

01-29

Notice of Rulemaking Hearing  
Tennessee Department of Transportation  
Civil Rights Division

There will be a hearing before the Tennessee Department of Transportation to consider the promulgation of new rules establishing the Bond Guarantee Program pursuant to Tennessee Code Annotated § 4-3-2305. The hearing will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, Tennessee Code Annotated § 4-5-204, and will take place in the Auditorium of the Main Administrative Building (Building "A") at the Tennessee Department of Transportation, Region III Office Complex, located at 6601 Centennial Boulevard, Nashville, Tennessee 37243-0360 at 4 p.m. CST on April 1, 2005 (Take Briley Parkway to Exit 26B, Centennial Boulevard West.)

Written comments will be considered if received by the close of business (4:30 p.m.) on April 1, 2005, in the Office of General Counsel, Tennessee Department of Transportation, Suite 300, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243-0326, or if received at the public rulemaking hearing on April 1, 2005.

Individuals with disabilities wishing to participate in these proceedings (or to review these filings) should contact the Department of Transportation to discuss any auxiliary aids or services needed to facilitate such participation. Such contact may be in person, by writing, telephone or other appropriate means, and should be made no less than ten (10) days prior to the public hearing (April 1, 2005) or the date the party intends to review such filings to allow time to provide such aid or service. Such contact may be made with the Department of Transportation's ADA Coordinator at Suite 400, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243-0327, or by telephone at (615) 741-4984.

For a copy of this notice of rulemaking hearing, contact: Brian R. Carroll, Tennessee Department of Transportation, Office of General Counsel, Suite 300, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243, telephone number (615) 741-2941.

Substance of Proposed Rules

New Rules

Chapter 1680-8-4  
Bond Guarantee Program

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1680-8-4-.01 Purpose. This rule establishes a program for providing financial assistance to select Certified Small Businesses through a Bond Guarantee Program (BGP).

Authority: T.C.A. § 4-3-2305.

1680-8-4-.02 Definition of Terms.

For the purpose of administering this program, the following definitions shall apply:

- (1) "Average Annual Gross Receipts" - means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.
- (2) "Bond Guarantee Program" or "BGP" - means a program in which the Tennessee Department of Transportation may act as a secondary surety for select Certified Small Businesses.
- (3) "Certification of Proficiency" - means a certificate awarded to Certified Small Businesses meeting the Minimum Curriculum Standards of Proficiency (See Rule 1680-8-4-.02(7) herein).
- (4) "Certified Small Business" - means a small business that has been approved by the Department as meeting the statutory criteria to participate (if selected by the Department) in the Construction Management Development Program (CMDP) and/or Bond Guarantee Program (BGP). A business meets the statutory criteria if the business (including its affiliates) is a certified disadvantaged business enterprise (DBE) as defined by 49 CFR Part 26. Also, a business meets the statutory criteria if the business satisfies all the requirements of a disadvantaged business enterprise (DBE) as defined by 49 CFR Part 26 other than the requirement that the business is owned by socially and economically disadvantaged individuals as defined in 49 CFR Part 26.5.

- (5) "Construction Management Development Program" or "CMDP" - means an original program of instruction taught to groups of individuals who are owners of Certified Small Businesses to enhance, improve, or develop skills needed to successfully perform construction projects. This program may consist of classroom instruction and on-the-job instruction.
- (6) "Department" - means the Tennessee Department of Transportation.
- (7) "Minimum Curriculum Standards of Proficiency" - means established minimum requirements that a Certified Small Business owner must attain to demonstrate proficiency and capability regarding the instruction received through the classroom instruction portion of the CMDP.
- (8) "Small Business" - means a business (including its affiliates) that over the business's previous three fiscal years has had Average Annual Gross Receipts (See Rule 1680-8-4-.02(1) herein) not in excess of the business size limitations established in 49 CFR Part 26.65, or as any such limitation may be adjusted for inflation by the United States Secretary of Transportation as provided in 49 CFR Part 26.65.
- (9) "Small Business Development Program Office" - means the office of the Tennessee Department of Transportation that has the responsibility of monitoring and enforcing the Department's CMDP and BGP.
- (10) "Tennessee Department of Transportation Small Business Development Review Committee" - means the committee within the Tennessee Department of Transportation which renders final decisions of the Department on the CMDP and BGP.

