately prior to the designated time for acceptance of bids for projects estimated to exceed \$50,000, review the prequalification of all bidders submitting bids. If a bid packet is received and the bidder is not currently qualified with said Board or his financial availability is not approved at the time, then this fact shall be brought to the attention of the Director or in his absence the Commissioner and the bid shall not be opened until receiving a decision as to the acceptability of the bid. The Director may solicit the aid of the Attorney General in making such a decision. (*Indiana Department of Administration; Public Works Division Sec F,3; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.5; filed Feb 3, 1982, 1:05 pm: 5 IR 512; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-6-4 Opening and reading bids; notifying bidders of delay or changes

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-2-1

Sec. 4. All bids shall be opened publicly and read at the place and time stated in the public notice and/or instructions to bidders, unless some condition or situation makes it impractical or impossible to do so. Should the time of opening be delayed or place of opening be changed for reason, every effort shall be expended in bringing knowledge of the change to the interested bidders as soon as the need for such a change becomes known to the Director. Bids shall never be opened prior to the appointed time. *(Indiana Department of Administration; Public Works Division Sec F,4; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.5; filed Feb 3, 1982, 1:05 pm: 5 IR 513; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-6-5 Contract bid award criteria; rejection or waiver of nonconforming bids

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 5. All bids shall conform to all applicable requirements of the specifications including the instructions to bidders, general conditions, and special conditions. The Bid Officer shall tentatively reject any bid failing to adhere to or conform to such and shall inform the Director or in his absence the Commissioner of this fact and await a decision as to the acceptability of the bid. It is the intent of the Department to not waive technicalities of the bidding procedure. The award of such contract shall be made on the basis of the lowest qualified bid, deemed to be the best bid. *(Indiana Department of Administration; Public Works Division Sec F,5; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.5; filed Feb 3, 1982, 1:05 pm: 5 IR 513; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-6-6 Single bid received; criteria for acceptance

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 6. If after proper solicitation of bids, only one bid is received, the Director shall make a thorough review of the situation in consort with the operating department to determine whether the one bid should be accepted or rejected and rebid. In making this judgment they should consider the type of work, its competitiveness, the timely need of the project, the possibility of unfavorable prices if rebid, the possible loss of the low bidder if rebid, and the equitable fairness to the single bidder of having his bid divulged to subsequent bidders if the project is rebid. *(Indiana Department of Administration; Public Works Division Sec F,6; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 5; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-6-7 Confirmation of significantly low bid

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-2-1

Sec. 7. A bid significantly below the other bids or the project cost estimate shall not be treated as prima facia evidence of mistake and no bid will be rejected based on presumed error in bid. In such instances the Bid Officer shall ask the low bidder, if represented at the opening, to quickly confirm his bid, while the bid opening is still in session, and if an error is alleged to have been made to submit evidence of such error in a timely manner to the Director, for consideration by the State. If the apparent low bidder is not present at the bid opening, the Bid Officer shall contact him as soon as possible and secure a confirmation of his bid or evidence of error. *(Indiana Department of Administration; Public Works Division Sec F,7; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 5; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-6-8 Low bid exceeds available funds

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 8. If the low bid exceeds the allocation, and additional funds are requested but not approved, then bids shall be rejected and project suspended or rebid with design revised in value equivalent to the overrun. (*Indiana Department of Administration; Public Works Division Sec F,8; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p. 6; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 7. Award of Contracts

25 IAC 2-7-1 Bid acceptance or rejection; written contracts; director's recommendation

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-1.1; IC 36-1-12

Sec. 1. For all proposals under \$5,000 the Public Works Project Manager shall, after consultation with the Designer, make a recommendation to the Director as to acceptance or rejection of the bids. If the Director concurs in a recommendation for acceptance, a letter type contract may be sent to the successful bidder with approval by the Commissioner. For bids that exceed \$5,000 the project manager and Designer, after a full review of the bid and discussion with all interested parties to the bid, shall make recommendation to the Director as to acceptance or rejection of the bids. If the Director concurs in a recommendation for acceptance the Director shall compose a formal contract for the signature of the Commissioner, for said work after determining that funds are available. If bids are rejected, the Director shall consult all parties concerned to ascertain the advisability of rebidding or cancelling the project, commensurate with the provisions of Rule 25 IAC 2-3-6 and Rule 25 IAC 2-6-8 above. (*Indiana Department of Administration; Public Works Division Sec G,1; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.6; filed Feb 3, 1982, 1:05 pm: 5 IR 513; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-7-2 Lowest responsible bid acceptance criteria; rejection conditions

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6-1-15; IC 5-16-1-1.1; IC 36-1-12

Sec. 2. A bid may only be awarded to a responsible contractor. Factors to be used in making a responsibility determination are quality of material, experience, efficiency, and reputation of the bidder, the character, integrity, credit, and conscientiousness of the bidder, the ability of the bidder to respond and answer in accordance with what is expected or demanded and to fulfill letter and spirit the contract made with him, the accessibility of the bidder, and any other factor that the commissioner determines to affect responsibility as defined in IC 4-13.6-1-15. (*Indiana Department of Administration; Public Works Division Sec G,2; filed Feb 29, 1972, 4:10 p.m.: Rules and Regs. 1973, p. 6; filed Feb 3, 1982, 1:05 p.m.: 5 IR 513; filed May 4, 1992, 9:30 a.m.: 15 IR 1906; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-7-3 Conditional acceptance of bid; work load of bidder exceeding prequalification rating (Repealed)

Sec. 3. (*Repealed by Indiana Department of Administration; Public Works Division; filed Feb 3, 1982, 1:05 pm: 5 IR 523*)

25 IAC 2-7-4 Contract letter; documents required to initiate work

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-2-15; IC 4-13.6

Sec. 4. The Contract shall be transmitted to the Contractor for his execution by a letter stating that the Contractor unless otherwise instructed in writing, should not commence any work or take delivery of noninventory materials until he receives a copy of the fully executed contract signed by all required signatories and all auxiliary documents including but not limited to insurance and bonds are completed and furnished to the state. (*Indiana Department of Administration; Public Works Division Sec G,4; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.6; filed Feb 3, 1982, 1:05 pm: 5 IR 513; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-7-5 Restriction on meetings between state and contractor; notifying attorney general (Repealed)

Sec. 5. *(Repealed by Indiana Department of Administration; filed Dec 17, 1992, 5:00 p.m.: 16 IR 1366)*

25 IAC 2-7-6 Limitations on contract renewals

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-2; IC 36-1-12

Sec. 6. For professional contractual services the Commissioner of the Department of Administration may, before expiration of existing contracts and with the consent of both parties, renew the contract annually not to exceed a total period of four years, except in those cases where no competition exists (25 IAC 2-5-1). Contract renewals shall be made at the same price or by reasonable escalations based on an independently published index specified in the contract documents and agreeable to both parties. *(Indiana Department of Administration; Public Works Division; 25 IAC 2-7-6; filed Feb 3, 1982, 1:05 pm: 5 IR 514; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-7-7 Contractor provided information

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-1.1; IC 36-1-12

Sec. 7. The prospective contractor shall supply information requested by the state concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the state shall base the determination of responsibility upon any available information or may find the prospective contractor nonresponsible if such failure is unreasonable. *(Indiana Department of Administration; 25 IAC 2-7-7; filed May 4, 1992, 9:30 a.m.: 15 IR 1907; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

Rule 8. Inspection of Construction

25 IAC 2-8-1 Construction inspection duties; designer's rights to approve design changes and interpretation

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 1. The Division has the responsibility for the inspection of all construction which has been designed by the Division. The Division shall also make periodic reviews of all construction which has been designed by Contract Designers, however such Designers by their contract are held responsible for the primary inspection. Such periodic inspection by the State does not relieve the Designer of the responsibility for the primary inspection, control and coordination of the project. The inspectors for the Division have for their primary purpose ensuring that such functions are properly carried out by the Contract Designer and secondarily to aid in the resolution of problems arising between the Contract Designer, the Institution personnel and the Contractor. On projects designed by a Contract Designer, the inspectors or institutional employees shall not give instructions to any Contractor or Subcontractor directly, except in an emergency, instead bringing the facts to the attention of the Contract Designer for resolution. Any change in the methods or performing an item of work, substitution of material, revision to schedule, extra work orders, extension of completion time or interpretation of the plans and specifications shall originate with the Designer and be approved by Public Works Division. *(Indiana Department of Administration; Public Works Division Sec H,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.7; filed Feb 3, 1982, 1:05 pm: 5 IR 514; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-8-2 Delegation of duties to other units of government (Repealed)

Sec. 2. *(Repealed by Indiana Department of Administration; Public Works Division; filed Feb 3, 1982, 1:05 pm: 5 IR 523)*

Rule 9. Approval of Partial Payments

25 IAC 2-9-1 Partial pay estimates; submission, review and approval procedure

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 5-16-5-2

Sec. 1. Contractor shall submit partial pay estimates as set out in the respective contract documents, but not more frequently than once a month, using the established forms supplied by the Division. Such estimates shall be submitted to the Designer for his review and approval. Designer must warrant that the work as described in the estimate has been accomplished and materials listed have been received and secured. The estimate shall then be transmitted to the Division for approval and then submitted to the Director and Commissioner for approval of payment. (*Indiana Department of Administration; Public Works Division Sec I, 1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.7; filed Feb 3, 1982, 1:05 pm: 5 IR 515; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-9-2 Materials storage and identification for partial payment request

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 5-16-5-2

Sec. 2. In order to be considered for inclusion in a partial payment request, materials must either be stored in a secure manner on the site or be separated and properly identified as being the property of the State and/or its Contractor if remaining in an off-the-site warehouse not considered the place of business of the vendor. (*Indiana Department of Administration; Public Works Division Sec I, 2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.7; filed Feb 3, 1982, 1:05 pm: 5 IR 515; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-9-3 Nonpayment of subcontractors; documentation of nonpayment; procedure

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-5

Sec. 3. Pursuant to IC 5-16-5, as amended, partial payments may be temporarily held up by the Division if it has received a certificate from a subcontractor asserting that his work, having been completed within the past 60 days was billed to the Prime Contractor and not paid. Copies of such certified claim shall be forwarded to the Contractor's bond surety for information and possible action. The partial pay request shall be released for payment upon satisfactory evidence that the Subcontractor has been paid. If it is evident that a disagreement exists as to the billing in question, then the State shall reduce the partial billing by the amount claimed and pass partial on for payment. Copies of all correspondence pertaining to the alleged non-payment to Subcontractors in violation of the contract between the State and the Prime Contractor shall be placed in their respective prequalification file for review by the Certification Board. Information relative to the alleged non-payment of bills due involving a contractor, subcontractor or materialman, shall be released to persons only when reasons for such information are set out in writing, or the one seeking such information appears in person and requests to see such financial records. (*Indiana Department of Administration; Public Works Division Sec I,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.8; filed Feb 3, 1982, 1:05 pm: 5 IR 515; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-9-4 Partial payments administered by highway commission

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1-3

Sec. 4. Pursuant to I.C. 4-13-1, the Division has delegated authority to the State Highway Commission to administer the partial payments for both Contract Designers and Contractors. (*Indiana Department of Administration; Public Works Division Sec I,4; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 8; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 10. Acceptance of Project and Final Payment

25 IAC 2-10-1 Final project inspection; final billing

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 5-16-5

Sec. 1. Whenever the project has progressed to the point of substantial completion, an inspection shall be made by the Contract

Designer accompanied by the Contractor, a representative of this Division and a representative of the Operating Department. After all deficiencies have been substantially remedied, the Designer shall recommend to the Director that the construction project be accepted. After the Director has accepted the project in behalf of the State (DAPW 5), the final billing may be submitted, accompanied by affidavits and other documents evidencing that all subcontracts and bills for materials and services have been paid. (*Indiana Department of Administration; Public Works Division Sec J,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.8; filed Feb 3, 1982, 1:05 pm: 5 IR 515; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-10-2 Approval of bill for payment; deduction for amounts disputed with subcontractors or materialmen

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 5-16-5

Sec. 2. Upon receipt of such final payment request and necessary affidavits, the billing will be passed for payment unless certificates of non-payment as submitted by subcontractors or materialmen have not yet been resolved. In that event, the amounts alleged to be owed shall be deducted from the contractor billings and the balance passed for payment as a partial payment. (*Indiana Department of Administration; Public Works Division Sec J,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 8; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-10-3 Final payment billing; preconditions

