STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION
DOA-2050 (C04/2012)

DIVISION OF EXECUTIVE BUDGET AND FINANCE
101 EAST WILSON STREET, 10TH FLOOR
P.O. BOX 7864
MADISON, WI 53707-7864
FAX: (608) 267-0372

EXISTING ADMINISTRATIVE RULES
Fiscal Estimate & Economic Impact Analysis

1. Type of Estimate and Analysis
☐ Repeal ☒ Modification

2. Administrative Rule Chapter, Title and Number

DWD 293 Payment and Performance Assurance Requirements

3. Date Rule promulgated and/or revised; Date of most recent Evaluation

Most recent revision - February 1, 2011

4. Plain Language Analysis of the Rule, its Impact on the Policy Problem that Justified its Creation and Changes in Technology, Economic Conditions or Other Factors Since Promulgation that alter the need for or effectiveness of the Rule.

DWD is required to adjust the minimum contract prices that determine the payment and performance assurance requirements that apply to contracts with state and local governments for the performance of labor or furnishing materials for a public improvement or public work on a biennial basis if the adjustment to be made is 5% or greater. No adjustment is required if the adjustment is lower than 5%. The contract prices are adjusted based on the change in the construction cost index as published by the Engineering news-record, a national construction trade publication.

The proposed rule adjusts the contract price thresholds to reflect a 6.15% increase in construction costs from December 2009 to December 2011 and a 5.4% increase in construction costs from December 2011 to December 2013. There is no adjustment in 2016 because increases in construction costs from December 2013 to December 2015 were less than 5%.

In addition, the proposed rule will create s. DWD 293.03 relating to indexing future contract thresholds. On each January 1 in an even calendared year, DWD will calculate the percentage difference between the construction cost index for December of the preceding year, and the construction cost index for December two years before the preceding year, and adjust those amounts by that percentage difference. Any calculated adjustment equal to 5% or greater will be published, and become effective upon publication, in the Wisconsin Administrative Register.

5. Describe the Rule's Enforcement Provisions and Mechanisms

The rule does not have enforcement provisions. It sets requirements that DWD biennially adjust contract thresholds to which payment and performance assurance requirements would apply.

6. Repealing or Modifying the Rule Will Impact the Following (Check All That Apply)
☐ State's Economy
☐ Local Government Units
☒ Specific Businesses/Sectors
☐ Public Utility Rate Payers
☐ Small Businesses

7. Summary of the Impacts, including Compliance Costs, identifying any Unnecessary Burdens the Rule places on the ability of Small Business to conduct their Affairs.

The proposed rule will have a positive impact on small businesses. Many construction companies are small businesses and by raising the thresholds in line with increases in construction costs, the proposed rule helps businesses by preventing the bond requirement from applying to small projects.

8. List of Small Businesses, Organizations and Members of the Public that commented on the Rule and its Enforcement and a Summary of their Comments.

The Surety & Fidelity Association of America, Washington DC. This organization objects to the amount of the increases in the bonding thresholds as determined by the statutory formula, stating that these would be some of the highest thresholds in the nation. Moreover, small businesses depend upon this assurance of payment even on smaller contracts. "By increasing the threshold, there will be a larger number of projects where payment protection is not available to subcontractors." Additionally, SFAA opposes the proposal that future increases be published rather than going through full formal rulemaking procedures.

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9. Did the Agency consider any of the following Rule Modifications to reduce the Impact of the Rule on Small Businesses in lieu of repeal?

☒ Less Stringent Compliance or Reporting Requirements
☒ Less Stringent Schedules or Deadlines for Compliance or Reporting
☐ Consolidation or Simplification of Reporting Requirements
☒ Establishment of performance standards in lieu of Design or Operational Standards
☐ Exemption of Small Businesses from some or all requirements
☐ Other, describe:

10. Fund Sources Affected
☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

11. Chapter 20, Stats. Appropriations Affected
None

12. Fiscal Effect of Repealing or Modifying the Rule
☒ No Fiscal Effect ☐ Increase Existing Revenues ☐ Increase Costs
☐ Indeterminate ☐ Decrease Existing Revenues ☐ Could Absorb Within Agency's Budget
☐ Decrease Cost

13. Summary of Costs and Benefits of Repealing or Modifying the Rule
Many construction companies are small businesses and the adjustment of the thresholds for application of the payment and performance bond requirements prevent these provisions from affecting small public works projects over time solely due to the effects of inflation.

14. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)
☐ Yes ☒ No

15. Long Range Implications of Repealing or Modifying the Rule
None

16. Compare With Approaches Being Used by Federal Government
The Miller Act (40 USC 3131 – 3134) applies to contracts awarded for the construction, alteration, or repair of any public building or public work of the Federal Government. While the Act provides that these bonds must be posted on contracts exceeding $100,000 in cost, the Federal Acquisition Regulation (CFR 48 Part 28) requires the bonds only on contracts that exceed $150,000.00.

17. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)
Iowa: Contracts for the construction of a public improvement shall, when the contract price equals or exceeds $25,000, be accompanied by a bond, with a surety, conditioned for the faithful performance of the contract, and for the fulfillment of other requirements as provided by law.

Illinois: Any contractor entering into a contract for public work of any kind costing over $50,000 with any state officials, boards, commissions or agents, or any political subdivisions, is required to supply and deliver a bond to the state or political subdivision, with good and sufficient sureties.

Michigan: Before any contract exceeding $50,000 is awarded for the construction, alteration, or repair of any public building or public work or improvement, the proposed contractor is required to furnish a performance bond and a payment bond which will become binding upon the award of the contract to the principal contractor.

Minnesota: Public entities entering into contracts greater than $100,000 must obtain a performance bond and a payment bond from the contractor. This requirement, with a few exceptions, applies to contracts for "the doing of any public work."

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