

PROPOSED EFFECTIVE DATE September 2020

3-324 QUALIFICATIONS OF CONTRACTORS

(A) Pre-Bid: Pursuant to Ark. Code Ann. §22-9-105, contractors who have an existing contract shall not bid on additional state capital improvement contracts with state agencies if the state agency determines that the Contractor has one (1) or more material issues of an existing contract and has provided written notification of their determination to the Contractor. Material issues include, but are not limited to:

(1) Having one (1) or more projects in which:

(a) the commencement of the project is delayed thirty (30) or more calendar days beyond the agency's notice to proceed and the delay is due to the contractor's acts or omissions, or both;

(b) the completion of the project is delayed ten percent (10%) or sixty (60) calendar days beyond the completion date, whichever is less, and the delay is due to the contractor's acts or omissions, or both;

(c) the Contractor has falsified or destroyed documents relating to the contract including without limitation, falsification of invoices, making false representations to state agency officials or making false statements about any payment(s);

(d) the Contractor has failed to replace inferior or defective work or materials after notification by the state agency to which such services or materials has been provided or delivered;

(e) the Contractor has failed to make appropriate and timely payments to their subcontractor;

(f) the agency has provided formal notice to the Surety to take action on a project;

(g) the Contractor has failed to meet the completion date for the project which has caused material harm, whether financial or operational, to the agency when the delay is due to the Contractor's acts or omissions, or both;

(h) the Contractor fails to adequately complete the project punch list within one hundred and twenty (120) calendar days from substantial completion and the delay is due to the Contractor's acts or omissions, or both; or

(i) the Contractor fails to respond to warranty issues or latent defects within ten (10) calendar days after being notified by the agency in writing.

(2)

(a) Appeals of material issues determinations by state agencies shall be made to the Transformation and Shared Services Office of State Procurement (OSP) Director or his or her designee.

(i) Substantive Requirements. An appeal must set forth facts showing that the appellant is a firm that has an existing state contract with a state agency and the factual basis for appealing the material issues determination by the state agency.

(ii) Formal Requirements. An appeal must be submitted in writing to the OSP Director. To expedite handling of appeals, if delivered by mail, the envelope containing an appeal should be clearly labeled "Appeal of Material Issues Determination." Appeals delivered by email should be identified as an Appeal of Material Issues Determination in the subject line and marked as important. An appeal shall include as a minimum the following: (1) The name and address of the appellant (or the appellant's attorney); (2) appropriate identification of the contract by reference to its number, if a number has been assigned; and (3) unless good cause is shown for its absence, a copy of any documents or supporting evidence upon which the appeal is based, attached to or enclosed with the appeal as an exhibit. Where such documents or supporting evidence substantiating any

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claims made in an appeal are believed or known to exist, but are not available with reasonable diligence to include as an exhibit within the time for submitting a protest, the anticipated documents must be described in the protest so as to explain how they are expected to support the appeal and when the appellant reasonably anticipates they will be available, if ever. Failure to provide such supporting exhibits without good cause or within a reasonable time may result in the appeal being denied.

(iii) Timeliness. To be timely, an appeal must be submitted in writing to the OSP Director within fourteen (14) calendar days after the written determination was delivered to the Contractor pursuant to Section 2(b).

(iv) Burden of Supporting an Appeal and Supplying Requested Information. A Contractor submitting an appeal has the burden of stating facts showing that the appellant has a factual basis for the appeal. In determining an appeal, the OSP Director may, but has no duty to, request an appellant or other interested party to submit documentation or information relevant to the appeal. Failure of any person to comply expeditiously with a request for documents or information by the OSP Director when determining an appeal may result in the appeal being determined without consideration of the requested information. Delivery of requested documents or information after three business days from the request is generally not considered expeditious, but the OSP Director may allow additional time for good cause.

(v) Claims of damages or questions of law. When an appeal claims damages or questions of law, the Contractor should submit a claim through the Arkansas Claims Commission. The Commission regulates the procedure by which such claims are submitted and determined.

(vi) Decisions. The decision of the OSP Director regarding an appeal under this rule is final and conclusive. Decisions shall be issued by the OSP Director in writing, state the reasons for the decision, and be mailed or otherwise furnished to the appellant and interested parties.

(b) The state agencies under the jurisdiction of the Division of Building Authority (DBA) shall promptly notify and provide their written determination to the Contractor and provide a written copy to the Section Administrator. State agencies shall provide written notification to DBA if an appeal in (2)(a) is not timely filed or if the appeal is overruled in favor of the Contractor. Upon receipt of this notification, the Section shall place the name of the prohibited bidder on the DBA Website. The prohibition shall not be for a period of more than three (3) years and shall remain effective until the state agency's written notification to DBA that the material issue(s) affecting the existing contract is no longer a concern for the state agency or the contract has been terminated or closed out, whichever is sooner.

