CHAPTER 6
PROCUREMENT OF DESIGN-BID-BUILD CONSTRUCTION CONTRACTOR COMPETITIVE SEALED BIDDING

(Procurements Greater than $100,000)

6.1 RELATED STATUTORY AUTHORITY

6.1.1 SC Code § 10-1-180 gives the State Engineer the authority and responsibility to determine the enforcement and interpretation of the building codes and reference standards on state buildings.

6.1.2 SC Code § 11-35-1520(13) list minor informalities and irregularities that are not cause for bid rejection.

6.1.3 SC Code § 11-35-1810 requires that the responsibility of the Bidder shall be determined for each contract let by the State.

6.1.4 SC Code § 11-35-3005 provides a list of project delivery methods agencies are allowed to use on construction projects.

6.1.5 SC Code § 11-35-3015(2) provides that if the Agency determines that design-bid-build is the most appropriate delivery method for the project, construction services must be procured through the competitive sealed bidding process as provided in SC Code §§ 11-35-1520 and 3020.

6.1.6 SC Code § 11-35-3020 requires that the Agency send all responsive Bidders a copy of the Bid Tabulation within 10 business days following the bid opening.

6.1.7 SC Code § 11-35-3020 permits negotiations after unsuccessful competitive sealed bidding within the limitations described by the law.

6.1.8 SC Code § 11-35-3020 requires that the lowest responsive Bidder meets the State standards of responsibility.

6.1.9 SC Code § 11-35-3020 requires that the Agency provide all responsive Bidders (and non-responsive Bidders) a copy of the Bid Tabulation at the same time they provide them a copy of the Notice of Intent to Award.

6.1.10 SC Code § 11-35-3023(B) permits prequalification of construction Bidders in a design-bid-build procurement in accordance with the approval and supervision of OSE.

6.1.11 SC Code § 11-35-3030 requires that all competitive sealed bidding for state construction contracts in excess of $100,000 be provided with bid security.

6.1.12 SC Code § 11-35-3030 and § 29-6-250 requires that all construction contracts valued in excess of $50,000 be provided with both a performance and a labor and material payment bond in the full amount of the contract.

6.1.13 SC Code § 11-35-4210 permits the State Engineer to resolve protested construction solicitations and awards.

6.1.14 SC Code § 40-11-260 requires general and mechanical contractors to be licensed for projects valued at $10,000 or more.

6.1.15 SC Code § 40-79-29 requires a valid license to engage in a burglar or fire alarm business or activity. Note that SC Code § 40-79-310 and § 40-11-410(5)(d) permits mechanical contractors with an electrical contractor's license to design, install, and service fire alarm systems.

6.1.16 SC Regulation 19-445.2042(C) states that a pre-bid conference may not be made mandatory unless by written determination of the Agency head or their designee.

6.1.17 SC Regulation 19-445.2050 permits only the information disclosed at the bid opening to be considered as public information under the Freedom of Information Act until the Notice of Intent to Award is issued.

6.1.18 SC Regulation 19-445.2145(B)(3) designates design-bid-build as an appropriate project delivery method for any infrastructure facility (except guaranteed energy, water, or wastewater savings contracts).

6.2 ADVERTISING PROJECTS FOR BIDDING

6.2.1 The competitive sealed bidding phase of a construction project begins with the advertisement of the project in South Carolina Business Opportunities (SCBO). It ends with the signing of the construction contract by both parties and the issuance of the Notice to Proceed.

6.2.2 The Agency must advertise all construction contracts with a construction budget exceeding $100,000 in SCBO (see Chapter 8 for small purchase advertisement requirements). The SCBO advertisement is the official invitation for construction bids and should be posted a minimum of 5 days prior to the pre-bid conference. The Agency may advertise in other media but errors in advertisements other than SCBO do not constitute a basis for a protest.

6.2.3 The Agency must submit advertisements for construction contracts that exceed the Agency's construction contract certification to OSE, using the Invitation for Design-Bid-Build Construction Services (SE-310) in MS Word format.

6.2.4 After a satisfactory review of the bid documents, OSE will approve the Invitation and submit it to SCBO for publication.

NOTE: If prime Contractors have been prequalified (Chapter 3), OSE will approve the SE-310 and return it to the Agency but will NOT submit it to SCBO as advertisement is not required.

6.3 PRE-BID CONFERENCES

6.3.1 Agencies must advertise pre-bid conferences in SCBO.

6.3.2 Agencies should schedule the conference to occur no less than 14 days prior to bid opening. This will allow the Agency to clarify by addendum any issues Bidders raise at the pre-bid conference. Additional days should be allowed for large or complicated projects.

