

WSR 23-11-024

EMERGENCY RULES

DEPARTMENT OF TRANSPORTATION

[Filed May 9, 2023, 1:56 p.m., effective May 9, 2023, 1:56 p.m.]

Effective Date of Rule: Immediately upon filing.

Purpose: The purpose of the WAC amendment is to adjust the form of financial data submitted by contractors seeking prequalification for two Washington state department of transportation ferries division (WSF) vessel renovation contracts and one vessel construction contract. The amendment will help maximize competition for the contracts without compromising the department's ability to assess the financial data. In recent years, WSF implemented similar WAC amendments for certain prior vessel construction contracts.

Citation of Rules Affected by this Order: Amending WAC 468-310-020 and 468-310-050.

Statutory Authority for Adoption: RCW 47.60.680 through 47.60.760.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: The existing WAC limits the maximum capacity rating to \$10 million for contractors not submitting audited financial statements for purposes of prequalification. The three WSF vessel contracts include: M.V. Tillikum Drydocking Contract No. 00-9946; Jumbo Mark II Class Ferries Hybrid-Electric Propulsion System Upgrade Contract No. 00-9955; and the upcoming Hybrid-Electric Olympic Class Ferries Contract. Each of the three contracts has an estimated value in excess of \$10 million. Also, the existing WAC restricts some shipyards' ability to submit bids for the contracts because their companies may use reviewed rather than audited financial statements.

The time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest since the first two contracts listed herein are currently on-ad with bids due this spring. There are very few shipyards in Puget Sound and the current WAC is restrictive of competition for the subject vessel contracts. The general welfare is best served when the department can maximize competition for its contracts without compromising the scope of a project, as with this proposed WAC amendment. WSF implemented similar WAC amendments for prior new vessel construction contracts.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 2, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 5, 2023.

Patty K. Rubstello
Assistant Secretary

OTS-4566.2

AMENDATORY SECTION (Amending WSR 08-19-004, filed 9/4/08, effective 10/5/08)

WAC 468-310-020 Contents of standard prequalification questionnaire and financial statement. The standard prequalification questionnaire and financial statement shall be transmitted to the director of Washington state ferries. The contractor shall provide the following information:

(1) The name, address, phone number, contractor registration number and type of organization (corporation, copartnership, individual, etc.) of the contractor seeking prequalification.

(2) The contract size in dollars and the class or classes of work for which the contractor seeks prequalification (such as vessel dry-docking and hull repairs, vessel electrical repairs, etc.) as enumerated in WAC 468-310-050(6).

(3) Ownership of the contractor and if a corporation, the name of the parent corporation (if any) and any affiliated companies or subsidiaries.

(4) An accurate and complete record of the (~~fifteen~~) 15 largest contracts in excess of (~~ten thousand dollars~~) \$10,000 performed by the contractor in whole or in part within the preceding three years both in Washington and elsewhere, including subcontracts, giving the contract amount, the date completed, the class of work, the name, address and phone number of the owner/agency representative, and any liquidated damages assessed against the contractor by an owner arising out of the performance of the contract.

(5) The principal officers and key employees showing the number of years each engaged in the class or classes of work for which the contractor seeks prequalification. The department may require resumes of such personnel as deemed proper for making its determination.

(6) Except as otherwise provided in this section or WAC 468-310-050(~~(+8)~~), a contractor requesting prequalification certification to perform work in excess of (~~ten million dollars~~) \$10,000,000 shall submit copies of its audited annual statements for the previous three years as audited by an independent certified public accountant which shall include comparative balance sheets and income statements, a statement of retained earnings, supporting schedules and notes attached thereto, and the opinion of the independent auditor. The financial statement shall not be more than (~~twelve~~) 12 months old when submitted. Any wholly owned subsidiary corporation may file the latest consolidated financial statement of its parent corporation in lieu of a financial statement prepared solely for such subsidiary providing the financial statement otherwise meets the requirements of the preceding two sentences. If a consolidated financial statement is filed on behalf of a subsidiary corporation, a bid of the subsidiary corporation will be considered only if there is on file with the department a letter from the parent corporation guaranteeing performance

by the subsidiary corporation of its contract with the department of transportation in an amount at least equal to the amount of the bid. A letter of guarantee by a parent corporation may cover a specific contract bid by its subsidiary or all contracts bid by its subsidiary within a stated period of time.