(c) Institutions of higher education shall promptly notify and provide a written determination to the Contractor and copy the Department of Higher Education. Institutions of higher education shall provide written notification to the Department of Higher Education if an appeal in (2)(a) is not timely filed or if the appeal is overruled in favor of the Contractor. Upon receipt of this notification, the Department of Higher Education shall place the name of the prohibited bidder on the Department of Higher Education's Website. The prohibition shall not be for a period of more than three (3) years and shall remain effective until the institution of higher education's written notification to the Department of Higher Education that the material issue(s) affecting the existing contract is no longer a concern

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for the institution of higher education or the contract has been terminated or closed out, whichever is sooner.

(B) Post-Bid: Contract awards should be made to the lowest responsible bidder. Breaches of responsibility may include ~~but not limited to~~ without limitation:

(1) Conviction for of a criminal offense in connection with obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(2) Conviction under State or Federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity;

(3) Conviction under State or Federal antitrust;

(4) Violation of contract provisions, as set forth below:

(a) Failure to perform in accordance with the specifications or within the time limit provided in the state capital improvement contract; or

(b) Failure to perform or unsatisfactory performance in accordance with the terms of one or more contracts;

(5) Failure to post bid or performance bonds as required by laws or rules;

(6) Substitution of work or materials without the prior written approval of the Agency and the Design Professional; however, these approvals shall not in any manner diminish the Section's approval of change orders;

(7) Failure to replace inferior or defective work or materials after notification by the Agency or the Section to which such services or materials has been provided or delivered;

(8) Refusal to accept a contract awarded pursuant to the terms and conditions of the contractor's bid;

(9) Falsifying invoices, or making false representations to any Agency or State official, or untrue statements about any payment under a contract or to procure award of a contract, or to induce a modification in the price or the terms of a contract to the contractor's advantage;

(10) Collusion or collaboration with another contractor or contractors in the submission of a bid or bids that results in, or could result in lessening or reducing competition for a bid;

(11) Falsifying information in the submission of any document in any process related to the capital improvement project.

(12) Failure to make appropriate and timely payments to their subcontractors;

(13) Any other act or omission the Agency determines to demonstrate that the Contractor cannot act in a responsible manner, including but is not limited to suspension or debarment by any other governmental entity for any cause, which may include but not limited to Contractors who are suspended or debarred by the State Department of Labor or deemed unqualified by the Contractor's Licensing Board.

From: [Johnson, Lacey A.](#)
To: [Jennifer Davis \(DIS\)](#)
Subject: BLR - DBA Minimum Standards and Criteria
Date: Tuesday, June 30, 2020 4:29:43 PM

Good afternoon, Jennifer,

I have finished reviewing the above-mentioned proposed rules, and I just have a few quick questions about them:

1. Are the “material issues” listed in section (A)(1)(c)-(f) and (i) of the proposed rules taken from a specific statutory source, or are they based on something else?
2. Ark. Code Ann. § 22-9-105(a)(2)(C) states that the State Procurement Director shall adopt rules to establish the process and procedure for appeals. Are these rules being promulgated by OSP in any capacity?
3. Per Act 422 and Ark. Code Ann. § 22-9-105(c), “the Secretary of the Department of Finance and Administration shall adopt rules to provide guidance on what is considered to be a material issue” Is DFA involved in the promulgation of these rules?
4. Is there specific authority for the fourteen calendar day timeframe within which appeals must be submitted (section (A)(2)(a)(iii))?
5. Where does the three-year timeframe on bid prohibitions come from (section (A)(2)(b))?

I appreciate your assistance!

Thank you,

Lacey A. Johnson
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**SECTION 3-324 OF THE
ARKANSAS DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES,
DIVISION OF BUILDING AUTHORITY STANDARDS AND CRITERIA**

PUBLIC COMMENTS AND DEPARTMENT RESPONSE

Name: Lacey Johnson, Bureau of Legislative Research

Comment: Are the “material issues” listed in section (A)(1)(c)-(f) and (i) of the proposed rules taken from a specific statutory source, or are they based on something else?

Department Response: They do not come from a rule or code reference. The law stated that the rule would provide guidance on what is considered a “material issue.” The issues listed are the main problems that state agencies/higher education have on construction projects. These material issues were developed in discussions DBA had with the Associated General Contractors (contractors’ group) and University of Arkansas staff.

Comment: Ark. Code Ann. § 22-9-105(a)(2)(C) states that the State Procurement Director shall adopt rules to establish the process and procedure for appeals. Are these rules being promulgated by OSP in any capacity?

