

603 KAR 2:015. Prequalification for construction, certificate of eligibility, and contract claims dispute.

RELATES TO: KRS 13B, 45A.245, 61.878(1)(c), 176.090-176.110, 176.130-176.220

STATUTORY AUTHORITY: KRS 174.080, 176.140(2)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 176.140 requires the cabinet to establish administrative regulations in order to determine the eligibility of bidders for construction contracts with the Department of Highways. This administrative regulation establishes the requirements for an applicant to obtain a certificate of eligibility with the cabinet. This administrative regulation also establishes the hearing procedures for a contract claims dispute.

Section 1. Definitions.

- (1) "Cabinet" means the Transportation Cabinet.
- (2) "Contract" means a competitively bid contract between the contractor and the department pursuant to KRS Chapter 45A and 176.090 through 176.110.
- (3) "Contractor" means the person, corporation, partnership, or joint venture that enters into a contract with the department for highway maintenance or construction.
- (4) "Maximum eligibility amount" means the maximum amount of uncompleted prime contract work authorized at one (1) time.

Section 2. Certificate of Eligibility.

- (1)
 - (a) A contractor bidding on a construction or maintenance project, or accepting a subcontract on a construction or maintenance project of the department, shall be prequalified and possess a certificate of eligibility issued by the department to bid on construction projects.
 - (b) The certificate shall state the maximum eligibility amount and types of work for which the contractor shall be qualified.
 1. The department may, for reasons of practicality, waive the requirements established in subsection (1)(a) and (b) on a project not specifically involving the construction or maintenance of a public road in connection with the letting of a contract if the requirement is not mandated by KRS 176.130.
 2. The waiver shall be included in the notice to contractors and the bid proposal for the project.
- (2) The Commissioner of Highways shall appoint a Construction Prequalification Committee composed of department employees to review each application and make a recommendation to the State Highway Engineer concerning the eligibility of a contractor to bid on a department construction or maintenance contract.

Section 3. Application for Certificate of Eligibility.

- (1) A contractor desiring to procure a certificate shall submit a completed Application for Certificate of Eligibility, TC 14-1, notarized by a notary who is not an officer of the company, to the Division of Construction Procurement. The applicant shall provide:
 - (a) Information regarding the applicant's ability to perform the types of work for which eligibility is requested;
 - (b) Construction experience resumes of the applicant's principal officers and key personnel;
 - (c) A description of the applicant's plant and equipment;
 - (d) Financial statements prepared as of the close of the previous fiscal year for an established company, or to reflect the current financial status of a newly established contractor applicant; and
 - (e) A certificate of authority if required by KRS 176.150(4).

(2)

(a) An applicant desiring eligibility in excess of \$1,000,000 shall submit financial statements presented in accordance with generally accepted accounting principles and audited by a certified public accounting firm.

(b) The audit shall be performed in accordance with generally accepted auditing standards.

(c) The applicant's financial statements shall include supplemental financial information if requested by the department.

(d) The financial statements for an applicant desiring eligibility of \$1,000,000 or less shall be accompanied by a review report issued by a certified public accounting firm or a compilation report or balance sheet issued by a certified public accounting firm or an accountant.

(3)

(a) Pursuant to KRS 61.878(1)(c), the department shall not make the application information required in this section available to the public.

(b) Pursuant to KRS 176.210, the department may make lists of qualified bidders public.

Section 4. Method of Computing Maximum Eligibility Amount.

(1)

(a) The allowable current net assets as determined from the financial statements, plus the cash surrender value, less loans, of life insurance on which the applicant is the beneficiary, excluding policies with other beneficiaries, shall be multiplied by a factor of twelve (12) to establish the net current assets factor.

(b) The book value of owned equipment shall be multiplied by a factor of six (6) to establish the equipment factor.

(c) The equipment factor shall be added to the net current assets factor to determine the maximum capacity factor of the contractor.

(2) The contractor's percentage rating shall be established by the department by evaluating the contractor's organization and experience, plant and equipment, and prior construction performance in accordance with the maximum percentages established in paragraphs (a) through (c) of this subsection.

(a) Organization and experience shall be twenty (20) percent.

(b) Plant and equipment shall be thirty (30) percent.

(c) Performance shall be fifty (50) percent.

