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19-445.2000. State Procurement Regulations.

A. through E. (No new changes)

F. Application of the Procurement Code.

(1) Process versus Approval. The Consolidated Procurement Code and its ensuing regulations establish processes and parameters for the acquisition of supplies, services, information technology, and construction. In some places, the Code and regulations also impose approval requirements. An exemption from approval is not an exemption from complying with the applicable processes or parameters. Approval alone does not substitute for complying with applicable processes.

(2) Other Required Approvals. Approval pursuant to the Code or regulations does not substitute for any other approval required by law. For example, if the Procurement Code applies to an acquisition and the overall arrangement involves either construction or the granting or acquiring any interest in real property, other independent processes or approval may be required by law, e.g., Sections 1-11-55, 1-11-56, 1-11-58, 1-11-65, or Chapter 47 of Title 2.

(3) Multiple Instruments Not Determinative. The application of the Code does not depend whether the parties memorialize the overall transaction into one or more contractual instruments. As a remedial statute, the Consolidated Procurement Code should be construed liberally to carry out its purposes. (Section 11-35-20) Accordingly, when multiple written agreements are part of an overall transaction to accomplish an overall purpose, the documents will be considered together for purposes of determining application of the Consolidated Procurement Code, even if the instruments have not been executed simultaneously or the parties are not the same.

(4) Revenue generating contracts. The Consolidated Procurement Code “applies to every procurement . . . by this State under contract acting through a governmental body . . .” (Section 11-35-40(2).) The term “contract” means “all types of state agreements, regardless of what they may be called, for the procurement . . . of . . . supplies, services, information technology, or construction.” (Section 11-35-310(8).) In pertinent part, the term “procurement” is defined as “buying, purchasing, renting, leasing, or otherwise acquiring any . . . construction.” (Section 11-35-310(25) (emphasis added.)) Accordingly, the Procurement Code applies even though the governmental body does not make a payment of money. Without limitation, examples of such contracts include revenue-generating contracts, concession agreements, and contracts structured as a design-build-finance-operate-maintain project. (Section 11-35-2910(8).)

(5) Financed Construction. The Consolidated Procurement Code “applies to every procurement . . . by this State under contract acting through a governmental body . . .” (Section 11-35-40(2).) The term “contract” means “all types of state agreements, regardless of what they may be called, for the procurement . . . of . . . construction.” (Section 11-35-310(18).) In pertinent part, the term “procurement” is defined as “buying, purchasing, renting, leasing, or otherwise acquiring any . . .

construction.” (Section 11-35-310(25) (emphasis added.) The term “construction” is defined as “the process of building . . . any . . . public improvements of any kind to real property.” (Section 11-35-310(7).) Read together, and absent an applicable exclusion (e.g., gifts) or exemption (e.g., Section 11-35-710), the Procurement Code applies to every acquisition of the process of improving real property by a governmental body, whether or not the acquisition involves an expenditure of money. Such acquisitions may be memorialized in a number of related agreements and, without limitation, may be structured as an in-kind exchange, lease-purchase, lease with purchase option, lease-lease-back, sale-lease-back, installment-purchase, or so-called public-private-partnership.

(6) Acquisition involving an interest in real property. Generally, the Procurement Code does not apply to an acquisition solely of an interest in real property; for example, the Procurement Code does not apply to an acquisition of land, even though it includes pre-existing improvements and fixtures (i.e., not built-to-suit), nor does it apply to an acquisition of a leasehold estate, even though it includes complementary subordinate supplies, services, information technology, or construction, e.g., landlord-performed tenant improvements for a lease not-to-own, building security, janitorial services). The Procurement Code, however, does apply to an acquisition of an interest in real property (e.g., a leasehold or fee simple) if the transaction also involves a material acquisition of supplies, services, information technology, or construction. For example, as discussed in R. 19-445.2000E(5), a lease-purchase of custom-built, new construction must be acquired pursuant to the Procurement Code. While not conclusive, the primary goal of the transaction may be determinative. Other factors to consider include any existing or ongoing relationship between the parties involved, whether debt is involved, the relationship between lease payments and any debt, any purchase option, and any control lessee may exercise over the construction.

F. Notice.

(1) When adequate public notice is required by Article 5, the notice must contain sufficient information to allow a prospective offeror to make an informed business judgment as to whether she should compete (or would have competed) for the contract, including at minimum the following:

- (a) a clear and concise description of the item(s) to be acquired;
- (b) how to obtain a copy of the solicitation document;
- (c) when and where responses are due;
- (d) the place of performance or delivery;
- (e) the term or duration of the contract; and
- (f) the actual or anticipated contract amount.