6.3.3 Agencies desiring to mandate potential Bidders' attendance at a pre-bid conference as a prerequisite to bid the project must prepare a written determination, by the Agency Head or their Designee. The determination must explain why mandatory attendance is justified by the unique nature of the project, and that a mandatory conference will not unduly restrict competition. The Agency must place this determination in its procurement file and provide a copy "for information only" to OSE with the SE-310.

6.3.4 Who Should Attend: The Agency's Project Manager, the Agency's A/E, and the OSE Project Manager should attend all pre-bid conferences for projects exceeding the Agency's construction contract certification.

6.3.5 Conducting the Conference

A. The Agency's Project Manager or its A/E should conduct the pre-bid conference. The guide "Pre-Bid Conference Discussion Items" found in Appendix B contains a list of suggested pre-bid discussion items. The Agency and its A/E should customize the list of discussion items for the project.

B. The Agency Project Manager or its A/E should discuss the Bid Documents (project manual and drawings) at the pre-bid conference in sufficient detail to ensure that all prospective Bidders understand the scope of the project.

6.3.6 Attendance at a Mandatory Pre-Bid Conference

A. If no Bidder, or only one Bidder, attends a mandatory pre-bid conference, the Agency must cancel the Invitation or schedule a new pre-bid conference that is either mandatory or non-mandatory.

B. If the Agency chooses to schedule a new pre-bid conference, it must advertise the conference in SCBO. The Agency should schedule this new conference to occur no less than 14 days prior to bid opening.

C. This may require the Agency to advertise a new bid opening date and time in SCBO at the same time it advertises the new pre-bid conference.

6.4 ADDENDA

6.4.1 The Agency must issue an addendum for modifications, clarifications, or corrections to the bid documents including, but not limited to, the following:

A. Providing a list of all firms represented at a Mandatory Pre-Bid Conference.

B. Providing responses to questions received from Bidders during the bidding period (do NOT include the questions asked, only provide the information required to modify or clarify the Bid Documents).

C. Providing a list of all substitutions approved by the Agency or A/E.

D. Changing the location, date, and/or time for the bid opening; or

E. Canceling the invitation for bids.

NOTE: Best practice is to only include in an addendum information that modifies the contract documents in some way. By including meeting minutes and sign-in sheets, those documents become a part of the contract and potentially create an ambiguity within the contract. While not required to keep non-mandatory Pre-Bid Conference/Site Visit Attendee sign-in sheets, if the Agency does, they may provide them to potential bidders upon request apart from any addendum. Likewise, the Agency may also provide copies of plan holders lists upon request.

6.4.2 At a minimum, an Addendum shall include the following:

A. Agency's name, state project name, and the state project number,

B. The number of the Addendum and the date it is issued,

C. A statement indicating the bidder must acknowledge receipt of the Addendum in the box(es) provided on the Bid Form. Failure to acknowledge may be grounds for rejection of the bid,

D. A listing and/or explanation of all revisions, deletions, and/or insertions to the bid documents contained in the addendum, and

E. Other items as noted in Section 6.4.1.

6.4.3 The Agency must issue all addenda modifying or correcting the bid documents at least five (5) business days before the date of bid opening.

6.4.4 If the Agency becomes aware of a critical modification or correction to the bid documents less than five (5) business days before the day of bid opening, the Agency should postpone the bid opening to allow issuance of the change a minimum of five (5) business days before the revised bid opening time and date. The five (5) business day period gives potential Bidders the opportunity to digest and accurately price the addendum.

6.4.5 A Bidder may protest an addendum within fifteen (15) days of its issuance.

6.4.6 The Agency may issue an addendum postponing the date for receipt of bids or withdrawing the invitation for bids at any time prior to the time set for bid opening.

6.4.7 When the Agency does issue an addendum to reschedule a bid opening, the Agency should schedule the new bid opening date no less than five (5) business days from the issue date of the addendum.

6.4.8 If an Agency conducts a mandatory pre-bid conference, the Agency must send addenda to all Bidders attending the pre-bid conference. If the Agency does not conduct a mandatory pre-bid conference, the Agency should send addenda to all plan holders of record. If the Agency posts the bid documents online, any addenda issued should be posted in the same location the original bid documents were posted.

6.4.9 Projects exceeding Agency construction contract certification, the Agency or A/E should send any addenda to OSE for review prior to sending to Bidders.

6.5 BID POSTPONEMENT

6.5.1 The Agency may postpone a bid opening for any of the following reasons:

A. Emergency, unanticipated events and causes beyond the control of the Bidders (e.g., flood, fire, accident, weather conditions) that interrupt normal government operations.

