

ILLINOIS POWER AGENCY

NOTICE OF PROPOSED RULES

- 1) Heading of the Part: Prequalified Supplier Lists for Construction and Construction-Related Professional Services
- 2) Code Citation: 83 Ill. Adm. Code 1230
- 3)

<u>Section Numbers</u> :	<u>Proposed Actions</u> :
1230.10	New Section
1230.20	New Section
1230.30	New Section
1230.40	New Section
1230.50	New Section
1230.60	New Section
1230.70	New Section
1230.80	New Section
- 4) Statutory Authority: 20 ILCS 3855/1-20(b)(23); 30 ILCS 500/30-20(b)
- 5) A Complete Description of the Subjects and Issues Involved: The IPA's authority for these rules extends from the following provision of the Illinois Procurement Code

Sec. 30-20. Prequalification

(b) The Illinois Power Agency shall promulgate rules for the development of prequalified supplier lists for construction and construction-related professional services and the periodic updating of those lists. Construction and construction related professional services contracts over \$25,000 may be awarded to any qualified suppliers, pursuant to a competitive bidding process. [30 ILCS 500/30-20(b)].

In developing draft rules, the Agency was informed by the following considerations:

First, the Agency is not facing an urgent operational need to develop a list of prequalified construction firms. When the Agency was created in 2007, it was anticipated that there could be a need for new power plant construction to serve municipal utilities and rural electric cooperatives. A role was carved out for the IPA to potentially develop such projects. However, changes in electric prices, the electric power development industry, and the economy have all resulted in that function being unnecessary. As a result, the IPA does not anticipate developing any power plants in the short and medium term, and has no construction projects on the horizon. Indeed, because the development of such projects appears very remote, the Agency has refrained from establishing a Resource

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Development Bureau and is seeking statutory changes to make the establishment of this bureau optional.

Second, the Agency's capacity to review individual construction firm qualifications is very limited. This is because, unlike entities such as the Capitol Development Board or the Department of Transportation, the Agency's statutorily prescribed involvement with construction firms is likewise limited-contained only to the unlikely possibility that a request is made for specific type of project (an "electric generation or co-generation facility"-a power plant) to serve a narrow segment of the market (Illinois municipal utilities, government aggregators, and rural electric cooperatives) upon those entities' request. The vast majority of the Agency's work involves the procurement of contracts for the delivery of energy, renewable resources, or similar products; these are fundamentally financial transactions. The Agency thus maintains no engineers on Staff and has limited technical expertise in other key areas. As a result, leveraging the work of entities that do have this expertise offers more efficient and reliable work than independent efforts.

Third, even if the Agency should rely on more qualified entities' work in actually vetting construction firms, it still must have safeguards built into its rules to protect its interest and the State's interest. Specifically, the Agency should still be able to exercise discretion over any list it develops and maintains, including the disqualification of firms should the Agency come across information demonstrating that a construction firm is ill-suited for prequalification.

With these considerations in mind, the IPA has drafted the following rules for the development of prequalified supplier lists for construction and construction-related professional services and the periodic updating of those lists. The Agency believes that these draft rules allow it to meet statutory requirements while minimizing administrative burdens given the remote likelihood that it may need to call upon such a list.

- 6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None
- 7) Will this rulemaking replace any emergency rule currently in effect? No
- 8) Does this rulemaking contain an automatic repeal date? No

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- 9) Does this rulemaking contain incorporations by reference? This rulemaking does not contain incorporations by reference, but allows for prequalification using processes established under 44 Ill. Adm. Code 950 or 44 Ill. Adm. Code 650.
- 10) Are there any other rulemakings pending on this Part? No
- 11) Statement of Statewide Policy Objective: This rulemaking does not create or expand a State mandate.
- 12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Comments should be filed, within 45 days after the date of this issue of the *Illinois Register* with:
- Brian P. Granahan
Chief Legal Counsel
Illinois Power Agency
160 N. LaSalle St., Suite C-504
Chicago IL 60601
- 312/814-4635
Brian.Granahan@Illinois.gov
- 13) Initial Regulatory Flexibility Analysis:
- A) Types of small businesses, small municipalities and not-for-profit corporations affected: Small businesses offering construction or construction-related professional services would be able to, in part, utilize the existing prequalification processes offered by the Capitol Development Board and the Department of Transportation for prequalification with the Illinois Power Agency. The Agency believes that this represents a minimized burden on any such entities.
- B) Reporting, bookkeeping or other procedures required for compliance: Under this rule, the Agency would be required to maintain a prequalified supplier list and to periodically update that list. Entities seeking to provide construction or construction-related professional services would be required to demonstrate that they are responsible prior to being prequalified.

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- C) Types of professional skills necessary for compliance: The rule applies only to entities offering construction or construction-related professional services that could potentially contract with the Agency.
- 14) Regulatory Agenda on which this rulemaking was summarized: This rulemaking was not summarized in a prior Agency regulatory agenda, but will be summarized in the Agency's July 2015 regulatory agenda.

