

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

Our File No. 1098 Withdrawn 11-2-84

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 10-19-84 ~~11-8-84~~
DATE FOR REVIEW 10-28-84 ~~11-13-84~~
DATE DUE 11-2-84 ~~11-20-84~~

Adopted w/a hearing _____
Adopted w/o hearing ✓
Temporary rule _____

Approved 11/8/84 Disapproved _____ Returned to Agency _____

Resubmitted _____ Due _____
Approved _____ Disapproved _____ Returned to Agency _____

Date filed w/Secretary of State 11/9/84 Revisor approved _____ disapproved _____

✓ Rule as Adopted

✓ Rule as Proposed

? Order Adopting 10.19.84 Date incomplete citation to statutory authority - should include "Art. 2". combined with FF

N/A Notice of Intent to Solicit Outside Opinion

✓ Order for rulemaking
N/A date of Hearing not submitted

N/A Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking
? Sufficiency no small biz statement incomplete citation to statutory authority

✓ Affidavit of Mailing Notice or rulemaking
8.7.84 At least 30 days prior to ~~hearing~~/adoption

✓ Mailing list Certificate

✓ Publication in State Register incomplete citation to statutory authority
8.20.84 At least 30/~~20~~ days prior to ~~hearing~~/adoption

N/A Hearing Examiner's Report

Chief Hearing Examiner's Report(s)
_____ Approving H.E.'s Report
_____ Approving agency action

✓ Agency's Findings of Fact combined with Order Adopting

N/A LCRAR Report or agency Affidavit

Certificate of Board's Resolution Adopting Rules

Order Approving Incorporation by Reference

✓ Statement of Need and Reasonableness contains small biz statement - will affect some.

N/A Petition for Adoption of a Rule

✓ Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

Certificate of Compliance w/Rulemaking Procedures

Affidavit of Mailing Notice of Submission to Attorney General

Notice of Submission to the Attorney General

✓ Comment to Atty. Gen.

Betsy Parker 7-29-13

Questions -- # 1098

1. §1230.3500 (pg 3, line 33) - is lyr subst Δ

2. 1230.3600 - terms specific - sig financial interest
   - influence
   - joint venture

3. 1230.3600 subp 2c - a biz is debarred if former principal debarred even tho didn't know anything biz + has sig financial interest + has authority w/ respect to MnDOT inquiries

4. stat auth to cover joint venture 1.3600 subp 2B

5. have stat auth to cover - embezzlement } .3100 subp 5
   - theft
   - antitrust } .3100 sub 5 + .3200 s 2

6. Rat basis for dist .3900 D from rest

stat auth

K time - any # of crimes wh/might constitued w/in it

AT - are often obtained in commission in bidding

embellgment - fraud or theft

↳ K Crime has been

~~responsibility~~ of someone

& honesty & integrity - - - ...

K Crime

---

joint venture - pool capital

↳ 2 or more parties working toward common end

what we know to be industry practice

sh allow ● stock ●

sig ⇒ principal practice / wanted to leave
a little / pro bono
debarring

compulsive
and enable to
control

leaving C if knew but did nothing
about

Sub Δ - lyr

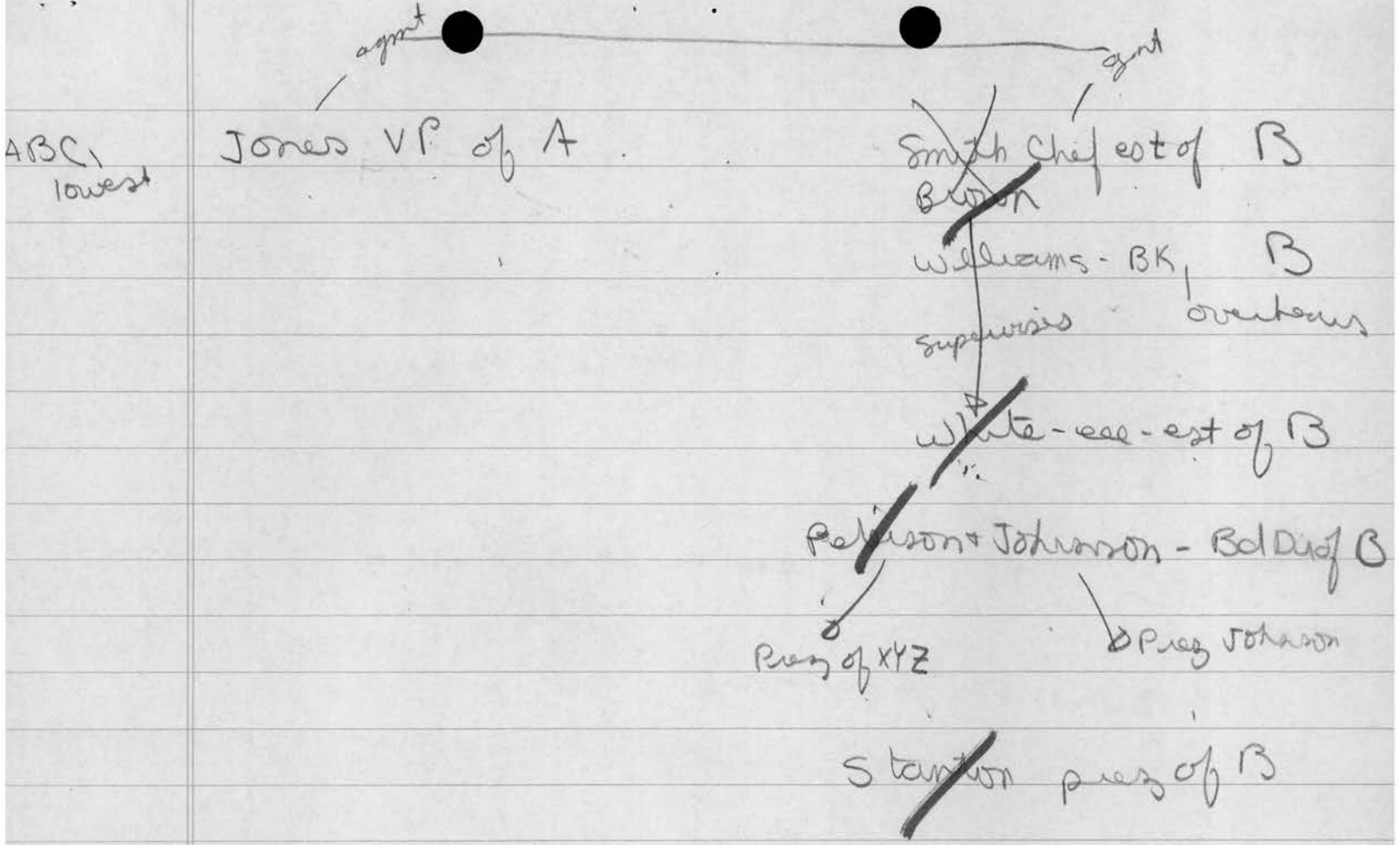
extend to desecration up to comm b/4 hand
prevent

governor ⊢ commission DOT wanted in

→ takes away some discretion
limits 1 to 3 yrs

at act

increase



1230.3600 subp. 2 C biz is debarred if former pers of a debarred biz has a sig financial interest + has auth to control

(6) 3600.0

entity different
dept Result
dept does not pay directly

diff level of responsibility
public trust
control is much direct
materials are procured from a list

rental

clear not competitive rental / how close

much closer con

purchase materials - lowest level

ability of dept control to avoid / collussion

filling pot holes

materials are

from a list

routine supplies

$5,000 limitation

SF-00006-03

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT Mn/DOT-Program Management
Room 820

TO: Steve Buffington
Special Assistant Attorney General
Department of Administration

DATE: October 15, 1984

FROM: Betsy Parker
Department of Transportation

PHONE: 7-2913

SUBJECT: Submission to the Attorney General of Adopted Rules of the Department of Administration Governing Debarment and Suspension of Persons from Receiving Mn/DOT Contracts

The following documents must be submitted to the Attorney General for review of the legality of the above-captioned rules. I have noted which are attached and which documents are already in your possession.

1. Order for notice of intent to adopt a rule without public hearing - you have the original.

2. Certificate as to completeness of Department of Administration mailing list - you have the original.

3. Findings, Conclusions and Order adopting the rules and setting forth changes - attached - Commissioner Hale must sign and date the last page - two copies must be submitted.

4. Statement of Need and Reasonableness - you have the original.

5. Written comments on the rule and requests for a public hearing - attached.

6. Certificate of Compliance with rule making procedures - for your signature - attached.

7. Affidavit of mailing notice of submission to the Attorney General - attached - please have it signed, dated and notarized.

8. Notice of submission to the Attorney General - attached - this must be signed and dated by Commissioner Hale. I have attached a list of people who requested this notice and three labeled envelopes. Please send the Notice of submission and a copy of the modified rules to each person for whom an envelope is provided. I have attached three extra copies of the rules for this purpose.

9. Notice of intent to adopt rules without a public hearing - you have the original.

10. Affidavit of mailing notice of intent to adopt rules without a public hearing. This must be notarized. You have the original.

11. State Register, August 20, 1984, containing the proposed rules and Notice of Intent - attached.

12. Rules as adopted showing modifications of the rule from that published in the State Register - four copies attached - all must be submitted.

Note that I have combined the Order adopting the rules with the Findings and Conclusions. Please call if I have neglected to furnish anything necessary for submission to the Attorney General or if any problems occur. It has been decided that if the Attorney General finds that any of the changes in the rule make a substantial change from the rule as proposed that Mn/DOT will request that the change be withdrawn. Please refer any questions about the rules as proposed or modified to me.

Thank you very much for your help in this matter.

cc: John Murphy
R. J. McDonald

RECEIVED
OCT 16 1984
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

SF-00006-02

DEPARTMENT ATTORNEY GENERAL

STATE OF MINNESOTA

Office Memorandum

TO : SANDRA J. HALE
Commissioner, Department of Administration

DATE: November 9, 1984

ATTN: Gilbert S. Buffington
Special Assistant Attorney General

FROM : Martha J. Casserly MJC
Special Assistant Attorney General

PHONE: 296-4692

SUBJECT: In the Matter of the Proposed Adoption of Rules of the State Department of Administration Relating to Debarment and Suspension of Persons from Bidding on Department of Transportation Contracts

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Please note that they have not been filed with the State Register. This must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of stamps of the Attorney General and Secretary of State;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages to the rules in the approved set.

If you have any questions in this regard, please contact me.

MJC:slz
Encs.

cc: Ms. Kathy Burek
Mr. Duane Harves

SF-00006-02

STATE OF MINNESOTA

DEPARTMENT ADMINISTRATION

Office Memorandum

TO : MARTHA J. CASSERLY
Special Assistant Attorney General

DATE: 11/2/84

FROM : SANDRA J. HALE
Commissioner of Administration Sandra J Hale

PHONE:

SUBJECT: IN THE MATTER OF RULES RELATING TO DEBARMENT AND SUSPENSION OF PERSONS FROM BIDDING ON DEPARTMENT OF TRANSPORTATION CONTRACTS

The Department of Administration is withdrawing the above-referenced rules. They will be resubmitted for your approval after the removal of language relative to a mandatory minimum period of debarment.

Thank you very much.

Department of Administration
Procurement Division

Adopted Rules Relating to Debarment and Suspension

Rules as Adopted

1230.3000 SCOPE.

Parts 1230.3000 to 1230.4300 apply to all Mn/DOT contracts.

1230.3100 DEFINITIONS.

Subpart 1. **Scope.** The terms used in parts 1230.3000 to 1230.4300 have the meanings given them in this part.

Subp. 2. **Administrative law judge.** "Administrative law judge" means a person appointed under Minnesota Statutes, section 14.48 or 14.49 and assigned under Minnesota Statutes, section 14.50 to hear contested cases.

Subp. 3. **Business.** "Business" means a sole proprietor doing business as a contractor, subcontractor, or supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. 4. **Commissioner.** "Commissioner" means the commissioner of the Department of Administration.

Subp. 5. **Contract crime.** "Contract crime" means a violation of state or federal antitrust law, fraud, theft, embezzlement, bribery, forgery, misrepresentation, making false statements, falsification or destruction of records, or other criminal offense in connection with obtaining, attempting to obtain, or performing a public or private contract or subcontract.

Subp. 6. **Contractor.** "Contractor" means a person to whom the Minnesota commissioner of transportation has awarded a Mn/DOT contract for which competitive bids are required or taken.

Subp. 7. **Conviction.** <u>"Conviction" has the meaning given to it in Minnesota Statutes, section 609.02, subdivision 5.</u>

<u>Subp. 8.</u> **Debar.** "Debar" means to disqualify under parts

IN THE STATUTES RR

1230.3100 to 1230.4300 from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

Subp. ~~8.~~ 9. **Mn/DOT contract.** "Mn/DOT contract" means a written instrument:

A. containing the elements of offer, acceptance, and consideration to which the Minnesota Department of Transportation is a party, or acts as an agent for a party under Minnesota Statutes, section 161.36, subdivisions 2 and 3, 360.016, subdivisions 2 and 3, or 360.039, subdivisions 2 and 3;

B. for which competitive bids are required or taken~~,~~; and

C. which is subject to the approval of the commissioner.

Subp. ~~9.~~ 10. **Person.** "Person" means a natural person or a business.

Subp. ~~10.~~ 11. **Principal.** "Principal" means an officer, director, or partner, or an employee ~~of a business,~~ or a shareholder engaged in management of the business.

Subp. ~~11.~~ 12. **Suspend.** "Suspend" means to temporarily disqualify from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

1230.3200 GROUNDS FOR DEBARMENT.

Subpart 1. **Contract crime.** A business must be debarred upon conviction in any jurisdiction, of the business or a principal of the business, for commission of a contract crime or when a conviction is imputed to the business under part 1230.3300.

Subp. 2. **Violation of antitrust laws.** A business must be debarred upon conviction in any jurisdiction, of the business or a principal of the business, for violating Minnesota Statutes, sections 325D.49 to 325D.66 or federal antitrust laws, or when a conviction is imputed to the business under part 1230.3300.

1230.3300 ~~LIABILITY~~ CONVICTION OF ~~INDIVIDUAL~~ PERSON IMPUTED

APPROVED BY THE REVISOR OF STATUTES OFFICE

TO BUSINESS.

The conviction of a person for offenses listed in part 1230.3200 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 and in the course of employment or with the knowledge, approval, acquiescence, or subsequent ratification of the conduct by the business.

1230.3400 DEBARMENT PROCEDURE.

Subpart 1. **Requirement.** A business must be debarred by the Minnesota Department of Transportation when one or more of the grounds set forth in part 1230.3200 are established at a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 2. **Three-year limitation.** A debarment or a suspension must be initiated within three years from the date of the conviction of a business for an offense described in part 1230.3200.

1230.3500 TERM OF DEBARMENT.

The administrative law judge shall recommend and the commissioner of transportation shall establish the term of debarment. The term of debarment depends upon: the seriousness of the ~~grounds~~ offense; whether restitution has been made; whether the debarred person cooperated in civil or criminal lawsuits; ~~and~~ the state's need to preserve the competitive bidding process; and whether the business is debarred or has been debarred in another jurisdiction. The length of the debarment period in another jurisdiction must be taken into account in determining the term of debarment in Minnesota.

1230.3600 DEBARMENT BASED ON AFFILIATION.

Subpart 1. **~~Liability~~ Conviction of business imputed to ~~individual~~ person.** The conviction of a business in any jurisdiction, for offenses listed in part 1230.3200 is imputed to any principal or other person associated with the business subject to debarment or suspension, who participated in, knew

OFFICIAL

of, or had reason to know of the conduct.

Subp. 2. **Debarment.** A business must be debarred when it:

A. employs a former principal of a debarred or suspended business or person described in subpart 1 as an officer, director, manager, or in another significant decision-making capacity;

B. 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

C. is a business in which a former principal of a debarred or suspended business has a significant financial interest and the former principal has the authority to or will control, direct, manage, or influence any activities of the business with respect to the Mn/DOT contract in question.

Subp. 3. **Procedure.** A business described in subpart 2 must be debarred after a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 4. **Duration.** The period of debarment must be the same as that of the debarred former principal or business.

1230.3700 DEBARMENT LIMITATION.

A person may not be debarred for more than three years for conduct which gave rise to the grounds for debarment. If new or different grounds arise, a new debarment hearing must be held.

1230.3800 EFFECTIVE DATE OF DEBARMENT.

A debarment takes effect on the date of the mailing of the order for debarment by the Minnesota Department of Transportation. The order for debarment must be sent by certified mail.

1230.3900 TERMINATION OF DEBARMENT OR AWARD DURING DEBARMENT.

The commissioner of transportation may terminate a debarment by order or may award a Mn/DOT contract to a debarred or suspended business when:

A. that business is the sole supplier of a material or service required by the Minnesota Department of Transportation;

APPROVED BY THE REVISOR OF STATUTES OFFICE BY

B. the commissioner of transportation determines that an emergency exists as defined in Minnesota Statutes, section 161.32, subdivision 3; ~~or~~

C. the commissioner of administration determines that an emergency exists as defined in Minnesota Statutes, section ~~16.06~~ 16B.08, subdivision ~~2~~ 6; or

D. the contract is for purchasing materials or renting equipment for routine road maintenance.

1230.4000 CONTINUATION OF CONTRACTS.

Mn/DOT contracts in existence at the time of debarment or suspension are not terminated by the debarment or suspension except as provided in part 1230.1200.

1230.4100 PROHIBITIONS.

Subpart 1. **Mn/DOT contracts.** Except as provided in part 1230.3900, the Department of Transportation may not award a Mn/DOT contract to a debarred or suspended person and may not approve a contract under which a debarred or suspended person will serve as a subcontractor or material supplier.

Subp. 2. **Subcontracts and purchase of materials.** Except as provided in part 1230.3900, a contractor to whom a Mn/DOT contract has been awarded by the Minnesota Department of Transportation may not subcontract with or purchase materials or services from a debarred or suspended person for performance of that contract.

1230.4200 SUSPENSION.

Subpart 1. **Order of suspension.** The commissioner of transportation shall suspend a person or business by order upon receiving notice or learning of a conviction for conduct described in part 1230.3200 or upon ~~learning~~ receiving evidence of an affiliation described in part 1230.3600, subpart 2.

Subp. 2. **Commencement of proceedings.** The commissioner of transportation shall start debarment proceedings within ten days of the mailing of the suspension order.

Subp. 3. **Notice and content.** The order for suspension must describe the reason for suspension and must be sent by

ACCEPTED IN THE
OFFICE OF THE SECRETARY OF STATE
ON [illegible]

certified mail to the person suspended.

Subp. 4. **Effective date of suspension; term.** The order for suspension takes effect on the date the order is mailed. No suspension may exceed 60 days.

1230.4300 NOTICE TO PUBLIC.

Subpart 1. **Notice to commissioner.** The Minnesota Department of Transportation shall provide to the commissioner a copy of each suspension, debarment, or termination order on the same day that the order is mailed to the debarred or suspended person.

Subp. 2. **Publication.** The commissioner shall publish weekly, in the State Register, a list of debarred and suspended persons, the effective date of each suspension and debarment, and the term of each debarment. The commissioner shall also publish notice of debarment terminations under part 1230.3900 and the effective date of the termination.

APPROVED BY THE
REVISOR OF STATUTES
OFFICE BY

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
NOV - 9 1984
Joan Anderson Growe
Secretary of State
9:20 AM

APPROVED AS TO FORM AND LEGALITY
November 9 1984
HUBERT H. HUMPHREY, III
ATTORNEY GENERAL
BY MJ Cassedy
SPECIAL ASSISTANT ATTORNEY GENERAL

AG copy

Department of Administration

Procurement Division

Adopted Rules Relating to Debarment and Suspension

Rules as Adopted

1230.3000 SCOPE.

Parts 1230.3000 to 1230.4300 apply to all Mn/DOT contracts.

1230.3100 DEFINITIONS.

Subpart 1. Scope. The terms used in parts 1230.3000 to 1230.4300 have the meanings given them in this part.

Subp. 2. Administrative law judge. "Administrative law judge" means a person appointed under Minnesota Statutes, section 14.48 or 14.49 and assigned under Minnesota Statutes, section 14.50 to hear contested cases.

Subp. 3. Business. "Business" means a sole proprietor doing business as a contractor, subcontractor, or supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. 4. Commissioner. "Commissioner" means the commissioner of the Department of Administration.

Subp. 5. Contract crime. "Contract crime" means a violation of state or federal antitrust law, fraud, theft, embezzlement, bribery, forgery, misrepresentation, making false statements, falsification or destruction of records, or other criminal offense in connection with obtaining, attempting to obtain, or performing a public or private contract or subcontract.

Subp. 6. Contractor. "Contractor" means a person to whom the Minnesota commissioner of transportation has awarded a Mn/DOT contract for which competitive bids are required or taken.

Subp. 7. Conviction. "Conviction" has the meaning given to it in Minnesota Statutes, section 609.02, subdivision 5.

Subp. 8. Debar. "Debar" means to disqualify under parts

APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

RR

1230.3100 to 1230.4300 from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

Subp. ~~8.~~ 9. Mn/DOT contract. "Mn/DOT contract" means a written instrument:

A. containing the elements of offer, acceptance, and consideration to which the Minnesota Department of Transportation is a party, or acts as an agent for a party under Minnesota Statutes, section 161.36, subdivisions 2 and 3, 360.016, subdivisions 2 and 3, or 360.039, subdivisions 2 and 3;

B. for which competitive bids are required or taken~~,~~; and

C. which is subject to the approval of the commissioner.

Subp. ~~9.~~ 10. Person. "Person" means a natural person or a business.

Subp. ~~10.~~ 11. Principal. "Principal" means an officer, director, or partner, or an employee ~~of a business,~~ or a shareholder engaged in management of the business.

Subp. ~~11.~~ 12. Suspend. "Suspend" means to temporarily disqualify from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

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APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

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1230.3400 DEBARMENT PROCEDURE.

Subpart 1. Requirement. Except as provided in subpart 2, a business must be debarred by the Minnesota Department of Transportation when one or more of the grounds set forth in part 1230.3200 are established at a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 2. Exception. The commissioner of transportation is not required to debar a business in Minnesota if the business has completed a debarment period of at least one year imposed by another jurisdiction for the offense which would be grounds for debarment in Minnesota.

Subp. 3. Three-year limitation. A debarment or a suspension must be initiated within three years from the date of the conviction of a business for an offense described in part 1230.3200.

1230.3500 TERM OF DEBARMENT.

The administrative law judge shall recommend and the commissioner of transportation shall establish the term of debarment. The term of debarment depends upon: the seriousness of the ~~grounds~~ offense; whether restitution has been made; whether the debarred person cooperated in civil or criminal lawsuits; ~~and~~ the state's need to preserve the competitive bidding process; and whether the business is debarred or has completed a debarment period of at least one year in another jurisdiction. In no case may a debarment be for a shorter period than one year. The length of the debarment period in another jurisdiction must be taken into account in determining

APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

the term of debarment in Minnesota.

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Subpart 1. ~~Liability~~ Conviction of business imputed to ~~individual~~ person. The conviction of a business in any jurisdiction, for offenses listed in part 1230.3200 is imputed to any principal or other person associated with the business subject to debarment or suspension, who participated in, knew of, or had reason to know of the conduct.

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A. employs a former principal of a debarred or suspended business or person described in subpart 1 as an officer, director, manager, or in another significant decision-making capacity;

B. 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

C. is a business in which a former principal of a debarred or suspended business has a significant financial interest and the former principal has the authority to or will control, direct, manage, or influence any activities of the business with respect to the Mn/DOT contract in question.

Subp. 3. Procedure. A business described in subpart 2 must be debarred after a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

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APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

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The commissioner of transportation may terminate a debarment by order or may award a Mn/DOT contract to a debarred or suspended business when:

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B. the commissioner of transportation determines that an emergency exists as defined in Minnesota Statutes, section 161.32, subdivision 3; ~~or~~

C. the commissioner of administration determines that an emergency exists as defined in Minnesota Statutes, section ~~16.06~~ 16B.08, subdivision ~~2~~ 6; or } FF

D. the contract is for purchasing materials or renting equipment for routine road maintenance. } FF

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APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

Rules as Proposed (all new material)

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RR

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Subp. 9. **Person.** "Person" means a natural person or a business.

Subp. 10. **Principal.** "Principal" means an officer, director, partner, or employee of a business, or a shareholder engaged in management of the business.

Subp. 11. **Suspend.** "Suspend" means to temporarily disqualify from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

1230.3200 GROUNDS FOR DEBARMENT.

Subpart 1. **Contract crime.** A business must be debarred upon conviction in any jurisdiction, of the business or a principal of the business, for commission of a contract crime or when a conviction is imputed to the business under part 1230.3300.

Subp. 2. **Violation of antitrust laws.** A business must be debarred upon conviction in any jurisdiction, of the business or a principal of the business, for violating Minnesota Statutes, sections 325D.49 to 325D.66 or federal antitrust laws, or when a conviction is imputed to the business under part 1230.3300.

1230.3300 LIABILITY OF INDIVIDUAL IMPUTED TO BUSINESS.

The conviction of a person for offenses listed in part 1230.3200 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 and in the course of employment or with the knowledge, approval, acquiescence, or subsequent ratification of the conduct by the business.

1230.3400 DEBARMENT PROCEDURE.

A business must be debarred by the Minnesota Department of Transportation when one or more of the grounds set forth in part 1230.3200 are established at a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

1230.3500 TERM OF DEBARMENT.

The administrative law judge shall recommend and the commissioner of transportation shall establish the term of debarment. The term of debarment depends upon: the seriousness of the grounds; whether restitution has been made; whether the debarred person cooperated in civil or criminal lawsuits; and the state's need to preserve the competitive bidding process.

1230.3600 DEBARMENT BASED ON AFFILIATION.

Subpart 1. **Liability of business imputed to individual.** The conviction of a business in any jurisdiction, for offenses listed in part 1230.3200 is imputed to any principal or other person associated with the business subject to debarment or suspension, who participated in, knew of, or had reason to know of the conduct.

Subp. 2. **Debarment.** A business must be debarred when it:

A. employs a former principal of a debarred or suspended business or person described in subpart 1 as an officer, director, manager, or in another significant decision-making capacity;

B. is owned by or associated in a joint venture with a debarred or suspended business or is controlled by a former principal of a debarred or suspended business; or

C. is a business in which a former principal of a debarred or suspended business has a significant financial interest and the former principal has the authority to or will control, direct, manage, or influence any activities of the business with respect to the Mn/DOT contract in question.

Subp. 3. **Procedure.** A business described in subpart 2 must be debarred after a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 4. **Duration.** The period of debarment must be the same as that of the debarred former principal or business.

1230.3700 DEBARMENT LIMITATION.

A person may not be debarred for more than three years for conduct which gave rise to the grounds for debarment. If new or

APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

different grounds arise, a new debarment hearing must be held.

1230.3800 EFFECTIVE DATE OF DEBARMENT.

A debarment takes effect on the date of the mailing of the order for debarment by the Minnesota Department of Transportation. The order for debarment must be sent by certified mail.

1230.3900 TERMINATION OF DEBARMENT OR AWARD DURING DEBARMENT.

The commissioner of transportation may terminate a debarment by order or may award a Mn/DOT contract to a debarred or suspended business when:

A. that business is the sole supplier of a material or service required by the Minnesota Department of Transportation;

B. the commissioner of transportation determines that an emergency exists as defined in Minnesota Statutes, section 161.32, subdivision 3; or

C. the commissioner of administration determines that an emergency exists as defined in Minnesota Statutes, section 16.06, subdivision 2.

1230.4000 CONTINUATION OF CONTRACTS.

Contracts in existence at the time of debarment or suspension are not terminated by the debarment or suspension except as provided in part 1230.1200.

1230.4100 PROHIBITIONS.

Subpart 1. **Mn/DOT contracts.** Except as provided in part 1230.3900, the Department of Transportation may not award a Mn/DOT contract to a debarred or suspended person and may not approve a contract under which a debarred or suspended person will serve as a subcontractor or material supplier.

Subp. 2. **Subcontracts and purchase of materials.** Except as provided in part 1230.3900, a contractor to whom a Mn/DOT contract has been awarded by the Minnesota Department of Transportation may not subcontract with or purchase materials or services from a debarred or suspended person for performance of

APPROVED IN THE
REVISOR OF STATUTES
OFFICE BY:

that contract.

1230.4200 SUSPENSION.

Subpart 1. **Order of suspension.** The commissioner of transportation shall suspend a person or business by order upon receiving notice or learning of a conviction for conduct described in part 1230.3200 or upon learning of an affiliation described in part 1230.3600, subpart 2.

Subp. 2. **Commencement of proceedings.** The commissioner of transportation shall start debarment proceedings within ten days of the mailing of the suspension order.

Subp. 3. **Notice and content.** The order for suspension must describe the reason for suspension and must be sent by certified mail to the person suspended.

Subp. 4. **Effective date of suspension; term.** The order for suspension takes effect on the date the order is mailed. No suspension may exceed 60 days.

1230.4300 NOTICE TO PUBLIC.

Subpart 1. **Notice to commissioner.** The Minnesota Department of Transportation shall provide to the commissioner a copy of each suspension, debarment, or termination order on the same day that the order is mailed to the debarred or suspended person.

Subp. 2. **Publication.** The commissioner shall publish weekly, in the State Register, a list of debarred and suspended persons, the effective date of each suspension and debarment, and the term of each debarment. The commissioner shall also publish notice of debarment terminations under part 1230.3900 and the effective date of the termination.