B. Revision of specifications and/or drawings; or

C. When postponement is clearly in the best interest of the State.

6.5.2 The Agency may postpone bids by issuing an addendum any time prior to the time set for the bid opening. If there is not enough time to issue a written addendum prior to the time set for the bid opening, the Agency must notify Bidders by telephone or other appropriate means followed with a written addendum. If possible, the Agency should verify with Bidders their receipt of the notice of postponement.

6.5.3 When time permits, the Agency must advertise notification of the postponement of bids in SCBO.

6.5.4 The addendum should notify the Bidders of the postponement of the original bid date and establish a new bid date. The new bid date will be no earlier than the fifth (5^{th}) business day after the date of issuance of the addendum.

6.5.5 In the event of 6.5.1.A, the time specified for the receipt of Bids will be deemed to be extended to the same time of day specified in the solicitation on the first day on which normal government operations resume.

6.6 BID CANCELLATION

6.6.1 The Agency may cancel the invitation for bids by written addendum at any time prior to the time set for the bid opening.

6.6.2 The Agency may issue the addendum as late as the time set for opening of bids. The Agency should send the addendum to all plan holders of record as soon as the Agency determines that it will cancel the bid opening.

6.6.3 The Agency must advertise the notification of the cancellation of bids in SCBO.

6.7 BID OPENINGS

6.7.1 Receipt of Bids Prior to Bid Opening

A. The Agency must keep all bids (including modifications) it receives before the time of opening secure and unopened. However, the Agency's Procurement Officer or their designee may open unidentified bids solely for the purpose of identification.

B. If a person opens a sealed bid by mistake, they should immediately write their name and position along with their signature on the envelope and deliver it to the Agency's Procurement Officer. This official must reseal the envelope and write on it an explanation of the opening, the date and time opened, the project number and their signature.

6.7.2 Public Opening of Bids

A. TIME FOR CONDUCTING BID OPENING

1. The Agency must publicly open bids at the time set forth in the SE-310.

2. In the event of a force majeure preventing the Agency from receiving bids, the Agency may postpone the bid opening until the next business day on which normal government operations resume, at the time originally specified.

B. BIDS RECEIVED AFTER DEADLINE FOR RECEIPT

1. The Agency must receive bids at the address indicated in the SE-310 and published in SCBO before the time for bid opening. If the indicated address is served by a central mailroom, delivery of bids sent by mail or other special delivery service (UPS, FED-EX, etc.) to that mailroom is sufficient.

2. The Agency must reject bids not delivered at the indicated location or the Agency mailroom before the time of the bid opening.

3. The Agency should return any bid it rejects for being late to the Bidder unopened.

4. If, after the bid opening, the Agency discovers a bid delivered at the location for delivery or the mailroom before the time for bid opening, the Agency must open and consider the bid. In such event, the Agency must document the circumstances in writing and place it in its procurement file.

C. CONDUCTING THE BID OPENING

1. At the time set for the bid opening, as indicated on the SE-310 or as modified by addendum, the individual opening bids for the Agency should declare that the time for receipt of bids has arrived and that they will no longer accept bids.

2. After declaring the arrival of the time for the bid opening, the name of the individual opening bids and the name(s) of the witness should be announced publicly and recorded on the bid tabulation sheet.

3. All timely bids should be opened individually and read in the presence of one or more witnesses. When only one Bidder submits a timely bid, the bid should be opened and read aloud.

4. If the Agency receives multiple bids within the same envelope, it should accept only the lowest responsive bid.

5. The Agency shall prepare a Bid Tabulation consisting of the following:

a. Project name and number

b. Agency name

c. Name of the timely Bidder(s).

d. Bidder(s) compliance with Bid Security requirements.

e. Bidder(s) acknowledgment of all Addenda.

f. Bidder(s) base bid amount.

g. Alternate Bid amount(s), if requested.

h. Name of Subcontractor(s) for the Base Bid and Alternate(s), if requested; and

i. Signature of the person opening the bids and the witness.

6.7.3 Conclusion of Bid Opening

After reading bids, the Agency should thank the Bidders for submitting bids and make the following announcements:

A. The bids and other required documentation will be checked and verified prior to issuing an official Bid Tabulation to all Bidders within ten (10) working days of the Bid Opening.

B. The date and location of the posting of the Notice of Intent to Award (SE-370), as set forth in the AIA Document A701, Instruction to Bidders - SCOSE Version (A701).

C. The Agency will send a copy of the posted SE-370 to each Bidder.

6.7.4 No Bids Received

If the Agency does not receive any bids prior to the declaring that the time for receipt of bids has arrived, they shall close the procurement as follows:

A. Submit a Request for Concurrence in Posting Notice of Intent to Award (SE-360) to OSE with "No Bids Received" shown as the Intended Awardee.

B. After OSE approval of the SE-360 and acknowledgement of the SE-370, post the SE-370 with "No Bids Received" shown as the Name of Bidder, at the location set forth in the A701 and send a copy to OSE the same day it is posted.

