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ARTICLE 70:07

HIGHWAY CONSTRUCTION CONTRACTS

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**ARTICLE 70:07**

**HIGHWAY CONSTRUCTION CONTRACTS**

Chapter

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**CHAPTER 70:07:01**

**GENERAL PROVISIONS**

Section

70:07:01:01 Definitions.

 **70:07:01:01.  Definitions.** Terms used in chapters 70:07:01 to 70:07:04 mean:

 (1)  "Awarding authority" a public or private authority that awards construction contracts;

 (2)  "Business" a natural person or sole proprietorship that performs work as a contractor or subcontractor or a partnership, association, corporation, or other entity formed for the purpose of performing work as a contractor or subcontractor;

 (3)  "Commission" the South Dakota Transportation Commission;

 (4)  "Committee" the classification and rating committee established by § 70:07:02:01;

 (5)  "Construction contract" the written agreement between the department and the contractor setting forth the obligations of the parties for the performance of the prescribed work, including the invitation for bids, proposal, contract form, contract bond, standard specifications, supplemental specifications, special provisions, general and detailed plans, and notice to proceed and any addendum, change order and agreement that is required to complete construction of the work, including any authorized extension of the contract, all of which constitute one instrument, for the improvement of the highway system;

 (6)  "Contract crime" a violation of a state law, a federal law, or a rule, regulation, or order of a federal or state department or agency pertaining to the construction, maintenance, repair, or supervision of highways or to fraud, theft, embezzlement, bribery, forgery, misrepresentation, making false statements, falsification or destruction of records, or any other criminal offense in connection with obtaining, attempting to obtain, or performing a public or private contract or subcontract;

 (7)  "Contractor" a business to whom the commission has awarded a department construction contract;

 (8)  "Conviction" any of the following accepted and recorded by a court:

 (a)  A plea of guilty;

 (b)  A verdict of guilty by a jury or a finding of guilt by a court; or

 (c)  A civil verdict or civil judgment against a person in which a civil penalty is imposed on the person as a result of a contract crime;

 (9)  "Current bidding capacity" the maximum dollar amount of work for which a prospective bidder may receive contract awards at any given bid letting;

 (10)  "Debar" to disqualify from entering into or being awarded a department construction contract or from serving as a contractor or subcontractor under a department construction contract;

 (11)  "Department" the South Dakota Department of Transportation;

 (12)  "Maximum bidding capacity rating" the maximum dollar amount of work a contractor may have under contract at any one time, either as principal or subcontractor, regardless of whom the work is for or where it is located, as authorized by the committee;

 (13)  "Person" a natural person;

 (14)  "Prequalified" possessing the requisite classification and bidding capacity rating to bid on a department construction contract;

 (15)  "Principal" an officer, director, or partner of a business or an employee or shareholder engaged in management of the business;

 (16)  "Prospective bidder" a person proposing to bid or bidding on a department construction contract;

 (17)  "Secretary" the secretary of the South Dakota Department of Transportation;

 (18)  "Suspend" to temporarily disqualify from entering into or being awarded a department construction contract or from serving as a contractor or subcontractor under a department construction contract;

 (19)  "Working capital" the difference between a contractor's current assets and current liabilities as classified on the contractor's audited financial statement plus 80 percent of the book value of the construction equipment listed in the contractor's prequalification statement and financial statement, plus committee-approved lines of credit.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:01, 19 SDR 154, effective April 11,1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020; 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

**CHAPTER 70:07:02**

**CLASSIFICATION AND BIDDING CAPACITY RATING**

Section

70:07:02:01 Classification and rating committee -- Membership -- Powers and duties.

70:07:02:02 Committee to keep record of proceedings.

70:07:02:03 Classification and maximum bidding capacity rating.

70:07:02:04 Procedure for obtaining or renewing classification and capacity rating.

70:07:02:05 Financial records confidential.

70:07:02:06 Time limit for statements.

70:07:02:07 Preference for work classification.

70:07:02:08 Work classification.

70:07:02:09 Assignment of work classification and maximum bidding capacity rating.

70:07:02:10 Effective period of work classification and rating.

70:07:02:11 Determination of current bidding capacity of prospective bidders.

70:07:02:11.1 Obligation to inform department of changes to certification of surety.

70:07:02:12 Repealed.

70:07:02:13 Ineligibility for assignment and classification rating.

70:07:02:14 Repealed.

70:07:02:15 Repealed.