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 5-16-5; IC 5-16-5.5-6

Sec. 3. Billing for final payment shall not be passed for payment until 60 days after (1) all contractor and subcontractor work has been totally completed including all punch list items, (2) all equipment has been delivered to the site, and (3) all equipment to be installed by contractor, supplier or a subcontractor has been installed and accepted. Final payment can be released only if all punch list items are completed by the contractor. (*Indiana Department of Administration; Public Works Division Sec J,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.8; filed Feb 3, 1982, 1:05 pm: 5 IR 515; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-10-4 Final payment by highway commission (Repealed)

Sec. 4. (*Repealed by Indiana Department of Administration; Public Works Division; filed Feb 3, 1982, 1:05 pm: 5 IR 523*)

Rule 11. Emergencies

25 IAC 2-11-1 Emergency conditions; imminent threat of substantial loss

Authority: IC 4-13-2-9

Affected: IC 5-16-1-1.6

Sec. 1. Prima facie evidence of an emergency exists whenever a substantial loss or service to the State would result if immediate remedial action is not taken. In addition to IC 5-16-1-1.6 and 25 IAC 2-5-4 emergency may include expiration of bids where loss of bids and rebidding would cause substantial loss to the State either by additional cost or lost revenue. (*Indiana Department of Administration; Public Works Division Sec K,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.9; filed Feb 3, 1982, 1:05 pm: 5 IR 516; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-11-2 State as non-occupying lessor; emergency procedures

Authority: IC 4-13-2-9

Affected: IC 5-16-1-1.6

Sec. 2. If state owned property is under lease to others and is in a state of disrepair to an extent that a continuance in this state may cause a default in such contract, and time is not available to pursue the regular procedures for securing the necessary labor,

materials and services to remedy the fault, then prima facie evidence of an emergency exists. If, in the opinion of the chief administrative officer of the department having jurisdiction over the property that an emergency exists and a need exists for procuring materials, labor or services outside the normal procurement procedures, he shall inform the Department of Administration and if the Commissioner concurs that an emergency exists, the materials, labor or services can be secured on an emergency basis as set out in IC 5-16-1-1.6 and 25 IAC 2-5-4. (*Indiana Department of Administration; Public Works Division Sec K,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.9; filed Feb 3, 1982, 1:05 pm: 5 IR 516; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-11-3 State as occupant lessor; emergency procedures

Authority: IC 4-13-2-9

Affected: IC 5-16-1-1.6

Sec. 3. If State-owned property under the jurisdiction and control of the State is in a state of disrepair so as to be harmful to the safety of the structure or a hazard to life, then prima facie evidence of an emergency exists. In such instances, the procedure described in 25 IAC 2-11-2 shall apply. This procedure also applies to property leased by the State wherein the State has the responsibility for the maintenance and upkeep of the building or where terms of the lease dictate contract work procedures. (*Indiana Department of Administration; Public Works Division Sec K,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.9; filed Feb 3, 1982, 1:05 pm: 5 IR 516; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-11-4 Documentation by person requesting emergency declaration

Authority: IC 4-13-2-9

Affected: IC 5-16-1-1.6

Sec. 4. The officer who initiated the emergency request shall set out in writing all pertinent facts involved in the problem as soon as possible, but not longer than one week after the discovery of the emergency with copies for the Director and Department affected by the emergency. All confirming emergency requisitions shall include the name and agency of the person giving the emergency authorization. Justification forms shall be filled out by the agency as required. (*Indiana Department of Administration; Public Works Division Sec K,4; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.9; filed Feb 3, 1982, 1:05 pm: 5 IR 516; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 12. Certification Board; Authority

25 IAC 2-12-1 Certification; construction of article 2

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 1. Statutory provisions governing the Certification Board of the Indiana Department of Administration, Public Works Division, may be found in IC 4-13-7 [*Repealed by P.L.24-1985, SECTION 25.*] as amended. Rules and Regulations incorporated herein are additional and supplemental to the Act and its amendments. (*Indiana Department of Administration; Public Works Division Sec L,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.9; filed Feb 3, 1982, 1:05 pm: 5 IR 516; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 13. Certification Board; Organization

25 IAC 2-13-1 Members of certification board; file room

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 1. The Certification Board, composed of the State Building Commissioner, Examiner or Deputy Examiner of the State Board of Accounts, and the Director of the Public Works Division, no more than two (2) of whom shall be members of the same

political party, shall have its files and other administrative materials quartered in space allocated by the Public Works Division. (*Indiana Department of Administration; Public Works Division Sec M,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 9; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-13-2 Executive secretary of board; administrative duties

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 2. An executive secretary, answerable directly to the Board and the Director of Public Works Division, shall handle all administrative functions of the Board; and shall, similarly, be provided office space, clerical and secretarial help by the Public Works Division. (*Indiana Department of Administration; Public Works Division Sec M,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.9; filed Feb 3, 1982, 1:05 pm: 5 IR 516; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-13-3 Election of chairman

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 3. The Chairman of the Board shall be nominated and elected from and by the members of the board for a yearly term dating from each January. It is permissible for the Chairman to succeed himself. (*Indiana Department of Administration; Public Works Division Sec M,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 10; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-13-4 Board meetings

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-14-1.5

Sec. 4. Meetings shall be held on the second Wednesday of each month unless circumstances require that another date be set. Rescheduling of meetings may be made upon unanimous consent of the members, but meetings shall never be more than forty-five (45) days apart. Special meetings may be called at any time if all members agree thereto, and if it is deemed that such special meeting will serve the best interests of the State of Indiana. In accordance with the Indiana Open Door Law, (IC 5-14-1.5, Acts of 1977), notice of all meetings will be posted on the bulletin board in the office of Public Works Division and notice given to all news media representatives who annually in writing request such notice be given. The agenda of each meeting will be posted with the time, date and place at least 48 hours prior. (*Indiana Department of Administration; Public Works Division Sec M,4; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.10; filed Feb 3, 1982, 1:05 pm: 5 IR 517; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-13-5 Quorum; majority

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 5. The board may meet with one member absent if it has the consent of the absent member. At least two members must agree if a motion is to be passed whether there be two or three members present. (*Indiana Department of Administration; Public Works Division Sec M,5; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 10; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 14. Certification Board; Purposes

25 IAC 2-14-1 Purposes of certification board; contractor's prequalification approval

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 1. (a) To determine which applicant contractors have the experience, physical capabilities, and financial resources to bid or to subcontract on State construction projects valued in excess of fifty thousand dollars, (\$50,000) which are implemented through the facilities of the Public Works Division and all other agencies so required by statute, and

(b) To determine which applicant designers have the professional capabilities, manpower, and experience necessary to perform architectural, engineering, or related professional work on State projects of the same magnitude likewise implemented through the Public Works Division. (*Indiana Department of Administration; Public Works Division Sec N,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.10; filed Feb 3, 1982, 1:05 pm: 5 IR 517; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-14-2 Board approval; “certificate of qualification”

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 2. Those applicant contractors and designers which receive Certification Board approval are prequalified for future State work to the time and classification limits set forth on the annually-renewed “certificate of qualification”, (hereinafter called the certificate). Contractors are, additionally, qualified to perform work up to a dollar limit (maximum qualification rating) indicated on the certificate. (*Indiana Department of Administration; Public Works Division Sec N,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.10; filed Feb 3, 1982, 1:05 pm: 5 IR 517; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-14-3 Prequalification denial; eligibility for projects under \$50,000

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 3. Those contractors which apply for, but are denied, prequalification by the Board are still eligible to bid or to subcontract on all Public Works projects valued at less than fifty thousand dollars (\$50,000), unless otherwise restricted by the Public Works Division. (*Indiana Department of Administration; Public Works Division Sec N,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.10; filed Feb 3, 1982, 1:05 pm: 5 IR 517; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 15. Prequalification and Bidding

25 IAC 2-15-1 Prequalification certificate required for project bids over \$50,000

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 1. If a contractor intends to bid on a Public Work's project valued in excess of fifty thousand dollars (\$50,000), his bid will not be opened unless he currently maintains a valid “certificate of prequalification” indicating that he is prequalified in the field of work for which the bid is being taken. (*Indiana Department of Administration; Public Works Division Sec O,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.10; filed Feb 3, 1982, 1:05 pm: 5 IR 517; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-15-2 Restrictions on prequalified bid acceptance

Authority: IC 4-13-2-9; IC 4-13.6-3-2

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 2. A bid exceeding fifty thousand dollars (\$50,000) by a prequalified contractor will not be considered for contract award on such project unless:

(a) The total dollar volume of his work to be completed on current and pending contracts when coupled with the estimated cost of the Public Works project to be bid amounts to a total less than his “maximum qualification rating” as shown on his current “certificate of qualification,” and

(b) A current notarized “Statement of Availability” (DAPW 11) for each bid reporting the dollar volume of work yet to be completed is submitted with the sealed bid.

(Indiana Department of Administration; Public Works Division Sec O,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.10; filed Feb 3, 1982, 1:05 pm: 5 IR 518; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

25 IAC 2-15-3 Exception to statement of availability requirement

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 3. The notarized "Statement of Availability" need not be submitted by those prequalified firms holding an "unlimited maximum qualification rating" (\$100,000,000 or more), but such firms must still be currently qualified in the area of construction concerned. *(Indiana Department of Administration; Public Works Division Sec O,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.11; filed Feb 3, 1982, 1:05 pm: 5 IR 518; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-15-4 Subcontractor's prequalification; qualification rating

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 4. Subcontractors who intend to perform State work valued in excess of fifty thousand dollars (\$50,000) under a prime contractor to be awarded a State contract, must be prequalified prior to the start of work by the prime. They may also be required to have a "total maximum qualification rating" which exceeds the total value of all their current and pending work combined when coupled with their subcontract amount. *(Indiana Department of Administration; Public Works Division Sec O,4; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.11; filed Feb 3, 1982, 1:05 pm: 5 IR 518; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-15-5 Conditional bid acceptance; exceptions to ineligibility

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 5. In those instances in which the Bidder would be precluded from bidding a particular project because the value of his workload at the time of bidding combined with his anticipated bid exceeds his qualification rating, the Bid Officer, with the concurrence of the Director, may conditionally accept his bid and consideration may be given offering him the contract if:

(a) he is the low bidder, and

(b) his "Statement of Availability" is supplemented with an affidavit affirming that he anticipates his outstanding obligations will be reduced to fall within his prequalification rating within sixty (60) days after the bid date. If the Director makes a decision to offer the contract to the apparent low bidder under such circumstances and with such assurances, then he may require the bidder to warrant that, in such interim, he will not further obligate his firm to new work to the extent that the above condition would not be met during the given time period.

(Indiana Department of Administration; Public Works Division Sec O,5; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.11; filed Feb 3, 1982, 1:05 pm: 5 IR 518; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)

Rule 16. General Prequalification Procedures and Requirements

25 IAC 2-16-1 Annual prequalification renewal period; grace period

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 1. Prequalification, specifying those fields in which a firm may engage in contract with the State of Indiana and the dollar limit (maximum qualification rating) to which a contractor may be committed, shall be on an annual basis with a three-month "grace" period dating from the scheduled annual renewal date. This thereby allows for a total of fifteen (15) months of prequalification dating from each renewal date. *(Indiana Department of Administration; Public Works Division Sec P,1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 11; filed Feb 3, 1982, 1:05 pm: 5 IR 519; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265)*

25 IAC 2-16-2 Temporary prequalification; term

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 2. The Certification Board may temporarily prequalify an applicant for any period of time from one (1) month to fifteen (15) months if circumstances suggest to the board that a full-term prequalification is not appropriate. (*Indiana Department of Administration; Public Works Division Sec P,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 11; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-16-3 Prequalification expiration period; 90 day certificate extension

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 3. If the period of prequalification expires and no acceptable renewal materials are rendered by the expired certificate holder, or if the certificate is revoked or suspended for cause before completion of an awarded contract and no acceptable provisions are made to the contrary, the contract may be cancelled by the Department of Administration.

