

14 PROPOSED REGULATIONS

Document No. 4894
STATE FISCAL ACCOUNTABILITY AUTHORITY
CHAPTER 19

Statutory Authority: 1976 Code Sections 11-35-10 et seq., and 2019 Act No. 41, Section 76

19-445. Consolidated Procurement Code.

Preamble:

The Consolidated Procurement Code authorizes the State Fiscal Accountability Authority to promulgate regulations governing the procurement, management, and control of any and all supplies, services, information technology, and construction to be procured by the State and any other regulations relating to implementation of Title 11, Chapter 35 (Sections 11-35-60 & -540(1)). The Authority previously submitted proposed regulations for legislative approval on January 8, 2019, as Document 4861. Pursuant to Section 76 of 2019 Act No. 41, the Authority published interim regulations in the *State Register* on August 23, 2019. The Act also requires the Authority to publish proposed final regulations it will follow to implement changes; accordingly, these proposed regulations include the text of the previously published interim regulations. In addition, the proposed regulation will address various matters regarding Regulation 19-445 and procurement in general.

Notice of Drafting for the proposed amendments was published in the *State Register* on July 26, 2019.

Section-by-Section Discussion

19-445.2000. State Procurement Regulations.

Sections A and B include two technical changes reflecting the Code Commissioner's reference to the authority's five-member board. No substantive change is intended. Section C adds two definitions — "certification" and "responsible procurement officer"— for clarity. *Note: these changes were previously submitted in Document 4861.*

Section B also includes an editorial change reflecting restructuring and the transfer of surplus property responsibilities to the Department of Administration. Definitions of "head of purchasing agency" and "certification" in section C have been revised to reflect changes made by Act No. 41. No substantive change is intended.

Former section E (Effective Date) has been deleted.

New section E is an interpretative regulation that reflects long standing administrative application of the Procurement Code and provides concise, accessible, guidance on the Code's application. Item 1 recognizes that statutory schemes other than the Procurement Code may govern a transaction. Item 2 recognizes that application of the Code doesn't depend on how contracts are documented, but what the transaction actually accomplishes. Item 3 explains the Code's application revenue generating contracts. Item 4 effectively applies Item 3 in the context of financed construction acquisitions. Item 5 explains how the Procurement Code relates to acquisitions involving an interest in real property.

Most procurements must be advertised. New Section F explains the minimum contents of the advertisement and explains how it applies to the public notices required by Act No. 41 for sole source and emergency procurements.

19-445.2010. Disclosure of Procurement Information.

Deletion of section A reflects the enactment of § 11-35-410(F) by Act No. 41. Section D is amended to reflect the addition of § 11-35-1535 by Act No. 41. Section E is modified to reflect existing business practices; agency staff participating in activities such as negotiations or proposal evaluation must sign an acknowledgement of their obligations under rules such as the State Ethics Act. Section E also implements new § 11-35-1535.

19-445.2020. Certification.

Section A eliminates “consulting services” as a category for certification and clarifies that certification for construction includes construction related professional services. Revisions to section A(3) and renumbered section B implement changes made to § 11-35-1210 by Act No. 41. Specifically, these changes identify the preconditions for the delegation of authority by the Director of the Division of Procurement Services. Existing section B has been renumbered as section D with non-substantive editorial changes. *Note: Section A(3) and renumbered section C include editorial changes reflecting restructuring that were previously submitted in Document 4861.*

19-445.2030. Competitive Sealed Bidding—The Invitation for Bids.

These changes are technical and merely restate existing law. The text proposed to be added to current paragraph (5) is taken verbatim from § 11-35-1520(3). Revised R.19-445.2095, *post*, makes this subsection equally applicable to requests for proposals.

Note: these revisions, with non-substantive editorial changes, were previously submitted in Document 4861.

19-445.2042. Pre-Bid Conferences.

Section D accommodates out-of-town prospective contractors by encouraging agencies to allow participation in pre-bid conferences by electronic means.

19-445.2045. Receipt, Safeguarding, and Disposition of Bids.

Act No. 41 amended § 11-35-410(C) to require regulations directing the disposition of responses when no award is made. R.19-445.2045C accomplishes this. The regulation reflects current practice of the Division of Procurement Services and is based in part on 2002 ABA Model Procurement Regulation R3-301.05.

