



Department of Transportation
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MEMORANDUM

TO: Darin Bergquist
FROM: Karla L. Engle
DATE: August 17, 2020
RE: August 27, 2020 Commission Meeting

The Department of Transportation asks the Transportation Commission to approve amendments to Administrative Rules of South Dakota Article 70:07 – Highway construction contracts.

Copies of the following documents are enclosed with this memo for the commission's consideration:

1. The proposed rules; and
2. The Rules Presentation Format Form, listing the procedural steps that have been taken so far in the rule adoption process.

Any written comments that are timely received will be provided to the commission prior to the meeting on August 27, 2020.

Thank you.

KLE
Enclosures

70:07:01:01. Definitions. ~~Terms As~~ used in chapters 70:07:01 to 70:07:04, ~~inclusive, have~~
the following meanings:

- (1) "Awarding authority," means a public or private authority that awards construction contracts;
- (2) "Business," means a natural person or sole proprietor proprietorship ~~doing business that~~
performs work as a contractor or subcontractor or a partnership, association, corporation, or other entity formed for the purpose of ~~doing business~~ performing work as a contractor or subcontractor;
- (3) "Commission," means the South Dakota Transportation Commission;
- (4) "Committee," means the classification and rating committee established by § 70:07:02:01;
- (5) "Construction contract," means the written agreement between the department and the contractor setting forth the obligations of the parties for the performance of the prescribed work, including the invitation for bids, proposal, contract form, contract bond, standard ~~specification~~
specifications, supplemental specifications, special provisions, general and detailed plans, and notice to proceed and any addendum, change order and agreement that is required to complete construction of the work, including any authorized extension of the contract, all of which constitute one instrument, for the improvement of the highway system;
- (6) "Contract crime," means a violation of a state law, a federal law, or a rule, regulation, or order of a federal or state department or agency pertaining to the construction, maintenance, repair, or supervision of highways or to fraud, theft, embezzlement, bribery, forgery, misrepresentation, making false statements, falsification or destruction of records, or any other criminal offense in connection with obtaining, attempting to obtain, or performing a public or private contract or subcontract;
- (7) "Contractor," means a ~~person~~ business to whom the commission has awarded a department construction contract;

(8) "Conviction," means any of the following accepted and recorded by a court:

(a) A plea of guilty;

(b) A verdict of guilty by a jury or a finding of guilt by a court; or

(c) A civil verdict or civil judgment against a person in which a civil penalty is imposed on the person as a result of a contract crime; ~~or~~

~~—— (d) A plea or verdict of guilty or a civil judgment in which a civil penalty is imposed on a person as a result of a contract crime;~~

(9) "Current bidding capacity," means the maximum dollar amount of work for which a prospective bidder may submit bids at any given bid letting;

(10) "Debar," means to disqualify from entering into or ~~receiving~~ being awarded a department construction contract or from serving as a contractor or subcontractor under a department construction contract;

(11) "Department," means the South Dakota Department of Transportation;

(12) "Maximum bidding capacity rating," means the maximum dollar amount of work a contractor may have under contract at any one time, either as principal or subcontractor, regardless of whom the work is for or where it is located, as authorized by the committee;

(13) "Person," ~~a business as defined in this section or~~ means a natural person;

(14) "Principal," means an officer, director, or partner of a business or an employee or shareholder engaged in management of the business;

(15) "Prospective bidder," means a person proposing to bid or bidding on a department construction contract;

(16) "Secretary," means the secretary of the South Dakota Department of Transportation;

(17) "Suspend," means to temporarily disqualify from entering into or ~~receiving~~ being awarded a department construction contract or from serving as a contractor or subcontractor under a department construction contract;

(18) "Working capital," means the difference between a contractor's current assets and current liabilities as classified on the contractor's audited financial statement plus 80 percent of the book value of the construction equipment listed in the contractor's prequalification statement and financial statement, plus committee-approved lines of credit.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:01, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

CHAPTER 70:07:02

CLASSIFICATION AND BIDDING CAPACITY RATING

Section

- 70:07:02:01 Classification and rating committee -- Membership -- Powers and duties.
- 70:07:02:02 Committee to keep record of proceedings.
- 70:07:02:03 Classification and maximum bidding capacity rating.
- 70:07:02:04 Procedure for obtaining classification and capacity rating.
- 70:07:02:05 Financial records confidential.
- 70:07:02:06 Time limit for statements.
- 70:07:02:07 Preference for work classification.

