IOWA GENERAL ASSEMBLY

Administrative Rules Review Committee

STATEHOUSE * ROOM 116 * DES MOINES, IOWA 50319 * (515) 281-3084/3355/4800
FAX (515) 281-4424 * E-MAIL jroyce@legis.state.ia.us; mduster@legis.state.ia.us

THE RULES DIGEST

June, 2008

Scheduled for committee review
Tuesday, July 8th, 2008
Senate Committee Room #22

Reference
XXX IAB No. 25(06/04/08)
XXX IAB No. 26 (06/18/08)
XXXI IAB No. 01 (07/02/08)

HIGHLIGHTS IN THIS ISSUE:

VENDOR LIABILITY: STATE CONTRACTS, Administrative Services Department 1
USE OF RESTRAINTS OR CONFINEMENT, Education Department 2
MUNICIPAL LANDFILLS, Environmental Quality Commission 3
OUTDOOR ADVERTISING, Department of Transportation 7

ADMINISTRATIVE SERVICES DEPARTMENT

9:05

Vendor liability, information technology procurement, XXX IAB 25, ARC 6809, NOTICE.

State of Iowa purchasing policy traditionally did not allow limitations on vendor liability for goods and services. In the area of information technology (IT), this has presented some problems. The failure of computer software or hardware can have unpredictable liability consequences, depending on the number of people affected by the failure and the impact of that failure. Potential liability can far exceed the value of the IT company itself and can make it difficult or impossible to obtain insurance to mitigate that risk. For that reason, contracts for goods and services in private business often limit the liability of the IT vendor to a specific amount or an amount based on the function or size of the contract.

2007 Iowa Acts, Chapter 215, §79 (Code §8A.311(21)) requires that the Department establish a policy for determining when limitation of vendor liability may be acceptable in state procurements for goods and services. These provisions apply only to procurements by the Department or on behalf of another state agency, Code §8A.311(5); e.g.: they do not apply to Board of Regents institutions or the Department of Transportation. Moreover, all departments have the ability to procure services via an Executive Order.

Following the enactment of this legislation the Department commissioned a report, "Limitation on Liability in Iowa IT Contracting"; the report analyzed various aspects of vendor liability and made a number of conclusions concerning the adverse effects of unlimited vendor liability:

- "Vendors are less able to construct and propose a solution that best addresses the problem while mitigating the risks to the state.
- The state will receive proposals based on incomplete information, i.e., the state's areas of risk for the project.
- Proposals received will have cost proposals that are inflated by vendors' costs to cover any possible risks vendors can imagine. Vendors must include these costs in order to justify the unknown risks they would be accepting.
- Competition has been reduced in recent years by unlimited liability provisions in Iowa RFP and contract language. All the firms contacted indicated they have a clear policy that they will not seek work in Iowa where unlimited liability is included in the contract…"

Under the Act, criteria for limiting vendor liability include (but are not limited to) situations where:

- A limitation is necessary to prevent a failure to obtain the goods or services sought, or obtaining the goods or services at a higher price if the state refuses to allow a limitation of liability;
- A limitation is commercially reasonable when taking into account any risk to the state created by the goods or services to be procured and the purpose for which they will be used.

The statute prohibits any limitation on liability for intentional torts, criminal acts, or fraudulent conduct. The rules expand on the statutory provisions by including in the prohibition such things as: intentional or willful misconduct, bad faith, unlawful acts, claims related to death, personal injury, or damage to real or personal property. Certain contractual obligations cannot be limited: indemnification, intellectual property, insurance, bonds, liquidated damages, compliance with applicable laws, confidential information, or express representations and warranties.

The proposed rules provide discretion to negotiate limited vendor liability when contracting only for information technology goods and services; note that Code §8A.311(21) is general in its terms and could be applied in many contracting situations. Under the process, once the competitive selection process is complete, the contracting agency may negotiate limitation of vendor liability provisions, if the purchasing agency, *in its sole discretion,* determines that the best interest of the state would be served by entering into negotiations. Under these provisions the limits of the vendor's liability are two times the contract value and generally apply to the vendor's liability for consequential, incidental, indirect, special, or punitive damages.

The criteria for allowing limited liability are the same as set out in the statute, with the addition of a section dealing with special circumstances. These are situations where the risk to the state is so significant that the statutory criteria are "not appropriate". The purchasing agency will identify the risks and identify steps which may help to mitigate the risks. Following this risk management analysis the agency, in consultation with the department of management will determine whether a higher limit of liability is appropriate.