APPROVED IN THE REVISOR OF STATUTES OFFICE BY:

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Governing Debarment and Suspension of Persons from Receiving Mn/DOT Contracts

FINDINGS CONCLUSIONS AND ORDER ADOPTING RULES

Notice of the Commissioner's intent to adopt the above entitled rules without a public hearing was published in the State Register on August 20, 1984 and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes, section 14.14, subdivision 1a. on August 7, 1984. Notice was mailed by the Minnesota Department of Transportation (Mn/DOT) to persons on the Mn/DOT list of Women Business Enterprises and Minority Business Enterprises on August 21, 1984. The Notice and a copy of the proposed rules were published in the Construction Bulletin on August 17, 1984 and were provided to Associated General Contractors, a Minnesota trade association with over 200 members, for mailing to its members on August 7, 1984.

After affording interested and affected persons 30 days to submit comments, receiving fewer than 25 requests for a public hearing, and having reviewed and considered the written and oral comments and statements submitted during the 30 day comment period, and the applicable statutes and rules, and confirming the need for and reasonableness of the above captioned rules, I find the following:

1. That proper notice of the intent to adopt the above captioned rules without a public hearing was given in this matter.

2. That the procedural requirements of Minnesota Statutes, sections 14.115, 14.14, 14.22 to 14.26 and Laws 1984, Chapter 640, sections 7, and 12 to 15 have been fulfilled.

3. That statutory authority to adopt the proposed rules has been documented in the Statement of Need and Reasonableness.

4. That the Statement of Need and Reasonableness demonstrates a rational basis for the adoption of the proposed rules and shows the need for and reasonableness of the proposed rules.

5. That the proposed rules should be modified as follows:

Part 1230.3100 DEFINITIONS.

Add: Subpart 7. Conviction. "Conviction" has the meaning given it in Minnesota Statutes, section 609.02, subdivision 5.

This definition is needed to make it clear that the Department treats a plea of guilty as a conviction. Minn. Stat. 609.02, subd. 5, states:

Subd. 5. Conviction. "Conviction" means any of the following accepted and recorded by the court:

(1) A plea of guilty; or
(2) A verdict of guilty by a jury or a finding of guilty by the court.

This is a reasonable clarification because it adopts the accepted legal definition of conviction and does not change the intended application of the rules.

Amend Subp. 9. Mn/DOT Contract. "Mn/DOT contract" means a written instrument containing the elements of offer, acceptance, and consideration to which the Minnesota Department of Transportation is a party, or acts as an agent for a party under Minnesota Statutes, sections 161.36, subdivisions 2 and 3, 360.016, subdivisions 2 and 3, or 360.039, subdivisions 2 and 3, for which competitive bids are required or taken, and which is subject to the approval of the commissioner.

This notification is needed to resolve confusion as to whether Mn/DOT contracts which Mn/DOT lets for the benefit or at the request of another unit of government are included in the definition. In some cases, the commissioner of transportation is a party to and lets contracts on competitive bids for work which is done for a municipality or other unit of government. In those cases the commissioner is a party to the contract in his capacity as agent for the other unit of government. The modification explicitly states that Mn/DOT contracts include contracts to which the commissioner is a party as an agent for someone else. This clarification is reasonable because it harmonizes the proposed rules with the law and with current practice.

Amend Subp. 11. Principal. "Principal" means an officer, director, or partner, or an employee ~~of a business,~~ or a shareholder engaged in management of the business. This modification restricts the definition of "principal" so that an employee of a business who is not engaged in management of the business will not be treated as a principal, and therefore, will not be subject to debarment. This change was needed to spare non-management employees the consequences of debarment. It is reasonable to impose the responsibility for detection and prevention of contract crimes only on persons with legal responsibility for the conduct of the business. This modification was requested in a letter submitted by Bill Hart of H.R. Loveall Construction, Inc. The Department of Transportation wishes to adopt the change.

Part 1230.3400 DEBARMENT PROCEDURE.

This part is modified as follows:

Subpart 1. A business must be debarred by the Minnesota Department of Transportation when one or more of the grounds set forth in part 1230.3200 are established at a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 2. A debarment or a suspension must be initiated within 3 years from the date of the conviction of a business for an offense described in part 1230.3200.

These modifications were made in response to a request from Daniel D. Foth, Executive Director, Associated Builders and Contractors, Inc. (Minnesota Chapter) 6300 Walker St., Minneapolis. He did not submit written comments, but requested at a meeting that the proposed rules be amended to take into account a debarment

imposed by a court. He felt that it would be unfair to debar someone twice. The rule has been amended to reflect that principle, but not quite as he suggested. The rule has been amended to take into account debarments imposed by any other jurisdiction because it is likely that contractors who have been debarred in Iowa, South Dakota, Kansas or other states may bid in Minnesota. No more court imposed debarments will occur in Minnesota. The two which occurred in September, 1984 were part of a settlement negotiated by the Antitrust Division of the Attorney General's Office. No more debarment negotiations will be conducted by that office.

Mr. Foth also requested that the rule be amended to include a statute of limitations for debarment. A statute of limitations provides certainty to people as to the finality or likelihood of certain government action being taken against them. It requires the commissioner of transportation to debar a business in a timely manner. Three years is a reasonable period of time in which to act because it is close enough to the date of conviction so that the integrity and responsibility of the contractor is still in doubt, yet it provides adequate time for the commissioner to learn of the conviction, hold a hearing and debar the convicted business.

Part 1230.3500 TERM OF DEBARMENT.

The phrase "...the seriousness of the grounds,..." is amended to read "...the seriousness of the offense,..." to make that reference to the charge which resulted in the conviction consistent with other references in the rules. See Part 1230.3100, subp. 5. Contract crime. "...or other criminal offense...; Part 1230.3300, "The conviction of a person for offenses listed..."; Part 1230.3600, subp. 1. "The conviction of a business in any jurisdiction, for offenses listed in part 1230.3200...". The word "offense" refers to an offense described in the definition of "contract crime." It is the particular offense which will be examined in determining the gravity of the crime when the period of debarment is established.

That part is further modified to read: "The term of debarment depends upon: the seriousness of the ~~grounds~~ offense, whether restitution has been made; whether the debarred person cooperated in civil or criminal lawsuits; ~~and~~ the state's need to preserve the competitive bidding process~~.~~ , and whether the business is debarred or has been debarred in another jurisdiction. The length of the debarment period in another jurisdiction must be taken into account in determining the term of debarment in Minnesota.

It is both reasonable and necessary to take into account the length of time a business has been debarred in another jurisdiction. It would be unfair to debar a business in Minnesota for the same offense for which it has been debarred in another jurisdiction if the debarment were for a period of time which Mn/DOT believed would protect its interest. If a business has been debarred in another state, the commissioner may decide not to debar in Minnesota after considering the other criteria involved in establishing the length of time a business will be debarred.

Part 1230.3600 DEBARMENT BASED ON AFFILIATION.

Part 1230.3600, subpart. 2. B. is modified to read:

B. 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

This modification is needed to correct the omission of the word 'principal' from the proposed rules. This section is intended to preclude current and former principals of a currently debarred business from contracting with Mn/DOT through subsidiaries of the debarred business or by engaging with another Mn/DOT contractor in a joint venture. These restrictions would prevent evasion of the commissioner's debarment order. Although a business might choose to purge itself of directors or managers convicted of antitrust violations, a business owned or controlled by such a person will remain under his control. Therefore in order to protect Mn/DOT this section must be amended so that it applies to both current and former principals of debarred businesses.

Part 1230.3900 TERMINATION OF DEBARMENT OR AWARD DURING DEBARMENT.

This part is modified by adding:

C. the commissioner of administration determines that an emergency exists as defined in Minnesota Statutes, section ~~16.06~~ 16B.08, subdivision ~~2~~ 6; or

This section is amended to show the recodification of the Department of Administration laws in 1984. There is no substantive change in the text.

D. The contract is for purchasing materials or renting equipment for routine road maintenance.

This modification was requested by several contractors and is also desired by the Department of Transportation. Two letters were received from H.R. Loveall Construction, Inc. asking that debarred contractors be allowed to supply materials or subcontract. Because the responsibility and reliability required of a subcontractor for his work on a project is very much like the responsibility and reliability required of a prime contractor, Mn/DOT does not wish to allow debarred persons to serve as subcontractors. However, Mn/DOT has a continuing need for road maintenance supplies and equipment. These items are obtained most economically from a location which is as near as possible to the site or area where they will be used. They are subject to measurement and testing by Mn/DOT to determine quantity and quality and because most such supplying is done locally do not present a situation where the previously adjudicated lack of responsibility of the contractor poses a threat to the departments contracting process or work. Therefore, it is reasonable to except these particular kinds of contracts from the prohibition against contracting with debarred persons. This modification benefits Mn/DOT, the public and debarred contractors by keeping maintenance costs low.

Part 1230.4000 CONTINUATION OF CONTRACTS.

This part is modified as follows:

Mn/DOT contracts in existence at the time of debarment or suspension are not terminated by the debarment or suspension except as provided in part 1230.1200.

This modification is necessary to make the language consistent with the references to Mn/DOT contracts in other parts of the rules. See Part 1230.3100 Definitions. "Mn/DOT contract."; Part 1230.3900 Termination "The commissioner of transportation may terminate a debarment by order or may award a Mn/DOT contract..."; Part 1230.4100 Prohibitions. Subpart 1. "Mn/DOT contracts." Except as provided in 1230.3900, the Department of Transportation may not award a Mn/DOT contract...";

Subp. 2. "Except as provided in part 1230.3900, a contractor to whom a Mn/DOT contract has been awarded...". It is reasonable to have consistent references to the same thing to avoid confusion. This change makes it clear that Rule 1230.4000 applies only to Mn/DOT contracts.

Part 1230.4200 SUSPENSION.

Subpart 1. is modified as follows:

Subpart 1. Order of suspension. The commissioner of transportation shall suspend a person or business by order upon receiving notice or learning of a conviction for conduct described in part 1230.3200 or upon ~~learning~~ receiving evidence of an affiliation described in part 1230.3600, subpart 2.

This modification was requested by telephone by Dan Foth, Executive Director, Associated Builders and Contractors. He feared that Mn/DOT would suspend a contractor on the basis of an unsubstantiated rumor of affiliation with a debarred person. Mn/DOT interprets "receiving evidence" to require some showing of affiliation, such as an affidavit, corporate articles or by-laws, employment agreements, signed checks, court or hearing records, an admission of a debarred person as to affiliation or some similar showing. This is only a change in wording and has no other effect.

NOW, THEREFORE, IT IS ORDERED that these rules identified as Proposed Rules of the State Department of Administration Governing Debarment and Suspension of Persons from Receiving Mn/DOT Contracts are adopted this __ day of November, 1984, pursuant to authority vested in me by Laws 1984, Chapter 544, Section 9 (to be codified Minnesota Statutes, section 16B.04, subdivision 1) and Laws 1984, Chapter 654, Article 2, Section 8.

STATE OF MINNESOTA

COMMISSIONER OF ADMINISTRATION

Fox River Bond
25% Cotton

STATE OF MINNESOTA
DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Relating to Debarment and Suspension of Persons from Bidding on Department of Transportation Contracts

ORDER FOR NOTICE OF INTENT TO ADOPT RULES WITHOUT PUBLIC HEARING

IT IS ORDERED this 30th day of July, 1984, that a Notice of Intent to Adopt Rules Without Public Hearing in the above-entitled matter be given to all persons who have registered their names with the State Department of Administration and to persons identified by the Minnesota Department of Transportation as having an interest in that matter for that purpose and be published in the State Register.

STATE OF MINNESOTA

Sandra J. Hale

COMMISSIONER OF ADMINISTRATION

Department of Administration
Procurement Division

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Relating to Debarment and Suspension of Persons from Bidding on Department of Transportation Contracts.

Notice of Intent to Adopt Rules Without a Public Hearing

Notice is hereby given that the State Department of Administration proposes to adopt the above-entitled rules without a public hearing. The Commissioner has elected to follow the procedures set forth in Minnesota Statutes, sections 14.22 to 14.28 and Laws 1984, Chapter 640, Sections 12 to 15.

Persons interested in these rules have 30 days to submit comments in support of or in opposition to the proposed rules. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held. If a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes, sections 14.14 to 14.18 and Laws 1984, Chapter 640, Sections 7, 8, 9, 10 and 11. The proposed rule may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

A person who wishes to submit comments or a written request for a public hearing should submit such comments or request to:

Betsy Parker
Program Management Division
Room 815
Minnesota Department of Transportation
St. Paul, MN. 55155
(612)297-2913

A person who wishes to submit comments or request a public hearing should state his or her name and address and is encouraged to identify the portion of the proposed rule addressed,the reason for the request, and any change proposed.

If a hearing is not required, notice of the date of submission of the proposed rule to the Attorney General for review will be mailed to any person requesting to receive the notice.

Authority for the adoption of these rules is contained in Laws 1984, Chapter 654, Section 8 and Minnesota Statutes, section 16.05. Additionally, a Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and is available upon request from Betsy Parker, Minnesota Department of Transportation (297-2913).

Upon adoption of the final rules without a public hearing, the proposed rules, this Notice, the Statement of Need and Reasonableness, all written comments received, and the final Rules as Adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to:

Betsy Parker
Minnesota Department of Transportation
St. Paul, MN. 55155
(612)297-2913

The adoption of these rules will not require the expenditure of any money by local government bodies.

A copy of the proposed rules is attached to this Notice.

Copies of this Notice and the proposed rules are available and may be obtained from the person named in this notice.

State of Minnesota

Sandra J. Hale

COMMISSIONER OF ADMINISTRATION

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Relating to Debarment and Suspension of Persons from Bidding on Department of Transportation Contracts

AFFIDAVIT OF MAILING

STATE OF MINNESOTA :
: ss.
COUNTY OF RAMSEY :

BARBARA LEHMKUHL, being first duly sworn deposes and says:

That on the 7th day of August, 1984, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Intent to Adopt Rules Without Public Hearing by depositing in the State of Minnesota Central Mail System for United States Mailing at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who have requested that their names be placed on file with the State Department of Administration for the purpose of receiving notice of the proposed adoption of rules by this agency. The attached notice was also mailed to persons who had requested that their names be placed on file with the Minnesota Department of Transportation and who were determined by the Department of Transportation to be interested in the above captioned rules.

Barbara Jean Lehmkuhl

Subscribed and sworn to before me this 10th day of October, 1984.

Linda M. Oelker

LINDA M. OELKER
NOTARY PUBLIC-MINNESOTA
RAMSEY COUNTY
MY COMMISSON EXPIRES APRIL 20, 1991

Department of Administration
Procurement Division

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Relating to Debarment and Suspension of Persons from Bidding on Department of Transportation Contracts.

Notice of Intent to Adopt Rules Without a Public Hearing

Notice is hereby given that the State Department of Administration proposes to adopt the above-entitled rules without a public hearing. The Commissioner has elected to follow the procedures set forth in Minnesota Statutes, sections 14.22 to 14.28 and Laws 1984, Chapter 640, Sections 12 to 15.

Persons interested in these rules have 30 days to submit comments in support of or in opposition to the proposed rules. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held. If a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes, sections 14.14 to 14.18 and Laws 1984, Chapter 640, Sections 7, 8, 9, 10 and 11. The proposed rule may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

A person who wishes to submit comments or a written request for a public hearing should submit such comments or request to:

Betsy Parker
Program Management Division
Room 815
Minnesota Department of Transportation
St. Paul, MN. 55155
(612)297-2913

A person who wishes to submit comments or request a public hearing should state his or her name and address and is encouraged to identify the portion of the proposed rule addressed,the reason for the request, and any change proposed.

If a hearing is not required, notice of the date of submission of the proposed rule to the Attorney General for review will be mailed to any person requesting to receive the notice.

Authority for the adoption of these rules is contained in Laws 1984, Chapter 654, Section 8 and Minnesota Statutes, section 16.05. Additionally, a Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and is available upon request from Betsy Parker, Minnesota Department of Transportation (297-2913).

Upon adoption of the final rules without a public hearing, the proposed rules, this Notice, the Statement of Need and Reasonableness, all written comments received, and the final Rules as Adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to:

Betsy Parker
Minnesota Department of Transportation
St. Paul, MN. 55155
(612)297-2913

The adoption of these rules will not require the expenditure of any money by local government bodies.

A copy of the proposed rules is attached to this Notice.

Copies of this Notice and the proposed rules are available and may be obtained from the person named in this notice.

State of Minnesota

Sandra J. Hale

COMMISSIONER OF ADMINISTRATION

STATE OF MINNESOTA
COUNTY OF RAMSEY

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Relating to Debarment and Suspension of Persons from Bidding on Department of Transportation Contracts

CERTIFICATE OF MAILING LIST

I hereby certify that the list of persons, associations, and other interested groups who have requested, pursuant to Minnesota Statutes, section 14.14, subdivision 1a, that their names be placed on filed with and maintained by the State Department of Administration for the purpose of receiving notice of the proposed adoption of rules by this agency is accurate and complete as of 4:30 p.m., this 7th day of August 1984.

Marcia J. Hansen

STATE REGISTER

STATE OF MINNESOTA



VOLUME 9, NUMBER 8

August 20, 1984

Pages 357-404

STATE REGISTER

Printing Schedule for Agencies

Issue Number	*Submission deadline for Executive Orders, Adopted Rules and **Proposed Rules	*Submission deadline for State Contract Notices and other **Official Notices	Issue Date
	SCHEDULE FOR VOLUME 9		
9	Monday Aug 13	Monday Aug 20	Monday Aug 27
10	Monday Aug 20	Friday Aug 24	Monday Sept 3
11	Monday Aug 27	Friday Aug 31	Monday Sept 10
12	Friday Aug 31	Monday Sept 10	Monday Sept 17

*Deadline extensions may be possible at the editor's discretion; however, none will be made beyond the second Wednesday (12 calendar days) preceding the issue date for rules, proposed rules and executive orders, or beyond the Wednesday (5 calendar days) preceding the issue date for official notices. Requests for deadline extensions should be made only in valid emergency situations.

**Notices of public hearings on proposed rules and notices of intent to adopt rules without a public hearing are published in the Proposed Rules section and must be submitted two weeks prior to the issue date.

Instructions for submission of documents may be obtained from the Office of the State Register, 506 Rice Street, St. Paul, Minnesota 55103, (612) 296-0930.

The *State Register* is published by the State of Minnesota, State Register and Public Documents Division, 117 University Avenue, St. Paul, Minnesota 55155, pursuant to Minn. Stat. § 14.46. Publication is weekly, on Mondays, with an index issue in September. In accordance with expressed legislative intent that the *State Register* be self-supporting, the subscription rate has been established at $130.00 per year, postpaid to points in the United States. Second class postage paid at St. Paul, Minnesota. Publication Number 326630. (ISSN 0146-7751) No refunds will be made in the event of subscription cancellation. Single issues may be obtained at $3.25 per copy.

Subscribers who do not receive a copy of an issue should notify the *State Register* Circulation Manager immediately at (612) 296-0931. Copies of back issues may not be available more than two weeks after publication.

The *State Register* is the official publication of the State of Minnesota, containing executive orders of the governor, proposed and adopted rules of state agencies, and official notices to the public. Judicial notice shall be taken of material published in the *State Register*.

Rudy Perpich
Governor

Sandra J. Hale
Commissioner
Department of Administration

Stephen A. Ordahl
Director
State Register and
Public Documents Division

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Circulation Manager

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NOTICE

How to Follow State Agency Rulemaking Action in the *State Register*

State agencies must publish notice of their rulemaking action in the *State Register*. If an agency seeks outside opinion before promulgating new rules or rule amendments, it must publish a NOTICE OF INTENT TO SOLICIT OUTSIDE OPINION also.

The PROPOSED RULES section contains:

- Calendar of public hearings on proposed rules.
- Proposed new rules (including notice of hearing and/or notice of intent to adopt rules without a hearing).
- Proposed amendments to rules already in existence in the Minnesota Rules.
- Proposed emergency rules.
- Withdrawal of proposed rules (option; not required).

The ADOPTED RULES section contains:

- Notice of adoption of new rules and rule amendments adopted without change from the previously published proposed rules. (Unchanged adopted rules are not republished in full in the *State Register* unless an agency requests this.)
- Adopted amendments to new rules or rule amendments (adopted changes from the previously published proposed rules).
- Notice of adoption of emergency rules.
- Adopted amendments to emergency rules (changes made since the proposed version was published).
- Extensions of emergency rules beyond their original effective date.

The OFFICIAL NOTICES section includes (but is not limited to):

- Notice of intent to solicit outside opinion before promulgating rules.
- Additional hearings on proposed rules not listed in original proposed rules calendar.

ALL ADOPTED RULES and ADOPTED AMENDMENTS TO EXISTING RULES published in the *State Register* and filed with the Secretary of State before July 31, 1983 are published in the *Minnesota Rules 1983*. ADOPTED RULES and ADOPTED AMENDMENTS TO EXISTING RULES filed after July 31, 1983 will be included in a supplement scheduled for publication in mid-1984. Proposed and adopted EMERGENCY (formerly called TEMPORARY) RULES appear in the *State Register* but are generally not published in the *Minnesota Rules 1983* due to the short-term nature of their legal effectiveness. Those that are long-term may be published.

The *State Register* publishes partial and cumulative listings of rule in the MINNESOTA RULES AMENDMENTS AND ADDITIONS list on the following schedule:

Issues 1-13, inclusive
Issues 14-25, inclusive
Issue 26, cumulative for 1-26
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Issue 39, cumulative for 1-39
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PROPOSED RULES

Pursuant to Minn. Stat. of 1982, §§ 14.22, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless 25 or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules; and
4. that the rule may be modified if the modifications are supported by the data and views submitted.

If, during the 30-day comment period, 25 or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of §§ 14.14-14.20, which state that if an agency decides to hold a public hearing, it must publish a notice of intent in the *State Register*.

Pursuant to Minn. Stat. §§ 14.29 and 14.30, agencies may propose emergency rules under certain circumstances. Proposed emergency rules are published in the *State Register* and, for at least 25 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Administration Procurement Division

Proposed Rules Relating to Debarment and Suspension

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the State Department of Administration proposes to adopt the above-entitled rules without a public hearing. The Commissioner has elected to follow the procedures set forth in Minnesota Statutes, sections 14.22 to 14.28 and Laws 1984, Chapter 640, Sections 12 to 15.

Persons interested in these rules have 30 days to submit comments in support of or in opposition to the proposed rules. Comment is encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be held. If a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes, sections 14.14 to 14.18 and Laws 1984, Chapter 640, Sections 7, 8, 9, 10 and 11. The proposed rule may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language.

A person who wishes to submit comments or a written request for a public hearing should submit such comments or request to:

Betsy Parker
Program Management Division
Room 815
Minnesota Department of Transportation
St. Paul, MN 55155
(612) 297-2913

A person who wishes to submit comments or request a public hearing should state his or her name and address and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed.

If a hearing is not required, notice of the date of submission of the proposed rule to the Attorney General for review will be mailed to any person requesting to receive the notice.

Authority for the adoption of these rules is contained in Laws 1984, Chapter 654, Section 8 and Minnesota Statutes, section 16.05. Additionally, a Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rules and identifies the data and information relied upon to support the proposed rules has been prepared and is available upon request from Betsy Parker, Minnesota Department of Transportation (297-2913).

Upon adoption of the final rules without a public hearing, the proposed rules, this notice, the Statement of Need and Reasonableness, all written comments received, and the final rules as adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to:

Betsy Parker
Minnesota Department of Transportation
St. Paul, MN 55155
(612) 297-2913

The adoption of these rules will not require the expenditure of any money by local government bodies.

A copy of the proposed rules is attached to this notice.

Copies of this notice and the proposed rules are available and may be obtained from the person named in this notice.

Sandra J. Hale
Commissioner of Administration

Rules as Proposed (all new material)

1230.3000 SCOPE.

Parts 1230.3000 to 1230.4300 apply to all Mn/DOT contracts.

1230.3100 DEFINITIONS.

Subpart 1. Scope. The terms used in parts 1230.3000 to 1230.4300 have the meanings given them in this part.

Subp. 2. Administrative law judge. "Administrative law judge" means a person appointed under Minnesota Statutes, section 14.48 or 14.49 and assigned under Minnesota Statutes, section 14.50 to hear contested cases.

Subp. 3. Business. "Business" means a sole proprietor doing business as a contractor, subcontractor, or supplier, or a partnership, association, corporation, or other entity formed for the purpose of doing business as a contractor, subcontractor, or supplier.

Subp. 4. Commissioner. "Commissioner" means the commissioner of the Department of Administration.

Subp. 5. Contract crime. "Contract crime" means a violation of state or federal antitrust law, fraud, theft, embezzlement, bribery, forgery, misrepresentation, making false statements, falsification or destruction of records, or other criminal offense in connection with obtaining, attempting to obtain, or performing a public or private contract or subcontract.

Subp. 6. Contractor. "Contractor" means a person to whom the Minnesota commissioner of transportation has awarded a Mn/DOT contract for which competitive bids are required or taken.

Subp. 7. Debar. "Debar" means to disqualify under parts 1230.3100 to 1230.4300 from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

Subp. 8. Mn/DOT contract. "Mn/DOT contract" means a written instrument containing the elements of offer, acceptance, and consideration to which the Minnesota Department of Transportation is a party, for which competitive bids are required or taken, and which is subject to the approval of the commissioner.

Subp. 9. Person. "Person" means a natural person or a business.

Subp. 10. Principal. "Principal" means an officer, director, partner, or employee of a business, or a shareholder engaged in management of the business.

Subp. 11. Suspend. "Suspend" means to temporarily disqualify from entering into or receiving a Mn/DOT contract or from serving as a subcontractor or material supplier under a Mn/DOT contract.

1230.3200 GROUNDS FOR DEBARMENT.

Subpart 1. Contract crime. A business must be debarred upon conviction in any jurisdiction, of the business or a principal of the business, for commission of a contract crime or when a conviction is imputed to the business under part 1230.3300.

Subp. 2. Violation of antitrust laws. A business must be debarred upon conviction in any jurisdiction, of the business or a principal of the business, for violating Minnesota Statutes, sections 325D.49 to 325D.66 or federal antitrust laws, or when a conviction is imputed to the business under part 1230.3300.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

1230.3300 LIABILITY OF INDIVIDUAL IMPUTED TO BUSINESS.

The conviction of a person for offenses listed in part 1230.3200 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 and in the course of employment or with the knowledge, approval, acquiescence, or subsequent ratification of the conduct by the business.

1230.3400 DEBARMENT PROCEDURE.

A business must be debarred by the Minnesota Department of Transportation when one or more of the grounds set forth in part 1230.3200 are established at a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

1230.3500 TERM OF DEBARMENT.

The administrative law judge shall recommend and the commissioner of transportation shall establish the term of debarment. The term of debarment depends upon: the seriousness of the grounds; whether restitution has been made; whether the debarred person cooperated in civil or criminal lawsuits; and the state's need to preserve the competitive bidding process.

1230.3600 DEBARMENT BASED ON AFFILIATION.

Subpart 1. Liability of business imputed to individual. The conviction of a business in any jurisdiction, for offenses listed in part 1230.3200 is imputed to any principal or other person associated with the business subject to debarment or suspension, who participated in, knew of, or had reason to know of the conduct.

Subp. 2. Debarment. A business must be debarred when it:

A. employs a former principal of a debarred or suspended business or person described in subpart 1 as an officer, director, manager, or in another significant decision-making capacity;

B. is owned by or associated in a joint venture with a debarred or suspended business or is controlled by a former principal of a debarred or suspended business; or

C. is a business in which a former principal of a debarred or suspended business has a significant financial interest and the former principal has the authority to or will control, direct, manage, or influence any activities of the business with respect to the Mn/DOT contract in question.

Subp. 3. Procedure. A business described in subpart 2 must be debarred after a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 4. Duration. The period of debarment must be the same as that of the debarred former principal or business.

1230.3700 DEBARMENT LIMITATION.

A person may not be debarred for more than three years for conduct which gave rise to the grounds for debarment. If new or different grounds arise, a new debarment hearing must be held.

1230.3800 EFFECTIVE DATE OF DEBARMENT.

A debarment takes effect on the date of the mailing of the order for debarment by the Minnesota Department of Transportation. The order for debarment must be sent by certified mail.

1230.3900 TERMINATION OF DEBARMENT OR AWARD DURING DEBARMENT.

The commissioner of transportation may terminate a debarment by order or may award a Mn/DOT contract to a debarred or suspended business when:

A. that business is the sole supplier of a material or service required by the Minnesota Department of Transportation;

B. the commissioner of transportation determines that an emergency exists as defined in Minnesota Statutes, section 161.32, subdivision 3; or

C. the commissioner of administration determines that an emergency exists as defined in Minnesota Statutes, section 16.06, subdivision 2.

1230.4000 CONTINUATION OF CONTRACTS.

Contracts in existence at the time of debarment or suspension are not terminated by the debarment or suspension except as provided in part 1230.1200.

1230.4100 PROHIBITIONS.

Subpart 1. Mn/DOT contracts. Except as provided in part 1230.3900, the Department of Transportation may not award a Mn/DOT contract to a debarred or suspended person and may not approve a contract under which a debarred or suspended person will serve as a subcontractor or material supplier.

Subp. 2. Subcontracts and purchase of materials. Except as provided in part 1230.3900, a contractor to whom a Mn/DOT contract has been awarded by the Minnesota Department of Transportation may not subcontract with or purchase materials or services from a debarred or suspended person for performance of that contract.

1230.4200 SUSPENSION.

Subpart 1. Order of suspension. The commissioner of transportation shall suspend a person or business by order upon receiving notice or learning of a conviction for conduct described in part 1230.3200 or upon learning of an affiliation described in part 1230.3600, subpart 2.

Subp. 2. Commencement of proceedings. The commissioner of transportation shall start debarment proceedings within ten days of the mailing of the suspension order.