- 70:07:02:08 ~~Work classifications~~ classification.
- 70:07:02:09 ~~Maximum~~ Work classification and maximum bidding capacity rating.
- 70:07:02:10 Effective period of work classification and rating.
- 70:07:02:11 Determination of current bidding capacity of prospective bidders.
- 70:07:02:12 ~~Allowable deductions for determining maximum bidding capacity rating~~ Repealed.
- 70:07:02:13 Ineligibility for violation of laws, rules, or orders.
- 70:07:02:14 Repealed.
- 70:07:02:15 ~~Ineligibility following grant of rating~~ Repealed.
- 70:07:02:16 Procedure for review of decision of committee.
- 70:07:02:17 Reclassification procedure.
- 70:07:02:18 ~~Forfeit~~ Submission of rating supplemental information.
- 70:07:02:19 ~~Renewal of prospective bidder prequalification~~ Repealed.
- 70:07:02:20 Prior experience requirements.

70:07:02:01. Classification and rating committee -- Membership -- Powers and duties.

The classification and rating committee ~~consists of four persons~~ shall consist of four members from the department selected by the commission. The committee may act for the ~~commission~~ department on all matters specified in this chapter. The secretary may appoint ~~a temporary alternate~~ alternates to serve if a committee member is members are unavailable.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 10 SDR 30, effective October 4, 1983; 13 SDR 129, 13 SDR 134, effective July 1, 1987; 15 SDR 142, effective March 26, 1989; transferred from § 70:01:05:22, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:03. Classification and maximum bidding capacity rating. A Unless the amount being bid is less than \$250,000, a prospective bidder shall obtain a work classification and maximum bidding capacity rating granted by the committee pursuant to this chapter before bidding the bid opening on a state highway construction contract unless the amount being bid is less than \$200,000.

Source: SL 1975, ch 16, § 1; 6 SDR 109, effective May 29, 1980; 8 SDR 45, effective October 28, 1981; 8 SDR 170, effective June 21, 1982; 13 SDR 159, effective May 3, 1987; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:02, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:04. Procedure for obtaining classification and capacity rating. To obtain or renew a work classification and maximum bidding capacity rating a prospective bidder shall submit a prequalification statement to the committee, on a form approved by the department. ~~The~~ In the prequalification statement, the prospective bidder shall include in the prequalification statement a description of the prospective bidder's equipment, organization, prior experience, and any suspension or debarment or pending proposed suspension or debarment by a state or federal any governmental agency from bidding on construction projects. At its discretion, the committee may request additional information.

In addition to the prospective bidder's prequalification statement, the prospective bidder shall furnish ~~audited financial details~~ documentation in accordance with either of the following:

(1) The prospective bidder may furnish a certification of surety from a bonding firm authorized to do business in this state stating the maximum bonding coverage the surety will issue on the

prospective bidder's behalf for both a single contract and for all of the prospective bidder's work including uncompleted contracts; or

(2) The prospective bidder may submit a separate statement of financial position audited by an independent certified public accountant. The opinion page of the audit statement shall include the audit firm's name, address, telephone number, and signature of a member of the firm.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 8 SDR 98, effective February 24, 1982; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:03, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:06. Time limit for statements. ~~A prospective bidder shall be prequalified before the bid opening. If a prospective bidder's prequalification rating expires before the bid opening, or the prospective bidder is requesting initial prequalification, the prospective bidder shall submit a completed prequalification statement to the committee. The A prospective bidder who wishes to receive or renew a work classification and maximum bidding capacity rating shall submit the prequalification statement must be received by and financial documentation to the committee at the Becker Hansen Building at 700 East Broadway Avenue in Pierre at least 14 days before the day of the letting. A prequalification rating must be approved by the committee before the bid opening.~~

