

CHAPTER 3 PRELIMINARY PROJECT PLANNING

SUB-CHAPTER 3.2 SELECTING OTHER ADDITIONAL PROCUREMENT PROCEDURES INCLUDING PRE-QUALIFICATION

3.2.1 SELECTION OF ADDITIONAL PROCURMENT PROCEDURES – SC Code Ann §§ 11-35-3023 & 11-35-3024(2)(c)

After, or in conjunction with, selecting the project delivery and source selection method, the Agency should determine if it wants to use additional construction procurement procedures permitted by the Procurement Code. These procedures include pre-qualification of contractors and subcontractors, short listing of offerors, stipends.

3.2.2. APPROVAL TO PREQUALIFY BIDDERS/OFFERORS AND SUB-BIDDERS/OFFERORS – SC Code Ann § 11-35-3023

Agencies may request approval from OSE to limit participation in a solicitation for construction to those businesses, including potential subcontractors that are prequalified. The Agency may submit its written request to OSE for approval of pre-qualification as a part of the written determination of project delivery method discussed in Sub-Chapter 3.1. The request must include a description of the general scope of work to be acquired, the deadline for submission of information, and how businesses may apply for consideration. If OSE approves pre-qualification of offerors, OSE must supervise the pre-qualification process.

If the selected project delivery method is design-bid-build, the Agency must demonstrate that the construction will exceed \$10 million or that the project is so unique in nature or involves such special circumstances that pre-qualification is necessary or otherwise warranted. For Design-Build, Design-Build-Operate-Maintain, and Design-Build-Finance-Operate-Maintain projects, the Agency must show that cost of preparing proposals is sufficiently high in view of the size, estimated price, and complexity of the procurement as to justify pre-qualifying offerors. *See SC Code Ann § 11-35-3024(c)(i).*

The Procurement Code does not specifically discuss pre-qualifying offerors for construction management at risk services; however, applying the standards for justifying pre-qualification of offerors for design-build or design-bid-build services provide a reasonable framework for justifying pre-qualification of construction management at risk offerors.

Pre-qualification for design-bid-build and design-build have significant differences regarding the limits an Agency may place on the number of businesses it pre-qualifies. In the context of design-bid-build, the Agency may not use pre-qualification to exclude otherwise qualified (responsible) firms from competition by limiting competition to a predetermined number of the highest ranked offerors. *See SC Code Ann Reg. 19-445.2132(A).* The Agency must solicit proposals from all businesses that meet the published minimum requirements.

In the context of design-build, pre-qualifying offerors is essentially a method of short listing. Using only the criteria set forth in the request for qualifications, the Agency ranks each business from most qualified to least qualified. The basis of the ranking is determined in writing. The Agency then selects a predetermined number of the highest ranked businesses from which it will solicit proposals. OSE recommends the Agency select a minimum of three businesses. If fewer than two businesses are pre-qualified, the Agency must cancel the pre-qualification process. The determination regarding how many offers to solicit is not protestable.

In determining whether or not to pre-qualify bidders and/or sub-bidders, the Agency must keep in mind that certain decisions made in the prequalification process or protestable. For instance, on a design-bid-build project, the determination that a particular contractor is not qualified is protestable on the grounds that the

Agency's decision is "clearly erroneous, arbitrary, capricious, or contrary to law." *See SC Code Ann § 11-35-2410*. On a design-build project, the determination that one offer is more highly qualified than another is protestable on the same grounds. Indeed, the decision to pre-qualify is protestable on the same grounds. *For the right to protest a decision of the Chief Procurement Officer, see SC Code Ann §11-35-4410(1)(b)*.

The actual process of pre-qualifying offerors is addressed in Chapter 11.1 or 12.1 (depending on the selected project delivery method) of this Manual and the Pre-Qualification Handbook.

3.2.3 ADDITIONAL PROCEDURES APPLICABLE TO DESIGN-BUILD, DESIGN-BUILD-OPERATE MAINTAIN, OR DESIGN-BUILD-FINANCE-OPERATE-MAINTAIN: SC Code Ann § 11-35-3024(2)(c)

If the Agency determines the cost of the cost of preparing proposals is high in view of the size, estimated price, and complexity of the project the Agency may 1) pre-qualify offerors as discussed above, 2) short list responsible offerors in accordance with provisions set forth in this Manual, or, 3) pay stipends to unsuccessful offerors. The decision to use these alternative procedures should be made at the time the Agency prepares its written determination of appropriate project delivery method. If the Agency determines it is appropriate to use one of the additional procedures, it should state so in the written determination of appropriate project delivery method and set forth the factors supporting its use.

Short listing differs from pre-qualification in that it occurs after receipt of proposals rather than before. Under this process, the Agency would receive proposals from any interested business and short list a predetermined number of responsible offerors reasonably susceptible of being selected prior to any discussions under SC Code Ann § 11-35-1530(6) and ranking under SC Code Ann § 11-35-1530(7). See Part E of this Manual for details on short listing.

Stipends are intended to stimulate interest in a project among potential offerors by notifying them that the Agency will partially compensate unsuccessful offeror's for the significant cost of preparing a proposal. See Part E of this Manual for more details on stipends.