

PREQUALIFICATION COMMITTEE  
MINUTES – JULY 9, 2009  
8:30 A.M. EDT

The following Committee members attended the meeting:

Karen Macdonald	Prequalification Engineer, Contract Administration Division; Committee Secretary and Non-Voting Member
Martha Kenley	Director, Economic Opportunity Division; Chair and Non-Voting Member
Tony Hedge	Chief, Accounting and Control Division; Voting Member
Greg Kicinski	Manager, Office of Project Management; Voting Member
Grant Knies	Budget Analyst; Voting Member
Mark Miller	Director, Construction Management; Voting Member
Tiffany Mulligan	Attorney, Legal Division; Counsel to the Committee and Voting Member
Joe Novak	State Construction Director; Voting Member
Jim Stark	District Deputy Commissioner, Seymour District; Voting Member

Also in Attendance:

Charlie Kahl	Indiana Construction Association
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The Committee reviewed the following agenda items:

1. Prequalification Committee Orientation
  - a. Prequalification Committee Charter
  - b. Prequalification Rules
  - c. Procedural Ground Rules
  - d. Open Door Requirements
  - e. Complaint Procedure
2. Revocation of Former Policies
3. Adoption of Charter and Procedures

#### 4. Planning for Future Initiatives

### PREQUALIFICATION COMMITTEE MEETING OPEN SESSION JULY 9, 2009

Martha Kenley, Committee Chair, called the meeting to order at about 8:30 a.m. EDT. All members were present.

Tiffany Mulligan introduced the proposed Charter. She explained the following with regard to the proposed charter:

- The purpose of the proposed Charter is to clarify the Committee's authority and responsibilities.
- The draft Charter is based on Indiana law, primarily INDOT's promulgated rules found in Title 105, Article 11 of the Indiana Administrative Code.
- All actions the Committee makes are recommendations from the Committee to the Commissioner.
- The permissive activities listed in the Charter are discretionary activities of the Committee. INDOT's Prequalification Section normally handles some of these activities (such as approval of initial and renewal prequalification applications), but the Prequalification Committee may consider them under this Charter and INDOT's rules.
- The purposes of the Committee are to ensure the integrity of the Department's process for qualifying contractors to bid on Department contracts, as required by I.C. 8-23-10; to provide fair and consistent treatment of contractors through strict adherence to Indiana law affecting the qualification status of contractors, specifically found in I.C. 8-23-10 and 105 IAC 11-2; and to provide contractors an opportunity to be heard consistent with 105 IAC 11-2 and provide clear and reliable communication to contractors when recommending to the Commissioner an action that will affect the contractor's qualification status.

Tiffany Mulligan provided an overview of the prequalification rules found in Title 105 Indiana Administrative Code Article 11. She explained the following with regard to the rules:

- 105 IAC 11 is part of the Indiana Administrative Code, made of INDOT promulgated rules. These rules have the force of law.
- 105 IAC 11 is made up of three rules. The members' packets include Rules 1 and 2 but do not include all of Rule 3, the section on bidding.
- The three rules are as follows:
  - Rule 1 – Definitions
  - Rule 2 – Requirements for prequalification of contractors
  - Rule 3 – Requirements for bidding
- Rule 2 is the relevant rule for the Committee, specifically sections 11-2-4 through 11-2-10.
- The actions the Committee can take against a contractor are outlined in 11-2-5 through 11-2-8 as described in the Charter.

- The appeals process is outlined in 105-IAC-11-2-9. It is a two-step appeals process: the first step is reconsideration by the Committee; and the second step is an Administrative Law Judge (ALJ) hearing. The contractor can choose to follow both steps or ask for an ALJ hearing only. If there is an appeal, the Committee's decision does not become effective until the contractor has exhausted all of its appeals.
- Under 105 IAC 11-2-10, the Committee may take action against a non-prequalified subcontractor for the same reasons it can take action against a prequalified contractor. A subcontractor must be prequalified if they have over \$300,000 in unearned work.

Tiffany Mulligan pointed out that 105-IAC-11-2-10 specifies a limit of \$100,000 per contract for non-prequalified subcontractors. This rule is superseded by the statute IC 8-23-10-4, which allows for \$300,000 per contract for non-prequalified subcontractors.

Mark Miller raised the question of bringing before the committee a tax lien.

Karen Macdonald stated INDOT checks tax liens when the bid is received and gives the company time to correct. The bid is not awarded to the company if the tax lien is not resolved within a certain timeframe.

Tony Hedge stated INDOT deals with the prime contractor. INDOT should bring the prime contractor before the Committee if bringing the subcontractor before the Committee.

Martha Kenley stated haulers and material suppliers do not need to be prequalified.

Charlie Kahl questioned whether haulers working just within the jobsite as opposed to "to and from" the jobsite need to be prequalified.

Tiffany Mulligan stated the rules provide that the prequalification requirements do not apply to "hauling to and from site," but INDOT has not distinguished between work to and from the site and work solely on the job site.

Jim Stark questioned why INDOT distinguishes between a lease and a subcontractor.

Martha Kenley stated she was not sure.

Martha Kenley proposed the meeting procedures. She explained the following with regard to meeting procedures:

- Meetings were scheduled at the beginning of the year for the second Thursday of each month. If no one objects, we will keep the same schedule.
- There must be a quorum for a vote, which is four of seven voting members.
- There must be a notice of the meetings posted forty-eight hours in advance.
- Executive sessions will be held only to consider confidential information in accordance with Indiana's Open Door law.

