

Report From Agency

STATE OF WISCONSIN

DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY

CR 06-077

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

REPORT OF THE DEPARTMENT OF TRANSPORTATION ON THE FINAL RULE DRAFT

This report is submitted to the chief clerks of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

Part 1--Analysis prepared by the Department of Transportation.

Part 2--Rule text in final draft form.

Part 3--Recommendations of the Legislative Council.

Part 4--Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

Submitted by:

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PART 1
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 or by contractual service providers, 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 copies of proposed rule: Copies of the proposed rule can be obtained, without cost, by writing 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.

PART 2

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

Trans 515.02 Definitions. In this chapter, "department" means the department of transportation.

Trans 515.03 Cost-benefit analysis. (1) ANALYSIS REQUIRED. The department shall complete a uniform cost-benefit analysis of each proposed contractual

service procurement under s. 84.01(13), Stats., involving an estimated expenditure of more than \$25,000 annually. Each cost-benefit analysis shall include the information set forth in subs. (2) to (6).

(2) SERVICE OVERVIEW. A cost-benefit analysis shall provide the following:

(a) A justification for the request written in clear, non-technical language that can be understood by persons who may not be directly involved in or familiar with the proposed service, with all acronyms fully defined.

(b) A list and description of any federal mandates, state statutes or administrative rules that dictate how the proposed service must be performed.

(3) TOTAL COST. Each proposed contractual service procurement under s. 84.01(13), Stats., shall include a total cost component. For each proposed contractual service procurement under s. 84.01(13), Stats., involving an estimated expenditure of more than \$25,000 annually, the department shall complete a detailed cost-benefit analysis showing that the proposed service can be performed more economically or efficiently by contract rather than by current state employees or by hiring permanent, project or limited term employees. The consideration of relevant costs shall include, but not be limited to, wage and salary costs, fringe benefits costs, administrative overhead costs, other operating costs, material costs, insurance costs, facility costs, contract price, contract monitoring, and one-time conversion costs. The department shall use the cost-benefit methodology set forth in chapter 8 of the department's Facilities Development Manual.

NOTE: To request the cost-benefit methodology set forth in the Facilities Development Manual, please contact the Department of Transportation, Bureau of Highway Development, Roadway Development Section, P.O. Box 7916, Madison, WI 53707-7916 or (608) 266-9349.

(4) **QUALITY.** A description of the proposed service to be performed, a list of items to be delivered, any specific conditions to be required of the contractor, and how the department will ensure that the contractor will provide services and quality as promised without financial losses to the State.

(5) **TECHNICAL EXPERTISE.** (a) *Capacity.* A description whether department employees have the capacity to perform the proposed service.

(b) *Expertise.* A description whether department employees have the expertise to perform the proposed service.

(6) **TIMELINESS.** (a) *Timeliness.* A complete schedule and timetable for the proposed service.

(b) *Project term.* A statement indicating whether the proposed service is a short-term project or is a long-term need for the department.

Trans 515.04 Continued appropriateness of contracting. The department shall review periodically, and before any renewal, the continued appropriateness of contracting under each contractual service agreement under s. 84.01(13), Stats., involving an estimated annual expenditure of more than \$25,000.

Trans 515.05 Effective date. The requirements of this rule apply to all contracts for which 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 August, 2006.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation

PART 4
CR 06-077

ANALYSIS OF FINAL DRAFT OF TRANS 515

(a) **Basis and Purpose of Rule.** This rule making is in response to 2005 Wis. Act 89 directing the Department to adopt rules requiring the Department to perform a cost benefit analysis before procuring engineering or other specialized services under s. 84.01(13), Stats., in excess of \$25,000. 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.

(b) **Modifications as a Result of Testimony at Public Hearing.** The public hearing was held in Madison on August 8, 2006. For explanation of the modifications made as a result of testimony at the hearing, see par. (d) below, ¶¶ 1 and 8.

(c) **List of Persons who Appeared or Registered at Public Hearing.** The following persons appeared/registered at the hearing:

Thomas Walker, Director of Government Affairs, Wisconsin Transportation Builders Association (WTBA), One South Pinckney Street, Suite 818, Madison, WI 53703. Mr. Walker spoke in opposition to the proposed rule.