(2) The notice required by section 11-35-1570 must include the same information.

19-445.2010. Disclosure of Procurement Information.

~~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. Reserved.~~

~~B. through C. (No changes)~~

~~D. Throughout the competitive sealed proposal process In procurements conducted pursuant to Section 11-35-1530 or Section 11-35-1535, state personnel with access to proposal information shall not disclose either the number of offerors or their identity prior to the issuance of an award or notification of intent to award, whichever is earlier, except as otherwise required by law.~~

E. 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~~ any individual information obtained in response to any type of solicitation, without first obtaining from that ~~person individual~~ a written agreement, in a form approved by the responsible chief procurement officer, regarding restrictions on the use and disclosure of ~~proposals~~ such information. Such agreements are binding and enforceable. Before allowing any individual to perform any role in discussions, negotiations, evaluation, or the source selection decision in a procurement conducted pursuant to Section 11-35-1530 or Section 11-35-1535, the responsible procurement officer must first obtain from that individual, in a form approved by the appropriate chief procurement officer, a written acknowledgement of compliance and an agreement to comply with rules designed to protect the integrity of the procurement process.

~~F. through H. (No changes)~~

19-445.2042. Pre-Bid Conferences.

~~A. through C. (No changes)~~

~~D. To minimize the time and expense imposed on industry by pre-bid conferences, the procurement officer should arrange for attendance by electronic means to the maximum extent practicable and in a manner consistent with R. 19-445.2027 (Electronic Commerce).~~

19-445.2080. Clarifications with Bidders Bid Reductions.

~~Apparent responsive bidder, as used in the source selection process, means a person who has submitted a bid or offer which obviously conforms in all material aspects to the solicitation. A procurement officer's decision regarding whether a bid is apparently responsive is final unless protested.~~

~~The responsible procurement officer may accept a voluntary reduction in price from a low bidder after bid opening but prior to award; provided that such reduction is not conditioned on, nor results in, the modification or deletion of any conditions contained in the invitation for bids.~~

19-445.2090. Award.

A. (No changes)

B. The procurement officer shall issue the notice of intent to award or award on the date specified in the solicitation, unless the procurement officer determines, and gives notice, that a longer review time is necessary. The procurement officer shall give notice of ~~a time extension to each bidder~~ the revised posting date in accordance with Section 11-35-1520(10) by posting it at the location identified in the solicitation.

19-445.2099. Competitive Negotiations.

A. General

(1) Competitive negotiations are governed by R. 19-445.2030B, -2040, -2042, -2045, -2050B, -2085C, -2090B, -2095C, -2095J, and -2098. Regulation 19-445-2097 (Rejection of Proposals) applies to competitive negotiations except that R. 19-445.2099(K)(1) is substituted for R. 19-445.2097A.

(2) Documentation required by this Regulation 19-445.2099 must be prepared at the time the process to be documented is conducted.

(3) The head of the using agency or his designee must appoint in writing an individual to serve as the selection executive (SE). The SE must be an individual who has sufficient rank and professional experience to effectively carry out the functions of an SE. For acquisitions of less than \$5,000,000, the using agency's senior procurement official is the selection executive (SE) unless the head of the using agency or his designee appoints another individual for a specific acquisition. Subject to the authority and approval of the responsible procurement officer, the SE shall—

(a) Recommend an acquisition team, tailored for the particular acquisition, that includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a well-developed solicitation, a comprehensive evaluation of offers, and effective negotiations (see R. 19-445.2017B(3));

(b) Approve the acquisition plan and the solicitation before solicitation release;

(c) Ensure consistency among and sufficiency of the solicitation requirements, evaluation factors and subfactors, solicitation provisions or contract clauses, and data requirements;

(d) Ensure that proposals are evaluated based solely on the factors and subfactors contained in the solicitation;

(e) Consider the recommendations of subject matter experts, advisory boards or panels (if any); and

(f) Select the source or sources whose proposal is the best value to the State, as provided in R. 19-445.2099K.

B. Procedures for Competitive Negotiations.

The Division of Procurement Services may develop and issue procedures which shall be followed when using the competitive negotiations method of acquisition.

C. Definitions

Clarification means any communication in which the responsible procurement officer requests or accepts information that clarifies any information in a proposal. Clarification does not include the request or acceptance of any change to the terms of an offer.

Competitive range means the offeror or group of offerors selected for negotiation.

Deficiency means any term of an offer that does not conform to a material requirement of a solicitation. A material requirement is one that affects the price, quantity, quality, delivery, or other performance obligations of the contract.

