

## Report From Agency

### PROPOSED ORDER OF THE DEPARTMENT OF ADMINISTRATION

The Wisconsin Department of Administration proposes an order to repeal Adm 21.07(1) (b) 2.; to renumber Adm 21.02 (7), (8), and (9); to amend Adm 21.01(1), 21.02(3), 21.03(2) and (3)(intro.), 21.04(1), 21.06(1)(b), 21.07(1)(intro.), (3)(c) and (d), 21.08 (1)(intro.) and (f), (2)(intro.), (3), (4) and (7), 21.09 (1), (2), (4), (5) and (6); to repeal and recreate Adm 21.05; and to create Adm 21.02 (7), relating to construction bidding and contracting.

#### **Analysis prepared by the Department of Administration**

Statutory authority: s. 16.004(1) and 16.855(15), Stats.

Statutes interpreted: s. 16.85 and 16.855, Stats.

#### **Agency Authority to Promulgate Rule:**

Pursuant to s. 16.85, Stats., the Wisconsin Department of Administration is responsible for the supervision of all engineering, architectural services or construction work performed by, or for, the state in the construction and acquisition of new buildings or improvements and additions to existing buildings.

#### **Related Statute or Rule:**

None

#### **Summary of Proposed Rule:**

The Department proposes amending Chapter Adm 21, regarding the Department's requirements for advertising, bidding and contracting construction projects.

The proposed rule amendments would permit bidders and contractors to submit state construction project bids via electronic format. This allows for standardized, fair and equitable bidding statewide while maintaining bid integrity. Projects outside of the Dane County area now require bidders to prepare bids in advance of bid opening and travel to Madison, or use a mail service to deliver the bid to the department. This practice is not considered equitable to contractors throughout the State because it does not allow equal preparation time for submitting bids for state construction projects.

Included in the proposed rule are amendments to provide consistency to Department of Administration references as well as language striking written word bids versus numerical values.

## **Comparison of Similar Rules in Adjacent States**

The State of Wisconsin surveyed other states through the National Association of State Facility Administrators and received several responses. The States of Montana, Ohio, Kansas and Alaska do not currently utilize electronic bidding practices. The State of Vermont has instituted electronic bidding with success and little adverse affect. Several states responded that electronic bidding was being utilized in their Transportation departments for roadway projects.

The State of Wisconsin also used data from the Federal Highway Administration regarding other states and bidding practices. Twenty-seven states are using electronic bidding for state DOT projects according to a 2006 survey.

The Illinois Capital Development Board opens sealed bids at four locations, Springfield, Chicago, Carbondale and Peru for state building construction projects.

The State of Minnesota Materials Management Division requires on line registration of vendors, but still does sealed public bid opening in paper format. Minnesota does have an initiative to move to electronic plan distribution to vendors.

The departments in the State of Iowa handle construction independently. With the exception of the Iowa Transportation Department, the other departments do individual sealed bid delivery and public bid opening via paper bid submittals.

The State of Michigan does not do electronic bidding with the exception of the ir transportation department.

## **Comparison with Existing or Proposed Federal Regulations**

The US Department of Transportation Federal Highway Administration utilizes electronic bidding for highway construction projects. A review of the federal websites appear to indicate that other federal agencies can centrally post requested construction/services to the Federal Business Opportunities website with instructions on bidding independent to each agency within the federal government. A review of most of these federal posted projects indicates bids are to be hardcopy, delivered by hand, overnight or other delivery service to a specified location. None appeared to have electronic bidding availability.

The US Army Corps of Engineers utilizes the US Central Contractor Registration site for Contractors interested in doing Business with the Federal Government. The solicitations appear to require submittal of sealed hard copy bids to be submitted at various locations throughout the country.

## **Data Used To Support Rule**

The current rule has been in existence since 1979 with little or no updating. Some editorial and dollar threshold changes were made in a 2006 rule package.

The proposed rule permits bidders and contractors to submit state construction project bids via electronic format. This allows for standardized, fair and equitable bidding statewide while maintaining bid integrity. Projects outside of the Dane County area currently require bidders to prepare bids in advance of bid opening and drive to Madison or use a mail service to deliver the bid to the department. This practice is not considered equitable to contractors throughout the state. Business practices since 1979 have radically changed including current practices such as electronic and web based advertisement, electronic document exchange and acceptance and electronic notifications. The proposed rule amendments will expedite the processing of construction documents and enhance the construction of state projects.

## **Effect on Small Businesses:**

The Department foresees a positive impact on small businesses. It is estimated the majority of bidders on state construction projects are small business contractors and vendors. This change will save contractors and bidders driving and delivery time and associated costs as well as allowing them additional time in the bidding process to prepare bids for submittal to the department.

## **Agency Contact Person:**

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## **Place where comments are to be submitted and deadline for submission:**

Comments may be submitted to the agency contact person that is listed above and via the Wisconsin Administrative Rules Website at:  
<http://adminrules.wisconsin.gov> by the end of the business day on June 15, 2008.