~~Requests to add work types or modify bidding capacity are considered a new prequalification statement submission and must meet the 14-day requirement.~~

~~A line of credit submitted to increase bidding capacity must be received by the committee before 11:00 a.m. of the last working day of the week preceding the letting. If the Legislature or the Governor declares any part of the last working day of the week preceding the letting to be a holiday,~~

~~the request must be received before 11:00 a.m. of the preceding day. opening of the prospective bidder's bid, unless a shorter time frame is approved by the committee.~~

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 8 SDR 170, effective June 21, 1982; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 0:01:05:04, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

Cross-References: ~~Ineligibility following grant of rating, § 70:07:02:15;~~ Reclassification procedure, § 70:07:02:17.

70:07:02:07. Preference for work classification. Each completed prospective bidder prequalification statement must indicate the types of work for which classification or classifications of work is requested, but the indication is not binding upon the committee.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:05, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:08. Work classifications classification. Types of work are classified as follows:

- (1) Major grading;
- (2) Minor grading;
- (3) Portland cement concrete paving;
- (4) Portland cement concrete repair (spall repair, joint repair, or pavement grinding);

- (5) Asphalt concrete paving and microsurfacing;
- (6) Asphalt surface treatment and asphalt crack sealing;
- (7) New bridge construction;
- (8) Bridge rehabilitation-~~(, including~~ deck overlays, fatigue retrofit, steel and concrete repair, epoxy chip seal, ~~or~~ and rail retrofit);
- (9) Minor structure construction-~~(, including~~ cast in place box culverts, pre-cast multi-beam deck bridges, ~~or~~ and mechanically stabilized earth (~~MSE~~) large panel retaining walls);
- (10) Lighting and signals;
- (11) Signing, delineation, and pavement marking;
- (12) Underground work and utilities-~~(, including~~ storm sewer, sanitary sewer, waterline, drainage pipe, ~~or~~ and precast box culvert);
- (13) Incidental construction-~~(, including~~ fencing, guardrail, railroad crossings, ~~MSE~~ mechanically stabilized earth modular block retaining walls, gravel surfacing, base course, landscaping, ~~or~~ and erosion control);
- (14) Miscellaneous concrete construction-~~(including~~ sidewalk, bike path, multi-use path, ~~or~~ and curb and gutter);
- (15) Bridge painting; and
- (16) High friction surface treatment and bridge deck polymer chip seal.

The committee may approve a prospective bidder in one or more types of work.

The committee may prequalify a prospective bidder on a project by project basis for one or more types of work or specialty work not specifically covered by the foregoing classifications.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:06, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:09. ~~Maximum~~ Work classification and maximum bidding capacity rating. The ~~committee may assign a work classification and criteria for determining~~ maximum bidding capacity ~~ratings are as follows~~ rating based on the following factors:

(1) The prospective bidder's ability to finance the work as shown by the prospective bidder's audited financial statement, surety statement, surety bond, ~~or supplemental independent audit, or~~ debt records and other financial documents;

(2) The ~~amount,~~ ownership, sufficiency, condition and availability of the prospective bidder's equipment;

(3) The work abilities and experience of the prospective bidder's personnel; and

(4) The quality and timeliness of the prospective bidder's ~~previous record~~ work on previous contracts with the department and other awarding authorities.

A maximum bidding capacity rating may not exceed ten times the amount of a prospective bidder's working capital. The committee may ~~honor~~ consider a bank line of credit to increase the prospective bidder's working capital. The prospective bidder shall ~~state~~ describe the line of credit on a form furnished by the committee ~~and is valid for the period of the prospective bidder's prequalification.~~ The committee may declare the prospective bidder ineligible for prequalification if the committee determines that the prospective bidder has been ~~is~~ deficient, ~~as determined by the committee,~~ in any of the ~~criteria~~ factors listed in this section.