Negotiation means any communication, oral or written, that invites or permits an offeror to change any texts or graphics in the terms of its offer in any way. Negotiation does not include communications involving (i) information that is necessary to understand an offer, but that does not change any text or graphics in the offer, (ii) information about the offeror, or (iii) any other information that will not bind the parties upon acceptance of an offer.

Offer means those portions of a proposal that constitute a written promise or set of promises to act or refrain from acting in a specified way, so made as to manifest a commitment to be bound by those promises upon acceptance by the State. Offer does not include mere descriptions of approaches, plans, intentions, opinions, predictions, or estimates; statements that describe the offeror's organization or capability; or any other statements that do not make a definite and firm commitment to act or refrain from acting in a specified way.

Proposal means the information submitted to the State in response to a request for proposals. The information in a proposal includes (i) the offer, (ii) information explaining the offer, (iii) information about the offeror, and (iv) any other information that is relevant to source selection decision making.

Weakness means a flaw in the proposal that increases the risk of unsuccessful contract performance. A “significant weakness” in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

D. Amending the solicitation

(1) When, either before or after receipt of proposals, the State changes its requirements or terms and conditions, the responsible procurement officer shall amend the solicitation.

(2) When, after the receipt of proposals, the State discovers that material inadequacies of the solicitation have contributed to technical or pricing deficiencies, the responsible procurement officer shall amend the solicitation to resolve the inadequacies, preferably prior to proceeding further with the procurement process.

(3) If a proposal of interest to the State involves a desirable departure from the stated requirements, the responsible procurement officer shall amend the solicitation, preferably prior to completion of proposal evaluation pursuant to F(1), provided this can be done without revealing to the other offerors the alternate solution proposed or any other information that is entitled to protection (see Regulation 19-445.2099I).

(4) Amendments issued after the established time and date for receipt of proposals may not exceed the general scope of the request for proposals and must be issued to those offerors that have not been eliminated from the competition.

(5) If, based on market research or otherwise, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the responsible procurement officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

E. Evaluation Factors

(1) The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition.

(2) Evaluation factors and significant subfactors must—

(a) Represent the key areas of importance and emphasis to be considered in the source selection decision; and

(b) Support meaningful comparison and discrimination between and among competing proposals.

(3) The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of the responsible procurement officer, subject to the following requirements:

(a) Price or cost to the State shall be evaluated unless the responsible procurement officer documents the reasons price or cost is not an appropriate evaluation factor for the acquisition and that decision is approved by the head of the using agency.

(b) The quality of the item to be acquired shall be addressed in every source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience.

(c) Past performance shall be evaluated unless the responsible procurement officer documents the reasons past performance is not an appropriate evaluation factor for the acquisition.

(4) All factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation. The rating method need not be disclosed in the solicitation.

(5) The request for proposals must state the relative importance of all factors to be considered in evaluating proposals but need not state a numerical weighting for each factor.

(6) If price is an evaluation factor, the solicitation must state whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price.

F. Evaluation Process

(1) General. Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. All proposals shall be evaluated and, after evaluation, their relative qualities must be assessed solely on the factors and subfactors specified in the solicitation. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.

(2) Evaluation methods. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings.

(3) Cost or price evaluation. The responsible procurement officer shall document the cost or price evaluation. As provided in R. 19-445.2122, price reasonableness shall be determined independently of cost or price evaluation.

(4) Past performance evaluation.

(a) Past performance information is one indicator of an offeror's ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This comparative assessment of past performance information is separate from the responsibility determination.

(b) The solicitation shall describe the approach for evaluating past performance, including evaluating offerors with no relevant performance history, and shall provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the stated requirement. The solicitation shall also authorize offerors to provide information on problems encountered on the identified contracts and the offeror's corrective actions. When evaluating an offeror's past performance, this information, as well as information obtained from any other sources, must be considered; however, the relevance of similar past performance information is a matter of business judgment.

(c) The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

(5) Technical evaluation. The source selection records shall include—

(a) An assessment of each offeror's ability to accomplish the technical requirements; and

(b) A summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors.

G. Exchanges with offerors.

(1) Control. The responsible procurement officer shall control all exchanges after opening and prior to award.

(2) Fairness and Impartiality. The responsible procurement officer shall treat all offerors fairly and impartially when deciding whether and when to seek clarification or to negotiate. Similarly-situated offerors shall be given similar opportunities to clarify and, if in the competitive range, to negotiate.

(3) Clarifications. The responsible procurement officer may conduct clarifications at any time prior to the award decision.

(4) Competitive Range.

