

DEPARTMENT OF TRANSPORTATION
DIVISION OF TRANSPORTATION SOLUTIONS
Statutory Authority: 29 Delaware Code, Section 6962 (29 **Del.C.** §6962)

FINAL

ORDER

2408 Performance-Based Contractor Evaluation Procedures

Pursuant to the authority provided by 29 **Del.C.** §6962, the Delaware Department of Transportation ("DelDOT") proposed to promulgate a new regulation entitled Performance-Based Contractor Evaluation Procedures. Notice of the proposed regulation was published in the Delaware *Register of Regulations* Volume 22, Issue 6, dated December 1, 2018.

The public was given notice and the opportunity to provide DelDOT with comments on the proposed regulation.

There were no questions or comments received during the public comment period. Several minor grammatical corrections have been made to the regulation as originally proposed and published that do not affect its original intent or meaning. Accordingly, the final regulation is not being republished.

Summary of the Evidence and Information Submitted

The proposed regulation was written in response to new requirements imposed by Senate Bill 208 of the 149th General Assembly, which made changes to 29 **Del.C.** §6962 relating to public works contracting requiring the Delaware Department of Transportation to adopt regulations to implement a performance-based contractor evaluation rating system.

Findings of Fact

Based on the record in this docket, I make the following findings of fact:

1. The proposed regulation was prepared in full collaboration with the technical advisory panel as described in Senate Bill 208 of the 149th General Assembly.
2. The proposed regulation fulfills the Department's obligation to promulgate regulations to implement a performance-based contractor rating system.
3. The public comment period was appropriately held open for 30 days and no public comment was received.
4. The adoption of these proposed regulations is in the best interest of the State of Delaware. Having received no public comment, there is no basis upon which to revise the proposed regulation and it is adopted, with minor grammatical changes made, as written.

Decision and Effective Date

Based on the provision of Delaware law and the record of this docket, I hereby adopt the Performance-Based Contractor Evaluation Procedures, as set forth in the version attached hereto, to be effective February 11, 2019.

It is so ordered on this 7th day of January 2019.

Jennifer Cohan, Secretary
Delaware Department of Transportation

2408 Performance-Based Contractor Evaluation Procedures

1.0 Purpose

In accordance with 29 **Del.C.** §6962, the purpose of this regulation is to set forth the procedures the Delaware Department of Transportation (the "Department") will follow in preparing performance-based contractor evaluations and calculating contractor performance-based ratings.

2.0 Applicability

- 2.1 The Department will complete performance-based evaluations (the "Performance Evaluations") on large public works contracts as defined in Title 29, Ch. 69 of the Delaware Code. The Performance Evaluations will be made on the construction company contracted by the Department to build the project (the "Contractor").

- 2.2 The Department shall provide notice to prospective bidders as part of contract advertisement regarding the prequalification requirements related to the performance based rating system under 29 Del.C. §6962.
- 2.3 For procurements made based on best value, performance must be at least 10%, but no more than 20% of the weighted selection criteria as described in 29 Del.C. §6962(d)(13)a.4.A.
- 2.4 Design Build contracts procured in accordance with Title 29 of the Delaware Code are not subject to these performance-based rating system requirements unless the Department's Request for Proposals (RFP) for a design build contract includes specific language requiring it.

3.0 Performance Evaluation Form, Criteria and Scoring

- 3.1 Performance Evaluations will be made on the Department issued form as shown in Appendix 'A'.
- 3.2 The criteria to be used for Performance Evaluations is as shown on the form in Appendix 'A'.
- 3.3 Scoring will be as shown on the form in Appendix 'A'.
- 3.4 Appendix 'A' is a part of this regulation.