## **Fiscal Estimate:**

### *State Fiscal Effect*

This rule will have no effect on the revenues received by the department.

A review and analysis by the Department has determined that allowable resources and funding has led the department to seek a vendor solution to

electronic bidding. This vendor solution will allow the Department to provide the security and reliability necessary to the Department and prospective bidders on state projects. The vendor solution anticipated initial costs are estimated at \$100,000 to \$250,000. The Department has budgeted for these costs and will absorb this cost through the 4% Division of State Facilities management fee. On-going annual maintenance costs for the vendor solution products will also be absorbed and funded through the 4% DSF management fee.

Costs for the internal training, implementation and necessary staffing or oversight of the vendor solution will be funded through operations of the Division of State Facilities.

#### *Local Fiscal Effect*

There is no fiscal effect on local units of government.

#### *Private Entities Fiscal Effect*

It is estimated the rule change will have both a reduced cost to contractors and bidders by allowing bidding to be done from their office as well as a possible increased cost to contractors and bidders by vendor subscription fees. Contractors and bidders will not have to overnight deliver or drive bids to the Madison bid opening location. Contractors and bidders doing business with state facilities may have a subscription service fee from a selected vendor that may be in the range of \$100 to \$500 annually plus a nominal monthly access fee in the range of \$10 to \$50 dollars. While the exact amount of the cost to bidders on state projects has not been fully determined, it is expected that some of this fee is offset with the convenience of submitting a bid via a secure electronic submission and not having to deliver paper copy bids and the associated travel and delivery expenses. The Department will attempt to seek out vendors with the lowest cost of operation to the Department and prospective bidders.

**TEXT OF RULE:**

**SECTION 1.** Adm 21.01(1) is amended to read:

Adm 21.01 Authority. (1) Section 16.855(15), Stats., empowers the department of ~~administration~~ to adopt rules to implement the advertising and award of contracts for construction projects.

**SECTION 2.** Adm 21.02(3) is amended to read:

Adm 21.02(3) “Bid guarantee” means a properly executed department of ~~administration~~ form of bid bond, a bank certified check, or a cashier’s check, in an amount equal to 10% of the highest combination base bid(s) and alternate bids submitted. In the event the federal government participates in a state project, the bid guarantee shall be as specified by the federal government, but not less than 10%.

**SECTION 3.** Adm 21.02 (7), (8) and (9) are renumbered to Adm 21.02 (8), (9) and (10), and Adm 21.02(8)(c) 5, as renumbered, is amended to read:

Adm 21.02(8) (c) 5. Is not presently on an ineligible list maintained by the department of ~~administration~~ for noncompliance with equal employment opportunities and affirmative action requirements as provided for in s. 16.765(9), Stats., or on any other agency list for construction related violation of statutes or administrative rules.

**SECTION 4.** Adm 21.02(7) is created to read:

Adm 21.02 (7) “Department” means the Wisconsin department of administration.

**SECTION 5.** Adm 21.03(2) and (3)(intro.) are amended to read:

Adm 21.03 (2) The department of ~~administration~~ shall advertise for proposals by publication of a class 1 notice under ch. 985, Stats., in the official state newspaper. The notice shall be published a minimum of 30 days prior to bid opening, unless the department of ~~administration~~ indicates in writing that the bidding period will be for a lesser period of time.

Adm 21.03 (3) In addition to the class 1 notice required in sub. (2), the department of ~~administration~~ may solicit and advertise for proposals by either or both of the following methods:

**SECTION 6.** Adm 21.04 (1) is amended to read:

**Adm 21.04 Issuance of addenda.** (1) The department of ~~administration~~ may issue addenda during the bidding period to correct, alter, or to provide clarification of the drawings and specifications for the project being bid or to extend the bidding period. No oral correction, alteration or clarification of said documents shall be considered valid.

**SECTION 7.** Adm 21.05 is repealed and recreated to read:

**Adm 21.05 Submittal and receipt of bids.**

(1) All bids shall be submitted electronically or in sealed envelopes.

(a) Electronic bids received by the department shall be submitted via a secured, authorized electronic transfer that provides for time and date verification as well as proper security in the transfer of data and information. Bids shall conform to project specification bid forms and include all information required by the specification as well as this section. The bidder shall submit all supporting and original documentation requested by the department within 3 calendar days of the request.

(b) Sealed envelope bids shall be enclosed in distinctly marked special envelopes provided by the department. Should the bidder not possess the special envelope provided by the department, the bidder shall place all of the following information on the face of the outermost envelope containing the bidder's proposal:

1. This envelope contains a sealed bid.
2. Project name.
3. Project number.
4. Location of project.
5. Division(s) of work being bid.
6. Bid date.
7. Name and address of bidder.

(2) The bidder is responsible for the bid described in sub. (1) (a) or (b) being delivered to the place designated in the published advertisement for proposals, on or before the date and time specified.