Subp. 3. Notice and content. The order for suspension must describe the reason for suspension and must be sent by certified mail to the person suspended.

Subp. 4. Effective date of suspension; term. The order for suspension takes effect on the date the order is mailed. No suspension may exceed 60 days.

1230.4300 NOTICE TO PUBLIC.

Subpart 1. Notice to commissioner. The Minnesota Department of Transportation shall provide to the commissioner a copy of each suspension, debarment, or termination order on the same day that the order is mailed to the debarred or suspended person.

Subp. 2. Publication. The commissioner shall publish weekly, in the *State Register*, a list of debarred and suspended persons, the effective date of each suspension and debarment, and the term of each debarment. The commissioner shall also publish notice of debarment terminations under part 1230.3900 and the effective date of the termination.

Department of Agriculture
Agronomy Services Division

Proposed Amendments to Rules Governing Pesticides

Notice of Intent to Amend Rules without a Public Hearing

Notice is hereby given that the Minnesota Department of Agriculture proposes to amend the above-entitled rules without a public hearing. The Commissioner of Agriculture has determined that the proposed adoption of these amendments will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes, Sections 14.21-14.28 (1982).

Persons interested in these rules are encouraged to submit comment in support of or in opposition to the proposed amendments, and shall have 30 days to do so. Each comment should identify the portion of the proposed amendments addressed, the reason for the comment, and any change proposed. The proposed amendments may be modified if the modifications are supported by the data and views submitted to the department and do not result in a substantial change in the proposed language.

Unless 25 or more persons submit written requests for a public hearing on the proposed rules within the 30-day comment period, a public hearing will not be held. Persons requesting a public hearing should state their name and address, and are encouraged to identify the portion of the proposed rules addressed, the reason for the request, and any proposed change. In the event a public hearing is required, the department will proceed according to the provisions of Minnesota Statutes, Sections 14.11-14.20 (1982).

Persons who wish to submit comments or a written request for a public hearing should submit them to: Gerald Heil, Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, MN 55107, (612) 296-1486.

Authority to adopt these rules is contained in Minnesota Statutes, Section 18A.43, Subd. 1. Additionally, a Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed amendments and

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identifies the data and information relied upon to support the proposed amendments has been prepared and is available upon request from Mr. Heil.

Upon adoption of the final amended rules without a public hearing, the proposed rules, this notice, the Statement of Need and Reasonableness, all written comments received, and the final rules as adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as adopted, should submit a written statement of such request to Mr. Heil.

The Commissioner is authorized by Minnesota Statutes, Section 18A.43, Subd. 1 to promulgate rules for proper enforcement of Minnesota Statutes, Sections 18A.21 to 18A.45. This includes regulating the use of pesticides and the designation of restricted use pesticides.

The proposed amendments to the pesticide rules would bring Minnesota's restrictions for Lindane use into conformity with federal regulations. The proposed change would allow Lindane to be sold for uses allowed by federal labeling requirements without requiring retailers to purchase a restricted use pesticide dealers license.

The proposed amendments will impact and benefit small business as defined in Minnesota Statutes, Section 14.115, because repealing Minnesota's restrictions on Lindane will allow retailers to sell the product in accordance with federal regulations and lessen state licensing and record keeping burdens.

Please be advised that Minnesota Statutes, Chapter 10A requires each lobbyist to register with the State Ethical Practices Board within five (5) days after he or she commences lobbying. A lobbyist is defined in Minnesota Statutes, Section 10A.01, subdivision 11 (Supp. 1979) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250.00, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250.00, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 40 State Office Building, St. Paul, MN 55155, (612) 296-5615.

One free copy of this notice and the proposed rules are available and may be obtained by contacting Mr. Heil.

August 6, 1984

Jim Nichols,
Commissioner of Agriculture

Rules as Proposed

1505.1070 RESTRICTED USE PESTICIDES.

Restricted use pesticides shall be those so classified by the administrator of the EPA. Additionally, all pesticides uses classified as restricted use by any other federal or state agency statutorily authorized to do said classification, as well as the pesticides listed in ~~parts~~ part 1505.1080 ~~and 1505.1090~~, shall, for the purposes of the administration of parts 1505.0830 to 1505.1290, be classified as restricted use pesticides.

REPEALER. Minnesota Rules, part 1505.1090 is repealed.

Department of Commerce

Proposed Rules Governing Employee Health and Disability Joint Self-Insurance

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Department of Commerce proposes to adopt the above-entitled rules without a public hearing. The Commissioner of Commerce has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes, section 14.21.

Persons interested in these rules shall have 30 days to submit comments in support of or in opposition to the rules. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed.

The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change.

No public hearing will be held unless twenty-five (25) or more persons make a written request for a hearing within the 30-day comment period. In the event a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes, section 14.14, subd. 1.

Persons who wish to submit comments or a written request for a public hearing should submit them to John Klein, Department of Commerce, 500 Metro Square Building, St. Paul, MN 55101. Any person requesting a public hearing should state her/his name and address, identify the portion of the proposed rule addressed, the reason for the request and any change proposed and send this information to the above address.

Authority for the adoption of these rules is contained in Minnesota Statutes, section 60H.06. Additionally, a Statement of Need and Reasonableness describing the need for and reasonableness of each provision and identifying the data and information relied upon to support the proposed rules has been prepared and is available upon request.

Upon adoption of the final rules without a public hearing, the proposed rules, this notice, the Statement of Need and Reasonableness, all written comments received, and the final rules as adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to Robin Hanson, Department of Commerce, 500 Metro Square Bldg., St. Paul, MN 55101.

A copy of the proposed rules is attached to this notice.

Copies of this notice and the proposed rules are available and may be obtained by contacting Robin Hanson at the above address.

Michael A. Hatch
Commissioner of Commerce

Rules as Proposed (all new material)

CHAPTER 2765
DEPARTMENT OF COMMERCE
EMPLOYEE HEALTH AND DISABILITY JOINT SELF-INSURANCE PLANS

2765.0100 DEFINITIONS.

Subpart 1. Scope. For the purposes of parts 2765.0100 to 2765.1500, the terms defined in this part have the meanings given them.

Subp. 2. Board. "Board" means a plan's board of trustees.

Subp. 3. Bylaws. "Bylaws" means the statements adopted by a plan that prescribe its purpose, government, and administration.

Subp. 4. Commissioner. "Commissioner" means the commissioner of the Department of Commerce.

Subp. 5. Coverage. "Coverage" means the right of a covered person to benefits provided directly or indirectly by a plan, by virtue of the coverage document.

Subp. 6. Coverage document. "Coverage document" means the document specifying the characteristics and duration of coverage provided through a plan.

Subp. 7. Covered employee. "Covered employee" means a plan member's employee who is covered through the plan, and a plan member's former employee receiving continued coverage under Minnesota Statutes, section 62A.17, subdivisions 1 to 5. "Covered employee" does not include dependents or other persons included under the coverage extended to a plan member's current or former employee.

Subp. 8. Days. "Days" means calendar days.

Subp. 9. Financial administrator. "Financial administrator" means an entity employing persons trained and experienced in money management and investments, and possessing no less than five years experience as an organization with demonstrated competence in money management and investments.

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Subp. 10. Fund year. "Fund year" means a plan's fiscal year, and must be the calendar year.

Subp. 11. Incurred basis stop-loss insurance. "Incurred basis stop-loss insurance" means the aggregate excess stop-loss insurance required by part 2765.1300, if on an incurred basis. The insurance is on an incurred basis if payments are charged against a fund year's deductible according to when liability for the payment was incurred.

Subp. 12. Insurer. "Insurer" means an insurance company licensed under Minnesota Statutes, section 60A.07, subdivision 4, and authorized by Minnesota Statutes, section 60A.06 to write sickness and disability insurance, or a service plan corporation licensed under Minnesota Statutes, section 62C.08.

Subp. 13. Member. "Member" means an employer that belongs to or participates in a plan. Reference to actions of a member includes actions on behalf of the member's covered employees and other covered persons.

Subp. 14. Paid basis stop-loss insurance. "Paid basis stop-loss insurance" means the aggregate excess stop-loss insurance required by part 2765.1300, if on a paid basis. The insurance is on a paid basis if payments are charged against a fund year's deductible according to when the payment was made.

Subp. 15. Plan. "Plan" means a joint self-insurance employee benefit plan approved under parts 2765.0100 to 2765.0250. Reference to actions of a plan includes actions by the plan's designated agents.

Subp. 16. Premium. "Premium" means the amount paid or to be paid for coverage by members. Premium does not include assessments or penalties.

Subp. 17. Runoff plan. "Runoff plan" means a plan that no longer has authority to self-insure, but that continues to exist for the purpose of paying claims, preparing reports, and administering transactions associated with the period when the plan provided coverage.

Subp. 18. Self-insure. "Self-insure" means to assume primary liability or responsibility for certain risks or benefits, rather than transferring liability or responsibility to some other entity.

Subp. 19. Separate employer. "Separate employer," for the purposes of meeting the minimum three-employer requirement, means an employer that is not the parent, subsidiary, or affiliate with a common parent of any other employer in the plan.

Subp. 20. Service company. "Service company" means an entity licensed under Minnesota Statutes, section 60A.23, subdivision 8 and rules adopted thereunder as a self-insurance plan administrator, or an entity named in Minnesota Statutes, section 60A.23, subdivision 8, paragraph (1), clause (a) or (b).

Subp. 21. Short-term disability benefit. "Short-term disability benefit" means income replacement payments of not more than one year's duration.

2765.0200 PURPOSE.

Parts 2765.0100 to 2765.1500 govern the formation, operation, and dissolution of multiple employer plans for joint self-insurance of employee health, dental, or short-term disability benefits. They are intended to ensure that the financial integrity of these plans is maintained, and that they are administered competently and equitably.

2765.0300 SCOPE.

The following are subject to the requirements of parts 2765.0100 to 2765.1500:

A. employers authorized to transact business in Minnesota that seek to jointly self-insure employee health, dental, or short-term disability benefits;

B. service companies that provide services to a plan; and

C. insurance companies licensed under Minnesota Statutes, section 60A.07, subdivision 4, or service plan corporations licensed under Minnesota Statutes, section 62C.08, that provide required stop-loss insurance to a plan.

2765.0400 BYLAWS.

Subpart 1. Content. Bylaws may contain any provisions that do not conflict with parts 2765.0100 to 2765.1500. Bylaws must, at a minimum, contain the following provisions:

A. the plan's name, purpose, and initial date of existence;

B. definitions of key terms;

C. a statement of the powers, duties, and responsibilities assigned to the board, the service company, and the financial administrator, and reserved to the membership;

D. the number, term of office, method of selection, and method of replacement of the members of the board;

E. the procedure for calling board meetings;

F. the method of periodic selection and review of the service company and financial administrator;

G. the procedure for amending the bylaws;

H. the procedure for resolving disputes among members, which must not include submitting disputes to the commissioner;

I. the criteria for membership in the plan, including standards of financial integrity and loss experience;

J. the procedure for admitting new members to the plan;

K. the criteria for expelling members from the plan, including nonpayment of premium;

L. the procedure for withdrawal and expulsion of members from the plan, including the minimum required period of membership;

M. a statement of the coverages the plan intends to provide;

N. the procedure for adding and dropping a member's participation in a particular coverage;

O. a schedule for premium payments by members and, if applicable, their employees;

P. the procedure for changing premium rates;

Q. the procedure for levying and collecting an assessment;

R. a statement of who may have access to plan funds and for what purposes;

S. the procedure for distributing dividends, and the eligibility of past members and past covered employees for dividends; and

T. the procedure for distributing assets remaining upon the plan's dissolution.

Subp. 2. Adoption and changes. The bylaws must be adopted in writing by all initial members. Authority to change the bylaws must reside with the membership or the board, according to the terms of the bylaws. Authority to change the bylaws may not be delegated to a contractor or other outside party. The plan must file bylaw changes with the commissioner not less than 30 days after adoption.

2765.0500 BOARD.

Subpart 1. Structure. A plan must have a board of trustees consisting of officials or employees of the members. No member may have more than one representative on the board. No trustee may be an employee, agent, or representative of the plan's service company, financial administrator, insurer, or other person or entity under contract with the plan. Trustees shall be elected by vote of the membership. There shall be an odd number of trustees, with staggered terms to provide continuity. One trustee shall be designated the chairperson. The board shall meet no less than four times annually.

Subp. 2. Duties. The board is responsible for operation of the plan. The board may delegate some or all of its responsibilities to the chairperson or other trustees between board meetings. All responsibilities of the plan not expressly delegated by the board or parts 2765.0100 to 2765.1500 are the responsibility of the board. The board shall, at a minimum, have the following responsibilities:

A. fiduciary responsibility for the plan's operation and financial condition;

B. selection, supervision, and evaluation of the service company, financial administrator, accountant, insurer, and any other contractors;

C. on the basis of the plan's overall financial condition, authorizing changes in premium, reserve, or investment practices; and declaring assessments or dividends as appropriate;

D. approving all reports concerning the plan's operations and status to the commissioner and the members;

E. monitoring delinquent premiums, loss experience, and the financial condition of individual members; and authorizing disciplinary action or expulsion as appropriate;

F. authorizing acceptance or rejection of applications for membership;

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G. as permitted by the bylaws, making or recommending changes to the bylaws for the improvement of the plan's operation and financial integrity; and

H. monitoring the plan's compliance with all statutes and rules governing its operation.

2765.0600 APPLICATION.

Subpart 1. Initial application. Three or more separate employers may apply to the commissioner for authority to form a joint self-insurance plan, using forms available from the commissioner. Applications must be submitted not later than 60 days prior to the requested date for authority to self-insure. All reinsurance contracts must be submitted not later than 30 days prior to the requested date. Applications submitted without responses to certain questions, or with responses that are inadequate must be returned to the applicant for resubmission. Applications not returned to the applicant for resubmission within 14 days of receipt must be approved or disapproved within 60 days of receipt.

Subp. 2. Renewal application. Existing plans may apply for renewal of their self-insurance authority by so indicating on their annual status report preceding expiration of their current authority. Applications must be approved or disapproved within 60 days of receipt of the status report.

Subp. 3. Exemptions. Joint self-insurance plans that offer a program of coverage qualified under the Employees Retirements Income Security Act (ERISA), United States Code, title 29, sections 1001 et seq., are exempted from parts 2765.0100 to 2765.1500 upon filing with the commissioner notice of this qualification from the United States Department of Labor.

Subp. 4. Merger. Two or more existing plans may apply to merge if the new plan assumes all obligations of the former plans. Merger applications are subject to the same requirements as prospective new plans.

Subp. 5. Approval and disapproval. Upon approval of an application, the commissioner shall issue an order authorizing the proposed joint self-insurance plan. Initial authorization orders for new plans are effective until the third May 1st after the initial authorization date. Renewal authorization orders are for two-year periods commencing May 1st. Approval of applications for authority to self-insure must be granted if the proposed plan conforms with:

A. all requirements of parts 2765.0100 to 2765.1500;

B. all applicable requirements of Minnesota Statutes, chapters 62A and 62E, and related rules, as described in part 2765.1000, subpart 1;

C. Minnesota Statutes, sections 72A.19 to 72A.32; and

D. other applicable Minnesota statutes and rules.

2765.0700 ENDING SELF-INSURANCE, RUNOFF PERIOD, AND PLAN DISSOLUTION.

Subpart. 1. Ending self-insurance authority. A plan may decide to end its self-insurance authority and cease to provide coverage, effective at the end of a fund year. The plan must notify the commissioner within 14 days of such a decision. A plan may not elect to end its self-insurance authority less than 45 days prior to the end of the fund year in question. Voluntary ending of self-insurance authority does not constitute plan dissolution under subpart 4.

Subp. 2. Revocation of self-insurance authority. The commissioner shall, by order, revoke the authority of a plan to self-insure upon ten-days written notice if any of the following events occur or conditions develop, and if the commissioner judges them to be material:

A. failure of the plan to comply with parts 2765.0100 to 2765.1500; with all applicable requirements of Minnesota Statutes, chapters 62A, 62D, 62E, and related rules, as described in part 2765.1000, subpart 1; or with other applicable Minnesota statutes or rules;

B. failure of the plan to comply with any lawful order of the commissioner;

C. commission by the plan of an unfair or deceptive practice as defined in Minnesota Statutes, sections 72A.17 to 72A.32, or in related rules; or

D. a deterioration of the plan's financial integrity to the extent that its present or future ability to meet obligations promptly and in full is or will be significantly impaired.

Subp. 3. Runoff period. A plan shall continue to exist as a runoff plan after its authority to self-insure has ended, for the purpose of paying claims, preparing reports, and administering transactions associated with the period when the plan provided coverage. A runoff plan must continue to comply with all appropriate provisions of parts 2765.0100 to 2765.1500, and with all other applicable Minnesota statutes and rules. Authority to exist as a runoff plan is open-ended, and does not require renewal of authority under part 2765.0600, subpart 2.

Subp. 4. Dissolution. A plan, including a runoff plan, that desires to cease existence shall apply to the commissioner for authorization to dissolve. Applications must be approved or disapproved within 60 days of receipt. Dissolution without

authorization is prohibited and void, and does not absolve a plan or runoff plan from fulfilling its continuing obligations, and does not absolve its members from assessment under part 2765.1400, subpart 6. The plan's assets at the time of dissolution must be distributed to the members and covered employees as provided in the bylaws. Authorization to dissolve must be granted if either of the following conditions are met:

A. the plan demonstrates that it has no outstanding liabilities, including incurred but not reported liabilities; or

B. the plan has obtained an irrevocable commitment from a licensed insurer that provides for payment of all outstanding liabilities, and for providing all related services, including payment of claims, preparation of reports, and administration of transactions associated with the period when the plan provided coverage.

2765.0800 ADMINISTRATION.

Subpart 1. Service company. A plan must contract with a service company for services necessary to the plan's day-to-day operations, except services and responsibilities reserved to the members, the board, individual trustees, the financial administrator, or other contractors. The service company must have expertise in and be licensed for administering health benefits. Subject to the oversight of the board, the service company shall, directly or through subcontractors, provide all services directly related to the administration of coverage. These services include but are not limited to:

A. accounting and recordkeeping;

B. billing and collection of premiums and assessments;

C. claims investigation, settlement, and reserving;

D. claims payment, including claims wholly or partially subject to stop-loss insurance or member deductibles;

E. general administration;

F. loss control, safety programs, or both; and

G. underwriting.

Subp. 2. Financial administrator. A plan must contract with a financial administrator for investment of the plan's assets and other financial or accounting services. No staff members of the financial administrator may be an owner, officer, employee, or agent of the service company, or of a subcontractor of the service company.

Subp. 3. Recordkeeping. A plan must maintain within the state of Minnesota all records necessary to verify the accuracy and completeness of all reports submitted to the commissioner under part 2765.1500. The commissioner may examine the plan's records in order to ascertain the plan's compliance with parts 2765.0100 to 2765.1500, and with other applicable statutes and rules. All records concerning claims, reserves, financial transactions, and other matters necessary to the plan's operations are the plan's property.

2765.0900 MEMBERSHIP.

Subpart 1. Availability. Plan membership is available only to employers domiciled and authorized to transact business in Minnesota. A plan may establish other nondiscriminatory criteria for membership. Nothing in these rules requires a plan to offer membership to an employer that does not meet the plan's underwriting standards.

Subp. 2. Joining. New members must be admitted according to the standards and procedures specified in the bylaws. Membership is not effective before the applicant has signed a membership agreement affirming its commitment to comply with the bylaws and parts 2765.0100 to 2765.1500. The membership agreement must disclose that under the rules governing this plan, the Minnesota commissioner of commerce may order that an assessment be levied against member employers, if necessary to maintain the plan's sound fiinancial condition.

Subp. 3. Leaving. The membership agreement must state the procedures for leaving the plan. A member must notify the plan of its desire to withdraw not less than 30 days before the date upon which it desires to withdraw. If the board determines that the withdrawal would cause the plan to be in violation of the minimum number of employers and covered employees requirement of Minnesota Statutes, section 62H.01, or any other requirement of parts 2765.0100 to 2765.1500 the plan shall notify the commissioner as required under subpart 5. Withdrawal from a plan is prohibited and void unless:

A. the member will have belonged to the plan continuously:

(1) until the end of the current fund year; or

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(2) until the end of the succeeding fund year for new members that join in the last three months of the fund year; or

(3) for a longer period if required by the bylaws; and

B. all outstanding premiums and assessments owed by the member have been paid.

Subp. 4. Expulsion. At least annually the plan shall review the status and experience of each member by comparison with the criteria for expulsion in the bylaws. Expulsion is subject to the procedures and requirements for voluntary withdrawal of a member, except that:

A. a member may be expelled with outstanding premiums or assessments owing; and

B. a member may be expelled notwithstanding that the minimum term of membership has not been satisfied.

Subp. 5. Minimum covered employees and employers. A plan shall monitor the number of employees it covers. If the number of covered employees is less than 300, the plan shall notify the commissioner at monthly intervals of the number of covered employees, until the number exceeds 300 for two consecutive months. If the number of covered employees becomes less than 250, or the number of members becomes less than three, the plan shall notify the commissioner:

A. of its intent to end its self-insurance authority; or

B. of its proposal for restoring compliance with Minnesota Statutes, section 62H.01.

If the proposal is unlikely, in the commissioner's judgment, to restore compliance within 90 days, or if after 90 days the plan continues to have less than 250 covered employees or less than three members, the commissioner shall revoke the plan's self-insurance authority.

Subp. 6. Runoff plan membership. After revocation of a plan's self-insurance authority, or after a plan notifies the commissioner in writing of its intent to end self-insurance authority voluntarily, no member may join, leave, or be expelled from the plan.

2765.1000 COVERAGE.

Subpart 1. Coverage administration and related requirements. Plans are subject to the requirements of Minnesota statutes and rules applicable to insurance companies providing insurance in Minnesota similar to the plan's coverage. These include requirements concerning coverage content, coverage administration, rates, underwriting, and related matters, including but not limited to:

A. the requirements of Minnesota Statutes, section 60A.082, and related rules, as applicable to group medical expense insurance and group disability income insurance;

B. the requirements of Minnesota Statutes, chapter 62A, and related rules, as applicable to group accident and health insurance as defined in Minnesota Statutes, section 62A.10, including but not limited to:

(1) filing and requesting approval for coverage documents and rates;

(2) coverage document language requirements;

(3) mandated benefits;

(4) employee notice requirements;

(5) requirements to offer continuation of coverage to employees and other covered persons; and

(6) requirements to offer conversion coverage through licensed insurers or health maintenance organizations to employees and other covered persons;

C. the requirements of Minnesota Statutes, sections 62A.23 and 62A.24, and related rules, as applicable to group disability income insurance;

D. the requirements of Minnesota Statutes, sections 62A.31 to 62A.42, and related rules, as applicable to insurance covering persons covered by medicare; and

E. the requirements of Minnesota Statutes, chapter 62E, and related rules, as applicable to plans of health coverage as defined in Minnesota Statutes, section 62E.02, subdivision 9.

Subp. 2. Coverage to individuals. Joint self-insurance plans shall not offer coverage to individuals other than members' employees and their dependents, except as required following termination of employment under Minnesota Statues, section 62A.17, subdivisions 1 to 5. Plans must comply with the conversion coverage requirements of Minnesota Statutes, sections 62A.17, subdivision 6, and 62E.16, by arrangements with licensed insurers or health maintenance organizations.

Subp. 3. Health maintenance organization coverage. A plan may arrange for covered persons to have an option of health

maintenance organization coverage, including employees of employers required to provide such an option by Minnesota Statutes, section 62E.17. Such an arrangement must be through a licensed health maintenance organization.

Subp. 4. Uniform underwriting. All coverages offered by a plan must be available according to the same underwriting standards to all employees of all members.

Subp. 5. Term of coverage. A plan shall not commit itself to providing coverage for any period which extends beyond the term of any stop-loss insurance policies required under part 2765.1300.

Subp. 6. Continuing responsibility. Notwithstanding cancellation or termination of coverage to a particular member, ceasing to offer a particular coverage, or ending or revocation of authority to self-insure, a plan retains indefinitely all responsibilities to covered employees and other covered persons associated with the period while coverage was in force. This responsibility ceases only after a plan dissolves under part 2765.0700, subpart 4.

2765.1100 PREMIUMS AND DIVIDENDS.

Subpart 1. Premium payments. The fund year must be the basis for calculating members' premiums. A plan may permit installment payments if payment is always due before premium is to be earned. Any delinquencies in payments by employees must be paid on their behalf by the employer, with the employer having the right to seek reimbursement from the employee. A plan shall promptly take appropriate action to collect any members' premiums or assessments that are past due. Collection costs are the obligation of the delinquent member. Payments determined to be uncollectible must be presented to the stop-loss insurer for reimbursement, as required by part 2765.1300, subpart 4.

Subp. 2. Dividends. A plan may declare and pay a dividend or distribution from its surplus only if:

A. the dividend would not cause the plan's surplus to be negative;

B. the plan does not have a stop-loss aggregate advancement liability; and

C. the dividend is apportioned on the basis of the relative amounts of premium paid by members and covered employees, and provides for proportional payments to members and covered employees.

2765.1200 RESERVES.

Subpart 1. Loss and premium reserves. A plan must establish reserves for all incurred losses, both reported and unreported, and for unearned premiums. To the extent that the amount of a loss is uncertain, reserves must be set conservatively. As the degree of uncertainty concerning a loss is changed by new events or information, the amount of the reserve must be changed appropriately. Accounting for reserves must be as required by the financial statement forms and instructions, under part 2765.1500, subpart 1.

Subp. 2. Full funding reserves. To comply with the full funding requirement of Minnesota Statutes, section 62H.02, a plan must establish full funding reserves corresponding to its aggregate excess stop-loss insurance for each fund year.

A. The amount of the reserves must be calculated as required by the financial statement forms and instructions, under part 2765.1500, subpart 1. The forms and instructions must provide that the base amount of the full funding reserves is equal to the plan's maximum possible liability under the aggregate excess stop-loss insurance, with credits for:

(1) individual excess stop-loss insurance reimbursements; and

(2) losses paid and reserves expected to be chargeable against the aggregate excess stop-loss insurance deductible.

B. Separate full funding reserves must be maintained for each fund year, beginning at the fund year's inception. Plans with paid basis stop-loss insurance must maintain each year's full funding reserve until 90 days after the fund year's end. Plans with incurred basis stop-loss insurance must maintain each year's full funding reserve until one year after the fund year's end.

C. Plans with paid basis stop-loss insurance must also maintain a separate runoff full funding reserve. The runoff reserve's purpose is to fully fund the plan's liability in the event of stop-loss insurance non-renewal. The runoff full funding reserve must be maintained until plan dissolution.

Subp. 3. Surplus or aggregate advancement. A plan must protect itself from cash flow difficulties by either of the following two methods.

A. Establishing and maintaining a surplus equal to the greater of:

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(1) three times the average paid monthly premium during the most recent fund year;

(2) three times estimated monthly premium, for plans that do not yet have one fund year's experience; or

(3) $100,000.

B. Obtaining language in the plan's aggregate excess stop-loss insurance policy requiring the insurer to advance funds to the plan under the conditions prescribed by this item. Any funds so advanced must be included in the fund-year settle-up calculation under the stop-loss insurance terms, if not previously repaid. No limit may be set on the amount of funds that the plan may require to be advanced. The policy language must include these sentences: "If, in good faith, the plan judges that it is suffering, or will soon suffer cash flow difficulties, to the extent that its ability to meet its obligations promptly and in full is or will be significantly impaired, the plan may borrow from the insurer funds sufficient in the plan's good faith judgment to correct the difficulties. Such funds shall be considered an advance against the insurer's potential aggregate excess insurance liability for the current fund year. If, as of the final reporting for that fund year, the insurer's liability is determined to be less than the amount of the aggregate advancement, the difference shall then be considered a debt of the plan to the insurer, and reasonable interest may be charged commencing at that time. Until the final reporting, no interest may be charged. The plan shall, in good faith, repay the advance or debt as rapidly as its financial resources permit, without incurring further cash flow difficulties." The policy must not alter or qualify these terms to harm the plan's rights materially.

2765.1300 STOP-LOSS INSURANCE.

Subpart 1. Purchase and alteration. The plan must inform the commissioner at least 90 days prior to expiration of any required stop-loss insurance policy whether it intends to renew the policy, and whether the insurer is willing to renew the policy. Alteration of a required stop-loss insurance policy mid-term with the effect of reducing coverage, and cancellation by the plan mid-term, are prohibited. Required stop-loss insurance policies must be noncancellable for a minimum of two years, for any cause including nonpayment of premium. If more than one stop-loss insurance policy is obtained in fulfillment of this part's requirements, their expiration dates must be the same.

Subp. 2. Individual excess. A plan must have and maintain individual excess stop-loss insurance, that provides for the insurer to assume all liability in excess of $25,000 per person per year under all coverages the plan offers. The reporting period under this coverage must be no less than one year after the fund year's conclusion. A plan may apply to the commissioner for increasing the individual excess stop-loss insurance limit, up to $50,000. The commissioner must approve this application if the increased limit would not be detrimental to the solvency and stability of the plan, considering the plan's experience, size, surplus, and other factors affecting financial integrity.

Subp. 3. Aggregate excess. A plan must have and maintain aggregate excess stop-loss insurance that provides for the insurer to assume all liability in excess of a specified amount of losses for each fund year. The aggregate excess coverage may be in the form of incurred basis stop-loss insurance or paid basis stop-loss insurance. Plans using paid basis stop-loss insurance must have and maintain extended or runoff aggregate excess stop-loss insurance on an incurred basis. The extended or runoff coverage must provide for the insurer to assume all liability in excess of a specified amount of losses incurred while the paid basis stop-loss insurance was in force, but paid after its termination or nonrenewal. The reporting period under paid basis insurance must be no less than three months after the fund year's conclusion. The reporting period under incurred basis insurance, including extended or runoff insurance, must be no less than one year after the fund year's conclusion.