70:07:02:16 Procedure for review of decision of committee.

70:07:02:17 Reclassification procedure.

70:07:02:18 Submission of supplemental information.

70:07:02:19 Repealed.

70:07:02:20 Prior experience requirements.

 **70:07:02:01.  Classification and rating committee -- Membership -- Powers and duties.** The classification and rating committee shall consist of four members from the department selected by the commission. The committee may act for the department on all matters specified in this chapter. The secretary may appoint alternates to serve if committee members are unavailable.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 10 SDR 30, effective October 4, 1983; 13 SDR 129, 13 SDR 134, effective July 1, 1987; 15 SDR 142, effective March 26, 1989; transferred from § 70:01:05:22, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:02:02.  Committee to keep record of proceedings.** The committee shall keep a record of its proceedings relating to all prospective bidders.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:24, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:02:03.  Classification and maximum bidding capacity rating.** Unless the amount being bid is less than $250,000, a prospective bidder shall obtain a work classification and maximum bidding capacity rating before the bid opening on a construction contract.

 **Source:** SL 1975, ch 16, § 1; 6 SDR 109, effective May 29, 1980; 8 SDR 45, effective October 28, 1981; 8 SDR 170, effective June 21, 1982; 13 SDR 159, effective May 3, 1987; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:02, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:02:04.  Procedure for obtaining or renewing classification and capacity rating.** To obtain or renew a work classification and maximum bidding capacity rating a prospective bidder shall submit a prequalification statement to the committee, on a form approved by the department. In the prequalification statement, the prospective bidder shall include a description of the prospective bidder's equipment, organization, prior experience, and any suspension or debarment or proposed suspension or debarment by any governmental agency. At its discretion, the committee may request additional information.

 In addition to the prospective bidder's prequalification statement, the prospective bidder shall furnish financial documentation in accordance with either of the following:

 (1)  The prospective bidder may furnish a certification of surety from a bonding firm authorized to do business in this state stating the maximum bonding coverage the surety will issue on the prospective bidder's behalf for both a single contract and for all of the prospective bidder's work including uncompleted contracts; or

 (2)  The prospective bidder may submit a separate statement of financial position audited by an independent certified public accountant. The opinion page of the audit statement shall include the audit firm's name, address, telephone number, and signature of a member of the firm.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 8 SDR 98, effective February 24, 1982; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:03, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020; 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:02:05.  Financial records confidential.** A financial statement submitted under this chapter is a confidential record exempt from disclosure pursuant to SDCL subdivision 1-27-1.6(2).

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:21, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:02:06.  Time limit for statements.** A prospective bidder who wishes to receive or renew a work classification and maximum bidding capacity rating shall submit the prequalification statement and financial documentation to the committee at least 14 days before the opening of the prospective bidder's bid, unless a shorter time frame is approved by the committee.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 8 SDR 170, effective June 21, 1982; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 0:01:05:04, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **Cross-References:** Reclassification procedure, § 70:07:02:17.

 **70:07:02:07.  Preference for work classification.** Each completed prospective bidder prequalification statement must indicate the types of work for which classification is requested, but the indication is not binding upon the committee.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:05, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:02:08.  Work classification.** Types of work are classified as follows:

 (1)  Major grading;

 (2)  Minor grading;

 (3)  Portland cement concrete paving;

 (4)  Portland cement concrete repair, including spall repair, joint repair, and pavement grinding;

 (5)  Asphalt concrete paving and microsurfacing;

 (6)  Asphalt surface treatment and asphalt crack sealing;

 (7)  New bridge construction;

 (8)  Bridge rehabilitation, including deck overlays, fatigue retrofit, steel and concrete repair, and rail retrofit;

 (9)  Minor structure construction, including cast in place box culverts, pre-cast multi-beam deck bridges, and mechanically stabilized earth large panel retaining walls;

 (10)  Lighting and signals;

 (11)  Signing, delineation, and pavement marking;

 (12)  Underground work and utilities, including storm sewer, sanitary sewer, waterline, drainage pipe, and precast box culvert;

 (13)  Incidental construction, including fencing, guardrail, railroad crossings, mechanically stabilized earth modular block retaining walls, gravel surfacing, base course, landscaping, and erosion control;

 (14)  Miscellaneous concrete construction, including sidewalk, bike path, multi-use path, and curb and gutter;

 (15)  Bridge painting; and

 (16)  High friction surface treatment and bridge deck polymer chip seal.