EDUCATION DEPARTMENT

9:35

Use of restraints, physical confinement or detention, IAB XXX No. 26, ARC 6838B, Notice.

The department proposes to amend rules relating to the state's general statutory ban on corporal punishment and the exceptions. The department acknowledges that the rules have not been reviewed since 1991 and cites to recent research regarding seclusion ("time out" rooms) and restraint of students as a reason for such a review of the rules.

These proposed amendments provide more detail than is presently set out in the rules. The proposed rules state that physical restraint and physical confinement or detention shall not be used as discipline for minor infractions and may be used only after other disciplinary techniques have been attempted, if reasonable under the circumstances. Only school employees who have received training may utilize physical restraint, physical confinement, or detention.

The proposed rules explain that the area of confinement and period of confinement shall be of reasonable dimensions, considering the age, size, and physical and mental condition of the student subject to confinement or detention, and shall be free from hazards and dangerous objects or instruments. Additionally, if a period of physical confinement or detention exceeds the shorter of 60 minutes or the school's typical class period, staff members shall evaluate the continued need for physical confinement or detention, shall obtain administrator approval for any continued confinement or detention beyond the initial periodic reevaluation. If a room or enclosure has a locking mechanism, the room and mechanism shall comply with all applicable building code requirements and meet other specified requirements.

The rules also require parental notification of confinement policies and documentation of all instances in which confinement is used.

PHARMACY BOARD

10:00

Pharmacy technicians/centralized prescriptions, IAB XXXI No. 01, ARC 6867B and 6869B, EMERGENCY.

At its April meeting the Committee imposed a 70 day delay on two board filings relating to the qualifications of pharmacy technicians and centralized prescription filling. In response to the issues raised at the April meeting the Board emergency implements a number of changes. Beginning July 1, 2010, the certification of pharmacy technicians is mandatory, and commenters at the April meeting voiced a number of concerns, including the current lack of a provision to grandfather in current pharmacy technicians and the accessibility of the training and examinations for pharmacy technicians. This emergency filing requires that a technician graduate from a program nationally accredited by the National Commission for Certifying Agencies. Additionally, technicians holding a valid current national certification from the Institute for the Certification of Pharmacy Technicians or the Pharmacy Technician Certification Board prior to July 1, 2010, are "grandfathered" in.

The second emergency filing defines “mail order pharmacy” and requires that a pharmacist, providing central fill or central processing functions as an employee of an Iowa-licensed pharmacy, must also be licensed in Iowa. The filing also exempts a central fill pharmacy from the requirement to return a prescription to the originating pharmacy for delivery to the patient if the central fill pharmacy is a mail order pharmacy. The filing also allows a central fill or central processing pharmacy to perform drug use review if it shares a central processing unit with an originating pharmacy.

ENVIRONMENTAL PROTECTION COMMISSION

10:50

Closure of existing MSWLF units, IAB XXX No. 25, ARC 6828B, Notice.

This proposal relates to sanitary landfills for municipal solid waste; the revisions address public comments in a prior rulemaking and an objection placed upon subrule 113.2(8) by the Administrative Rules Review Committee. That subrule was part of a larger rulemaking relating to the operation and environmental regulation of solid waste landfills. In December, the Committee determined that subrule 113.2(8) is unreasonable and stated, “These members are concerned that subrule 113.2(8) constitutes an improper regulatory taking.” The legal effect of this objection is to shift the burden of proof to the Department in any legal challenge to the subrule. Such a legal challenge has been filed.

The amendment is intended to allow municipal solid waste landfills to continue to use previously approved landfill cells which have a basal liner and leachate collection system until those cells have been filled. The amendment is also intended to address questions that have arisen regarding the current closure requirements for sites that were closed pursuant to the previous rule requirements.

Specifically, the proposed rules state that "any new unit or lateral expansion of an existing unit shall be constructed with a leachate collection system and liner that meet the requirements of subrule 113.7(5) and are continuous beneath and onto the sides of the new unit or lateral expansion of an existing unit." Additionally, the proposed rules state that "[t]hose portions of existing MSWLF units demonstrating placement of final cover in conformance with previously approved plans and specifications or regulations in effect at the time of such closure shall not be required to apply additional cover solely to achieve compliance with rule 113.12(455B).

With the adoption of a revision to subrule 113.2(8) the objection placed on the earlier version of that subrule will no longer be in place.