Note: certain of these changes were previously submitted in Document 4861.

19-445.2065. Rejection of Bids.

Proposed R.19-445.2045C eliminates the need for section D.

Note: these changes were previously submitted in Document 4861.

19-445.2080. Bid Reductions.

The existing text of R.19-445.2080 is removed to reflect the repeal of § 11-35-1520(8).

The new text of R.19-445.2080 is added to confirm the authority of procurement staff to accept a voluntary reduction in price from a low bidder. This change dovetails with the repeal by Act 41 of the 5th sentence of §11-35-1520(10), which addressed negotiations after a competitive sealed bid, a topic which is generally addressed by § 11-35-1540.

19-445.2090. Award.

Section B is modified to reflect changes Act No. 41 made to § 11-35-1520(10) regarding notice of a revised posting date.

19-445.2095. Competitive Sealed Proposals.

R.19-445-2095A clarifies that the reasonable notice required by the Consolidated Procurement Code and current regulations for preparation of bids also applies to competitive sealed proposals.

R.19-445.2095B and -2095C make technical changes to the current sections.

Note: these changes were previously submitted in Document 4861.

R.19-445-2095E is modified to reflect Act No. 41’s repeal of § 11-35-1520(8).

New section K applies to the process of negotiations the same set of controls that apply to the process of conducting of discussions (see R.19-445.2095I(2)) and provides for the identification of negotiation objectives before initiating negotiations.

16 PROPOSED REGULATIONS

Instructions: Document 4861, which has been submitted to the General Assembly but not approved, includes a section K of R.19-445.2095 with different text. If the General Assembly approves Document 4861 after its approval, if any, of this proposed regulation, the text herein should appear in the Code of Regulations.

New section L incorporates notice provisions in R.19-445.2090(B), applicable when posting an award on competitive sealed bids is delayed, to like delays in awarding on competitive sealed proposals.

19-445.2097. Rejection of Proposals.

R.19-445.2095B makes R.19-445.2045C applicable to RFPs, thus eliminating the need for section D.

19-445.2099. Competitive Negotiations.

This regulation is completely new. It implements the addition of § 11-35-1535 by Act No. 41, which authorizes the use of competitive negotiations as a source selection procedure. The regulation addresses post-opening amendments to the solicitation; evaluation factors; evaluation process; exchanges with offerors, including clarifications and negotiations; limitations on exchanges; tradeoffs, and the award process.

19-445.2100. Small Purchases and Other Simplified Purchasing Procedures.

The changes to this regulation implement the changes made to § 11-35-1550 by Act No. 41. In large measure, this regulation explains, but does not modify, the processes outlined in § 11-35-1550. Paragraph A(6) requires that notice of an award must be communicated to all bidders if the small purchase exceeds \$50,000.

19-445.2105. Sole Source Procurements.

Changes to section C clarify and simplify requirements for a written determination, and incorporate the new notice requirements in Act No. 41. Section D makes clear that statutory requirements for competitive procurements apply likewise to sole source contracts.

19-445.2110. Emergency Procurements.

New section F incorporates the notice requirements in Act No. 41.

19-445.2115. Information Technology Procurements.

The repeal of sections A and B of R.19-445.2115 reflect the repeal of § 11-35-1580 by Act No. 41.

19-445.2120. Cost or Pricing Data.

Changes to this regulation help implement the streamlined contracting procedures available for commercial products.

19-445.2125. Responsibility of Bidders and Offerors.

New subsection D(2) implements changes in Act No. 41 to § 11-35-1529, governing reverse auctions.

19-445.2127. Organizational Conflicts of Interest.

Act No. 41 adds § 11-35-1840, which expressly provides for the adoption of regulations dealing with organizational conflicts of interest. This is a new regulation.

Outside of construction, the State's procurement laws do not currently address organizational conflicts of interest. An organizational conflict of interest (OCI) may prevent a contractor from providing impartial advice or service to the government; or it may create an unfair competitive advantage favoring one offeror over others. An offeror with a significant OCI may be disqualified from award of a contract, or may be subject to restrictions on additional work to mitigate the conflict. Since an OCI usually exists without any wrongdoing by an offeror or contractor, it is not a matter of responsibility. Similarly, since a contractor with an OCI may be positioned to perform exactly as the State requires, it is also not a matter of responsiveness.