 The committee may approve a prospective bidder in one or more types of work.

 The committee may prequalify a prospective bidder on a project by project basis for one or more types of work or specialty work not specifically covered by the foregoing classifications.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:06, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:02:09.  Assignment of work classification and maximum bidding capacity rating.** The committee may assign a work classification and maximum bidding capacity rating based on the following factors:

 (1)  The prospective bidder's ability to finance the work as shown by the prospective bidder's audited financial statement, surety statement, surety bond, independent audit, or debt records and other financial documents;

 (2)  The ownership, sufficiency, condition, and availability of the prospective bidder's equipment;

 (3)  The work abilities and experience of the prospective bidder and its personnel; and

 (4)  The quality and timeliness of the prospective bidder's work on contracts with the department and other awarding authorities.

 A maximum bidding capacity rating may not exceed ten times the amount of a prospective bidder's working capital. The committee may consider a bank line of credit to increase the prospective bidder's working capital. The prospective bidder shall describe the line of credit on a form furnished by the committee.

 If a certification of surety is furnished in accordance with subdivision 70:07:02:04(1), then the maximum bidding capacity rating may not exceed the maximum bonding coverage for all the prospective bidder's work; and the prospective bidder may not submit a bid for more than the maximum bonding coverage for a single contract.

 If an audited financial statement is furnished, the prospective bidder may not bid more than 50 percent of the maximum bidding capacity on any single construction contract.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:07, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020; 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:02:10.  Effective period of work classification and rating.** If the prospective bidder submits an audited statement of financial position in accordance with subdivision 70:07:02:04(2), any work classification and maximum bidding capacity rating granted by the committee is effective for the period specified by the committee, but not more than 18 months from the date of the balance sheet. If a certification of surety is submitted in accordance with subdivision 70:07:02:04(1), any work classification and maximum bidding capacity rating granted by the committee must expire upon the expiration or rescission of the certification of surety. If requested in writing by the prospective bidder, the committee may extend the effective date of the work classification and maximum bidding capacity rating one time for not more than 60 days. The prospective bidder must make the request and receive the extension before the opening of any bid affected by the extension.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 8 SDR 98, effective February 24, 1982; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:08, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020; 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:02:11.  Determination of current bidding capacity of prospective bidders.** For any given department bid letting, the contracts awarded to a bidder may not total more than the bidder's current bidding capacity. The current bidding capacity is arrived at by subtracting from the maximum bidding capacity rating the dollar amount of all uncompleted bonded work wherever located.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:10, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020; 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:02:11.01.  Obligation to inform department of changes to certification of surety.** If a prospective bidder's certification of surety is rescinded or if the bonding amount stated in the certification is reduced, the prospective bidder shall notify the department of the recission or the reduction. The prospective bidder shall provide the department with written notice within five days after the prospective bidder receives notice of the recission or reduction in coverage.

 **Source:** 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:02:12.  Allowable deductions for determining maximum bidding capacity rating.** Repealed.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:11, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **70:07:02:13.  Ineligibility for assignment of classification and rating.** The committee shall declare a prospective bidder ineligible to be prequalified if the prospective bidder:

 (1)  Violated a state law, a federal law, or a rule, regulation or order of a federal or state department or agency pertaining to the construction, maintenance, repair, or supervision of highways;

 (2)  Submitted a falsified prequalification statement, audited financial statement, or certification of surety; or

 (3)  Is deficient in any of the factors listed in § 70:07:02:09.

 The period of ineligibility may be up to 36 months.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:18, 19 SDR 154, effective April 11, 1993; 40 SDR 197, effective May 27, 2014; 47 SDR 38, effective October 6, 2020; 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:02:14.  Ineligibility for false statements.** Repealed.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:19, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; repealed, 40 SDR 197, effective May 27, 2014.

 **70:07:02:15.  Ineligibility following grant of rating.** Repealed.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:17, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **70:07:02:16.  Procedure for review of decision of committee.** A prospective bidder may, within 14 days after receipt of notice of a decision of the committee, ask the secretary to review that decision by submitting a request in writing setting forth the decision to be reviewed and the change in the decision being requested, along with any supporting information or documentation. The secretary shall issue a written decision within five business days following receipt of the request for review and any supporting information or documentation. The decision of the secretary constitutes final agency action.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:23, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **Cross-Reference:** Classification and rating committee -- Membership -- Powers and duties, § 70:07:02:01.

