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# Regulation Highlights

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July 2007

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# Disclaimer

- Presentation is not an official agency interpretation of any laws
- Presentation represents only the current views of the presenter, not those of the agency or the chief procurement officers
- Presentation is offered only for educational purposes
- Presentation is intended only to bring significant changes and the related issues to your attention

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# Topics

- How You Can Find Them
- Where You Can Find Additional Info
- When the Regulations Take Effect
- What Are the Most Significant Changes

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# Do Your Homework

- Today's Presentation is **NOT** a Substitute for Reading the New Regulations Yourself.
- Changes have been made that will not be discussed today.
- Everyone Should Read the Section-By-Section Discussion Posted On The Web

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# How Do I Find Them?

- State Register, V.31, # 5, May. 25, 2007
- [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)
  - Click on: General Info – Legal
  - “NEW Proc. Regs published in State Register V.31, # 5, eff. May. 25, 2007”
- Merger of Old and New not available yet.
- New “blue book” available Sept. 2007

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# Resources

- Section-By-Section Discussion (10-27-2006 State Register)
  - do not rely on this version of text
- Redline of Changes to Regulations made May 25, 2007
  - do not rely on this version of text
  - Note: references to paragraph numbers are incorrect
- Both posted: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)
  - Click on: General Info – Legal

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# Effective Date

- Regulations are effective on **May 25, 2007**
- Except some sections apply only to solicitations issued after **September 3, 2007**
  - Sections 2010, -.2015, -.2050, -.2095, -.2097, -.2105, -.2120, -.2180
- Effective dates established by R. 19-445.2000(E)

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# R. 19-445.2000

- ¶(C)(1) - “head of purchasing agency” is always limited to agency’s certification except for emergency & small purchase
- ¶(D) - info or allegations concerning improper conduct must be transmitted to CPO
- ¶(E) - effective date



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# R. 19-445.2005

- ¶(A) - Submit to MMO any revisions to your Internal Procurement Procedures Manual
- Highlight the changes (redline & ~~strikeout~~)

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# R. 19-445.2005

- ¶(A)(1)(c) - “establish a clear means by which vendors can identify the governmental body's procurement officers and the limits of their authority.”
- Information for the Vendors
  - Employee Names
  - Dollar Authority for each Name
- Starting Point: Put in your manual

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## R. 19-445.2010

- ¶ (A) - If requested in writing by an **actual offeror prior to final award**, the responsible procurement officer shall, within **ten days** of the receipt of any such request, make **documents directly related to the procurement activity** not otherwise exempt from disclosure available for **inspection** at an **office of the responsible procurement officer**.

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# R. 19-445.2010

- ¶ (B)
  - Pre-award, All requests for information should be referred to and answered by procurement officer
  - Educate your agency staff

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# R. 19-445.2010

## ■ ¶ (C)

- Prior to award / intent, state personnel other than the procurement officer should not be providing information unless procurement officer authorizes in writing.
- Focus on “source selection information”

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# R. 19-445.2010

## ■ Source Selection Information

- Includes info “related to or involved in the evaluation”
  - evaluator’s names
  - vendor’s names
  - vendor’s prices
  - evaluation plans / criteria
  - evaluation rankings / score sheets
- Does not include “information **previously** made available to the public,” e.g., info in solicitation, information read out at bid opening.

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# R. 19-445.2010

- ¶(D) - In RFPs, no one should disclose either the number of offerors or their identity, except as otherwise required by law.
  - Public opening can be an exception, discussed below
- ¶ (E) - Pre-award, proposals may not be released to anyone without a written agreement (similar to LAC draft audits)

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# R. 19-445.2015

- Old regulation has been repealed
- New Regulation
  - Requires Ratification or Termination any time a contract is unauthorized or otherwise entered into in violation of any law
  - Applies only when contract is active
    - after contract formation
    - before contract ends, e.g., services performed, supplies delivered, and you've paid



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# R. 19-445.1025

- Absent ratification, contract must be terminated.
- Above certification or \$100,000, whichever is less, the CPO must approve.
- Improper to make payment on illegal contracts.
- Quarterly Reporting required of any ratification or termination
  - Report on same report you use to report emergencies, sole sources, trade-in, and preferences

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# R. 19-445.2022

- ¶ (A) - CPOs authorized to temporarily suspend an agency's authority to conduct any procurements above \$25,000
- ¶ (B) - CPOs authorized to audit any transaction, any time.