The certification board may extend a valid certificate for a period of not more than ninety (90) days upon written request from the certificate holder prior to the original expiration date justifying such extension. The request will be acknowledged in writing and the board so informed at the next scheduled meeting. Only one such extension may be granted for each certificate. (*Indiana Department of Administration; Public Works Division Sec P,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.11; filed Feb 3, 1982, 1:05 pm: 5 IR 519; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-16-4 Initial prequalification application; prequalification booklet

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 4. Any applicants for initial prequalification shall submit a fully-completed "prequalification booklet" which is available from the Public Works Division upon request. A booklet will be considered incomplete if all applicable information is not supplied, or if that information rendered proves to be false and such incomplete booklet will accordingly not be considered. All applicants for prequalification should allow up to forty-five (45) days for complete review of application materials and consideration by the Certification Board. (*Indiana Department of Administration; Public Works Division Sec P,4; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.11; filed Feb 3, 1982, 1:05 pm: 5 IR 519; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-16-5 Effect of failure to meet qualifications

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 5. Any deviation from requirements set forth in the booklet or in this document will be critically evaluated in the consideration of the application and either a lesser rating or revocation may be expected. (*Indiana Department of Administration; Public Works Division Sec P,5; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p. 12; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-16-6 Board's application review; recommendation

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 6. Following examination and evaluation of all prequalification materials, the members of the board shall review each application and make their recommendations according to their findings. (*Indiana Department of Administration; Public Works Division Sec P,6; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.12; filed Feb 3, 1982, 1:05 pm: 5 IR 519; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-16-7 Prequalification suspension; denial, revocation; sanctions; grounds

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 7. The board may suspend, deny, or revoke the prequalification of those applicants not complying with the stipulations of the act or of these regulations [25 IAC 2-16]. Additionally, verified reports or indications of misfeasance, malfeasance, or other undesirable practices made by any reliable source (including agent or representatives of the Public Works Division as it concerns the Division's projects) or financial statements indicating instability, a precarious financial position or poor business procedures in the eyes of the board shall each be further due cause for denial, revocation, or suspension of prequalification by the board. A certificate of qualification may be revoked if the contractor:

- (a) fails to pay, or satisfactorily settle, all bills due to labor and material on former or existing contracts, or
- (b) is convicted of a violation of a state or federal law in relation to a public contract
- (c) defaults on a previous contract, or
- (d) fails to enter into a Public Works implemented project contract.

Notification of such pending action will be made in writing, setting forth the grounds for the proposed certificate revocation. The action shall become final unless an appeal in writing is filed. Any appeal must be filed as prescribed hereinafter. The period of disqualification shall not exceed two (2) years. (*Indiana Department of Administration; Public Works Division Sec P, 7; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.12; filed Feb 3, 1982, 1:05 pm: 5 IR 519; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-16-8 Prequalification renewal request; board decision; appeals

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 8. Acceptance or rejection of an applicant's request for initial prequalification or renewal shall be decided at the board's meeting, and the executive secretary shall thereafter carry out the administration of the board's decision including notifying each applicant of the board's action thereon.

Any applicant dissatisfied with the decision of the Board may, within fifteen (15) days after receiving such notification, request in writing a reconsideration of that decision and submit additional written evidence bearing on his qualification. The Certification Board will consider any such request within forty-five (45) days of receipt thereof. If the written evidence supports the contractor and a favorable decision is rendered, a revised certificate or written notice of reinstatement will be issued. (*Indiana Department of Administration; Public Works Division Sec P, 8; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.12; filed Feb 3, 1982, 1:05 pm: 5 IR 520; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 17. Application of Contractors and Sub-contractors
25 IAC 2-17-1 Submission of prequalification booklet; annual supplemental documentation

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 1. Contractors and subcontractors shall complete and submit a copy of the "prequalification booklet" every third year, but must annually submit, as a minimum a verified financial statement, list of projects under contract, and notice of any organizational changes. Other materials and/or forms may be submitted with the prequalification booklet as supplementary data, but no form may be submitted in lieu of the booklet when it is due. (*Indiana Department of Administration; Public Works Division Sec Q, 1; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.12; filed Feb 3, 1982, 1:05 pm: 5 IR 520; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-17-2 Annual financial statements; form; certificate forfeiture; grounds for application rejection

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-1-6; IC 4-13.6; IC 5-16-1-2

Sec. 2. Financial statements submitted annually by contractors and subcontractors with other renewal materials may be in the applicant's standard pamphlet form as prepared by their accountants, or may be transposed to the financial section of the prequalification booklet if that booklet is to be submitted. All statements must be complete and explicit. All financial statements must be verified as to their accuracy and legitimacy by a Certified Public Accountant (C.P.A.) or a licensed Public Accountant (P.A.) not directly affiliated with the applicant. All financial statements will be kept in confidence by the Certification Board and Public Works Division subject to IC 4-1-6.

The Board may, at any time during which a certificate is in effect, demand a new financial statement and if same is not forthcoming within sixty (60) days of the date of the request, the certificate held will be considered forfeited and the party concerned will not be permitted to bid on contracts implemented through Public Works until such a new statement has been received and acted upon by the Board.

If, at any time during the valid period of a certificate of qualification the latest statement on record with the Board ceases to represent fairly and substantially the financial position or the construction equipment of the contractor to whom the certificate was issued, it shall be the responsibility of that contractor to so notify the Board and to refrain from further bidding on Public Works projects until his qualification has been confirmed or revised. Failure to give such notice will constitute a violation of these rules and regulations [25 IAC 2-17].

The Certification Board reserves the right to require a personal interview with any contractor when considering qualification.

If the date of the financial statement is more than six (6) months old when submitted, the Board may request a new statement.

Different organizations controlled by the same owners and/or officers that desire prequalification must use financial statements of a common date. (*Indiana Department of Administration; Public Works Division Sec Q,2; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.12; filed Feb 3, 1982, 1:05 pm: 5 IR 520; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-17-3 Prequalification limited to field experience areas; data required

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 3. Applicant contractors shall be prequalified only in those areas in which their prequalification booklet indicates that they are experienced and investigation indicates satisfactory performance. Experience data given in the booklet, and in the interim renewal application shall specifically show each classification for which the contractor wishes to be qualified. (*Indiana Department of Administration; Public Works Division Sec Q,3; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.12; filed Feb 3, 1982, 1:05 pm: 5 IR 521; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-17-4 Method for determining base qualification rating; “unlimited” classification defined

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 4. A standard mathematical formula is described as being:

$10 \times (\text{Current Assets} - \text{Current Liabilities}) + 5 \times (\text{Net Worth} - \text{New Working Capital})$ will be applied to each applicant's financial statement to determine the “Base Qualification Rating”. Those contractors showing a base qualification rating of one hundred million or more (\$100,000,000) shall be classified as “UNLIMITED”. An experience and performance factor reduction of 25% will be made in the case of new applications applied to the base qualification rating, unless otherwise recommended by the State Architect, State Engineer, Deputy Director or Board Member. (*Indiana Department of Administration; Public Works Division Sec Q,4; filed Feb 29, 1972, 4:10 pm: Rules and Regs. 1973, p.13; filed Feb 3, 1982, 1:05 pm: 5 IR 521; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-17-5 Method for determining “total maximum qualification rating”; written agenda for meeting supplied

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 5. The “total maximum qualification rating” is determined by applying a plus or minus percentage, not exceeding 25%, to the base qualification rating. That percentage shall be determined in the investigation of references, past performance, reports

filed pertaining to the company (PQ-3), or on the basis of recommendations of the State Architect, State Engineer, Deputy Director, and board members. A copy of the agenda will be given to all of the aforementioned prior to the meeting to allow such recommendations to be made before action is taken by the Board. (*Indiana Department of Administration; Public Works Division Sec Q, 5; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.13; filed Feb 3, 1982, 1:05 pm: 5 IR 521; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-17-6 Prequalification denial; base qualification rating less than \$50,000

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 6. Prequalification will not be granted to contractors having current liabilities in excess of current assets or a "Base Qualification Rating" of less than fifty thousand dollars (\$50,000). (*Indiana Department of Administration; Public Works Division Sec Q, 6; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.13; filed Feb 3, 1982, 1:05 pm: 5 IR 522; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-17-7 Supplemental documentation; corporation's signing authority; out-of-state corporations

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 7. The initial application of a corporation shall be accompanied by a certified copy of the minutes covering the election of current officers and a certified copy of the official action assigning the current authority for individuals' personal signature to contracts of the corporation, such official actions may be either a portion of the original Articles of Incorporation or some subsequent official action of the stockholders or the board of directors. If personnel or authority for individuals' personal signature are changed in any manner, the Board shall be immediately notified and furnished with certified copies of appropriate documents.

An initial application submitted by an out-of-state (foreign) corporation must be accompanied by a copy of the certificate issued by the Indiana Secretary of State admitting them to do business in Indiana. Thereafter, a copy of the certificate will not be required, but current status with the Corporation's Division of the Secretary of State's office will be checked at the time of renewal, and any foreign corporation not in good standing will not be issued a prequalification certificate even though approved by the Board until good standing is verified. (*Indiana Department of Administration; Public Works Division; 25 IAC 2-17-7; filed Feb 3, 1982, 1:05 pm: 5 IR 522; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 18. Application of Designers

25 IAC 2-18-1 Annual prequalification renewal; prequalification booklet submission

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6; IC 5-16-1-2

Sec. 1. Designers must fully complete and annually submit the "Prequalification Booklet" for the purpose of yearly prequalification renewal. The designer applicant is urged to supply any new informational booklets or brochures relating to the capabilities of the applicant whenever such documents become available. However, such supplemental materials are not to be submitted in lieu of the prequalification application. (*Indiana Department of Administration; Public Works Division Sec R, 1; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.13; filed Feb 3, 1982, 1:05 pm: 5 IR 522; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-18-2 Certification in field of architecture; staff requirements

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 2. Designers will receive certification in the field of architecture only if a professional architect currently registered as such in Indiana is employed at least thirty (30) hours each week by the applicant firm and is listed in that capacity in the

prequalification booklet. The architect on whose qualifications certification is to be granted must also be shown as the architect in charge of at least three (3) projects listed in the experience data portion of the booklet. (*Indiana Department of Administration; Public Works Division Sec R,2; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.13; filed Feb 3, 1982, 1:05 pm: 5 IR 522; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-18-3 Certification in fields of professional engineering; certification in related nonlicensed fields

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 3. Certification will be granted only in those fields of engineering in which the applicant designer indicates that an Indiana Registered Professional (P.E.) is working at least thirty (30) hours a week as an employee of the applicant, and who is shown as the engineer in charge of at least three (3) projects listed in the experience data portion of the booklet.

Resumes or experience data outlines for each Designer will be accepted in lieu of the requirement that each must be listed as the architect or engineer in charge as specified in Section 2 and 3 above (25 IAC 2-18-2) and this section. Such information must show explicitly the specialties for which the applicant firm is requesting certification.

Applicant designers may be certified for more than one classification when classifications are closely related, i.e., Sanitary Engineering and Waste Water Engineering, or when one classification does not require licensing, i.e., Interior Design, or when one classification is Photogrammetry, or when the firm shows overwhelming evidence of the capability to satisfactorily handle classification combinations other than those previously mentioned. (*Indiana Department of Administration; Public Works Division Sec R,3; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.13; filed Feb 3, 1982, 1:05 pm: 5 IR 522; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-18-4 Certification of other nonlicensed fields

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 4. For those professional areas which are not registered in Indiana, but which are certified by the Board, the applicant designer must show a full time employee in each such field with sufficient training and adequate experience to satisfy the Board that certification should be granted. (*Indiana Department of Administration; Public Works Division Sec R,4; filed Feb 29, 1972, 4:10 pm; Rules and Regs. 1973, p.13; filed Feb 3, 1982, 1:05 pm: 5 IR 523; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

25 IAC 2-18-5 Joint venture application conditions

Authority: IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13.6

Sec. 5. Joint venture contract applications will be considered when the parties to the joint venture separately hold valid certification. (*Indiana Department of Administration; Public Works Division; 25 IAC 2-18-5; filed Feb 3, 1982, 1:05 pm: 5 IR 523; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

Rule 19. Minority Business Development; State Public Works (Repealed)

(*Repealed by Indiana Department of Administration; filed May 30, 2003, 11:00 a.m.: 26 IR 3313*)

Rule 20. Minority Business Development; State Procurement (Repealed)

(*Repealed by Indiana Department of Administration; filed May 30, 2003, 11:00 a.m.: 26 IR 3313*)

ARTICLE 3. STATE PERSONNEL DIVISION – NON-MERIT EMPLOYEES (TRANSFERRED)

NOTE: Transferred from the Indiana department of administration (25 IAC 3) to the state personnel department (31 IAC 1) by Acts 1981, P.L.30, SECTION 3 (IC 4-15-1.8-8). Effective July 1, 1981.