(a) After complying with Section 11-35-1535(G) (Exchanges with offerors), and before negotiating with anyone, the responsible procurement officer shall establish a competitive range comprised of the offerors that submitted the most promising offers.

(b) Ordinarily, the competitive range should not include more than three offerors. The responsible procurement officer may select only one offeror and may select more than three. The rational for establishment of, and every modification to, the competitive range shall be determined in writing.

(c) Prior to conducting the minimum negotiations required by Section 11-35-1535(I)(3)(b)(i) and R. 19-445.2099H(2), otherwise promising offerors should not be excluded from the competitive range due solely to deficiencies that are reasonably susceptible of correction.

(d) After conducting the minimum negotiations required by 11-35-1535(I)(3)(b)(i) and R. 19-445.2099H(2), the responsible procurement officer may eliminate an offeror from the competitive range if the offeror is no longer considered to be among the most promising.

(e) Offerors excluded or otherwise eliminated from the competitive range may request a debriefing

H. Negotiations with offerors

(1) Negotiations – General.

(a) The responsible procurement officer shall participate in and control all negotiations.

(b) The primary objective of negotiation is to maximize the State's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation.

(c) The State may use any method of communication.

(d) Prior to any negotiation session, the using agency must document its prenegotiation objectives with regard to each offeror in the competitive range.

(e) The responsible procurement officer shall prepare a record of each negotiation session.

(f) Negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

(g) The responsible procurement officer may not relax or change any material requirement of the solicitation during negotiation except by amendment in accordance with R. 19-445.2099D.

(h) Negotiations may include pricing. The responsible procurement officer may state a price that the State is willing to pay for what has been offered and may tell an offeror its price standing.

(i) Subject to the following requirements, the scope and extent of negotiations are a matter of the responsible procurement officer's judgment:

(i) Section 11-35-30 (Obligation of Good Faith);

(ii) R. 19-445.2099G(2) (Fairness and Impartiality); and

(iii) R. 19-445.2099H(2) (Minimum Negotiations).

(j) The State may engage in more than one session with an offeror if necessary. Subject to R. 19-445.2099G(2), the conduct of multiple sessions with a particular offeror does not require the conduct of multiple sessions with other offerors.

<u>(k) Throughout the competitive negotiation process, state personnel shall not disclose the content of any offeror's proposal to any other offeror.</u>
<u>(l) State personnel shall not promise that the State will select an offeror for award if it makes a particular change or set of changes to its offer.</u>
<u>(2) Negotiations – Minimum – Problem Identification</u>
<u>The State shall negotiate with each offeror in the competitive range. At a minimum, the State shall identify and seek the correction of any deficiency and the elimination of any other undesirable term in an offer.</u>
<u>(3) Negotiations – Enhancement.</u>
<u>(a) The responsible procurement officer may negotiate with offerors in the competitive range to seek changes in their offers that the State desires and to allow them to make other improvements.</u>
<u>(b) The responsible procurement officer may state specific terms that the State desires and seek improvements in already acceptable terms.</u>
<u>(4) Proposal Revisions.</u>
<u>(a) The responsible procurement officer may request or allow proposal revisions either (i) to clarify and document understandings reached during negotiations, or (ii) to provide offerors an opportunity to respond to an amendment.</u>
<u>(b) If an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to that offeror's proposal shall be accepted or considered.</u>
<u>(c) Upon the completion of all negotiations, the responsible procurement officer shall request that offerors still in the competitive range submit final offers not later than a specified common cutoff date and time that allows a reasonable opportunity for submission. When submitting final offers, an offeror may revise any aspect of its offer. The responsible procurement officer shall notify offerors that failure to submit a final offer by the common cutoff date and time will result in the consideration of their last prior offer. Requests for final offers shall advise offerors that final offers shall be in writing and that the government intends to make award without obtaining further revisions.</u>
<u>I. Limitations on exchanges. State personnel involved in the acquisition shall not engage in conduct that—</u>
<u>(1) Favors one offeror over another;</u>
<u>(2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;</u>
<u>(3) Reveals the names of individuals providing reference information about an offeror's past performance; or</u>
<u>(4) Knowingly furnishes source selection information in violation of Regulation 19-445.2010.</u>

J. Tradeoff Process

(1) A tradeoff process is appropriate when it may be in the interest of the State to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

(2) This process permits tradeoffs among cost or price and non-cost factors and allows the State to accept other than the lowest priced proposal. The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file.