Authority: T.C.A. § 4-3-2305.

1680-8-4-.03 Bond Guarantee Program.

- (1) Department Requirements and Limitations.
  - (a) The Department may guarantee sureties participating in the BGP against a portion of their losses incurred and paid as a result of a Certified Small Business's breach of the terms of a bid bond and/or contract bond on any eligible contract. The Department may guarantee up to ninety percent (90%) of a surety bond amount of two hundred fifty thousand dollars (\$250,000) or less and up to eighty percent (80%) of a surety bond amount greater than two hundred fifty thousand dollars (\$250,000) if such surety bond is provided by an approved surety. The surety must obtain the Department's approval before a guaranteed bond can be issued. The Department may determine the bond guarantee amount based on the

criteria outlined in Rule 1680-8-4-.03(4) herein and the availability of funds. Participation in the BGP is limited due to the statutory mandate that in no event shall the total amount guaranteed under this program at any given time exceed five million dollars (\$5,000,000).

- (2) A surety who desires to participate in the BGP shall submit an Application for Surety Participation Form to the Tennessee Department of Transportation Small Business Development Program Office.
- (3) Certified Small Business Eligibility Requirements/Limitations.
  - (a) Eligibility to participate in the BGP shall be specifically limited to Certified Small Businesses that have attained a Certificate of Proficiency by meeting the Minimum Curriculum Standards of Proficiency in the CMDP or that have received an exemption from the CMDP (See Rule 1680-8-3-.09).
- (4) The Department is authorized to expend funds from the State highway fund to fund administrative expenses and fund any losses that may arise under the BGP. In no event shall the total amount guaranteed under this program at any given time exceed five million dollars (\$5,000,000). Therefore, the number, size, and availability of the bond guarantees shall be limited. Obtaining a Certification of Proficiency does not ensure that a Certified Small Business will receive a bond guarantee. The Department may use the following criteria to determine which Certified Small Businesses may participate in the BGP and receive a bond guarantee (it shall be the responsibility of the applicant to provide evidence of the following criteria):
  - (a) Administration and Management of Business.

The applicant shall provide adequate evidence that it:

1. Holds all current and relevant licenses and meets all other legal requirements regarding the Certified Small Business;
2. Shows capability to develop an overall business plan;
3. Maintains an adequate credit history;
4. Maintains adequate staff and employees required to carry out the work associated with the Certified Small Business;
5. Maintains a payroll system set up to feed accurate and complete information into the job costing system;

6. Is able to generate accurate financial statements in accordance with generally accepted accounting principles; and
7. Has policies and procedures regarding timely billing and collection from customers.

(b) Bidding/Estimates.

The applicant shall provide adequate evidence that it:

1. Has an understanding how to implement all requisite steps in the preparation of Department bids; and
2. Has competence in accurately estimating project costs.

(c) Contract Negotiating and Knowledge.

The applicant shall provide adequate evidence that it:

1. Has an understanding of contract terms concerning the rights, obligations, and liabilities for Small Businesses;
2. Has an understanding of the basic elements of Department contracts; and
3. Has an ability to adequately negotiate, draft, and interpret subcontracts.

(d) Project Planning.

The applicant shall provide adequate evidence that it:

1. Has capability in scheduling and phasing the work of a project and in allocating labor to timely complete the project;
2. Has skill in developing schedules for ordering and assuring delivery of materials and equipment and hiring of work force; and
3. Has knowledge of the reports and other paperwork required by the Department and/or the prime contractor.

(e) Project Performance.

The applicant shall provide adequate evidence that it:

1. Maintains a system of project monitoring that includes job-site inspections by management as well as periodic reporting from its project superintendent;
2. Maintains a field monitoring and reporting system to warn of any deviations from project schedule or cost overruns;
3. Maintains a reporting system that will keep detailed records of the time expended and materials used on a project;
4. Has capability to maintain an updated and accurate job costing system;
5. Maintains a system for dealing with change orders; including requiring written change order and method for calculating prices to cover the changes; and
6. Demonstrates knowledge of project closeout procedures.

(f) Inability to obtain surety bond.