(3)

(a) The maximum eligibility amount shall be determined by multiplying the contractor's percentage rating and the maximum capacity factor. The maximum capacity factor shall not exceed \$1,000,000 if unaudited financials have been submitted.

(b) A contractor's current eligibility amount shall be the net difference between the contractor's maximum eligibility amount as shown on the certificate of eligibility issued by the department and the total value of uncompleted prime contract work charged to the contractor, regardless of the location and with whom the contractor is contracted.

Section 5. Issuance of Certificate of Eligibility.

(1)

(a) The Construction Prequalification Committee shall review each application for a certificate of eligibility and make a recommendation of eligibility to the State Highway Engineer.

(b) The State Highway Engineer shall issue a determination of eligibility, based on KRS 176.130 through 176.220 and this administrative regulation, within thirty (30)

calendar days after receipt of the application unless the application is deferred as established in Section 6(3) of this administrative regulation.

(c) Upon receiving a separate written request from a contractor not prequalified with the department indicating the contractor's intent to bid on a specific federal-aid project that has been advertised for a bid opening within the thirty (30) day period, the department shall review the application and make a determination of eligibility, based on KRS 176.130 through 176.220 and this administrative regulation, within fifteen (15) calendar days.

(2) A certificate of eligibility shall terminate 120 calendar days after the end of the applicant's fiscal year unless the certificate is suspended or revoked prior to that time.

(a) An applicant shall file a new application pursuant to Section 3 of this administrative regulation within ninety (90) calendar days after the end of the applicant's fiscal year.

(b) The department shall review the application and approve or disapprove the issuance of a new certificate of eligibility within thirty (30) calendar days of the date of receipt by the department.

(3) The certificate of eligibility in effect as of the bid opening date shall constitute the basis for determining the eligibility of a bidder.

(4) An applicant may, in regard to the department's decision on its application:

(a) Request reconsideration of the department's decision pursuant to Section 6 of this administrative regulation; or

(b) Appeal the department's decision pursuant to Section 9 of this administrative regulation.

Section 6. Reconsideration of Decisions.

(1)

(a)

1. An applicant may request reconsideration of a decision of the Construction Prequalification Committee if the applicant is denied a certificate of eligibility or disagrees with the maximum eligibility amount or the types of work established in its certificate of eligibility.

2. An applicant may request reconsideration of a department decision to suspend or revoke the certificate of eligibility or to reduce the maximum eligibility amount.

(b) A request for reconsideration shall be submitted in writing to the department within ten (10) calendar days of the applicant's receipt of the notice of the department's action.

(c) A request for reconsideration shall state the basis of the request and be supported by information and evidence that indicates why a certificate of eligibility should be issued or why the certificate of eligibility should be amended.

(d) The Construction Prequalification Committee shall review the request and may contact the applicant for clarification or expansion of the submitted information. The committee shall make a recommendation to the State Highway Engineer.

(e) The Department of Highways shall notify the applicant of the determination within thirty (30) calendar days after receipt of the request for reconsideration.

(f) If the Department of Highways does not concur with the reconsideration request of the applicant, the applicant shall be notified of his or her right to an administrative hearing pursuant to Section 9 of this administrative regulation.

(2)

(a) An applicant denied a certificate of eligibility may submit a new application for reconsideration.

(b) The department shall consider the new application and notify the applicant of the action taken within thirty (30) calendar days after receipt of the application.

(3)

(a) An application that has been deferred by the department until the applicant settles an outstanding debt to the Commonwealth, completes a project, or satisfies prior concerns about work performance on a project shall remain in the possession of the department until the reason for deferral is resolved.

(b)

1. An applicant shall be notified of a deferral within ten (10) calendar days after action is taken by the department to defer the application.

2. The applicant shall be notified of his or her right to an administrative hearing regarding the deferral.

(4)

(a) An interim application may be submitted if there has been a substantial increase in the net current assets of the applicant and the applicant wishes to apply for an increase in the maximum eligibility shown on the certificate of eligibility.

(b) The interim application shall contain a financial statement certified in the same manner as the statements submitted by the applicant at the close of the previous fiscal year.

(c) The department shall review the interim application and notify the applicant of the department's determination within thirty (30) calendar days after receipt of the application.

(5)

(a) A certificate holder, upon receipt of a certified mail request from the department, shall submit an interim financial statement or current information relating to the applicant's organization, equipment, and work status.