K. Award

(1) Unless there is a compelling reason to reject proposals, award must be made to the responsible offeror whose final proposal meets, in all material respects, the requirements announced in the solicitation, as amended, and is determined in writing to provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals and, if price is an evaluation factor, any tradeoffs among price and non-price factors. -Award must be based on a comparative assessment of final proposals from offerors within the competitive range against all source selection criteria in the solicitation.

(2) The contract file must document the basis on which the award is made, and the documentation must explain and justify the rationale for any business judgments and tradeoffs made or relied on in the award determination, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

(3) The contract file must document who performed the functions required by sections F, J, and K of R. 19-445.2099 and which functions they performed.

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

A. Authority.

(1) An agency may make ~~Small-small~~ purchases not exceeding the limits prescribed ~~(under \$50,000)~~ shall be made as provided in Section 11-35-1550 in accordance with the procedures in that section and herein. For small purchases over ten thousand dollars, bidders must be provided reasonable time to prepare their bids, no less than seven (7) days after notice is provided as required by Section 11-35-1550(2)(c), unless a shorter time is deemed necessary for a particular procurement as determined in writing by the head of the purchasing agency or his designee. In accordance with Section 11-35-1550(2)(c), an agency may:

<u>(2) Any purchase of supplies, services, or information technology made pursuant to Section 11-35-1550 must be within the agency's certification.</u>
<u>(3) These simplified acquisition procedures shall not be used for items available under mandatory state term contracts (see R. 19-445-2020B(1)).</u>
<u>(4) Contracts solely for the procurement of commercially available off-the-shelf products pursuant to section 11-35-1550 are not subject to laws identified in Section 11-35-2040.</u>
<u>(5) Adequate public notice must comply with R. 19-445.2000F.</u>
B. Purchases pursuant to Section 11-35-1550(2)(b) (Three Written Quotes).
<u>(1) Unless quotes are received from at least three responsive and responsible bidders and attached to the purchase requisition, adequate public notice must be given and documented with the purchase requisition. So-called "no bids" are not bona fide and do not satisfy this requirement.</u>
<u>(2) If adequate public notice is not given in South Carolina Business Opportunities, the request for quotes must be distributed equitably among qualified suppliers.</u>
C. Purchases pursuant to Section 11-35-1550(2)(c) (Advertised Small Purchase) may be made by giving adequate public notice in South Carolina Business Opportunities and:
<u>(1) solicit issuing a written solicitation for</u> written quotes, as <u>further specified</u> described in Section 11-35-1550(2)(eb);
<u>(2) solicit</u> ing bids in accordance with Section 11-35-1520, Competitive Sealed Bidding, Section 11-35-1525, Competitive Fixed Price Bidding, or Section 11-35-1528, Competitive Best Value Bidding; or
<u>(3) solicit</u> ing proposals in accordance with Section 11-35-1530, Competitive Sealed Proposals.
D. The purpose of these simplified procedures is to provide additional flexibility so that acquisitions in this dollar range may be solicited, offered, evaluated, and awarded efficiently while minimizing the burden and administrative costs for both the State and industry. The appropriate Chief Procurement Officer may develop and issue procedures, guidance, and forms for use in procurements conducted pursuant to Section 11-35-1550 and this regulation.
<u>BE.</u> Establishment of Blanket Purchase Agreements. (No changes)
19-445.2105. Sole Source Procurements.
A. through B. (No changes)
C. Written Determination.

~~(1) The written determination as to whether to conduct a procurement ~~shall be made~~ as a sole source shall be made by either the Chief Procurement Officer, the head of a purchasing agency, or designee of either office above the level of the procurement officer. Any delegation of authority by either the Chief Procurement Officer or the head of a purchasing agency with respect to sole source determinations shall be submitted in writing to the Materials Management Officer. ~~Such determination and the basis therefor shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness.~~~~

~~(2) The written determination must include a purchase description that states the using agency's actual needs, which shall not be unduly restrictive. In cases of reasonable doubt, competition should be solicited. ~~Any request by a governmental body that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.~~ The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision and must be accompanied by market research that supports the decision. The determination must be authorized prior to contract execution.~~

~~(3) Compliance with the notice requirements in Section 11-35-1560(A) must be documented in the procurement file.~~

D. Other Applicable Provisions.

~~Sole source procurements must comply with all applicable statutes and regulations, including without limitation, Sections 11-35-30 (Obligation of good faith), -210 (Determinations), -410 (Public access to procurement information), -1810 (Responsibility of bidders and offerors), -1830 (Cost or pricing data), -2010 (Types of contracts), -2030 (Multiterm contracts), -1610 (Change order or contract modification), -2440 (Records of procurement actions), -2730 (Assuring competition), and -4230 (Authority to resolve contract and breach of contract controversies).~~

19-445.2110. Emergency Procurements.

