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Supplement to Licensing and Qualification of Bidders in Selected Studies in Highway Law

A report prepared under ongoing NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by Ross D. Netherton. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report supplements and updates a section in Volume 3 of Selected Studies in Highway Law, dealing with licensing and qualification of public works contractors. An overview of state legislation, prequalification policies and procedures, and suspension and revocation procedures are described.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3 dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new papers, seven supplements, and an

expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of \$90.00 per set.

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**Supplement to
Licensing and Qualification of Bidders
IN
Selected Studies in Highway Law***

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**STATE LAWS AND REGULATIONS RELATING TO LICENSING OF PUBLIC WORKS
CONTRACTORS (p. 1056)**

Overview of State Legislation (p. 1056)

Although construction techniques, management practices, and quality control procedures have continued to evolve with the objective of improving project results and reducing the risk of failure or defective work, contractor licensing laws and rules remain necessary parts of the public's defense against unreliable, fraudulent, and incompetent work.¹ Accomplishment of this objective has been held to require that the regulatory penalties apply as consistently to licensed contractors who undertake work beyond the scope of their licenses as to those who are unlicensed for any type of construction work.² Conditions of the license must be met regardless of any inconsistent arrangements made between private parties, even though the convenience of the construction process may be served by them. Therefore, where a contractor, duly licensed to do business in his own name, undertook to assist a street paving contractor by acting under the latter's name to perform the specialized step of heat scarifying the project's old pavement and applying a bonding agent, it was held that he acted as an unlicensed contractor, because the licensing law required him to do business only under the name by which he was licensed.³

While recognizing that strict adherence to licensing requirements limits the flexibility often desired by contractors to improvise responses to unforeseen construction problems, courts are very reluctant to relax compliance standards. Their attitude is summed up by a California court's observation that

... it reflects the significance the Legislature has placed on the deterrence of unlicensed persons from engaging in their contracting business. The policy to be served outweighs any harshness which may be sustained by a party.⁴

* Supplementary material to the paper "Licensing and Qualification of Bidders" is referenced to topic headings therein. Topic headings not followed by a page number relate to new matters.

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Although licensing laws generally provide that intentional failure to comply is punishable as a misdemeanor, a parallel deterrent is the doctrine that courts will not enforce claims of contractors who do not comply with licensing laws. This rule may be applied to defeat the entire contract as being illegal where entered into by an unlicensed contractor, or it may be applied to limit the right of recovery by a licensed contractor to the dollar limit of the work which his license authorizes him to undertake.⁵ Application of contractor licensing laws to bar an unlicensed contractor's action against a state has been held not to constitute a taking of property without due process of law.⁶

With only a few exceptions, contractor license fees are set at levels needed to defray, at least in part, the expenses of administering the regulatory features of the law. Principles of tax equality apply, and have been tested in cases where licensees pay differing rates according to classifications described in the law. Delaware's law provides that non-resident contractors must pay fees for each job performed, while resident contractors pay only a single annual license fee. It has been held that this rate structure was not unconstitutional, despite the fact that non-residents might pay considerably more fees annually than residents would.⁷

Comparison of State Legislation: Statutory Structure (p. 1057)

The information herein supplements Table 1 (pp. 1060-1069 in *Selected Studies in Highway Law*), which presents a summary of the essential features of State laws and regulations relating to licensing of contractors for public works construction projects. The updated information shown includes current citations of State legislation and regulations, and notes significant substantive changes occurring since 1975. The supplement at the conclusion of the table summarizes the newly established licensing requirements in the State of New Mexico.

Scope of the Licensing Requirement (p. 1058)

Consistent with their purpose to protect the public against unreliable, incompetent, or fraudulent construction practices generally, statutes requiring the licensing of construction contractors have tended to describe the objects of their regulation in broad and inclusive terms. As a result, much of the litigation involving these laws is concerned with interpreting statutory definitions of the term "contractor."⁸ This has called for making distinctions between contractors and their employees, and between general contractors and others performing the functions of materialmen, lessors of equipment, and fabricators of manufactured products used as fixtures.⁹

In their interpretation of contractor licensing laws, the courts have distinguished between contractors and their employees according to the extent to which they share in determining the nature of the work to be done and methods to be used, and in supervising the work.¹⁰ Therefore, in considering whether one who furnished a backhoe and operator must obtain a contractor's license, the court was persuaded he should not,

TABLE 1
SUMMARY OF STATE LAWS AND REGULATIONS RELATING TO LICENSING
OF CONTRACTORS

STATE	CITATIONS	UPDATE INFORMATION
ALASKA	STAT. (1984 Supp.) 08.18.011 to 08.18.171 ADMIN. CODE, § 12, AAC 21	
ARIZONA	STAT. (1984 Supp.) 32- 1101	No license required for public works construction contracts. (Laws, 1981, c.221)
ARKANSAS	STAT. (1984 Supp.) 71- 701-71	
CALIFORNIA	BUS & PROF. CODE (1984 Supp.) § 7000 to 7150	
DELAWARE	CODE (1984 Supp.) § 2501 to 2503	
HAWAII	REV. STAT. (1984 Supp.) § 444-1 to 444- 24	
IDAHO	CODE (1984 Supp.) 54- 1901 to 54-1929	
LOUISIANA	REV. STAT. (1984 Supp.) 37:2151 to 37:2163	
MISSISSIPPI	CODE (1984 Supp.) 31- 3-1 to 31-3-23	
MONTANA	REV. CODE (1984) 37- 71-201 to 37-71-213	Minimum amount of contract requiring license increased from \$1,000 to \$5,000. (Laws, 1983, c. 152)
NEVADA	REV. STAT. (1984) 624,040 to 624,360	
NEW MEXICO	STAT. ANN. (1985) 60- 13-1 to 60-13-57	License requirement established by new legislation. See summary below at end of table.
NORTH CAROLINA	GEN. STAT. (1983 Supp.)	Minimum amount of contract requiring license increased from \$10,000 to \$30,000. (Laws, 1979, c. 713). License classification revised to provide: Unlimited license: no limit on contract amount. Intermediate license: contracts up to \$500,000. Limited license: contracts up to \$175,000.
NORTH DAKOTA	CENT. CODE (1984 Supp.)	License classification revised to provide: Class A: No limit on amount of single contracts or annual total. Class B: Up to \$250,000 for single contract. Class C: Up to \$120,000 for single contract. Class D: Up to \$50,000 for single contract. (Laws, 1981, c.438)

STATE	CITATIONS	UPDATE INFORMATION
TENNESSEE	CODE (1984 Supp.)	License requirement does not apply to contracts with Tennessee Department of Transportation.
VIRGINIA	CODE (1984 Supp.) 54-113 to 54-145.3:9	Minimum amount of contract requiring license increased from \$30,000 to \$40,000 for single contract, and total amount of contracts per year increased from \$300,000 to \$400,000. (Laws, 1977, c.640; 1978, c.521)

TABLE 1—Supplement
SUMMARY OF NEW MEXICO CONSTRUCTION INDUSTRIES LICENSING
ACT, NMSA 60-13-1 et seq.

LICENSING AGENCY	Construction Industries Division, New Mexico Department of Commerce and Industry.
SCOPE OF LICENSING REQUIREMENT:	All persons engaged in the business of contracting, defined as one who undertakes, offers to undertake, or purports to have capacity to undertake by himself or through others, contracting, including constructing, altering, repairing, installing or demolishing roads, highways, bridges, parking areas, or related projects. Definition includes subcontractors and specialty contractors.
EXAMINATION:	Written examination.
CRITERIA FOR LICENSING:	Financial responsibility; good reputation; demonstrated familiarity with rules and regulations of the Construction Industries Division and trade bureau; no illegal activity in contracting business for a year prior to license application; New Mexico address; registration with state Revenue Bureau.
CLASSIFICATION OF LICENSEES	Licenses are issued for classifications designated by Director, Construction Industries Division. Statutory definition of contractor lists 16 specialties for contractor licensing.
PERIOD OF LICENSE	One year.
CAUSES FOR REVOCATION	Violation of Construction Industries Licensing Act or regulations pursuant to it; false, misleading or deceptive advertising; acting outside scope of license; misrepresentation in license application; unjustified abandonment of a contract; diversion of funds; negligent departure from plans; wilful or fraudulent action resulting in injury to others; assisting others to violate licensing law; acting in the capacity of a contractor under a name not shown on license.
SPECIAL PROVISIONS	Contractors on highway projects involving Federal-aid funds may bid without having a special license, but successful bidder must obtain a special license for the project before starting work.

because he was told by others where to dig, when to come to work, and what degree of care was needed, and the work was supervised by representatives of other contractors at the work site.¹¹

In contrast, where one has control over the manner in which details of the work are accomplished, purchases materials and equipment, hires labor, and supervises the construction process, he is subject to the licensing requirement, notwithstanding that he is called an employee, and his employer makes suggestions as to these matters and coordinates various parts of the total project.¹² The fact that one person works for another at an hourly rate does not necessarily exclude him from contractor status under typical licensing laws.¹³

Where decision-making authority is divided, or is exercised jointly, the criterion of control must be applied cautiously. Even when the decisions of one are limited chiefly to accepting construction plans and specifications which he has hired another to prepare and supervise, both may be regarded as general contractors so as to require them to obtain licenses.¹⁴

By the same criterion of control, one who undertakes to supply labor and materials to a general contractor also may be treated as a contractor. Despite the general preference for strict construction of regulatory legislation, Arkansas' contractor licensing law was applied to a materials and labor subcontractor on the grounds that he had agreed to (1) do work to the owner's satisfaction, (2) indemnify the owner and general contractor for any claim resulting from his fault, (3) do work according to the owner's plans and specifications, and be responsible for work and materials, and (4) restore damaged work.¹⁵