ARTICLE 4. OPERATION OF MOTOR VEHICLES

Rule 1. Limitation on Operation of Motor Vehicles

25 IAC 4-1-1 Prohibition of the operation of state vehicles while under the influence of alcohol or controlled substance

Authority: IC 4-13-1-4; IC 4-13-1-7

Affected: IC 4-13-1-4; IC 7.1-1-3-5; IC 35-48-1-9

Sec. 1. (a) All state employees, with the exception of law enforcement officers carrying out authorized undercover operations, are prohibited from operating state vehicles at any time with any measurable amount of alcohol from alcoholic beverages as defined in IC 7.1-1-3-5 or controlled substances as defined in IC 35-48-1-9 in their bodies.

(b) Alcohol or controlled substance detection may be accomplished by any of the following methods:

(1) blood test;

(2) breathalyzer; or

(3) urinalysis.

(c) Any other reasonable method may also be used for detection of alcohol or controlled substances.

(d) The violation of this section shall result in appropriate actions being taken by the Indiana department of administration concerning operation of state vehicles, up to permanent revocation of an employee's authorization to operate a state vehicle.

(e) The Indiana department of administration will also refer the matter to the agency which employs the individual, for such actions that agency deems appropriate under the administrative policies and procedures implemented by the state personnel department or that agency.

(f) These sanctions in no way limit what actions could be undertaken through appropriate civil or criminal statutes. (*Indiana Department of Administration; 25 IAC 4-1-1; filed Mar 12, 1991, 3:35 p.m.: 14 IR 1610; readopted filed Nov 20, 2001, 9:30 a.m.: 25 IR 1265*)

ARTICLE 5. MINORITY AND WOMEN'S BUSINESS ENTERPRISES

Rule 1. Scope of Activities

25 IAC 5-1-1 Duties of minority and women's business enterprises division

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13-16.5-2; IC 4-13.6; IC 5-22

Sec. 1. The duties of the minority and women's business enterprises division, hereinafter referred to as the "division", shall be as defined in IC 4-13-16.5-2(f). (*Indiana Department of Administration; 25 IAC 5-1-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3296*)

25 IAC 5-1-2 Duties of the deputy commissioner, minority and women's business enterprises

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-3; IC 4-13.5-1; IC 4-13.6; IC 4-13-16.5-3; IC 5-22

Sec. 2. The duties of the deputy commissioner of the division shall be as defined in IC 4-13-16.5-3. (*Indiana Department of Administration; 25 IAC 5-1-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3296*)

25 IAC 5-1-3 Policy statement

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) It is the policy of the state to provide an equal opportunity for existing and operating minority business enterprises and women's business enterprises to receive and participate in the state's procurement and contracting process. The department shall act on behalf of the state to actively promote, monitor, and enforce its MBE/WBE program.

(b) The deputy commissioner of the department, through the minority and women's business enterprises section of the

department, and in concert with the governor's commission on minority and women's business enterprises, shall be the final authority on all matters pertaining to the maintenance and administration of the MBE/WBE program and compliance thereto. (*Indiana Department of Administration; 25 IAC 5-1-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3296*)

Rule 2. Definitions

25 IAC 5-2-1 Definitions

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1-2; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 4-33-14; IC 5-22

Sec. 1. (a) The following definitions apply throughout this article:

(1) "Application for MBE/WBE program waiver" or "waiver application" means the document(s) submitted by a prime contractor to the state requesting the contractor's exemption from the contract goal and stating the reasons why the contractor requires the waiver.

(2) "Broker" means a business entity serving as an intermediary who negotiates contracts of purchase and sale, without assuming any risk of loss.

(3) "Commission" means the governor's commission on minority and women's business enterprises.

(4) "Commissioner" means the commissioner of the department of administration defined at IC 4-13-1-2.

(5) "Contract" means any contract awarded by a state agency for construction projects or the procurement of goods or services, including professional services.

(6) "Contract goal" means a targeted amount of participation as measured by the desired percentage of involvement by minority and women's business enterprises.

(7) "Contractor" means a person or business entity that contracts with a state agency to provide goods or services.

(8) "Department" means the Indiana department of administration.

(9) "Deputy commissioner" means the deputy commissioner for minority and women's business enterprises of the department as set forth in IC 4-13-16.5-1.

(10) "M/WBE compliance review committee" means the committee that is responsible for the appeal of specific contract issues. The committee consists of:

(A) the chairman of the governor's commission on minority and women's business enterprises;

(B) the general counsel of the department; and

(C) the director of the public works or procurement division of the department;

whichever is appropriate, or their respective designees.

(11) "MBE/WBE program waiver" or "waiver" means the document supplied by the state to the prime contractor that approves the application for MBE/WBE program waiver.

(12) "MBE/WBE subcontractor plan" or "plan" means the document supplied by prime contractors to the state (usually required at the time of most bid submittals), which indicates the means whereby the minority or women's business participation will be attained.

(13) "Minority business enterprise" or "MBE" means an individual, partnership, corporation, limited liability company, or joint venture of any kind that is owned and controlled by one (1) or more persons who are:

(A) United States citizens; and

(B) members of a minority group.

(14) "Minority group" means the following:

(A) Blacks.

(B) American Indians.

(C) Hispanics.

(D) Asian Americans.

(E) Other similar minority groups as defined by 13 CFR 124.103.

(15) "Offeror" means any business entity that makes an offer to enter into a binding contract for the provision of materials or services to a state agency.

(16) "Owned and controlled" means having:

- (A) ownership of at least fifty-one percent (51%) of the enterprise, including corporate stock of a corporation;
- (B) control over the management and active in the day-to-day operations of the business; and
- (C) an interest in the capital, assets, and profits and losses of the business proportionate to the percentage of ownership.
- (17) "Program" means the minority and women's business enterprises program as administered by the department.
- (18) "Qualifying member" means, for MBE goals, any member of a minority group and, for WBE goals, a woman.
- (19) "State agency" means any of the following:
 - (A) An authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative department of state government.
 - (B) An entity established by the general assembly as a body corporate and politic.
 - (C) A state educational institution.

The term does not include the state lottery commission or the Indiana gaming commission with respect to setting and enforcing goals for awarding contracts to minority and women's business enterprises. The term does not include the Indiana gaming commission to the extent the subject matter of these rules conflict [*sic.*, *conflicts*] with or are [*sic.*, *is*] otherwise covered by IC 4-33-14, et seq.

- (20) "Subcontractor" or "second tier contractor" means any person entering into a contract with a prime vendor to directly furnish services or supplies toward the contract.
- (21) "Supplier" or "distributor" means any business entity supplying materials, but no significant on-site labor is contributed in furtherance of the contract or to a vendor.
- (22) "Vendor" means any person or business entity that has entered into a binding contract for the provision of materials or services to a state agency.
- (23) "Women's business enterprise" or "WBE" means an individual, partnership, corporation, limited liability company, or joint venture of any kind that is owned and controlled by one (1) or more persons who are:
 - (A) United States citizens; and
 - (B) whose gender is female.

(b) A reference to a federal statute or regulation is a reference to the statute or regulation in effect January 1, 2001.

(c) Notwithstanding this section, with reference to business certification status as a broker or supplier, historic purchasing practices, standards for the industry, and risk of loss may be considered. (*Indiana Department of Administration; 25 IAC 5-2-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3296*)

Rule 3. Certification Standards

25 IAC 5-3-1 Certification policy

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. The department will act on behalf of the state to actively promote, monitor, and enforce the standards for certification of minority business enterprises and women's business enterprises. (*Indiana Department of Administration; 25 IAC 5-3-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3297*)

25 IAC 5-3-2 Application for certification as an MBE or a WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-14-3-4; IC 5-22

Sec. 2. (a) The enterprise seeking certification as an MBE or a WBE shall submit its application on the form or forms approved by the department, accompanied by all requested documentation.

(b) An enterprise seeking certification as an MBE or a WBE has the burden of demonstrating that it meets the requirements of this rule concerning ownership and control by qualifying members.

(c) The individual signing the application for certification shall be a qualifying member. The qualifying member or members are those whose participation is relied upon to meet the ownership and control requirements, and each shall certify as to his or her status as a qualifying member. The qualifying member signing the application for certification for not-for-profit enterprise must be

the highest-ranking official working in the enterprise on a day-to-day basis.

(d) An enterprises *[sic.]* seeking MBE or WBE certification shall cooperate fully with the department's requests for information and documentation relevant to the certification process. Failure to cooperate fully may result in denial of MBE or WBE certification.

(e) An enterprise seeking MBE or WBE certification has an affirmative obligation to disclose all material and relevant information affecting that's *[sic., that]* enterprise's eligibility for certification. Any material misrepresentation or omission may be grounds for denial of certification or may result in the issuance of an order to show cause why such certification should not be revoked.

(f) All documents submitted in connection with an application for certification as an MBE or WBE are subject to the Indiana Access to Public Records Act, IC 5-14-3. The department will maintain as confidential any tax returns, other financial information, and trade secret information as authorized under Indiana Code section 5-14-3-4(a).

(g) An applicant (an individual who is a qualifying member) can submit a maximum of two (2) applications per year. At any time, only one (1) application can be pending.

(h) If an enterprise withdraws its application prior to completion of the review process, it may reapply at any time, but the reapplication will be treated as a new application and considered in the order in which it is received.

(i) An enterprises *[sic.]* certified as an MBE or WBE as of the date these rule *[sic.]* become effective shall retain its certification until it expires, unless revoked as provided in this article.

(j) If an enterprise has an application for certification as an MBE or a WBE with the department at the date these rules become effective, the department will make its certification determination based on the rules that were in effect at the time the application was received. (*Indiana Department of Administration; 25 IAC 5-3-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3297*)

25 IAC 5-3-3 Certification standards regarding qualifying membership determination

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) In determining whether an individual asserting that he or she is a member of a minority group (for MBE certification) or a woman (for WBE certification), the department shall consider all the facts in the record, viewed as a whole.

(b) The department will rebuttably presume that a citizen of the United States who is a women or a member of a minority group is a qualifying member.

(c) Being born in a country does not, by itself, suffice to make an individual a member of a minority group.

(d) In a *[sic.]* making its determination regarding qualifying membership, the department may consider whether the person has historically held himself or herself out to be a qualifying member and whether the person is regarded as a qualifying member by the relevant community.

(e) The department may request such additional documentation as it may reasonably need to support an individual's claim that he or she is a member of a minority group or a woman. (*Indiana Department of Administration; 25 IAC 5-3-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3298*)

25 IAC 5-3-4 Ownership determinations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. (a) In determining whether a qualifying member owns an enterprise, the department shall consider all the facts in the record, viewed as a whole.

(b) To be an eligible MBE or WBE, an enterprise must be at least fifty-one percent (51%) owned by qualifying members. In the case of a:

(1) corporation, qualifying members must own at least fifty-one percent (51%) of each class of voting stock outstanding and fifty-one percent (51%) of the aggregate of all stock outstanding;

(2) partnership, fifty-one percent (51%) of each class of partnership interest must be owned by qualifying members, and such ownership must be reflected in the partnership agreement; and

(3) limited liability company, at least fifty-one percent (51%) of each class of membership interest must be owned by

qualifying members.

(c) An enterprise's ownership by qualifying members must be real, substantial, and continuing, going beyond any pro forma ownership reflected in ownership documents. The qualifying members must enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities used to evidence the ownership interest of a qualifying member shall be held directly by the qualifying member. Except as provided in this subsection, no securities or assets held in trust, or by any guardian for a minor, will be considered as held by a qualifying member in determining the ownership of an enterprise. However, securities or assets held in trust will be regarded as held by a qualifying member for the purpose of determining ownership of the enterprise if either of the following apply:

(1) The beneficial owner of securities or assets held in trust is a qualifying member, and the trustee is the same or another such individual.

(2) The beneficial owner of a trust is a qualifying member who, rather than the trustee, exercises effective control over the management, policymaking, and daily operational activities of the enterprise. Assets held in a revocable living trust may be counted only if the same qualifying member is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the qualifying member to acquire an ownership interest must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the enterprise or an owner who is not a qualifying member, or mere participation in an enterprise's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of business do not render an enterprise ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a qualifying member's contribution to acquire ownership:

(1) The owner's expertise must be as follows:

(A) In a specialized field.

(B) Of outstanding quality.

(C) In areas critical to the enterprise's operations.

(D) Indispensable to the enterprise's potential success.

(E) Specific to the type of work the enterprise performs.