(7) A list of all major items of equipment to be used in those classes of work for which prequalification certification is requested including the original cost, age, location and condition of such equipment. The schedule shall show whether the equipment is owned, leased or rented. All major items of useful equipment should be listed even though fully depreciated but no obsolete or useless equipment should be included. In the event the contractor seeks prequalification certification to perform work on ferry vessels, the schedule shall also describe plant facilities of the contractor including shipyards, dry docks, repair facilities and other plant facilities.

(8) Such other information as may be required by the prequalification questionnaire.

(9) Notwithstanding the provisions of this section, a contractor who wishes to prequalify for the department's procurement of new auto ferries for the Port Townsend/Keystone ferry route, pursuant to the department's 2008 invitation for bids, shall submit a reviewed financial statement for at least one year in the previous three years, plus annual financial statements for two additional years in the previous three years. The reviewed financial statement shall be prepared by an independent certified public accountant which shall include comparative balance sheets and income statements, a statement of retained earnings, supporting schedules and notes attached thereto, and the opinion of the independent auditor. The form and quantity of financial statements shall be specified in the department's invitation for bids and is subject to modification by addendum during the bid process. This subsection applies in lieu of the form and quantity of audited financial statements specified in subsection (6) of this section for the Port Townsend/Keystone vessel procurement only. It does not replace or modify any other provisions in this chapter or governing prequalification statutes that authorize the department to evaluate a contractor's financial ability to perform the contract.

(10) Notwithstanding the provisions of this section, a contractor who wishes to prequalify for the department's New Hybrid-Electric Olympic Class Ferries Contract(s), the Jumbo Mark II Class Ferries Hybrid-Electric Propulsion System Upgrade Contract No. 00-9955, and/or the M.V. Tillikum Drydocking Contract No. 00-9946, shall submit a reviewed financial statement for at least one year in the previous three years, plus annual financial statements for two additional years in the previous three years. The reviewed financial statement shall be prepared by an independent certified public accountant which shall include comparative balance sheets and income statements, a statement of retained earnings, supporting schedules and notes attached thereto, and the opinion of the independent auditor. The form and quantity of financial statements shall be specified in the department's invitation for bids or request for proposals and is subject to modification by addendum during the bid or proposal process. This subsection applies in lieu of the form and quantity of audited financial statements specified in subsection (6) of this section, for the contracts listed in this subsection only. It does not replace or modify any other provisions in this chapter or governing prequalification statutes that authorize the department to evaluate a contractor's financial ability to perform a contract.

[Statutory Authority: RCW 47.56.780, 47.60.680, and 47.60.690. WSR 08-19-004, § 468-310-020, filed 9/4/08, effective 10/5/08. Statutory Authority: RCW 47.60.816. WSR 04-11-004, § 468-310-020, filed 5/5/04, effective 6/5/04. Statutory Authority: RCW 47.60.680 and 47.60.690. WSR 99-03-025 (Order 189), § 468-310-020, filed 1/11/99, effective 2/11/99. Statutory Authority: RCW 47.60.680. WSR 88-19-040 (Order 114), § 468-310-020, filed 9/14/88. Statutory Authority: 1983 c 133. WSR 83-19-014 (Order 84), § 468-310-020, filed 9/12/83.]