4.0 Performance Evaluation Procedures

- 4.1 Timing of Performance Evaluations
 - 4.1.1 For projects that have an original contract time of 240 calendar days or less, a Performance Evaluation will be made no later than 60 calendar days after substantial completion or completion of the final punchlist work, whichever occurs first. Performance Evaluations will continue to occur every six months until the final estimate is paid.
 - 4.1.2 For projects with an original contract time greater than 240 calendar days and less than 365 calendar days, a Performance Evaluation will be made at approximately 50% completion. An additional Performance Evaluation will be made no later than 60 days after substantial completion or completion of the final punchlist work, whichever occurs first. Performance Evaluations will continue to occur every six months until the final estimate is paid.
 - 4.1.3 For projects with an original contract time longer than 365 calendar days, Performance Evaluations will be made every six months. An additional Performance Evaluation will be made no later than 60 days after substantial completion or completion of the final punchlist work, whichever occurs first. Performance Evaluations will continue to occur every six months until the final estimate is paid.
- 4.2 Performance Evaluations will be completed in accordance with the following steps:
 - 4.2.1 Each Performance Evaluation will be initiated and completed by the Department employee in charge of administering the contract (the "Evaluator") specified by the Department at the preconstruction meeting.
 - 4.2.2 The Performance Evaluation will be reviewed for approval by the Department employee (the "Reviewer") specified by the Department at the preconstruction meeting.
 - 4.2.3 Upon approval, the completed Performance Evaluation will be submitted to the primary point of contact for the Contractor, as specified by the Contractor at the time of the preconstruction meeting, for review.
 - 4.2.4 The Contractor will have ten (10) business days to exercise the following options:
 - 4.2.4.1 Accept the Performance Evaluation;
 - 4.2.4.2 Request a meeting in writing to propose changes to the Performance Evaluation to the Secretary's designee in charge of Construction as specified by the Department at the preconstruction meeting (the "Review Meeting").
 - 4.2.5 Within two (2) business days of receipt of a request for a Review Meeting, the Secretary's designee in charge of Construction shall schedule the Review Meeting with the requesting Contractor. The review meeting shall be held no more than ten (10) business days after the date of the request, unless the Contractor and the Secretary's designee in charge of Construction mutually agree in writing to a later date.
 - 4.2.6 The purpose of the Review Meeting will be to discuss the Performance Evaluation and the Contractor must bring any and all supporting documentation or witnesses required to support any changes the Contractor is requesting to the Performance Evaluation.
 - 4.2.7 Within ten (10) business days after the Review Meeting, the Secretary's designee in charge of Construction shall make a determination in writing (the "Determination") to accept any of the Contractor's changes and revise the Performance Evaluation, or to leave the Performance Evaluation as written.
 - 4.2.8 Upon receipt of the Determination, the Contractor may:
 - 4.2.8.1 Accept the Performance Evaluation;
 - 4.2.8.2 Appeal in accordance with subsection 8.3 of this regulation.

4.2.9 If no action is taken by the Contractor within ten (10) business days after the receipt of the Determination then the Performance Evaluation will be considered final.

4.3 For contracts with multiple locations, such as open-end contracts and indefinite delivery-indefinite quantity (IDIQ) contracts, Performance Evaluations will be made at the frequency described in subsection 4.1 of these regulations. The Department will aggregate multiple locations under such contracts in one Performance Evaluation as reasonably practicable.

5.0 Calculation of Performance Rating; Prequalification of Bidders; Notification of Performance Rating]

5.1 Calculation of Performance Rating

5.1.1 The performance-based rating (the "Performance Rating") for a Contractor shall be calculated as a rolling average of the score of all Performance Evaluations on file for that Contractor for the most recent three year period as measured from the date of advertisement.

5.1.2 Should no Performance Evaluations exist as set forth in subsection 5.1.1, the Department will utilize the average score of all available Performance Evaluations on file for the previous five year period measured from the date of advertisement.

5.2 Prequalification of Bidders

5.2.1 The Performance Rating, as calculated in subsection 5.1, for a Contractor shall be utilized as a prequalification to bid at the time of bid.

5.2.2 Bidders with scores of equal to or greater than 85% shall be permitted to bid.

5.2.3 Bidders with scores of less than 85% who comply with the retainage requirements of 29 Del.C. §6962 shall be permitted to bid provided the Agreement to Accept Retainage in Appendix 'B' is executed and submitted with the bid. Lack of an executed Agreement to Accept Retainage will result in the rejection of the bid by the Department.

5.3 Notification of Performance Rating. The Department shall post publicly the Performance Rating for all Contractors on the Department's website on a weekly basis.

6.0 Provisional Performance Rating

6.1 Successful bidders awarded Department contracts who have no performance history within the last five (5) years will be assigned a provisional Performance Rating of 85% at the date of advertisement, which shall be applied until a true average can be determined based on actual Performance Evaluations on Department contracts.

6.2 Contractors assigned a provisional Performance Rating may request an interim Performance Evaluation in accordance with subsection 7.1.2 of these regulations.

7.0 Variable Retainage

7.1 The rate of retainage will be as follows:

7.1.1 A 5% retainage shall be withheld by the Department from each monthly progress payment due the Contractor if the Contractor's Performance Rating as calculated in subsection 5.1 of these regulations is less than 85% at the time of advertisement.