 **70:07:02:17.  Reclassification procedure.** A holder of a work classification and maximum bidding capacity rating may request a different or additional work classification or a higher maximum bidding capacity rating, or both, by submitting a new prequalification statement and any revised financial documentation to the committee at least 14 days before the opening of any affected bids, unless a shorter time frame is approved by the committee. Any changes to a work classification or maximum bidding capacity rating take effect on the day granted by the committee.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:15, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **Cross-Reference:** Time limit for statements, § 70:07:02:06.

 **70:07:02:18.  Submission of supplemental information.** The committee may require a prospective bidder who holds a work classification and maximum bidding capacity rating to submit supplemental documentation or other information relating to any of the factors set out in § 70:07:02:09. The prospective bidder shall submit the supplemental documentation or information within 14 days of the request, unless a longer time period is specified in writing by the committee.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:16, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:02:19.  Renewal of prospective bidder's prequalification.** Repealed.

 **Source:** 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **70:07:02:20.  Prior experience requirements.** Only work performed by the prospective bidder in the previous five years shall be considered by the committee, unless the bidder demonstrates, to the satisfaction of the committee, that earlier experience is relevant to the bidder's work classification and maximum bidding capacity rating.

 **Source:** 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

**CHAPTER 70:07:03**

**BID PROPOSALS**

Section

70:07:03:01 Procedure for accessing bid proposals.

70:07:03:01.01 Optional combination bidding.

70:07:03:02 Repealed.

70:07:03:03 Repealed.

70:03:03:04 Repealed.

70:07:03:05 Award of multiple contracts.

70:07:03:06 Repealed.

 **70:07:03:01.  Procedure for accessing bid proposals.** A prospective bidder may access bid proposals from the department's website for each letting. If the bid letting is held at a department region office, the department shall publish the instructions for obtaining the bid proposals on the department's website.

 **Source:** SL 1975, ch 16, § 1; 6 SDR 109, effective May 29, 1980; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:09, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; 32 SDR 109, effective December 26, 2005; 40 SDR 121, effective January 6, 2014; 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:03:01.01.  Optional combination bidding.** The department may issue bid proposal forms for multiple projects to be bid in combination or separately, so that prospective bidders may elect to submit bids on the combination of projects, one or more separate projects, or both the combination of projects and one or more separate projects.  If one or more responsive bids are submitted for the combination of projects and all the separate projects, the department may award contracts for the combination bid or for separate project bids that result in the lowest total cost for all projects.  If no responsive bids are received on the combination of projects, the department may award contracts for any of the separate projects. If responsive bids are received only on the combination of projects, the department may award a contract for the combination bid. If one or more responsive bids are submitted for the combination of projects but no responsive bids are received on at least one of the separate projects, the department may award a contract for the combination bid but all separate project bids will be rejected.

 **Source:** 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:03:02.  Time for submitting requests for bid proposals.** Repealed.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:12, 19 SDR 154, effective April 11, 1993; 25 SDR 145, effective May 30, 1999; repealed, 32 SDR 109, effective December 26, 2005.

 **70:07:03:03.  Denial of proposal for substandard work.** Repealed.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 11 SDR 22, effective August 12, 1984; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:25, 19 SDR 154, effective April 11, 1993; 32 SDR 109, effective December 26, 2005; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020; 49 SDR 47, effective November 21, 2022.

 **70:07:03:04.  Preference in selection of bid proposals.** Repealed.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:13, 19 SDR 154, effective April 11, 1993; repealed, 40 SDR 121, effective January 6, 2014.

 **70:07:03:05.  Award of multiple contracts.** If a prospective bidder is the lowest competent and responsible bidder on more than one project and the total amount of these bids exceeds the current bidding capacity, the department may only award contracts in an amount up to the current bidding capacity. The department shall select contracts for award based on the best interests of the department.

 **Source:** 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:03:06.  Substitution of bidders prohibited.** Repealed.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:14, 19 SDR 154, effective April 11, 1993; repealed, 40 SDR 121, effective January 6, 2014.

**CHAPTER 70:07:04**

**SUSPENSION AND DEBARMENT**

Section

70:07:04:01 Suspension for subcontracting violation.

70:07:04:02 Suspension of bidder.

70:07:04:03 Suspension -- Notice and content -- Effective date.

70:07:04:04 Repealed.

70:07:04:05 Grounds for debarment -- Contract crime.

70:07:04:06 Grounds for debarment -- Violation of antitrust laws.

70:07:04:07 Conviction of person imputed to business.