AMENDATORY SECTION (Amending WSR 08-19-004, filed 9/4/08, effective 10/5/08)

WAC 468-310-050 Classification and capacity rating. (1) Except as otherwise specified in this section, each contractor seeking pre-qualification under these rules will be classified for one or more of the classes of work listed in subsection (6)(a) of this section and will be given a maximum capacity rating in accordance with its financial ability, the adequacy of its equipment and plant facilities to perform the class or classes of work for which it has sought prequalification, the extent of the contractor's experience in performing contracts of the class or classes for which prequalification is sought, and the adequacy of the experience and capability of the contractor's officers and key employees in performing contracts of the class or classes for which prequalification is sought. The maximum capacity rating will limit the quantity of uncompleted work which the contractor shall have under contract at any one time either as a prime contractor or a subcontractor.

(2) Except as provided in subsections (7) through ~~((+9))~~ (10) of this section, the maximum capacity rating for a contractor applying for a rating in excess of ~~((fifty thousand dollars))~~ \$50,000 will be ~~((ten))~~ 10 times the contractor's net worth as set forth in the standard prequalification questionnaire and financial statement. A properly executed letter of credit from an acceptable financial institution may be considered as an asset increasing the contractor's maximum capacity rating by the amount of the credit, but without the use of a multiplier. The maximum capacity rating for a contractor not submitting an audited financial statement as provided in WAC 468-310-020(6) will be ~~((ten million dollars))~~ \$10,000,000: Provided, That in all cases the contractor's maximum capacity rating may be reduced to an amount considered by the department to be within the contractor's actual capacity based upon its organization, personnel, equipment and plant, and experience.

(3) Consideration will be given to raising, by an amount not to exceed ~~((fifty))~~ 50 percent, the maximum capacity rating of a contractor who qualifies with respect to actual capacity based upon organization, personnel, equipment and plant facilities, and experience, upon receipt of evidence of a current bonding capacity of such additional amount with a corporate surety. Such evidence shall be in the form of a letter of commitment executed by an officer of the surety who is authorized to bind the surety. Notwithstanding the provisions of this subsection, the maximum capacity rating for a contractor not submitting an audited financial statement as provided in WAC 468-310-020(6) will be ~~((ten million dollars))~~ \$10,000,000.

(4) The certificate of prequalification issued by the department will establish a contractor's maximum capacity rating which will be subject to reduction by the total value of its current uncompleted work regardless of its location and with whom it may be contracted to determine the contractor's bidding capacity at the particular time.

(5) Notwithstanding the provisions of this section, a contractor will be allowed to submit a bid for an amount up to \$50,000 on a class or classes of work for which it is prequalified without regard to any financial maximum capacity rating or financial current capacity rating: Provided, That the contractor's current capacity may be reduced to an amount considered by the department to be within the contractor's actual capacity based upon its organization, personnel, equipment and plant facilities, and experience.

(6) (a) Construction, repair and maintenance work on ferry vessels for which prequalification certification under these rules may be granted are classified as follows:

- Class 81 Vessel construction and renovation;
- Class 82 Dry-docking and hull repairs;
- Class 83 Vessel metal fabrication repairs;
- Class 84 Vessel electrical repairs;
- Class 85 Vessel miscellaneous repairs;

(b) A contractor currently prequalified under RCW 47.28.070 to perform those classes of work required in the construction, improvement and repair of ferry terminal facilities will initially be deemed prequalified under these rules to perform such classes of work with the same capacity rating as approved by the department for highway related work.

(7) Notwithstanding the provisions of this section, proposers who wish to prequalify for the department's construction of new 130-auto ferries, pursuant to the department's 2003 request for proposals, must submit evidence of their ability, if awarded the contract, to obtain contract security in the amount of (~~thirteen million dollars~~) \$13,000,000. The department estimates such amount to be adequate to protect (~~one hundred~~) 100 percent of the department's estimated exposure to loss on the vessel construction contract, as calculated by the department prior to issuance of the request for proposals. Such amount shall be specified in the project request for proposals and is subject to modification by addendum during the request for proposals process. The actual contract security amount for the project construction contract will be a percentage of the successful proposer's total bid price. Such percentage shall be specified in the construction contract within the request for proposals. For the new 130-auto ferries contract, this provision applies in lieu of the maximum capacity rating formula specified in subsection (2) of this section.