6.8 BID WITHDRAWAL, MODIFICATION, OR CORRECTION

6.8.1 Withdrawal or Modification of Bids before Bid Opening

A. Prior to the time of bid opening, a Bidder may modify or withdraw their bid.

B. A Bidder's modification to their bid should be made on the bid form.

6.8.2 Withdrawal or Correction of Bids after Bid Opening

A. Except in limited circumstances, Bidders may not withdraw or modify their bids in the period after the time of the bid opening but before the time for bid acceptance.

B. The Agency should require a Bidder requesting permission to withdraw or correct their bid during this period to submit the request in writing. All decisions to permit correction or withdrawal of bids must be supported by a written determination of appropriateness made by the State Engineer or, if the project is within Agency certification, the Agency Head, or their designee.

C. CORRECTION:

1. Correction to bids after bid opening may cause Bidders and the public to question the integrity of state procurements and may be prejudicial to fair competition. Nonetheless, the Consolidated Procurement Code does permit approval of requests to correct a mistake in bid after bid opening in limited circumstance.

2. The following applies to a request to correct a bid after bid opening due to a mistake made:

a. Correction is allowable in the unlikely event that the lowest responsive and responsible Bidder requests a downward correction in bid price due to a mistake in bid. The rules that follow do not apply to such a request.

b. With the exception of a. above, a mistake in judgment is never correctable.

c. A mistake of fact (error in transcription, clerical error, etc.) is correctable under the following limited circumstances:

1) The mistake must be one that will clearly cause the Bidder substantial loss, and

2) The correction must not be prejudicial to the interest of the State or fair competition.

a) If the Bidder requesting correction is not the low Bidder and the correction will make the Bidder the low Bidder, the mistake and intended bid must be clearly evident from examining the bid document.

b) A bid that is nonresponsive on its face is never the low bid; therefore, the mistake and intended bid must be clearly and unambiguously evident from examining the bid document in order to allow a correction that will make the bid responsive.

c) If the Bidder is the low Bidder and is requesting an upward correction to his bid that if allowed will not change his position as low Bidder, then:

(1) The mistake and intended bid must be:

(a) clearly evident from examining the bid document; or

(b) apparent from an examination of clear and convincing evidence presented by the Bidder.

(2) The corrected bid must be significantly lower than the next lowest bid so as not to create the perception in the minds of reasonable people that the Bidder is attempting to game the system by seeking to recover the difference between his bid and the next lowest bid.

(3) The request must not be one to correct multiple mistakes.[1]

(4) The requestor must not have a history of requesting bid corrections.[2]

3. Any request to correct a bid due to mistake must be made before performance.

4. A low Bidder requesting an upward correction to his bid based on evidence other than the bid document must:

a. Provide the following documentation in support of his claim of mistake:

1) A complete copy of his bid takeoff marked confidential.

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[1] Multiple mistakes, each of which will cause substantial loss, may raise the public perception that the Bidder has intentionally built mistakes into his bid to use to his advantage after bid opening. Even if this is not in fact what the Bidder has done, multiple unrelated mistakes in a bid, each of which will cause substantial loss, is an indication of extreme carelessness on the part of the Bidder causing one to question the responsibility of the Bidder. Provided the Bidder meets the requirements for withdrawal of bid, permitting the Bidder to withdraw his bid due to mistake is the better approach in such cases.

[2] A history of requesting corrections indicates the Bidder, either negligently or intentionally, has a reckless disregard for the integrity of the State Procurement system and fair competition.

a) All portions of the bid takeoff prepared by hand or typewriter must be provided in the original format.

b) All copies of those portions of the bid takeoff prepared on a computer must be accompanied by:

(1) an audit record, acceptable to the party reviewing the request for correction, showing the time, date, and nature of every change, up to the time of bid opening, made to those portions of the bid takeoff on which the Bidder is relying to prove his claim of mistake and to prove his intended bid.

(2) a description of the bid preparation program used by the Bidder, including the name and edition of the software and information to provide the reviewer with an understanding of how the Bidder prepares his bids using the program.

2) If the mistake involves a mistake by the Bidder related to a Subcontractor's bid, the Subcontractor's bid as received by the Bidder along with evidence showing that the bid was received by the Bidder before bids were due to the Agency.

b. If required by the person reviewing the request, consent to an independent audit of any computer-generated document including an audit of the software used, the hard drive of the computer and/or server on which the bid was prepared, which audit is to be provided at Bidder's cost.

5. All statements by the Bidder and other individuals supporting the request for correction must be upon personal knowledge given under oath under penalty of perjury.