A. through E. (No changes)

F. Notice.

~~Compliance with the notice requirements in Section 11-35-1570(B) must be documented in the procurement file.~~

~~FG.~~ Written Determination.

The Chief Procurement Officer or the head of the purchasing agency or a designee of either office shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision.

19-445.2115. Information Technology Procurements.
A. Authority and Purpose. [Reserved]
Every governmental body, whether using State appropriations or other funds, shall rent, purchase, or lease any information technology, or software, or contract for consulting or other services in the field of information technology only in accordance with these Regulations.
B. Organization. [Reserved]
Every governmental body shall develop in coordination with the designated board officer master plan for Information Technology procurements as defined in Section 11-35-310 of the Procurement Code. Subject to the approval of the master plan by the designated board office, acquisition of Information Technology by governmental bodies shall be through the Information Technology Management Office.
C. Software Licensing.
Pursuant to Section 11-35-510 and 11-35-1580 , the Information Technology Management Officer may execute an agreement with a business on behalf of, and which binds all, governmental bodies in order to establish the terms and conditions upon which computer software may be licensed, directly or indirectly, from that business by a governmental body. Such an agreement may provide for the voluntary participation of any other South Carolina public procurement unit. Such agreements do not excuse any governmental body from complying with any applicable requirements of the Procurement Code and these Regulations, including the requirements of Section 11-35-1510.
19-445.2120. Cost or Pricing Data.
A. Definitions
(1) Adequate Price Competition. Price competition exists if competitive sealed proposals are solicited, at least two responsive and responsible offerors independently compete for a contract, and price is a substantial factor in the evaluation. If the foregoing conditions are met, price competition shall be presumed to be “adequate” unless the procurement officer determines in writing that such competition is not adequate.
(2) Commercial product has the meaning stated in Section 11-35-1410(1).
(23) Established catalog price has the meaning stated in Section 11-35-1410.

(34) Established Market Price means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.
(45) Prices Set by Law or Regulation. The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the State and other customers.
B. Thresholds
(1) Section 11-35-1830(1)(a) applies where the total contract price exceeds five hundred thousand dollars.
(2) Section 11-35-1830(1)(b) applies where the pricing of any change order, contract modification, or termination settlement exceeds five hundred thousand dollars, unless the procurement officer determines in writing that such information is necessary to determine that the pricing is reasonable. Price adjustment amounts shall consider both increases and decreases (e.g., a \$150,000 modification resulting from a reduction of \$350,000 and an increase of \$200,000 is a pricing adjustment exceeding \$500,000.). This requirement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for administrative convenience in the same modification.
<u>(3) Cost and pricing data should not be required for the acquisition of any item that meets the definition of commercial product, including any modification that does not change the item from a commercial product to a non-commercial product, unless the purchase or modification exceeds the thresholds established in this section and the procurement officer determines in writing that no other basis exists to establish price reasonableness.</u>
C. through D. (No changes)
19-445.2125. Responsibility of Bidders and Offerors.
A. through C. (No changes)
D. Duty Concerning Responsibility.
(1) Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening.
<u>(2) Consistent with Section 11-35-1529(3), the procurement officer must determine responsibility of bidders in competitive on-line bidding before bidding begins.</u>
E. through G. (No changes)

19-445.2127. Organizational Conflicts of Interest.

A. General.

(1) “Organizational conflict of interest” occurs when, because of other activities or relationships with the State or with other businesses:

(a) a business is unable or potentially unable to render impartial assistance or advice to the State, or

(b) the business’ objectivity in performing the contract work is or might be otherwise impaired, or

(c) a business has an unfair competitive advantage.

(2) This regulation applies to acquisitions of supplies, services and information technology.

(3) The general rules in sections B (Providing systems engineering and technical direction), C (Preparing specifications or work statements), and D (Providing evaluation of offers) below prescribe limitations on contracting as the means of avoiding organizational conflicts of interest that might otherwise exist in the stated situations. Conflicts may arise in situations not expressly covered in sections B, C, and D. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are

(a) Preventing the existence of conflicting roles that might bias a contractor’s judgment; and

(b) Preventing unfair competitive advantage.

(4) The terms “contractor” and “subcontractor” are defined by Section 11-35-310.

B. Providing systems engineering and technical direction. A business shall not be awarded a contract to supply a system or any of its major components, or be a subcontractor or consultant, if that business, as a contractor, provided or provides a combination of substantially all of the following activities:

(1) determining specifications or developing work statements,

(2) determining parameters,

(3) identifying and resolving interface problems,

(4) developing test requirements,

(5) evaluating test data,

(6) supervising design,

(7) directing other contractors’ operations, and

(8) resolving technical controversies.