If a certification of surety is furnished in accordance with subdivision 70:07:02:04(1), the maximum bidding capacity rating ~~must conform to~~ may not exceed the bonding limitations established by the surety on the prospective bidder's behalf.

If an audited financial statement is furnished, the ~~per contract bidding capacity is~~ prospective bidder may not bid more than 50 percent of the maximum bidding capacity on any single construction contract.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:07, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:10. Effective period of work classification and rating. If the prospective bidder submits an audited statement of financial position in accordance with subdivision 70:07:02:04(2), the any work classification and maximum bidding capacity rating granted by the committee is effective for the period specified by the committee, but not more than 18 months from the date of the balance sheet. If a certification of surety is submitted in accordance with subdivision 70:07:02:04(1), the any work classification and maximum bidding capacity rating ~~expires according to the expiration date as shown on the prospective bidder's surety bond or~~ granted by the committee must expire upon the expiration or rescission of the certification of surety. The prospective bidder shall provide the department with written notice of the rescission of a certification of surety within five days after the prospective bidder receives notice of the rescission. ~~The~~ If requested in writing by the prospective bidder, the committee may grant one extension of extend the effective date of the work classification and maximum bidding capacity rating one time for not more than 60 days to the period that the maximum bidding capacity rating is effective. The prospective bidder shall submit any request for an

~~extension to the committee in writing. The prospective bidder must make the request and receive the extension before the opening of any bid affected by the extension.~~

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 8 SDR 98, effective February 24, 1982; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:08, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:11. Determination of current bidding capacity of prospective bidders. ~~The department shall give a prospective bidder a current bidding capacity in a specified dollar amount under one or more classifications for which the prospective bidder has qualified. The~~ For any given department bid letting, a prospective bidder may not submit bids that total more than the bidder's current bidding capacity. The current bidding capacity is arrived at by subtracting from the maximum bidding capacity rating the ~~uncompleted~~ dollar amount of all uncompleted bonded work wherever located.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:10, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:12. Allowable deductions for determining maximum bidding capacity rating. ~~The committee may include a deduction for any of the following factors when calculating the maximum bidding capacity rating:~~

~~—— (1) Current ability;~~

- ~~—— (2) Experience and organization;~~
- ~~—— (3) Ownership, sufficiency, availability, and condition of major items of equipment;~~
- ~~—— (4) Quality and timeliness of work performed on previous contracts; and~~
- ~~—— (5) Independent financial audit concerns, including account and debt records.~~
- ~~—— Deductions may not exceed 50 percent for any one factor.~~

~~The committee may limit a prospective bidder to a specific number of projects over the \$200,000 prequalification requirement based on any of the criteria in this section Repealed.~~

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:11, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

~~—— **General Authority:** SDCL 31-5-10.~~

~~—— **Law Implemented:** SDCL 31-5-10.~~

70:07:02:13. Ineligibility for violation of laws, rules, or orders. ~~The contractor or~~ If a prospective bidder's violation of bidder violates a state law, a federal law, or a rule, regulation, or order of a federal or state department or agency pertaining to the construction, maintenance, repair, or supervision of highways, or ~~the submission of~~ if the prospective bidder submits a falsified prequalification statement or audited financial statement, the committee ~~may make a contractor or declare~~ the prospective bidder ineligible to be prequalified for up to 36 months, ~~as determined by the committee or as based on federal regulations.~~

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:15. Ineligibility following grant of rating. ~~The committee may declare a prospective bidder ineligible before the department receives bids or the commission awards a contract if a development occurs after the granting of a classification or a maximum bidding capacity rating which in the determination of the committee would affect the responsibility of the prospective bidder.~~ Repealed.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:17, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

~~General Authority:~~ SDCL 31-5-10.