Julie Millard, Engineering Specialist, State Engineers Association (SEA), 4247 Hwy. 173, Nekoosa, WI 54457. Ms. Millard spoke in favor of the proposed rule.

Carol Godiksen, Executive Director, American Council of Engineering Companies of Wisconsin (ACEC-WI), 3 South Pinckney Street, Suite 800, Madison, WI 53703. Ms. Godiksen spoke for information on the proposed rule.

Terri Lenz, Policy Analyst, Department of Administration, Division of Enterprise Operations, 101 East Wilson Street, 6th Floor, P. O. Box 7867, Madison, WI 53702-7867. Ms. Lenz registered for information.

(d) **Summary of Public Comments and Agency Response to those Comments:** The written comment period was held open until close of business August 8, 2006. No written comments were received beyond what was submitted at the public hearing. All three commenting organizations provided the following written comments:

WTBA, ACEC-WI and SEA questioned the assumption that the number of hours to perform the proposed project are the same for both WisDOT and consultant staff. Both SEA and ACEC-WI implied that the constituencies they represent are more efficient while WTBA said they are simply different. WisDOT does not currently have data and supporting analysis to justify different estimates of hours for consultants and state staff. Nevertheless, WisDOT changed the final rule to permit the use of different hours estimates in the event that the Department develops a method to separately estimate

those hours. WisDOT will assume the hours to be the same unless there is evidence to support differences.

WTBA, ACEC-WI and SEA questioned whether the rule adequately weighed the subjective factors of "quality, technical expertise and timeliness of service" required by 2005 Wis. Act 89. ACEC-WI also believes that "risk management, staffing experience and productivity, cost of delay, and many other true costs of project delivery" are not considered in the analysis. Subjective factors are inherently difficult to measure objectively. WisDOT believes state staff and consultant staff both provide quality products in the majority of situations where WisDOT contracts for services. WisDOT agrees with ACEC-WI's assertion that subjective factors are just as important, if not more important, than price when making outsourcing decisions. However, none of the commenting organizations suggest how to quantify the subjective measures required in 2005 Wis. Act 89 (or that they suggest), nor how to include them within the cost-benefit analyses. 2005 Wis. Act 89 is also silent on how to quantify those factors. WisDOT has modified the rule to require the cost-benefit analysis to include conditions intended to ensure that the contractor will provide services and quality as promised without financial losses to the State, to require a description of whether Department employees have the technical expertise to perform the proposed service, and to include a complete schedule and timetable for the proposed service and the duration of the proposed project term.

WTBA suggested that ch. Trans 515 should include more details about the cost-benefit analysis methodology. Contracts analyzed under ch. Trans 515 will be for a variety of services. The sources of information and detailed methodology used to conduct the analysis will vary depending on the type of service being performed. While WisDOT considers the initial methods of analysis available to be the best options currently available, WisDOT wishes to maintain the flexibility to make changes to its detailed methodologies when there are opportunities to improve the quality and reliability of the analysis with respect to various services and so declines to make the rule more specific. WisDOT has modified the rule to require the use of the cost-benefit methodology published in Chapter 8 of the Department's Facilities Development Manual.

WTBA stated that the hour and dollar estimates used in the cost-benefit analysis are meaningless because the anticipated scope and staffing for the consultant contract change significantly during the negotiation process. WTBA suggested that the cost-benefit analysis be completed after contract negotiations, when the clearest scope of services is known. WisDOT anticipates conducting the cost-benefit analysis for the "proposed engagement," per 2005 Wis. Act 89, at the time of solicitation because that is the time closest to the decision to contract for services. WisDOT acknowledges that changes do occur during the contract negotiation process, so WisDOT has modified the rule by deleting the requirement that it complete the cost-benefit analysis before the solicitation of interest date. While WisDOT anticipates completing the majority of the cost-benefit analyses before the solicitation of interest date, deleting the requirement allows flexibility for more complicated negotiated services.