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## R. 19-445.2025

- Regarding Professional Services - The first un-codified paragraph of Section 2025 is deleted because 2006 Act No. 376 (S.572) deleted Section 11-35-1270.

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# R. 19-445.2030

- ¶ (5)
  - 7 Day Minimum Bidding Period
  - Day 1 is First Day after notice, e.g., SCBO ad

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# R. 19-445.2042

## ■ Pre-Bid Conferences

- long enough after solicitation issued to allow vendors to become familiar with the solicitation
- long enough before opening to allow vendors to consider conference results in preparing their offers

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## R. 19-445.2050

- ¶(A) - Law already requires two people at openings: the person doing the opening and a witness.
- Now, both persons must certify the tabulation in writing as true and accurate

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# R. 19-445.2065

- ¶ (D)
  - If an IFB is cancelled, bids must be returned to the bidders.

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# R. 19-445.2070

## ■ ¶ (D)(2)

- Bidders may be requested to delete objectionable conditions from their bid provided that these conditions do not go to the substance, as distinguished from the form, of the bid or work an injustice on other bidders. Bidder **should** be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness.



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# R. 19-445.2070

- ¶ (D)(2)
  - What to Waive = 1520(13) & (D)(2)
  - What **not** to Waive - R. 2070(A) to (D)(1)
- Read with R. 19-445.2080 (next slide, out of order)

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# R. 19-445.2080

- Code allows clarifications in IFBs, FPB & BVB
- Allows clarifications with “apparent responsive bidders”
- R. 19-445.2080 makes “apparent responsive bidders” = “**obviously** responsive bidders”
- Section-By-Section Discussion: “The Procurement Code provides very limited opportunity for the state to clarify ambiguities in the context of sealed bidding. [*Curing minor informalities is an example.*] This regulation is revised to insure that such clarification is available only if the bidder is **obviously** responsive.”

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# R. 19-445.2070

- ¶ (G)
  - “unsigned bid” rule repealed
  - Only 11-35-1520(13) governs

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# R. 19-445.2077

- Bid Samples & Descriptive Literature
  - Samples & Cut Sheets may be requested only “when it is necessary to evaluate required characteristics of the items bid”
  - IFB shall state (1) that samples and literature should not be submitted unless requested, and (2) will not be examined or considered in determining responsiveness (use words of regulation)
- Don't consider unless requested

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# R. 19-445.2085

- ¶ (A)
- Correction / Withdrawal of Bids
- Written Determination Required
- Approval Required
  - CPO / Agency Head / Designee

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# R. 19-445.2090

- Formerly, Code & Regs required
  - that the location & anticipated date of award be *announced at bid opening*
  - that the award be posted on that date unless notice otherwise given
- Now, Code & Regs require
  - that the location & anticipated date of award be *stated in the solicitation*
  - that the award be posted on that date unless notice otherwise given

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# R. 19-445.2100

- ¶ (A) - Establishes a minimum bidding period of seven days between the date of the SCBO ad and bid opening

# R. 19-445.2100

- ¶ (B)(1) - Blanket Purchase Orders
- Formerly OK for “**anticipated** repetitive needs for small quantities of supplies”
- Now OK for “repetitive needs for small quantities of **miscellaneous** supplies”
- Section-by-Section Discussion: “Item B(1) was changed *to insure that Blanket Purchase Agreements are not used for recurring known needs* for which an agency should conduct an independent procurement.”



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# R. 19-445.2105

- Sole Source
- ¶ (C)
- Substantive Written Determination Required
- Determination must be authorized prior to contracting.

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# R. 19-445.2110

- Emergency Procurements
- ¶ (F) - Emergency after Unsuccessful IFB
  - Deleted; must meet “emergency” conditions
- ¶ (F) -
  - Substantive Written Determination Required
  - Determination must be authorized prior to contracting.