Where employee status is not at issue, liability under construction contractor licensing laws may turn on how directly and substantially one's work contributes to the construction process and project result. One who merely supplies goods for others to install or whose products are not permanently attached to a structure has regularly been held out not to be a contractor within the terms of the licensing law.¹⁶ The same applies to lessors of construction equipment. Where, however, a subcontractor furnished loaders and trucks with drivers to haul dirt from a borrow pit to designated highway construction sites, it was held that he contributed substantially to the highway project and was subject to the contractor's licensing requirement. Answering the argument that the subcontractor was not subject to the requirement "because he did nothing except deposit dirt on the roadbed, and that the grading, tamping and other work was performed by defendants and at defendants' direction," the court found that this work did in fact contribute directly and substantially to the highway project, and that "by agreeing to comply with the engineering plans and drawings for the construction of the freeway, plaintiff became more than a mere conveyor of dirt."¹⁷

In contrast, construction of a spur on a logging location was held not to require registration under Washington's licensing law when it was shown that the road was primarily a fire control measure, and its transportation use was incidental to that primary use.¹⁸

The distinction between contractors and manufacturers of fabricated

items used in highway construction or operations has been presented in various situations involving on-site assembly and installation of fixtures. The California court's approach to this problem is illustrated in *Walker v. Thornsberry*,¹⁹ where a general contractor purchased prefabricated metal restrooms from a manufacturer, to be delivered to the construction site and bolted to a concrete foundation furnished for them by the purchaser. Plumbing, electrical hook-ups, roofing, and painting were to be done by the general contractor or other subcontractors. On these facts, the court held that the manufacturer was not engaged in construction which required obtaining a contractor's license. His contribution to the finished construction project was "at most minor and incidental," and not sufficient to make the items installed a fixed part of the structure being built. This approach has found favor in other states.²⁰

The test used by the California court in *Walker v. Thornsberry* may have different results in other circumstances. Where a sprinkler system and mounting for signs were buried in the ground, and there was excavation and construction of concrete dugouts, it was held that these actions constituted construction within the purview of the contractor's licensing law.²¹

Painting always must be carefully considered in its particular circumstances. Often it is entirely incidental to the construction process, whereas in other cases it clearly adds something necessary to the structure in question. Moreover, painters frequently have almost complete control over the way their work is done. In such cases, painters are considered contractors for licensing purposes.²²

Contractor licensing laws may restrict their scope only to certain types of construction contracting, as in the case of Idaho's law for licensing public works contractors.²³ In the case of a contract to excavate and dispose of earth and rock, and to reclaim land at a sanitary landfill site, it was held that such work could be regarded as public works construction within the purview of the statute, even though no structures were involved in the project.²⁴

Suspension and Revocation Procedures (p. 1070)

Because severe sanctions and penalties may be involved in the disciplinary provisions of contractor licensing laws, courts have emphasized their reluctance to construe these laws more broadly than necessary to achieve the statutory purpose.²⁵ This policy is regularly tested in determinations of whether contractor actions or omissions bring his conduct within any of the statutory grounds for suspension or revocation of his contractor's license. Recent judicial interpretation of contractor licensing laws has refined the list of the leading causes of disciplinary action. Sometimes arising in judicial review of administrative actions by licensing agencies, but more often discussed in connection with the limits of civil actions for compensation of work performed, the existence of grounds for disciplinary action is a question of fact, to be proved by substantial evidence.

Where statutory lists of grounds for disciplinary action specify that misconduct must be willful, this intent is an essential element of proof.

In some situations, willfulness may be inferred from the nature of the act. Therefore, in an alleged breach of California's standards pertaining to abandonment of a construction project and failure to complete a project,²⁶ it was held that a contractor who never showed up to commence work violated both standards.²⁷ The court rejected the idea that it was necessary to have first commenced performance and later terminated it without justification, or that the willfulness of the action must be proved under the California statute.

Closely related to these cases are others involving the adequacy of performance or performance in accordance with project plans, specifications and estimates, or other conditions of work.²⁸ A case-by-case approach to disciplinary action on these grounds is necessary because of the wide variety of conditions involved, contractors' preference for using performance specifications, and the ease with which plans and specifications can be modified through change orders during the progress of work. In practice, construction rarely can be performed without some deviation from the original plans and specifications, and determination of whether deviations reach a point of violating the licensing standard requires consideration of all the circumstances.

In this process, the courts have developed and applied the doctrine of substantial performance by the contractor. As described by the court which adopted this doctrine in California, the guiding principle is that

... there is substantial performance where the variance from the specifications of the contract does not impair the building or structure as a whole, and where after it is erected the building is actually used for the intended purpose, or where the defects can be remedied without great expenditure and without material damage to other parts of the structure, but that the defects must not run through the whole work so that the object of the owner to have the work done in a particular way is not accomplished, or be sure that a new contract is not substituted for the original one, nor be so substantial as not to be capable of a remedy, and the allowance out of the contract price will not give the owner essentially what he contracted for.²⁹

A certain amount of leeway has been allowed in holding contractors to the requirement that a currently valid license must be maintained at all times when their work is in progress. Thus, where a contractor's license expired after 90 percent of a project had been completed, and the remaining work was actually completed under the supervision of licensed professional personnel, the court held that the contractor was in substantial compliance with the licensing law.³⁰

In contrast, where a contractor's license expired while work was in progress, but the licensee failed to act promptly to renew it or have a licensed manager supervise the remaining work, it was held he was not in substantial compliance with the licensing law.³¹

Courts have been less inclined to apply doctrines of forgiveness where violation of licensing standards appear to involve deliberate and willful choice. This attitude is clearly present when dealing with cases of alleged diversion of funds given to contractors for specific construction work,³² or misrepresentation of information in license applications or business dealings,³³ or failure to pay bills for labor or materials.³⁴

Diversion of funds advanced to assist commencement of construction or other purposes is everywhere treated seriously by licensing agencies. New Mexico's contractor licensing law, which makes diversion of funds a cause for revocation, is described as "imposing a fiduciary duty upon contractors who have been advanced money pursuant to construction contracts."³⁵

Among the causes for disciplinary action listed in typical contractor licensing laws, one of the most difficult to apply is the rule that contractors must perform construction in a workmanlike manner, in accordance with the plans and specifications, and reasonably within the agreed or estimated costs. Standards of workmanship may be provided specifically either in the contract plans and specifications, or in a trade or industry code applicable to the work in question. Where these sources do not, for any reason, furnish suitable guidance for disciplinary action, licensing agencies and courts have defined "workmanlike manner" as doing the work in an ordinarily skilled manner, as a skilled workman should do it by reference to established usage and accepted industry practices prevailing where the work is performed.³⁶

Where failure to follow plans and specifications must, by law, be willful or deliberate to bring it within the applicable licensing standard, evidence of intent may be inferred from the conduct of the parties. Thus, where willful departure from workmanlike standards was charged, the decision of the licensing agency to discipline the contractor was upheld when it was shown that the contractor failed to install an acceptable slab of concrete, and then represented that he could correct the defect by a "pour-over" technique, which only made matters worse. This, the court said, "indicates a purposeful departure from accepted trade standards which may be properly characterized as 'willful.'"³⁷

Parallel to the problem of failing to follow plans and specifications and often associated with it, is the contractor's failure to perform work within the contract price or cost estimate.³⁸ Cost overruns sometimes are listed among statutory reasons for license revocation,³⁹ but more often they are associated with failure to follow specifications, or with incompetent or negligent performance, which are well-recognized grounds for revocation or suspension. In addition, courts regularly apply an indirect penalty in some instances of cost overrun, by limiting contractor recovery to the dollar ceiling of his license.⁴⁰

Although contractors are not often disciplined because of assisting the evasion of licensing laws, this possibility is illustrated where one permits his contractor's license to be used by unlicensed contractors on a project in which he does not actively participate.⁴¹

STATE PRACTICE REGARDING PREQUALIFICATION OF BIDDERS ON HIGHWAY CONSTRUCTION CONTRACTS (p. 1072)

Overview of State Legislation (p. 1072)

The information herein supplements Table 2 (pp. 1076-1109 in *Selected Studies in Highway Law*), which presents a summary of the essential features of State laws and regulations relating to qualification

of bidders on highway construction contracts. The updated information shown includes current citations of State legislation and regulations, and notes significant substantive changes occurring since 1975.

Trends in Prequalification Policy and Procedure

During the decade 1970-1980, the pattern of prequalification policies and procedures which had been developed in the 1960s remained substantially unchanged. The basic elements of these systems continued to be responsive to the type and size of construction programs being carried on in the State and Federal-Aid Highway Programs. Heavy construction and bridge projects, needed to complete the National System of Interstate and Defense Highways, together with major urban expressway programs, helped maintain both the number and dollar value of highway construction contracts at relatively high levels during these years.

As the decade closed, however, two developments occurred that have indirectly but significantly affected the role of prequalification processes in highway construction programs since that time. One of these was the widespread notice taken of instances in which bidders circumvented the normal safeguards designed to assure bona fide competition in the award of public construction contracts—so called “bid-rigging.”

Although there is some reason to think that public construction contracting is always subject to a certain amount of pressure to restrain competition among bidders, the greatly increased level of Federal investigation and prosecution of bid-rigging in highway paving contracts, commencing in 1979, highlighted this problem and led to a variety of reactions by state and local governments.⁴² Among the measures for long-term reduction of bid-rigging, the American Association of State Highway and Transportation Officials (AASHTO) in 1981 issued a document titled “Suggested Guidelines for Strengthening Bidding and Contract Procedure.”

The AASHTO-suggested guidelines were in an informational report discussing practices which several states had found to be effective in maintaining bona fide competition. Many of the techniques described dealt with scrutiny of bids at the time of contract award, but major attention was given to measures that can be taken to monitor qualifications of bidders before accepting their bids.