Subp. 4. Delinquencies and insolvencies. A plan must have and maintain the following language in its required aggregate excess stop-loss insurance policy: "The insurer shall, at the plan's or the commissioner's request, pay premium to the plan on behalf of a member that fails to pay due to insolvency, unauthorized withdrawal from the plan, or any other reason. The insurer may attempt to collect reimbursement from the member on whose behalf the insurer is called upon to pay premium." The policy must not alter or qualify these terms to harm the plan's rights materially.

Subp. 5. Surety coverage. A plan must have and maintain the following language in its required aggregate excess stop-loss insurance policy: "The insurer shall, at the commissioner's request, assume direct responsibility for the plan's coverage and all other responsibilities under parts 2765.0100 to 2765.1500 and related statutes, if the plan becomes insolvent, ceases operations without authorization, or otherwise fails to fulfill its responsibilities under parts 2765.0100 to 2765.1500 and related statutes. The insurer may attempt to collect reimbursement from the plan or a member on whose behalf the insurer is called upon to pay premium, pay claims, or incur other extraordinary expenses. However, the insurer must fulfill its responsibilities under this section while any collection attempts are pending. The insurer's responsibilities extend to all matters arising during or attributable to the policy period, and do not terminate with the end of the policy period." The policy must not alter or qualify these terms to harm the plan's rights materially.

Subp. 6. Return of liability. No liability or other responsibilities transferred to an insurer under this part may, directly or indirectly, be returned to a plan, a member, or a member's parent, subsidiary, or affiliate. This does not prohibit the insurer from seeking reimbursement from the plan or a member, as permitted under subparts 4 and 5.

2765.1400 FINANCIAL INTEGRITY.

Subpart 1. Fidelity bond. All contractors and individuals who handle plan funds or who will have authority to gain access to plan funds, including trustees, must be covered by a fidelity bond. The bond must cover losses from dishonesty, robbery, forgery or alteration, misplacement, and mysterious and unexplainable disappearance. The amount of coverage for each occurrence must be $300,000 or more. The plan must purchase a fidelity bond covering the required contractors and individuals, or submit separate proof of coverage for all required contractors and individuals not covered under the plan's bond.

Subp. 2. Integrity of assets. A plan's assets:

A. must not be commingled with the assets of any member;

B. must not be loaned to anyone for any purpose, or used as security for a loan, except as permitted under subpart 5 for investments;

C. must be employed solely for the purposes stated in the bylaws, and in compliance with parts 2765.0100 to 2765.1500 and related statutes; and

D. must not be considered the property or right of any member, covered employee, or other covered person, except:

(1) for benefits under the coverage documents;

(2) for dividends declared in accordance with part 2765.1100, subpart 2; and

(3) for a portion of the assets remaining after the plan's dissolution, in accordance with part 2765.0700, subpart 4.

Subp. 3. Sources and uses of funds. A plan may expend funds for payment of losses and expenses, and for other costs customarily borne by insurers under conventional insurance policies in Minnesota. Except as provided in part 2765.1200, subpart 3, item B, a plan must not borrow money or issue debt instruments. A plan may bring legal suits to collect delinquent debts. A plan must not obtain funds through subrogation of the rights of covered employees or other covered persons. A plan may receive funds only from:

A. its members as premiums, assessments, or penalties;

B. its insurers or indemnitors pursuant to insurance or indemnification agreements;

C. dividends, interest, or the proceeds of sale of investments;

D. refunds of excess payments;

E. coordination of benefits with automobile coverage, workers' compensation coverage, and other employee health benefit coverage; or

F. collection of money owed to the plan.

Subp. 4. Separate accounts. A plan may establish separate accounts for the payment of claims or certain types of expenses. These accounts must be used only by the service company, its authorized subcontractors, or the financial administrator, as appropriate to the account's purpose. The amount in these special accounts must not exceed an amount reasonably sufficient to pay the claims or expenses for which it is established. All monetary and investment assets not in these accounts must be under the control of the financial administrator.

Subp. 5. Investments. A plan's investments are subject to the requirements of Minnesota Statutes, section 475.66, as regards both permitted types of investments, maturities, and depositories. In addition, a plan must not invest in securities or debt of a member, or a member's parent, subsidiary, or affiliate; or any person or entity under contract with the plan.

Subp. 6. Monitoring financial condition. The board must regularly monitor the plan's revenues, expenses, and loss development, and evaluate its current and expected financial condition. The board must attempt in good faith to maintain or restore the plan's sound financial condition, using any means at its disposal. These means include but are not limited to adjusting premium rates, underwriting standards, dividend rates, expulsion standards, and other powers granted in parts 2765.0100 to 2765.1500 and the bylaws. If the commissioner judges that the board's actions are inadequate to maintain or restore the plan's sound financial condition, the commissioner shall, as appropriate: order an increase in the premium rates; revoke the plan's self-insurance authority; or order that an assessment be levied against the members.

Members must not require covered employees to pay a portion of an assessment, nor must covered employees be required

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to pay any amount for premium increases on coverage in force. The amount of assessments must not be more than the amount of members' most recent annual premium, including the portion paid by covered employees.

2765.1500 REPORTING.

Subpart 1. Financial statements. A plan must prepare annual financial statements containing a balance sheet; a full funding reserves calculation worksheet; a statement of revenues, expenses, and suprlus; a statement of changes in financial position; and a schedule of investments. The statements must be prepared on forms and according to instructions prescribed by the commissioner. The financial statements must be filed with the commissioner no later than 30 days after the fund year's conclusion. The financial statements must be audited by an independent certified public accountant, and an audit report must be filed with the commissioner no later than 180 days after the fund year's conclusion. A plan's first annual financial statement, and every second annual financial statement thereafter must be accompanied by a statement from a qualified actuary concerning the balance sheet items that are based on actuarial assumptions and methods. The form of the actuary's statement and the scope of the actuarial review must be according to instructions prescribed by the commissioner.

Subp. 2. Quarterly reports. A plan must file quarterly reports with the commissioner no later than 30 days after the end of the first, second, and third quarters of each fund year. Quarterly reports must contain statements of the plan's:

A. current total cash on hand and on deposit, and total investments;

B. current total reserve for unearned and advance premiums, total reserve for outstanding losses reported and unreported, total operating full funding reserve, and total runoff full funding reserve;

C. dividends declared during the quarter;

D. gross premiums written during the quarter;

E. losses paid during the quarter;

F. proximity to the aggregate excess stop-loss insurance attachment point for the current fund year and, if applicable, the past fund year;

G. current total members and covered employees; and

H. any other matters the commissioner requests that the board address.

Subp. 3. Extraordinary audits. Upon sufficient cause, the commissioner shall require a plan to investigate the accuracy of one or more entries on its financial statements or quarterly reports, and to report its findings. If necessary for the investigation's purposes, the commissioner shall require a plan to contract with a qualified actuary, claims specialist, auditor, or other specialists as appropriate to the type of entry being investigated. If warranted by investigation's findings, the commissioner shall require changes in the plan's reserving, accounting, or recordkeeping practices. These extraordinary audits are in addition to the commissioner's rights to examine self-insurance plans under Minnesota Statutes, section 60A.03, subdivisions 3, 5, and 6, and section 60A.031. Sufficient cause includes:

A. losses that appear significantly different than losses experienced by other self-insurance plans or insurance companies for similar coverage;

B. unusual changes in the amount of entries from period to period that are not sufficiently explained by the financial statements, quarterly reports, or footnotes; or

C. other indications that a plan's financial statements or quarterly reports may not accurately reflect the plan's status and transactions.

Subp. 4. Annual status report. No later than 30 days after the fund year's conclusion, a plan must file with the commissioner a statement describing any changes that have occurred in the information filed with its initial application for authority to self-insure, or with the plan's most recent status report. The status report must be filed in a form and according to instructions prescribed by the commissioner.

Subp. 5. Penalty. The financial statements and status report required under subparts 1 and 4 are considered together to be a plan's annual statement. This filing and other filings required by parts 2765.0100 to 2765.1500 and related statutes are subject to Minnesota Statutes, section 72A.061, as applicable to licensed insurance companies for comparable filings.

Subp. 6. Revenue fee. No later than 60 days after each fund year's conclusion, a plan must file a report with the commissioner of revenue disclosing the total amount of claims paid during the fund year, with no deduction for claims wholly or partially reimbursed through stop-loss insurance. The report must be filed on a form available from the commissioner of revenue. At the time of filing the report, the plan shall pay the fee required by Minnesota Statutes, section 62H.07, to the commissioner of revenue in the amount of two percent of the total amount of claims paid during the fund year, with no deduction for claims wholly or partially reimbursed through stop-loss insurance.

Department of Commerce

Proposed Rule Governing Savings Associations' Branch Offices

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Department of Commerce proposes to adopt the above-entitled rules without a public hearing. The Commissioner of Commerce has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minnesota Statutes, section 14.21.

Persons interested in these rules shall have 30 days to submit comments in support of or in opposition to the rules. Comments are encouraged. Each comment should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. The proposed rules may be modified if the modifications are supported by the data and views submitted to the agency, and do not result in a substantial change in the proposed language.

No public hearing will be held unless twenty-five (25) or more persons make a written request for a hearing within the 30-day comment period. In the event a public hearing is required, the agency will proceed according to the provisions of Minnesota Statutes, section 14.14, subd. 1.

Persons who wish to submit comments or a written request for a public hearing should submit them to Allyn R. Long, Assistant Commissioner, Department of Commerce, 500 Metro Square Building, St. Paul, MN 55101. Any person requesting a public hearing should state her/his name and address, identify the portion of the proposed rule addressed, the reason for the request and any change proposed and send this information to the above address.

Authority for the adoption of these rules is contained in Minnesota Statutes, section 46.01, subd. 2. Additionally, a Statement of Need and Reasonableness describing the need for and reasonableness of each provision and identifying the data and information relied upon to support the proposed rules has been prepared and is available upon request from Allyn Long.

Upon adoption of the final rules without a public hearing, the proposed rules, this notice, the Statement of Need and Reasonableness, all written comments received, and the final Rules as Adopted will be delivered to the Attorney General for review as to form and legality, including the issue of substantial change. Persons who wish to be advised of the submission of this material to the Attorney General, or who wish to receive a copy of the final rules as proposed for adoption, should submit a written statement of such request to Linda Phillips, Department of Commerce, 500 Metro Square Bldg., St. Paul, MN 55101.

A copy of the proposed rule is attached to this notice.

Copies of this notice and the proposed rule are available and may be obtained by contacting Linda Phillips at the above address.

Michael A. Hatch
Commissioner of Commerce

Rule as Proposed

2675.3160 BRANCH OFFICES.

Subpart 1. Authorizing resolution. A savings association may make an application to establish a branch office ~~only in the manner prescribed herein. An association which desires to establish a branch office shall, by resolution of its board of directors, authorize the establishment of such office at a specified location. The president and secretary of the association, or its other presiding and recording officers, shall execute a certificate embracing, under the corporate seal of the association, the resolution of the board of directors authorizing the establishment of such branch office, and shall execute and acknowledge an application, in writing, in the form prescribed by the Banking Division, requesting a certificate authorizing the association to establish a branch office at the location stated in the application. The certificate embracing the resolution and the application shall be filed with the commissioner of banks~~. The application must be in writing in the form prescribed by the Department of Commerce and submitted to the commissioner of commerce.

Subp. 2. Summary denial. The commissioner shall ~~summarily~~ deny such application if it is determined that any of the following conditions exist:

A. the location of the proposed branch office is more than 100 miles from home office of the association on the effective date of this part; ~~the association has been transacting business for a period of less than three years; or~~

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B. the commissioner has granted, within one year preceding the filing of the application, another application by the association under this section for a certificate authorizing it to establish a branch office;

C. the commissioner has denied, other than summarily, within one year preceding the filing of the application, another application by the association under this part for a certificate authorizing it to establish a branch office at the same location or within the immediate vicinity thereof; or

D. the association has filed with the commissioner another application for a certificate authorizing it to establish a branch office with respect to which action by the commissioner is pending.

If the commissioner summarily denies such application, he shall serve the order of summary denial upon the association by mail at its principal place of business.

Subp. 3. to 7. [Unchanged.]

Housing Finance Agency

Proposed Rules Amending the Solar Energy and Energy Conservation Bank Programs

Notice of Intent to Adopt Rules without a Public Hearing

Notice is hereby given that the Minnesota Housing Finance Agency ("agency") proposes to adopt the above-entitled rules without a public hearing. The agency has determined that the proposed adoption of these rules will be noncontroversial in nature and has elected to follow the procedures set forth in Minn. Stat. § 14.21 to 14.28.

Persons interested in these rules shall have 30 days to submit comments in support of or in opposition to the proposed rules within the 30-day comment period. Such comments are encouraged, and should identify the portion of the proposed rule addressed, the reason for the comment, and any change proposed. The proposed rule may be modified as the result of comments received if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language. Unless twenty-five or more persons submit written requests for a public hearing on the proposed rule within the 30-day comment period, a public hearing will not be held. In the event a public hearing is required, the agency will proceed according to the provisions of Minn. Stat. § 14.14 *et. seq.* Any person requesting a public hearing should state his or her name and address, and is encouraged to identify the portion of the proposed rule addressed, the reason for the request, and any change proposed.

Persons who wish to submit comments or a written request for a public hearing should submit such comments or request to:

Kathleen J. Johnson
Legal Division
Minnesota Housing Finance Agency
Suite 200
333 Sibley Street
St. Paul, Minnesota 55101
Telephone: 612/296-9793

Authority for the adoption of these rules is contained in Minn. Stat. § 462A.06, Subd. 4 and 11. Additionally, a Statement of Need and Reasonableness that describes the need for and reasonableness of each provision of the proposed rules, and that identifies the data and information relied upon to support the proposed rules has been prepared and is available from Kathleen J. Johnson upon request.

Upon adoption of the final rules without a public hearing, the proposed rules, this notice, the Statement of Need and Reasonableness, all written comments received, the final rules as adopted will be delivered to a designee of the Attorney General for review as to form and legality, including the issue of substantial change, and to determine whether the agency has the authority to adopt the rules and whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules. Persons who wish to receive notice of the date of submission of these rules to the Attorney General for review, or who wish to receive a free copy of the final rules as adopted, should make such requests to Kathleen J. Johnson.

A copy of the proposed rule is attached to this notice. Additional copies may be obtained by contacting Kathleen J. Johnson.

Please be advised that Minn. Stat. Ch. 10A.03 requires each lobbyist to register with the State Ethical Practices Board within five (5) days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, Subd. 11 as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who

spends more than five hours in any month or more than $250.00, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250.00, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, (612) 296-5615.

August 17, 1984

James J. Solem
Executive Director

Rule as Proposed

4900.1630 ENERGY CONSERVATION DEFERRED LOAN AND GRANT PROGRAM.

Subpart 1. Additional recipient eligibility criteria. In addition to meeting the applicable eligibility criteria in Code of Federal Regulations, title 24, section 1800.63, a deferred loan or grant recipient:

A. shall own and occupy the one-to-four family residential building, as defined in Code of Federal Regulations, title 24, section 1800.3, to be improved with the proceeds of a deferred loan and bank assistance or a grant and bank assistance; and

B. shall not be seeking, have a current commitment for, or be able to obtain within a reasonable period of time, assistance for the same eligible energy conservation improvements under subpart 5 from any of the following programs: federal Weatherization Program under United States Code, title 42, section 6863; ~~agency home improvement loan program under parts 4900.0510 and 4900.0520;~~ and agency home improvement grant and rehabilitation loan programs under parts 4900.0610 to 4900.0700~~; and energy conservation assistance programs available from local entities~~.

Subp. 2. to 9. [Unchanged.]

Department of Human Services

Proposed Emergency Rules Relating to Special Needs Rate Exception for Very Dependent Persons with Special Needs

Notice of Intent to Adopt Emergency Rules

The State Department of Human Services proposes to adopt the above-entitled emergency rules to implement Minnesota Statutes, Section 256B.501, Subd. 8.

Persons interested in these rules have until 4:30 p.m., September 14, 1984 to submit written comments. The proposed emergency rules may be modified if the modifications are supported by the data and views submitted to the agency and do not result in a substantial change in the proposed language. Written comments should be sent to:

Susan Canine
Department of Human Services
4th Floor, Centennial Office Building
St. Paul, MN 55155

Upon adoption of these emergency rules, this notice, all written comments received, and the adopted emergency rules will be delivered to the Attorney General and to the Revisor of Statutes for review as to form and legality.

Notice of the date of submission of the proposed emergency rule to the attorney general will be mailed to any person requesting to receive this notice. The Attorney General shall approve or disapprove the proposed emergency rule and any modifications on the tenth working day following the date of receipt of the proposed emergency rule from the agency.

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The adopted emergency rules will not become effective without the Attorney General's approval and the Revisor of Statutes' certification of the rules' form. Emergency rules take effect five working days after approval by the Attorney General.

As required by the Administrative Procedures Act, Minnesota Statutes, chapter 14, these emergency rules shall be in effect for up to 180 days following their adoption and may be continued in effect for an additional 180 days if the Commissioner gives notice of continuation by publishing notice in the *State Register* and mailing the same notice to all persons registered with the Commissioner to receive notice of rulemaking proceedings. The emergency rules shall not be effective 360 days after their effective date without following the procedures in Minnesota Statutes, sections 14.13 to 14.20.

The purpose of proposed Minnesota Rules, parts 9510.1020 to 9510.1140 [Emergency] is to establish procedures for counties and providers to follow to seek authorization for a special needs rate exception for very dependent persons with special needs and establish procedures for determining the special needs rate exception payments for training and habilitation services and for intermediate care facilities for the mentally retarded.

Proposed Minnesota Rules, parts 9510.1020 to 9510.1140 [Emergency] apply to providers operating licensed training and habilitation services or intermediate care facilities for the mentally retarded and counties who are seeking authorization of a special needs rate exception for very dependent persons with special needs.

Proposed Minnesota Rules, parts 9510.1020 to 9510.1140 [Emergency] include provider applications, county review of provider applications, client eligibility, provider eligibility, county approval process, county's application to the commissioner, commissioner's determination, establishing the special needs rate exception payment, variance requests, emergency procedures, duration of the special needs rate exception, records, reports, audits and repayment, and appeals.

These emergency rules will not result in any additional state or county spending beyond the amount of funds appropriated by the legislature.

A free copy of the proposed emergency rule may be obtained by contacting Susan Canine at 612/297-1241.

Leonard W. Levine
Commissioner of Human Services

Rules as Proposed (all new material)

9510.1020 [Emergency] DEFINITIONS.

Subpart 1. Scope. The terms used in parts 9510.1020 to 9510.1140 [Emergency] have the meanings given them in this part.

Subp. 2. Case manager. "Case manager" means the person designated by the county to provide direct services to the client, which involve client participation. The services include client assessment and screening, developing individual service plans, arranging and coordinating services, monitoring and evaluating client progress, and assuring that clients' rights are protected.

Subp. 3. Client. "Client" means a person who is receiving training and habilitation services or intermediate care facility for the mentally retarded services funded under the medical assistance program.

Subp. 4. Commissioner. "Commissioner" means the commissioner of the Department of Human Services or a designated representative.

Subp. 5. County. "County" means the county board of commissioners for the county which provides case management services to the client or the county board of commissioners' designated representative.

Subp. 6. Employee benefits. "Employee benefits" means compensation actually paid to or for the benefit of the employees other than salary. Employee benefits include group health or dental insurance, group life insurance, pensions or profit sharing plans, governmentally-required retirement plans, sick leave, vacations, and in-kind benefits. Employee benefits do not include payroll-related costs.

Subp. 7. Equipment. "Equipment" means portable aids designed to increase a client's independent functioning which are purchased for the client and remain the property of the client upon discharge.

Subp. 8. Intermediate care facility for the mentally retarded or ICF/MR. "Intermediate care facility for the mentally retarded" or "ICF/MR" means a program licensed to serve mentally retarded residents under Minnesota Statutes, section 252.28, and a physical plant licensed as a supervised living facility under Minnesota Statutes, chapter 144, which together are certified by the Minnesota Department of Health as an intermediate care facility for the mentally retarded.

Subp. 9. Provider. "Provider" means the person or entity operating a licensed training and habilitation service or an ICF/MR.

Subp. 10. Payroll-related costs. "Payroll-related costs" means the employer's share of social security withholding taxes, workers' compensation insurance, and state and federal unemployment compensation taxes or costs.

Subp. 11. Special needs rate exception payment. "Special needs rate exception payment" means a payment established under parts 9510.1020 to 9510.1140 [Emergency].

Subp. 12. Staff intervention. "Staff intervention" means the direct client care provided by program personnel or outside program consultants, or the training of direct care program personnel by outside program consultants for the purpose of addressing the client's needs as identified in the special needs rate exception application.

Subp. 13. State hospital. "State hospital" means an ICF/MR or nursing home owned and operated by the state of Minnesota.

Subp. 14. Training and habilitation services. "Training and habilitation services" means health and social services provided under Minnesota Statutes, sections 252.21 to 252.261 and 256B.501. "Training and habilitation services" does not include waivered services as defined in Minnesota Statutes, section 256B.501, subdivision 1.

9510.1030 [Emergency] APPLICABILITY AND PURPOSE.

Subpart 1. Applicability. Parts 9510.1020 to 9510.1140 [Emergency] establish procedures for counties and providers to follow to seek authorization for a special needs rate exception for very dependent persons with special needs and establish procedures for determining the special needs rate exception payments for training and habilitation services and for intermediate care facilities for the mentally retarded. Parts 9510.1020 to 9510.1140 [Emergency] do not apply to state hospitals.

Subp. 2. Purpose. The purpose of the special needs rate exception is to provide to a specific client services whose costs are not included in the per diem rate of the intermediate care facility for the mentally retarded or the per diem rate of the training and habilitation service. The special needs rate exception payment is intended to fund short-term special needs for a specific client and is only to be allowed after all other funding sources or alternatives have been exhausted.

9510.1040 [Emergency] APPLICATION TO BE COMPLETED BY PROVIDER.

Subpart 1. Application. The provider shall apply to the county for a special needs rate exception to cover the cost of additional equipment or services necessary to serve clients eligible under part 9510.1050 [Emergency], subpart 2. A separate application must be completed for each client unless the staff intervention or additional equipment is shared by the clients identified. If more than one client is included in the application, client information must be submitted for each client. The application must include the information in subparts 2 to 4.

Subp. 2. Information about client's needs and methods used to address needs. The provider must:

A. identify the client including:

(1) name;

(2) name and address of the client's legal representative;

(3) medical assistance identification number;

(4) date of admission or anticipated admission to the provider's program;

(5) diagnosis;

(6) age;

(7) current residence; and

(8) current day program;

B. describe the client's special need or needs which put the client at risk of state hospital placement or continued state hospital placement;

C. describe the proposed staff intervention including:

(1) the amount of staff or consultant time required;

(2) qualifications of the program staff or outside consultants providing the intervention;

(3) frequency of intervention;

(4) intensity of intervention; and

(5) duration of intervention;

D. describe the equipment needed and the plan for use of the equipment by the client;

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E. identify the total cost and the unit cost of the equipment or the proposed staff intervention;

F. describe the modifications needed to integrate the equipment and staff intervention into the client's individual program plan;

G. describe the projected behavioral outcomes of the staff intervention or the use of the equipment and when the outcomes will be achieved;

H. describe how the client's progress toward the behavioral outcomes in item G will be measured and monitored by the provider; and

I. describe the degree of family involvement with the client.

Subp. 3. Information about provider. The provider shall submit:

A. information identifying the provider including:

(1) name and address of the provider;

(2) name and address of the place where the services will be delivered, if different from subitem (1);

(3) name and telephone number of the person authorized to answer questions about the application; and

(4) medical assistance provider number; and

B. an explanation of the efforts used to meed the client's needs within the provider's current per diem rate, including modifications made to the individual program plan and other available resources used.

Subp. 4. Supporting documentation. The provider shall submit with the application the following:

A. A copy of the individual program plan including the measurable program outcomes which will be achieved by the client as a result of the proposed staff intervention or the equipment.

B. For an ICF/MR, a copy of the most recent facility profile as prepared by the quality assurance and review section of the Minnesota Department of Health. For a training and habilitation service program, a description of the physical condition, medical condition, and behavioral characteristics of the clients currently served by the program.

C. Documentation of the provider's historical costs on which the current per diem rate is based. An ICF/MR provider shall submit a copy of the cost report submitted under parts 9510.0500 to 9510.0890 or 12 MCAR §§ 2.05301-2.05315 [Temporary] on which the current per diem rate is based and a copy of the most recent rate determination letter. A training and habilitation service program shall submit a copy of the translation worksheet required in 12 MCAR §§ 2.0300-2.0304 [Temporary] and any adjustments made by the county or the commissioner.

D. Work papers showing the method used to determine the cost of the intervention identified in subpart 2, item E, including the hourly wage of current staff who will implement the intervention, the unit cost of consultation or training services, and the unit cost of equipment requested.

E. Documentation that any equipment requested in the application is not available from the Department of Vocational Rehabilitation or covered under parts 9500.0750 to 9500.1080.

F. Documentation that any consultant services requested in the application are not services covered under parts 9500.0750 to 9500.1080.

G. The name and address of any vendor or contractor to be reimbursed by the special needs rate exception and the name of the person or persons who will actually provide the equipment or services if known.

9510.1050 [Emergency] COUNTY REVIEW OF PROVIDER'S APPLICATION.

Subpart 1. Criteria. The county shall determine if the provider submitting the application and the client or clients identified in the application meet the criteria in subparts 2 to 5. The county shall submit to the commissioner the applications which meet the criteria in subparts 2 to 5.

Subp. 2. Client eligibility. A client shall be eligible for a special needs rate exception if the client meets the criteria in items A to D:

A. the client is eligible for medical assistance under Minnesota Statutes, chapter 256B;

B. the client is a resident of an ICF/MR;

C. the client is mentally retarded according to the definitions in parts 9525.0010 to 9525.0100 or has related conditions defined in Code of Federal Regulations, title 42, section 435, and has at least one of the following characteristics:

(1) severe maladaptive behavior as listed in unit (a), (b), or (c);

(a) self-injurious behavior which is a clear danger to the client; or

(b) aggressive behaviors which are a clear danger to others; or

(c) destructive behaviors which result in extensive property damage;

(2) severe physical disabilities such as deafness, blindness, or motor problems which require short-term environmental orientation training;

(3) medical conditions as listed in unit (a) or (b);

(a) degenerative diseases diagnosed by a physician such as Hurler's syndrome or tuberous sclerosis; or

(b) short-term medical disabilities that can be treated within the level of care the Minnesota Department of Health certifies the ICF/MR to provide, such as temporary immobility, intermittent catheterization, or post-operative recuperation;

D. the client is at risk of placement in a state hospital within 60 days or of remaining in a state hospital, unless additional resources are provided through parts 9510.1020 to 9510.1140 [Emergency] due to:

(1) conditions and characteristics described in item C; and

(2) the unavailability of other resources as determined under subpart 4.

Subp. 3. General provider eligibility. A provider shall be eligible for a special needs rate exception if the provider meets the following criteria:

A. the provider is willing to serve or continue to serve a client who is eligible for a special needs rate under subpart 2 if the special needs rate exception is approved;

B. the provider's historical cost per diem does not include the historical cost of serving clients with similar needs; and

C. the existing program or services offered by the provider cannot be modified to meet the client's needs within the provider's approved per diem rates, including any operating cost incentives or allowances.

Subp. 4. Availability of other resources. The provider shall be eligible for a special needs rate exception only if the county determines that:

A. There are no other existing resources or services covered under parts 9500.0750 to 9500.1080 available to meet the client's needs.

B. There are no other appropriate ICFs/MR or services located within a reasonable distance available to meet the person's needs. To determine if a client should be placed in another ICF/MR or service, the case manager shall:

(1) Consider the placement preferences of the client and family of the client. If the client cannot communicate a preference, the client's legal representative must be consulted.

(2) Consider whether the location of the alternative ICF/MR or service will impair the current level of family involvement.

Subp. 5. Evaluation of staff intervention and equipment purchases. The county shall review the information submitted in accordance with part 9510.1040 [Emergency] to determine if:

A. the proposed staff intervention and equipment purchases meet the identified client needs and will result in continued placement in the ICF/MR or training and habilitation service after the special needs rate exception terminates; and

B. all proposed services and service providers comply with applicable professional and program licensure standards.

9510.1060 [Emergency] COUNTY APPROVAL PROCESS.

Subpart 1. Time period. The county shall approve or deny applications within 15 working days of the date the complete application was received from the provider. Approval or denial shall be made in accordance with subparts 2 to 4.

Subp. 2. Consultation with county of financial responsibility. If the county which receives the provider's application is not the county of financial responsibility, the county which receives the provider's application shall consult with the county of financial responsibility before approving the provider's application. The county of financial responsibility's statement of approval or

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objections must be forwarded to the commissioner with the provider's approved application or notice of denial. If the county of financial responsibility's statement of approval or objections are not forwarded to the commissioner, the county's application shall not be considered complete.

Subp. 3. County approval or denial. The county shall review the provider's application to determine if the application is complete and meets the criteria in 9510.1020 to 9510.1140 [Emergency]. The county shall approve the provider's application if the application is complete and meets the criteria. The county shall deny the provider's application if the application is incomplete or does not meet the criteria unless the provider's application can be adjusted to meet the criteria or the county submits a written request for a variance under part 9510.1100 [Emergency].