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# Written Determinations

- For Guidance, Read Court Case
- [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)
  - Click on “Other Court Opinions”
  - Select “Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003)”

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# R. 19-445.2120

- Cost or Pricing Data
- If you award or sign change orders with a value in excess of \$500,000, you need to study both:
  - Section 11-35-1810
  - Regulation 19-445.2120

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# R. 19-445.2125

- Responsibility
- ¶ (B)
- Up until the moment of award, contractor must provide information you request regarding responsibility
- You may consider any source of information. Examples: other agencies, other contractors, banks, trade associations, commercial sources of supplier info (e.g., Dunn & Bradstreet)

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# R. 19-445.2145

- Responsibility
- ¶ (D)
- Determination not limited to circumstances existing at the time of opening.
- You can consider any information you get up until the moment you post your award / intent

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# R. 19-445.2145

- Responsibility
- ¶ (F)
- acknowledges authority to establish minimum qualifications (a/k/a/ “special standards of responsibility”)
- unenforceable unless they are “specific, objective, and mandatory”
  - OK: 3 licensed professional engineers
  - not OK: adequate qualified engineers

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# R. 19-445.2132

- Pre-Qualification
- ¶ (A) - Authorization
  - Written Determination required
  - Approval by CPO / Agency Head / Designee



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# R. 19-445.2132

- Pre-Qualification
- ¶ (A) - Notice to Vendors
- Prompt notice to those qualified
- Prompt notice to those not qualified
  - Including “specific information why qualification was not attained”
- ¶ (B) - Receipt of Submittals
  - Handled just like Bids - See R. 19-445.2045

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# Providing Notice of Prequalification

- Do Not Provide notice by (1) group letter, (2) broadcast email, or (3) solicitation amendment!
- WHY?
  - Bad Business

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# Providing Notice of Prequalification For IFB:

- R. 19-445.2045(A): “Prior to bid opening, information concerning the identity and number of bids received shall be made available only to the state employees, and then only on a “need to know” basis.”
- R. 19-445.2050(C): “Only the information disclosed by the procurement officer of the governmental body or his designee at bid opening is considered to be public information under the Freedom of Information Act, Chapter 4 of Title 30, until after the issuance of an award or notification of intent to award, whichever is earlier.”

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# Providing Notice of Prequalification For RFP

- R. 19-445.2010(D): “Throughout the competitive sealed proposal process, state and non-state personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law.”

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# R. 19-445.2135

## ■ Multi-Term Contracts

- No written determination required unless any single term exceeds one year
  - Can't circumvent with automatic renewals with no option to non-renew
- No longer tied to fiscal years; tied to calendar year
- If written determination required, must
  - be prepared prior to issuance of solicitation
  - provide a detailed justification

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# Warning

- Do Not allow the need for a written determination to drive your decision on whether or not to use a multi-term.
- Base your decision on business reasons.

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# R. 19-445.2152

- Standard Equipment Agreement
  - 2006 Act No. 376 deleted the Code provision regarding the Standard Equipment Agreement - Section 11-35-2010(2)
  - New Regulations revised the Regulation regarding the Standard Equipment Agreement
  - Now, Standard Equipment Agreement must be used only:
    - if total potential value exceeds \$15,000
    - or
    - if duration exceeds 90 days

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# R. 19-445.2165

## ■ Gifts

- To Government - R. 19-445.2165
- To People - Ethics Act

## ■ Exercise Caution in Accepting Gifts to Agency - Educate Management

- Don't solicit or accept gifts from a donor - or anyone related to the donor - if you have reason to believe the donor has or is seeking to do business with your agency
- If you must, consult the regulation very carefully!