C. Preparing specifications or work statements.

(1) If a contractor prepares and furnishes complete specifications for a specific acquisition of tangible supplies or information resources, or their components, that contractor shall not be allowed to furnish these items, either as a prime contractor or as a subcontractor at any tier, for a reasonable period of time including, at least, the duration of the initial contract for purchase of the items.

(2) If a contractor prepares, or assists in preparing, a work statement to be used in a specific acquisition of a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services unless (a) the acquisition is a sole source under R. 19-445.2105; (b) it has participated in the development and design work; or (c) more than one contractor has been involved in preparing the work statement.

D. Providing evaluation of offers. A contractor shall not be awarded a subsequent contract or subcontract at any tier under a solicitation in which the contractor is required to evaluate the offers.

E. Procurement Officer Responsibilities.

(1) The responsible procurement officer, in consultation with the using agency, shall analyze planned acquisitions in order to (a) identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (b) avoid, neutralize, or mitigate significant potential conflicts before contract award.

(2) The responsible procurement officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the procurement officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond.

F. Waiver. The head of a purchasing agency may waive the general rules in sections B, C, and D by determining that its application in a particular situation would not be in the State's interest. Any request for waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head. The appropriate Chief Procurement Officer must concur in any waiver if the value of the acquisition exceeds the limits of the governmental body's authority under Section 11-35-1210(1).

G. The appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies to detect organizational conflicts of interest and techniques to avoid or mitigate them.

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

A. through F. (No changes)

G. Maximum Contract Periods

~~Prior to opening, a~~ Every contract with a total potential duration in excess of five years must be approved as required by Section 11-35-2030(4) or 11-35-2030(5). No solicitation shall be issued for a contract with a total potential duration in excess of five years, nor shall any contract with a total potential duration in excess of five years be awarded pursuant to Section 11-35-1560, until such approval is granted.

19-445.2141. Commercial Products.

A. Definitions.

(1) Commercial product has the meaning stated in Section 11-35-1410, and does not include printing or insurance.

(2) Commercially available off-the-shelf product (“COTS”) has the meaning stated in Section 11-35-1410, and does not include printing or insurance.

B. General.

(1) Agencies shall conduct market research to determine whether commercial products or COTS are available that could meet agency requirements, and should endeavor to acquire commercial products or COTS when they are available to meet agency needs (see R. 19-445.2140D (Preference for commercially available products)).

(2) Consistent with Section 11-35-1535(A)(2), the competitive negotiations source selection method may not be used to acquire only commercially available off-the-shelf products.

C. Price reasonableness.

(1) An advantage of COTS is that the existence of a competitive market helps to determine price reasonableness. There must be substantial sales of a COTS product to establish market prices. Market prices are current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated from sources independent of the offeror—for example, through market research.

(2) “Items customarily sold in bulk” means products that are loaded and carried in bulk without mark or count. COTS does not include bulk materials, like fuel and grain, because the prices for those items fluctuate, making it difficult or impossible to rely on short-term pricing to establish price reasonableness for purchase contracts that may be for a longer term.

D. Purchase description or specification.

The agency's purchase description must contain sufficient detail for potential offerors of commercial products or COTS to know which products may be suitable. Generally, an agency's specification for COTS should describe the type of product to be acquired and explain how the agency intends to use the product in terms of function to be performed, performance requirement or essential physical characteristics. Describing the agency's needs in these terms allows offerors to propose products that will best meet the State's needs.

E. Terms and Conditions.

The procurement officer should be aware of customary commercial terms and conditions when pricing COTS. COTS prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The procurement officer should review the using agency's standard contract terms and conditions, along with commercial terms appropriate for the acquisition of the particular item. The procurement officer should consider avoiding terms inconsistent with commercial practice, unless those terms are required by law (see R. 19-445.2143) or are essential to the using agency's requirements.

F. Simplified purchasing procedures for COTS.

(1) Section 11-35-1550(2)(b) authorizes the use of simplified procedures for the acquisition of supplies and information resources in amounts up to \$100,000, if the responsible procurement officer reasonably expects, based on the nature of the supplies or information resources sought, and on market research, that offers will include only COTS. The purpose of these simplified procedures is to vest procurement officers with additional procedural discretion and flexibility, so that COTS acquisitions in this dollar range may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the State and industry (see R. 19-445.2100).