Subp. 4. Notification. The county shall send the provider and the client written notice of the county's decision on the provider's application. If the county denies the provider's application, the county shall notify the commissioner, provider, and client of the reasons for the denial in writing. The notice of the denial must state the specific provisions of the provider's application on which the county based the denial.

9510.1070 [Emergency] COUNTY'S APPLICATION TO COMMISSIONER.

If the county approves the provider's application, the county shall apply to the commissioner for a special needs rate exception within 15 working days of the date of receipt by the county from the provider of a complete application and supporting documentation. To apply for a special needs rate exception, the county shall submit to the commissioner a copy of the provider's approved application and supporting documentation and the following documents:

A. documentation of the steps taken by the county to determine client and provider eligibility in accordance with parts 9510.1020 to 9510.1140 [Emergency], including documentation of the conditions which put the client at risk of state hospital placement or continued state hospital placement;

B. a copy of the client's most recent individual service plan;

C. a copy of the client's most recent annual individual program plan in the ICF/MR, individual program plan in the training and habilitation service, most recent medical evaluation, and most recent behavioral assessments, including any programs for aversive and deprivation procedures;

D. a copy of the client's state hospital discharge plan, if the special needs rate exception is requested to facilitate the client's discharge from a state hospital;

E. a copy of the county's plan to coordinate and monitor the implementation of the client's individual service plan;

F. documentation that the county of financial responsibility has approved the changes in the individual service plan if the county submitting the application is not the county of financial responsibility or if the county of financial responsibility does not approve the changes, a statement of the reasons the county of financial responsibility does not approve of the changes and a description of the actions, if any, to be taken by the county of financial responsibility; and

G. a description of the proposed services to be provided by the day training and habilitation service and the ICF/MR and how the services will be coordinated by the county and the providers. If the special need allowance is not requested for both the day training and habilitation service and the ICF/MR, a written explanation must be provided by the county.

9510.1080 [Emergency] COMMISSIONER'S DETERMINATION.

The commissioner shall review the county application for compliance with parts 9510.1050 [Emergency] and 9510.1070 [Emergency] in determining whether to approve or deny an application for a special needs rate exception. The commissioner shall notify the county, provider, and the client or the client's legal representative of the decision within ten working days of the date the commissioner receives a completed application from the county. The special needs rate exception, if approved by the commissioner, shall be effective as of the date the county submits a completed application to the commissioner. If the commissioner denies the application, the commissioner shall notify the county, provider, and client or client's representative of the reasons for the denial.

9510.1090 [Emergency] ESTABLISHING SPECIAL NEEDS RATE EXCEPTION PAYMENT.

Subpart 1. Established by commissioner. The commissioner shall establish the special needs rate exception payment according to subparts 2 to 5.

Subp. 2. Allowable costs. Unless otherwise reimbursable by the Department of Vocational Rehabilitation or by direct payments under parts 9500.0750 to 9500.1080, the following costs, if approved by the commissioner, are allowable for purposes of establishing the special needs rate exception payment:

A. additional salary, employee benefits, or payroll-related costs for direct care staff required to meet the client's needs as identified in the provider's application;

B. additional costs of services provided by a licensed medical, therapeutic, or rehabilitation practitioner; a mental health practitioner supervised by a board-certified psychiatrist; or a licensed psychologist or licensed consulting psychologist;

C. the cost of additional equipment required to meet the client's needs as identified in the provider's application.

Subp. 3. Nonallowable costs. Only costs listed in subpart 2 are allowable for purposes of establishing the special needs rate exception. All other costs shall be disallowed.

Subp. 4. Limitation. The combined per diem costs of training and habilitation services, ICF/MR services, and the special needs rate exception payment and any other special needs rate exception payments in effect for the same client, shall not exceed the medical assistance per diem cost of providing services to mentally retarded persons in state hospitals. For the purpose of determining this limitation, items A to F apply.

A. The training and habilitation services per diem in effect on the date the provider's completed application is submitted to the county must be mutliplied by the number of days the services are provided annually.

B. The ICF/MR's temporary or final payment rate in effect on the date the provider's completed application is submitted to the county must be multiplied by 365.

C. The special needs rate exception amount must not exceed the total allowable costs in subpart 2. If a special needs rate exception is necessary for a client in both the ICF/MR and the training and habilitation service program, these amounts must be combined. If the client is currently receiving a special needs rate exception, that amount must also be included.

D. The amounts determined in items A to C must be combined and divided by 365 to determine the combined per diem cost.

E. The state hospital medical assistance per diem rate must be the rate in effect on the date the provider's completed application is submitted to the county.

F. If the per diem cost in item D exceeds the per diem cost in item E, the commissioner shall deny the special needs rate exception application unless the per diem cost can be adjusted to meet the client's needs within the per diem cost in item E or the commissioner grants a variance under part 9510.1100 [Emergency].

Subp. 5. Computation of special needs rate exception payment. The special needs rate exception payment must be calculated as follows:

A. The cost of additional equipment allowed in accordance with subpart 2 shall be paid as a lump sum payment during the first billing period following approval of the special needs rate exception.

B. Except as provided in item C, in order to compute the special needs rate exception payment for personnel costs, the costs of additional personnel allowable according to subpart 2, items A and B, must be divided by the estimated number of days the staff intervention will be needed.

C. In order to compute the special needs rate exception per diem for personnel costs which vary during the estimated staff intervention period, the costs must be assigned on a monthly basis proportionate to the actual personnel costs incurred and then divided by the number of client days in the month.

D. Costs computed under items B and C shall be reimbursed as incurred and billed.

9510.1100 [Emergency] VARIANCE REQUEST.

Subpart 1. Variance request. The county may request a variance from the commissioner to approve a provider application which exceeds the limit in part 9510.1090 [Emergency], subpart 4 by up to ten percent, if the provider meets the criteria in subpart 2.

Subp. 2. Eligible provider. A provider may apply for a variance if the provider provides or plans to provide training and habilitation services to a client who resides in an ICF/MR which has a per diem rate equal to or greater than 85 percent of the medical assistance per diem cost of providing services to mentally retarded persons in the state hospitals.

Subp. 3. Submittal of request. The county shall submit the written variance request, including documentation showing that the provider meets the criteria for a variance, with the county's application for the special needs rate exception payment.

Subp. 4. Review of variance request; notification. The commissioner shall review the variance request with the county's

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

application for the special needs rate exception payment. If the commissioner denies the variance request, the commissioner shall notify the county, provider, and client or client's legal representative of the reasons for the denial.

9510.1110 [Emergency] EMERGENCY PROCEDURE

Subpart 1. Definition. For the purposes of this part, an emergency is either a postoperative condition resulting from unplanned surgery, or the sudden onset of self-injurious or aggressive client behavior which results in an immediate danger to self or others; which would result in immediate admission to the state hospital in the absence of intervention.

Subp. 2. Emergency approval. In an emergency, the county may approve the addition of staff necessary to intervene in the emergency without obtaining prior approval from the commissioner, only staff costs shall be allowed under this part. In an emergency, the county shall:

A. notify the commissioner by telephone no later than the next working day and in writing within three working days of the client's situation, and state in the notice a description of the behaviors requiring emergency intervention and the actions taken by the provider to control the behaviors;

B. require the provider to submit an application completed in accordance with parts 9510.1020 to 9510.1140 [Emergency] within ten working days; and

C. submit to the commissioner an application for a special needs rate exception completed and submitted in accordance with parts 9510.1020 to 9510.1140 [Emergency].

Subp. 3. Reimbursement for emergency services. A special needs rate exception for the costs identified in part 9510.1090 [Emergency], subpart 2, item A, for staff approved in accordance with subpart 2 shall be reimbursable for a period not to exceed two weeks from the date of the county's request. The provider shall submit the application required in subpart 2, item B, for continuation of the special needs rate exception for more than ten working days. The county shall notify the commissioner if the provider fails to submit the application required in subpart 2, item B, and the commissioner shall discontinue the emergency special needs rate exception payment.

9510.1120 [Emergency] DURATION OF SPECIAL NEEDS RATE EXCEPTION.

Subpart 1. Maximum length of time for a special needs rate exception. A special needs rate exception shall be established for a period not to exceed one year from the date of receipt of the county application by the commissioner except as provided in subpart 2.

Subp. 2. Renewals. If the county determines that a special needs rate exception should be continued after the period initially approved, the county shall submit a new application in accordance with parts 9510.1020 to 9510.1140 [Emergency] at least 30 days prior to the date the special needs rate exception is scheduled to terminate. The county application for a renewal must contain a program and fiscal evaluation demonstrating the effectiveness of the initial special needs rate exception. Special needs rate exceptions for staff intervention must be limited to a one-year renewal per identified special need.

Subp. 3. Terminations. The commissioner may terminate the special needs rate exception prior to the date stated in the application upon recommendation by the county. The county may recommend termination if:

A. the rate is no longer necessary because other funds are available;

B. there is evidence that the funds have not been used for the purposes stated in the application;

C. the client's needs have changed and can be met without the special needs rate exception; or

D. no progress has been made in rectifying the identified problem area. This item shall not apply to services provided to clients with degenerative diseases if the criteria in subitems (1) to (4) are met:

(1) the service is required due to the degenerative disease;

(2) the client's physician has determined that no progress in the identified problem area can be expected;

(3) the county has submitted the determination by the client's physician to the commissioner and requested an exception to this item; and

(4) the request for an application has been reviewed and approved by the state medical review team.

The commissioner shall notify the county and the provider 15 days before discontinuing payments due to termination.

9510.1130 [Emergency] RECORDS, REPORTS, AUDITS, AND REPAYMENT.

Subpart 1. Records. The provider shall maintain complete program and fiscal records and supporting documentation identifying the services and costs provided under the special needs rate exception. The costs must be maintained in well-organized files and identified in accounts separate from other facility or program costs. The provider's records shall be subject to the maintenance schedule, audit availability requirements, and other provisions of parts 9505.1750 to 9505.2150.

Subp. 2. Reports. The county shall submit items A and B to the commissioner.

A. A quarterly program and fiscal review of the overall effectiveness of the services to be provided under the special needs allowance unless the commissioner determines that a different schedule of reviews is needed to evaluate the success of the program or redetermine the special needs rate exception payment. The review must be submitted within 30 days of the end of each quarter in which a special needs rate exception is in place and must include:

(1) the provider's compliance with the application;

(2) the client's progress in attaining the measurable program goals in the individual program plan for which the special needs rate exception was requested; and

(3) the county and provider's plans to reduce reliance on the special needs rate exception.

B. A final report submitted within 90 days of termination of a special needs rate exception which documents the following:

(1) the extent to which the program goals identified in the special needs rate exception application were accomplished;

(2) the total amount of money paid to the provider through the special needs rate exception payment for equipment and actual costs and types of equipment purchased;

(3) the amount of expenditures incurred by the provider for costs allowable under part 9510.1090 [Emergency], subpart 2; and

(4) the total amount of unexpended funds determined by subtracting subitem (3) from subitem (2).

Subp. 3. Audits. The commissioner may conduct program and fiscal audits of any provider receiving a special needs rate exception to identify any overpayments made to the provider and ensure compliance with parts 9510.1020 to 9510.1140 [Emergency].

Subp. 4. Repayment. Any overpayments to the provider included in the special needs rate exception payment must be paid back to the medical assistance program within 60 days of the date the provider receives the notice of overpayment from the county or the commissioner. No retroactive payment must be made if the provider's costs exceed the special needs rate exception payment.

9510.1140 [Emergency] APPEALS.

Subpart 1. By provider. A provider whose application for a special needs rate exception is denied or not acted on within the deadlines in part 9510.1060 [Emergency], subpart 1, or whose special needs rate exception is suspended, reduced, or terminated by the county may appeal the action or decision to the commissioner. The appeal must be submitted to the commissioner in writing within 30 days of the date the provider received notification of the action or decision. The appeal must state the reasons the provider is appealing the county's action or decision including the bases for the county's action or decision which are disputed, the specific sections of the provider's application which the provider is relying on for the appeal, and an explanation of why the provider disagrees with the county's action or decision.

The commissioner shall review the application and supporting documentation submitted to the county and any additional documents submitted with the appeal to determine if the provider can prove by a preponderance of evidence that they are eligible for a special needs rate exception and in compliance with parts 9510.1020 to 9510.1140 [Emergency]. No special needs rate exception payment will be made pending the outcome of the appeal.

Subp. 2. By county. If the county disagrees with the commissioner's decision on the county application, the county may appeal the decision to the commissioner and request reconsideration. To be reconsidered, the appeal must be filed in writing, with the commissioner, within ten days of the date the commissioner gave notice to the county of the decision on the county application. The appeal must state the reasons why the county is appealing the commissioner's decision and present evidence explaining why the county disagrees with the commissioner's decision. The commissioner shall review the evidence presented in the county's appeal and send written notification to the county of the decision on the appeal. No special needs rate exception payment shall be made pending the outcome of the appeal. The commissioner's decision on the appeal must be final.

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

ADOPTED RULES

The adoption of a rule becomes effective after the requirements of Minn. Stat. § 14.14-14.28 have been met and five working days after the rule is published in *State Register*, unless a later date is required by statutes or specified in the rule.

If an adopted rule is identical to its proposed form as previously published, a notice of adoption and a citation to its previous *State Register* publication will be printed.

If an adopted rule differs from its proposed form, language which has been deleted will be printed with strikeouts and new language will be underlined. The rule's previous *State Register* publication will be cited.

An emergency rule becomes effective five working days after the approval of the Attorney General as specified in Minn. Stat. § 14.33 and upon the approval of the Revisor of Statutes as specified in § 14.36. Notice of approval by the Attorney General will be published as soon as practicable, and the adopted emergency rule will be published in the manner provided for adopted rules under § 14.18.

Energy & Economic Development Authority

Extension of Emergency Rules Governing Administration of the Public School Energy Conservation Investment Loan Program

Notice is hereby given that on July 25, 1984 the Chairman of the Energy & Economic Development Authority ordered that 6 MCAR § 2.2500-2.2509 (emergency), which governs administration of the Public School Energy Conservation Investment Loan Program, be continued in effect for an additional 180 days. The emergency rules were effective February 24, 1984, and published in the *State Register* as Adopted at Volume 8, Number 38 (8 S.R. 2112). This continuation is in accordance with Minnesota Statutes section 14.35. The new expiration date for 6 MCAR § 2.2500-2.2509 (emergency) will be February 20, 1985 or the date 6 MCAR § 2.2500-2.2509 (emergency) is replaced by permanent rules, whichever date is earlier.

OFFICIAL NOTICES

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

State Board of Education
Department of Education
Management Assistance Division

Outside Opinion Sought Regarding Proposed Rules Governing the Licensure of School Business Officers and the Relicensure of School Administrators

Notice is hereby given that the State Board of Education is seeking information or opinions from sources outside the agency in preparing rules governing the licensure of School Business Officers and the Relicensure of School Administrators. The promulgation of these rules is authorized by Minnesota Statutes, Section 125.05.

The State Board of Education requests information and comments concerning the development of a revised licensure rule for School Business Officers, a change in the renewal requirement for an entrance school administrative license, and the deletion of the individual professional development activity requirement for renewal of a continuing school administrative license. Interested persons may submit statements of information or comment orally or in writing. Written statements should be addressed to:

George B. Droubie
Minnesota Department of Education
610 Capitol Square Building
550 Cedar Street
St. Paul, Minnesota 55101

Oral statements will be received during regular business hours over the telephone at (612) 296-2046 and in person at the above address.

All statements of information and comments shall be accepted until September 20, 1984. Any written material received by the State Board of Education shall become part of the record in the event that the rules are amended.

August 20, 1984

Daniel Skoog
Assistant Commissioner
Management Assistance Division

Department of Energy and Economic Development

Notice of Final Allocations of Issuance Authority for Calendar Year 1984

Notice to all Industrial Development Bond Issuers and Interested Parties:

The Department of Energy and Economic Development has determined the final amounts of issuance authority for calendar year 1984 allocated to entitlement issuers re-submitting certifications of previous use to the Department after enactment of a federal limitation act pursuant to Minn. Laws 1984, ch. 585 § 15, to be codified as Minn. Stat. 474.18, subd 2.

The Department of Energy and Economic Development has determined the final amounts of issuance authority allocated to entitlement issuers based upon the following:

1. The allocations for entitlement issuers and procedures set forth in Minn. Laws 1984, ch. 582 § 15;

2. The state ceiling for private activity bonds of $150 multiplied by the most recent census estimate of the resident population of the State of Minnesota published by the Bureau of the Census in 1983, which is 4,133,000; and

3. The re-certifications of previous use submitted to the Department by entitlement issuers.

The Department used the following formula to determine the final amounts of issuance authority allocated to entitlement issuers set forth below:

INDIVIDUAL ALLOCATIONS TO ENTITLEMENT ISSUERS

$ 418,710,000 (Total state allocation to Entitlement Issuers)
$ 667,646,437 (Combined 3 year high average for all Entitlement Issuers)

equals 62.7143316% × $_____ 3 year high average for Entitlement Issuer

equals $ allocation

Issuer	Allocation
Albert Lea	$2,790,788
Alexandria	$918,138
Apple Valley	$3,104,370
Austin	$1,724,644
Baxter	$660,591
Becker	$22,911,636
Beltrami County	$1,672,382
Blaine	$2,618,323
Bloomington	$10,751,327
Brainerd	$1,674,473
Brooklyn Center	$7,159,886
Brooklyn Park	$5,041,187
Burnsville	$11,582,919
Cambridge	$2,571,288
Cannon Falls	$1,037,922
Chanhassen	$679,405
Chaska	$1,071,370
Cloquet	$1,919,059

Issuer	Allocation
Columbia Heights	$3,347,900
Coon Rapids	$4,295,932
Cottage Grove	$1,996,406
Dawson	$1,185,301
Duluth	$10,894,525
Eagan	$9,901,339
East Grand Forks	$1,149,763
East Gull Lake	$731,667
Eden Prairie	$9,239,314
Eveleth	$888,453
Fairmont	$2,926,669
Faribault	$1,850,073
Farmington	$636,550
Fergus Falls	$2,571,288
Fridley	$8,137,185
Golden Valley	$2,753,159
Grand Rapids	$1,013,882
Hastings	$930,263

Issuer	Allocation
Hibbing	$752,572
Hopkins	$1,941,009
Hutchinson	$2,484,533
Lakeville	$3,392,845
Le Sueur	$2,408,648
Little Canada	$1,183,210
Long Prairie	$773,477
Luverne	$731,667
Mankato	$3,893,515
Maple Grove	$1,747,639
Maplewood	$5,261,941
Mendota Heights	$3,108,540
Minneapolis	$48,917,622
Minnetonka	$13,098,933
Montevideo	$772,432
Moorhead	$946,359
New Brighton	$2,037,589
New Hope	$1,924,285
New Prague	$1,426,751
New Ulm	$825,739
Northfield	$878,905
Owatonna	$982,525
Park Rapids	$1,233,382
Pipestone	$804,834
Plymouth	$2,935,031
Princeton	$715,989
Proctor	$4,160,051
Red Wing	$2,732,254
Richfield	$3,606,074
Rochester	$2,606,826
Rogers	$871,729
Rosemount	$4,747,475
Roseville	$627,143
Saint Cloud	$4,567,694
Saint Louis Park	$2,799,150
Saint Paul	$87,919,849
Sartell	$4,515,432
Sauk Rapids	$845,598
Savage	$1,255,332
Shakopee	$2,569,197
Shoreview	$1,460,199
Silver Bay	$26,130,971
South Saint Paul	$1,659,839
Springfield	$664,772
Stillwater	$1,684,716
Vadnais Heights	$2,022,537
Waite Park	$1,369,263
West Saint Paul	$821,558
White Bear Lake	$2,783,471
Willmar	$2,064,765
Winona	$3,713,734
Woodbury	$971,027
	$418,710,000

Department of Energy and Economic Development

Outside Opinion Sought and Notice of a Public Meeting Regarding the Development of a State Plan for the Commercial and Apartment Conservation Service

Notice is hereby given that the State of Minnesota is seeking information or opinion from sources outside the Department in preparing a State Plan and subsequent Administrative Rules for the federally mandated Commercial and Apartment Conservation Service (CACS) Program. Under the CACS program, regulated utilities will be required to offer energy audits and related services to their commercial customers and owners of apartment buildings which have at least five units.

The Department requests information and comments concerning the subject matter of this State Plan. Interested or affected parties may submit comments or statements of information orally or in writing. One of the ways the Department intends to solicit outside opinions on the State Plan is to hold a public meeting. Therefore, a meeting has been scheduled for September 5, 1984, at 900 American Center Building, 7th Floor, Room 715. The meeting shall start at 10:00 a.m. and continue until all representatives of Associations or other interested groups or persons have had an opportunity to be heard concerning the CACS State Plan.

Interested individuals are encouraged to submit written comments at the hearing in addition to any oral comments.

Individuals who wish to receive a copy of the Draft State Plan, or have questions on the Draft State Plan or wish to submit written comments should contact:

Mark Polich
Audit Programs Coordinator
Energy Division
Department of Energy and Economic Development
150 East Kellogg Boulevard
St. Paul, Minnesota 55101
(612) 297-3293

All statements of information and comments shall be accepted during this public hearing. Any written material received by the Department either at the public meeting or independent of it, shall become part of the record when and if this State Plan is submitted as a proposed rule.

Department of Labor and Industry

Indications of Interest Sought for Securing Funds for Operation of Labor Education Advancement Programs (LEAP)

In accordance with instructions from the Legislature, the Commissioner of the Department of Labor and Industry will develop an application process by which organizations currently established or organizations seeking to become established as providers of Labor Education Advancement Programs (LEAP) may seek funding for the 1985-1987 fiscal biennium.

Applications received shall be reviewed and prioritized by the Commissioner, and a recommended level of funding transmitted to the 1985 Legislature. Applications for indications of interest must be received by September 14, 1984.

Organizations interested in seeking funds may obtain information and application forms by contacting:

Kathy Novosad
Department of Labor and Industry
444 Lafayette Road
St. Paul, MN 55101
(612) 296-6529

Steve Keefe, Commissioner
Department of Labor & Industry

Office of the Secretary of State

Notice of Vacancies in Multi-Member State Agencies

Notice is hereby given to the public that vacancies have occurred in multi-member state agencies, pursuant to Minn. Stat. 15.0597, subd. 4. Application forms may be obtained at the Office of the Secretary of State, 180 State Office Building, St. Paul 55155-1299; (612) 296-2805. Application deadline is September 11, 1984.

METROPOLITAN COUNCIL has 1 vacancy open immediately for a public member, (must be a resident of council district 5). The council coordinates planning and development of the 7 county Twin Cities metropolitan area; establishes a long range development plan containing regional plans for aging, the arts, aviation, health, housing, law and justice, parks and open space, solid waste, transportation, wastewater management and water resources; reviews the long range plans for local governments, and can require them to be consistent with the regional plans. Members are appointed by the Governor and confirmed by the Senate. Each council member shall reside in the council district he represents; members serve staggered four-year terms; must file with EPB. Meetings twice a month, Metro Square Bldg., St. Paul; members receive $50 per diem plus expenses. For specific information contact the Metropolitan Council, 300 Metro Square Bldg., St. Paul 55101; (612) 291-6359.

MEDICAL SERVICES REVIEW BOARD has 1 vacancy open immediately for a hospital administrator member. The board advises the department on medical matters relating to workers compensation and hears appeals on decisions of the department. Members are appointed by the Commissioner of Labor and Industry. Members receive $35 per diem plus expenses; must file with EPB. For specific information contact the Medical Services Review Board, Dept. of Labor and Industry, Office of Public Affairs, 444 Lafayette Rd., St. Paul 55101; (612) 297-4373.

State Planning Agency
Human Services Division
Developmental Disabilities Program

Announcement of Town Meetings on the Future of State Hospitals

A series of town meetings will be held at nine sites from August 22 through September 25, 1984. These meetings are being held as part of research required by Minnesota Laws 1984 Chapter 654 § 19. The meetings which will take place in each of the eight state hospital regions and the Twin Cities Metropolitan Area are intended to collect public testimony in preparation for the 1985 legislative session.

Persons unable to attend the meeting in their region are invited to send their suggestions to:

Colleen Wieck, Executive Director
Developmental Disabilities Program
State Planning Agency
201 Capitol Square Building
St. Paul, MN 55101
(612) 296-9964

The schedule of meetings is:

DATE	TIME	PLACE
August 22	7:00 p.m.-9:30 p.m.	Cambridge Elementary School Cambridge, Minnesota
August 29	7:00 p.m.-9:30 p.m.	Faribault Junior High School Faribault, Minnesota
September 6	7:00 p.m.-9:30 p.m.	Anoka City Hall Anoka, Minnesota
September 13	2:00 p.m.-5:00 p.m.	The Central Office Building 611 W. 5th St. Willmar, Minnesota
September 17	7:00 p.m.-9:30 p.m.	St. Peter High School St. Peter, Minnesota
September 24	7:00 p.m.-9:30 p.m.	High School Cafeteria Brainerd, Minnesota
September 25	2:00 p.m.-4:00 p.m. and 7:00 p.m.-9:00 p.m.	Vocational Technical School Detroit Lakes (Regarding the Fergus Falls State Hospital)
October 3	1:00 p.m.-3:00 p.m.	Moose Lake High School Moose Lake, Minnesota
October 9	7:00 p.m.-10:00 p.m.	Prudential Life Insurance Auditorium 3701 Wayzata Boulevard Minneapolis, Minnesota

Department of Transportation

Amended Order and Notice of Street and Highway Routes Designated and Permitted to Carry the Gross Weights Allowed Under Minn. Stat. § 169.825, Order No. 69269

Whereas, the Commissioner of Transportation has made his Order No. 68884, as amended by Order No. 69226, designating and permitting certain street and highway routes, or segments of those routes, to carry the gross weights allowed under Minnesota Statutes § 169.825, and

Whereas, the Commissioner has determined that the additional following routes, or segments of routes, should be designated to carry the gross weights allowed under Minnesota § 169.825.

IT IS HEREBY ORDERED that Commissioner of Transportation Order No. 68884 is amended this date by adding the following designated streets and highway routes, or segment of routes, as follows:

COUNTY ROADS

Chisago County—CSAH 30
From Jct. TH 61 to Jct. TH 361 (Rush City) (effective 5/15).

August 9, 1984

Richard P. Braun
Commissioner

Department of Transportation

Amended Order and Notice of Street and Highway Routes Designated and Permitted to Carry the Gross Weights Allowed under Minn. Stat. § 169.825, Order No. 69270

Whereas, the Commissioner of Transportation has made his Order No. 68884, as amended by Orders Nos. 69226 and 69269, designating and permitting certain street and highway routes, or segments of those routes, to carry the gross weights allowed under Minnesota Statutes § 169.825, and

Whereas, the Commissioner has determined that the additional following routes, or segment of routes, should be designated to carry the gross weights allowed under Minnesota § 169.825.

IT IS HEREBY ORDERED that Commissioner of Transportation Order No. 68884 is amended this date by adding the following designated streets and highway routes, or segment of routes, as follows:

TRUNK HIGHWAYS

TH 32—From Hitterdal Elevator in Hitterdal to Jct. TH 10. The provisions of this order shall only be effective through September 15, 1984.

August 9, 1984

Richard P. Braun
Commissioner

STATE CONTRACTS

Pursuant to the provisions of Minn. Stat. § 16.098, subd. 3, an agency must make reasonable effort to publicize the availability of any consultant services contract or professional and technical services contract which has an estimated cost of over $2,000.

Department of Administration procedures require that notice of any consultant services contract or professional and technical services contract which has an estimated cost of over $10,000 be printed in the *State Register*. These procedures also require that the following information be included in the notice: name of contact person, agency name and address, description of project and tasks, cost estimate, and final submission date of completed contract proposal.

Commodities contracts with an estimated value of $5,000 or more are listed under the Procurement Division, Department of Administration. All bids are open for 7-10 days before bidding deadline. For bid specifics, time lines, and other general information, contact the appropriate buyers by calling 296-2513. If the appropriate buyer is not available, contact Harvey Leach or Barbara Jolly at 296-3779.

Department of Administration Procurement Division

Commodities Contracts Currently Open for Bidding

Requisition #	Item	Ordering Division	Delivery Point	Estimated Dollar Amount
02-310-13295	Carpeting & Install	MN Correctional Facility	Sauk Centre	Contact buyer
79-000-44165	Tablet Arm Chairs	Transportation	St. Paul	Contact buyer
27-156-43503	Classroom Seating	Normandale Community College	Bloomington	Contact buyer
78-760-01878	Weight Fitness Machines	MN Correctional Facility	Red Wing	Contact buyer
27-154-41001	Rubbish Removal Contract	Lakewood Community College	Lakewood	Contact buyer
79-000-42298	Purchase of Toner & Developer	Transportation	St. Paul	Contact buyer

Requisition #	Item	Ordering Division	Delivery Point	Estimated Dollar Amount
29-000-36237	Fish Food	Natural Resources—S. Service Center	Duluth	Contact buyer
27-148-42114	Service Contract Science & Technology Equipment	Rochester Community College	Rochester	Contact buyer
29-000-36254	Signs	Natural Resources	St. Paul	Contact buyer
Sch 113-B	Trucks	Various	Various	Contact buyer
79-000-44035	Recurring Helium	Transportation	Various	Contact buyer
78-620-20422	Farm Wagon	MN Correctional Facility	Stillwater	Contact buyer
27-151-43080	Classroom Seating	Minneapolis Community College	Minneapolis	Contact buyer
29-000-36252	Steel "U" Sign Posts	DNR	Various	Contact buyer
75-200-06080	Insulated Tray System	MN Veterans Home	Minneapolis	Contact buyer
29-007-32698	Green Hardwood Chips	DNR—North Service Center	Grand Rapids	Contact buyer
29-000-36244	Rental of Photocopy Machine	DNR Bureau of Engineering	St. Paul	Contact buyer
26-073-16621	Roof Repair	St. Cloud State University	St. Cloud	Contact buyer
Contract	Fine Papers	Various	Various	300,000-320,000
43-000-05576	Snow Making Equipment	Iron Range Resources & Rehabilitation Board	Biwabik	Contact buyer
29-000-36231	Office Move	Natural Resources	St. Paul	Contact buyer
Contract	Laundry Service	MN Correctional Facility	Lino Lakes	9,000-10,000
43-000-05516	Truck	Iron Range Resources & Rehabilitation Board	Eveleth	Contact buyer
37-090-94762 Rebid	Purchase of Photocopy Machine	Education	Same	Contact buyer
Sch 113-A	Buses	Transportation	Various	Contact buyer
Contract	Steel Office Furniture—REBID	Various	Various	Contact buyer
79-000-43946	Ceiling Fans	Transportation	St. Paul	Contact buyer
Contract	State Duplicating Overload	Central Duplicating	St. Paul	100,000-150,000
32-200-11923	Noise Measuring System	Pollution Control	Roseville	Contact buyer

Contact the receptionist at 296-2513 for referral to specific buyers.