D. WITHDRAWAL

1. A Bidder's request to withdraw a bid due to mistake must document the fact that the Bidder's mistake is clearly an error that will cause him substantial loss.

2. Though there is no South Carolina case on point, the common law standard is that the mistake must be a clerical mistake as opposed to a judgment mistake, and actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the bid and original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

3. Historically, such documents were prepared by hand making their authenticity more reliable. Today, it is normal for bids to be prepared on a computer and the evidence of authenticity without digital forensics is not reliable. Therefore, the Bidder must certify by affidavit under penalty of perjury that the documents provided in support of its claim of mistake are either original work papers, documents, and materials or true and accurate copies of original computer data on which its bid was actually based.

4. If the Agency allows a Bidder to withdraw their bid because of the Bidder's mistake, the decision to do so must be supported by a written determination of appropriateness by the State Engineer or their designee or, if the project is within Agency certification, the Agency Head, or their designee.

5. If the Agency allows a Bidder to withdraw their bid because of the Bidder's mistake, the Agency must return the bid security to the Bidder. In the case of an electronic bid bond, the Agency does not need to take any action to return the security.

E. RETENTION OF BID SECURITY

1. If a Bidder withdraws their bid without the Agency's approval or refuses to enter into a contract, then the Agency must retain their bid security.

2. If the security is a bid bond, the Agency should make a claim on the bond in accordance with the bond's provisions.

6.9 IMMEDIATELY AFTER BID OPENING

After the bid opening, but before posting of the SE-370, the Agency needs to verify the following:

6.9.1 The bid security, in the form of AIA A310, is at least 5% of the base bid and accompanied by a signed power of attorney.

6.9.2 The surety company is licensed to operate in South Carolina and has a minimum financial rating in AM Best listing of A (any A is acceptable, including A---). See "Website Verification for Surety Companies" found in Appendix I.

NOTE: To check the authenticity of an electronic bid bond, go to the Surety2000 web site (www.surety2000.com) to register (as Owner/Obligee) and follow the links to match the electronic bid bond number provided on the bid bond. In this case, also check the listed surety company as described above.

6.9.3 The apparent low Bidder and all listed Subcontractors have the proper South Carolina contractor's licenses to execute a contract for the project.

6.9.4 The lowest responsive Bidder has met the other requirements specific to the project, as listed in the solicitation documents.

6.10 DETERMINATION OF BIDDERS' RESPONSIVENESS

6.10.1 Bid Irregularities that are Cause for Rejection

Reasons for which the Agency must reject bids as non-responsive include, but are not limited to, the following:

A. Bidder's failure to attend a mandatory pre-bid conference and/or a mandatory site visit.

B. Bidder's failure to deliver the bid on time.

C. Bidder's failure to provide the required bid security and/or properly executed power of attorney, except as allowed by law.

D. Bidder's failure to bid an alternate, except as allowed by law.

E. Bidder's failure to list Subcontractors as required by law.

F. Bidder's qualification of their bid by materially modifying the bid form or listing material exceptions to the requirements of the solicitation.

G. Bidder's delivery of their bid directly to the Agency or its representative via facsimile machine; or

H. Bidder's failure to include in the bid envelope all material items required by the bid documents.

6.10.2 Minor Informalities that are Not Cause for Rejection

A. The Agency should not reject bids for minor informalities (irregularities) in the bid.

B. In such cases, the Agency may ask the Bidder to correct the defect or where it is advantageous to the State, the Agency may waive the requirement.

C. The Agency's request to correct or the determination to waive must be in writing.

D. If the Agency asks the Bidder for a correction of a minor informality and Bidder fails to do so, the Agency may reject the bid as non-responsive.

E. Minor informalities in the bid include, but are not limited to, the following:

1. Bidder's failure to write "Sealed Bid Enclosed" on the outside of the mailing envelope.

2. Bidder's failure to seal the bid envelope.

3. Bidder's listing of a modification to the bid amount on the outside of the bid envelope provided such modification does not reveal the Bidder's bid price before the bid opening (however, such modifications may only be considered to the extent permitted by law).

4. Bidder's failure to list information on the envelope other than that which may be required by law.

5. Bidder providing a fax copy or other reproduction of any or all bidding documents in the bid envelope.

6. Bidder's failure to indicate for an alternate "ADD" or "DEDUCT", but only when the adjustment to the base bid is obvious.

7. Failure to include Unit Prices on the bid form when requested.

8. Bidder providing additional listings of "Subcontractor Specialty" beyond those listed on the bid form.

9. Bidder's failure to sign the bid, but only if:

a. the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber-stamped signature and submits evidence of that authorization, and the bid carries that signature; or

b. the unsigned bid is accompanied by other material indicating the Bidder's intention to be bound by the unsigned document, such as the submission of a bid guarantee with the bid or a letter signed by the Bidder with the bid referring to and identifying the bid itself.

10. Bidder providing a reproduction of a signature on any or all bidding documents.

11. Corporate Bidder's failure to include its seal on the bid.

12. Bidder's failure to sign the bid bond if the bond has been properly executed and signed by the bonding company or agent; and

13. Immaterial variations from the exact requirements of the bidding documents.

6.10.3 Failure to Provide Required Bid Security

A. Each bid in excess of $100,000 must include in the bid envelope either a certified cashier's check or a bid bond payable to the Agency (the Agency must be named as the obligee) in an amount not less than five percent of the Base Bid. Personal checks or letters of credit are not acceptable.

B. Copied or faxed bid bonds and Powers of Attorney are acceptable but must be included in the bid envelope.

C. The Agency must give a Bidder submitting a bid security that is not in the required amount or written by a surety not meeting the required surety rating and financial strength one business day from the bid opening to cure the deficiency.

D. A bid that does not include the bid security required by the SE-310 (or, if allowed, a Bidder that fails to provide the required bid security within one business day) is non-responsive and the Agency must reject it.

6.10.4 Failure to Acknowledge Addenda

The Agency must reject a bid where the Bidder failed to acknowledge all addenda unless:

A. The bid received indicates in some way that the Bidder received the addendum(a), such as where the addendum(a) added another item to the solicitation and the Bidder submitted a bid on it, if the Bidder states under oath that it received the addendum(a) before bidding and that the Bidder will stand by its bid price; or

B. The addendum(a) has no effect on price or quantity or merely a trivial or negligible effect on quality or delivery, and is not prejudicial to Bidders, such as an addendum(a) correcting a typographical mistake in the name of the governmental body.

6.11 DETERMINATION OF BIDDER'S RESPONSIBILITY

Before posting the SE-370, the Agency must satisfy itself that the apparent low Bidder meets the State's Standards of Responsibility.

6.11.1 Criteria for Determining Responsibility

Criteria the Agency should use in determining whether the Bidder meets the State's Standards of Responsibility include whether the Bidder has:

A. The appropriate financial, material, equipment, facility, and personnel resources and expertise (or the ability to obtain them) necessary to meet all contractual requirements.

B. A satisfactory record of performance.

C. A satisfactory record of integrity.

D. The necessary legal qualifications to contract with the State (includes being properly licensed).

E. Supplied all necessary information in connection with the inquiry concerning responsibility; and

F. No record of debarment from participation in construction projects in past 3 years from any state or Federal agency as recorded in the federal government's System for Award Management (SAM). This can be found at https://www.SAM.gov .

6.11.2 Verify Proper Contractor Licensing and License Limitations:

A. Before posting the SE-370, the Agency must verify that the Bidder and its listed Subcontractors have the proper contractor's license and license limitations, and they were in effect at the time of bidding.

B. If the Agency determines that a Bidder or one of its listed Subcontractors does not have the proper license and license limitations, the Agency must declare the Bidder is non-responsible. The Agency should notify the SC Contractors' Licensing Board that the Bidder or Subcontractor is offering to perform work without a proper license. The Agency may contact the Contractors' Licensing Board at: https://llr.sc.gov/clb/ .

6.11.3 Related Resources for use in Determining Responsibility

A. If an Agency is uncertain about a Bidder's responsibility, it should require the Bidder to complete the Questionnaire for Contractors (SE-350) and provide any other information the Agency may need to support its determination.

B. The Agency should complete the project and Agency information on the SE-350 and send it to the Bidder by certified mail with return receipt requested. The Agency may also send the form via email to expedite the process, but the hard copy must still be mailed.

C. Upon receipt of the SE-350 and other requested information from the Bidder, the Agency should verify the information contained therein together with any other information available to the Agency, to determine if the Bidder is deficient in one or more way.

D. If a Bidder is determined to be responsible, then the Agency may proceed with submitting the Request for Concurrence in Posting Notice of Intent to Award (SE-360) to OSE.

E. Right of Nondisclosure: Except as otherwise provided by SC law, the Agency must not disclose Bidder furnished confidential information outside of the offices of SFAA, the Office of the Attorney General, OSE, or the Agency without prior written consent by the Bidder.

6.11.4 Action upon Determination of Non-Responsibility

A. WRITTEN DETERMINATION

1. If the Agency determines a Bidder to whom it would have otherwise awarded a contract, to be non-responsible, it should prepare a written determination to that effect. The written determination must:

a. Be prepared by the Agency's Procurement Officer.

b. Set forth the basis of the finding of non-responsibility; and

c. Be made part of the Agency's procurement file.

2. The Agency should promptly send a copy of its determination to the non-responsible Bidder and to OSE.

B. AWARD TO NEXT LOWEST BIDDER

The Agency may proceed with awarding the contract to the next lowest responsive and responsible Bidder by submitting to OSE the SE-360 for that Bidder.

6.12 TIE BIDS

If two or more Bidders are tied in price, while otherwise meeting all the required conditions, the Agency must award the project per the procedures set forth in Section 11-35-1520(9).

6.13 EXTENDING BID EXPIRATION PERIOD

6.13.1 If the Agency desires to extend the bid expiration period beyond the time given in the Bid Form, then it should obtain a written extension of bid prices(s) and bid bonds from the lowest three (3) Bidders before the expiration of that period.

6.13.2 A Bidder does not have to agree to hold its bid price beyond the bid expiration period; however, the Agency should consider for award only the bids of those Bidders who provide a written extension of their bids and bid bonds before the expiration of the original bid expiration period.

6.13.3 If the Agency fails to obtain a written extension of at least one bid and bid bond before the end of the expiration period, it will have to re-bid the project before it can award a contract.

6.14 REJECTION OF ALL BIDS

6.14.1 Unless there is a compelling reason to reject one or more bids, the Agency must award to the lowest responsible and responsive Bidder.

6.14.2 The Agency may cancel the invitations for bids after opening, but prior to award, if the procurement officer determines in writing that:

A. Inadequate or ambiguous specifications were cited in the invitation.

B. Specifications have been revised.

C. The supplies or services being procured are no longer required.

D. The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to Bidders' plants.

E. Bids received indicate that a less expensive article differing from that on which the bids were invited can satisfy the needs of the State.

F. All otherwise acceptable bids received are at unreasonable prices.

G. The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or

H. For other reasons, cancellation is clearly in the best interest of the State.

6.14.3 The Agency must close the procurement as follows:

A. Submit an SE-360 to OSE with "No Contract to be Awarded" shown as the Intended Awardee and indicate the reason under "Remarks". Attach the Bid Tabulation and the Agency Determination to the SE-360.

B. After OSE approval of the SE-360, post the SE-370, with "No Contract to be Awarded" shown as the Name of Bidder and indicate the reason under "Remarks".

6.14.4 The Agency shall post the SE-370 at the location given at the bid opening, send a copy to all Bidders along with their bid security, and send a copy of the SE-370 to OSE.

6.15 RE-BIDDING PROJECTS

6.15.1 If the Agency rejects all bids, it may re-bid the project provided it significantly modifies the scope of the construction documents or delays re-bidding by up to or beyond three months, depending on what's in the best interest of the State. The Agency must advertise the project for re-bid just as it did for bid.

6.15.2 When re-bidding a project, the Agency must add the word "RE-BID" before the Project Name on the SE 310. If scope changes are made, the Agency must modify the project description in the SE-310.

6.15.3 For contracts exceeding Agency construction contract certification, the Agency must submit the new SE-310 to OSE in MS Word format for approval and advertisement in SCBO.

6.16 PERMITTED NEGOTIATIONS AFTER UNSUCCESSFUL BIDDING

6.16.1 If bids exceed available funds, the Agency may negotiate with the lowest responsive and responsible Bidder when it determines in writing that:

A. Circumstances will not permit the delay required to re-solicit competitive sealed bids; and

B. The low Bidder's base bid, less any deductive alternates, does not exceed available funds by more than ten percent of the construction budget established for that portion of the work.

1. The "available funds" are considered to be the Total Approved Project Funding (Line 1 of Budget on page 2 of the SE-310) less any amount encumbered by the Agency (i.e., A/E fees, inspections, equipment, etc.).

2. The "construction budget" is given in Line 2 of Budget on page 2 of the SE-310.

3. The calculation then becomes:

Step 1: Calculate 10% of "construction budget".

Step 2: Determine the "available funds" and add it to the Step 1 value.

Step 3: If the "low Bidder's base bid, less any deductive alternates" is less than the total in Step 2, negotiation is allowed.

6.16.2 The Agency shall place a copy of its written determination in the procurement file and forward a copy to OSE prior to beginning negotiations.

6.16.3 In negotiations, the Agency may change the scope of the work to reduce the cost to be within the established construction budget. However, the Agency may not reduce the cost below the established construction budget by more than ten (10) percent, without a written request by the Agency and the written approval of the State Engineer. The Agency's request must be in the best interest of the State.

6.16.4 The Agency may not accept or use substitution of listed Subcontractors as a means to negotiate a reduction in the contract amount.

6.16.5 Upon completion of successful negotiations with the Contractor, the Agency must submit the SE-360 to OSE along with a description of the changes made to the scope of the project.

6.17 INSUFFICIENT FUNDS AUTHORIZED BY FORM A-1

The Agency may not award a construction contract for a PIP project unless the most recently approved Form A-1 authorizes unencumbered funds sufficient to cover the full amount of the contract plus construction contingencies.

6.18 NOTICE OF INTENT TO AWARD

6.18.1 Requirement of Posting

A. Once the Agency determines that the lowest responsive and responsible bid is within available funds and has concurrence of OSE, it must post the SE-370. The Agency shall post this notice at the location stated in the AIA A701-SCOSE and announced at the bid opening.

B. Even if the Agency received only one bid, it must post the SE-370.

C. On the day of posting, the Agency must send a copy of the SE-370 with the bid tabulation to all Bidders.

D. If a change to the posting date of the SE-370 is necessary, a notice of the revised posting date must be given by posting the notice at the location identified in the solicitation and sent electronically to all Bidders.

6.18.2 OSE Concurrence with Posting

A. If the proposed contract value exceeds the Agency's construction contract certification, OSE must concur in the posting of the SE-370.

B. For such contracts, the Agency must provide the bid and responsibility determination documents supporting award of a contract to the proposed awardee. The Agency must request OSE's concurrence using the SE-360.

C. OSE will have five (5) business days from the date of receipt of the SE-360 and all required documentation to notify the Agency of any defect in their documentation or, based on that documentation, any apparent defect in their bid opening procedures or determination of responsiveness and responsibility.

D. If the Agency does not receive a response from OSE within five (5) business days from the date OSE receives the SE-360 and all required documentation, OSE will be deemed to have granted approval for the Agency to post the SE-370.

E. To submit by email, the Agency must provide PDF copies of the SE-360 and all required documentation to the OSE Project Manager and the OSE Administrative Assistant.

F. If negotiations were permitted with the lowest responsive and responsible Bidder, the Agency shall list the negotiated amount on the SE-370 and provide an explanation of the negotiations that resulted in a change in the Bid amount announced at the Bid Opening in the Remarks portion of the SE-370.

6.19 CONTRACT EXECUTION WAITING PERIOD

6.19.1 Unless the Agency received only one bid, it must wait seven (7) business days after posting the SE-370 before it may enter into a contract with the lowest responsive and responsible Bidder. If only one bid is received, and that bid is determined to be responsive and responsible, the protest period is waived.

6.19.2 During this time, an actual Bidder who is aggrieved in connection with the Agency's intended award may protest.

6.19.3 If the State Engineer receives such a protest in writing during this period, the Agency may not award a contract until the matter is resolved unless the Agency requests a lifting of the stay in accordance with the provisions of the Procurement Code and the State Engineer grants the request.

6.19.4 If the State Engineer does not receive any protests, the Agency may enter into the contract on the eighth (8^{th}) day after posting the SE-370.

6.20 SUBMITTING THE CONTRACT TO CONTRACTOR FOR EXECUTION

6.20.1 Once all conditions precedent to executing a contract have occurred, the Agency should submit a completed contract to the Contractor with a cover letter requiring the Contractor to execute the contract and return it to the Agency within seven (7) days.

6.20.2 The Contractor shall also be required to provide the Agency with the following documents within three (3) days after submitting the signed contract:

A. Certificate(s) of insurance in the form of the latest edition of the ACORD 25S showing that the Contractor has insurance in place for the project that meets the requirements of Exhibit A of the AIA Document A101, SCOSE Version.

B. The Performance Bond (SE-355) with executed Power of Attorney; and

C. The Labor & Material Payment Bond (SE-357) with executed Power of Attorney.

6.21 REVIEWING CERTIFICATE OF INSURANCE AND PERFORMANCE AND PAYMENT BONDS

6.21.1 After receiving the certificates of insurance and performance and payment bonds from the Contractor, the Agency should review them to determine that they are authentic and meet the requirements of the SC Consolidated Procurement Code, Regulations, and the contract.

6.21.2 The Agency is responsible to assure that it has the required performance and payment bond in place before signing the contract and permitting the Contractor to start work. Failure to do so could make the Agency liable for the Contractor's failure to pay its Subcontractors and suppliers.

6.21.3 After confirming that all bonds and insurance are valid and in place, the Agency shall sign the contract and send one copy back to the Contractor and one copy to OSE for their files.

6.22 RETURN OF BID SECURITY AND DISPOSITION OF BIDS

6.22.1 Except for the three (3) lowest responsive and responsible Bidders, the Agency should return the bid securities of all other Bidders within ten (10) days after the date of the bid opening. Upon execution of a contract, the Agency shall return the bid securities of the three lowest Bidders.

6.22.2 The Agency must retain all bids until it has a fully executed contract. The Agency must retain the bid of the successful Bidder in its procurement file.