

INDIANA DEPARTMENT OF TRANSPORTATION

100 North Senate Avenue

Room N755

Indianapolis, Indiana 46204-2249

(317) 232-5533

FAX: (317) 232-0238

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MITCHELL E. DANIELS, JR., Governor  
THOMAS O. SHARP, Commissioner

Writer's Direct Line  
317-234-0410

October 10, 2006

Paul Berebitsky, Director  
Contractor/Government Relations  
Indiana Constructors, Inc.  
One North Capital Avenue, Suite 300  
Indianapolis, IN 46204-2026

Dear Paul:

I write in response to your letter dated October 2, 2006 requesting clarification and written guidance on the implementation of IC 4-13-18 and the answers to several specific questions. While INDOT's best answers to your inquiries are provided, it is important to remember, that like yourselves, we have only the bare language of the statute to follow and cannot predict with certainty how a court would ultimately view these issues.

**(1) If a contractor's employees are drug-tested according to a collectively-bargained agreement that complies with IC 4-13-18-5(c), is it then not necessary for the drug-testing program covering those employees to comply with the provisions of IC 4-13-18-6?**

If the contractor submits an applicable drug-testing plan negotiated in a collective-bargaining agreement that meets the requirements of IC 4-13-18-5(c), then the applicable portion of (c) states that the, "contractor . . . shall be treated as having [a] program that complies with this chapter." The collective bargaining agreement must comply only with 5(c) and not with section 6.

**(2) If a contractor participates in multiple collective-bargaining agreements that each include drug-testing provisions complying with IC 4-13-18-5(c), is it necessary to submit a copy of each agreement (even when the language of each is nearly identical) or would the submittal of one such agreement be considered responsive?**

If the contractor has employees covered by more than one collective-bargaining agreement, then a copy of each agreement should be submitted.

**(3) In submitting the applicable drug-testing provision from a collectively-bargained agreement, is it necessary to include any additional documentation to identify the agreement from which the provision came or to verify that this contractor is a participant of this agreement? If such documentation is required, would the cover page of the agreement be satisfactory? Would a letter from the industry association that negotiated the agreement be satisfactory verification? What other documentation be acceptable? What other documentation would be required?**

The notice to bidders indicated that contractors should submit the appropriate documentation to comply with IC 4-13-18. Thus, INDOT will assume that a plan submitted with the bid is actually followed by the contractor. If later follow-up discloses that a contractor submitted a plan that was not followed, punitive action through the Prequalification Committee can be explored; however, these sorts of reviews will not be made prior to the award of the contract for which the plan was submitted.

**(4) To be deemed responsive and responsible, does a contractor need to have a drug-testing program covering only those employees working on the site of the proposed project or will the contractor have to show that it has a drug-testing plan for all of its employees?**

The statute at IC 4-13-18-5(a) requires the contractor to submit with the bid a written plan to "test the contractor's employees for drugs." As before, the notice to bidders requested that contractors submit a plan to comply with IC 4-13-18 and INDOT does not plan to investigate the extent of compliance prior to contract award. If a contractor submits a plan or plans, INDOT will assume that the plan complies with the statute. It is up to the contractor to assure that all applicable statutes are followed. The quoted statutory language is vague on whether the legislature intended to include all the contractor's home office employees such as bookkeepers or receptionist; however, it is clearly intended to apply to all workers on the site of the contract.

**(5) To be responsive and responsible, would a contractor need to include in its drug-testing program under IC 4-13-18 those employees (primarily truck drivers) who are already subject to drug-testing under the provisions of 49 CFR 40 and 382 and as adopted by reference into IC 8-2.1-24-18?**

Please note the responses to questions 3 and 4. A plan submitted to include workers at the contract site would need to include the truck drivers if they are employees of the contractor. The plan could incorporate CDL required testing into its plan as one component.

**(6) If a contractor has some employees who are subject to a collective-bargained drug-testing program that satisfies the criteria of IC 4-13-18-5(c) and other employees that are not part of the bargaining agreement, is it acceptable to INDOT for that contractor to apply those same provisions to the other employees?**

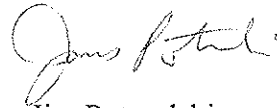
It is important to remember that INDOT does not dictate that any particular employees be tested in any particular fashion. INDOT's statutory responsibility is to assure that no contracts are awarded to any contractor failing to submit a drug-testing plan, as required by IC 4-13-18. As noted previously, for the purpose of contract awards, a plan submitted will be assumed to comply with IC 4-13-18.

**(7) If it is necessary to test all employees and a contractor has some employees who are subject to a collectively-bargained drug-testing program that satisfies the criteria of IC 4-13-18-5(c) and a separate program that satisfies the criteria of IC 4-13-18-6, is it necessary to submit copies of both programs with each bid?**

As noted in question 4, there is some ambiguity to the statutory plan requirements; however, the legislative intent must have included all workers on the jobsite. If both plans have to be submitted in order to include all employees on the worksite then a copy of both plans should be submitted. As stated above, upon submission of a plan as complying with IC 4-13-18, INDOT will assume that it does. It would not be possible to make these determinations prior to award since INDOT will have no way of knowing exactly which employees will be working on the site.

Once there is some experience with the statutory provisions discussed, it may be possible to be more precise in the explanation of what is acceptable. At this time, the intention is to accept the plan submitted by any good faith bidder. INDOT reserves the right to follow-up to assure the submitted plan is being followed, but this will be done after and separate from the bidding and award process. Call me if you wish to discuss. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jim Poturalski".

Jim Poturalski  
Deputy Commissioner  
Highway Management

Cc: John Morton  
Bob Cales  
Mark Miller  
Dennis Kuchler