Department Response: No, OSP provided the language contained in the rule regarding the appeal processes. Since DBA and OSP are all under TSS and the subject matter involved capital improvements (of which OSP does not have authority over), DBA was the one chosen as a practical matter to push the promulgation under the TSS umbrella since the topic of the rule is capital improvements.

Comment: Per Act 422 and Ark. Code Ann. § 22-9-105(c), “the Secretary of the Department of Finance and Administration shall adopt rules to provide guidance on what is considered to be a material issue” Is DFA involved in the promulgation of these rules?

Department Response: No. The responsibility for these rules was transferred to TSS Division of Building Authority by Act 901 of 2019.

Comment: Is there specific authority for the fourteen calendar day timeframe within which appeals must be submitted (section (A)(2)(a)(iii))?

Department Response: While this Act does not specify a specific timeline, Ark. Code Ann. 19-11-244 outlines a 14-day timeline for protesting solicitations and awards so the same was used for this section.

Comment: Where does the three-year timeframe on bid prohibitions come from (section (A)(2)(b))?

Department Response: The 3-year language was requested by higher education to give the prohibition more meaning to the “carrot/stick” approach of having the contractor perform better on existing contracts.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT _____
DIVISION _____
PERSON COMPLETING THIS STATEMENT _____
TELEPHONE NO. _____ FAX NO. _____ EMAIL: _____

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two (2) copies with the Questionnaire and proposed rules.

SHORT TITLE OF THIS RULE

1. Does this proposed, amended, or repealed rule have a financial impact? Yes No

2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule?
Yes No

3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes No

If an agency is proposing a more costly rule, please state the following:

- a) How the additional benefits of the more costly rule justify its additional cost;

- b) The reason for adoption of the more costly rule;

- c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and

- d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

b) What is the additional cost of the state rule?

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?
Yes No See attached for supplemental response to the following questions

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
 - (a) justifies the agency's need for the proposed rule; and
 - (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
- (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
- (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
 - (a) the rule is achieving the statutory objectives;
 - (b) the benefits of the rule continue to justify its costs; and
 - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

Question 7 Supplemental Response

Yes, there is a possibility of lost profits reaching the amount of \$100,000 if the Contractor is prohibited in bidding and being determined as the “lowest responsible bidder.” Colleges and universities have more bid projects than DBA. The majority of DBA bid projects are in the mid ranges of \$300,000 - \$750,000. While a contractor profit margin on DBA bid projects may not reach \$100,000 on one project, it is conceivable that a combination of project awards could reach the amount.

(1) a statement of the rule’s basis and purpose;

The changes in this proposed rule provides for a method of determining contractors eligibility to bid on future state agency capital improvement projects when a material issue exists on a state agency contract. The proposed rule determines what is a “material issue”, the process of notifying the Contractor of the issue and the appeal process to the State Procurement Director.

- A state agency determines a material issues exists and provided the Contractor written notification.
- Material issues are related to a contractor taking too long to begin a contract, too long to complete a project, committing fraud, providing inferior work, failing to provide warranty work and failure to provide payments to subcontractors.
- Appeals of state agency determinations are made to the Office of Procurement.
- If a timely appeal is not provided or if the appeal is denied, the names of the ineligible Contractors are placed on the Division of Building Authority and the Department of Higher Education websites.
- The prohibition shall not last for more than 3 years and shall remain until the state agency provides notification that material issue is no longer of concern or the contract has been terminated or closed out, whichever is sooner. At which point the Contractor’s name is removed from the website.

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;

The proposed rule is required by Ark. Code Ann. §22-9-205. The rule addresses the issue of poor performing contractors on existing state contracts from seeking other state capital improvements until the performance is corrected or the contract is terminated but the prohibition cannot last for more than 3 years.

(3) a description of the factual evidence that:

(a) justifies the agency’s need for the proposed rule; and

(b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule’s costs;

The proposed rule is being implemented due to concerns raised in 2018 by the Ikaso Consulting LLC report to the ALC Review Committee regarding the State’s procurement issues. Act 422 of 2019 was enacted as a result of the report. The benefit of the bidder’s prohibitions contained in

the proposed rule (pursuant to Ark. Code Ann. §22-9-105) is to encourage Contractors to provide quality work on state projects.

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

The rule is mandated by law and specifically tailored to impact poor performing contractors. There is not a list of less costly alternatives to the proposed rule.

(5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

Public Comment will be furnished at the close of the public comment period.

(6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and

Existing rules have not contributed to the problem.

(7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
(a) the rule is achieving the statutory objectives;
(b) the benefits of the rule continue to justify its costs; and
(c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

TSS will implement an agency wide review of the department wide rules on a regular basis regarding a-c above.