~~Law Implemented:~~ SDCL 31-5-10.

70:07:02:16. Procedure for review of decision of committee. A prospective bidder may, within 14 days after receipt of notice of a decision of the committee, ask the secretary to review that decision by submitting a request in writing setting forth the decision to be reviewed and the change in the decision being requested, along with any supporting information or documentation. The secretary, ~~or the secretary's designee,~~ shall issue a written decision within five business days following receipt of the request for review and any supporting information or documentation. The decision of the secretary, ~~or the secretary's designee,~~ constitutes final agency action.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:23, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

Cross-Reference: Classification and rating committee -- Membership -- Powers and duties, § 70:07:02:01.

70:07:02:17. Reclassification procedure. A holder of a work classification and maximum bidding capacity rating may request a ~~reclassification~~ different or additional work classification or a higher maximum bidding capacity rating, or both, by submitting a new prequalification statement and any revised financial documentation to the committee at least 14 days before the ~~day of the bid letting~~ opening of any affected bids, unless a shorter time frame is approved by the committee. A ~~reclassification or an increase in a~~ Any changes to a work classification or maximum bidding capacity rating, ~~or both, are in~~ take effect on the day granted by the committee.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:15, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

Cross-Reference: Time limit for ~~questionnaires~~ statements, § 70:07:02:06.

70:07:02:18. ~~Forfeit~~ Submission of rating supplemental information. The committee may require a prospective bidder who holds a work classification and maximum bidding capacity rating to submit ~~a new prequalification statement concerning an existing maximum bidding capacity rating~~ supplemental documentation or other information relating to any of the factors set out in 70:07:02:09. ~~Failure to~~ The prospective bidder shall submit a new prequalification statement the supplemental documentation or information within 14 days of the request ~~forfeits the existing maximum bidding capacity rating, unless a longer time period is specified in writing by the committee~~.

—— ~~If a prospective bidder forfeits a maximum bidding capacity rating, the committee shall receive and act upon a new prequalification statement from the prospective bidder before bids may be honored.~~

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:16, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:02:19. Renewal of prospective bidder's prequalification. ~~To retain or revise prequalification status, a prospective bidder shall complete a new prospective bidder prequalification statement based on either the expiration date of the bidder's surety bond, or the expiration date of the bidder's audited financial statement. The prequalification committee shall review the prequalification statement and determine the new status of eligible work types, bidding capacity per contract, maximum bidding capacity, and expiration date.~~ Repealed.

Source: 40 SDR 121, effective January 6, 2014.

~~General Authority:~~ SDCL 31-5-10.

~~Law Implemented:~~ SDCL 31-5-10.

70:07:02:20. Prior experience requirements. Only work performed by the prospective bidder in the previous five years shall be considered by the committee.

~~The committee may consider an exception for work not performed in the last five years if the prospective bidder provides documentation that the bidder had the equipment, manpower, and experience to perform that work., unless the bidder demonstrates, to the satisfaction of the committee, that earlier experience is relevant to the bidder's work classification and maximum bidding capacity rating~~

Source: 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:03:03. Denial of proposal for substandard work. The ~~committee~~ department may ~~direct the department not to accept~~ recommend rejection of a bid proposal from a prospective bidder if the prospective bidder has work under contract and the status of the work is not up to the standard of progress or quality required by the department.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 11 SDR 22, effective August 12, 1984; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:25, 19 SDR 154, effective April 11, 1993; 32 SDR 109, effective December 26, 2005; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:03:05. Award of multiple contracts. If a prospective bidder ~~bids~~ is the lowest competent and responsible bidder on more than one project and the total amount of ~~the low these~~ bids exceeds ~~its~~ the current bidding capacity, the department may only award contracts in an amount up to the current bidding capacity. The department shall select ~~projects to~~ contracts for award ~~that are to the advantage~~ based on the best interests of the department.

Source: 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

CHAPTER 70:07:04

SUSPENSION AND DEBARMENT

Section

70:07:04:01 Suspension for subcontracting violation.