The applicant shall provide adequate evidence that it:

1. Has made at least one (1) unsuccessful attempt to obtain a surety bond.
- (5) **Guaranteed Bond Limit.** No Certified Small Business may have more than two (2) Department guaranteed bonds at any one time, and the total amount of such guaranteed bonds shall not exceed one million dollars (\$1,000,000).
- (6) **Bond Applications.**
- (a) When requested by the Certified Small Business, the Department may provide assistance in preparing bond applications that are to be presented to surety companies to obtain a bonding capacity.
  - (b) When the Certified Small Business has developed a complete package that is deemed acceptable, it will be forwarded to a surety company that has agreed to participate in this program.
- (7) The Department may assist a Certified Small Business, which has been accepted into the BGP, in obtaining a surety bond.

- (a) Once the surety company decides to execute the bond on the basis of the BGP, a Justification for Bond Guarantee form will be submitted by the surety company to the Department.
  - (b) Upon receipt of the Justification for Bond Guarantee form, the Department may execute and return the Bond Guarantee Agreement form to the surety company.
- (8) Project monitoring and technical assistance may be provided to all Certified Small Businesses receiving a bond guarantee.

Authority: T.C.A. § 4-3-2305.

1680-8-4-.04 Revocation.

- (1) The Department's acceptance of a Certified Small Business in the BGP may be revoked if the Department finds the business no longer meets the requirements of a Certified Small Business.
- (2) A Certified Small Business's participation in the BGP may be revoked if the Department finds the business no longer meets the requirements set forth in Rule 1680-8-4-.03(4)(a)(1) herein.
- (3) A business's participation in the BGP may be revoked if the Department finds the business willfully made a false, deceptive, or fraudulent statement in any document submitted to the Department.
- (4) Prior to revoking a Certified Small Business's participation in the BGP, written notice shall be sent from the Small Business Development Program Office explaining why the Department's acceptance of the Certified Small Business in the BGP shall be revoked. The Certified Small Business shall have fifteen (15) days to respond to the deficiencies. If the Certified Small Business does not respond or if the Certified Small Business's explanation is not sufficient, then the Certified Small Business shall be advised by certified mail, return receipt requested, of the preliminary finding of ineligibility for retention of participation in the BGP. Reasons shall be given for the preliminary finding.
- (5) The Certified Small Business shall then have fifteen (15) days after receipt of notice to submit a written appeal to the Tennessee Department of Transportation Small Business Development Review Committee, which may reverse or uphold the Small Business Development Program Office's preliminary finding in its final decision.
- (6) Should the Certified Small Business not appeal within the fifteen (15)-day period, then the preliminary finding of the Small Business Development Program Office

shall become the final decision of the Tennessee Department of Transportation Small Business Development Review Committee.

- (7) No application fee or registration fee shall be refunded upon revocation.

Authority: T.C.A. § 4-3-2305.

1680-8-4-.05 Forms.

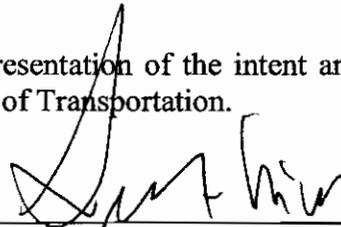
- (1) The following listed forms are hereby incorporated by reference and made a part of the Rules of the Department:

- (a) Application for Bond Guarantee Program (BGP).
- (b) Application for Small Business Certification.
- (c) Agreement for Surety Participation Form.
- (d) Justification for Bond Guarantee Form.
- (e) Bond Guarantee Agreement Form.
- (f) Application for Surety Bond Guarantee Assistance.

- (2) Copies of these forms are to be obtained from the Tennessee Department of Transportation/Civil Rights Office, Small Business Development Program, Suite 1800, James K. Polk Building, 505 Deaderick Street, Nashville, Tennessee 37243-0347.

Authority: T.C.A. § 4-3-2305.

I certify that this is an accurate and complete representation of the intent and scope of rulemaking proposed by the Tennessee Department of Transportation.



Gerald F. Nicely  
Commissioner

Tennessee Department of Transportation

Subscribed and sworn to before me this the 31<sup>st</sup> day of January, 2004. 2005

Angela P. Martin

Notary Public



My Commission Expires on the 2<sup>nd</sup> day of March, 2008.

The notice of rulemaking set out hereon was properly filed in the Department of State on the 31 day of Jan., 2004. 2005

Riley C. Darnell

Riley C. Darnell

Secretary of State

By: Manda

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