The proposed new regulation provides general policy concepts and guidance on the issue of OCIs and leaves to the chief procurement officers the task of developing specific procedures to implement those concepts.

R.19-445.2127A defines OCI and describes its potentially deleterious impact on the acquisition process. It underscores the need for analysis to identify potential conflicts and to plan for its mitigation in advance of award. The importance of judgment and common sense is emphasized.

R.19-445.2127B identifies systems engineering and technical direction as circumstances where OCI can create a performance risk for the State, as well as a potential unfair competitive advantage. In performing these activities, a contractor occupies a highly influential and responsible position in determining a system's basic concepts and supervising their execution by other contractors. Therefore, this contractor should not be in a position to make decisions favoring its own products or capabilities.

R.19-445.2127C identifies another situation where an OCI should be disqualifying for subsequent work: where the State's contractor furnishes specifications or a statement of work. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the State can be assured of getting unbiased advice as to the content of the specifications and can avoid allegations of favoritism in the award of contracts.

R.19-445.2127D states the common-sense rule that a contractor should not be allowed to perform work under a contract where it assisted the agency in evaluating and awarding that contract.

R.19-445.2127E outlines the procurement officer's responsibilities regarding OCI, and emphasizes the need to address OCI early in the acquisition process. It also establishes a default of award to the most advantageous offeror, notwithstanding an OCI, unless the OCI cannot be avoided or mitigated. In the latter case, the procurement officer must provide the conflicted offeror an opportunity to respond.

R.19-445.2127F permits an agency, within its certification authority, to waive an OCI in response to a written request, detailing the extent of the conflict and reasons for its waiver.

Finally, R.19-445.2127G authorizes the chief procurement officers to develop policies and procedures to detect OCI and techniques to avoid or mitigate them.

19-445.2135. Conditions for Use of Multi-term Contracts.

Revisions to this regulation clarify existing practice for approving contracts with extended terms, and implement the express requirement in amended § 11-35-2030 that approval must be had prior to issuing the solicitation.

19-445.2141. Commercial Products.

Act No 41 expresses a legislative finding "that acquisition policies that more closely resemble those of the commercial marketplace, encourage the acquisition of commercial items, and, where possible, allow use of terms and conditions accepted in the marketplace, will promote efficiency and economy in contracting and avoid unnecessary burdens for agencies and contractors." The Act defines "commercial product" and "commercially available off-the-shelf products," or COTS products (§§ 11-35-1410(1) and (2)). It authorizes streamlined procedures for purchasing COTS products up to \$100,000 (§ 11-35-1550(2)(b)). And it exempts sellers of COTS products from compliance with certain laws unrelated to competitive purchasing (§ 11-35-2040).

Procurement regulations have long emphasized the State's preference for commercially available products (R.19-445.2140D). New R.19-445.2141 expands on that policy and provides clarity and guidance to implement the legislature's COTS enactments.

Section A of the regulation restates and clarifies the definitions of COTS product and commercial product.

Section B underscores the importance of market research in developing a purchasing strategy for COTS products.

Section C explains how the commercial marketplace may effectively establish price reasonableness for COTS products.

Section D expands on instructions for COTS-friendly specifications already expressed in R.19-445.2140D.

Section E explains simplified procedures for buying COTS products, including considerations to eliminate unnecessary restrictions on vendors who wish to sell to the State.

Finally, R.19-445.2141H authorizes the chief procurement officers to develop guidance and forms implementing the statutory and regulatory scheme.

18 PROPOSED REGULATIONS

19-445.2143. Contract clauses and administration.

Act No. 41 includes new § 11-35-2050, which expressly makes unenforceable against the State certain specific contract terms that are contrary to law. It also includes new § 11-35-1610, prohibiting contract changes inconsistent with the Code or ensuing regulations. This new regulation implements those statutory changes.

Section A states long-standing legal precedent that contracts formed pursuant to the Consolidated Procurement Code are deemed to include all its mandatory provisions.

Section B explains and implements § 11-35-2050.