(2) Section 11-35-2040 provides that COTS purchases made using any of the simplified procedures of Section 11-35-1550 are exempt from a number of statutory provisions that vendors have complained are overly burdensome. The procurement officer should consider Section 11-35-2040 and R. 19-445.2143 when preparing the solicitation or written request for quotes.

(3) Regulation 19-445.2120B(3) prohibits requiring cost or pricing data when acquiring a commercial product, including COTS, unless the purchase or modification exceeds the thresholds established in that section and the procurement officer determines in writing that no other basis exists to establish price reasonableness.

H. The appropriate Chief Procurement Officer may develop and issue guidance, including solicitation forms, which may be used by agencies acquiring COTS using small purchase procedures.

19-445.2143. Contract clauses and administration.

A. Contracts formed pursuant to the Consolidated Procurement Code are deemed to incorporate all applicable provisions thereof and the ensuing regulations.

B. Prohibited Terms. Unless otherwise specifically provided or authorized by law, if a contract contains any of the following terms, the term shall be void, and the contract is otherwise enforceable as if it did not contain such term or condition:

(1) Terms (a) subjecting the State of South Carolina or its agencies to the jurisdiction of the courts of other states; or (b) requiring the State of South Carolina or its agencies to bring or defend a legal claim in a venue outside this State. (Sections 11-35-2050 and -4230)

(2) Terms limiting the time in which the State of South Carolina or its agencies may bring a legal claim under the contract to a period shorter than that provided in South Carolina law. (Sections 11-35-4230(2) and 15-3-140)

(3) Terms imposing a payment obligation, including a rate of interest for late payments, inconsistent with the terms of Section 11-35-45.

(4) Terms that require the State to defend, indemnify, or hold harmless another person. (Section 11-35-2050)

(5) Terms requiring that the contract be governed or interpreted by other than South Carolina law. (Section 11-35-2050)

C. A material change is a change order or contract modification that is beyond the general scope of the original contract, such that the subject of the modification should be competitively procured absent a valid sole-source justification. Material changes are inconsistent with the underlying purposes and policies of this code. The appropriate Chief Procurement Officer may develop and issue guidance and procedures for evaluating whether a change order or modification is material.

19-445.2155. Intergovernmental Relations.

A. (No changes)

B. Intergovernmental Acquisitions.

(1) Terms used in this section shall have the meanings defined in Section 11-35-4610, unless the context clearly indicates otherwise.

(2) Consistent with Section 11-35-4900, all contracts between a governmental body and any other public procurement unit must have the prior written approval of the appropriate chief procurement officer or her designee, unless exempt.

<u>(3) An intergovernmental contract is exempt from the requirement in section B(2) if:</u>
<u>(a) the specific supply, service, or information technology is expressly authorized by the enabling legislation of the governmental body supplying the item, or</u>
<u>(b) the board has exempted the type of procurement from such approval, or</u>
<u>(c) the contract is expressly authorized by law, or</u>
<u>(d) the contract is awarded in accordance with one of the source selection methods described in Section 11-35-1510.</u>
<u>(4) Requests may be submitted on a form designated by the chief procurement officer for that purpose and must include at a minimum the following information:</u>
<u>(a) Terms of the proposed agreement, including (i) the name of the other public procurement unit it proposes to contract with, (ii) a description of the supplies, services, or information technology to be acquired, (iii) the value or price of the proposed contract, and (iv) the term of the proposed contract. If the value of the proposed contract exceeds \$25,000 a copy of the proposed agreement must be attached to the request.</u>
<u>(b) The cost savings the governmental body estimates from the contract and a description of the methodology used in calculating the estimate. The estimate should include a comparison, based on appropriate market research, of the proposed contract value to the cost of acquiring the supplies, services, or information technology by use of an acquisition process that includes competition from businesses (i.e., non-governmental entities).</u>
<u>(c) A summary of the acquisition planning performed and market research conducted.</u>
<u>(d) A certification that the contract price of the proposed agreement is fair and reasonable, and a description of how the cost reasonableness was determined.</u>
<u>(e) A certification that the proposed agreement is not a sole source contract.</u>
<u>(5) Requests must be signed by the head of a purchasing agency, or, for a contract with a total potential value no greater than \$100,000, her designee.</u>
<u>(6) Requests must be submitted to the appropriate chief procurement officer in sufficient time to permit an acquisition (including any required notices) pursuant to Article 5 of the Code in the event the request is not approved.</u>
<u>(7) The appropriate Chief Procurement Officer may develop and issue procedures and guidance respecting the request and approval of intergovernmental contracts, which shall be followed by all agencies.</u>