

Clearinghouse Rule 06-077

STATE OF WISCONSIN

DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

The Wisconsin Department of Transportation proposes an order to create ch. TRANS 515, relating to contractual service procurement

**NOTICE OF HEARING
AND
TEXT OF PROPOSED RULE**

NOTICE IS HEREBY GIVEN that pursuant to s. 84.01(13), amended by 2005 Wis. Act 89, Stats., and interpreting s. 84.01(13), Stats., the Department of Transportation will hold a public hearing in **Room 951** of the Hill Farms State Transportation Building, 4802 Sheboygan Avenue, Madison, Wisconsin on the **8th** day of **August**, 2006, at **10:00 AM**, to consider the creation of ch. Trans 515, Wisconsin Administrative Code, relating to contractual service procurement.

An interpreter for the hearing impaired will be available on request for this hearing. Please make reservations for a hearing interpreter at least 10 days prior to the hearing.

Parking for persons with disabilities and an accessible entrance is available.

Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: ss. 16.70(3g) and 84.01(13), Stats.

Statutory authority: ss. 16.70(3g) and 84.01(13), Stats.

Explanation of agency authority: The Department of Transportation is authorized to execute contracts for engineering and other services under s. 84.01(13), Stats. That statute also requires the Department to conduct a cost-benefit comparison of having that work performed by state employees, if the contract will cost \$25,000 or more. In addition to promulgating permanent rules, Act 89 requires the Department to promulgate emergency rules on this subject not later than July 1, 2006, and requires the Department to conduct this comparison for all contractual services solicited on or after July 1, 2006.

Related statute or rule: ss. 16.70(3g), 84.01(13) and 84.06(1m), Stats.

Plain language analysis: The proposed rule requires a cost benefit analysis before procuring engineering or other specialized services under s. 84.01(13), Stats., in excess of \$25,000 when those services are normally performed by state employees. The required analysis includes a comparison between the costs of contracting out and performing the services with state employees. The analysis also considers other subjective factors such as timeliness, quality and technical expertise.

Summary of, and preliminary comparison with, existing or proposed federal regulation: N/A

Comparison with Rules in Adjacent States:

Michigan: Department legal counsel is unaware of and was unable to locate any rules in this state pertaining to this subject.

Minnesota: Department legal counsel is unaware of and was unable to locate any rules in this state pertaining to this subject.

Illinois: Department legal counsel is unaware of and was unable to locate any rules in this state pertaining to this subject.

Iowa: Iowa Code sec. 23A.2 (2205) prohibits the state from offering to the public any supply or service that is also offered by private enterprise. This prohibition does not apply to supplies or services to be used or consumed solely by the state. There appears to be no requirement that the state compare costs and benefits of obtaining services by state employees or private enterprise.

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: 2005 Wisconsin Act 89 requires the Department to promulgate this rule.

Analysis and supporting documentation used to determine effect on small businesses: The proposed rule does not affect the amount or quality of engineering or specialized services procured from private enterprise and therefore is expected to have no effect on small businesses.

Effect on small business: The requirements of the rule will be implemented by Department employees and will have no effect on external parties including small business. The Department's Regulatory Review Coordinator may be contacted by e-mail at andrew.ruiz@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect and anticipated costs incurred by private sector: The Department estimates that compliance with 2005 Wisconsin Act 89 will cost it \$217,000 per year. No similar costs will be borne by the private sector.

Agency contact person and place where comments are to be submitted and deadline for submission: The public record on this proposed rule making will be held open

until close of business the day of the hearing to permit the submission of comments in lieu of public hearing testimony or comments supplementing testimony offered at the hearing. Any such comments should be submitted to Randy Knoche, Department of Transportation, Bureau of State Highway Programs, Room 951, P. O. Box 7913, Madison, WI 53707-7913. You may also contact Mr. Knoche by phone at (608) 266-1824.

To view the proposed amendments to the rule, view the current rule, and submit written comments via e-mail/internet, you may visit the following website:
<http://www.dot.wisconsin.gov/library/research/law/rulenotices.htm>.

TEXT OF PROPOSED RULE

SECTION 1. Ch. Trans 515 is created to read:

CHAPTER TRANS 515 CONTRACTUAL SERVICE PROCUREMENT

Trans 515.01 Purpose and scope. (1) The purpose of this chapter is to create standards and procedures for conducting a cost-benefit analysis before contracting out for any service performed by state employees and involving an estimated expenditure of more than \$25,000, as required under s. 84.01(13), Stats.

(2) This chapter applies to all procurements of services executed under the authority of s. 84.01(13), Stats., that involve an estimated expenditure of more than \$25,000, except contracts for any service that is not a service performed by state employees.