(b) The information requested shall be submitted within thirty (30) calendar days after receipt of the request. Failure to provide the information requested shall constitute a basis for the suspension or revocation of a certificate of eligibility.

(6) An applicant may request an administrative hearing if the applicant is denied a certificate of eligibility, the application is deferred, or the applicant disagrees with the maximum eligibility amount or the types of work listed in the certificate of eligibility.

(7) To request an administrative hearing, an applicant shall notify the department in writing within ten (10) calendar days after receipt of the denial or certificate of eligibility.

Section 7. Revocation.

(1) A certificate of eligibility shall be subject to suspension, revocation, or a reduction in the maximum eligibility amount upon receipt of information or evidence that a holder of a certificate of eligibility has failed to perform satisfactorily by failure to comply with the laws, administrative regulations, or specifications applicable to a contract or subcontract.

(2) A notice to the certificate holder stating the grounds on which the action is proposed, shall be sent by certified mail.

(3) A request for reconsideration pursuant to Section 6 of this administrative regulation, or a request for an administrative hearing, shall be submitted by the certificate holder in writing within ten (10) calendar days of the receipt of notice of a decision by the cabinet. If a written request is not received within ten (10) calendar days, the proposed action shall become final.

Section 8. Administrative Claims Process.

(1) The cabinet shall not consider a claim for extra work as established in the edition of the Standard Specifications for Road and Bridge Construction applicable to the contract between the cabinet and the contractor unless the contractor has submitted a completed Notice of Potential Claim, TC 63-77, to the engineer before beginning the disputed work.

(2) A notice of claim against the cabinet for delay shall be submitted in writing to the engineer on a completed Notice of Potential Claim, TC 63-77 within ten (10) calendar days of the date the contractor knew or should have known of the existence of the claim

as based on daily records, contractor records, or applicable correspondence. A notice of claim presented to the cabinet by the contractor after ten (10) calendar days shall not be considered for payment by the cabinet.

(3) After receipt of Notice of Potential Claim, TC 63-77, the cabinet shall respond to the contractor with Acknowledgement of Notice of Potential Claim, TC 63-78.

(4) For claims involving extra work, the contractor shall submit to the engineer a summary of the force account forms that identify each operation affected, and the specific locations where work is affected, no later than fourteen (14) calendar days after filing the Notice of Potential Claim TC 63-77, and on a weekly basis thereafter.

(5) If the contractor's records indicate costs that are greater than those on record with the cabinet, the engineer shall notify the contractor in writing.

(a) A contractor shall respond to the engineer within three (3) working days if he or she disagrees with the findings of the engineer.

(b) If the contractor fails to respond, the records of the cabinet shall control.

(6) For claims involving delay, the contractor shall submit the following in writing no later than fourteen (14) calendar days after filing the Notice of Potential Claim, TC 63-77, and on a weekly basis thereafter:

(a) Information regarding the potential effect to the schedule caused by the delay;

(b) Identification of the operations that have been, or will be delayed;

(c) The possible mitigating actions and the additional costs or time to implement the mitigating actions;

(d) An explanation of how the department's act or omission delayed the operation and an estimation of the amount of time necessary to complete the project; and

(e) An itemization of the extra costs incurred including:

1. How the extra costs relate to the delay and how they were calculated and measured;

2. An identification of the project employees for whom the costs are being compiled; and

3. An identification of the contractor's equipment by manufacturer and the numbers of the items of equipment for which costs have been compiled.

(7) A contractor may request additional time or a different submittal schedule, such as biweekly or monthly, by submitting a written request to the engineer. Approval or denial of the request shall be issued by the engineer within seven (7) calendar days of receipt of the request.

(8)

(a) If the contractor submits the claim to the engineer, the engineer, in consultation with the district transportation engineering branch manager, shall attempt to resolve the dispute with the contractor within sixty (60) calendar days of the date of receipt of the submitted claim from the contractor

(b) If the claim is not resolved by the engineer, then the claim shall be submitted to the director, Division of Construction, who shall have ninety (90) calendar days from the date of submission to make the final determination.