Section C implements § 11-35-1610 by defining the material change doctrine and declaring that such changes are inconsistent with the Code's underlying policies. The Procurement Review Panel expressly recognized this doctrine in *IN RE: South Carolina Patients' Compensation Fund v. Modus21, LLC*, Case No. 2013-5.

19-445.2145. Construction, Architect Engineer, Construction Management, and Land Surveying Services.

Revisions to R.19-445.2145 are all conforming changes reflecting Act No. 41's amendments.

Section C changes reflect the Act's revised thresholds for required bonds.

Section H reflects the Act's repeal of construction indefinite delivery contracts from § 11-35-3310 and its addition of task order contracts in § 11-35-3320.

19-445.2152. Leases, Lease/Payment, Installment Purchase, and Rental of Personal Property.

Technical change only. No substantive change intended.

Note: these changes were previously submitted in Document 4861.

19-445.3000. School District Procurement Codes; Model.

Technical change only. No substantive change intended.

Note: these changes were previously submitted in Document 4861.

The following sections of Regulation 19-445 are modified as provided below in the text. All other items and sections remain unchanged.

Notice of Public Hearing and Opportunity for Public Comment:

Should a hearing be requested pursuant to Section 1-23-110(A)(3) of the S.C. Code, as amended, such hearing will be held on October 15, 2019, at 10:00 AM in Room 252 of the Edgar A. Brown Building, State House Grounds, Columbia, South Carolina. Persons desiring to make oral comment at the hearing are asked to provide written copies of their presentation for the record. If a qualifying request pursuant to Section 1-23-110(A)(3) is not timely received, the hearing will be canceled.

Written comments, requests for the text of the proposed amendments or any other information, and any requests for a public hearing, should be submitted to Office of General Counsel, 1201 Main Street, Suite 420, Columbia, S.C. 29201 or to regulations@mmo.state.sc.us, on or before 5:00 PM on September 24, 2019. Copies of the text of the proposed amendments for public notice and comment are available at <https://procurement.sc.gov/review-period-draft>.

Preliminary Fiscal Impact Statement:

No additional state funding is requested. The State Fiscal Accountability Authority estimates that no additional costs will be incurred by the State and its political subdivisions in complying with the proposed revisions to Regulation 19-445.

Statement of Need and Reasonableness:

DESCRIPTION OF REGULATION: South Carolina Consolidated Procurement Code.

Purpose: These regulations are proposed to clarify and improve the procedures used in procurement.

Legal Authority: 1976 Code Sections 11-35-10 et seq., and 2019 Act No. 41, Section 76.

Plan for Implementation: The proposed amendments would be incorporated within R.19-445 upon publication in the State Register as a final regulation. The proposed amendments will be implemented in the same manner in which the existing regulation is implemented. As part of its routine training program, the State Fiscal Accountability Authority will offer training classes to inform government officials regarding the impact of the proposed regulations.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

As reflected in Section 11-35-20, the Consolidated Procurement Code was enacted to consolidate, clarify, and modernize the law governing procurement in this State and to permit the continued development of explicit and thoroughly considered procurement policies and practices. These regulations are designed to achieve those purposes and policies, consistent with best practices developed through experience. Accordingly, the State Fiscal Accountability Authority determined that the proposed amendments to the state's procurement regulations are needed and reasonable.

DETERMINATION OF COSTS AND BENEFITS:

There will be no increased cost to the State or its political subdivisions, nor will the proposed amendments result in any increased cost to the business community. The proposed amendments will benefit covered governmental entities by enhancing the integrity of the process, improving efficiency, and allowing sound procurement practices that enable government to acquire better value for the taxpayer's dollars.

UNCERTAINTIES OF ESTIMATES:

There are no uncertainties of estimates relative to the costs to the State or its political subdivisions

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

The proposed regulations have no effect on the environment or on public health.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

There will be no detrimental effect on the environment or public health if the regulations are not implemented.

Statement of Rationale:

The Consolidated Procurement Code expressly contemplates the continued development of explicit and thoroughly considered procurement policies and practices. The proposed changes are needed to accommodate developments in the law and in best practices for government procurement, and to further consolidate, clarify, and modernize the law governing procurement in this State. S.C. Code Section 11-35-20(d).