Capitol Area Architectural and Planning Board

Competition Announcement for Design of Minnesota State Judicial Building

THE DESIGN CHALLENGE

The State of Minnesota, The Minnesota Judicial System, and the Capitol Area Architectural and Planning Board announce a national competition for the design of a Minnesota Judicial Building to be located in Minnesota's Capitol Area. This project presents a major design challenge.

The winning design must incorporate an existing building which is on the National Register of Historic Buildings with new facilities which are to be added on an adjacent site. The project includes renovation of approximately 100,000 GSF and 125,000 GSF of new construction, and will provide facilities for the Minnesota Supreme Court, Court of Appeals, and state law library.

THE COMPETITION

Detailed information regarding the competition and credential submission requirements will be sent to all registrants.

COMPENSATION AND AWARDS

The finalists will be paid a cash stipend to be determined. The winner will be awarded a cash prize and the commission to further develop the project.

ELIGIBILITY

The competition is open to all firms or teams which include personnel with NCARB certification or architectural registration in Minnesota. From credentials submitted by the registrants a limited number will be selected as finalists, and will be invited to submit competition design proposals.

The criteria for the selection of the design finalists will include previously-demonstrated ability to accomplish projects of this type and scope.

REGISTRATION

Registration will be by letter accompanied by a non-refundable check for $50.00 made payable to the Capitol Area Architectural and Planning Board. Registrations should be addressed to:

Walter H. Sobel, FAIA and Associates
Professional Advisor
Minnesota Judicial Building Competition
Capitol Area Architectural and Planning Board
Room 122 Capitol Building
St. Paul, Minnesota 55155

Letters of registration are due September 26, 1984.

Department of Energy and Economic Development Community Development Division

Juvenile Justice Grants Available

The Minnesota Juvenile Justice Advisory Committee and the Department of Energy and Economic Development announce the availability of $200,000 for Youth Intervention Projects to begin January 1, 1985 and end December 31, 1985. Applications must be submitted before October 5, 1984.

Application forms and other program information can be obtained by contacting:

Steve Gustafson
Justice Grant Program
Community Development Division
Department of Energy and Economic Development
9th Floor, American Center Building
150 East Kellogg Boulevard
St. Paul, Minnesota 55101
(612) 296-8243

Housing Finance Agency

Multi-Family Rental Housing Program

The Minnesota Housing Finance Agency (Agency) is interested in providing permanent and construction financing for multi-family rental housing, and is requesting development proposals for the new construction or substantial rehabilitation of such housing under the following three programs:

MARKET RATE MODERATE INCOME FAMILY GRADUATED PAYMENT MORTGAGE PROGRAM
(Approximately 525 Units)

The Moderate Income Family Graduated Payment Mortgage Program (Program) provides financing that allows the production of approximately $25 million dollars in rental housing for moderate income Minnesota family households.

Location: Statewide
Sponsor: Limited Dividend and Non-profit Developers

Financing Conditions:

—Agency would issue 30-year fixed rate bonds and provide a graduated payment mortgage.

—Initial interest rate would be approximately 2% below bond rate.

—The interest rate on the mortgage would increase from the second to fifth year in equal increments at which time the rate would remain fixed at the bond interest rate for the balance of the mortgage term.

—Agency would make funds available to finance interest shortfalls; funds will be repaid upon sale of development.

—Agency would underwrite the development using the agncy's normal underwriting procedures, with interest rate based on the initial first year's reduced rate.

—Construction financing would be available.

—Due to federal regulations, developments must remain rental property for 15 years.

Tenant Requirements:

—20% of the units rented to households whose incomes do not exceed 80% of median.

—75% of the units rented to market rate, low and moderate income tenants within MHFA income limits.

—Developer must demonstrate market.

MARKET RATE FAMILY SHALLOW SUBSIDY RENTAL PROGRAM (Approximately 90-100 Units)

The agency has available approximately $3,500,000 in 7½%, 30-year financing. The MHFA Market Rate Family Shallow Subsidy Rental Program (Program) is to make rental housing affordable to low and moderate income Minnesota family households.

Location: Statewide
Sponsor: Limited Dividend and Non-profit Developers

Financing Conditions:

—30-year permanent financing; projected interest rate 7½% + ½% annual fee.

—Construction financing available.

Eligible Developments:

Developments eligible to receive financing under this Program are those which:

a. Have unit rents which do not exceed 100% of new construction FMR's for walk-up buildings in the geographic area in which they are to be developed.

b. Preferably have between 12 and 36 units on one site.

c. Are designed to serve low and moderate income family households.

d. Are either new construction or substantial rehabilitation.

Tenant Requirements:

—Family tenant households which do not exceed Agency's annual income limits for the unit in which they are residing.

—Must have minimum of one person per bedroom in the unit.

Agency would set aside approximately $500,000 to be made available on a case-by-case basis to assure housing quality and program feasibility.

MARKET RATE ELDERLY INTEREST WRITEDOWN RENTAL PROGRAM (Approximately 225 Units)

The Market Rate Elderly Interest Writedown Rental Program (Program) provides financing that allows for the construction of approximately $10-11 million in rental housing for low and moderate income elderly households in Minnesota.

Location: Statewide
Sponsor: Limited Dividend and Non-profit Developers

Financing Conditions:

—Agency would issue 30-year fixed rate bonds and provide mortgages with an interest rate writedown of approximately two to four percentage points.

—The writedown would be in the form of a grant unless the mortgage is prepaid; then the agency would require repayment of the writedown amount.

—Developments located in Economic Development Region 11 and cities of Duluth, Moorhead, St. Cloud, and their suburbs would be underwritten using a rate of approximately 9½%, plus ½% servicing fee, or 2% below the bond rate, whichever is higher (Approximately 150 Units).

—Developments located in the remainder of Minnesota would be underwritten at an interest rate of approximately 7½%, plus ½% servicing fee, or 4% below the bond rate, whichever is higher (Approximately 75 Units).

—Agency will underwrite developments using its normal underwriting procedures.

The agency is also considering providing additional supplementary tenant subsidies subject to the agency's rulemaking process. Some of the proposed features of this Program are:

—Direct rent reduction for eligible elderly tenants.

—To be eligible, elderly household income must be 50% of median income and tenants must occupy a one-bedroom unit.

—Term of subsidy would average 10 years.

—Amount of subsidy approximately $150 a month.

—Limited to 20% of the units in the development.

Applications for the programs, including those mailed to the agency, must be received by the agency no later than 3:00 p.m., October 19, 1984. (In the event that after the deadline and selection, funding remains or additional funding becomes available, the agency will continue to accept applications on an open pipeline, case-by-case basis.) All applications mailed to the agency shall be certified mail, return receipt requested. Anyone delivering an application to the agency must request a receipt.

A developer's packet containing application materials is available for each of the three programs. PLEASE specify which program is desired when requesting a packet from the Minnesota Housing Finance Agency, Suite 200, 333 Sibley Street, St. Paul, Minnesota, 55101, or when calling (612) 297-3294.

Department of Human Services Health Care Programs Division

Contract Available for Health Care Consultation

The Department of Human Services intends to issue a consulting contract to a medical doctor with skills in gerontology and knowledge of special needs of residents of long term care facilities. The work site will generally be in the City of St. Paul, however, limited travel could be required.

The contract will be awarded by September 10, 1984 and will continue through June 30, 1985 and will not exceed $20,000.

The contract selection will be based on the candidate's experience, relocation, achievements, professional standing and his/her ability to meet the Department's level of work activity in a timely manner.

Proposals and inquiries should be directed to:

Thomas Gaylord, Assistant Director
Health Care Programs Division
Minnesota Department of Human Services
Space Center
444 Lafayette Road
St. Paul, MN 55101
(612) 296-2741

Metropolitan Council

Invitation for Sealed Bids for Laser Page Print System

The Metropolitan Council is requesting sealed bids for a Laser Page Print System. The Laser Page Print System must have the capability of printing at 70 pages per minute or greater and support direct bus or channel interconnecting to a central computer.

Specifications for this system may be obtained by contacting Roy Larson, Information Systems Director, at 291-6480. Specifications will be available August 23, 1984.

Sealed bids for this Laser Page Print System will be accepted by the Metropolitan Council until 11:30 a.m. C.D.T., on the 6th of September, 1984. The Purchasing Officer will publicly open the sealed bids in the Office of the Metropolitan Council at 11:30 a.m. C.D.T. on the 7th of September, 1984.

All sealed bids shall be addressed to:

Metropolitan Council
300 Metro Square Building
St. Paul, Minnesota 55101
ATTN: Purchasing Officer

All sealed bids shall be marked "Laser Page Print System—To Be Opened at 11:30 a.m., September 7, 1984." Bids shall be accompanied by a bid bond, certified check, or a cashier's check payable to the Metropolitan Council in the amount not less than five percent (5%) of the total bid price.

The Metropolitan Council reserves the right to reject any or all bids, and to waive any minor irregularities and deviations from the specifications.

Maurice K. Dorton
Executive Director
Metropolitan Council

SUPREME COURT

Decisions of the Court of Appeals Filed Tuesday, August 7, 1984

Compiled by Wayne O. Tschimperle, Clerk

C1-84-162 Rausch Manufacturing Company, Relator, v. Minnesota Occupational Safety and Health Review Board, et al. Department of Labor and Industry.

An overturned order is not a final order for purposes of Minn. Stat. § 182.661 (1982), authorizing penalties for failure to abate safety and health hazards. Penalties may not be imposed on the basis of the Board's overturned order dated June 3, 1982.

Reversed. Popovich, C.J.

C0-84-170 Northwestern State Bank of Luverne v. Barclays American Business Credit, Inc., Appellant. Rock County.

Refund of worker's compensation insurance premium is not "an account or proceed thereof" within the meaning of Minn. Stat. § 336.9-106 (1982).

The debtor's tooling, molds, dies and jigs are not inventory within the meaning of Minn. Stat. § 336.9-109(4) (1982).

The Bank's interest in assigned life insurance policies was extinguished when the loan the policies secured was paid and the Bank failed to take action continuing the assignment.

Affirmed in part and reversed in part. Popovich, C.J.

C6-83-1622 Darcy Suzette Berry, Appellant, v. Thomas Joseph Breslain. Hennepin County.

The award to respondent of a lien on petitioner's nonmarital homestead was error.

Respondent is not entitled to attorney's fees for this appeal.

Reversed. Parker, J.

C9-84-572 John Tevens Able, Appellant, v. Commissioner of Public Safety. Hennepin County.

The record does not support the finding that a store clerk who concluded that a customer was intoxicated and observed him get in his car made a valid citizen's arrest for D.W.I. because it was not established that the D.W.I. was committed in the clerk's presence or that an arrest for D.W.I. was made.

Remanded. Parker, J.

CX84-919 State of Minnesota v. Pamela M. Horner, Appellant. Brown County.

A defendant placed on probation for one offense, who is subsequently sentenced that day to prison for another offense using the *Hernandez* method of sentencing, has the right to demand execution of the prior probationary sentence.

Affirmed as modified. Parker, J.

C5-83-1837 North Star Mutual Insurance Company, Appellant v. Darryl Johnson, et al. Pine County.

The motor vehicle exclusion of the insured's farm policy does not exclude coverage for negligence in securing sprayer arms to a farm sprayer bolted to the bed of the insured's pickup truck.

Affirmed. Foley, J.

C0-83-2040 Richard J. Anderson, Appellant, v. Thomas J. DeLisle, et al. Washington County.

Minnesota recognizes a cause of action for unjust enrichment brought by a defaulting vendee after statutory cancellation of a contract for deed. Such an action lies where it would be morally wrong for one party to enrich himself at the expense of another.

Under the unusual stipulated facts of this action for unjust enrichment for improvements to the vendors' property, the defaulting vendee cannot recover more than he invested to make the improvements.

Reversed, jury award reinstated as modified. Foley, J.

C9-84-622 Paul Mark Petersen, Appellant, v. Mary L. Petersen. Hennepin County.

The Court of Appeals has no jurisdiction to consider an incomplete notice of appeal not timely filed.

Dismissed. Foley, J.

C3-84-227 Fire & Casualty Insurance Company of Connecticut, Appellant, v. Illinois Farmers Insurance Company. Hennepin County.

When a hunter accidently shoots his partner near their vehicle, the vehicle is the mere situs of the accident and, therefore, the accident does not arise out of the maintenance and use of the vehicle.

Affirmed. Wozniak, J.

C0-84-413 In Re: the Marriage of: Gary A. Englund, Petitioner, Appellant, v. Mary Jo Englund a/k/a Mary Jo Diemert. Washington County.

The trial court did not abuse its discretion by not ordering the modification of child custody or holding an evidentiary hearing on the matter.

Where the initial decree provides that the custodial parent is to be solely responsible for child support, the provision cannot be modified without showing a substantial change in circumstances.

Affirmed. Wozniak, J.

C5-83-2003, C5-84-52 Orrin F. Jacobs, et al. v. Farmland Mutual Insurance Company, Appellant, (C5-83-2003); and Orrin F. Jacobs, as Trustee for the Heirs and Next-of-Kin of Michael Gordon Jacobs, Deceased, and Orrin F. Jacobs and Audrey M. Jacobs, Individually v. Farmland Mutual Insurance Company, Frank Gentile, Appellant, (C5-84-52). Traverse County.

Evidence of fraud was clear, convincing, and justified punitive damages where claims adjuster and insurer settled wrongful death claim for $4,000 that was worth much more. The claims adjuster was entitled to indemnity, but not attorney's fees.

Affirmed. Huspeni, J.

C5-83-1854 Julian Johnson Construction Corporation, Appellant, v. Edward E. Parranto and Valentine M. Parranto, Husband and Wife, and Parranto Builders, Inc., Heritage State Bank of North St. Paul. Ramsey County.

The evidence supported the trial court's finding that plaintiff negligently performed its excavation contract with defendants.

Defendants were third party beneficiaries of plaintiff's contract with the township to build roads in a plat of land under development by defendants.

Affirmed. Leslie, J.

C3-83-2050 Gordon Wilson v. Charles M. Spilman, et al., Dell E. Bourke, Appellant. Aitkin County.

The finding of the trial court that respondent Wilson is the fee owner of a 35.7 acre parcel of land is supported by the evidence and is not clearly erroneous. The finding that respondent owned a 4.3 acre parcel is contrary to the evidence.

Affirmed in part, reversed in part, and remanded. Leslie, J.

C0-84-24 In the Matter of Arbitration County of Cass, Walker, Minnesota, and Law Enforcement Labor Services, Inc., Bloomington, Minnesota. Cass County.

The "misconduct" standard for discharge of a public employee under the Veterans Preference Act is the same as the "just cause" standard applied by the arbitrator.

Appellant's claim for unpaid salary under the Veterans Preference Act is not before this court when not raised at the arbitration hearing.

An arbitrator is not required by the Uniform Arbitration Act to make findings of fact to support an award.

Affirmed. Leslie, J.

C8-84-207 Henry Vasek and Ronald Vasek, d/b/a Vasek Farms, Appellants, v. Warren Grain & Seed Company, Cargill, Incorporated. Marshall County.

The appellant's suit is barred by the statutes of limitation found in Minn. Stat. §§ 336.2-725 and 325D.24.

Service of process upon Gary Hill of Warren Grain did not constitute service upon Cargill.

Affirmed. Leslie, J.

C0-84-735 In the Matter of the Alleged Mental Illness of Robert D. Stewart. Hennepin County.

The order continuing commitment of appellant under Minn. Stat. § 253B.12, subd. 4 (Supp. 1983) as mentally ill does not satisfy the statutory requirement that findings be made.

Remanded for findings. Leslie, J.

C4-83-1974 State of Minnesota v. William John Miller, Appellant. Hennepin County.

Appellant's arrest was not invalid even though the original offense charged of driving under the influence was not committed in the officer's presence.

The trial court did not abuse its discretion in granting the state's motion to amend the complaint during trial to specify appellant was charged with being in physical control of a vehicle rather than driving a vehicle.

Affirmed. Nierengarten, J.

CX-84-225 State of Minnesota v. Robert Thomas, Appellant. Hubbard County.

The evidence supports appellant's conviction for assault in the second degree.

Appellant's conviction for assault in the second degree did not arise out of the same behavioral incident as that of a sale of a controlled substance because it was clearly motivated by a separate criminal objective.

The trial court properly used the *Hernandez* method in computing appellant's criminal history score.

Affirmed. Nierengarten, J.

C4-84-849 Bobby Little, Relator, v. Larson Bus Service, and Commissioner of Economic Security. Department of Economic Security.

Relator was discharged from his employment due to misconduct when he took an unauthorized leave of absence and was, therefore, properly disqualified from receiving unemployment compensation benefits pursuant to Minn. Stat. § 268.09, subd. 1(1) (Supp. 1983).

Affirmed. Nierengarten, J.

CX-83-1994 In Re: the Marriage of: Charlene Shirley McKinnon, Appellant, v. John Patrick McKinnon. St. Louis County.

By expressly agreeing to submit the merits of respondent's motion for change of custody to the court upon affidavits and without oral argument, appellant waived her right to an evidentiary hearing on the motion.

Evidence in the record was sufficient to support the court's decision to grant the respondent's motion for change of custody.

Affirmed. Randall, J.

C9-84-85 The Minneapolis Community Development Agency, Appellant, v. Lillie Mae Powell. Hennepin County.

The trial court erred in dismissing this unlawful detainer action before trial on the merits. The facts do not support the court's determination that the landlord had waived the notice of eviction it had served upon its tenant.

Reversed and remanded for trial. Randall, J.

C9-83-2036 In Re: the Marriage of: Kathleen G. Kottke, Petitioner, v. Gary C. Kottke, Appellant. Hennepin County.

A finding that property was acquired in exchange for an inheritance was not clearly erroneous. It was not an abuse of discretion to award respondent cash for an inheritance she invested in the home of the parties.

The trial court did not abuse its discretion in awarding respondent a percentage interest in future pension payments to appellant.

The trial court did not abuse its discretion in refusing not to award a money judgment for loan payments made by appellant but which were to be paid by respondent according to a temporary relief order.

Affirmed. Crippen, J.

C1-83-1835 Rose Marie Morey, Petitioner, v. Gilbert Peppin, Appellant. Dakota.

An adjudicated father who has formally acknowledged paternity is entitled to an evidentiary hearing on his motion for an award of custody of a child born outside of marriage.

The determination of child custody without findings of fact is reversible error.

The trial court did not abuse its discretion in electing not to order a social investigation and report.

Disclosure of a parent's mental health records can be demanded in a custody dispute, but the trial court must carefully protect the parent from irrelevant or oppressive disclosures.

Affirmed in part, reversed in part and remanded. Crippen, J.

C5-84-715 Richard A. Cash, Relator, v. Commissioner of Economic Security. Department of Economic Security.

Relator sought unemployment compensation benefits for several weeks in which his employment rendered him ineligible for benefits, and evidence reasonably supports the Commissioner's finding that relator knowingly and willfully failed to disclose that employment. The Commissioner's disqualification of relator from receipt of benefits for an additional 15 weeks was not an abuse of discretion.

Affirmed. Crippen, J.

Decisions of the Supreme Court Filed Friday, August 10, 1984

Compiled by Wayne O. Tschimperle, Clerk

C0-83-952 Henry Blackburn, Frank Davis, Richard L. Doege, Francis Hyde, Gerald Kaplan, and Marjorie Thies, Appellants, v. Doubleday Broadcasting Company, Inc., KDWB-FM; Malrite of Minnesota, Inc., KEEY-FM; Entertainment Communications, Inc., WAYL-FM; Hudson Broadcasting Corporation, KQRS-FM; Emmis Broadcasting of Minnesota, WLOL-FM. Hennepin County.

The Federal Communications Act preempts plaintiffs' claim that defendants' radio transmissions constitute an actionable nuisance by distorting their reception of other desired radio signals.

Plaintiffs are not third-party beneficiaries under defendants' lease agreements.

Affirmed. Scott, J.

C2-83-936, C5-83-1207, CX-83-1381 Horace Mann Insurance Company v. Independent School District No. 656 and Fireman's Fund Insurance Company, Appellants (C2-83-936, C5-83-1207), Security Insurance Company, Eugene J. Crosby, Guardian Ad Litem for R.L.E., et al., Appellants (CX-83-1381), Michael Phillips. Rice County.

A general liability insurance policy containing an "intentional damages" exclusion precludes a duty to defend and indemnify an insured adult public school teacher who allegedly had sexual contact with one of his minor students.

When an adult school teacher and counselor engages in behavior of repeated sexual contacts with a minor student, an intent to cause bodily injury may be inferred as a matter of law to preclude coverage under a homeowner's insurance policy.

The general liability insurer of a school district has no obligation to defend an employee of the district nor to indemnify the district for any judgment that might be entered against it based upon claims against the teacher-counselor because he engaged in sexual contact with a minor student.

When a teacher is sued for behavior allegedly causing damages which occurred in the course and scope of his employment, the school district has an absolute statutory duty to defend him.

A school district owes no duty to indemnify a teacher or other employee guilty of malfeasance or willful or wanton neglect of duty.

Affirmed in part; reversed in part. Kelley, J.

CX-83-1056 The Estate of Gloria J. Lehmann, by Walter A. Lehmann, as Personal Representative, and Walter A. Lehmann and Agnes Lehmann, v. Robert W. Metzger, Defendant and Third-Party Plaintiff, v. Auto-Owners Insurance Company, Third-Party Defendant. Appellant. Hennepin County.

Reversed and remanded for vacation of judgment in favor of respondent and entry of judgment for appellant. Kelley, J.

C7-83-1077 State Farm Fire and Casualty Company, Appellant, v. Tony Williams, Harry Keller. Rice County.

When an insured under a homeowner's insurance policy repeatedly inflicts nonconsensual sexual acts upon a physically disabled adult victim, intent by the insured to inflict bodily harm is inferred as a matter of law.

Since the intentional act exclusion and facts beyond the complaint indicate no coverage exists, the insurer has no duty to defend or indemnify the insured in either the declaratory judgment or main action.

Reversed and remanded. Kelley, J.

Took no part, Coyne, J.

ERRATA

Board of Dentistry

Corrections to Proposed Rule Amending Fees of the Board of Dentistry, 8 SR 2688

Two items published in the June 18, 1984 issue of the *State Register* (8 SR 2688) are in error. The corrections are as follows:

Rule as Proposed

3100.2000 Fees.

Subpart 1. Application Fees. . . . . .

A. dental applicant, $70;

should be changed to read:

A. dentist applicant, $70;

The other change occurs in Subpart 3 of the same rule. The third line of **Subpart 3** cites part *3100.1406*; this should read: *3100.1400*.

Please note: this is a correction of typing errors. This is not an amendment.

State of Minnesota
State Register and Public Documents Division
117 University Avenue
St. Paul, Minnesota 55155

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(toll-free # for MN:
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STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Governing Debarment and Suspension of Persons from Receiving Mn/DOT Contracts

FINDINGS CONCLUSIONS AND ORDER ADOPTING RULES

Notice of the Commissioner's intent to adopt the above entitled rules without a public hearing was published in the State Register on August 20, 1984 and was sent by United States mail to all persons on the list maintained by the agency pursuant to Minnesota Statutes, section 14.14, subdivision 1a. on August 7, 1984. Notice was mailed by the Minnesota Department of Transportation (Mn/DOT) to persons on the Mn/DOT list of Women Business Enterprises and Minority Business Enterprises on August 21, 1984. The Notice and a copy of the proposed rules were published in the Construction Bulletin on August 17, 1984 and were provided to Associated General Contractors, a Minnesota trade association with over 200 members, for mailing to its members on August 7, 1984.

After affording interested and affected persons 30 days to submit comments, receiving fewer than 25 requests for a public hearing, and having reviewed and considered the written and oral comments and statements submitted during the 30 day comment period, and the applicable statutes and rules, and confirming the need for and reasonableness of the above captioned rules, I find the following:

1. That proper notice of the intent to adopt the above captioned rules without a public hearing was given in this matter.

2. That the procedural requirements of Minnesota Statutes, sections 14.115, 14.14, 14.22 to 14.26 and Laws 1984, Chapter 640, sections 7, and 12 to 15 have been fulfilled.

3. That statutory authority to adopt the proposed rules has been documented in the Statement of Need and Reasonableness.

4. That the Statement of Need and Reasonableness demonstrates a rational basis for the adoption of the proposed rules and shows the need for and reasonableness of the proposed rules.

5. That the proposed rules should be modified as follows:

Part 1230.3100 DEFINITIONS.

Add: Subpart 7. Conviction. "Conviction" has the meaning given it in Minnesota Statutes, section 609.02, subdivision 5.

P.1

This definition is needed to make it clear that the Department treats a plea of guilty as a conviction. Minn. Stat. 609.02, subd. 5, states:

Subd. 5. Conviction. "Conviction" means any of the following accepted and recorded by the court:

(1) A plea of guilty; or
(2) A verdict of guilty by a jury or a finding of guilty by the court.

This is a reasonable clarification because it adopts the accepted legal definition of conviction and does not change the intended application of the rules.

Amend Subp. 9. Mn/DOT Contract. "Mn/DOT contract" means a written instrument containing the elements of offer, acceptance, and consideration to which the Minnesota Department of Transportation is a party, or acts as an agent for a party under Minnesota Statutes, sections 161.36, subdivisions 2 and 3, 360.016, subdivisions 2 and 3, or 360.039, subdivisions 2 and 3, for which competitive bids are required or taken, and which is subject to the approval of the commissioner.

This notification is needed to resolve confusion as to whether Mn/DOT contracts which Mn/DOT lets for the benefit or at the request of another unit of government are included in the definition. In some cases, the commissioner of transportation is a party to and lets contracts on competitive bids for work which is done for a municipality or other unit of government. In those cases the commissioner is a party to the contract in his capacity as agent for the other unit of government. The modification explicitly states that Mn/DOT contracts include contracts to which the commissioner is a party as an agent for someone else. This clarification is reasonable because it harmonizes the proposed rules with the law and with current practice.

Amend Subp. 11. Principal. "Principal" means an officer, director, or partner, or an employee ~~of a business,~~ or a shareholder engaged in management of the business. This modification restricts the definition of "principal" so that an employee of a business who is not engaged in management of the business will not be treated as a principal, and therefore, will not be subject to debarment. This change was needed to spare non-management employees the consequences of debarment. It is reasonable to impose the responsibility for detection and prevention of contract crimes only on persons with legal responsibility for the conduct of the business. This modification was requested in a letter submitted by Bill Hart of H.R. Loveall Construction, Inc. The Department of Transportation wishes to adopt the change.

Part 1230.3400 DEBARMENT PROCEDURE.

This part is modified as follows:

Subpart 1. Except as provided in subpart 2. a business must be debarred by the Minnesota Department of Transportation when one or more of the grounds set forth in part 1230.3200 are established at a hearing or opportunity for hearing conducted under Minnesota Statutes, chapter 14.

Subp. 2. The commissioner of transportation is not required to debar a business in Minnesota if the business has completed a debarment period of at least one year imposed by another jurisdiction for the offense which would be grounds for debarment in Minnesota.

Subp. 3. A debarment or a suspension must be initiated within 3 years from the date of the conviction of a business for an offense described in part 1230.3200.

These modifications were made in response to a request from Daniel D. Foth, Executive Director, Associated Builders and Contractors, Inc. (Minnesota Chapter) 6300 Walker St., Minneapolis. He did not submit written comments, but requested at a meeting that the proposed rules be amended to take into account a debarment imposed by a court. He felt that it would be unfair to debar someone twice. The rule has been amended to reflect that principle, but not quite as he suggested. The rule has been amended to take into account debarments imposed by any other jurisdiction because it is likely that contractors who have been debarred in Iowa, South Dakota, Kansas or other states may bid in Minnesota. No more court imposed debarments will occur in Minnesota. The two which occurred in September, 1984 were part of a settlement negotiated by the Antitrust Division of the Attorney General's Office. No more debarment negotiations will be conducted by that office. Nevertheless, the principle that a business which has completed a debarment elsewhere should not be debarred twice for the same offense if it has been debarred for the minimum period of time required in Minnesota, seems fair and has been incorporated in the rules.

Mr. Foth also requested that the rule be amended to include a statute of limitations for debarment. A statute of limitations provides certainty to people as to the finality or likelihood of certain government action being taken against them. It requires the commissioner of transportation to debar a business in a timely manner. Three years is a reasonable period of time in which to act because it is close enough to the date of conviction so that the integrity and responsibility of the contractor is still in doubt, yet it provides adequate time for the commissioner to learn of the conviction, hold a hearing and debar the convicted business.