70:07:04:02	Suspension of bidder.
70:07:04:03	Suspension -- Notice and content -- Effective date.
70:07:04:04	Commencement of debarment proceedings after suspension, <u>Repealed</u> .
70:07:04:05	Grounds for debarment -- Contract crime.
70:07:04:06	Grounds for debarment -- Violation of antitrust laws.
70:07:04:07	Conviction of person imputed to business.
70:07:04:08	Debarment based on affiliation.
70:07:04:09	Reasons for debarment.
70:07:04:10	Debarment procedure <u>Right to hearing on suspension and debarment.</u>
<u>70:07:04:10.1</u>	<u>Notice of suspension or debarment.</u>
<u>70:07:04:10.2</u>	<u>Hearing request.</u>
<u>70:07:04:10.3</u>	<u>Failure to respond.</u>
70:07:04:11	Debarment period when conviction imputed or based on affiliation.
70:07:04:12	Duration of debarment.
70:07:04:13	Effective date of debarment.
70:07:04:14	Time limit for initiating debarment or suspension.
70:07:04:15	Term of debarment
70:07:04:16	Termination of debarment or award during debarment.
70:07:04:17	Continuation of contracts.
70:07:04:18	Award of department contracts to debarred or suspended persons <u>business</u> prohibited -- Exception.

70:07:04:19 Subcontracts with debarred or suspended ~~persons~~ business prohibited --
Exception.

70:07:04:20 Suspension of prequalification.

70:07:04:21 Period of suspension.

70:07:04:22 Prequalification requirements following completion of suspension or debarment.

70:07:04:01. Suspension for subcontracting violation. The standard specifications for road and bridge construction included in the construction contract shall contain provisions for subcontracting.

If ~~evidence and investigation establish the~~ secretary determines a contractor has ~~attempted to violate~~ violated subcontracting provisions, the secretary may suspend the bidding qualifications of the ~~prospective bidder~~ contractor for up to 180 days.

Source: SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 11 SDR 22, effective August 12, 1984; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:20, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:02. Suspension of bidder. The secretary may suspend a ~~person or~~ business from bidding ~~by order~~ upon receiving notice or learning of a conviction for a contract crime or violation of antitrust law or upon receiving evidence of an affiliation described in § 70:07:04:07, 70:07:04:08, or 70:07:04:09.

Source: 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:03. Suspension -- Notice and content -- Effective date. The order of suspension ~~shall~~ must describe the reason for suspension and the period of suspension. The order ~~shall~~ must be sent by certified mail to the ~~person or~~ business suspended.

The order of suspension ~~takes~~ must take effect on the date the order is mailed. A suspension may not exceed 180 days.

Source: 19 SDR 154, effective April 11, 1993.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:04. Commencement of debarment proceedings after suspension. ~~The secretary shall start debarment proceedings within 180 days after the mailing of the suspension order.~~ Repealed.

Source: 19 SDR 154, effective April 11, 1993.

~~**General Authority:** SDCL 31-5-10.~~

~~**Law Implemented:** SDCL 31-5-10.~~

~~**Cross Reference:** Debarment procedure, § 70:07:04:10.~~

70:07:04:05. Grounds for debarment -- Contract crime. The commission ~~shall~~ may debar a business if the business or a principal or former principal of the business is convicted in any jurisdiction of a contract crime or if a conviction is imputed to the business as set forth in §§ 70:07:04:07 and 70:07:04:08.

Source: 19 SDR 154, effective April 11, 1993.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:06. Grounds for debarment -- Violation of antitrust laws. The commission ~~shall~~ may debar a business if the business or a principal or former principal of the business is convicted in any jurisdiction of violating SDCL chapter 37-1, federal antitrust laws, or another state's antitrust laws, or if a conviction is imputed to the business as set forth in §§ 70:07:04:07 and 70:07:04:08.