(8) Notwithstanding the provisions of this section or WAC 468-310-020, proposers who wish to prequalify for the department's construction of new 130-auto ferries, pursuant to the department's 2003 request for proposals, shall, in addition to the evidence of contract security required in subsection (7) of this section, submit an audited financial statement for at least one year in the previous three years, plus annual financial statements for two additional years in the previous three years. The audited financial statement shall be performed by an independent certified public accountant which shall include comparative balance sheets and income statements, a statement of retained earnings, supporting schedules and notes attached thereto,

and the opinion of the independent auditor. The form and quantity of financial statements shall be specified in the project request for proposals and is subject to modification by addendum during the request for proposals process. For the new 130-auto ferries contract, this provision applies in lieu of the quantity of audited financial statements specified in WAC 468-310-020.

(9) This subsection shall apply to the Port Townsend/Keystone vessel procurement only and shall be used in lieu of the requirements of subsections (1) through (5) of this section. It does not replace or modify any other provisions in this chapter or governing prequalification statutes. The department may prequalify a contractor under a Class 81 classification to bid on the Port Townsend/Keystone vessel procurement pursuant to this section based on the department's evaluation of the following criteria:

(a) Whether the contractor has adequate equipment and plant facilities available to accomplish the work;

(b) Whether the contractor has trained personnel available to perform the work;

(c) Whether the contractor has demonstrated experience in the type of work;

(d) Whether the contractor has an organization and technical staff with the size, training, experience and capability to accomplish the work;

(e) Whether the contractor has adequate financial resources to perform the type and size of work, or the ability to timely secure such resources. In evaluating such financial resources, the department may consider the contractor's overall financial condition including, but not limited to:

(i) Level of capitalization;

(ii) Cash flow;

(iii) Level of business activity;

(iv) Credit history;

(v) Debts;

(vi) Assets; and

(vii) Ability to obtain financing, including but not limited to, irrevocable lines of credit, and parent company guarantees.

A contractor does not have adequate financial resources when, based upon the totality of the circumstances, it lacks the financial resources reasonably expected of a contractor capable of performing the work on time and without interruption.

(10) This subsection shall apply to the New Hybrid-Electric Olympic Class Ferries Contract(s), the Jumbo Mark II Class Ferries Hybrid-Electric Propulsion System Upgrade Contract No. 00-9955, and the M.V. Tillikum Drydocking Contract No. 00-9946 only and shall be used in lieu of the requirements of subsections (1) through (5) of this section. It does not replace or modify any other provisions in this chapter or governing prequalification statutes. The department may prequalify a contractor under applicable classes of work to bid or propose on one or more of the contracts listed in this subsection based on the department's evaluation of the following criteria:

(a) Whether the contractor has adequate equipment and plant facilities available to accomplish the work;

(b) Whether the contractor has trained personnel available to perform the work;

(c) Whether the contractor has demonstrated experience in the type of work;

(d) Whether the contractor has an organization and technical staff with the size, training, experience, and capability to accomplish the work;

(e) Whether the contractor has adequate financial resources to perform the type and size of work, or the ability to timely secure such resources. In evaluating such financial resources, the department may consider the contractor's overall financial condition including, but not limited to:

(i) Level of capitalization;

(ii) Cash flow;

(iii) Level of business activity;

(iv) Credit history;

(v) Debts;

(vi) Assets; and

(vii) Ability to obtain financing including, but not limited to, irrevocable lines of credit, and parent company guarantees.

A contractor does not have adequate financial resources when, based upon the totality of the circumstances, it lacks the financial resources reasonably expected of a contractor capable of performing the work on time and without interruption.

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