Part 1230.3500 TERM OF DEBARMENT.

The phrase "...the seriousness of the grounds,..." is amended to read "...the seriousness of the offense,..." to make that reference to the charge which resulted in the conviction consistent with other references in the rules. See Part 1230.3100, subp. 5. Contract crime. "...or other criminal offense...; Part 1230.3300, "The conviction of a person for offenses listed..."; Part 1230.3600, subp. 1. "The conviction of a business in any jurisdiction, for offenses listed in part 1230.3200...". The word "offense" refers to an offense described in the definition of "contract crime." It is the particular offense which will be examined in determining the gravity of the crime when the period of debarment is established.

That part is further modified to read: "The term of debarment depends upon: the seriousness of the ~~grounds~~ offense, whether restitution has been made; whether the debarred person cooperated in civil or criminal lawsuits; ~~and~~ the state's need to preserve the competitive bidding process~~.~~ , and whether the business is debarred or has completed a debarment of at least one year in another jurisdiction. In no case may a debarment be for a shorter period than one year. The length of the debarment period in another jurisdiction must be taken into account in determining the term of debarment in Minnesota.

p3

It is both reasonable and necessary to take into account the length of time a business has been debarred in another jurisdiction. It would be unfair to debar a business in Minnesota for the same offense for which it has been debarred for a certain minimum period of time in another jurisdiction. ~~However, in order to provide certainty to the process and to allow adequate time for the business to reform or reorganize, a minimum term of debarment must be established. If a business has been debarred for one year in another state, the commissioner may decide not to debar in~~

Minnesota after considering the other criteria involved in establishing the length of time a business will be debarred. Requiring a minimum period for a debarment does not negate consideration of the criteria in Part 1230.3500: it still allows application of the criteria in determining the extent to which the debarment should exceed one year. Although it appears to require all persons convicted of contract crimes to be treated the same, it does allow consideration of individual differences in the application of the criteria to each situation in determining whether the debarment period should be longer than one year, and if so, how long it should be. This does not make a fundamental change in the rule, for without this provision, the commissioner could still impose a debarment period of at least one year for each person or business convicted of a contract crime. ~~It merely gives notice that all persons will be debarred for a minimum period of time~~.

Part 1230.3600 DEBARMENT BASED ON AFFILIATION.

Part 1230.3600, subpart. 2. B. is modified to read:

B. is owned by or associated in a joint venture with a debarred or suspended business or is controlled by a <u>principal or</u> former principal of a debarred or suspended business; or

This modification is needed to correct the omission of the word 'principal' from the proposed rules. This section is intended to preclude current and former principals of a currently debarred business from contracting with Mn/DOT through subsidiaries of the debarred business or by engaging with another Mn/DOT contractor in a joint venture. These restrictions would prevent evasion of the commissioner's debarment order. Although a business might choose to purge itself of directors or managers convicted of antitrust violations, a business owned or controlled by such a person will remain under his control. Therefore in order to protect Mn/DOT this section must be amended so that it applies to both current and former principals of debarred businesses.

Part 1230.3900 TERMINATION OF DEBARMENT OR AWARD DURING DEBARMENT.

This part is modified by adding:

C. the commissioner of administration determines that an emergency exists as defined in Minnesota Statutes, section ~~16.06~~ <u>16B.08</u>, subdivision ~~2~~ <u>6; or</u>

This section is amended to show the recodification of the Department of Administration laws in 1984. There is no substantive change in the text.

<u>D. The contract is for purchasing materials or renting equipment for routine road maintenance</u>.

This modification was requested by several contractors and is also desired by the Department of Transportation. Two letters were received from H.R. Loveall Construction, Inc. asking that debarred contractors be allowed to supply materials or subcontract. Because the responsibility and reliability required of a subcontractor for his work on a project is very much like the responsibility and reliability required of a prime contractor, Mn/DOT does not wish to allow debarred persons to serve as subcontractors. However, Mn/DOT has a continuing need for road maintenance supplies and equipment. These items are obtained most economically from a location which is as near as possible to the site or area where they will be used.

They are subject to measurement and testing by Mn/DOT to determine quantity and quality and because most such supplying is done locally do not present a situation where the previously adjudicated lack of responsibility of the contractor poses a threat to the departments contracting process or work. Therefore, it is reasonable to except these particular kinds of contracts from the prohibition against contracting with debarred persons. This modification benefits Mn/DOT, the public and debarred contractors by keeping maintenance costs low.

Part 1230.4000 CONTINUATION OF CONTRACTS.

This part is modified as follows:

Mn/DOT contracts in existence at the time of debarment or suspension are not terminated by the debarment or suspension except as provided in part 1230.1200. p.5

This modification is necessary to make the language consistent with the references to Mn/DOT contracts in other parts of the rules. See Part 1230.3100 Definitions. "Mn/DOT contract."; Part 1230.3900 Termination "The commissioner of transportation may terminate a debarment by order or may award a Mn/DOT contract..."; Part 1230.4100 Prohibitions. Subpart 1. "Mn/DOT contracts." Except as provided in 1230.3900, the Department of Transportation may not award a Mn/DOT contract..."; Subp. 2. "Except as provided in part 1230.3900, a contractor to whom a Mn/DOT contract has been awarded...". It is reasonable to have consistent references to the same thing to avoid confusion. This change makes it clear that Rule 1230.4000 applies only to Mn/DOT contracts.

Part 1230.4200 SUSPENSION.

Subpart 1. is modified as follows:

Subpart 1. Order of suspension. The commissioner of transportation shall suspend a person or business by order upon receiving notice or learning of a conviction for conduct described in part 1230.3200 or upon ~~learning~~ receiving evidence of an affiliation described in part 1230.3600, subpart 2. p.6

This modification was requested by telephone by Dan Foth, Executive Director, Associated Builders and Contractors. He feared that Mn/DOT would suspend a contractor on the basis of an unsubstantiated rumor of affiliation with a debarred person. Mn/DOT interprets "receiving evidence" to require some showing of affiliation, such as an affidavit, corporate articles or by-laws, employment agreements, signed checks, court or hearing records, an admission of a debarred person as to affiliation or some similar showing. This is only a change in wording and has no other effect.

NOW, THEREFORE, IT IS ORDERED that these rules identified as Proposed Rules of the State Department of Administration Governing Debarment and Suspension of Persons from Receiving Mn/DOT Contracts are adopted this 19th day of October, 1984, pursuant to authority vested in me by Laws 1984, Chapter 544, Section 9 (to be codified Minnesota Statutes, section 16B.04, subdivision 1) and Laws 1984, Chapter 654, Section 8.

STATE OF MINNESOTA

COMMISSIONER OF ADMINISTRATION

JULY 19, 1984

STATE OF MINNESOTA
COUNTY OF RAMSEY

BEFORE THE MINNESOTA
COMMISSIONER OF ADMINISTRATION

In the Matter of Proposed
Rules Relating to Debarment
and Suspension of Persons
From Bidding on Department of
Transportation Contracts

STATEMENT OF NEED
AND REASONABLENESS

The Commissioner of Administration, pursuant to Minnesota Statutes, section 14.23, presents facts establishing the need for and reasonableness of proposed rules relating to debarring and suspending certain persons from the award of contracts by the Minnesota Department of Transportation (Mn/DOT).

I. Statutory Authority

Laws 1984, Chapter 654, Section 8, directs the Commissioner of Administration to adopt rules relating to disqualifying persons convicted of contract crimes from receiving transportation department contracts.

> The commissioner of administration shall adopt rules to establish the standards and procedures by which a contractor who has been convicted of a contract crime, and its affiliates, will be disqualified from receiving the award of a state contract or from serving as a subcontractor or material supplier under a state contract. The rules shall apply to contracts let by the commissioner of transportation and to other contracts and purchases the commissioner of administration deems necessary and appropriate.

Minnesota Statutes, section 16.02, subdivision 4, provides that the Commissioner of Administration has the power and duty with respect to all agencies of the state to supervise and control the making of all contracts for buildings, highways, and other improvements. Section 16.08 provides in part

> All contracts and purchases made by or under the supervision of the commissioner or any state department or agency for which competitive bids are required shall be awarded to the lowest responsible bidder, taking into consideration conformity with the specifications, terms of delivery, and other conditions imposed in the call for bids. The commissioner shall have power to decide as to the lowest responsible bidder for all purchases. As to contracts other than for purchases, the head of the interested department or agency shall make the decision, subject to the approval of the commissioner.

The authority of the commissioner to adopt rules governing state contracts is found in Minnesota Statutes, section 16.05, which states;

> The commissioner shall have power, with the approval of the governor, to make and amend rules and regulations, not inconsistent with law, respecting any matter within the scope of the powers and duties conferred by sections 16.01 to 16.23, which rules and regulations shall have the force and effect of law; provided, that every such rule or regulation affecting any person or agency, other than a member of the department of administration, shall be filed with the secretary of state, and shall not take effect until so filed.

II. General Statement of Need and Reasonableness

The proposed rules establish a procedure to allow Mn/DOT to debar and suspend persons who bid or may bid for Mn/DOT contracts. This is a new subject for state rulemaking. Government contracts for which competitive bids are taken are normally awarded to the lowest responsible bidder. Minnesota Statutes, section 16.08, states, "All contracts...for which competitive bids are required shall be awarded to the lowest responsible bidder, taking into consideration conformity with the specifications, terms of delivery and other conditions imposed in the call for bids." The purpose of seeking competitive bids and awarding the contract to the lowest responsible bidder is to promote competition and to obtain the best possible commodity, service, public building or highway for the lowest possible cost. "The basic purpose of competitive bidding is to give to the public the benefit of the lowest obtainable price from a responsible contractor." Foley Bros., Inc. v. Marshall 266 Minn. 259, 123 N.W.2d 387, 391 (1963).

Competitive bidding is somewhat risky for contractors and suppliers as the results are unknown when the contractor is estimating his cost and attempting to determine how much work he will have in any given time period. Some contractors, dissatisfied with the unpredicability of competitive bidding, have engaged in a contract crime known as bidrigging. Bidrigging is the concerted activity of two or more bidders to determine by private agreement, the winning bidder of a public contract advertised for competitive bidding.

> Bidrigging on public contracts is by no means a recent phenomenon. As early as 1894, several manufacturers of cast iron pipes, including two Tennessee firms, were charged with engaging in a combination and conspiracy to fix the bids to government entities and others. Among the collusive arrangements was an agreement whereby certain bidders "reserved cities" for themselves. For unreserved cities, the successful bidder was determined by the "auction pool" operated by the conspirators. When the successful conspirator had been determined, "the other defendants put in bids at the public letting as high as a selected bidder requested in order to give the appearance of active competition between defendants." Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 219 (1899). "Highway Bid Rigging:

The Tennessee Experience", National Association of Attorneys General Antitrust Report, October, 1981, p.1.

Although price fixing, bidrigging or territorial allocations may occur in bidding on any kind of contract, bidrigging on airport and highway construction projects has recently been recognized as a national problem. The United States Department of Justice began investigating highway construction bidrigging in 1979. By March 1983 it had initiated 215 criminal prosecutions in 15 states. One hundred forty eight corporations and 164 individuals have pled guilty and fines of $44 million have been levied. The investigations and prosecutions are continuing. U.S. General Accounting Office, Actions Being Taken to Deal With Bid Rigging in the Federal Highway Program, Report to the Chairman. Committee on Public Works and Transportation, House of Representatives, May 23, 1983, p. 7. The Office of the Inspector General of the U.S. Department of Transportation also investigates antitrust violations and prosecutes offenders. As a result of bidrigging investigations conducted in 1983, that office obtained 100 indictments, 82 convictions and $11.7 million in fines. "Bid Rigging Enforcement Outlined", AASHTO Journal, February 24, 1984, p. 6. Contractors in Iowa and Nebraska have recently pled guilty to or been convicted of antitrust violations involving public construction projects. Lincoln, Nebraska Star, March 19, 1982. To date no prosecutions have occurred in Minnesota, although an officer of a Minnesota construction company pled guilty on March 4, 1983, in U.S. District Court for the Southern District of Iowa, to violating the Sherman Antitrust Act in bidding on a federally funded highway project in Iowa.

Antitrust violations raise the cost to the public of accomplishing construction projects because the normal competitive process is not allowed to operate. Instead the price is artificially established by the bidders who collude to determine who will do the work and the amount of the winning bid. Some states (North Carolina and Tennessee) have used ten percent of the contract award price as a measure of overcharges on rigged contracts. Thus, in many cases, where bids on public construction contracts have been rigged the public may have paid ten percent more than necessary. It has been reported that the Federal Highway Administration has noted that the cost of paving highways has dropped as much as 25 percent in states where bidrigging investigations have occurred. Tillet, "Bidrigging Costs States." State Government News, August, 1982, p. 7.

Mn/DOT has a strong interest in avoiding contracting with persons or firms that have been convicted of antitrust violations. It cannot trust that the bid from such a firm is an honest and accurate estimate of the cost of the advertised work or that the contractor will deal honestly with Mn/DOT. Other contract related offenses such as fraud, embezzlement, bribery, filing false documents and forgery also show a lack of integrity and responsibility on the part of a business.

The state has a duty to protect its funds and a vested interest in dealing only with the most responsible contractors. Minnesota Statutes, section 16.08, specifically directs the commissioner to award contracts and purchases to the lowest responsible bidder. (emphasis added) In fiscal year 1983, construction contracts totalling $272.7 million were awarded. In 1984, the total will be $403.6 million. Mn/DOT engages in a large volume of contracting that it must protect from the inflation that results from anti-competitive activities and from the danger and the economic risk posed by irresponsible bidders.

One of the important issues Mn/DOT must face in awarding public contracts is how to deal with persons and businesses that have been accused, indicted or convicted of bidrigging, other antitrust violations or other contract crimes indicating a lack of business integrity or honesty. This issue may arise with respect to businesses convicted locally of antitrust and other contract related offenses, or with respect to businesses that wish to bid on state contracts, to serve as subcontractors or to supply materials in Minnesota that have been convicted of contract related crimes in other states. For the reasons stated above Mn/DOT should not deal with such businesses.

Mn/DOT can protect its public contracts from irresponsible and dishonest persons by employing procedures known as suspension and debarment. Debarment is the formal disqualification, after a hearing, of a business or individual from the award of a contract funded in whole or in part by government funds, and from the opportunity to serve as subcontractor or material supplier. Debarment is intended to protect the integrity of the state's competitive bidding process. It is based on the theory that an individual or firm that violates the bidding laws or engages in contract related crimes is not trustworthy and should not be the recipient of state contracts for some specified period of time. Suspension is temporary (no more than 60 days) and allows the state to cease dealing with a business while it holds a hearing or begins the hearing process.

Debarment and suspension are protective in nature. The United States government procurement process has provided for administrative debarment and suspension of general application to federal contractors since 1928. Calimari, The Aftermath of Gonzalez and Horne on the Administrative Debarment and Suspension of Government Contractors, 17 N. England L. Rev. 1137, 1141 (1982). Most federal agencies have been enforcing some form of debarment, suspension or non-responsibility determination procedure for more than thirty years. The U.S. Department of Transportation has its own procedure for debarring irresponsible highway construction contractors who seek federally-aided contracts. The U.S. D.O.T. regulations prohibit awarding federally-aided highway construction contracts to persons who have been debarred by a federal agency. 49 C.F.R. Part 29 (1984).

The states have also addressed this problem. Twenty four states have laws or rules that permit or require debarment or disqualification of non-responsible bidders. Eight states have begun to develop debarment and suspension rules since it has become evident that there is widespread collusive activity in the highway construction business. Some states (Nebraska, Virginia and New Jersey) debar or suspend prospective bidders upon charge, indictment, or statement of a co-conspirator. In other states (Maryland, North Carolina) debarment occurs only after conviction or civil judgment.

The existence of a debarment procedure also protects the competitive bidding process by discouraging collusive activities. Some states feel that the threat of debarment and loss of ability to bid on or receive state contracts is a greater deterrent to collusive activity than the threat of a large fine or jail sentence.

Minnesota does not have a formal procedure for identifying and then debarring or suspending businesses convicted of antitrust or contract related offenses. In order to meet the statutory requirement that contracts be awarded to the lowest responsible bidder, Mn/DOT must have a procedure which provides for suspension and debarment of irresponsible businesses under certain specified circumstances. Mn/DOT

needs a procedure for application to wholly state funded contracts and for situations in which the Federal Highway Administration has not yet acted or has not provided due process to the business in question.

The case law shows that there are circumstances which justify the government's refusal to deal with certain bidders. However, that decision must be reached fairly and in accordance with the requirements of due process.

A contractor has no absolute right to do business with the government. See Perkins v. Lukens Steel Co., 310 U.S. 113, (1940); Gonzalez v. Freeman, 334 F.2d 570, 574 (D.C.Cir. 1964); Trap Rock Industries, Inc., v. Kohl, 59 N.J.471, 284 A.2d 161 cert. denied, 405 U.S. 1065 (1972). However, the administrative suspension or denial of the right to bid or contract with the government directs the power of the government at a particular person and also may have serious economic consequences for a contractor. Several federal cases have held that due process requires that before a business may be denied the right to bid or contract, certain procedural safeguards must be observed, including notice of the grounds for debarment and an opportunity for some type of hearing. See Peter Kiewit Sons' Co., v. U.S. Army Corps of Engineers, 534 F. Supp. 1139, 1153, (D.D.C.1982); Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1271 (D.C.Cir. 1972).

These proposed rules will establish a procedure to protect Mn/DOT from dealing with dishonest and irresponsible contractors and will provide due process for persons proposed to be suspended and debarred.

III. Need and Reasonableness of the Proposed Rules.

Minnesota Rule 1230.3000 Scope.

These rules will apply to all Mn/DOT contracts. The definition of "Mn/DOT contract" is explained in the section on definitions. The authorizing statute, Laws 1984, Ch. 654, section 8, requires that the rules apply to all contracts let by the Commissioner of Transportation.

Minnesota Rule 1230.3100 Definitions.

Subpart 1. Scope.

Subpart 2. "Administrative law judge." "Administrative law judge" is defined to make the definition consistent with state law. Minnesota Statutes, section 14.50, provides that all hearings of state agencies require to be conducted under the Minnesota Administrative Procedure Act must be conducted by an administrative law judge assigned by the Chief Administrative Law Judge. It is intended that all hearings resulting from administration of these rules will be conducted according to the Minnesota Administrative Procedure Act.

Subpart 3. "Business." This word is defined to encompass all the various organizations and entities which might be formed to do business as a contractor, subcontractor or material supplier for Mn/DOT. It permits a shorthand reference to all the possible forms of business organizations.

Subpart 4. "Commissioner." "Commissioner" means the Commissioner of the Department of Administration. This is defined for the convenience of people using the rules and to simplify the reference to the Commissioner of Administration.

Subpart 5. "Contract crime." "Contract crime" is defined to include a variety of crimes related to making and performing contracts. It is reasonable to restrict the definition and the application of these rules to convictions for crimes related to contracting because that is the activity the state must protect through these rules. Any crime committed to enable the defendant to obtain a contract or to affect or influence the award or performance of a contract, shows that the defendant does not act responsibly where contracts are concerned. All the offenses listed in the definition could be committed in making or performing a contract.

Subpart 6. "Contractor." This word is defined so that persons using the rules will know that when the word "contractor" is used in these rules it has a specific meaning.

Subpart 7. "Debar." The word "debar" is defined so that people will know what the word means. The definition of "debar" is the meaning commonly understood by people who are familiar with the process of debarment as it occurs in relation to government procurement. The definition is similar to that in federal procurement regulations ("...to preclude a contractor from government contracting..." Office of Federal Procurement Policy, Policy Letter 82-1, Appendix A, 47 Federal Register 28854, 28858) and to definitions used by some states in their debarment rules. This definition of the word "debar" does not prevent a person from bidding on a Mn/DOT contract but prevents the person from being awarded a Mn/DOT contract or from serving as a subcontractor or material supplier under an awarded Mn/DOT contract.

Some states prohibit debarred persons from bidding on state contracts (Maryland, South Carolina, North Carolina, Nebraska, Iowa). Virginia and Texas prohibit debarred persons from contracting with the state (same as award). In some cases, a person who has been convicted of a contract-related offense, but not yet debarred by the federal government or by Minnesota or another state, may wish to bid on a Mn/DOT contract. Mn/DOT is not harmed by allowing a convicted person or business to bid, for a bid has no binding effect. If the bidder is not the lowest responsible bidder, Mn/DOT need not concern itself immediately about whether the contractor is responsible, but can hold the hearing in due time. If the bidder is the lowest bidder and has been previously convicted of a contract-related offense, Mn/DOT must then hold a debarment hearing if the bidder has not already been debarred.

Subpart 8. "Mn/DOT contract." "Mn/DOT contract" is defined according to the simplest legal definition of contract. It is defined in a way which limits the application of these rules to contracts that will be awarded by Mn/DOT and for which competitive bids are required by law or for which competitive bids are taken at the option of the agency. It is reasonable to restrict the application of the rules to Mn/DOT contracts for which competitive bids are or may be taken because other contracts can be negotiated between Mn/DOT and the contractor or supplier. Mn/DOT is not obliged to make an award or deal with any particular bidder when it contracts by negotiation and, therefore, can reject applicants who are deemed not responsible.

Subpart 9. "Person." "Person" is defined to include natural persons and business corporations, associations and any other organizations or entities which might wish to contract with the state.

Subpart 10. "Principal." "Principal" is defined to permit a shorthand reference to a number of individuals.

Subpart 11. "Suspend." "Suspend" is defined to mean a temporary disqualification from being awarded a Mn/DOT contract or from serving as a subcontractor or material supplier under an awarded Mn/DOT contract. The word suspend is needed to define the status of those against whom department proceedings are being prepared, but who are not yet debarred from contracting with Mn/DOT or from serving as a subcontractor or supplier. It denotes a pending debarment proceeding.

Minnesota Rule 1230.3200 Grounds for Debarment.

The grounds for debarment were drawn from several sources: A Policy Letter issued by the U.S. Office of Federal Procurement Policy, The American Bar Association Model Procurement Code, the American Bar Association Statement of Principles for the Debarment and Suspension Reform Act and from federal case law.

Policy Letter No. 82-1 of the U.S. Office of Management and Budget, Office of Federal Procurement Policy, 47 Fed. Reg. 28854, (1982) (to be codified at 48 Code of Federal Regulations Subpart 9.4 as of October 1, 1984) became effective August 30, 1982, and applies to federal agencies and persons who contract directly with agencies of the federal government. It resulted from study of federal debarment procedures by the Senate Subcommittee on Oversight of Government Management. Hearings before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs. 97th Cong. 1st Sess. (March 11, 12, 1981). The Policy Letter sets forth U.S. government agency-wide policies and procedures for debarment and suspension of U.S. government contractors and provides for a consolidated list of administrative debarments and suspensions. It also establishes certain due process safeguards for contractors.

The federal Policy Letter established three basic grounds for debarment: 1) conviction of or civil judgment for a variety of contract or business related offenses (the Minnesota rules will adopt these grounds); 2) serious violation of the terms of a governmental contract; 3) and any other cause of so serious a nature that it affects the contractor's present responsibility (Paragraph 7.2). The federal rationale for adoption of these grounds is stated in the comments section of the Policy Letter, 47 Fed. Reg. 28854, 28856:

> The objective of Appendix A (The Policy Letter text) is to assure that Government agencies do not deal with non-responsible business concerns. The concept of business responsibility is one which is well understood in the Government contracting community. Evidence of a contractor's lack of responsibility in the past may be considered when determining whether or not a contractor is presently responsible. The implication in the comments that the determination of responsibility covers something other than present responsibility is an unwarranted reading of the Policy Letter.
>
> These commentors were also concerned that debarment would be used to punish contractors for past transgressions. Debarment is not a form of punishment

for Government contractors; it is a procedure which must be available to the Government in order to protect its interests from non-responsible contractors.

The American Bar Association Section of Public Contract Law studied the question of debarment and suspension for one year. The result of that study was a statement of 36 Principles that it proposed as a Debarment and Suspension Reform Act to be enacted by Congress. The Principles were accompanied by a background report which evaluated current federal practice (this was prior to the adoption of Federal Policy Letter 82-1) and federal case law and explained the rationale for each Principle. The recommended Principles and the report were adopted by the ABA House of Delegates in January, 1982. American Bar Association Section of Public Contract Law, Proposed Debarment and Suspension Reform Act, January, 1982. The ABA proposal would have provided more procedural safeguards for government contractors than the Federal Policy Letter, and it proposed the creation of an independent board to hear debarment cases, taking the hearing out of the debarring agency.

The rationale for the ABA debarment and suspension proposal was offered by George M. Coburn and Milton Eisenberg, both members of the ABA Section of Public Contract Law, Special Committee on Debarment:

> The ABA proposal would strengthen the authority of the government to protect itself from these irresponsible persons by providing a firm legislative foundation for administrative debarments and suspensions. It also would ensure that decisions to debar and suspend are based on reliable evidence and follow fair procedures, thereby making them less vulnerable to subsequent attack in the courts. Finally, the implementation of such a proposal would provide positive incentives to contractors and others to remedy deficiencies in performance, conduct, or management if they want to continue to participate in the competitive procurement process and in various federal assistance programs.
>
> Both the ABA proposal and the OFPP Policy Letter proceed from the premise that while debarments and suspensions are necessary in appropriate cases, they are considered to have a "drastic" impact, that they should be considered remedial and not punitive in nature, and that they should be imposed for no longer than is necessary to protect the government's interest.... Both also recognize that the government must be able to protect itself from fraudulent and incompetent contractors as well as from others participating in federal programs. Finally, both acknowledge that the procedures for suspension and debarment must afford fundamental fairness to those affected. Coburn and Eisenberg, "Debarment, Suspension Methods Stir Controversy," Legal Times (Wash., D.C.), Aug. 23, 1982, p. 14.

The ground for debarment proposed by the ABA in Principle 4 was a "...determination that there is a substantial and continuing risk that in obtaining or performing government contracts...such person will not substantially perform all material obligations and requirements..." The Principle stated that an obligation could be considered material if it related to "honest and fair dealing".

The comments to this Principle explained the specific kind of conduct that would require debarment:

> Throughout the Statement of Principles, the Committee has made clear its belief that in cases involving allegations of fraud or criminal conduct, the Board should generally wait for and defer to the results of a criminal trial, assuming the government seeks criminal penalties as well as its debarment remedy. Thus, the Committee expects that the Board will treat criminal convictions for fraud, embezzlement, forgery, bribery, and other offenses indicating a lack of business integrity or business honesty, or convictions for violations of federal or state antitrust laws, or other offenses relating to obtaining or performing contracts as prima facie evidence to support debarment. Comment to Principle No. 4., ABA Proposed Debarment and Suspension Reform Act.

Those are among the grounds proposed in these rules.

The ABA Model Procurement Code, (1975) Section 9-102, specifies that causes for debarment or suspension include...

> (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
>
> (b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a (State) contractor;
>
> (c) conviction under state or federal antitrust statutes arising out of the submission of bids or proposals.

The grounds for debarment in these proposed rules, are based primarily on these three models and on the rationales which support them.

Minnesota is required to award competitive contracts to the lowest, responsible bidder. The state may not award a contract to a bidder who is not responsible. "Under this statute, (referring to Minnesota Statutes, section 16.08) public officials charged with the duty of awarding public contracts on competitive

bids must award the bid to the lowest responsible bidder." Foley, at 390, (emphasis added). Although there are Minnesota cases which hold that contracts must be awarded to the lowest responsible bidder, there are no Minnesota cases construing the word "responsible".

The North Dakota Supreme Court construed a statute which required that certain contracts be advertised and let after such advertisement, only to the lowest responsible bidder. The Court stated:

> The mandate of the statute is not (as appellant assumes) that the contract shall be let to the "lowest bidder"; the mandate is that the contract shall be let to the "lowest responsible bidder." If the Legislature had intended that the contract should in every case be let to the lowest bidder, it would doubtless have said so. What the Legislature did say was that the school board should let the contract to the "lowest responsible bidder...The term "responsible", as used in the statute, means something more than mere financial responsibility. It means responsibility as regards the duty to be assumed by the contractor by the particular contract under consideration, and includes all the various elements that bear on that question, such as the integrity of the bidder and his skill, ability, and capacity to perform that particular work (citations omitted). Ellingson v. Cherry Lake School District, 55 N.D.141, 212 N.W. 773, 775, (1927).

The Supreme Court of New Jersey in directly addressing the question of what is required by the term "responsible" stated:

> The relevancy of moral responsibility is evident. It heads off the risk of collusive bidding. It assures honest performance. It meets the citizen's expectation that his government will do business only with men of integrity. The question then is whether under the circumstances of these cases the Commissioner could reasonably believe it was not in the best interest of government to deal with these contractors until the criminal allegations were resolved in some manner. Cf. Arthur Venneri Co., supra, 29 N.J. at 402, 149 A.2d 228.
>
> We need hardly labor the point that the charges of bribery contained in the indictments would, if established, reveal a lack of moral responsibility for doing business with the State. That the charges do not relate to the performance of a government contract is of no moment; it could not be supposed that a man who would bribe law enforcement officers would bribe no one else. Trap Rock Industries, Inc., 284 A.2d at 166.