(c) If the matter is not resolved by the engineer and the contractor and prior to making a final determination on the matter, the director, Division of Construction shall convene an informal settlement conference with the contractor for the purpose of either settling the dispute or identifying the issues that need resolution. If the settlement conference is unsuccessful, the director, Division of Construction, shall notify the contractor in writing of the cabinet's decision regarding the contractor's claim.

(d) If the engineer or the director, Division of Construction, fails to render a decision within the time limits established in this section, the inaction shall be deemed a denial of the claim by the cabinet, and the contractor may proceed with the administrative hearing process pursuant to Section 9 of this administrative regulation. If a decision is

not rendered within the time limits established in paragraphs (a) and (b) of this subsection, the cabinet shall bear all costs associated with the hearing officer.

(9) The contractor shall request an administrative hearing pursuant to KRS Chapter 13B within thirty (30) calendar days of the date of the notification of the decision by the cabinet.

(10)

(a) Upon the agreement in writing of both parties, the parties may engage in formal nonbinding mediation of the dispute with a mediator agreeable to both parties.

(b) The parties participating in the mediation shall each pay one-half (1/2) of the costs associated with the mediator.

(11) If mediation is agreed upon by the parties, all time limits related to the continuing administrative process shall be stayed until either the cabinet or the contractor submits written notice to the other that they are terminating the mediation process. The time limits previously stayed shall commence to run upon the date of the written notice.

Section 9. Hearing Procedure.

(1) A request for an administrative hearing pursuant to the provisions of this administrative regulation shall be in writing and mailed to the Kentucky Transportation Cabinet, State Highway Engineer, Department of Highways, 200 Mero Street, Frankfort, Kentucky 40622.

(2) A written request for an administrative hearing shall be submitted to the State Highway Engineer within thirty (30) calendar days of the date of the decision by the director, Division of Construction.

(3) A request for an administrative hearing that is not submitted timely to the cabinet shall be denied, and the decision by the director, Division of Construction, shall stand.

(4) The secretary of the Transportation Cabinet, after receiving the report and recommendation of the hearing examiner, may accept the report and recommendation in its entirety, or reject or modify the findings and recommendations of the hearing examiner as established in a final order pursuant to KRS Chapter 13B.

(5) The contractor shall be notified by final order of the secretary's decision.

(6) The contractor shall have appeal rights pursuant to KRS Chapter 13B.

(7) The contractor shall reimburse the cabinet one-half (1/2) of the expenses of the hearing officer within thirty (30) calendar days after the date of the entry of the final order by the Secretary of Transportation. If a contractor fails to pay its portion of the hearing officer expenses, the cabinet shall withhold an amount due to the contractor from a current or future project.

(8) Pursuant to KRS 45A.245, a contractor may forego the KRS Chapter 13B hearing and file a lawsuit in Frankfort, Kentucky in the Franklin County Circuit Court.

Section 10. Material Incorporated by Reference.

(1) The following material is incorporated by reference:

(a) "Application for Certificate of Eligibility", TC 14-1, February, 2017;

(b) "Notice of Potential Claim", TC 63-77, November, 2018;

(c) "Acknowledgement of Notice of Potential Claim", TC 63-78, November, 2018;

(d) "Standard Specifications for Road and Bridge Construction", March 1, 2004;

(e) "Standard Specification for Road and Bridge Construction", December 14, 2008;

(f) "Standard Specification for Road and Bridge Construction", June 15, 2012;

(g) "Standard Specifications for Road and Bridge Construction, January 1, 2019.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Kentucky Transportation Cabinet, Department of Highways, Division of Construction Procurement, 200 Mero Street, Frankfort, Kentucky 40622. The office hours are 8 a.m. to 4:30 p.m. on weekdays. The office telephone number is (502) 564-3500.

(3) This material may also be found on the cabinet's website at <https://transportation.ky.gov/Construction/Pages/Kentucky-Standard-Specifications.aspx>. (HIWA-CE; 1 Ky.R. 809; eff. 5-14-1975; 3 Ky.R. 538; eff. 3-2-1977; 5 Ky.R. 686; eff. 8-6-80; 11 Ky.R. 1869; eff. 7-9-1985; 14 Ky.R. 171; eff. 9-10-1987; 1645; eff. 3-10-1988; 23 Ky.R. 1014; 1596; eff. 10-1-1996; 26 Ky.R. 1700; eff. 5-22-2000; 45 Ky.R. 2173, 2665; eff. 4-5-2019.)