Source: 19 SDR 154, effective April 11, 1993.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:08. Debarment based on affiliation. The conviction of a person or business for a contract crime in any jurisdiction is imputed to any principal, former principal, successor business or corporation, or any other person who is associated with or formerly associated with ~~a~~ the convicted person or business which is subject to debarment or suspension and who participated in, knew of, or had reason to know of the contract crime.

Source: 19 SDR 154, effective April 11, 1993.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:09. Reasons for debarment. The commission ~~shall~~ may debar a business for the following reasons:

(1) The business employs a former principal of a debarred or suspended business or person as an officer, director, or manager or in another significant decision-making capacity while the former principal or business is debarred or suspended;

(2) The business is owned by or associated in a joint venture with a debarred or suspended business or is controlled by a principal or former principal of a debarred or suspended business; or

(3) A former principal of a debarred or suspended business has a significant financial interest in the business and the principal has the authority to or will control, direct, manage, or influence activities of the business concerned with the department contract in question.

Source: 19 SDR 154, effective April 11, 1993.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:10. ~~Debarment procedure~~ Right to hearing on suspension and debarment. The secretary may suspend a business and the commission may debar a business only after a hearing or opportunity for hearing pursuant to contested case procedure in SDCL chapter 1-26 has been provided for the business.

Source: 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:10.1 Notice of suspension or debarment. The secretary shall notify the business of the intent to suspend or debar. The notice must inform the business of the right to request a hearing prior to imposition of suspension or debarment and must include an explanation of the procedure for requesting a hearing. The notice must be sent by certified mail to the address on record with the department. The secretary shall send notice of intent to disbar within 60 days after a suspension order.

Source:

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:10.2 Hearing request. To request a hearing, the person shall submit a written request to the secretary. A mailed hearing request must be postmarked or an electronic hearing request must be received within twenty days following the date of the notice to suspend or debar. Upon receipt of a request for hearing, the secretary shall issue a notice of hearing pursuant to SDCL chapter 1-26.

Source:

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:10.3 Failure to respond. Failure to request a hearing within the time specified in 70:07:04:10.2 constitutes a waiver of the right to a hearing. If the right to a hearing on suspension is waived, the secretary may issue an order of suspension. If the right to a hearing on debarment is waived, the commission may issue an order of debarment.

Source:

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:11. Debarment period when conviction imputed or based on affiliation. The period of debarment ~~for a person, business, or successor business when~~ if a conviction for a contract crime is imputed ~~from a person to the business~~ under § 70:07:04:07 or based on affiliation under § 70:07:04:08 ~~is the same as that of the debarred~~ may not be less than any period of debarment imposed on the convicted ~~person, former principal,~~ or business.

Source: 19 SDR 154, effective April 11, 1993.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:12. Duration of debarment. A ~~person~~ business may not be debarred for more than ~~one year~~ three years for conduct which gave rise to the ~~grounds for~~ debarment. ~~If new or different grounds arise, a new debarment hearing shall be held.~~

Source: 19 SDR 154, effective April 11, 1993.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:14. Time limit for initiating debarment or suspension. A debarment or a suspension must be initiated within three years from the date of the conviction of a person or business for a contract crime.

Source: 19 SDR 154, effective April 11, 1993.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:18. Award of department contracts to debarred or suspended persons
business prohibited -- Exception. Except as provided in § 70:07:04:16, the department may not award a department contract to a debarred or suspended ~~person~~ business.

Source: 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:19. Subcontracts with debarred or suspended persons **business prohibited --**
Exception. Except as provided in § 70:07:04:16, a contractor to whom a department contract has been awarded by the commission may not subcontract with a debarred or suspended ~~person~~

business for performance of the department contract. The department may not approve a debarred or suspended subcontractor, except as provided in § 74:07:04:16.