* * *

Commission voting requirements, IAB XXXI No. 01, ARC 6828B, EMERGENCY.

The previous quorum requirement for the Commission stated that a majority of the commission constituted a quorum and that "the concurrence of a majority of the members of the commission is required to determine any matter." In short, five members constituted a quorum and an affirmative vote of five members was required to take action.

Under this *emergency* filing the required number of affirmative votes for official action will vary

depending on the number of commissioners currently appointed by the Governor. Essentially the rule provides that that four votes are sufficient to take action when there are only seven appointed members.

This new policy actually directly implements the enabling statute. Iowa Code §455A.6 states:

> *5. A majority of the members of the commission is a quorum, and a majority of a quorum may act in any matter within the jurisdiction of the commission, unless a more restrictive rule is adopted by the commission.*

It is unclear whether the word "members" means sitting members or statutory members. In rule 1.7 the Commission has adopted Robert's Rules of Order, which provides that "a majority of the votes cast, ignoring blanks, is sufficient for the adoption of any motion that is in order…" [article VIII, §46]. It should be noted that the emergency rule is still more restrictive than the statute or Robert's Rules; the rule requires four affirmative votes, while theoretically the statute would only require three. The Commission did not want to implement a rule that allowed a minority of the entire membership to decide an issue.

The issue in this rulemaking is the emergency adoption and implementation of the change. For a number of months the nine member commission functioned with only seven sitting members; the Commission states this resulted in "delayed Agency action, gridlock, and stalemate, with the minority at times deciding an issue."

To resolve this problem the Commission implemented the voting change as an emergency filing. Commission members felt the change was only a clarification of the current policy, establishing that a majority consisted of sitting members not statutory members. The issue with this emergency filing is that the membership problem actually dates back to November, 2007; the problem existed for six months before the emergency rule was put in place. This lengthy delay provided an opportunity to at least publish a notice of intended action and receive public comment, and then adopt the rule "emergency after notice". Commission members noted that the Commission attempted to cope with the problem for months before deciding the quorum requirement needed to be revised. At that point the Commission did not want to wait another four months while the "regular" rulemaking process proceeded, and for that reason adopted the rules on an emergency basis.

The actual quorum problem has now been resolved, at least for now, by the appointment of an eighth commission member.

The revision is clearly within the authority of the commission, but that fact does not itself justify a emergency filing. Emergency rulemaking is always a balancing act, weighing the value of public comment and criticism against the need to have the rule in immediate effect. Changing the voting requirement can have a significant impact on the very nature of commission decision-making. In this situation an opportunity for public comment is not "unnecessary, impracticable, or contrary to the public interest." Public comment can be a valuable tool in assessing the nature and extent of the impact the change might have on Commission decision-making.

Conversely, the problem of commission membership does not seem to be an actual emergency, at least not in the sense of an imminent threat. The problem seems more chronic than it is critical. The problem existed for some seven months before the Commission finally took action; during that time the Commission did function, albeit with delayed action and sometimes gridlock. Those problems are not trivial, but policy-making is a political and legislative process as well as a legal process; delays and even gridlock will occur. The Commission has developed a long-term solution to the problem, but it should be subject to public review and comment before its implementation.

* * *

Technical standards and corrective action requirements for owners and operators of underground storage tanks, IAB XXXI No. 1, ARC 6892B, Filed.

This rulemaking amends chapter 135 relating to the risk-based corrective action (RBCA) assessment process for underground storage tank releases. Sites are classified based on the level of risk and a three-tiered process is used to evaluate risk. Since 1996, a two-dimensional model has been used to evaluate and predict the risk of groundwater contamination migrating horizontally

and impacting a receptor such as a drinking water well. The Commission acknowledges a perception that the length of plumes generated by portions of groundwater model may significantly overestimate the horizontal length of actual groundwater contamination plumes. Consequently, an effort has been made to recalibrate the model.

The revised model results in shrinking the modeled plume size. In addition, the Tier 2 groundwater transport model, old or revised, only predicts the horizontal movement of the groundwater, and data collected for the modeling is generally from superficial water table monitoring points. It does not evaluate the potential vertical movement of the contaminants in the aquifer or the influence of pumping wells on the groundwater movement.