(F) Documented in the records of the enterprise. These records must clearly show the contribution of expertise and its value to the enterprise.

(2) The individual whose expertise is relied upon must have a significant financial investment in the enterprise.

(g) In evaluating enterprise ownership, the department will deem the qualifying member to hold all interests in a business or other assets obtained by the qualifying member:

(1) as the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

(2) through inheritance, or otherwise because of the death of the former owner.

(h) In evaluating enterprise ownership, the department will disregard all interests in a business or other assets obtained by a qualifying member as the result of a gift or transfer without adequate consideration from any nonqualifying individual or non-MBE or WBE enterprise that is:

(A) involved in the same enterprise, or an affiliate of the enterprise, for which MBE or WBE certification is sought; or

(B) involved in the same or a substantially similar line of business; or

(C) engaged in an ongoing business relationship with the enterprise, or an affiliate of the enterprise, for which MBE or WBE certification is sought.

(2) To overcome this presumption and permit the interests or assets to be counted, the qualifying member must demonstrate that:

(A) the gift or transfer to the qualifying member was made for reasons other than obtaining certification as a MBE or WBE; and

(B) the qualifying member actually controls the management, policy, and operations of the enterprise, notwithstanding the continuing participation of a nonqualifying individual who made the gift or transfer.

(i) The department will apply the following rules in situations in which marital assets form a basis for ownership of an enterprise:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one (1) spouse, the ownership interest in the enterprise must be *[sic.]* deemed to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the enterprise is domiciled. The department may not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the by qualifying member of the applicant enterprise.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the enterprise must be included as part of the enterprise's application for MBE or WBE certification.

(3) The department must take into consideration financial implications of the transfer/renouncement. For example, if the renouncement is for rights to a home, the applicant shall provide documentation of the transfer with mortgage holder.

(j) The department will consider the following factors in determining the ownership of an enterprise; however, it will not regard a contribution of capital as failing to be real and substantial, or find an enterprise ineligible, solely because:

(1) A qualifying member acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in subsection (h).

(2) There is a provision for the cosignature of a spouse who is not a qualifying member on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents.

(3) Ownership of the enterprise or its assets is transferred for adequate consideration from a spouse who is not a qualifying member to a spouse who is such an individual. In this case, the department will scrutinize the ownership and control of an enterprise to ensure that it is owned and controlled, in substance as well as in form, by a qualifying member.

(k) Except as provided in this subsection, an enterprise that is not owned by qualifying members, but instead is owned by another enterprise, even an MBE or WBE enterprise, cannot be an eligible MBE or WBE.

(1) If qualifying members own and control an enterprise through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the department may certify the subsidiary if it otherwise meets all requirements of this subdivision. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) The department may certify such a subsidiary only if there is cumulatively fifty-one percent (51%) ownership of the subsidiary by qualifying members. The following examples illustrate how this cumulative ownership provision works:

(A) Qualifying members own one hundred percent (100%) of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified if it meets all other requirements.

(B) Qualifying members own one hundred percent (100%) of a holding company, which owns fifty-one percent (51%) of a subsidiary. The subsidiary may be certified if all other requirements are met.

(C) Qualifying members own eighty percent (80%) of a holding company, which in turn owns seventy percent (70%) of a subsidiary. In this case, the cumulative ownership of the subsidiary by qualifying members is fifty-six percent (56%) (eighty percent (80%) of the seventy percent (70%)). This is more than fifty-one percent (51%), so the department may certify the subsidiary if all other requirements are met.

(D) Same as examples in clause (B) or (C), but someone other than the qualifying members of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by qualifying members through the holding or parent company, the department cannot certify it because it fails to meet control requirements.

(E) Qualifying members own sixty percent (60%) of a holding company, which in turn owns fifty-one percent (51%) of a subsidiary. In this case, the cumulative ownership of the subsidiary by qualifying members is about thirty-one percent (31%). This is less than fifty-one percent (51%), so the department cannot certify the subsidiary.

(l) Recognition of an enterprise as a separate nonconsolidated entity for tax or corporate purposes is not necessarily sufficient to demonstrate that an enterprise is an independent business, owned and controlled by qualifying members.

(m) An enterprise that is owned by an Indian tribe, Alaska native corporation, or native Hawaiian organization as an entity, rather than by Indians, Alaska natives, or native Hawaiians as individuals, may be eligible for certification. Such an enterprise must

be controlled by qualifying members, as provided in this article and 13 CFR 124.103. (*Indiana Department of Administration*, 25 IAC 5-3-4; filed May 30, 2003, 11:00 a.m.: 26 IR 3298)

25 IAC 5-3-5 Control determinations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 5. (a) In determining whether qualifying members control an enterprise, the department will consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified as a MBE or WBE. An independent business is one the viability of which does not depend on its relationship with another enterprise or enterprises.

(1) In determining whether a potential MBE or WBE is an independent business, the department will scrutinize relationships with non-MBE or non-WBE enterprises in such areas as personnel, facilities, equipment, financial, bonding support, and other resources.

(2) The department must consider whether present or recent employer/employee relationships between the qualifying member of the potential MBE or WBE and non-MBE or WBE or persons associated with non-MBE or WBEs compromise the independence of the potential MBE or WBE.

(3) The department must examine the enterprise's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MBE or WBE enterprise.

(4) In considering factors related to the independence of a potential MBE or WBE, the department must consider the consistency of relationships between the potential MBE or WBE and non-MBE or WBE with customary industry practice.

(c) An MBE or WBE must not be subject to any formal or informal restrictions that limit the customary discretion of the qualifying members. There can be no restrictions through corporate charter provisions, bylaw provisions, contracts, or any other formal or informal devices, including, but not limited to, cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nonqualifying partners, conditions precedent or subsequent, executory agreements, voting trusts, or restrictions on or assignments of voting rights, that prevent the qualifying members, without the cooperation or vote of any nonqualifying individual, from making any business decision of the enterprise. This subsection does not preclude a spousal cosignature on documents as provided for in this section.

(d) The qualifying members must possess the power to direct or cause the direction of the management and policies of the enterprise and to make day-to-day as well as long term decisions on matters of management, policy, and operations.

(1) A qualifying member must hold the highest officer position in the enterprise, for example, chief executive officer or president.

(2) In a corporation, qualifying members must control the board of directors.

(3) In a partnership, one (1) or more qualifying members must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not qualifying members may be involved in an MBE or WBE as owners, managers, employees, stockholders, officers, and directors. Such individuals must not, however, possess or exercise the power to control the enterprise or be disproportionately responsible for its the *[sic]* operation.

(f) The qualifying members of the enterprise may delegate various areas of the management, policymaking, or daily operations to other participants in the enterprise, regardless of whether these participants are qualifying members. Such delegations of authority must be revocable, and the qualifying members must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the qualifying members in the enterprise's overall affairs must be such that the department can reasonably conclude that the qualifying members actually exercise control over the enterprise's operations, management, and policy.

(g) The qualifying members must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the enterprise is engaged and the enterprise's operations. The qualifying members are not required to have experience or expertise in every critical area of the enterprise's operations, or to have greater experience or expertise in a given field than managers or key employees. The qualifying members must have the ability to intelligently and critically evaluate information presented by other participants in the enterprise's activities and to use this information to make independent decisions concerning the enterprise's daily operations, management, and policymaking. Generally, expertise limited

to office management, administration, or bookkeeping functions unrelated to the principal business activities of the enterprise is insufficient to demonstrate control.

(h) If federal, state, or local law, statute, ordinance, or regulation requires an individual to have a particular license or other credential in order to own or control a certain type of enterprise, then the qualifying members who own and control a potential MBE or WBE of that type must possess the required license or credential. If federal, state, or local law does not require such a person to have such a license or credential to own or control an enterprise, the department may not deny certification solely on the ground that the person lacks the license or credential. However, the department may take into account the absence of the license or credential as a factor in determining whether the qualifying members actually control the enterprise.

(i) The department may consider differences in remuneration between the qualifying members and other participants in the enterprise in determining whether to certify an enterprise as a MBE or WBE. Such consideration shall be in the context of the duties of the persons involved, customary industry practice, the enterprise's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the enterprise.

(1) The department may determine that an enterprise is controlled by a qualifying member although that person's remuneration is lower than that of some other participants in the enterprise.

(2) In a case where a nonqualifying individual formerly controlled the enterprise, and a qualifying member now controls it, the department may consider a difference between the remuneration of the former and current controller of the enterprise as a factor in determining who controls the enterprise, particularly when the nonqualifying individual remains involved with the enterprise and continues to receive greater compensation than the qualifying member.

(j) In order to be deemed as controlling an enterprise, a qualifying member cannot engage in outside employment or other business interests that conflict with the management of the enterprise or prevent the individual from devoting sufficient time and attention to the affairs of the enterprise to control its activities. For example, absentee ownership of a business and part-time work in a full-time enterprise are not viewed as constituting control. However, an individual will be viewed as controlling a part-time business that operates only on evenings or weekends, or both, if the individual controls it all the time it is operating.

(k) The following are requirements concerning control of an enterprise run by a family:

(1) A qualifying member may control an enterprise even though one (1) or more of the individual's immediate family members (who themselves are not qualifying members) participate in the enterprise as a manager, employee, owner, or in another capacity. Except as otherwise provided in this subsection, the department must make a judgment about the control the qualifying member exercises vis-à-vis other persons involved in the business as it does in other situations, without regard to whether or not the other persons are immediate family members.

(2) If the department cannot determine whether a qualifying member, as distinct from the family as a whole, controls the enterprise, then the qualifying member has failed to carry his or her burden of proof concerning control, even though he or she may participate significantly in the enterprise's activities.

(l) Where an enterprise was formerly owned or controlled, or both, by a nonqualifying individual (whether or not an immediate family member), ownership or control, or both, was transferred to a qualifying member, and the nonqualifying individual remains involved with the enterprise in any capacity, the qualifying member now owning the enterprise must demonstrate that:

(1) The transfer of ownership or control, or both, to the qualifying member was made for reasons other than obtaining certification as an MBE or WBE.

(2) The qualifying member actually controls the management, policy, and operations of the enterprise, notwithstanding the continuing participation of a nonqualifying individual.

(m) In determining whether an enterprise is controlled by qualifying members, the department may consider whether the enterprise owns equipment necessary to perform its work. However, the department may not determine that an enterprise is not controlled by qualifying members solely because the enterprise leases, rather than owns, such equipment, where leasing equipment is a customary industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the enterprise.

(n) The department must grant certification to an enterprise only for specific types of work in which the qualifying members have the ability to control the enterprise. To become certified in an additional type of work, the enterprise must have been certified for at least six (6) months in its current type of work, or certified by the department for at least one (1) year, and demonstrate that its qualifying members are able to control the enterprise with respect to the newly-requested type of work. The department may not, in this situation, require that the enterprise be recertified or submit a new application for certification, but it must verify the qualifying member's control of the enterprise in the additional type of work. However, the department must apply the same standards

to additional types of work that were applied originally. Certification in these additional work areas are not guaranteed simply because the enterprise is currently certified. Further, there is a presumption against having more than three (3) industry variations in the same enterprise.

(o) An enterprise operating under a franchise or license agreement may be certified if it meets the standards in this part and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the department will generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be deemed controlled by qualified members, any nonqualifying partners must not have the power, without the specific written concurrence of the qualifying member, to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The qualifying members controlling an enterprise may use an employee leasing company. The use of such a company does not preclude the qualifying members from controlling the enterprise if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the leased employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

(r) There is a presumption against the ability to operate and control more than three (3) enterprises within the context of this article. (*Indiana Department of Administration; 25 IAC 5-3-5; filed May 30, 2003, 11:00 a.m.: 26 IR 3300*)

25 IAC 5-3-6 Other factors considered for certification

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6-4; IC 5-22

Sec. 6. (a) The department will consider whether an enterprise performs a commercially useful function in making decisions about whether to certify an enterprise as a MBE or WBE. Determination that an enterprise performs a commercially useful function will be made based on the following considerations:

(1) An MBE or WBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the MBE or WBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether an MBE or WBE is performing a commercially useful function, one must evaluate the amount of work subcontracted, industry practices, whether the amount the enterprise is to be paid under the contract is commensurate with the work it is actually performing and the credit claimed for its performance of the work, and other relevant factors.

(2) An MBE or WBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MBE or WBE participation. In determining whether an MBE or WBE is such an extra participant, one must examine similar transactions, particularly those in which MBEs or WBEs do not participate.

