



## Common Sense Initiative

**Mike DeWine**, Governor  
**Jon Husted**, Lt. Governor

**Carrie Kuruc**, Director

### Business Impact Analysis

Agency, Board, or Commission Name: ODOT

Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

Construction Bidding and Contracting

Rule Number(s): 5501:2-3-03, 5501:2-3-05, 5501:2-3-08 and 5501:2-3-10

Date of Submission for CSI Review: October 14, 2020

Public Comment Period End Date: November 10, 2020

Rule Type/Number of Rules:

- |  |  |
|--|--|
| <input type="checkbox"/> New/___ rules                               | <input type="checkbox"/> No Change/___ rules (FYR? __) |
| <input checked="" type="checkbox"/> X Amended/___ 4 rules (FYR? yes) | <input type="checkbox"/> Rescinded/___ rules (FYR? __) |

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing

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regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

### **Reason for Submission**

1. R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rules for CSI review.

Which adverse impact(s) to businesses has the agency determined the rule(s) create?

The rule:

- \_\_\_\_\_ a. Requires a license, permit, or any other prior authorization to engage in or operate a line of business.
- \_\_\_\_\_ b. Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.
- x**\_\_\_\_\_ c. Requires specific expenditures or the report of information as a condition of compliance.
- d. Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

### **Regulatory Intent**

- e. Please briefly describe the draft regulation in plain language.

*Please include the key provisions of the regulation as well as any proposed amendments.*

The regulations govern the application of contractors requesting to become qualified with the department to perform contract work, both prime and subcontract. They describe the determination of an applicant's responsibility and competency, the certification of qualification given to an applicant, exceptions to that certification of qualification for subcontractors, and finally the revocation of a certification of qualification or debarment of a certificate holder and the process followed.

The amendments proposed in 5501:2-3-03 and 5501:2-3-05 seek to lower the net worth threshold necessary to qualify as a prime contractor applicant. This reduces the risk of a newly formed company overextending itself and reduces the chance of failure on an ODOT project.

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The amendments proposed in 5501:2-3-08 increase the subcontract amount allowed, which is low risk given that subcontractors who perform work on ODOT projects must be qualified to perform complicated work and ODOT is protected by its contract with the prime contractor and its bonding. If these companies perform more work on bigger projects, they will be given more opportunities to grow and potentially become a prime contractor themselves.

The amendments proposed in 5501:2-3-10 give ODOT the ability to revoke an existing certificate of qualification without the full 119 proceeding of a debarment. The certificate is not a license to work but is instead a permission to do certain type(s) of work on large projects. Debarment is taking away the right to work, but revocation of a certificate is a temporary pause on some or part of the work a contractor performs for ODOT. Thus, there needs to be a lesser standard and lesser process for revoking a prequalification versus a debarment proceeding. Debarment requires a full 119 Administrative Process with appeal rights. Revocation of prequalification was never intended to be that onerous for the contractor or ODOT. Finally, revoking prequalification only temporarily suspends future work and does not impact existing work like a debarment would, thus creating further need for a delineation between them.

- f. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.

119.03, 5525.05

5525.01, 5525.02, 5525.03, 5525.04, 5525.05, 5525.06, 5525.07, 5525.08 and 5525.09

- g. Does the regulation implement a federal requirement? **Yes** Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? **No- We already have federal approval for the program; however, we are allowed to set our own thresholds when it comes to monetary prequalifications.**

*If yes, please briefly explain the source and substance of the federal requirement.*

- h. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

**Not Applicable- We are not exceeding the federal requirement with these amendments.**

- i. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

**It is an area of regulation that is federally required of the agency; moreover, the agency needs to have contractors who are qualified to perform the complicated**

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**work of building our highways and bridges. These regulations ensure that only qualified contractors can work on ODOT projects.**

- j. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

**Success will be measured when work done by qualified contractors doesn't fail and the contractors don't overextend themselves by committing to more work than they can handle.**

- k. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931? **No.**

*If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.*

### **Development of the Regulation**

9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

*If applicable, please include the date and medium by which the stakeholders were initially contacted.*

**These regulations were provided via email on October 19<sup>th</sup> to the stakeholder group that they will primarily effect- the Ohio Contractors Association (OCA)- for distribution to its members. ODOT received a response from Chris Runyan, President, Chris Engle, Director of Public Agency Advocacy, and Michelle Holdgreve, Director of Legislative/Environmental Advocacy that upon review by OCA, no objections were noted and no suggested comments or edits were offered by OCA.**

10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency? **None. The stakeholders that were contacted did not have any suggested changes and found the amendments to be satisfactory. Further, the publication of the rules and BIA on our website as well as through the e-notification system, in addition to the public hearing and notification thereof will provide any necessary input from affected stakeholders.**

11. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

**None- the experience of the agency was used to develop the rules originally as well as these proposed amendments.**

12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

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**None- These regulations have been in place for decades and the proposed amendments are only minor enhancements to the regulations.**

13. Did the Agency specifically consider a performance-based regulation? Please explain.  
*Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

**No- For these prequalifications the contractors are rated and scored after every project. These ratings are used to develop the prequalification amounts. ODOT has performance-based measurements in place as a result of the rules that we implement per project but these are not added into the rule for fluidity purposes.**

14. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

**ODOT is the only agency that regulates highway construction contractors so there is no other authority in existence that regulates in this manner.**

15. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

**ODOT regularly communicates through emails, our website and contacts within the contractor community. We would inform them of the proposed changes when they become public, and contractors will give feedback at that time.**

#### **Adverse Impact to Business**

16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community; and
- b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and
- c. Quantify the expected adverse impact from the regulation.

*The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.*

**The impacted business community consists of members of the Ohio Contractors Association and other associated business organizations. The only cost of compliance or consequence to the impacted business community from these amendments will be via employer time for compliance with documentation requirements. It's completely free for a contractor to apply for prequalification to ODOT.**

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**17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

**The impacted business community consists of members of the Ohio Contractors Association and other associated business organizations. The only cost of compliance or consequence to the impacted business community from these amendments will be via employer time for compliance with documentation requirements. It's completely free for a contractor to apply for prequalification to ODOT.**

#### **Regulatory Flexibility**

**18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

**If the business is small enough and they don't bid on our contracts (i.e., they are a subcontractor) they don't have to apply for prequalification. The regulations already have a built-in component for small businesses to perform minor work for the department.**

**19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

**The agency has never fined businesses or contractors for lack of compliance with our regulations.**

**20. What resources are available to assist small businesses with compliance of the regulation?**

**The entire application process is online and staff are always available during regular business hours to walk contractors through our prequalification process.**