The amendments also provide a transition policy and procedures which give owners and operators the option of electing to continue evaluating a site under the revised or the old model. Under the adopted rules, a public water supply well risk assessment is triggered if a public water supply well is located within 2,500 feet of an underground storage tank source area and would only apply to RBCA assessments of new releases or to the optional reevaluation of old release sites using the revised model. The adopted rules rely on groundwater professionals to conduct a risk analysis based on available information and to submit to the Department a recommendation based on their professional judgment as to the potential risk of impact to a public water supply well from the leaking underground storage tank release. If the Department agrees with the recommendation that it is unlikely the well is at risk of impact, the Department may classify the well as “no action required.” If the Department disagrees with the recommendation, the Department then has the burden to establish a sufficient basis to show that the public water supply well is, more likely than not, at risk.

The amendments in their current form were written after these additional stakeholder meetings and were presented at the May ARRC meeting. The most controversial part of the amendments is the new requirement for the special assessment procedures for public water supply well receptors. The comments in opposition generally related to the assertion that the recalibrated Tier 2 model is adequate for assessing risk to pumping wells and, therefore, the special procedures for assessment of risk to public water supply wells are unnecessary and overly burdensome, and may result in excessive assessment costs.

A provision which would have granted the Department reservation authority to require a risk assessment for receptors which fall outside of the modeled plume other than public water supply wells was omitted from the adopted amendments due to concerns by stakeholders that the reservation of authority was too broad. However, the Department believes it may have the authority on a case-by-case basis to require risk assessment or corrective action for receptors outside of the modeled plume if there is an imminent risk or hazardous condition.

HUMAN SERVICES DEPARTMENT

1:00

Emergency assistance, IAB XXXI No. 1, ARC 6920B, Notice.

The Iowa Disaster Aid Individual Grant Progam was established in Code section 29C.20A to assist with disaster-related expenses or serious needs of individuals or families adversely affected by a disaster which cannot otherwise be met by other means of financial assistance. To be eligible for a grant, an applicant must have an annual household income that is less than one hundred thirty percent of the federal poverty level based on the number of people in the applicant's household. The Department's proposed amendments make the following changes to the program:

- Raise the reimbursement limit for home repair to $5,000, commensurate with the higher benefit limit Adopted and Filed Emergency and published as **ARC 6878B**.
- Add reimbursement for debris removal, including trees, of up to $1,000.
- Increase the limit for electrical or mechanical repairs from $300 to $1,000.
- Require additional documentation from the applicant, including proof of income and identity, proof of vehicle registration and insurance, and a brief statement of how the disaster caused the loss being claimed.

- Clarify how the program covers insurance deductibles. The program will not pay if the claim is higher than the deductible.
- Clarify that the program does not cover repairs on rental property.
- Clarify the roles of various government agencies in administering the program.
- Update terms to reflect those used in the Code.

LABOR DEPARTMENT

No Rep

Wind tower lifts, IAB XXX No. 26, ARC 6853B, Notice; ARC 6852B, Filed Emergency.

Due to the expanding wind energy industry in Iowa and the fact that many wind tower lifts have already been installed, with more installations to begin soon, the Elevator Safety Board has adopted temporary amendments to the elevator safety rules are imperative to ensure the safety and health of wind tower mechanics pending completion of the performance-based code process through the American Society of Mechanical Engineers (ASME).

Many of the wind towers are approximately 300 feet high, and mechanics require access to the full interior of the towers, including the top of the towers. According to the Board, the height of the newer towers is increasing and the installation of powered equipment has begun to move the mechanics up and down, but there are no directly applicable safety codes for the equipment. The board has determined that this equipment, commonly referred to as a “lift” or “work cage” by the industry, meets the definition of “elevator” found in Iowa Code chapter 89A.

ASME has begun the lengthy process of implementing a new performance-based code that will eventually ensure the health and safety of mechanics using wind tower lifts, and the board voted to adopt ASME Code A17.7, effective July 23, 2008. However, it could be many months before wind tower lifts can receive approval through the ASME performance-based code.

The board's amendments specify restrictions for installation and operation of wind tower lifts, inspection requirements, and permit fees. The board has also proposed these same amendments under notice to allow public comment.

PROPANE RESEARCH AND EDUCATION COUNCIL

No Rep

Organization and operation, IAB Vol. XXX, No. 25, ARC 6810B, ADOPTED.

Code Supplement §101C.3 creates the Iowa propane education and research council consisting of, nine members representing the retail propane marketers and one public member. There are a number of ex-officio, nonvoting members. The council will develop programs and projects that include:

- Safety and training;
- research and development of clean and efficient propane
- utilization equipment;
- information and education for the public related to the use of propane;
- assistance to persons who are eligible for the low-income home energy assistance program.