70:07:04:08 Debarment based on affiliation.

70:07:04:09 Reasons for debarment.

70:07:04:10 Right to hearing on suspension and debarment.

70:07:04:10.01 Notice of suspension or debarment.

70:07:04:10.02 Hearing request.

70:07:04:10.03 Failure to respond.

70:07:04:11 Debarment period when conviction imputed or based on affiliation.

70:07:04:12 Duration of debarment.

70:07:04:13 Effective date of debarment.

70:07:04:14 Time limit for initiating debarment or suspension.

70:07:04:15 Term of debarment

70:07:04:16 Termination of debarment or award during debarment.

70:07:04:17 Continuation of contracts.

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 **70:07:04:01.  Suspension for subcontracting violation.** The standard specifications for road and bridge construction included in the construction contract shall contain provisions for subcontracting.

 If the secretary determines a contractor has violated subcontracting provisions, the secretary may suspend the bidding qualifications of the contractor for up to 180 days.

 **Source:** SL 1975, ch 16, § 1; 8 SDR 45, effective October 28, 1981; 11 SDR 22, effective August 12, 1984; 13 SDR 129, 13 SDR 134, effective July 1, 1987; transferred from § 70:01:05:20, 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:02.  Suspension of bidder.** The secretary may suspend a business from bidding upon receiving notice or learning of a conviction for a contract crime or violation of antitrust law or upon receiving evidence of an affiliation described in § 70:07:04:07, 70:07:04:08, or 70:07:04:09.

 **Source:** 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:03.  Suspension -- Notice and content -- Effective date.** The order of suspension must describe the reason for suspension and the period of suspension. The order must be sent by certified mail to the business suspended.

 The order of suspension must take effect on the date the order is mailed. A suspension may not exceed 180 days.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:04.  Commencement of debarment proceedings after suspension.** Repealed.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **70:07:04:05.  Grounds for debarment -- Contract crime.** The commission may debar a business if the business or a principal or former principal of the business is convicted in any jurisdiction of a contract crime or if a conviction is imputed to the business as set forth in §§ 70:07:04:07 and 70:07:04:08.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:06.  Grounds for debarment -- Violation of antitrust laws.** The commission may debar a business if the business or a principal or former principal of the business is convicted in any jurisdiction of violating SDCL chapter 37-1, federal antitrust laws, or another state's antitrust laws or if a conviction is imputed to the business as set forth in §§ 70:07:04:07 and 70:07:04:08.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:07.  Conviction of person imputed to business.** The conviction of a person for a contract crime is imputed to a business when the conduct which gave rise to the conviction occurred in connection with the person's performance of duties for or on behalf of that business in the course of employment or with the knowledge, approval, acquiescence, or subsequent ratification of the person's conduct by the business.

 **Source:** 19 SDR 154, effective April 11, 1993.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:08.  Debarment based on affiliation.** The conviction of a person or business for a contract crime in any jurisdiction is imputed to any principal, former principal, successor business or corporation, or any other person who is associated with or formerly associated with the convicted person or business and who participated in, knew of, or had reason to know of the contract crime.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:09.  Reasons for debarment.** The commission may debar a business for the following reasons:

 (1)  The business employs a former principal of a debarred or suspended business or person as an officer, director, or manager or in another significant decision-making capacity while the former principal or business is debarred or suspended;

 (2)  The business is owned by or associated in a joint venture with a debarred or suspended business or is controlled by a principal or former principal of a debarred or suspended business; or

 (3)  A former principal of a debarred or suspended business has a significant financial interest in the business and the principal has the authority to or will control, direct, manage, or influence activities of the business concerned with the department contract in question.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:10.  Right to hearing on suspension and debarment.** The secretary may suspend a business and the commission may debar a business only after a hearing or opportunity for hearing pursuant to contested case procedure in SDCL chapter 1-26 has been provided for the business.

 **Source:** 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:10.01.  Notice of suspension or debarment.** The secretary shall notify the business of the intent to suspend or debar. The notice must inform the business of the right to request a hearing prior to imposition of suspension or debarment and must include an explanation of the procedure for requesting a hearing. The notice must be sent by certified mail to the address on record with the department. The secretary shall send notice of intent to disbar within 60 days after a suspension order.

 **Source:** 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:10.02.  Hearing request.** To request a hearing, the person shall submit a written request to the secretary. A mailed hearing request must be postmarked or an electronic hearing request must be received within twenty days following the date of the notice to suspend or debar. Upon receipt of a request for hearing, the secretary shall issue a notice of hearing pursuant to SDCL chapter 1-26.