The grounds for debarment described in Minnesota Rule 1230.3200 provide specificity to the determination of whether a bidder is responsible. Since responsibility embraces moral responsibility, integrity and honesty, it stands to

reason that conviction of contract related crimes evidences a lack of moral standards, integrity and honesty. Conviction of the violations of law proposed as grounds in these rules offers compelling evidence that a contractor cannot be trusted to enter into or perform a government contract in a manner that is consistent with and protects the interest of the public. The establishment of one or more of the grounds for debarment described in this part will be evidence of the lack of moral responsibility of the contractor. These are reasonable grounds for refusing to deal with a contractor. Mn/DOT cannot rely on the integrity or honesty of a bidder who has been convicted of fraud, antitrust violations, embezzlement, making false statements or filing false documents.

The grounds for debarment are fair. They clearly describe the situations in which a business would be subject to debarment. Each offense which is listed in the grounds is evidence of dishonesty and lack of reliability and integrity of the bidder. The application of the rule is limited to offenses which occur in connection with contractual matters because that is the governmental activity sought to be protected by these rules.

The grounds are further limited by the requirement that there be a conviction. The conviction establishes the persons and businesses subject to debarment. It also establishes the non-responsibility that is presumed in the enumeration of these offenses, beyond a reasonable doubt in the case of criminal defendants. This removes discretion from the administrative agencies and assures uniformity of treatment. Some states provide for debarment upon indictment, charge, admission made out of court, statement of co-conspirator or upon "adequate" evidence of commission of the kinds of offenses that are listed in these grounds. Under these rules no debarment would be sought in Minnesota prior to the conviction of the business or any of the principals in the business.

The following activities have been judicially recognized as grounds for debarment: attempt to bribe law enforcement officer, Trap Rock Industries, Inc., 284 A.2d 161 and 304 A.2d 193; bribery of state officials, Polyvend v. Puckorius, 77 111. 2d 287, 395 N.E. 2d 1376, app. dismd. 444 U.S. 1062 (1980); plea of guilty to misuse of official inspection certificates, Gonzalez v. Freeman, 334 F.2d 570 (D.C.Cir. 1964) statute authorized debarment, but court reversed for failure of agency to observe procedural requirements; excessive charges, Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C.Cir. 1980) reasoned basis for determination of lack of integrity, but debarment reversed for failure to give notice of determination; giving gratuities to navy personnel, Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C.Cir. 1972); violation of overtime pay laws on government contract, Copper Plumbing & Heating Co. v. Campbell, 290 F.2d 368 (D.C.Cir. 1961); failure to pay property taxes for four years, Community Economic Development Corp., Inc. v. United States, 577 F. Supp. 425 (D.D.C. 1983).

Minnesota Rule 1230.3300 Liability of Individual Imputed to Business.

Minnesota Rule 1230.3300 imputes the illegal conduct of an individual to his business if the conduct occurred in the course of employment and with the knowledge or acceptance of the business. In Trap Rock Industries, Inc., 304 A.2d 193, the corporation was debarred as a result of the bribery conviction of the majority stockholder and the court upheld the debarment. A business can act only through its principals. This rule prevents a business from allowing an employee or principal to violate antitrust or other laws, benefit from those acts, fire the employee, and claim that the business had nothing to do with the illegal activity. A business reflects the character of the people giving it direction. This rule prescribes the link between the determination of the guilt of a principal and the effect on the

business. When an officer, agent or employee acts within the scope of his duties his knowledge is imputable to the corporation. Brooks Upholstering Company, Inc. v. Aetna Insurance Company, 276 Minn. 257, 149 N.W. 2d 502 (1967).

Minnesota Rule 1230.3400 Debarment Procedure.

Proposed Minnesota Rule 1230.3400 requires debarment when one or more of the grounds enumerated in this rule are established after an administrative hearing or opportunity for hearing conducted under Minnesota Statutes, Chapter 14. This rule is necessary to make the debarment procedure conform to Minnesota Statutes, section 14.57, which requires the initiation of contested case proceedings whenever required by law. Minnesota Statutes, section 14.58, requires that parties to a contested case be afforded an opportunity for hearing after reasonable notice. Deprivation of the right to seek award of government contracts has been held to require notice of the suspension or debarment, a statement of the charges or grounds, and the opportunity to respond to the charges in the case of a debarment. Horne Bros., Inc., at 1271; Old Dominion Dairy Products, Inc., at 968 and 969. Reliance on the contested case procedures of Chapter 14 and the rules of the Office of Administrative Hearings under Minnesota Rules 1400.5200 - 1400.8500 will satisfy the requirements for due process.

Minnesota Rule 1230.3500 Term of Debarment.

Minnesota Rule 1230.3500 requires the Administrative Law Judge to recommend and the Commissioner of Transportation to establish the term of debarment. It provides that the term of debarment depends on the seriousness of the grounds, whether restitution has been made to the state, whether the debarred person cooperated in civil or criminal lawsuits and the state's need to preserve the competitive bidding process. These conditions are necessary because making restitution and cooperating in civil or criminal lawsuits provide evidence of a person's willingness to comply with the law. They indicate the good faith of the debarred person and are reasonable measures of the debarred person's attitude toward the requirements of the law. These criteria are similar to the criteria adopted by other states. Tennessee adopted the position that it would recommend to the Federal Highway Administration that it lift the debarments of firms involved in bidrigging in Tennessee when the firm made restitution for overcharges, made full disclosure of bidrigging activities and cooperated in the ongoing antitrust investigation. (National Association of Attorneys General Antitrust Report, October, 1981, p. 9) It saw the term of debarment as being related to the willingness of the debarred business to cooperate with the state.

The term of debarment must be left to the discretion of the department. The Commissioner is the person best qualified to establish the debarment period. The Department of Transportation will have the information about the conviction and will have presented it at the hearing. The agency will be able to judge the seriousness of the offense and will know, through the Attorney General's or other prosecutor's office, whether or when restitution is made and whether the debarred business or individual has cooperated in the enforcement of the law. In cases where the violation was not serious, or a guilty individual has been purged from the business, the agency could impose a very brief debarment because the debarred individual or business has shown a desire to comply with the law and will not represent a continuing threat to the integrity of the state's contracting function.

The courts have rarely ruled on the appropriateness, or means of establishing the term of debarment. In general, agencies have discretion to determine when to debar and for what period of time as long as the requirements of procedural due process are observed and the reasons for debarment are those permitted by law or regulation. In Roemer v. Hoffman, 419 F. Supp. 130 (D.D.C. 1976), the court remanded the case to the debarring officer for the Department of Defense for a review of the debarment. In that case, the plaintiff was debarred for three years as a result of a conviction indicating lack of business integrity. When the debarment was imposed, the plaintiff had already been suspended for a period of 29 months, and had paid a settlement to the government. At the debarment hearing he presented evidence of present good character and of the prior suspension and restitution. Because the debarring officer did not state his reasons for the additional three year debarment, the case was remanded. In cases where the court found the debarment reasonable, the period of debarment has not been scrutinized. Copper Plumbing & Heating Co., 290 F.2d 368 (D.C.Cir. 1961) 3 years; Polyvend, 395 N.E. 2d 1376, apparently permanent; Trap Rock Industries, Inc. v. Kohl, 63 N.J. 1, 304 A.2d 193 (1973) 5 years.

It is difficult to equate a specific period of time with a cure of the grounds that led to debarment. It is reasonable to select a maximum period and then establish the term based on the criteria in Minnesota Rule 1230.3500. The agency must determine, after a hearing, a reasonable period of debarment that does not exceed three years. In Copper Plumbing & Heating Co. v. Campbell, the court considered whether a three year debarment imposed by the Comptroller General at the request of the Department of Labor was penal. The debarment had been imposed as a result of violations of the Eight Hour Laws (wage laws). The court concluded that the three year debarment was not penal but was..."a regulation for affectuating compliance, and furthering the public policy represented by the labor acts." Copper Plumbing & Heating Co., at 372. Having found that the debarment was authorized, the court allowed the three year debarment.

Minnesota Rule 1230.3600 Debarment Based on Affiliation.

Subpart 1. Conviction of Business Imputed to Individual.

Subpart 1. imputes the conviction or liability of a debarred business to an individual who participated in, knew of, or should have known of the illegal conduct. An individual's acceptance of, participation in, or failure to discover such conduct when he is in any position in which he can control, influence, manage or direct the business makes him liable for failing to question or object to the illegal conduct.

Subpart 2. Debarment Required.

Subpart 2. states the circumstances in which Mn/DOT must debar businesses that are owned, managed, directed, controlled, or influenced by former principals of debarred businesses. This requirement is necessary to prevent a person who has been debarred, or who is or was a principal in a debarred business from starting another business under a new name, from joining another business to escape the effect of debarment or from buying another business will bid on Mn/DOT contracts under his influence or control. A business over which a debarred person exercises control or influence presents the same problem with respect to lack of responsibility as a debarred business. This problem arises particularly where there is interlocking control or management of businesses, where an individual who is an officer,

director, owner, partner or manager of a debarred business serves in one of those capacities in another business. The debarred person's acceptance, promotion, participation in, or negligence in failing to discover conduct which leads to grounds for debarment in one company raises serious questions about the integrity and responsibility of any other business over which he exerts control or influence. Because the rule requires debarment of a business in which an officer, director, partner, principal or employee or shareholder engaged in management is convicted of a contract related crime, all businesses that that person controls, directs, manages or influences must be debarred. If the business did not bear the consequences of the illegal acts of the principal or of the principal's failure to prevent or correct illegality, there would be no reason for the persons in control of a business to assure that all activities of the business were undertaken in conformance with the law.

That this is true has been recognized by several courts. In Stanko Packing Company, Inc. v. Bergland, 489 F. Supp. 947 (D.D.C. 1980), the court considered whether there was substantial evidence of the plaintiff's affiliation with another supplier which had been debarred to justify debarring the plaintiff. The plaintiff was in the meat packing business and its president and two of its directors were partners in another meat packing firm that had been debarred. The Debarring Officer noted that the individuals had management responsibilities in both firms. The plaintiff was debarred even though all three of the officers denied participation in the illegal acts of the other firm. The debarment was based on the interlocking management relationships between plaintiff and the other company and the evidence of violations of the Federal Meat Inspection Act by the other company over which plaintiff's president and directors exercised control.

A recent Illinois case, Polyvend, Inc. v. Puckorius, 77 Ill 2d 287, 32 Ill Dec. 872, 395 N.E. 2d 1376 (1979), upheld a law which provided that where an official, agent or employee of a business entity committed or attempted bribery of an officer or employee of the state on behalf of the business entity and pursuant to the direction or authorization of a responsible official of the business, the business would be charged with the conduct. In that case, Stoltz, president of Polyvend, had pleaded guilty to bribery while serving as president of another company which was the sole owner of Polyvend. Subsequently, the two companies merged and Stoltz, who apparently held the controlling interest in Polyvend, signed a bid as president. The plaintiff argued that the law which barred Polyvend from receiving the contract because its president had committed a crime while he was president of Polyvend's parent corporation was an unconstitutional bill of attainder. The court, in upholding the application of the law to Polyvend said:

> ...A bill of attainder has been defined as "a legislative act which inflicts punishment without a judicial trial." United States v. Lovett (1946), 328 U.S. 303, 315, 90 L.Ed. 1252, 1259, 66 S.Ct. 1073, 1078. We do not think that section 10.1 of the Illinois Purchasing Act can be called a bill of attainder. There clearly was a judicial determination of guilt concerning a controlling shareholder and official of the corporation when Stoltz was convicted of bribery in 1974. The legislative act, section 10.1, simply attributed his guilt to the corporation. This is no different than any other civil or criminal provision which holds a corporation responsible for the acts of

its officials. The only way a corporation can act is through its officers, directors and employees.

A similar problem was addressed by the United States Supreme Court in DeVeau v. Braisted (1960), 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109. In that case, union officials and others challenged the constitutionality of a section of the New York Waterfront Commission Act which provided that no person could solicit or receive dues on behalf of any waterfront union if an officer of such union had been convicted of a felony. As a result of the Act, the International Longshoremen's Association was denied dues solicitation and collection privileges because of an officer's conviction of a felony 36 years earlier. The court, considering the claim that the Act was unconstitutional as a bill of attainder and as an ex post facto law, stated:

"Finally, S 8 of the Waterfront Commission Act is neither a bill of attainder nor an ex post facto law.... Clearly, S 8 embodies no further implication of appellant's guilt than are contained in his 1920 judicial conviction;.... The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation.... The proof is overwhelming that New York sought not to punish ex-felons, but to devise what was felt to be a much needed scheme of regulation of the waterfront...." (Emphasis added.) (363 U.S. 144, 160, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109, 1120.)

Similarly, section 10.1 (of the Illinois Purchasing Act) was devised as a much needed regulation of government procurement policies and cannot be said to constitute a bill of attainder.... Polyvend, Inc. v. Puckorius, at 1382-1383.

The Office of Federal Procurement Policy, Policy Letter No. 82-1, section 7.1(b) extends a debarment to all divisions of a business unless the order specifically limits it to certain divisions. The debarring official may extend the debarment to include affiliates if they are named in the notice and given an opportunity to respond to the proposed debarment. The definition of "affiliate" bears on the ability of one company to control another or of a third company to control both companies. The federal regulation is similar to proposed Minnesota Rule 1230.3600, Subpart 2. C.

The ABA Proposed Debarment and Suspension Reform Act also addressed the scope of debarment. Principle number 8 provides that the scope of the debarment should be no broader than necessary to protect the governmental interests at stake. However, the Committee proposed that upon satisfactory proof the Debarment Board could debar

or suspend persons who control, are controlled by or are under common control with the person (business) debarred or suspended by the Board. The Comment to Principle number 8 explained the reason for this as follows:

> Decentralization of management by divisions or plants may make company-wide debarments unfair and unnecessary in some cases. The Committee believes that the Board should be given discretion to limit a debarment or suspension to some administrative unit of a company where that is appropriate...
>
> On the other hand, the Board should also have discretion to extend the effect of its debarment order to persons related to the debarred or suspended party where an agency can show that such broader relief is necessary. For example, where an individual is debarred because of fraudulent conduct, he should not be able to avoid the effect of the Board's order by the expedient of seeking contracts through his wholly-owned corporation.

Proposed Principle number 9 would allow the Debarment Board to allow an agency to refuse a specific contract, grant, loan or other assistance to a person who employs in a significant decision-making capacity, is associated with (as in a joint venture) or is controlled by, a debarred or suspended person. "The Board shall issue an order granting such authority unless it finds that the debarred or suspended person will not materially participate in or benefit from such a contract, grant, loan or other assistance."

The Comment to the Principle states that an agency should be allowed to refuse to deal with persons who employ in a significant decision-making capacity, join in a joint venture, or are controlled by a debarred or suspended person. The ABA proposal addresses situations where a debarred person goes to work for or joins in business with a business that has not been debarred. It proposes that the government not deal with those companies unless it can impose conditions on the business that exclude the debarred person from participation in the contract in question.

ABA Principal number 9 is similar to this proposed rule. The rule would allow Mn/DOT to refuse to award a contract to a business in which a debarred person exercises control. This is a reasonable restriction that protects Mn/DOT by allowing it to decline to risk its contracts with businesses subject to the control or influence of persons who lack moral responsibility and integrity.

Subpart 3. Procedure.

Subpart 3. requires that persons debarred under this section be provided the due process notice and hearing required by Minnesota Statute, Chapter 14.

Subpart 4. Duration.

Subpart 4. provides that the length of the debarment of the second business shall be the same as the debarment imposed on the former principal or business. The former principal of a debarred business in effect takes the taint of the violation

with him to the new business. The debarment would be based on the same conduct as that considered in the first debarment and the term of debarment would be based on the considerations described in proposed Minnesota Rule 1230.3500. As both the conduct under scrutiny and the elements considered in determining the duration of debarment will be the same as those considered in the debarment of the former principal's business, it is reasonable to impose the same term of debarment. This also prevents persons from avoiding the effect of a debarment by working for or starting a new business.

Minnesota Rule 1230.3700 Debarment Limitation.

Minnesota Rule 1230.3700 provides that no person may be debarred for more than 3 years for grounds arising out of conduct which gave rise to the debarment. This is intended to impose a limit on the length of any one debarment. The period of 3 years was selected because that is the maximum period of debarment recommended by the ABA Section of Public Contract Law in its Proposed Debarment and Suspension Reform Act. (Principle number 7). Other states that have adopted debarment regulations have adopted a three year limit. As a general principle, a debarment should be no longer than is necessary to assure that the integrity of the government contracting process is no longer threatened. A limit of 3 years is reasonable because it is difficult to determine exactly when any particular wrongdoing or illegal activity has been cured. Rather than require a debarred person to return to the hearing process with evidence of having cured any illegal activity or with evidence of present good faith, the debarment will automatically terminate 3 years after imposition or sooner if a shorter debarment was imposed. The comments to the ABA Proposed Debarment and Suspension Reform Act state that the ABA committee agreed on a maximum 3 year term for debarment including any period for which suspension was imposed, even though some members of the committee felt that a longer term, such as five years, would be more appropriate. A government agency could seek a renewal of the debarment at the end of that 3 year period if it believed that continued debarment was necessary, but it could not rely on the same grounds for which debarment had previously been imposed. The ABA Committee felt that a continuing violation should be regarded as a new ground for debarment.

Policy Letter 82-1 issued by the Office of Federal Procurement Policy also allows a debarment to run up to 3 years depending on the seriousness of the cause.

Minnesota Rule 1230.3800 Effective Date of Debarment.

Minnesota Rule 1230.3800 provides that the debarment takes effect on the date of mailing of the order by Mn/DOT. This is a reasonable provision because it gives notice of the effective date of the debarment order. It establishes a date that can be ascertained by examining the receipt of mailing by certified mail. It provides certainty as to the effective date of the order and is consistent with the rule that service by mail is complete upon placing the item to be served in the mail (See Minnesota Rule 1400.5100, Subp. 4 and Minnesota Rule 1400.8200.).

Minnesota Rule 1230.3900 Termination of Debarment or Award During Debarment.

Minnesota Rule 1230.3900 provides that the Commissioner of Transportation may terminate a debarment by order, or award a state contract to a debarred or suspended person when that person is the sole supplier of a material or service required by the state, when the Commissioner of Transportation determines that an emergency exists as defined in Minnesota Statutes, section 161.32, subdivision 3, or when the

Commissioner of Administration determines that an emergency exists as defined in Minnesota Statutes, section 16.06, subdivision 2.

The Comment to the ABA Proposed Debarment and Suspension Reform Act, Principle number 6, Effect of Debarment or Suspension Order, suggests that a debarred or suspended person may be awarded a grant or contract if the agency head determines that there is a compelling need for the product or services and states the reason therefore, and if either reasonable steps are being taken to cure the debarment, or the agency is seeking alternative sources. The Comment states that the Committee intended the exceptions to be made on a case by case basis depending on the need of the government.

> ...for example, the fact that a contractor may be indispensable for one type of contract may not excuse an exception for other contracts with the same agency where alternative sources of supply are available. The Committee further intends that the determination of the agency head...to continue to do business with a debarred or suspended firm should be final and conclusive and not subject to court challenge.

The government has a strong interest in having available to it the service or materials that it needs for the performance of any state contract. If the only contractor or supplier who can provide a particular service or material has been debarred or suspended the government must be able to deal with him under conditions that it may negotiate.

It is reasonable to allow the Commissioner of Transportation discretion to purchase from a debarred person who is the sole supplier of a material needed by the state. In that case, the Commissioner would negotiate the contract and would have control over the terms. Minnesota Statutes, section 161.32, subdivision 3, defines emergency as "...a condition on a trunk highway that necessitates immediate work in order to keep such highway open for travel." When the Commissioner of Transportation determines that there is an emergency it is reasonable to allow him to terminate a debarment or to hire a debarred or suspended person when it is necessary to keep a road open and there is no alternative. If there is no time to advertise for bids and select the lowest responsible bidder and a debarred or suspended contractor is located nearby or available for work, it would be necessary to employ the debarred person. The need of the state to keep the road open would be the paramount consideration in such a case.

It is important for Mn/DOT to be able to make exceptions to enable it to respond to unforeseen circumstances that call for immediate action in the public interest. This is the basis for the Commissioner's determination under section 16.06 that an emergency exists which requires acting outside normal procedures.

Minnesota Rule 1230.4000 Continuation of Contracts.

This section provides that contracts in existence at the time of debarment or suspension shall not be terminated by the debarment or suspension. This is a reasonable provision that protects both the contractor and the state by assuring that contracts that have already been made will not be disrupted by a subsequent debarment. It is in the interest of the public to allow completion of contracts on which work has begun. However, Minnesota Rule 1230.1200 permits the Director of

Procurement of the Department of Administration to cancel purchases when the contractor agrees, the contract was obtained illegally, or the contractor fails to deliver.

Minnesota Rule 1230.4100 Prohibitions.

Minnesota Rule 1230.4100, Subpart 1. prohibits Mn/DOT from awarding a contract to a debarred or suspended person and prohibits approval of a contract under which a debarred or suspended person would serve as contractor, subcontractor or material supplier. This provision states the effect of a debarment or suspension. After lack of responsibility is established Mn/DOT must not deal with those businesses: "All contracts and purchases made by or under the supervision of the commissioner or any state department or agency for which competitive bids are required shall be awarded to the lowest responsible bidder,..." Minnesota Statutes, section 16.08. It also prohibits the contractor from hiring debarred or suspended persons to perform Mn/DOT contracts.

A business that has been found not responsible does not change character as a result of being a subcontractor or supplier instead of a contractor. For many businesses, these activities are interchangeable; a business may serve as a contractor for one job and subcontract or sell supplies to the contractor on another job. In that case, the business, although not dealing directly with Mn/DOT could still have an affect on the performance of the contract. Mn/DOT is responsible for securing the timely, honest and proper completion of the contract. To do that it must prohibit its contractors from dealing with irresponsible businesses. If the rule did not apply to subcontractors and material suppliers it is likely that debarred contractors would become subcontractors so that they could evade the effect of the debarment.

Subpart 2. notifies contractors that they may not subcontract to, or purchase materials from, debarred or suspended persons.

Minnesota Rule 1230.4200 Suspension

Minnesota Rule 1230.4200, Subpart 1. provides that the Commissioner of Transportation shall suspend a person by order upon receiving notice or learning of a conviction for conduct described in Minnesota Rule 1230.3200 or upon learning of an affiliation described in Minnesota Rule 1230.3600, Subpart 2. The agency must commence debarment proceedings within 10 days of mailing the suspension order. The suspension order must be mailed by certified mail. This provision will protect the state from being required to award contracts to persons who may soon be debarred. Because the grounds for debarment are so narrow, a hearing for debarment will involve little more than evidence of the conviction and a determination that the person subject to debarment is the person who was convicted of the described conduct or to whom the conviction will be imputed. Therefore, when the commissioner learns of a conviction, it is extremely likely that debarment will follow. This is more than adequate evidence on which to base a suspension pending debarment. In the case of a business, the business will be suspended when the agency learns that one of the principals has been convicted for conduct described in Minnesota Rule 1230.3200.

To prevent the government from being required to deal with irresponsible contractors, it's necessary to suspend the person pending the debarment hearing. The business or individual subject to debarment is protected by the provision which

provides that no suspension may exceed 60 days. This limits the amount of time the contractor may be held in limbo pending the debarment proceeding.

One federal court has approved a 30 day suspension without a hearing and other courts have suggested that longer suspensions would be acceptable. In Horne Bros., Inc. v. Laird, at 1270, the court said:

> This procedure (the suspension) does not require that the suspended contractor be offered an opportunity to confront his accusers and to rebut the "adequate evidence" against him. Yet the suspension may be continued for eighteen months or more. While we may accept a temporary suspension for a short period, not to exceed one month, without any provision for according such opportunity to the contractor, that cannot be sustained for a protracted suspension.

With respect to the reasonableness of suspension the court noted:

> A question of judgment is involved, but we note that no contractor may be suspended under the regulations unless there is "adequate evidence" of a dereliction. This can ordinarily be demonstrated without either tipping the Government's entire case, or even prematurely disclosing the identity of key witnesses. The "adequate evidence" showing need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. This is less than must be shown at the trial, but it must be more than uncorroborated suspicion or accusation. Horne Bros., at 1271.

Under these rules, the commissioner upon learning of a conviction or judgment for a contract related offense would have more than adequate evidence of the irresponsibility of the prospective contractor. At this point the interest of the state in dealing only with responsible businesses and the strong evidence of the business irresponsibility would outweigh any risk of wrongful suspension as a result of a 60 day suspension. The business would be notified of the grounds for suspension with the order for suspension. Within 10 days it would receive a notice of the charges and notice of the opportunity for hearing on debarment. These procedures are adequate to protect the due process rights of the business and to protect the state.

Other courts have noted that temporary suspensions may be warranted for a reasonable period of time pending an investigation. Old Dominion Dairy Products, Inc., at 966. One court would permit suspensions of 12 to 18 months during which the government might prepare its case if the suspension were based on adequate evidence, notice of the charges were provided to the contractor and the contractor was permitted to make at least a written response to the charges. Transco Security, Inc. of Ohio v. Freeman, 639 F.2d. 318, 324, (6th Cir.) cert. denied, 454 U.S. 820 (1981).

The provisions of the proposed suspension rule are necessary to protect the state. The rule is reasonable as it provides for notice to contractors, it assures that the effective date of the order can be determined and it limits the suspension to 60 days.

Minnesota Rule 1230.4300 Notice to Public.

Subpart 1. requires Mn/DOT to notify the Commissioner of Administration of each debarment and suspension. It is reasonable to notify her because she has final approval of all state contracts and is interested in the debarment and suspension determinations. She must also publish the weekly list of debarments and suspensions and cannot do so unless the information has been provided to her.

Subpart 2. requires the Commissioner of the Department of Administration to publish a list of debarred and suspended contractors. This is a reasonable requirement that will give other agencies notice of debarments and suspensions by Mn/DOT. Because debarred persons may not serve as subcontractors or material suppliers, it is necessary to publish a list of debarred and suspended persons to inform the contractors. This will enable contractors to avoid dealing with debarred and suspended persons.

IV. Small Business Considerations in Rulemaking.

Minnesota Statutes, section 14.115, requires an agency which proposes new rules to consider methods of reducing the impact of the rules on small businesses. Subdivision 2 lists five methods which must be considered. The agency's analysis follows:

(a) the establishment of less stringent compliance or reporting requirements for small businesses;

The rule establishes no compliance or reporting requirements.

(b) the establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;

The rule establishes no schedules or deadlines for businesses.

(c) the consolidation or simplification of compliance or reporting requirements for small businesses;

The rule establishes no compliance or reporting requirements.

(d) the establishment of performance standards for small businesses to replace design or operational standards required in the rule; and

The rule establishes no design or operational standards.

(e) the exemption of small businesses from any or all requirements of the rule.

These rules will affect only small businesses that have been convicted of contracted related offenses and which seek the award of state contracts. Minnesota Statutes, section 16.08, directs that contracts be awarded to the lowest responsible

bidder and, therefore, requires a determination of the responsibility of a bidder and consideration of any evidence of lack of responsibility. The commissioner must reject bids from bidders who are deemed not responsible. The law also requires that due process notice and opportunity to be heard be provided to persons who may be excluded from government contracting. These rules establish a procedure to provide due process to bidders. Exemption of small businesses from the requirements of these rules would also deprive them of due process. If the rules exempted irresponsible small businesses, Minnesota Statutes, section 16.08 would still require the commissioner to refuse to deal with those businesses. Therefore, small businesses cannot be exempted.

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Governing Debarment and Suspension of Persons from Receiving Mn/DOT Contracts

STATEMENT OF COMPLIANCE WITH RULEMAKING PROCEDURES

I, Special Assistant Attorney General Gilbert S. Buffington, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedure Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed without any exceptions.

Gilbert S. Buffington

Special Assistant Attorney General

Dated: October 19, 1984

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Governing Debarment and Suspension of Persons from Receiving Mn/DOT Contracts

AFFIDAVIT OF MAILING NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

Gilbert S. Buffington, being first duly sworn, deposes and says:

That on the 19th day of October, 1984, in the City of St. Paul, County of Ramsey, State of Minnesota, he served the attached Notice of Submission to the Attorney General by depositing in the ~~(State of Minnesota Central Mail System for United States mailing (or)~~ United States mail) at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who requested notice that the rules in the above-entitled matter have been submitted to the attorney general.

Gilbert S. Buffington

Subscribed and sworn to before me
this 19 day of Oct., 1984.

Judith V. Welhrwein

JUDITH V. WEHRWEIN
NOTARY PUBLIC
RAMSEY COUNTY
My commission expires Feb. 24, 1988

STATE OF MINNESOTA

DEPARTMENT OF ADMINISTRATION

In the Matter of the Proposed Adoption of Rules of the State Department of Administration Governing Debarment and Suspension of Persons from Receiving Mn/DOT Contracts

NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, sections 14.05 to 14.36:

PLEASE TAKE NOTICE that the above-captioned rules have been submitted to the Office of the Attorney General on this date, October 19, 1984, for review as to form and legality. Pursuant to Minnesota Rule 2000.0700, the Attorney General will not approve the rules for at least eight calendar days after receipt to allow any person or association time to comment on the legality of the rules, after which that Office will complete its review. If you desire to comment on the legality of the above-captioned rules, you should direct your comments to the Office of the Attorney General, G-25 State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155, telephone (612) 296-1288. Please note that the above-cited rule of the Attorney General also provides that a copy of any written comments submitted to the Attorney General must be submitted simultaneously to the Agency. Those comments must be sent to Betsy Parker, Program Management Division, Room 815, Minnesota Department of Transportation, Saint Paul, Minnesota 55155, telephone (612) 297-2913).

The proposed rule was modified after publication in the State Register. A free copy of the modified rule is available from Betsy Parker, Program Management Division, Room 815, Minnesota Department of Transportation, Saint Paul, Minnesota 55155, telephone (612) 297-2913). A copy of the modified rule is enclosed with this notice.

Sandra Hale