(3) In the case of construction contracts, if an MBE or WBE does not perform or exercise responsibility for at least the agency's requisite percent of the total cost of its contract with its own work force, or the MBE or WBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it is presumed that the enterprise is not performing a commercially useful function.

(b) The department may consider, in making certification decisions, whether an enterprise has exhibited a pattern of conduct indicating prior involvement in attempts to evade or subvert the intent or requirements of the MBE or WBE program.

(c) The department shall evaluate the eligibility of an enterprise on the basis of present circumstances. It will not refuse to certify an enterprise based solely on historical information indicating a lack of ownership or control by qualifying members in the past, if the enterprise currently meets the ownership and control standards of this part.

(d) The department will not require an MBE or WBE enterprise to be prequalified (or certified under the division of public works) as a condition for certification. Standards for prequalification and certification are made pursuant to 105 IAC 11 and IC 4-

13.6-4, respectively. However, if the prequalification (certification) is industry/trade-specific, the department will require all enterprises that participate in its contracts and subcontracts related to that area to be prequalified.

(e) The applicant for MBE or WBE certification must possess reasonable prospects for success in competing in the public sector. The department will deem an enterprise that has been in business for two (2) full years immediately prior to its date of application as possessing reasonable prospects for success in competing in the public sector.

(1) Income tax returns for each of the two (2) previous tax years must show operating revenues in the selected types of work for which the applicant is seeking certification.

(2) The department may waive the two (2) years in business requirement if each of the following conditions is met:

(A) The qualifying member or members have demonstrated management experience.

(B) The qualifying member or members have demonstrated technical experience to carry out type of business for which certification is sought.

(C) The qualifying member has a record of successful performance on contracts from governmental or nongovernmental sources in its primary area of certification.

(D) The applicant for certification as an MBE or a WBE has demonstrated, or can demonstrate, its ability to timely obtain the personnel, facilities, equipment, and any other requirements needed to perform contracts.

(Indiana Department of Administration; 25 IAC 5-3-6; filed May 30, 2003, 11:00 a.m.; 26 IR 3302)

25 IAC 5-3-7 Review by the department of applications for certification as an MBE or WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 7. (a) Certification process requirements are as follows:

(1) At a minimum, the department will take the following steps in determining whether an enterprise meets the standards for certification as an MBE or WBE:

(A) On-site visits. The department will:

(i) Make on-site visits during normal business hours to company headquarters with little or no advance notice in its efforts to make an accurate determination of the ownership and control of an enterprise. The department may interview the principal officers of the enterprise and review their resumes and work histories. The department may also perform an on-site visit to job sites if there are such sites on which the enterprise is working at the time of the eligibility investigation in its jurisdiction or local area.

(ii) With regards to out-of-state enterprises, the department may rely upon the site visit report of other recognized governmental entities with respect to an enterprise applying for certification.

(B) If the enterprise is a corporation, analyze the ownership of stock in the enterprise.

(C) Analyze the bonding and financial capacity of the enterprise.

(D) Determine the work history of the enterprise, including contracts it has received and work it has completed.

(E) Obtain a statement from the enterprise of the type of work it prefers to perform as part of the MBE or WBE program and its preferred locations for performing the work, if any.

(F) Obtain or compile a list of the equipment owned by or available to the enterprise and the licenses the enterprise and its key personnel possess to perform the work it seeks to do as part of the program.

(G) Require potential enterprises to complete and submit an appropriate application form.

(2) The applicant will be required to certify the completeness, accuracy, and truthfulness of the information submitted by way of notarized affidavit.

(3) The department must review all information on the application form prior to making a decision about the eligibility of the enterprise. If the department determines that the form clearly indicates the applicant is ineligible for certification, it may waive the on-site requirement.

(4) The department may request, at any time that it deems necessary, further information or clarification of any matter relating to an enterprise's qualification as an MBE or a WBE.

(5) The department must conduct preliminary audits of accounting records, project files, and any legal documents that may be pertinent or relevant to the certification of an enterprise as an MBE or a WBE.

(6) The department will make recommendations to the appropriate agencies and departments based on the totality of its

investigation, including document reviews, interviews, site visits, and audits regarding the enterprise seeking certification as an MBE or a WBE.

(7) The department will make recommendations to the appropriate agencies and departments for further investigation if misrepresentation is suspected.

(8) The department will make a determination on applications for certification within ninety (90) of the completion of its on-site investigation or, in the case of an out-of-state enterprise, within ninety (90) days of the receipt of its home state investigation report. The department may extend this time period once, for no more than an additional sixty (60) days, upon written notice to the enterprise, explaining fully and specifically the reasons for the extension. Failure to make a determination by the applicable deadline under this paragraph may be deemed, by the applicant, a constructive denial of the application, and the basis on which the enterprise may petition for review under 25 IAC 5-4-2.

(b) Applications from MBE or WBE enterprises domiciled outside of Indiana require the following, in addition to the items in this article:

(1) The enterprise must be qualified and in good standing with the state of its organization.

(2) The home state shall provide the on-site interview that was conducted in association with the certification. Certification of out-of-state applicants by the department is conditional to the out-of-state applicant meeting the standards of certification set forth in this article. The department reserves the right to grant or deny certification to an MBE or WBE with current, in-place certification status with other governmental agencies and departments with recognized certification authority.

(c) An applicant for certification as an MBE or a WBE may notify the department that it is seeking similar certification from another agency or certifying entity and request that the department provide a copy of its application documentation and report of site visit to such agency or entity. The notice may be on a form prescribed by the department. The department will respond to two (2) requests a year at no charge to the applicant. Additional requests will be honored only if the applicant pays the department's then-prevailing copying costs and postage. (*Indiana Department of Administration; 25 IAC 5-3-7; filed May 30, 2003, 11:00 a.m.: 26 IR 3303*)

25 IAC 5-3-8 Rules affecting an enterprise's responsibility after being certified as an MBE or a WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 8. (a) An enterprise's responsibilities after certification include, but are not necessarily limited to, the responsibilities set forth in this section. Failure to comply with the provisions of this section may result in an order to show cause why MBE or WBE certification should not be revoked.

(b) Each MBE-certified enterprise and each WBE-certified enterprise must notify the department in writing within thirty (30) days of each change affecting its qualifying membership, ownership, or control requirements, and of any other material change to the information provided in the application form.

(1) Changes in contact information must be reported, including address, telephone number, and personnel.

(2) Management responsibility among members of a limited liability company must be reported.

(3) Supporting documentation must be attached describing in detail the nature of such changes.

The notice must take the form of a notarized affidavit.

(c) A certified MBE or WBE enterprise must provide, every year on the anniversary of the date of its certification, a notarized affidavit stating that there have been no changes to enterprise's qualifying members, ownership, or control requirements, or any other material change to the information provided in its application form, except for changes about which the enterprise has previously notified the department. The affidavit shall specifically affirm that the enterprise continues to meet standards for certification under these rules.

(d) Once the department has certified an MBE or WBE, the enterprise shall remain certified for a period of at three (3) years unless or until its certification has been revoked. The department may not require firms to reapply for certification as a condition of continuing to participate in the program during this three (3) year period unless the factual basis on which the certification was made changes. (*Indiana Department of Administration; 25 IAC 5-3-8; filed May 30, 2003, 11:00 a.m.: 26 IR 3304*)

Rule 4. Procedures Governing Denial of Application for Certification or Revocation of Certification as an MBE or a WBE

25 IAC 5-4-1 Revocation of an enterprise's certification as an MBE or a WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) This section establishes standards for processing a complaint issued to a challenged enterprise concerning the possible revocation of its certification.

(b) Requirements for ineligibility complaints are as follows:

(1) Any person may file with the department a written complaint alleging that a currently certified enterprise is ineligible and specifying the alleged reasons why the enterprise is ineligible. The department is not required to accept a general allegation that an enterprise is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the enterprise is ineligible and should not continue to be certified.

(2) The department must review its records concerning the enterprise, any material provided by the enterprise and the complainant, and other relevant information. The department may request additional information from the enterprise or conduct any other investigation deemed necessary.

(3) If the department determines, based on this review, that there is reasonable cause to believe that the enterprise is ineligible, the department must provide written notice to the enterprise that it proposes to find the enterprise ineligible, setting forth the reasons for the proposed determination. If the department determines that such reasonable cause does not exist, it must notify the complainant and the enterprise in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) If, based on notification by the enterprise of a change in its circumstances or other information that comes to the attention of the department that there is reasonable cause to believe that a currently certified enterprise is ineligible, the department must provide written notice to the enterprise that it proposes to find the enterprise ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(d) Requirements for complaints from other state agencies are as follows:

(1) If a state agency determines that information in an enterprise's records, or other information available to that agency, provides reasonable cause to believe that a certified enterprise does not meet the eligibility criteria of this subsection, the state agency may request that the department initiate a proceeding to remove the enterprise's certification.

(2) The state agency must provide the department all relevant documentation or other information.

(e) The department may issue an order requiring an enterprise to show cause why its certification as an MBE or a WBE should not be revoked as provided in subsection (a), (b), or (c). In such case the enterprise shall be entitled to a hearing as set forth in 25 IAC 5-4-2 [section 2 of this rule].

(f) The department must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the department at the time of its certification of the enterprise. It may base such a decision only on one (1) or more of the following:

(1) Changes in the enterprise's circumstances since the certification of the enterprise by the department that render the enterprise unable to meet the eligibility standards of this rule.

(2) Information or evidence not available to the department at the time the enterprise was certified.

(3) Information that was concealed or misrepresented by the enterprise in previous certification actions by a department.

(4) A change in the certification standards or requirements since the enterprise was certified.

(5) A documented finding that the department's determination to certify the enterprise was factually erroneous.

(g) During the pendency [*sic., pendency*] of a proceeding to determine if an enterprise's WBE or MBE should be revoked or suspended, the enterprise shall retain its status until a final order revoking certification is issued by the commission.

(h) When an enterprise's certification as an MBE or a WBE has been revoked and is no longer subject to judicial review, the department will take the following action relative to prime contractors who have relied in good faith upon the certification of the disqualified entity:

(1) When a prime contractor has made a commitment to use the disqualified enterprise, or there has been a commitment to use the enterprise as a prime contractor, but a subcontract or contract has not been executed before the order to show cause provided for in subsection (e) has been issued, the ineligible enterprise does not count toward the contract goal or overall goal. The prime contractor is to meet the contract goal with an eligible enterprise or demonstrate that it has made a good faith effort

to do so.

(2) If a prime contractor has executed a subcontract with the enterprise before the department has issued a notice to show cause, the prime contractor may continue to use the enterprise on the contract and may continue to receive credit toward its goal for the enterprise's work. In this case, or in a case where a prime contract has been awarded to an enterprise that is subsequently decertified, the portion of the decertified enterprise's performance of the contract remaining after the notice of its ineligibility shall not count toward the overall goal, but may count toward the contract goal.

(Indiana Department of Administration; 25 IAC 5-4-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3305)

25 IAC 5-4-2 Review of determinations by the department regarding certification as an MBE or a WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 4-21.5-3-5; IC 5-22

Sec. 2. (a) An enterprise:

(1) whose application for certification as an MBE or as a WBE has been denied; or

(2) to which the department has issued an order to show cause why its MBE or WBE certification should not be revoked; shall be given notice of such action and shall be entitled to petition for review under the Indiana Administrative Orders and Procedures Act, IC 4-21.5, et seq.

(b) The administrative law judge or judges appointed to hear any matter arising under this rule shall have had no prior involvement in the review or preliminary determination of the matter heard.

(c) The ultimate authority under this article is the commission.

(d) When an enterprise is denied certification, it cannot reapply for certification for nine (9) months. The time period for reapplication begins to run at the time the enterprise's administrative and judicial remedies are exhausted. *(Indiana Department of Administration; 25 IAC 5-4-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

Rule 5. MBE/WBE Participation in Procurement and Contracting; Prime Contractors

25 IAC 5-5-1 Policy; procurement and contracting

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-1.3-3; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) It is the policy of the state to provide an equal opportunity for minority and women's business enterprises to participate in the state's procurement and contracting processes as prime contractors.

(b) Pursuant to IC 4-13-1.3-3, the department may delegate its authority to a state agency. *(Indiana Department of Administration; 25 IAC 5-5-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

25 IAC 5-5-2 Activities to achieve participation

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. The department shall perform activities to provide minority and women's business enterprises the opportunity to participate in the state's award of purchases and contracts. *(Indiana Department of Administration; 25 IAC 5-5-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

25 IAC 5-5-3 Outreach and assessment

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) The department shall perform activities to outreach to minority and women's business enterprises. The department shall assess where and when the programs are most valuable to these enterprises.