7.1.2 A Contractor who is subject to retainage pursuant to subsection 5.2.3 may request an interim Performance Evaluation when a contract reaches 50% completion. If final score of that interim performance evaluation is greater than 85%, the retainage withheld by the Department on future progress payments shall be reduced to 2% for the remaining life of that contract. Interim Performance Evaluations shall be placed on file by the Department and utilized in the calculation of a Contractor's Performance Rating. Interim Performance Evaluations shall follow the procedures set forth in Section 4.0 of this regulation.

7.2 For the avoidance of doubt, a Contractor is not permitted to hold retainage from its subcontractors and all must be paid in accordance with applicable law.

7.3 The Department shall release 60% of the retainage at Substantial Completion as that term is defined in the Contract. The remaining 40% of the retainage will be released upon approval of the final pay estimate in order to satisfy the statutory requirements under 29 Del.C. §6962(d)(5) regarding documentation of payment to subcontractors.

8.0 Appeals

8.1 Submission, Appeals, and acknowledgement of receipt of appeals, shall be made in writing. Appeals may be submitted by email to the addresses set forth below.

8.2 Appeal of Performance Rating

- 8.2.1 A Contractor may appeal their assigned Performance Rating at any time after publication, provided, however, that if a Contractor intends to bid on an upcoming project, the Contractor must appeal the Performance Rating no later than ten (10) calendar days after advertisement for that project. Should a Contractor file an appeal of their Performance Rating more than ten (10) calendar days after advertisement the published Performance Rating on the date of advertisement shall be used for that bid and the result of the appeal will only affect calculation as applied to future bids.
- 8.2.2 All appeals shall be made in writing to the Department's Contract Administration Office and submitted to the Contract Services Administrator electronically at DOT-ask@state.de.us.
- 8.2.3 The Contract Administration Office shall render a decision in writing within **[5 five (5)]** business days from the date of receipt of an appeal stating the basis for the decision and providing any and all supporting documentation. The decision shall be transmitted to the Contractor via email.
- 8.2.4 The determination of the Contract Services Administrator shall be the final determination by the Department on this matter and there is no right of further administrative appeal.
- 8.2.5 The scope of appeals pursuant to this section is limited to the mathematical computation of the Performance Rating. Any Contractor wishing to appeal the results of a Performance Evaluation must do so pursuant to subsection 8.3 of this regulation.

8.3 Appeal of Performance Evaluation

- 8.3.1 A Contractor may appeal the results of a Performance Evaluation only after first completing the steps outlined in subsection 4.2 of these regulations.
- 8.3.2 Any notice of appeal must be filed within ten (10) business days of receipt of a Determination pursuant to subsection 4.2.7. Failure to provide notice of an appeal within this timeframe constitutes a waiver of the right to appeal.
- 8.3.3 All appeals shall be made in writing to the Secretary of Transportation electronically at DOT-ask@state.de.us.
- 8.3.4 After receiving the notice of appeal, the Secretary or the Secretary's designee will review the record and will contact the Contractor within **[45 fifteen (15) business]** days to schedule a meeting to discuss the appeal.
- 8.3.5 The scope of appeals pursuant to this section is limited to the issues, facts, and documents raised to the Secretary's designee in charge of Construction. No facts, issues, or documents not presented to the Secretary's designee in charge of Construction will be considered at the appeal meeting.
- 8.3.6 Within **[30 thirty (30)]** business days of the meeting, the Secretary or the Secretary's designee shall issue a written decision that will serve as the final decision of the Department concerning the appeal.
- 8.3.7 Should the Performance Evaluation that is the subject of a Contractor's appeal, when factored into the computation of the Contractor's Performance Rating, result in the imposition of retainage under Title 29, Ch. 69 of the Delaware Code, the implementation of retainage provisions as outlined in Section 7.0 will not take place until after a final decision of the Department.

Appendix 'A'

Contractor's Performance Evaluation Form

Contractor's Performance Evaluation Form

[http://regulations.delaware.gov/register/february2019/final/Contractors Performance Evaluation Form.pdf](http://regulations.delaware.gov/register/february2019/final/Contractors%20Performance%20Evaluation%20Form.pdf)

Appendix 'B'

Contractor's Agreement to Accept Retainage

The following statement shall be placed in the bid documents on the Proposal Certification page just above the signatures, which shall indicate the Bidder's acknowledgement, consent and agreement to the withholding of retainage by the Department:

"Bidder acknowledges that **[if]** its Performance-Based Rating as defined in 29 Del.C. §6962 and section 2408 of Title 2 of Delaware's Administrative Code is below the required minimum ~~[threshold. As threshold, as]~~ a condition to bid, Bidder acknowledges, consents and agrees to the Department withholding retainage of up to 5% from the monies due at the time of each progress payment under the contract."

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