The suggested guidelines note that much of the data regularly received from contractors in their application for prequalification can provide incidental information needed in connection with identifying bids that are not realistic. Data on ownership and control of an applicant's business may reveal possible monetary motives for collusive bidding where it is suspected. Equipment lists may alert a contracting agency to the submission of complementary or collusive bids where a firm lacks equipment necessary to perform the work required. Finally, prequalification processing provides an opportunity to forewarn applicants of the seriousness of the consequences of collusive bidding, and begin building an administrative record which can support any subsequent action to revoke qualification or impose other disciplinary measures if collusion is established.

TABLE 2

SUMMARY OF STATE LAWS AND REGULATIONS RELATING TO QUALIFICATION OF BIDDERS

STATE	CITATIONS	UPDATE INFORMATION
ALABAMA	CODE, (1983), 34-8-1 to 34-8-27	<i>Rating Formula:</i> Revised to provide that capacity rating for licensee is determined by multiplying net worth by a factor up to 10 reflecting contractor's performance record.
ALASKA	STAT., (1984), 35.15.050 1959 OP. ATTY. GEN. No. 27 Stand. Specs. for Hwy. Constr. (1981), 102-1.01, 102-1.03, 102-1.13	Department of Transportation and Public Facilities has discretionary to require prequalification of bidders. Unless otherwise provided in the project announcement, contractors are not required to be prequalified in order to bid on highway construction projects. Bidder qualifications are evaluated at the time of contract award, based on experience, equipment and financial information filed with bid.
ARIZONA	Admin. Rules and Regs., R-17-3-04 (Aug. 7, 1970)	
ARKANSAS	STAT. (1983), 14-612 State Hwy. Commn. Stand. Specs. (1978 ed.) 102-1	<i>Application Deadline:</i> Prospective bidders may file application at any time, but must allow 7 days for processing by department. Prequalification must be certified before bid proposal will be issued. <i>Period of Qualification:</i> 1 year, plus 3 months for filing renewal. <i>Rating Formula:</i> Maximum Capacity Rating is determined as the total of contractor's net liquid assets multiplied by 20. Bidding Capacity is determined by subtracting the dollar amount of current uncompleted work from Maximum Capacity Rating.
CALIFORNIA	PUB. CONTRACTS CODE, (1984). 10160 et. seq.	Bidders on contracts for the California Department of Transportation are exempt from prequalification requirements of the Public Contracts Code. Bidder qualifications are evaluated at the time of contract award based on information furnished with bid. Determination that a bidder is not qualified must be based on an administrative hearing.
COLORADO	Dep't of Hwys. Rules for Constr. Bidding, (Sept. 1984) 2.20 to 2.23.	<i>Documents Submitted with Application:</i> Must include statement of key personnel experience, list of owned affiliates, and list of failures to perform. <i>Criteria for Certification:</i> In addition to other criteria, applicant must show absence of previous debarment or false statements on license application.

STATE	CITATIONS	UPDATE INFORMATION
CONNECTICUT	Dep't of Transp. Form CON-16 (Mar: 1985 ed.)	<p><i>Period of Certification:</i> 16 months from date of financial statement.</p> <p><i>Classification of Contractors:</i></p> <ol style="list-style-type: none"> 1. General highway construction 2. Highway construction 3. Bridges (major structures, repair, reconstruction) 4. Highway and bridge construction 5. Paving (bituminous, concrete) 6. Miscellaneous: a. Electrical b. Signing c. Signals d. Pavements e. Fencing f. Planting g. Demolition h. Other <p><i>Formulas:</i> Maximum Capacity Rating is determined by the sum of contractor's surplus net worth, capital stock paid up, and 50 percent of the difference between equipment market value or purchase price and equipment book value, all multiplied by 10. The ability factor of 10 is used for initial prequalification of all contractors.</p> <p>When contractor requests proposal form for a specific project, his Maximum Bidding Capacity is determined by his Maximum Capacity Rating less the amount he wishes to bid and the uncompleted portions of work under construction, less remaining work to be performed by subcontractors. This is expressed as $BC\ MAX = M - (U + W - S)$</p>
DELAWARE	CODE, (1984), t.29, s.6906 Div. of Hwys. Gen. Rules and Regs. of Prequal., 1984	<p><i>Documents Submitted with Application:</i> Must include Minority/Nonminority/Female Classification Form.</p> <p><i>Classification of Contractors:</i> Regulations list 28 classes of work for which contractors may be prequalified.</p>
DISTRICT OF COLUMBIA		<p>Except in the case of construction projects under "sheltered markets" (set asides), no prequalification of bidders is required prior to bid opening. Contracting Officer evaluates low bidder's financial statement, corporate experience, plant and equipment, pending contract commitments, and other information needed to determine lowest responsible bidder.</p> <p>For projects under "sheltered market" programs (e.g., Disadvantaged Business Enterprise, Minority Business Enterprise), the special requirements for eligibility to participate in them are added to the general criteria of financial responsibility, plant and equipment capacity, and personnel. Prequalification of bidders for these special programs may be applied for when a project is announced, or for a one-year period, with annual renewal.</p>

STATE	CITATIONS	UPDATE INFORMATION
FLORIDA	STAT. (1984), t.26, § 337.14 FLA. ADMIN. CODE, Rule Chap. 14-22	<p><i>Documents Submitted With Application:</i> Financial statement, equipment list, experience, past performance record, organization and personnel, and information on any previous contract crimes.</p> <p><i>Exemptions from Certification:</i> Contracts for less than \$150,000.</p> <p><i>Criteria for Certification:</i> Financial responsibility, equipment, necessary organization and management, satisfactory experience and work record, integrity and responsibility, history of contract crimes, violation of state policy on gifts and gratuities.</p> <p><i>Period of Certification:</i> 16 months from date of financial statement.</p>
GEORGIA	CODE ANN., (1984) 32-2-66 Rules and Regs., c.672-5, Prequal. of Contractors, 1982	<p><i>Documents Submitted With Application:</i> Financial statement, equipment list, statements of organization, personnel and management experience, record of principal work for past 3 years, list of liens or claims in past 5 years, list of criminal convictions for restraint of trade.</p> <p><i>Exemptions from Certification:</i> Contracts for less than \$250,000.</p> <p><i>Criteria for Certification:</i> Financial responsibility, plant and equipment capacity, personnel and organization, experience, liens and claims.</p> <p><i>Application Deadline:</i> 10 days prior to bid opening.</p> <p><i>Classification of Contractors:</i> Contractors are not classified for prequalification purposes.</p>
HAWAII	REV. STAT. (1983) 103-25 Stand. Specs. for Road and Bridge Constr., 102.01, 102.03, 102.12	
IDAHO	CODE (1984) 54-1901 to 54-1924	No prequalification is required for holders of a valid contractor's license to bid on highway construction projects. Subsequent to bid opening, Department evaluates the low bidder's financial statement, record of experience, equipment, and current commitments, and other information pertaining to determination of his responsibility.
ILLINOIS	REV. STAT. (1984) c.127, § 132.6 ILL. ADMIN. CODE, pts. 625, 645, 665, 675	<p><i>Exemptions for Certification:</i> Contracts for less than \$5,000.</p> <p><i>Application Deadline:</i> 30 days prior to contract letting.</p>

STATE	CITATIONS	UPDATE INFORMATION
	Stand. Specs. for Road and Bridge Constr., 102.01	<p><i>Rating Formulas:</i> Financial Rating is determined by allowable net current assets and real estate multiplied by:</p> <p>10 for \$0 to \$200,000 11 for \$200,000 to \$300,000 12 for \$300,000 and over,</p> <p>plus equipment (allowable depreciated value of equipment), less long term encumbrances, multiplied by six.</p> <p>Work Rating is based on Performance Factor (numerical rating from 1 to 4 by District Engineer at close of construction season), Experience Factor (dollar value of work completed in category for which rating is sought), and Equipment Factor (physical capacity of contractor to do special work, based on industry standards of productivity, and converted to dollar value).</p> <p>Work Rating = $PF/3 (EF/2 + EqF/2)$ New contractors use $WR = PF/3 \times EqF$.</p>
INDIANA	CODE (1984) 8-13-10 Highway Commn., Rules and Regs.	<p><i>Exemptions from Certification:</i> Subcontracts for less than \$100,000.</p> <p><i>Application Deadline:</i> 15 days prior to bid opening for new applicants; 7 days prior to bid opening for renewal applicants.</p> <p><i>Rating Formulas:</i> Maximum rating of 100 is reduced by deficiencies in the following categories: organization, personnel, construction experience, prosecution of work on previous contracts, adequacy and condition of equipment, attitude toward departmental regulations, public relations, and equal employment practices.</p> <p>Contractor's maximum aggregate financial capacity rating is determined by adding:</p> <ol style="list-style-type: none"> Accepted liquid assets multiplied by 10. Construction equipment value multiplied by 8, but not to exceed 1½ times (a). Accepted fixed and other assets multiplied by 2, but not to exceed 25% of (a) plus (b).
IOWA	CODE (1984) 314.1 State Hwy. Commn. Regs. on Qual. of Bidders (1984)	<i>Exemptions from Certification:</i> Contracts for less than \$100,000.
KANSAS	Kansas Dep't of Transp. Stand. Operating Manual (1984), 0265.00/02	<i>Classification of Contractors:</i> Regulations list 16 categories of construction work for which contractors may be prequalified.