(b) The department shall provide information on qualifications necessary for enterprises to compete for bid opportunities.

(Indiana Department of Administration; 25 IAC 5-5-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)

25 IAC 5-5-4 Promoting MBE/WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. The department shall provide and promote opportunities for minorities and women to participate in procurement and contracting opportunities as prime vendors. *(Indiana Department of Administration; 25 IAC 5-5-4; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

25 IAC 5-5-5 Monitoring MBE/WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6-4; IC 4-13.6-5; IC 5-22

Sec. 5. (a) In monitoring MBE/WBE participation in prime contract awards, the department shall do the following as it pertains to procurement and contracting at the agency level pursuant to IC 4-13.6-4 and IC 4-13.6-5:

- (1) Establish a standard method to record solicitations of these procurements.
- (2) The agency shall provide the department with such information as the department deems reasonably necessary to carry out the purposes of this rule, including:
 - (A) Information on the contractors contacted, including name, address, telephone number, fax, and e-mail.
 - (B) The contractor's ethnicity and gender.
 - (C) Whether or not the contractor is a small business.
 - (D) Whether or not the contractor is new to the state's procurement process.
 - (E) The contractor's bid amount (or that the contractor chose not to bid).
 - (F) The person completing the form.
 - (G) The personnel responsible for the solicitation.

(b) To monitor MBE/WBE participation in prime contract awards, the department shall do the following as it pertains to contracts other than procurement and contracting at the agency level:

- (1) Monitor the lists of enterprises bidding to develop potential strategies to increase the number of bidders. The form for such recording should include, but not be limited to, the following:
 - (A) Information on the contractors, including name, address, telephone number, fax, and e-mail.
 - (B) The contractor's ethnicity and gender.
 - (C) The reason or reasons the company has chosen not to bid.
- (2) Establish a system to debrief bidders who do not win state contracts. The method of debriefing may include:
 - (A) Feedback to MBE and WBE bidders in general to ensure they are aware of the availability of information regarding bid tabulations.
 - (B) Work with small business assistance organizations to counsel MBE and WBE bidders in general on strengthening future proposals and understanding of state requirements.
- (3) Maintain a list of bidders, consisting of information regarding all enterprises that bid or quote contracts. This list shall be used to compile and track those enterprises that have shown an interest in participating in the state's procurement and contracting processes. The information to be compiled shall include, but may not be limited to, the following:
 - (A) Company name, address, phone number, fax, and e-mail.
 - (B) Owner's name, gender, and ethnicity.
 - (C) If new to the state bid process, age of enterprise and gross annual receipts.
 - (D) For this bid, name of proposed subcontractors proposed, including, for each company, the company's name, owner's name, gender, and ethnicity.

(Indiana Department of Administration; 25 IAC 5-5-5; filed May 30, 2003, 11:00 a.m.: 26 IR 3307)

25 IAC 5-5-6 Reporting MBE and WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 6. All state agencies, as defined in IC 4-13-16.5-1, shall report to the department its award of prime contracts to MBEs and WBEs on a quarterly basis. The form of the report shall be in compliance with policies and procedures of the department. *(Indiana Department of Administration; 25 IAC 5-5-6; filed May 30, 2003, 11:00 a.m.: 26 IR 3307)*

Rule 6. MBE and WBE Participation in Procurement and Contracting; Subcontractors

25 IAC 5-6-1 Promoting MBE and WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-1.3-3; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) The department shall provide and promote opportunities for minorities and women to participate in procurement and contracting opportunities as subcontractors.

(b) Pursuant to IC 4-13-1.3-3, the department may delegate its authority to a state agency. *(Indiana Department of Administration; 25 IAC 5-6-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3307)*

25 IAC 5-6-2 Monitoring MBE and WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. (a) In monitoring the participation of MBEs or WBEs as subcontractors, the department shall conduct preproject meetings with all subcontractors and prime contractors. The department shall determine which projects will require a preproject meeting. Items of discussion at the meeting shall include, but may not be limited to, the following:

- (1) Subcontractors will learn when their services are likely to be needed.
- (2) The department will explain the state's prompt payment program.
- (3) The department will provide a review of MBE/WBE program requirements.
- (4) The department will explain the state's nondiscrimination and antidiscrimination laws.

(b) All contract amendments and change order requests must include an explanation of how MBEs and WBEs will be used and the percentage represented above the current contract amount.

(c) Notify appropriate subcontractors when contracts are revised upward through amendments or change orders, or both.

(d) All prime contractors, including MBE and WBE prime contractors, must meet the contract goals through use of subcontractors. MBE and WBE prime contractors will get no credit toward the contract goal for the use of their own workforce. *(Indiana Department of Administration; 25 IAC 5-6-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3307)*

25 IAC 5-6-3 Reporting MBE and WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) In addition to requirements mentioned in other areas of the part, prime contractors shall be required to report all subcontractor participation, that is, MBE/WBE-certified subcontractors and non-MBE/WBE certified subcontractors. The report shall include, but may not be limited to, the following:

- (1) Company name, address, telephone number, fax, and e-mail.
 - (2) Owner's name, gender, and type of qualifying membership.
 - (3) Name of contact person employed by the enterprise.
 - (4) Work the enterprise will perform and the approximate date when the subcontractors' work will commence (individually).
 - (5) Contract amount for services to be performed (individually).
- (b) Each state agency, as defined in IC 4-13-16.5-1, shall report to the department its use of MBEs and WBEs as

subcontractors on a quarterly basis. The form of the report shall be in compliance with policies and procedures of the department. (*Indiana Department of Administration; 25 IAC 5-6-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3308*)

25 IAC 5-6-4 Procedure for subcontractor bid submission

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. (a) In a case where the bidder has arranged to subcontract one hundred percent (100%) or more of the subcontractor goal to MBEs and WBEs, a completed MBE/WBE subcontractor plan shall be submitted along with the other required bid documents.

(1) All MBE and WBE subcontractors must be validated by the department prior to the award of the contract. The completed plan shall include the following information:

(A) Name of the enterprise to be employed.

(B) Phone number of the enterprise.

(C) Name of a contact person from the enterprise.

(D) Work the enterprise will perform and the approximate date when the MBEs work will commence.

(E) Contract amount for services that will be performed.

(2) In a case where the bidder has had the MBE/WBE subcontractor plan approved, where that bidder has been awarded the contract, and where the awarded contract is one hundred thousand dollars (\$100,000) or more, the bidder shall submit participation reports monthly, or at more frequent intervals, as may be requested.

(3) The department reserves the right to periodically require progress reports from the contractor on projects less than one hundred thousand dollars (\$100,000) regarding continuing MBE and WBE participation.

(b) Purchases from MBE or WBE suppliers are allowed for MBE or WBE credit in the program. The maximum allowable credit will be limited to sixty percent (60%) of the total project goal. The supplier must perform a commercially useful function.

(c) In a case where the bidder has been unable to arrange to subcontract one hundred percent (100%) of the subcontract goal, but has been able to arrange to subcontract some of the goal to MBEs or WBEs, both a completed MBE/WBE subcontractor plan and a completed application for MBE/WBE program waiver shall be submitted with the other required bid documents, as prescribed. All MBE and WBE subcontractors must be validated by the department prior to the award of the contract. All forms are to be completed as described in subsection (a).

(d) In a case where the bidder has been unable to arrange to subcontract the goal percentage or in a case where no MBE or WBE participation is expected to occur, a completed application for MBE/WBE program waiver shall be submitted, along with the other required bid documents, as prescribed. The application for program waiver shall be used to demonstrate the bidder's efforts to employ MBEs and WBEs on the project. The application shall include the following information:

(1) Names of the MBE and WBE enterprises that the bidder has contacted or been contacted by.

(2) Persons working at the enterprises who were contacted.

(3) Phone numbers of the enterprises.

(4) Types of contacts or communications.

(5) An explanation of the results obtained, such as price not competitive, unable to contact, or no response.

The state reserves the right to verify and seek further clarification of any information submitted.

(e) Compliance with this rule is considered to be a demonstration of the bidder's responsiveness and responsibility. Therefore, all statements shall be complete, legible, true, and correct and shall not omit material facts. Failure to provide complete and accurate MBE and WBE subcontractor plans using minority and women's business enterprises validated as MBEs and WBEs by the department or failure to provide applications for MBE/WBE program waivers, or both, may be the basis for rejection of the bid. (*Indiana Department of Administration; 25 IAC 5-6-4; filed May 30, 2003, 11:00 a.m.: 26 IR 3308*)

Rule 7. Compliance

25 IAC 5-7-1 Policy

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) The results of a Statistical Analysis of Utilization, conducted in accordance with IC 4-13-16.5-1, will determine the availability of qualifying minority and women's business enterprises in the marketplace.

(b) Should the Statistical Analysis of Utilization find statistically significant disparities in state contractual expenditures in specifically defined areas, as compared to the ready, willing, and able minority and women's business enterprises in the state, the department shall institute goals for procurement and contracting to remedy the disparate findings of the study. (*Indiana Department of Administration; 25 IAC 5-7-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3309*)

25 IAC 5-7-2 Parties to whom this rule applies

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. (a) This rule applies to all state agencies defined in IC 4-13-16.5-1 and 25 IAC 5-2-1(a)(19).

(b) This rule does not apply to state agencies whose purchases and contracts are not addressed in an applicable Statistical Analysis of Utilization. However, such state agencies shall provide reports to the department of MBE and WBE procurement and contracting. This information shall be incorporated as data for the next Statistical Analysis of Utilization. The state agency shall not be exempt from that point forward. (*Indiana Department of Administration; 25 IAC 5-7-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3309*)

25 IAC 5-7-3 Goal setting

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) The goal setting shall be subject to the following provisions:

(1) The goals shall be updated annually, during the month of March, to go into effect July 1 of the same year.

(2) The goals shall reflect current utilization and availability.

(3) The goals will apply to procurements and contracts as awarded, and to change orders, amendments, and other modifications to the contract, which affect contract value.

(4) In accordance with IC 4-13-16.5-1, the findings of discrimination shall be updated, and the continuance of the goals shall be subject to the results of that review.

(b) Upon approval of the commission, the department may set overall MBE and WBE goals, which may be met through the use of prime contractors, subcontractors, suppliers, joint ventures, or other arrangements that afford meaningful opportunities for MBE and WBE participation.

(c) Upon approval of the commission, the department may set specific MBE and WBE goals in the areas of construction, professional services, suppliers, and other business services based on the disparate findings of the Statistical Analysis of Utilization.

(d) Goals set by the department shall incorporate the availability of MBEs and WBEs to perform the work and the availability of MBEs and WBEs in the location where the work is to be done.

(e) Subgoals may be set, wherein specific race and gender goals are set, incorporating the findings of the study, and in accordance with applicable laws.

(f) Goals may vary on individual contracts. However, the combined participation shall represent the MBE and WBE participation for the year. (*Indiana Department of Administration; 25 IAC 5-7-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3309*)

25 IAC 5-7-4 Compliance monitoring

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. (a) In the management of this program, the department shall exercise its rights to employ all available administrative actions and remedies to ensure that the goals and intent of the program are successfully met. Therefore, the department shall serve as the final authority in the authentication, acceptance, and certification of MBE and WBE enterprises according to the criteria established in this article.

(b) The department shall be final authority in the review, acceptance, and approval of all MBE and WBE affidavits and

subcontractor plans, and applications for MBE/WBE program waivers, which are included in bid packages. In the performance of these duties, the department shall:

- (1) Review all MBE and WBE affidavits and subcontractor plans, and applications for MBE or WBE program waivers, after the bid opening and before the award of the contract, in order to verify the authenticity of the documents and the successful bidder's adherence to the rules and regulations set forth in the contract documents.
- (2) Contact and interview the successful bidder or its listed subcontractors and material suppliers if further information is required to establish authenticity and to issue approval of the submitted documentation.
- (3) Conduct audits, as necessary, of the accounting records of the successful bidder and the MBE and WBE participants to determine and establish their authenticity for the final acceptance and approval of the documentation.
- (4) Issue an official NOTICE OF REJECTION when it has been determined that the successful bidder has not complied with the instructions set forth in the contract documents and this rule. The department may direct the successful bidder to submit revised documentation within five (5) working days or file for an official application for MBE/WBE program waiver. The department shall reserve the right to reject any and all bids when the successful bidder fails to respond to the department's request.
- (5) Issue an official NOTICE OF CONDITIONAL APPROVAL when the following has been determined:
 - (A) That the successful bidder has demonstrated a good faith effort towards compliance to the program, but when one
 - (1) or more of the MBE or WBE enterprises listed does not conform to the guidelines of this article.
 - (B) When the levels of participation do not reach the goal of the project.