The council is similar to an agricultural assessment board in that its activities are funded by an assessment on each marketer---one-tenth of one cent on each gallon of odorized propane sold. This program is repealed December 31, 2014.

PUBLIC HEALTH DEPARTMENT

No Rep

Office of multi-cultural health, IAB XXX No. 25, ARC 6832B, ADOPTED.

In 2006 the legislature created the office of multi-cultural health, this newly created agency deals with health issues faced by "racial, ethnic, and linguistic multicultural individuals and families, immigrants and refugees." The office will collect information on the health status of multi-cultural communities, provide information and assistance to deal with health care needs in multi-cultural communities.

A 15-member advisory council is part of the office, made up of representative from each of the six local public health service regions, community and business leaders and service providers.

REAL ESTATE COMMISSION

No Rep

Grant committee, IAB XXX No. 26, ARC 6844B, NOTICE.

2008 Iowa Acts, Senate File 2250 amends Code §543B.54, revising the makeup of the grant committee that provides funds for real estate educational programs. The Iowa real estate education fund provides for college credit real estate education programs at Iowa community

colleges and other Iowa colleges and universities, and to assist the real estate commission in providing an education director. Twenty-five dollars of each licensing fee is deposited in the fund.

Four members of the committee will be directly appointed by the Iowa association of realtors. Rules governing the grant committee must be promulgated in consultation with the association.

REVENUE DEPARTMENT

No Rep

Assessment practices and equalization-conduct of appeals, IAB XXX No. 26, ARC 6855B, Filed.

The Property Assessment Appeal Board initiated this rulemaking to correct existing subrules and add new subrules to clarify the practice and procedure for the conduct of appeals before the board.

The rules amend the definition of "party" to include appellee, clarify what qualifies as "filing", amends filing and response deadlines and requirements, sets forth discovery procedures for appeals before the board, and designates settlement procedures.

The board received comments and suggestions from the Iowa State Association of Assessors but determined no changes to the proposed amendments were necessary as they conform to the Iowa Code, Iowa Case law, and Iowa Rules of Civil Procedure. These amendments are identical to those published under notice and will become effective July 23, 2008.

TRANSPORTATION DEPARTMENT

No Rep

Outdoor advertising, IAB XXX No. 25, ARC 6814B, Filed.

This proposed rulemaking amends the department's rules relating to outdoor advertising along interstate, freeway-primary, and primary highways. The rules eliminate reference to municipal, county, and school district recognition signs due to the revocation of permit requirements for these signs in 2006.

The proposed rules add a definition of "LED display", amend other provisions to accommodate the definition, and specify under what conditions a LED display may be used. The proposed rules also amend and clarify the definitions of "modifications", "regularly used", and "service club or religious notice".

The proposed rules make conforming amendments to certain rules relating to obstructions in the right-of-way based on legislation from 2006. The department proposes amendments to its rules relating to signs with flashing, intermittent, or moving lights by distinguishing between on-premises and off-premises signs and removing restrictions for on-premises signs that were incorrectly included in the existing rules.

The proposed rules make changes to rules relating to advertising devices along interstate highways by specifying that an advertising device visible from an interstate highway must be located within an area zoned and used for commercial or industrial purposes, within 750 feet of the regularly used portion of a commercial or industrial activity visible from the main-traveled way, and on the same, individual, platted parcel of land as the commercial or industrial activity. The proposed rules also clarify that side-by-side or double deck sign configurations are considered to be a single face and a single square footage.

The department proposes amendments to rules relating to abandoned and illegal advertising devices by adopting provisions similar to the statutory language in Code sections 306B.5 and 306C.19. Additionally, the department proposes removing provisions relating to the sale of used advertising structures because such a process is not provided for in the Code and the department has had little success in selling such structures.

The proposed rules implement Code section 306C.11 that allows businesses located within the limits of a commercial or industrial development to advertise on a sign located anywhere in the district regardless of land ownership. The proposed rules define "development directory sign", allow the name of a business to appear on no more than two development directory signs visible to traffic in any one direction, and includes requirements for a commercial or industrial development that are based on the requirements of federal law and Federal Highway Administration regulations.

In response to comment from The Outdoor Advertising Association, the department made one change to the rules that were originally published under notice by clarifying the definition of "modification."