Source: 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:20. Suspension of prequalification. ~~The department secretary may deny or suspend a contractor's the prequalification status. A suspension or denial pursuant to this rule prohibits the contractor from bidding on any department construction contract for which prequalification is required. The suspension may be of any business based on a violation of a state or federal law, rule, or regulation; an order of a federal or state department or agency pertaining to the construction, maintenance, repair, or supervision of highways; suspension or debarment by a state or federal agency; or poor or unsatisfactory management, quality, and timeliness of work performed on existing or previous contracts; or failure to submit supplemental information as requested by the committee under § 70:07:02:18. A suspension pursuant to this section prohibits the business from bidding on any department contract for which prequalification is required.~~

Source: 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:21. Period of suspension. The suspension of ~~a contractor's~~ prequalification status ~~shall~~ must be for a specific period of time, based on the seriousness of the deficiency, but not to exceed 180 days.

Source: 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

70:07:04:22. Prequalification requirements following completion of suspension or debarment. A ~~contractor who~~ business that was suspended or debarred and has completed the suspension or debarment period, shall reapply for prequalification status before bidding on a ~~department~~ construction contract for which prequalification is required. The ~~contractor~~ business may submit prequalification application information before the end of the suspension or debarment period, but no prequalification approval is effective until completion of the suspension or debarment period.

Source: 40 SDR 121, effective January 6, 2014.

General Authority: SDCL 31-5-10.

Law Implemented: SDCL 31-5-10.

Interim Rules Review Committee
Recommended Rules Presentation Format

When you submit the final draft to the Legislative Research Council (LRC) and the Rules Review Committee, please answer these questions to show that the SDCL § 1-26 rule-making process is complete. Use this format to organize your presentation to the Committee.

- Approval to proceed? Yes **X** No Date **July 22, 2020**

- The date of your public hearing. Date **August 27, 2020**

- The date you submitted the proposed rules and the supporting documents to LRC and the Bureau of Finance and Management: Date **July 28, 2020** (*Note - This must be completed at least 20 days before your public hearing.*)
 - any publication incorporated by reference;
 - the fiscal note;
 - the impact statement on small business; and
 - the notice of hearing.

- The date and the name of the newspapers where you published the notice of the public hearing.
 - Date **July 31, 2020** Newspaper **Aberdeen American News**
 - Date **July 31, 2020** Newspaper **Rapid City Journal**
 - Date **July 31, 2020** Newspaper **Sioux Falls Argus Leader**
 - Date **July 30, 2020** Newspaper **Pierre Capital Journal**

Summarize how and when interested persons, if any, were contacted and how many were contacted. **On July 29, 2020, copies of the hearing notice and proposed rules were mailed to the twelve individuals or entities who have requested mail notification of rule-making by the commission. On July 28, 2020, electronic copies of the hearing notice and proposed rules were sent to the three individuals who have requested electronic notification of rule-making. The hearing notice, proposed rules, small business impact statement, and fiscal notes were also posted on the Open SD website for the State of South Dakota. Before initiating the rule-making process, the department also provided a draft of the proposed rules to Associated General Contractors, an association of highway contractors, for informal review and comment. On July 29, 2020, the department also posted a copy of the rules and hearing notice on its bid-letting website and invited review and comment by prospective bidders.**

- Provide the page numbers in the minutes where it mentions how the agency considered amendments, data, opinions, or arguments regarding the proposed rules, along with any changes and final action. _____
- If the rules are implementing a bill from last session, identify the bill number. _____
- The date you submitted the final rules and supporting documents to the LRC and the Rules Review Committee: Date _____ (*Note - This must be received no later than 5 days before the Rules Review Committee meeting.*)

- the "Approval of Rules" - Form 11 (LRC only);
- the style and form copy (LRC only);
- the "Affidavit" of mailing - Form 12 (LRC only);
- the final copy of the rules (Both);
- the minutes of the hearing (Both);
- the record of written comments (Both);
- the impact statement on small business – Form 14 (Committee only);
- the fiscal note – Form 5 (Committee only);
- the budgetary information required to increase a fee (Committee only); and
- the rules process outline (Both).