(3) All bids received by the department shall be stamped electronically or upon the face of the envelope indicating the date and time the bid was received.

(4) Bids received by the department after the date and time designated in the advertisement for proposal shall be returned to the bidder unopened.

(5) The department shall determine bids that conform with this section in the best interests of the state.

**SECTION 8.** Adm 21.06 (1) (b) is amended to read:

Adm 21.06 (1) (b) Personal appearance of the bidder or the bidder's authorized representative, whereby the identity and authority of the person may be ascertained by the ~~department of administration~~. After authority and identity is established, the individual shall be required to sign a receipt for the withdrawn bid.

**SECTION 9.** Adm 21.07 (1)(intro.) is amended to read:

**Adm 21.07 Bid opening.** (1) A representative of the department of ~~administration~~ shall preside at the bid opening as the bidding officer. At the date and time for bid opening, the bidding officer shall announce the following to those in attendance:

**SECTION 10.** Adm 21.07(1) (b)2. is repealed.

**SECTION 11.** Adm 21.07(3) (c) and (d) are amended to read:

Adm 21.07 (3) (c) The ~~written word~~ price quotation for the base bid and alternate bid(s).

Adm 21.07 (3) (d) If offered, the ~~written word~~ price quotation of a combined bid and identification of the base bids which constitute the work proposed under the combined bid submitted.

**SECTION 12.** Adm 21.08 (1)(intro.) and (f) are amended to read:

**Adm 21.08 Rejection of bids.** (1) The department of ~~administration~~ shall reject any bid which evidences any of the following conditions:

Adm 21.08(1)(f) The bid is submitted by a bidder who, through investigation, is found not to be qualified or responsible within the definition of these rules, ~~s. Adm 21.02(7)(b) and (c) s. Adm 21.02(8)(b) and (c)~~.

**SECTION 13.** Adm 21.08 (2)(intro.) is amended to read:

Adm 21.08 (2) The department of ~~administration~~ may reject any bid if the included documents have any of the following informalities, unless such informalities are waived by the department of ~~administration~~ and corrected by the bidder within 3 working days from the date and time of bidder notification:

**SECTION 14.** Adm 21.08 (3), (4) and (7) are amended to read:

Adm 21.08 (3) The department ~~of administration~~ may reject all low bids constituting the total lowest construction cost when such amount exceeds the authorized funds available.

Adm 21.08 (4) The department ~~of administration~~ reserves the right to reject any or all bids, if in the opinion of the department ~~of administration~~ the best interest of the state will be served.

Adm 21.08 (7) The department ~~of administration~~, with the approval of the attorney general, may settle or dispose of cases or issues arising out of errors, omissions, or mistakes contained in a bid which result in the bidder giving written notice of the bidder's intent not to execute the contract. However, if no such settlement is obtained, the bidder is not entitled to recover the bid guarantee unless the bidder proves in circuit court for Dane county that in making the mistake, error or omission the bidder was free from negligence.

**SECTION 15.** Adm 21.09(1), (2), (4), (5) and (6) are amended to read:

**Adm 21.09 Award of contracts.** (1) The department ~~of administration~~ will award contracts to the lowest qualified responsible bidder or bidders that result in the lowest total construction cost for the project and such amount does not exceed the available funds authorized for the project. Final determination as to which bidders are the lowest qualified responsible bidders is vested with the department ~~of administration~~.

Adm 21.09 (2) In cases where the bidding documents provide a formula for evaluation analysis in conjunction with the base bid or alternate bid(s), the department ~~of administration~~ will award to the lowest qualified responsible bidder(s) whose bid(s) produce the lowest bid when combined with the dollar value derived from the formula for converting evaluation factors. (see ~~s. Adm 21.02(7)(a).~~ s. Adm 21.02(8)(a).)

Adm 21.09 (4) Should the total of the proposals submitted by the lowest qualified responsible bidder(s) exceed the limits imposed by authorized funds, the department ~~of administration~~ may negotiate deductive changes in the lowest qualified bid for each contract to bring the bids within funding limits.

Adm 21.09 (5) The department ~~of administration~~ may consider any unsolicited material accompanying the bid of the lowest qualified responsible bidder only after contracts have been awarded on the basis of the information contained in the bid form. Such consideration may be given to unsolicited material only if it is in the best interest of the state to do so, and does not warrant rejection due to any of the conditions stated in s. Adm 21.08 (1) (e).



Adm 21.09 (6) Award of a contract will not be finalized until the required performance payment bond and certificate of insurance have been received and approved by the department of administration.

**SECTION 16.** Adm 21.09 (Note) is amended to read:

Note: See ~~Adm 21.02(7)(e) 5.~~ Adm 21.02(8)(c) 5. and 21.08(1)(f).

**SECTION 17.** 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.

Dated: May 21, 2010

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Michael L. Morgan  
Secretary of Department of Administration