The full text of the Proposed Rules begins on the next page:

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TITLE 83: PUBLIC UTILITIES
CHAPTER III: ILLINOIS POWER AGENCY
SUBCHAPTER a: CONTRACTS AND FEESPART 1230
PREQUALIFIED SUPPLIER LISTS FOR CONSTRUCTION AND
CONSTRUCTION-RELATED PROFESSIONAL SERVICES

Section

1230.10	Purpose and Scope
1230.20	Definitions
1230.30	Special Projects
1230.40	Confidentiality
1230.50	Development of Contractor Prequalification Lists
1230.60	Prequalification Criteria and Responsibility Determinations
1230.70	Maintenance of Contractor Prequalification Lists
1230.80	Effect of Nonresponsibility Determination on Current Contracts

AUTHORITY: The Illinois Power Agency Act [20 ILCS 3855] and Section 30-20(b) of the Illinois Procurement Code [30 ILCS 500/3-20(b)].

SOURCE: Adopted at 39 Ill. Reg. _____, effective _____.

Section 1230.10 Purpose and Scope

- a) Any Illinois Power Agency construction or construction-related services contracts awarded in connection with IPA's development of electric generation or co-generation facilities shall be awarded only to responsible contractors. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors and suppliers. In the absence of information clearly indicating that the prospective contractor is responsible, IPA shall make a determination of nonresponsibility. Only responsible contractors shall be prequalified, and only prequalified contractors shall be permitted to bid on IPA electric generation or co-generation facility development projects. A determination of nonresponsibility may be made at any time prior to or after award of a contract.
- b) This Part governs IPA's process for *the development of prequalified supplier lists for construction and construction-related professional services and the periodic*

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updating of those lists to comply with the requirements of the Illinois Procurement Code, the Illinois Power Agency Act, and any applicable requirements of other statutes or rules triggered by IPA's actions (Section 30-20(b) of the Code).

Section 1230.20 Definitions

The following terms are defined for this Part:

"Act" means the Illinois Power Agency Act [20 ILCS 3855].

"Agency" or "IPA" means the Illinois Power Agency.

"Bidder" means one who submits a response in a competitive sealed bidding process, to an invitation for bid, or to a multi-step sealed bidding process, for a contract to construct some or all aspects of an electric generation or co-generation facility (Sec. 1-15.02 of the Code).

"Code" means the Illinois Procurement Code [30 ILCS 500].

"Contractor" means a firm that has a contract with IPA's to construct some or all aspects of an electric generation or co-generation facility.

"Director" means the Director, or the Director's designee, of the Illinois Power Agency (Section 1-10 of the Act).

"Facility" means an electric generating unit or a co-generating unit that produces electricity, including related equipment necessary to connect the facility to an electric transmission or distribution system (Section 1-10 of the Act).

"Feasibility Study" means an analysis of IPA's ability to develop an electric generation or co-generation facility consistent with the requirements of the Act and IPA's responsibilities under the Act, and otherwise in compliance with applicable State and federal laws.

"Responsibility" is a determination made by the IPA that a bidder or contractor *has the capability in all respects to perform fully the contract requirements and the integrity and reliability that will assure good faith performance (Section*

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1-15.80 of the Code). A determination of nonresponsibility may be made at any time prior to or following award of a contract.

Section 1230.30 Special Projects

When IPA determines a construction project is so large or specialized that a special bidder prequalification and responsibility determination is appropriate, IPA may set appropriate standards of acceptability different from those set out in this Part.

Section 1230.40 Confidentiality

IPA shall maintain documents relating to responsibility determinations of a contractor in an independent file separate from other documents and analyses. These documents are confidential and shall be disclosed only to the contractor (who shall be entitled to disclosure of the complete file except for the name of any person filing a complaint with or providing information to IPA regarding that contractor) or to units of federal, State or local government, including but not limited to law enforcement agencies. IPA shall, upon request, release to anyone the contractor's prequalification status with IPA. In all other respects, IPA shall comply with its statutory responsibility *to provide adequate protection for confidential and proprietary information furnished, delivered, or filed by any person, corporation, or other entity* (Section 1-120 of the Act).

Section 1230.50 Development of Contractor Prequalification Lists

- a) IPA shall develop a prequalified supplier list for construction and construction-related professional services firms upon the completion of a feasibility study concluding that IPA's development of a facility is feasible.
- b) Within 90 days after completion of a feasibility study concluding that IPA's development of a facility is feasible, IPA will develop and provide an online portal allowing for application for prequalification status for construction and construction-related professional services firms.
- c) The Director shall make reasonable efforts to communicate the development of IPA's prequalification application portal and the opening of its prequalification window to potentially interested contactors.
- d) New bidders and bidders nearing the prequalification expiration date must complete a contractor prequalification and bidder responsibility application,

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including the Financial Interests and Potential Conflicts of Interest forms required under Section 50-35 of the Code.