STATE	CITATIONS	UPDATE INFORMATION
KENTUCKY	STAT. (1984) 176-130 to 176-190 Admin. Regs. 603 KAR 2:015	
LOUISIANA	STAT. (1984) 37-2151 to 37-2163	
MAINE	Dep't of Transp. Stand. Specs., Hwys. and Bridges (1984), 102.01	
MARYLAND	CODE (1983), art. 21, § 3-402 CODE OF MARYLAND REGS. (1984), 21.05.02.05	Prequalification of bidders on highway construction contracts is optional with the Department. When the Department determines that prequalification of bidders will be required, the criteria and procedure for qualification are published with the invitation for bids.
MASSACHUSETTS	GEN. LAWS (1984), c.29 § 8B CODE OF MASS. REGS. c.720, § 1.00-5.00	<p><i>Classification of Contractors:</i> Regulations list 9 categories of construction work and 6 categories of maintenance work for which prequalification is required.</p> <p><i>Rating Formulas:</i> Maximum Capacity Rating is determined by multiplying net working assets by an assigned factor reflecting contractor's experience, as follows:</p> <p>Up to 2 years—3; 2 to 5 years—6; 5 to 8 years—10; More than 8 years—12.</p> <p>Maximum Capacity Rating is rounded off to nearest \$1,000 for up to \$100,000; nearest \$10,000 for up to \$1,000,000; and nearest \$100,000 for over \$1,000,000.</p>
MICHIGAN	COMP. LAWS (1984) 247.809; 24.102; 24-104	<p><i>Documents Submitted with Application:</i> Financial statement, equipment list, experience record, equal employment opportunity policy statement.</p> <p><i>Classification of Contractors:</i> Statute lists 20 categories of work for which prequalification is required.</p>
MINNESOTA		
MISSISSIPPI	CODE (1984), 31-3-1 to 31-3-25	
MISSOURI	REV. STAT. (1984) 227.100	
MONTANA		Bidders are not required to be prequalified in order to bid on Federal-aid or State-funded highway construction projects. Bidders' qualifications may be investigated in connection with contract award if Highway Commission deems it necessary.

STATE	CITATIONS	UPDATE INFORMATION
NEBRASKA	REV. STAT. (1984) 39-1348 to 39-1352 Stand. Specs. for Hwy. Constr. (1985) 102.01, 102.03, 102.15	<i>Rating Formulas:</i> Contractor's Maximum Qualification is established by adding current assets, less current liabilities, plus 50 percent of other assets, less other liabilities, and multiplying the total by a factor reflecting contractor's length of service, record of performance on public works construction, and other pertinent factors. A rating factor of 1 to 10 is used, with first-time bidders assigned a rating of 3 until their performance is evaluated. Contractor's Current Rating is established as his Maximum Qualification, less the amount of uncompleted work at the time of contract letting, except that the Department may use a tolerance of 24 percent of bidder's current rating to make a contract award.
NEVADA	REV. STAT. (1983) 408.870 Specs. for Road and Bridge Constr. (1976) 102.02, 102.12	<i>Contractor Classification:</i> Contractors may be prequalified for the following categories of work: Road construction Bridge construction Surfacing Site work Buildings Other construction <i>Rating Formulas:</i> Maximum Capacity Rating is established as working assets multiplied by a rating factor expressed in decimals, and derived from the average of the following weighted factors: Experience 1-20 Quality of work 1-20 Performance 1-20 Financial condition 1-10 Personnel qualifications 1-10 Equipment 1-10 Timely completion of work 1-10 General attitude 1-10 Prompt payment of bills 1-5 Public relations 1-5 Ratings are given to "experienced" contractors for 1 year. Ratings are given to new contractors for single project only.
NEW JERSEY	STAT. ANN. (1984) 27:7-35.1 to 27:7-35.12 ADMIN. CODE, 16:65-1.1 et seq. Policy and Procedure Regs., No. 3.102A, Dec. 12, 1972	<i>Exemptions from Certification:</i> Subcontracts of less than \$100,000 for one project, or under \$200,000 for two or more projects with the Department of Transportation. <i>Application Deadline:</i> 15 days prior to date for receiving bids.

STATE	CITATIONS	UPDATE INFORMATION
NEW MEXICO	Stand. Specs. for Road and Bridge Constr. (1970) s. 102	<i>Classification of Contractors and Rating Formulas:</i> Contractors are prequalified on general capability to perform highway construction. No classification of work is established at the time of certification. Prequalified bidders are screened at the time they request proposal forms. If screening indicates lack of adequate resources, personnel, equipment, or experience to perform the construction work in question, eligibility to bid is denied.
NEW YORK		
NORTH CAROLINA	GEN. STAT. (1984) 136-18(1), 136-128.1 ADMIN. CODE (1984), t.19A:02D § 1801 Stand. Specs. for Roads and Structures (1984) 102-2, 102-14	<i>Classification of Contractors and Rating Formulas:</i> No classification of contractors for categories of work are established at the time of prequalification. Prospective bidders are screened for capability to perform work when projects are announced and proposal forms are requested.
NORTH DAKOTA	CENT. CODE (1983) 43-07-01 to 43-07-23 Stand. Specs. for Road and Bridge Constr. § 102	<i>Rating Formulas:</i> Bidder must have a Contractor's License for class of work in which the project falls, except where Federal-aid highway construction projects are involved. Contractor's Licenses are issued for the following categories of contracts: Class A: No dollar limit Class B: Up to \$250,000. Class C: Up to \$120,000 Class D: Up to \$ 60,000 Contractor's Maximum Bid Capacity is determined by net worth multiplied by 5.
OHIO	REV. CODE (1984), 5525.02 to 5525.09	
OKLAHOMA	STAT. (1984), t.61, § 118	
OREGON	REV. STAT. (1984) 279.012 to 279.028	<i>Rating Formulas:</i> Department does not attempt to establish maximum capacity rating for bidding or for contractor's total work prior to award of contract.
PENNSYLVANIA	STAT. (1984), t. 36 670-404.1 Dept. of Transp. Rules and Regs. (Oct. 29, 1980) 457.1 to 457.16	<i>Exemptions from Certification:</i> Demolition contracts for less than \$25,000, and "miscellaneous" work, such as mowing and snow removal, as determined by Chief Engineer. <i>Contractor Classification and Rating Formulas:</i> Regulations list 28 categories of construction work for which contractors may be prequalified.

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		<i>Rating Formulas:</i> Maximum Capacity Rating is determined by multiplying sum of net working capital plus one-half line of credit plus one-half book value of equipment by Assigned Ability Factor of 1 to 15. In lieu of foregoing method, contractor has option of being rated by multiplying \$50,000 by Assigned Ability Factor.
RHODE ISLAND	Stand. Specs. for Road and Bridge Constr. (1974) 102.01, 102.02, 102.13	Discretionary authority for prequalification of bidders is contained in Department of Public Works' Standard Specifications, but in practice contractors on departmental highway construction projects are not required to be prequalified in order to bid. Bidder qualifications are evaluated at the time of contract award, based on filing of experience questionnaire and financial report.
SOUTH CAROLINA	CODE (1984), 57-5-1650	
SOUTH DAKOTA	CODIFIED LAWS (1983) 51-5-10 Dept. of Transp. Regs., 70:01:05 Stand. Specs. for Road and Bridge Constr., § 21	<i>Exemptions from Certification:</i> Contracts for less than \$100,000. <i>Classification of Contractors:</i> Regulations list 14 categories of work for which contractors may be prequalified. <i>Rating Formulas:</i> Maximum Capacity Rating is established as 10 times contractor's working capital on his audit. Department may also consider letters of credit issued to contractor by banks.
TENNESSEE	CODE ANN. (1984) 54-5-1 to 54-5-17	<i>Contractor Classification:</i> Contractors are prequalified on general capacity to perform highway construction. No classification of work or maximum bid capacity is established at the time of prequalification. Qualified contractors are screened when projects are announced and bidders request proposal forms.
TEXAS	VERNON REV. CIV. STAT. (1984) § 6674h to 6674i State Hwy. Comm'n Order No. 66127 (May 1, 1952) Tex. Hwy. Bull. No. 2, Jan. 1974	<i>Application Deadline:</i> 15 days prior to date for submitting bid. <i>Rating Formulas:</i> Bidding capacity is established by multiplying adjusted net worth by a factor assigned to contractor by Highway Department. Initial certification is made with factor of 20, but factor may be adjusted by the Department when renewing the certification based on new documentation and performance record.
UTAH	State Road Comm'n Policy on Prequal. of Bidders, No. 09-1, Mar. 10, 1967	<i>Exemptions for Certification:</i> Contracts for less than \$500,000. <i>Rating Formulas:</i> Maximum Rating Capacity is determined by net liquid assets multiplied by experience factor of 2 for 1 year and

STATE	CITATIONS	UPDATE INFORMATION
		5 for 2 or more years. Premium rating factors (-1 to +5) may be added based on performance evaluations. Maximum Bidding Capacity is determined by Maximum Capacity Rating less dollar amount of currently uncompleted contracts. Maximum Capacity Rating may be increased by pledge of personal assets of contractor's officers. Rating may be reduced by half where applicant does not submit Certified Public Accountant's preparation of his financial statement.
VERMONT	Prequal. of Contractors Procedure Manual, Mar. 1976	
VIRGINIA	Stand. Specs. for Road and Bridge Constr., 102.01 Rules and Regs. Governing Prequal. and Classification of Prospective Bidders, July 1, 1975 Rules and Regs. Governing Prequal. of Bidders for Minority Plan Projects, Dec. 2, 1974	
WASHINGTON	REV. CODE (1984) 47.28.170 Stand. Specs. for Road and Bridge Constr., 1-02.1	
WEST VIRGINIA	CODE (1984) c.17, art.4, § 19 Stand. Specs. for Road and Bridges, 102.01 ADMIN. CODE, 17-2A serv. III, § 2	<i>Exemptions from Certification:</i> Department reserves right to exclude projects of a special nature from prequalification requirement. <i>Contractor Classification:</i> Statute lists 22 categories of construction work for which contractor may be prequalified. <i>Rating Formulas:</i> Capacity Rating is determined by adding net current assets, cash value of life insurance, one-half unencumbered book value of equipment, and line of credit statements up to half of net current assets, and multiplying this total by a Performance Factor of 1 to 10 based on applicant's past performance. For initial certifications, a Performance Factor of 5 is used.