After a review of the situation and circumstances, the successful bidder may be directed to submit a revised MBE or WBE subcontractor plan or may be granted an official MBE/WBE program waiver, thereby allowing an exception to the goal for the project or any portion thereof.

- (6) Issue an approval of the MBE or WBE subcontractor plan when it has been determined that the successful bidder has achieved compliance with the project goal.
- (7) Issue an MBE/WBE program waiver from all or part of the project goal when it has been determined that the successful bidder has employed a good faith effort towards compliance to the program and when it has been determined that the realization of the project goal will not be feasible because of circumstances which are beyond the control of the bidder.
- (8) Make recommendations to the appropriate agencies for further investigation if misrepresentation is suspected.
- (c) The department is the final authority in the review and acceptance of the successful bidder's MBE and WBE program participation reports. Therefore, the department reserves the right to do the following:
 - (1) Receive copies, on a timely basis or upon demand, of all reports for the expressed purpose of review, acceptance, or rejection. Timeliness of submittal, accuracy, and completeness will be subject to close scrutiny in the execution of this process.
 - (2) Conduct interviews with the appropriate personnel or designated representatives from an enterprise, as necessary, to determine and establish authenticity for acceptance of the reports.
 - (3) Conduct audits of the accounting records of an enterprise to determine accuracy in reporting and to establish authenticity for acceptance of the reports.
 - (4) Direct the successful bidder and the MBE and WBE participants, or all, to provide, as necessary, additional documentation to establish authenticity for acceptance of the reports.
 - (5) Make recommendations to the appropriate agencies for further investigation if misrepresentation is suspected.
 - (d) Because the attainment of the project goal has been established through contractual provisions with the prime contractor, the department shall consider the prime contractor to be the sole source of responsibility for goal attainment and project administration and shall, therefore, be held accountable for the actions of all of its subcontractors, including those subcontractors who have subcontracted work to MBE and WBE contractors or who have purchased materials from MBE and WBE suppliers.
 - (e) The department may employ its authority to make determinations of responsiveness and responsibility based on the actions of the subcontractors regarding adherence to Indiana laws and rules. (*Indiana Department of Administration; 25 IAC 5-7-4; filed May 30, 2003, 11:00 a.m.: 26 IR 3309*)

25 IAC 5-7-5 Application for MBE/WBE program waiver

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 5. (a) In cases where the contractor is unable to meet the project goal, the contractor may petition the department for relief from that goal by filing an application for MBE/WBE program waiver. The application for MBE/WBE program waiver shall show all reasonable good faith efforts that were made by the contractor for the purpose of fulfilling the project goal. Such reasonable efforts shall include, but may not be limited to, the following:

(1) Documentation of direct contact or negotiations with MBEs and WBEs for specific contracting opportunities, the actions taken shall be reported in a manner that will include the following items:

(A) A detailed statement of the efforts made to negotiate with MBEs and WBEs, including the following:

(i) The names, addresses, and telephone numbers of MBEs and WBEs contacted.

(ii) A detailed statement of the reason why prospective agreements were not reached.

(B) A detailed statement of the efforts made to select portions of the work proposed to be performed by MBEs and WBEs in order to increase the likelihood of achieving the stated goal.

(2) Documentation of any advertising that the contractor performed in the search for prospective MBEs and WBEs for the contract.

(3) Documentation of any notifications that the contractor provided to minority business assistance agencies for the purpose of locating prospective MBEs and WBEs for the contract.

(4) Documentation of the contractor's efforts to research other possible areas of participation, including, but not limited to, any of the following:

(A) Suppliers.

(B) Shipping or transport enterprises.

(C) Engineering enterprises.

(D) Any other role that may contribute to the production and delivery of the product or service specified in the contract.

(5) Documentation regarding the contractor's affirmative action policies or programs as they pertain to the utilization of MBEs and WBEs. This documentation should also provide an explanation of the methods used to carry out the affirmative action policies.

(6) Documentation relevant to any other efforts the contractor has made to assist MBEs and WBEs in overcoming the traditional barriers of participation in the industry affected by the contract.

(b) When considering an application for MBE/WBE program waiver, the department will consider the following, including, but not limited to:

(1) The methods utilized by the contractor.

(2) The time the contractor has allowed for a meaningful response to its solicitations.

(3) Statements received from MBEs and WBEs who have been listed as having been contacted by the contractor.

(c) The contractor shall maintain adequate records of all relevant data with respect to the utilization and attempted utilization of MBEs and WBEs and shall provide full access to these records to the department upon its request to inspect them. (*Indiana Department of Administration; 25 IAC 5-7-5; filed May 30, 2003, 11:00 a.m.; 26 IR 3310*)

25 IAC 5-7-6 Grant of waiver from project goal

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 6. Upon review and analysis of the documentation supplied to the department by the contractor, a determination will be made and the contractor will be promptly notified of the results. Such results may include the following:

(1) Notification that the contractor has been granted a waiver from the project goal and has been authorized to proceed without any MBE or WBE participation on the contract.

(2) Notification that the contractor has been granted a partial waiver from the project goal and has been authorized to proceed when MBE and WBE participation is greater than zero (0), but less than the project goal.

(3) Notification that further information will be required before a final determination may be made.

(4) Notification that the application for MBE/WBE program waiver has not been granted. In such a case, the following action may result:

(A) The contractor may be required to provide further information.

(B) The contractor's bid may be rejected.

(Indiana Department of Administration; 25 IAC 5-7-6; filed May 30, 2003, 11:00 a.m.: 26 IR 3311)

25 IAC 5-7-7 Appeals process for bid rejection or denial of waiver

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 7. (a) Upon notification that the application for MBE program waiver has been denied, the contractor may request a hearing with the MBE compliance review committee. The request for the hearing shall be directed to:

M/WBE Compliance Review Committee
c/o Indiana Department of Administration
Indiana Government Center-South
402 West Washington Street
Indianapolis, Indiana 46204.

(b) In the appeals process, the committee shall be responsible for the following activities:

(1) Arrange a time and place to hear the contractor's appeal within five (5) working days of the date of the receipt of the contractor's request for the hearing.

(2) Provide the contractor with every opportunity to present the reason for the appeal.

(3) Review and discuss all of the information at hand, including the following:

(A) MBE or WBE availability.

(B) The contractor's original efforts towards MBE and WBE utilization.

(C) Statements from MBEs or WBEs listed in the documentation supplied by the contractor.

(D) The arguments offered by the contractor at the hearing.

(4) Arrive at a final determination within five (5) working days after the conclusion of the appeal hearing.

(c) If the contractor is dissatisfied with the decision made by the M/WBE compliance review committee, the contractor may submit to the commissioner within five (5) working days after receipt of the committee's decision, a written request for review and reconsideration, stating with particularity the basis of its objections. The request for review may be accompanied by such additional written material as the contractor deems relevant to the review. The commissioner, or his or her designee, will consider the request and issue a written decision within ten (10) working days after receipt of all material. Failure of the commissioner to respond within ten (10) working days will be deemed a confirmation of the committee's decision. *(Indiana Department of Administration; 25 IAC 5-7-7; filed May 30, 2003, 11:00 a.m.: 26 IR 3311)*

25 IAC 5-7-8 Sanctions; contractors

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10; IC 35-43-5-9; IC 35-44-2-1

Sec. 8. (a) In the event of a violation of this rule, the department shall notify the contractor of the violations and will seek a course of action to correct them. The selected course of action may include the recommendation for the imposition of sanctions for material breach of contract if any of the following are determined:

(1) The contractor has not demonstrated a good faith effort to comply with this rule.

(2) The contractor has failed to cooperate in providing information regarding its good faith efforts to comply with this rule.

(3) The contractor provides false or misleading information concerning its minority business enterprise contracting activity or in relation to the contractor's good faith efforts to comply with this rule.

(4) The contractor fails to make prompt payment to a minority business for services, materials, or labor, whether with respect to the present contract or a previous contract between the contractor and the minority business, unless the contractor, in good faith, contests the payment or any part of it. The contractor fails to promptly pay the uncontested part to the minority business in the event the contractor, in good faith, contests part of a payment.

(5) The business enterprise provides false or misleading information concerning its status as a bona fide entity, which is owned and actively controlled by racial minorities.

(6) The contractor subjects an MBE or WBE to unlawful discriminatory conduct.

(b) In the event that it is determined that a violation of this rule has occurred, the department may elect to immediately employ

one (1) or more of the following sanctions:

- (1) Withholding payments on the specific contract in which the deficiency is known to exist until such time that satisfactory corrective measures are made.
- (2) Adjustment to payments due or the permanent withholding of retainages of the specific contract in which the deficiency is known to exist.
- (3) Suspension or termination of the specific contract in which the deficiency is known to exist. In the event that this sanction is employed, the contractor will be held liable for any consequential damages arising from the suspension or termination of the contract, including damages caused as a result of the delay or from increased prices incurred in securing the performance of the balance of the work by other contractors.
- (4) Recommendation to the certification board to revoke the contractor's certification status with the public works division of the department. This recommendation may result in the suspension or revocation of the contractor's ability to perform on future state contracts for a period no longer than thirty-six (36) months.
- (5) Suspension, revocation, or denial of the MBE or WBE certification and eligibility to participate in the MBE or WBE program for a period of not more than thirty-six (36) months.

(c) In the event that sanctions are required, they may be employed immediately. Suspension or stay is in the sole discretion of the commissioner.

(d) In the event that the contractor has provided false or misleading information, the department may elect to provide the information to the appropriate investigating agencies for investigation and enforcement of any possible criminal violations or relevant statutes under IC 35-43-5-9 or IC 35-44-2-1.

(e) In the event that the contractor fails to pay the minority business in a timely manner or fails to satisfactorily resolve any outstanding claims, the department may elect to withhold the disputed amount from the payments due to the contractor and may elect to suspend or terminate the contract.

(f) In the event that the minority business enterprise has provided false or misleading information, the department may elect to provide the information to the appropriate investigating agencies for investigation and enforcement of any possible criminal violations of relevant statutes. (*Indiana Department of Administration; 25 IAC 5-7-8; filed May 30, 2003, 11:00 a.m.: 26 IR 3312*)

25 IAC 5-7-9 Appeals process for violations ruling or sanctions imposed

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 9. (a) Upon notification of the determination of rules violations or sanctions imposed, the contractor may request a hearing before the MBE compliance review committee. The request for the hearing of an appeal shall be directed to:

M/WBE Compliance Review Committee
c/o Indiana Department of Administration
Indiana Government Center-South
402 West Washington Street
Indianapolis, Indiana 46204.

(b) In the appeals process, the committee shall be responsible for the following activities:

- (1) Arrange a time and place to hear the contractor's appeal within five (5) working days of the date of the receipt of the contractor's request for the hearing.
- (2) Provide the contractor with every opportunity to present the basis for the appeal.
- (3) Review and discuss all of the information at hand and the arguments offered by the contractor at the hearing.
- (4) Arrive at a final determination within five (5) working days after the conclusion of the hearing.

(c) If the contractor is dissatisfied with the decision made by the M/WBE compliance review committee, the contractor may submit to the commissioner within five (5) working days after receipt of the committee's decision, a written request for review and reconsideration, stating with particularity the basis of its objections. The request for review may be accompanied by such additional written material as the contractor deems relevant to the review. The commissioner, or his or her designee, will consider the request and issue a written decision within ten (10) working days after receipt of all material. Failure of the commissioner to respond within ten (10) working days will be deemed a confirmation of the committee's decision. (*Indiana Department of Administration; 25 IAC 5-7-9; filed May 30, 2003, 11:00 a.m.: 26 IR 3312*)

Rule 8. Commission Members

25 IAC 5-8-1 Ethics of commission members

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. Commission members shall abide by all applicable state statutes, administrative rules, policies, and guidelines regarding ethical conduct. (*Indiana Department of Administration; 25 IAC 5-8-1; filed May 30, 2003, 11:00 a.m.; 26 IR 3313*)

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