- e) Upon the receipt of a full and complete application, determinations on prequalification shall be made by IPA within a reasonable timeframe established by IPA not to exceed 90 days.
- f) Prequalification shall be valid for a period of one year, with the opportunity for renewal.
- g) Nothing shall prohibit IPA from developing, nor require IPA to develop, a prequalified supplier list for construction and construction-related professional services firms prior to the completion of a feasibility study concluding that the development of a facility is feasible.

Section 1230.60 Prequalification Criteria and Responsibility Determinations

- a) To maximize efficiency and leverage the expertise of other State entities, IPA contractor prequalification shall be granted to firms having met the following criteria:
 - 1) Valid (i.e., not suspended, debarred, expired or nullified) prequalification with the Capitol Development Board pursuant to 44 Ill. Adm. Code 950; or
 - 2) A valid (i.e., not suspended, debarred, expired or nullified) Certificate of Eligibility issued by the Illinois Department of Transportation pursuant to 44 Ill. Adm. Code 650.
- b) Firms meeting the criteria in subsection (a) and having completed any additional forms required by IPA or by State law, including the Financial Interests and Potential Conflicts of Interest forms required under Section 50-35 of the Code, shall be deemed to have met IPA's responsibility requirements and shall be considered prequalified to bid on IPA's construction or construction-related professional services contracts.
- c) Responsibility Determination

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- 1) Firms that meet the criteria in subsection (a) and that have completed any forms required by IPA or by State law, including the Financial Interests and Potential Conflicts of Interest forms, shall be deemed to have met IPA's responsibility requirements and shall be considered prequalified to bid on IPA construction or construction-related professional services contracts.
- 2) Each prospective bidder must provide IPA with adequate documentation of responsibility, demonstrating that the bidder meets the criteria enumerated in subsection (c)(1) and any other requirements developed by IPA, through an application process developed by IPA.
- 3) The initial determination of responsibility, made through evaluation of a new or renewal application to IPA, may be changed upon receipt of additional or different information. The contractor is required to inform IPA of any significant change to the information submitted in its application, and IPA reserves the right to demand completion of a contractor/bidder responsibility application and supporting documents at any time.
- 4) IPA's responsibility determination will be reviewed periodically through a renewal application. IPA's responsibility determination may also be reviewed on an ongoing basis through other information.
- d) Notwithstanding the responsibility requirements in subsections (a) through (c), in no circumstances shall prequalification be granted to firms that would be prohibited by State law or rules from bidding on a State contract or otherwise contracting with the State of Illinois.
- e) Notwithstanding the responsibility requirements in subsections (a) through (c), nothing shall prohibit IPA from establishing heightened standards for prequalification for projects determined by IPA to be special projects.
- f) Notwithstanding the responsibility requirements in subsections (a) through (c), nothing shall prohibit IPA from suspending, nullifying or modifying prequalification status should IPA determine any of the following:

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- 1) That material inaccuracies are present in the firm's application (or renewal application) for prequalification with the Capitol Development Board or Department of Transportation;
 - 2) That prequalification would be inconsistent with Illinois State law or other State requirements; or
 - 3) That prequalification would otherwise be contrary to the interests of IPA, contrary to the interests of the State of Illinois, or against the public interest, safety or welfare.
- g) IPA will deny prequalification to any firm that has not affirmatively demonstrated its responsibility. IPA's determination of responsibility shall be final.

Section 1230.70 Maintenance of Contractor Prequalification Lists

- a) The Director is responsible for the maintenance of IPA's Prequalified Supplier List, including maintaining the confidentiality of any confidential or proprietary information offered through the prequalification application process.
- b) IPA's Prequalified Supplier List will contain at least the following:
 - 1) The name and business address of any prequalified contractor;
 - 2) The nature of each prequalified contractor's work;
 - 3) The current prequalification status of all listed contractors;
 - 4) The basis for granting prequalification status for each prequalified contractor;
 - 5) A log of all responsibility determinations made by IPA with respect to any prequalified contractor;
 - 6) The primary contact for any contractor granted prequalification status;
 - 7) The expiration date associated with any contractor's current prequalification status.

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- c) The Director will update the Prequalified Supplier List within a reasonable time after a change in the status of, or a change in material information associated with, a prequalified contractor.
- d) The Director is responsible for communicating with prequalified firms about a pending expiration in prequalification status and for the development of a renewal process for successfully prequalified contractors.

Section 1230.80 Effect of Nonresponsibility Determination on Current Contracts

Existing IPA contracts may be terminated when a contractor is determined to be nonresponsible and it is in the public interest to do so, whether or not the nonresponsibility has a direct connection with the current contract.