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# R. 19-445.2180

## ■ ¶ (A) Assignments

- Does not relieve contractor of its contractual obligations; involves a contractor either delegating its performance obligations or its rights under the contract to a third party
- New Reg bars assignment absent written approval by CPO / agency head / or designee
- Exception: assignment of money receivable

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# R. 19-445.2180

- ¶ (B) Novation
  - Relieves contractor of its contractual obligations
  - “New” contractor furnishes performance bond or “old” contractor guarantees performance of “new” contractor
  - Generally - avoid novations

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# R. 19-445.2180

- ¶ (C) Change of Name
  - Involves a change of name only
  - NOT appropriate if “new” name is not the *exact* same business entity
  - requires “a document indicating such change of name”
    - Examples: amendment to articles of incorporation, revised partnership agreement
    - Warning: If name change involves change of business type, consider responsibility issues.
      - Example: A partnership becomes a limited liability company
  - requires written agreement (i.e., a change order) with contractor
    - agreement “shall specifically indicate that no other terms and conditions of the contract are thereby changed”

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# R. 19-445.3000

- **FOR LARGE SCHOOL DISTRICTS ONLY**
  - This new regulation fills in the gaps in the statute regarding the “substantially similar” procurement codes that large school districts must adopt.
    - Read it!
  - This new regulation authorizes MMO to publish a model school district code. We’re working on it.
  - This new regulation - ¶ (E) - allows ANY school district to adopt the model.

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# Competitive Sealed Proposals

- R. 19-445.2095 re-written
- R. 19-445.2065 no longer applies to RFPs
- R. 19-445.2070 no longer applies to RFPs
- R. 19-445.2097 is added
- R. 19-445.2010 impacts RFPs

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# R. 19-445.2095

## ■ ¶ (C)(1)

- ❑ time-stamp proposals upon receipt
- ❑ tabulate proposals received - showing name of offeror, number of modifications, description of item offered
- ❑ tabulation must be certified in writing as true and accurate by BOTH person opening and a witness
- ❑ tabulation public only after award / intent is posted

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# R. 19-445.2095

- states “proposals shown only to state personnel on a “need to know” basis”
  - Read in conjunction with R. 19-445.2010(E), which states “*Prior to the issuance of an award or notification of intent to award, whichever is earlier, the procurement officer shall not release a proposal to a person without first obtaining from that person a written agreement, in a form approved by the responsible chief procurement officer, regarding restrictions on the use and disclosure of proposals.*”

# R. 19-445.2095

## ■ ¶ (C)(1)

- “Proposals shall be opened publicly....” HOWEVER:
- In IFBs, R. 19-445.2050(A) requires that during opening staff must “read aloud so much thereof, including prices, to those persons present....” NO SUCH REQUIREMENT EXISTS FOR RFPs. Just the opposite. The law dictates that “Contents and the identity of competing offers shall not be disclosed during the process of opening by state personnel.” ¶ (C)(1)
- “Throughout the competitive sealed proposal process, state and non-state personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law.” R. 19-445.2010(D)



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# R. 19-445.2095

In summary,

Open proposals publicly, but without revealing the proposal's contents or identifying who submitted the proposal.

If, as a consequence of opening proposals publicly, the number of proposals is revealed, so be it. However, you should not otherwise “disclose . . . the number of offerors”

Tabulation is available after award doc posted

Prior to award, proposals should be distributed on a need to know basis, after each recipient signs an agreement (like an LAC report)

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# R. 19-445.2095

- ¶ (H)(1) - new regulation on pre-bid conferences applies to RFPs
- Former ¶ (G)(2) made R. 19-445.2065 applicable to RFPs. This language has been deleted. Rejection of bids is now addressed by R. 19-445.2097 - which is simply a re-write of 2065 for the RFP context.
- Former ¶ (G)(3) made R. 19-445.2070 applicable to RFPs. This language has been deleted. Rejection of individual bids is now addressed by R. 19-445.2095(J). Discussed below.

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# R. 19-445.2095

- Discussions with Offerors
- 2006 Act No. 376 rewrote Section 11-35-1530(6) to allow discussions with offerors, after opening but prior to award.
- ¶ (I) explains the conditions under which such discussions can take place.
- Details beyond today's presentation.
- Such discussions may be conducted only by a procurement officer authorized to do so by the appropriate Chief Procurement Officers

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# R. 19-445.2095

- ¶ (J) - Rejection of Individual Proposals
- Responsiveness & RFPs
  - material requirements still the touchstone
  - but
    - possible fixes during discussions
    - solicitations should be drafted to include fewer mandatory obligations

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That's All Folks!

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