STATE	CITATIONS	UPDATE INFORMATION
WISCONSIN	STAT. (1984), 66.29(2) Policy on Prequal. of Bidders, Sept. 1979	<i>Exemptions from Certification:</i> Contracts for less than \$100,000. <i>Contractor Classification:</i> Statute lists 11 categories of construction work for which contractor may be prequalified. <i>Rating Formulas:</i> Maximum Capacity Rating is based on net current assets, plus 60 percent of net noncurrent assets, generally multiplied by a factor of 5. Selection of the work factor in each case depends upon evaluation of applicant's past performance and current condition. Continued satisfactory performance and good financial condition can result in raising the factor to a maximum of 10. Poor records of performance may result in reduction of the factor below 5.
WYOMING	STAT. (1984), 24-2-108 Policy No. 24-7, (Rev. Mar. 26, 1970)	

The value of information obtained through prequalification processing may be enhanced if contractors are required, in addition to annual or other periodic renewal of certification, to update their qualification file promptly when there is a corporate or affiliation change, or a reduction of more than 10 percent of their stated assets.⁴³

Because the primary purpose of the prequalification process is associated with the administration of public contracts rather than the punishment of wrongdoing, it is generally distinguished from suspension or debarment of contractors imposed as a criminal penalty or as disciplinary action by a licensing agency.⁴⁴ Nevertheless, the requirement for annual and special renewals of prequalification status provides opportunities to maintain a series of checkpoints to assure continuing compliance with orders or agreements applicable to a contractor. For example, a typical court judgment or a plea bargain where bid-rigging is charged may involve removal of debarment or other civil sanctions in exchange for a *nolo contendere* plea, plus removal of certain individuals from the contractor's management, institution of internal procedures and policies to prevent recurrence of the offensive practices, and appropriate restitution of public funds. In such situations, prequalification procedures may provide surveillance of the contractor's compliance with the terms of a court order or settlement, as well as provide a practical incentive for remaining in compliance.

The second development of the 1970s-1980s which influenced administration of the prequalification process was the establishment of programs to assist disadvantaged business enterprises (DBE) to have greater participation in Federal-aid highway projects. Although not

made a mandatory condition of Federal aid until 1980, the policy of the Federal Highway Administration actively promoted increased use of minority business in highway construction from 1975 onward. The Surface Transportation Assistance Act of 1982 made it mandatory that 10 percent of all Federal-aid highway funds spent by the states must be awarded to DBE contractors or subcontractors. State-by-state, this general requirement was prorated into dollar amounts, which, in turn, were allocated to specific projects in the construction program.

A report by the General Accounting Office in 1985 documents the report on the readiness of the states to achieve the goals set under this program, and describes measures being taken to accomplish the long-range objective of increasing the number of DBEs that are capable and available to compete for highway construction contracts on a regular basis.⁴⁵ Among other findings, this report concluded that currently certified DBEs had the capability to perform 10 percent of the highway construction work contemplated, but it noted the existence of other problems that might limit successful utilization of this capacity. Specifically, not all certified DBEs were interested in working on highway construction. Also, despite the fact that all states and various Federal agencies and construction industry groups have carried on or sponsored training and assistance activities, the distribution of professionally qualified DBEs nationwide remains uneven, both in terms of the skills and numbers of firms available.

This has presented several issues concerning state prequalification systems for highway construction contractors. Specifically, should the prevailing technical criteria for prequalification be relaxed for DBEs in order to increase the number eligible for certification? State highway and transportation agencies have not advocated or followed this practice, feeling that the paramount priority must be given to the public interest in protecting the highway investment by dealing only with contractors of demonstrated capability and responsibility.

Should state highway and transportation agencies require subcontractors as well as prime contractors to be prequalified as a condition of bidding on construction contracts where Federal-aid funds are involved? Currently, the great majority of DBEs serve as subcontractors, and this ratio is likely to remain unchanged for the foreseeable future. But if one objective of the DBE assistance programs is to eventually increase participation of DBE firms as prime contractors, the effect of introducing them to regular prequalification even while serving as subcontractors needs consideration. Experience of states that require prequalification of subcontractors deserves study.

Establishment of procedures for certification of DBEs and other minority business enterprises under Federal minority assistance programs has created an additional screening process parallel to the prequalification requirement that a state may have for assuring contractors' technical and financial responsibility. Certification of DBEs includes determination of disadvantaged status, investigation of applicants to avoid certification of "fronts" and "captive" businesses, and monitoring such activities as "mentor-protege" arrangements between selected prime

contractors and DBE subcontractors, or other special requirements. Although their administration and enforcement are separate from the states' general prequalification of prime contractors, they add to the incentives for prime contractors to maintain their general eligibility as bidders, and may have to be taken into account by state highway and transportation agencies in monitoring such eligibility.⁴⁶ Diversity among the states in their definitions of disadvantaged businesses and their interpretation of criteria of eligibility for DBE certification under Federal law suggests the need for development of greater interstate reciprocity in accepting certifications. Yet, although this need has been recognized by the U.S. Department of Transportation, the Federal policy has been to give only limited encouragement to establishment of reciprocity procedures until the risk of abuse is reduced.⁴⁷

Scope of Requirements (p. 1074)

State laws and policies on prequalification of subcontractors vary. In favor of prequalification, it is pointed out that the needs to assure competency and responsibility in construction work are as great in regard to subcontractors as for prime contractors. Prequalification of subcontractors therefore may assist prime contractors in locating potential subcontractors whose work record and financial condition have been documented and evaluated. In addition, where specialty work is contracted for separately, the same specialty contractor may bid as a prime contractor on one project, and appear as a subcontractor in another.

These benefits have a practical price for the public works agency which must process the additional volume of subcontractor applications, annual reports, and other paperwork. Specialty contractors tend to have a high proportion of small businesses, of which a certain number are likely to have only minimal experience and capitalization. Highway and transportation agencies may understandably believe they cannot effectively monitor the number or range of specialty businesses that may wish to be prequalified, and may prefer, instead, to let the public's interest be protected by the diligence of the prime contractor, backed up by his surety bonding company, each of which has a direct interest in seeing that the contract is performed satisfactorily.

Prequalification of subcontractors as well as prime contractors is required in ten states.⁴⁸ In several of these cases, however, bidders on projects involving less than specified amounts of money are except from this requirement,⁴⁹ and in others the requirement is satisfied by submitting lists of proposed subcontractors for the approval of the contracting agency at the time of contract award.⁵⁰

Administration of prequalification programs, regardless of their scope, needs good working definitions of subcontractors for the variety of situations in which it may be necessary to distinguish them from other parties in the construction process. The distinction between subcontractors and employees is one which must be made frequently, and was an issue in *Ro-Med Construction Company, Inc. v. Clyde M. Bartly Co., Inc.*,⁵¹ under Pennsylvania's regulations which required contractors on

state highway projects to use only subcontractors currently prequalified and classified by the Department of Transportation. In a suit for breach of contract to construct roadside rest area buildings, the defense was offered that the contract was illegal because one part who had acted as a subcontractor had not been prequalified for such work.

At trial, evidence was offered that the alleged subcontractor arranged to have its payroll carried by the prime contractor, and its key personnel listed with nonexistent job titles on the prime contractor's employee list. The genuineness of this apparent employee relationship was further brought into question by evidence of how labor actually was hired and supervised for the project in question.

In this case the court concluded that the evidence raised genuine doubts regarding the employee-subcontractor relationship which precluded summary judgment on the legality of the contract under the State Department of Transportation's prequalification regulations.

Distinctions may also have to be made between subcontractors and fabricators or suppliers of materials and structural units at work sites. Such cases generally turn on whether the party in question performs a substantial part of the contract as a "distinct part of the work" in such a way that he does not contemplate merely furnishing materials or supplying personal service.⁵²

When legislation specifies standards to be applied in prequalification, strict construction of the statutory language may limit what a contracting agency can do to modify or change its procedures. Even where emergencies occur, courts seem to be very wary of allowing any administrative modification of standards or procedures that may exceed delegated authority. This was the result where the Washington Department of Transportation attempted to particularize the manner in which temporary measures should be taken while a major highway bridge was being replaced, and include this in the standards for prequalification of bidders on their project.⁵³

In this instance it was decided that a temporary floating bridge should be installed to allow traffic operations to be maintained on an arterial highway while a permanent bridge for the highway was being built at a nearby location. The department had had good success with the design and methods used by a particular contractor, and, when it published its notice for bids, it modified its usual prequalification criteria to require bidders to show "necessary experience, organization and technical qualifications to design and construct floating bridges," and provide "evidence of previous successful use . . . of the proposed floating bridge configuration."⁵⁴ The proposed configuration, as set forth in the bid specifications, essentially described the method used by a particular contractor whose previous work on floating bridges had impressed the department. Ultimately, that contractor was the only one certified to bid, and other interested bidders appealed the department's denial of their prequalification.