 **Source:** 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:10.03.  Failure to respond.** Failure to request a hearing within the time specified in § 70:07:04:10.02 constitutes a waiver of the right to a hearing. If the right to a hearing on suspension is waived, the secretary may issue an order of suspension. If the right to a hearing on debarment is waived, the commission may issue an order of debarment.

 **Source:** 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:11.  Debarment period when conviction imputed or based on affiliation.** The period of debarment if a conviction for a contract crime is imputed under § 70:07:04:07 or based on affiliation under § 70:07:04:08 may not be less than any period of debarment imposed on the convicted person or business.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:12.  Duration of debarment.** A business may not be debarred for more than three years for conduct which gave rise to the debarment.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:13.  Effective date of debarment.** A debarment takes effect on the date of the final decision by the commission. The order for debarment shall be sent by certified mail.

 **Source:** 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:14.  Time limit for initiating debarment or suspension.** A debarment or a suspension must be initiated within three years from the date of the conviction of a person or business for a contract crime.

 **Source:** 19 SDR 154, effective April 11, 1993; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:15.  Term of debarment.** The commission shall establish the term of debarment, based on the following:

 (1)  The seriousness of the offense;

 (2)  Whether restitution has been made;

 (3)  Whether the debarred person cooperated in civil or criminal lawsuits;

 (4)  The state's need to preserve the competitive bidding process; and

 (5)  Whether the business is debarred or has been debarred in another jurisdiction or in this state.

 **Source:** 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:16.  Termination of debarment or award during debarment.** The commission may terminate a debarment by order or may award a department contract to a debarred or suspended business under any of the following circumstances:

 (1)  The business is the sole supplier of a material or service required by the department;

 (2)  The commission determines that an emergency exists; or

 (3)  The contract is for purchasing materials or renting equipment for routine road maintenance.

 **Source:** 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:17.  Continuation of contracts.** Department contracts in existence at the time of debarment or suspension are not terminated by the debarment or suspension.

 **Source:** 19 SDR 154, effective April 11, 1993.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:18.  Award of department contracts to debarred or suspended business prohibited -- Exception.** Except as provided in § 70:07:04:16, the department may not award a department contract to a debarred or suspended business.

 **Source:** 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:19.  Subcontracts with debarred or suspended business prohibited -- Exception.** Except as provided in § 70:07:04:16, a contractor to whom a department contract has been awarded by the commission may not subcontract with a debarred or suspended business for performance of the department contract. The department may not approve a debarred or suspended subcontractor, except as provided in § 74:07:04:16.

 **Source:** 19 SDR 154, effective April 11, 1993; 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:20.  Suspension of prequalification.** The secretary shall suspend the prequalification status of any business based on a violation of a state or federal law, rule, or regulation; an order of a federal or state department or agency pertaining to the construction, maintenance, repair, or supervision of highways; suspension or debarment by a state or federal agency; poor or unsatisfactory management, quality, and timeliness of work performed on existing or previous contracts; inability to finance the work; lack of equipment or capable and experienced personnel; or failure to submit supplemental information as requested by the committee under § 70:07:02:18. A suspension pursuant to this section prohibits the business from bidding on any department contract for which prequalification is required.

 **Source:** 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020; 49 SDR 47, effective November 21, 2022.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10, 31-5-10.1, 31-5-10.2, 31-5-10.3.

 **70:07:04:21.  Period of suspension.** The suspension of prequalification status must be for a specific period of time, based on the seriousness of the deficiency, but not to exceed 180 days.

 **Source:** 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

 **70:07:04:22.  Prequalification requirements following completion of suspension or debarment.** A business that was suspended or debarred and has completed the suspension or debarment period, shall reapply for prequalification status before bidding on a construction contract for which prequalification is required. The business may submit prequalification application information before the end of the suspension or debarment period, but no prequalification approval is effective until completion of the suspension or debarment period.

 **Source:** 40 SDR 121, effective January 6, 2014; 47 SDR 38, effective October 6, 2020.

 **General Authority:** SDCL 31-5-10.

 **Law Implemented:** SDCL 31-5-10.

**CHAPTER 70:07:05**

**HIGHWAY CONSTRUCTION CONTRACT REQUIREMENTS**

(Repealed. 40 SDR 121, effective January 6, 2014)