- When a member cannot attend a meeting, he or she should send a written delegation to Karen Macdonald. It should be done for each meeting rather than a broad delegation for any meeting the member cannot attend.
- The minutes will be voted on the following meeting.

Tiffany Mulligan stated that we want to keep the decision making of the Committee as objective as possible. She further stated you should recuse yourself from voting if you've had substantial and personal involvement with the issue being considered by the Committee to avoid the appearance of a conflict of interest. Also, you should not assign a subordinate to vote for you in these situations.

Tony Hedge stated the State Board of Accounts (SBOA) requested minutes from 2008 Prequalification Committee meetings. He wants to know if these were sent to SBOA.

Karen Macdonald stated she would check into it.

Tony Hedge suggested that Item 2.g of the proposed meeting procedures include a request for an action or improvement plan as another option as a recommended course of action. Martha Kenley stated that when a Committee member wants to make a motion, he or she can ask for an action plan or improvement plan.

Charlie Kahl questioned how detailed the minutes would be.

Martha Kenley stated not everyone's statements or questions would be quoted, but the minutes would detail the discussions and the minutes would be open to the public.

Tiffany Mulligan overviewed the requirements of the Indiana Open Door law. She noted the following:

- Because the Committee is appointed directly by the Commissioner and takes official action upon public business, the Committee must abide by the Open Door Law.
- The law specifically provides that it is to be liberally construed so we should err on the side of providing more openness not less.
- The sheet included in the packet covers the most relevant points of the law for the Committee, including requirements for both notice and minutes, but does not include the entire law.
- A person must be present to vote and cannot be present through conference call.
- The law limits executive sessions to very specific agenda items. For our purposes, the only reason to hold an executive session is to discuss items that are classified as confidential under state or federal law, such as discussions of a contractor's financial statement.
- If we don't follow the Open Door Law, we risk any decision we make being declared void.

Martha Kenley questioned if a contractor's prequalification limit would be considered confidential.

Tiffany Mulligan stated she didn't think it would be considered confidential.

Tony Hedge questioned whether the ownership of a company, especially when companies are owned by other companies, is confidential.

Martha Kenley stated we would have to decide based on the situation whether an Executive Session was necessary at that time.

Tiffany Mulligan stated the Committee must certify that only confidential information was discussed at Executive Session by a statement in the minutes for executive sessions.

Tiffany Mulligan reviewed the complaint procedures and explained the following:

- The purpose of the proposed procedures is to have a uniform system for evaluating initial complaints and determining whether there is enough information for the Committee to consider the complaint.
- It also puts the burden for preparing the complaint to go before the Committee on the person making the complaint.
- The person making the complaint must summarize the complaint, gather information and send documentation to Martha Kenley, Tiffany Mulligan and Karen Macdonald

Jim Stark questioned how complaints on contractors were brought to the committee in the past.

Karen Macdonald stated complaints were made to the Prequalification Engineer or to the State Construction Engineer or the Prequalification Engineer would notice a pattern of poor CR-2's and bring a contractor before the Committee.

Jim Stark stated districts talk with each other and might want to coordinate with each other when making a complaint.

Karen Macdonald suggested someone from construction be involved in the complaint process.

Charlie Kahl stated the prime contractor should be brought before the Committee when a subcontractor is brought before the Committee.

Martha Kenley indicated she would like the Committee to vote to revoke all former policies related to the Prequalification Committee

Tiffany Mulligan stated she believes policy 12-8 dated 3-18-05, which was included in the Committee members' packets, is the most current policy; however, there may be other policies elsewhere that are out of date.

Martha Kenley pointed the Committee's attention to the Prequalification Operating Procedures. The Prequalification Section uses these procedures, but they do not necessarily relate to what the Committee does.

Mark Miller stated \$100,000,000 as an unlimited prequalification amount does not apply as much as it did when the policy was adopted in 1980.

Karen Macdonald stated the procedures are not all-inclusive. She believes these items were brought to committee for opinion.

Martha Kenley asked whether Committee members would like to revoke current policies and adopt new policies today or at the next meeting.

Greg Kicinski commented that he would like an opportunity to review the proposed procedures and Charter in light of the discussion at orientation before voting on them.

Martha Kenley stated she would send all of the Committee members an electronic copy of the Charter and Procedures to comment on, and the Committee will take a vote on them at the next meeting.

Martha Kenley proposed future initiatives. First she proposed revisions to the rules and noted the following:

- Rulemaking is a long process.
- We need a subcommittee to work on the proposed rules.
- If anyone would like to be involved in the rulemaking, let her know.
- The rules will not affect the statute.

Martha Kenley also proposed a future initiative of expanding the Committee's work to consultants. She indicated that she wants the committee and possibly a subcommittee to review this proposal internally before the Committee starts bringing consultants before the Committee.

Charlie Kahl stated the definition of contractor in the rules could include consultants.

Tiffany Mulligan stated that although the definition for contractor is broad, INDOT has applied the prequalification rules in 105 IAC 11 to construction contractors only.

Mark Miller commented that because consultants do not bid on projects, he did not think 105 IAC 11 applied to consultants.

Martha Kenley stated to contact her with comments or suggestions for the Committee. She also stated that if anyone cannot commit to serving on the Committee to let her know.

Martha Kenley adjourned the meeting at 10:27 a.m.