The court viewed the department's action as inconsistent with the policy that public contracts must be awarded through competitive bidding. This policy already was limited by the prequalification standards

contained in the state law,⁵⁵ and any attempt to introduce further limitations administratively must be solidly based on legislative authority. Admittedly, this put the department in a difficult position, since its need to replace a major bridge destroyed by storm was both critical and immediate. Under the circumstances, the department concluded it did not have time to prepare a detailed bridge design and perform customary engineering analysis before putting it into operational use. Therefore, it selected a solution which already had been demonstrated as safe for public use, and made the previous successful use of that design a requirement for prequalification of bidders. Notwithstanding this, the court said:

Obviously, this court cannot question the department's conclusion as to its own engineering capabilities, particularly when given the time constraints under which the department had to operate. Indeed, superficially, at least, the department's determination to seek a reasonably safe interim solution—one which the public can be expected to accept—appears to be laudable. . . . The legal question presented by this appeal, however, is not whether the department's decision is laudable; rather, the issue is whether that decision can be applied as a prequalification item—thus drastically curtailing the competitive bidding process. . . . [The] item . . . was inserted within the bid specifications intentionally and precisely because the department was confronted with an emergency and wanted to avoid having to consider any proposed design not previously shown to have been successfully used, even though the department considered such contractor fully competent by experience, organization and technical qualification to design and construct a floating structure. By choosing to eliminate competent bidders at the prequalification stage, the salutary effect of truly competitive bidding was lost.⁵⁶

Most statutes which provide for prequalification of bidders use standards which measure a contractor's ability and capacity to perform contracts in various categories of construction. Typically, financial condition, equipment, experience, and organization are the indicators used to establish eligibility. Other matters which may affect a contractor's responsibility, such as his business honesty and integrity, may become grounds for rejection of the bid of a properly prequalified low bidder, or may be grounds for suspension or debarment. In practice, however, it may become difficult to maintain the distinction between prequalification and the determination of a low bidder's responsibility. This is illustrated in a series of cases growing out of New Jersey's landmark decision in *Trap Rock Industries, Inc. v. Kohl*.⁵⁷

In this case, decided in 1972, the New Jersey Department of Transportation suspended Trap Rock, a properly prequalified bidder, because one of its key officers was under indictment. This suspension was upheld, and the court observed in passing:

The question is whether a distinction can be drawn between the right of Trap Rock to bid and its right to receive an award under bids already in. We see no basis for a distinction. The public interest in the States contracts is no less demanding because bids have been submitted.⁵⁸

A year later, the Department ruled that this suspension also made Trap Rock ineligible to serve as a materialman or other source of materials to a prime contractor whose contract with a local government was funded in any part by the department's funds. Notwithstanding arguments that prequalification of materialmen was not required by statute, and that to try to do so in all cases would entail great difficulty, the court upheld the suspension, declaring that the contracting agency could not on those accounts "ignore what it learns about those who seek to do business directly with the State."⁵⁹

New Jersey's statute on prequalification requires contractor applicants to answer a questionnaire intended to reveal financial ability, prior experience, adequacy of plant and equipment, organization, "and such other pertinent and material facts as may be deemed desirable." By its ruling on the suspension of Trap Rock Industries, the New Jersey court raised the question of whether information which customarily is used to determine responsibility and fitness to receive a contract award can also properly be relied on to suspend eligibility to bid on future contracts. The court's decisions affirmed that the Commissioner of Transportation could do this, and could later reinstate the contractor as a qualified bidder when he was satisfied that the reason for disqualification was removed.

These cases were followed by another in 1975 which reopened the issue of whether the same grounds used to stop work on a project could also sustain a decision to suspend the contractor's eligibility to bid on future contracts with the department. In this instance, the department in effect reversed an earlier decision to reinstate the contractor's eligibility to bid, and imposed a new suspension on the ground that one of the individuals responsible for the earlier corporate criminal acts had not disassociated himself sufficiently from the corporation's management to insulate the corporation from his previous lack of integrity.⁶⁰

The court found no fault with the department's power to reappraise and modify prior determinations of eligibility when it appeared necessary to protect the public interest, or with the grounds cited to justify suspension of bidding eligibility. But on review of the department's action, the court found that the Commissioner relied on the evidence presented at a prior hearing, and decided to reimpose suspension by applying a contrary and speculative interpretation to the conclusion reached by the previous Commissioner on the same evidence. Warning that "the power to reconsider must be exercised reasonably, with sound discretion reflecting due diligence, and for good and sufficient cause," the appellate court held that, under the circumstances, the department's action was not sustained by the evidence.⁶¹

Where prequalification statutes permit consideration of factors bearing on bidder responsibility as well as ability and capacity, prequalification and debarment tend to be used as complementary processes. Contractors' efforts to assert a "right" to do business with public agencies have succeeded at least in creating certain procedural limitations on departmental discretion in debarment actions.⁶² To date, however, these limitations have not been applied to prequalification actions that are regarded as administrative rather than disciplinary in character.

Once they are certified to be prequalified bidders by the highway agency, contractors are required to give evidence of their continuing eligibility for this status by periodically renewing their certification. Generally, this is done annually in a procedure that includes submission of information on work performed during the past year, an updated financial statement, and description of personnel and equipment. In addition, highway agency regulations customarily require certified contractors to promptly notify the agency of any significant changes in their record or circumstances that might affect their capacity to perform work for which they have been certified.

This requirement may be in general terms, or it may be particularized by referring to information called for in the agency's prequalification questionnaire, or other enumerated actions or events. For either type of requirement, however, interpretations of their scope may differ. This is illustrated in *E. Smalis Painting Company, Inc. v. Commonwealth, Department of Transportation*.⁶³ Here, departmental prequalification regulations required contractors to submit a statement of any felony convictions of its directors, principal officers, or key personnel, and, also, to notify the department of any changes in such information. Based on these requirements, and acting on information from a local prosecuting attorney's office that petitioner's president had been convicted of a felony and was awaiting sentence, the department suspended the contractor.

In contesting the suspension, petitioner argued that the duty to submit a report of the conviction did not arise until sentencing was completed. The court disagreed. While conceding that the term "conviction" had both a popular usage and a technical usage, and that the technical usage should be used unless it would defeat the apparent intent of the law, the court felt that in this instance "conviction" was to be understood as meaning a verdict of guilty or a plea of guilty.⁶⁴

The possibility that information obtained and relied on for prequalification of bidders may have secondary legal significance is raised in a Michigan court in *E. F. Solomon v. Department of State Highways and Transportation*.⁶⁵ This suit sought to recover liquidated damages withheld from a prime contractor for a work delay resulting from the insolvency of a subcontractor during the course of construction. Under the defendant department's regulations, subcontractors as well as prime contractors are required to prequalify and submit evidence of their ability to carry out the work contemplated, and, in this instance, the prime contractor selected a paving subcontractor from the department's list of prequalified bidders.

Referring to these prequalification procedures, plaintiff argued that a warranty of accuracy accompanied prequalification approval and listing by the department, and, in this instance, plaintiff reasonably relied on this implied warranty to his detriment. In his argument, plaintiff cited cases where contractor claims were allowed because of reliance on erroneous information supplied by the highway agency.⁶⁶

While the court might have distinguished these cases because, in each

case, the state knew the unreliability of the information given to its contractor, it elected instead to meet the issue of an implied warranty of accuracy squarely. It stated that prequalification procedures were "simply a mechanism by which defendant determined who would be allowed to bid on state highway projects,"⁶⁷ and emphasized that recovery of claims based on misrepresentation of information generally depended on the state having previous knowledge of its erroneous character, or else having failed to take appropriate precautions which would have revealed the error in time to avoid it or the consequences of relying on it.

The court also cited the state constitutional prohibition against using the credit of the state as a guarantee or surety in favor of a private individual and declared that the contractor's attempt to find an implied warranty of accuracy in the prequalification process would accomplish precisely what the constitution prohibited.⁶⁸

Appeal and Review of Adverse Actions (p. 1116)

Legislative authority for prequalification of bidders normally includes authority for the certifying agency to suspend or revoke a contractor's certification for various enumerated causes and "for other good cause." Consistent with their basic approach to review of administrative actions, courts generally are not inclined to second-guess the decision of an executive regulatory agency on its merits in the absence of a showing of fraud, bad faith, or arbitrariness.⁶⁹ Yet, because prequalification directly affects the right to have one's bid considered for a contract award, disciplinary action that results in suspension or revocation of a bidder's eligibility is taken seriously by all interested parties. Recognizing that the right to engage in business has important economic consequences, courts have insisted that disciplinary actions against qualified bidders must be handled in accordance with rules that assure fairness and equal treatment, and are in strict compliance with applicable statutes and administrative regulations, whether it is convenient or not for the administrative agency.

This is illustrated in *White Construction Company, Inc. v. Division of Administration, State Department of Transportation*,⁷⁰ where the prequalifying agency notified a contractor of his temporary suspension by letter from the agency's Director of Road Operations, citing apparent failures to follow certain procedures on the work site and relying on statutory authority to suspend for good cause. In an action for mandamus to restore the contractor's bidding status, the Florida Supreme Court found that the agency's intended suspension was not effective because it was not issued by the Secretary of Transportation, as required by the statutory language.⁷¹

Noting the practical problems that such strict construction of procedural requirements might create, the court commented:

This is not to say that the Department of Transportation, Division of Administration does not have the power to delegate routine matters to subordinates, but the suspension of a person from the performance of his business which he has been certified to perform by the Department is

highly penal in nature, and should be done only by those having specific authority to do so. In this particular instance, there should be strict adherence to statute and rules of the Department of Transportation.⁷²

The last statement of the court, calling for strict procedural compliance, deserves to be emphasized, because the case does not enlarge the contractor's substantive rights. Prequalification is not on the same level as a license to do business, so that debarment from bidding on highway construction contracts does not constitute revocation of the right to engage in any construction work, and no constitutionally protected right is infringed.⁷³

While observing this distinction, however, the court in *White Construction Company* made it clear that where prequalification authority is conferred by statute, and the certifying agency promulgates rules, the agency must comply fully and precisely with those rules in its dealing with bidders. Similarly, contractors must comply with these rules in order to protect their rights. For example, failure to make timely application for administrative review of a suspension order has resulted in holding that the right to such a hearing was waived.⁷⁴

Whether specifically required by statute or not, the concept of fairness requires that disciplinary action by a licensing agency be based on a hearing, with opportunity for the licensee to explain or contradict the evidence being considered. Normally, such a hearing is held prior to issuing any suspension order so that premature or unwarranted penalties may be avoided. Statutory procedures may, however, provide that where public health or safety justifies it, a temporary suspension order may be issued prior to holding a hearing on the matter.⁷⁵

Prequalification and Certification of Disadvantaged Business Enterprises

Although not made a statutory requirement until the Surface Transportation Assistance Act of 1982, the policy of promoting use of minority businesses in Federal-aid highway construction work was implemented administratively for the previous 8 years. Beginning in 1975, the Federal Highway Administration required Federal-aid highway project contractors to solicit bids from minority contractors and encouraged states to establish programs of their own to help small businesses and minority businesses compete for highway construction contracts. In particular, states were requested to identify minority businesses that could be used as subcontractors in Federal-aid projects, to maintain directories of minority businesses interested in highway construction for distribution to prime contractors, and directed state highway departments to review their contracting rules and eliminate any which unfavorably affected minority and small businesses. Thereafter, in 1977, the Federal Highway Administration began setting nationwide goals for minority business in Federal-aid highway projects.

In 1980, regulations were issued by the U.S. Department of Transportation to require state highway and transportation agencies to have minority business enterprise (MBE) programs. These regulations included the earlier FHWA regulations, and required states to certify eligible MBEs and set goals for their participation. The use of these

firms, now called Disadvantaged Business Enterprises (DBE), was further promoted by regulations of the Department of Transportation promulgated in August 1983. Under these regulations, it was provided that, unless otherwise determined, at least 10 percent of all Federal-aid highway funds spent by a state must be awarded to DBE contractors. Under this program, states developed procedures for certifying contractors as DBEs qualified to serve either as prime contractors or subcontractors.⁷⁶

Carrying out the statutory concept of "socially and economically disadvantaged individuals," FHWA, in 1984, amended its MBE program regulations to apply to this new group, as follows:

Definitions.

... "Disadvantaged business" means a small business concern: (a) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. . . .

"Socially and economically disadvantaged individuals" means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act. Recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also may determine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged.

(a) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(b) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;

(c) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(d) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U. S. Trust Territories of the Pacific, and the Northern Marianas;

(e) "Asian-Indian Americans," which includes persons whose origins are from India, Pakistan, and Bangladesh.⁷⁷

The states' procedures for prequalification of DBEs are intended only to certify DBE program eligibility. Their chief practical result has been to facilitate efforts of prime contractors and contracting officers to meet DBE program goals. Prequalification for these programs does not evaluate an applicant's financial, managerial, or technical capabilities. Certification as a DBE, or listing in a directory of prequalified DBE contractors, does not constitute or imply the same approval as prequalification for highway and bridge construction work.

Notwithstanding this limitation, state DBE prequalification records usually contain information which, to some extent, indicates a contractor's ability to perform highway construction work. For example, often DBE applicants are required to describe the types of work they do, and their past business. Also, DBE applicants' expertise may be indicated by the information they submit relating to types of highway-related work they have done, their bonding experience, and previous prequalifications for highway work.⁷⁸

¹ Northwest Cascade Constr. Co. v. Custom Component Structures, 8 Wash. App. 581, 508 P.2d 623 (1973), *mod.* 83 Wash. 2d 453, 519, P.2d 1 (1974); Scientific Cages, Inc. v. Banks, 81 Cal. App. 3d 885, 146 Cal. Rptr. 780 (1975).

² Alan S. Meade Assoc., Inc. v. McGarry, 315 S.E.2d 69 (N.C. App., 1984).

³ Hagberg v. John Bailey Contractor, 435 So.2d 580 (La. App., 1983).

⁴ Scientific Cages, Inc. v. Banks, 81 Cal. App. 3d 885, 146 Cal. Rptr. 780 (1975).

⁵ Brady v. Fulghum, 308 S.E.2d 327 (N.C., 1983).

⁶ Cameron v. State, 15 Wash. App. 250, 548 P.2d 555 (1976), where contractor sought recovery of bid bond and cost of parking lot construction.

⁷ American Paving Co. v. Director of Revenue, 377 A.2d 379 (Del. Super. 1977).

⁸ See e.g., CAL. BUS. & PROF. CODE, § 7026 (West 1985) defining "contractor," for the purpose of licensing as synonymous with "builder," and, specifically, one who "undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erecting of scaffolding or other structures or works in connection therewith, or the clearing of grounds or structures in connection therewith, and whether or not the performing of the work herein described involves the addition to or fabrication into any structure, project, development or improvement herein described of any material or article of merchandise. The term contractor includes subcontractor and specialty contractor."

⁹ Bremmeyer v. Kiewit Sons Co., 16 Wash. App. 318, 555 P.2d 1183 (1976); Scientific Cages, Inc. v. Banks, 81 Cal. App. 3d 885, 146 Cal. Rptr. 780 (1978).

¹⁰ Compare, Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981) and Phillips v. Parton, 59 N.C. App. 179, 296 S.E.2d 317 (1982).

¹¹ Dahl-Beck Electric Co. v. Rogge, 275 Cal. App. 2d 893, 80 Cal. Rptr. 440 (1969). Other California cases making this distinction include: Powell v. Berg, 99 Cal. App. 2d 353, 211 P.2d 743 (1950), plaintiff performed services and advanced funds, and furnished truck. Malich v. Rockwell, 91 Cal. App. 2d 463, 205 P.2d 389 (1949), plaintiff built wharf for hourly wages which he used to buy material and hire labor; Andrew v. Conner, 101 Cal. App. 2d 621, 225 P.2d 943 (1951), plaintiff rented equipment and labor; Cargill v. Ashziger, 165 Cal. App. 2d 220, 331 P.2d 774 (1958), plaintiff furnished labor and equipment for grading and paving; Rodini v. Harbor Engineers, 191 Cal. App. 2d 560, 12 Cal. Rptr. 924 (1961), plaintiff rented trucks, earthmoving equipment and labor for hourly rates, but did not supervise work.

¹² Campbell v. Smith, 68 N.M. 373, 362 P.2d 523 (1961).

¹³ N. M., OP. ATTY GEN. 6332 (1955-56).

¹⁴ Harrell v. Clarke, 325 S.E.2d 33 (N.C. App. 1985).

¹⁵ Bird v. Pan Western Corp., 261 Ark. 56, 546 S.W.2d 417 (1977).

¹⁶ 19 A.L.R. 3d 1409.

¹⁷ Leonard v. Hermreck, 168 Cal. App. 2d 142, 355 P.2d, at 515, 516-517 (1959).

¹⁸ Martinson v. Publishers Forest Products Co., 11 Wash. App. 42, 521 P.2d 233 (1974). See also, Fray v. Rogers, 272 Cal. App. 2d 858, 77 Cal. Rptr. 776 (1969), where clearing and logging are exempted by California statute.

¹⁹ 97 Cal. App. 3d 842, 158 Cal. Rptr. 862 (1979).

²⁰ S.C., OP. ATTY GEN. 78-72, 103 (1978), stating that a company engaged in unloading, moving, and securing machinery to a building foundation previously constructed for the machinery did not have to obtain a contractor's license. But the work of hooking up the machinery's supply lines for air, water, and vacuum could be performed only by a licensed specialty contractor.

²¹ E. A. Davis & Co. v. Richards, 120 Cal. App. 2d 237, 260 P.2d 805 (1953). See also, CAL. 59 OP. ATTY GEN. 424 (Aug. 31, 1976), adopting the "substantial change" criterion, and Concienne Inc. v. Southwest Community Inns, Inc., 80 N.M. 512, 458 P.2d 587 (1969).

²² 19 A.L.R. 3d 1409.

²³ IDA. CODE, § 54-1901 (1983).

²⁴ McKay Constr. Co. v. Ada County Bd. of County Comm'rs, 99 Ida. 235, 580 P.2d 412 (1978).

²⁵ Peck v. Ives, 84 N.M. 62, 499 P.2d 684 (1972).

²⁶ CAL. BUS. & PROF. CODE, §§ 7107, 7113 (1985).

²⁷ Bailey-Sperber, Inc. v. Pensanti, 64 Cal. App. 3d 725, 134 Cal. Rptr. 740 (1976).

²⁸ J. W. Hancock Enterprises, Inc. v. Ariz. State Registrar of Contractors, 142 Ariz. 400, 690 P.2d 119 (Ariz. App. 1984); Mickelson Concrete Co. v. Contractors State License Board, 95 Cal. App. 3d 631, 157 Cal. Rptr. 96 (1979).

²⁹ Tolstoy Constr. Co. v. Minter, 78 Cal. App. 3d 665, 143 Cal. Rptr. 570, at 573-574 (1978), citing Thomas Haverty Co. v. Jones, 185 Cal. 285, 197 P. 105 (1920). See also, First Charter Land Corp. v. Middle Atlantic Dredging Co., 218 Va. 304, 237 S.E.2d 145 (1977).

³⁰ Barrett, Robert & Wood, Inc. v. Armi, 296 S.E.2d 10 (N.C. App. 1982).

³¹ Brown v. Solano County Business Development Inc., 92 Cal. App. 3d 192, 154 Cal. Rptr. 700 (1979).

³² Kinast v. Dep't of Professional Regulation, 458 So.2d 1159 (Fla. App. 1984).

³³ Godwin v. Dep't of Professional Regulation, 461 So.2d 226 (Fla. App. 1984); Watson v. Welton, 115 Ariz. 76, 563 P.2d 331 (Ariz. App. 1977).

³⁴ Fillmore Products, Inc. v. Western States Paving, Inc., 561 P.2d 687 (Utah 1977).

³⁵ *In re Romero*, 535 F.2d 618 (10th Cir. 1976) at 621.

³⁶ J. W. Hancock Enterprises, Inc. v. Registrar of Contractors, 126 Ariz. 511, 617 P.2d 19 (1980).

³⁷ Mickelson Concrete Co. v. Contractors' State Licensing Bd., 95 Cal. App. 3d 631, 157 Cal. Rptr. 96 (1979); Moore v. Fla. Constr. Industry Licensing Bd., 356 S.2d 19 (Fla. App. 1978).

³⁸ Mickelson Concrete Co. v. Contractors' State Licensing Bd., 95 Cal. App. 3d 631, 157 Cal. Rptr. 96 (1979).

³⁹ CAL. BUS. & PROF. CODE, § 7113 (1985).

⁴⁰ Recovery allowed only to license limit: Alan S. Mead & Assoc., Inc. v. McGarry, 315 S.E.2d 69 (N.C. App. 1984); Sample v. Morgan, 319 S.E.2d 607 (N.C. 1984); Brady v. Fulghum, 308 S.E.2d 327 (N.C. 1983); Helton v. Angelopoulos, 629 S.W.2d 15 (Tenn. 1982). Recovery beyond license limit allowed: Martin v. Mitchell Cement Contracting Co., Inc., 74 Cal. App. 3d 15, 140 Cal. Rptr. 424 (1977). See also: Gurkovic v. State Contractor Bd., 95 Nev. 489, 596 P.2d 850 (1979), license board reprimand; Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 198 Colo. 444, 601 P.2d 1369 (1979), criminal penalty for unlicensed activity.

⁴¹ Moore v. Fla. Constr. Industry Licensing Bd., 356 So.2d 19 (Fla. App. 1978); Neilson & Co. v. Cassia & Twin Falls County Joint Class A School District 151, 96 Ida. 763, 536 P.2d 1113 (1975).

⁴² See e.g., U. S. General Accounting Office, *Actions Being Taken to Deal With Bid Rigging in the Federal Highway Program*, Report GSO/PLRD-83-78 (May 23, 1983), and Steven Flax, "The Crackdown on Colluding Roadbuilders," *Fortune*, at 79-81 (Oct. 3, 1983).

⁴³ American Association of State Highway and Transportation Officials, *Suggested Guidelines for Strengthening Bidding and Contract Procedures*, at 1-4 (Washington: AASHTO, Oct. 1981).

⁴⁴ For discussion of Federal contracting law, see generally, George Coburn, "Due Process Issues in Debarment and Suspension," 42 Fed. Cont. Rep. 571-579 (1984); James Graham, "Suspension of Contractors and Ongoing Criminal Investigations for Contract Fraud: Looking for Fairness from a Tightrope of Competing Interests," 14 PUB. CONT. L. J. 216-239 (1984); How-

ard Cox, "Due Process Issues in Suspension and Debarment. A Government Perspective," 43 Fed. Cont. Rep. 429-438 (1985).

For comparison of Federal statutes and cases with California statutes and cases, and discussion of pre-award proceedings to determine low bidder's responsibility, see *Comment: "Due Process in Public Contracts: Pre-award Hearings to Determine Responsibility of Bidders,"* 5 PAC. L. J. 142-164 (1974).

⁴⁵ U.S. General Accounting Office, *Information on the Federal Highway Administration's Disadvantaged Business Enterprise Program*, GAO/RCED-85-31 (Mar. 15, 1985).

⁴⁶ See discussion in Orrin Finch, "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting," *NCHRP Research Results Digest 146* (Nov. 1985) pp. 3-31.

⁴⁷ While acknowledging savings of time and effort in processing certifications, the Department of Transportation noted that if certification by one state must be accepted by others on full faith and credit, it would be possible for fronts and firms of marginal eligibility to seek certification in places with least effective programs for screening out ineligible businesses. This type of "forum-shopping" is not consistent with the objectives of the program. See 49 C.F.R. 23.51, 23.53, and comments in 48 F.R. 33440 (July 21, 1983).

⁴⁸ Idaho, Indiana, Kentucky, Michigan, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, and Virginia.

⁴⁹ *E.g.*, Indiana, \$25,000; New Jersey, \$100,000; Virginia, \$1,000,000.

⁵⁰ *E.g.*, North Carolina; North Dakota.

⁵¹ 411 A.2d 790 (Pa. Super. 1979).

⁵² *E.g.*, *Druml Co. v. Knapp*, 6 Wis. 2d 418, 94 N.W.2d 615 (1959).

⁵³ *Manson Constr. and Eng'r Co. v. State*, 24 Wash. App. 185, 600 P.2d 643 (1979).

⁵⁴ 600 P.2d 643 at 645.

⁵⁵ RCW 47.28.070. (1984)

⁵⁶ 600 P.2d 643 at 647.

⁵⁷ 59 N.J. 471, 284 A.2d 161 (1971); *cert. den.*, 405 U.S. 1065 (1972).

⁵⁸ *Trap Rock Industries, Inc. v. Kohl*, 63 N.J. 1, 304 A.2d 193 (1973).

⁵⁹ 304 A.2d 193 at 194. The New Jersey Department of Transportation regulations required contractors to notify the State Engineer of sources of materials they intended to use.

⁶⁰ *Trap Rock Industries, Inc. v. Sagner*, 133 N.J. Super. 99, 335 A.2d 574 (1975).

⁶¹ 335 A. 2d at 580. This decision was affirmed by the New Jersey Supreme Court when the court divided equally. *Trap Rock Industries, Inc. v. Sagner*, 69 N.J. 599, 355A.2d 636 (1976).

⁶² See *e.g.*, *Gallo Asphalt Co. v. Sagner*, 71 N.J. 405, 365 A.2d 932 (1976), requiring adherence to a plea bargain which precluded use of guilty pleas as evidence in subsequent civil proceedings. *Berlanti v. Bodman*, 780 F.2d 296 (3d Cir. 1985) stated that an otherwise qualified contractor has a "property interest" in not being arbitrarily debarred, which interest entitles him to procedural protections under the due process clause. Department of Labor v. Titan Constr. Co., No. A-160, S. Ct., N.J., Sept. Term 1985, allowed Commissioner to debar corporate officer for cause, but required that he establish standards for debarment by regular rulemaking action and provide procedural safeguards at debarment proceedings.

⁶³ 452 A.2d 601 (Pa. Cmnlwth, 1982).

⁶⁴ 452 A.2d at 602.

⁶⁵ 131 Mich App. 479, 345 N.W.2d 717 (1984).

⁶⁶ *In Holloway Constr. Co. v. State*, 44 Mich. App. 508, 205 N.W.2d 575 (1973), a contractor relied on the state's assurance that a specified borrow pit would be available for use in construction of expressway ramps and service roads, whereas, at that time, the state knew it did not have a right to use that pit, and later substituted another, less convenient for the contractor's use. *In Kensington Corp. v. State*, 77 Mich. App. 417, 253 N.W.2d 781 (1977), the contractor relied on the state's information concerning soil conditions at the site for building a bridge abutment, and used specifications and methods that were suitable for construction in such soil class. Subsequently, when structures collapsed because of the softer soil actually present, the state acknowledged that the soil classification was erroneous, and that its engineer at the work site knew the true character of the soil.

⁶⁷ 345 N.W.2d at 719.

⁶⁸ 345 N.W.2d at 718-719.

⁶⁹ *King's Bay Busses, Inc. v. Aiello*, 418 N.Y.S.2d 284 (N.Y. Sup. 1979).

⁷⁰ 281 S.2d 194 (Fla. 1973).

⁷¹ FLA. STAT. (1984), 337.16(a); FLA. ADMIN. CODE, 14-8.01, 14.(c).

⁷² 281 S.2d at 197.

⁷³ *Dep't of Labor and Industry v. Union Paving & Constr. Co.*, 168 N.J. Super. 19, 401 A.2d 698 (1979). Prequalification is a procedure and practice established to serve the public interest, and not to advance the interest of private parties. The bidder's status is permissive in its nature, so that a contracting agency has the right to go beyond its initial certification to reopen its investigation and evaluation of a bidder's qualifications whenever there is cause to do so. *Malan Constr. Corp. v. Board of County Comm'rs*, 187 F.Supp. 937 (D. Mich. 1960.).

⁷⁴ *Dickerson, Inc. v. Rose*, 398 So.2d 922 (Fla. App. 1981), also holding that where a contractor's certification was suspended while he had a bid pending consideration, he was disqualified from bidding in the fu-

ture, but his pending bid was not ineligible to be considered.

⁷⁵ *State ex rel Perry v. Miller*, 300 S.E.2d 622 (W. Va. 1983).

⁷⁶ If certified as a prime contractor, a DBE must comply with all applicable standards and regulations of Federal-aid highway projects, just as other prime contractors. Actions by State highway agencies are prescribed in 23 C.F.R. 230.207 (1985).

⁷⁷ 49 C.F.R. 23, Subpart D, § 23.62 (1984).

⁷⁸ U.S. General Accounting Office, *Information on the Federal Highway Administration's Disadvantaged Business Enterprise Program*, GAO/RCED-85-31 (Mar. 15, 1985) 5-7.

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, federal administrators, and others involved in licensing and qualification of bidders on public works contracts. The summary of current practice among the states and the identification of trends should be of particular interest. As an update of pages 1043-1124 in Volume 3 of Selected Studies in Highway Law, the information in this Digest will eventually be distributed as a supplement to Volume 3.

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