Similarly, SEA suggested that WisDOT should complete mid-contract and post-contract comparisons of consultant costs with the original cost-benefit analysis to

evaluate performance accurately. These additional analyses on contracts are beyond the scope of 2005 Wis. Act 89, and WisDOT declines to require them as part of ch. Trans 515. Moreover, WisDOT anticipates that final negotiated contract amounts or actual expenditures will not always match cost-benefit analysis figures because of the scope issues discussed above. In addition to changes in scope, final contract amounts should be higher because the analysis is based on historical costs while the costs of contract work will be performed in the future. Also, accurate contract estimation is difficult without knowing the specific firm that will perform the work. WisDOT uses industry-wide averages in the cost-benefit analyses. By definition, only a few consultants' cost structures will approach those average figures. Without knowing which firms are competing for the work, however, using averages seems to WisDOT the most reasonable approach.

ACEC-WI disagrees with the way WisDOT included contract administration or oversight hours in the cost-benefit analyses. Most of the aspects of oversight mentioned within the cost-benefit analysis (preparing advertisement, conducting selection process, reviewing/approving invoices, negotiating contracts) would not be performed if WisDOT engineering staff completed the project. Most costs of overseeing WisDOT employees are incorporated into WisDOT costs as either direct hours or as indirect costs attributed to WisDOT work. General oversight and supervision of projects that would occur regardless of who is doing the work are neutral costs and should not be included in WisDOT's estimate of costs to administer a consultant contract. Costs included in WisDOT's estimate of costs to administer a contract should be marginal costs that would not be incurred if WisDOT performed the work with state staff.

WTBA and ACEC-WI question the need to perform additional cost-benefit analyses whenever a contract is amended. WisDOT has deleted this requirement.

SEA suggested that the rule should prevent firms from viewing the cost-benefit analyses until after the firms have submitted their proposals in order to maintain the competitive nature of the consultant selection process. ACEC-WI commented it also supports this provision of the rule. WisDOT deleted this provision from the rule because WisDOT can restrict access to the analysis until after the contract is executed, if WisDOT demonstrates that it cannot share the data for competitive or bargaining reasons, as provided in the Open Records and Public Meetings laws, ss. 19.35 and 19.85, Stats. SEA also believes that releasing the task amounts by engineering activity would hurt the competitive process, and that WisDOT should only disclose total estimated WisDOT and consultant hours and dollars for the project. WisDOT sees no issues with its methodology hurting the competitive process.

ACEC-WI proposed that a third party such as the Legislative Audit Bureau undertake the cost-benefit analysis, as well as perform the comparison of WisDOT and private firm indirect cost rates, instead of WisDOT. 2005 Wis. Act 89 states, "the department shall conduct a uniform cost-benefit analysis"; WisDOT cannot assign this task to another party. Having the Legislative Audit Bureau explore the differences between WisDOT and consultant indirect cost rates is beyond the scope of 2005 Wis. Act 89 and WisDOT's authority.

ACEC-WI points out that private firms pay taxes and liability insurance premiums while WisDOT does not. WisDOT has modified the rule to consider relevant costs, including operating costs and insurance payments.

ACEC-WI asked for some specific language changes within the rule:

1. The rule is modified as requested to perform a cost-benefit analysis for "any service potentially performed by state employees." Although Act 89 requires the cost-benefit analysis to compare the total cost, quality, technical expertise, and timeliness "of a service performed by state employees," WisDOT will complete the cost-benefit for every engagement involving an estimated expenditure of more than \$25,000 annually, regardless of whether WisDOT currently performs that type of service. WisDOT has modified the rule to consider the cost of hiring permanent, project or limited term employees to provide the services and the probable quality, technical expertise, and timeliness of those hypothetical state employees.
2. The term "contractor" in the current language will not be changed to "service provider." The common definition of contractor as "one who agrees to provide materials or services at an agreed upon price" is appropriate within the context of the rule.
3. The limit of considering only those indirect costs that are "allocable" was changed to consider only "relevant" costs.

(e) **Explanation of any Changes Made to the Plain Language Analysis or Fiscal Estimate.** No changes made.

(f) **Response to Legislative Council Recommendations.** The Legislative Council Clearing House report contained no recommendations on the proposed rule.

(g) **Final Regulatory Flexibility Analysis.** The requirements of the rule will be implemented by Department employees and will have no effect on external parties, including small business.