Trans 515.02 Definitions. In this chapter:

(1) "Contract" means any contract or work order executed under s. 84.01(13), Stats., that is likely to result in an encumbrance, including any master contract having a well-defined scope of services.

(2) "Cost-benefit analysis" means a comprehensive written study to identify and compare the total cost, quality, technical expertise, and timeliness of a service performed

by state employees and resources with the total cost, quality, technical expertise, and timeliness of the same service obtained by means of a contract for contractual services.

(3) "Department" means the department of transportation.

(4) "Direct costs" means any cost that can be identified specifically with one particular cost objective, including the cost of salaries, limited term employees, fringe benefits and supplies.

(5) "Indirect costs" means the cost, allocable on a pro rata basis, of any general management or administrative cost that is incurred for a purpose benefiting more than one cost objective.

(6) "Master contract" means a contract under which no contractual obligation exists but that permits multiple purchases of goods or services by executing a work order that defines a specific scope of services and price.

(7) "Period contract" means a contract in which the contract scope of services is defined as services performed over a specified period of time.

(8) "Project contract" means a contract in which the contract scope of services is defined by the completion of the project or phase of a project.

(9) "Proposed engagement" means any execution of a contract, any renewal or extension of a contract, and any amendment of a contract that modifies the contract's scope of services. Any amendment to a contract that does not modify the contract's scope of services is not a proposed engagement.

(10) "Service performed by state employees" means engineering, consulting, surveying or other specialized work on department projects that is within the scope, expertise and ordinary duties of department employees. It does not include work performed for cities, villages, towns, or counties under ss. 84.01(5) or 84.03, Stats.

(11) "Solicitation of interest date" means the date on which the department advertises its intent to contract for services and solicits notice of interest, statement of qualification or proposal from persons wishing to perform those services. For contracts not requiring a public advertisement, it means the date the department first contacts any person regarding their interest in performing those services.

(12) "Total cost" means direct costs plus allocable indirect costs.

Trans 515.03 Cost benefit analysis. (1) Before the solicitation of interest date, the department shall conduct a cost-benefit analysis of each contract for a service performed by state employees and that involves an estimated expenditure of more than \$25,000.

(2) The cost-benefit analysis shall divide the work into functional tasks and shall show the total number of hours estimated to complete each task, unless the department states in its analysis why the specific proposed work justifies using another method. The cost-benefit analysis shall assume that state employees and contractors will require the same hours to complete a task. The department shall determine cost rates per task using historical data, wherever sufficient historical data exists. The cost-benefit analysis shall include all of the following:

(a) An estimate of the total cost of having state employees perform the services, including:

1. Estimated direct cost of wages.
2. Estimated direct cost of expenses.
3. Allocated fringe benefits.
4. Allocated time off with pay.
5. Allocated indirect costs.

(b) An estimate of the total cost to the department of the proposed engagement of services, including:

1. Estimated contract price.
2. Estimated cost per hour for each task, including salary, expenses, overhead and profit.
3. Estimated costs incurred by department to execute and administer contract cost, including the allocable cost, if any, of the contractor's use of state facilities, equipment or state employees.

(c) An evaluation of other factors affecting the decision to engage services under s. 84.01(13), Stats., including:

1. Quality.
2. Technical expertise.
3. Timeliness of service.

(3) This section does not apply to any of the following:

(a) Any master contract in which the scope of services is not defined until a work order is negotiated and executed.

(b) Any work order under a master contract for which a cost-benefit analysis was performed.

Trans 515.04 Contract renewals. The department shall complete a cost-benefit analysis in accordance with s. Trans 515.03(2) before renewing or extending a period contract or authorizing subsequent phases of any project contract, if the value of the renewal or authorization involves an estimated additional expenditure of \$25,000 or more.

Trans 515.05 Access to cost-benefit analyses. Any person may inspect or copy a cost-benefit analysis completed under this chapter, if any of the following applies:

(1) The contract or work order for the service has been executed.

(2) No contract or work order for the service has been executed, unless the department makes a specific demonstration that there is a need to restrict public access to the cost-benefit analysis at the time that the request to inspect or copy the cost-benefit is made. Pursuant to ss. 19.35 and 19.85, Stats., the department may prohibit any person from inspecting or copying a cost-benefit analysis if the demonstration shows that the department is deliberating or negotiating the purchasing of services, or that competitive or bargaining reasons require the department to withhold the cost-benefit analysis.

Trans 515.056 Effective date. The requirements of this rule apply to all contracts for which the solicitation of interest date is after June 30, 2006.

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this ____ day of June, 2006.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation