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Document No. 4861
STATE FISCAL ACCOUNTABILITY AUTHORITY
CHAPTER 19
Statutory Authority: 1976 Code Sections 11-35-10 et seq.

19-445. Consolidated Procurement Code.

Preamble:

The Consolidated Procurement Code authorizes the State Fiscal Accountability Authority to promulgate regulations governing the procurement, management, and control of any and all supplies, services, information technology, and construction to be procured by the State and any other regulations relating to implementation of Title 11, Chapter 35 (Sections 11-35-60 & -540(1)). The proposed regulation will address various matters regarding Regulation 19-445 and procurement in general.

Notice of Drafting for the proposed amendments was published in the *State Register* on September 28, 2018.

Section-by-Section Discussion

Section 2000. State Procurement Regulations.

Technical changes are made to reflect the Code Commissioner’s reference to the authority’s five-member board. No substantive change intended.

Two definitions—“certification” and “responsible procurement officer”—have been added for clarity.

Section 2015. Unauthorized or Illegal Procurements.

According to the South Carolina Supreme Court, contracts entered into in violation of public procurement laws are void. While this rule may be fundamentally necessary, the results can be unduly harsh – depending on the facts. A regulation allowing the ratification of improperly awarded contracts allows the government to avoid some of these harsh results. Unfortunately, it also opens a Pandora’s box – it permits officials to use ratification to achieve otherwise prohibited results. In order to work, such a regulation must be clear with regard to when a contract remains void, when a contract can be ratified, and if ratified, when performance can continue. To illustrate, some contracts – say, shortly after award – should simply be declared void. Some should be ratified, then terminated; this approach avoids the challenges of voiding a contract by maintaining existing rights, such as warranties for equipment in use, but honors the procurement policies by stopping the contract at that time. In some instances, the overall urgency and necessity of the state require that it continue with the contract notwithstanding its award in violation of law. For each set of facts, the regulation must properly address the parties’ rights and responsibilities after improper conduct is discovered.

The current regulation was last modified in 2007, when an attempt was made to address similar concerns. Lessons learned since then demonstrate that the regulation overly favors ratification, has not achieved results consistent with the purposes and policies of the Code, and lacks clarity. For these reasons, the regulation has been rewritten to provide clearer instructions on what options are available when an unauthorized or otherwise illegal contract is identified.

Section 2017. Pre-Solicitation Procedures.

This regulation is completely new. It furnishes valuable tools for procurement professionals that should increase the efficiency and economy of the procurement process. It will result in both faster and better acquisitions from the State’s perspective, and closer cooperation with the private sector to better align the State’s needs with commercially available products and services. The regulation includes three substantive

parts: Acquisition Planning, Market Research, and Exchanges with Industry. R.19-445.2017B requires acquisition planning, a vital step in the procurement process that is all too often overlooked. This proposed regulation does not apply to acquisitions of construction. R.19-445.2017C requires market research, another step in the acquisition cycle that helps agencies ensure they adopt strategies appropriate to the market for the specific supplies or services they are purchasing. R.19-445.2017D addresses interaction between purchasing agencies and the private sector. There is a widespread misconception among State personnel that there should be little or no contact with private sector representatives about anticipated acquisitions. The new section is intended to dispel that myth and to encourage closer communication between the State and its prospective offerors, so that agency needs and expectations can be better aligned with market realities. Additional safeguards are included to avoid inappropriate communications or disclosure of information that might favor one offeror over another. *See* R.19-445.2017D(6).

Section 2020. Certification.

Technical changes only. No substantive change intended.

Section 2027. Electronic Commerce.

Electronic commerce has been recognized in South Carolina since at least 2004 by the Uniform Electronic Transactions Act, 2004 S.C. Act No. 279, § 1, codified at S.C. Code Ann. §§ 26-6-10, *et seq.* (“UETA”). By its terms UETA applies to government agencies. The current procurement regulations pre-date electronic commerce. This new regulation explicitly authorizes widespread existing practices among governmental bodies currently using e-commerce solutions, including for issuing solicitations, amendments and other notices; receiving offers and related documents in response to solicitations; and providing required notices, including awards or intents to award, for contracts governed by the Consolidated Procurement Code.

R.19-445.2027B(3) stipulates that the procurement modules in SCEIS meet the new requirements.

If electronic commerce is used, R.19-445.2027C(1) requires the solicitation to specify the methods to be used. The last sentence makes clear that only the method(s) specified in the solicitation is acceptable. For example, an invitation to submit bids through SCEIS does not permit an offeror to e-mail her bid to the procurement officer. If an offer is submitted by a method other than that specified in the solicitation, it will be rejected as non-responsive.

Section 2030. Competitive Sealed Bidding—The Invitation for Bids.

These changes are technical and merely restate existing law. The text proposed to be added to current paragraph (5) is taken verbatim from Section 11-35-1520(3).

Section 2040. The Official State Government Publication.

No print edition of SCBO has been published in nearly ten years. The proposed amendment reflects that SCBO currently exists only in electronic form. Distribution to public libraries and others is by posting on the SCBO website, at <https://scbo.sc.gov/>(.) Since subsection (B), dealing with “copies” furnished to public libraries, is proposed to be deleted, the heading for R.19-445.2040A is no longer required.

Section 2045. Receipt, Safeguarding, and Disposition of Bids.

Subsection C is added to reflect current practice, as articulated in 2002 ABA Model Procurement Regulation R3-301.05; and to provide for disposition of electronic offers.

Section 2060. Telegraphic Bids.

This regulation has been repealed. Proposed new R.19-445.2027, Electronic Commerce, *ante*, renders it unnecessary.

Section 2065. Rejection of Bids.

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

Section 2070. Rejection of Individual Bids.

Technical change only.

Section 2085. Correction or Withdrawal of Bids; Cancellation of Awards.

A federal court in South Carolina has held that our state would follow the majority rule, that a bidder on a public project can withdraw its bid, even after opening and regardless of contract provisions to the contrary, if the bid is affected by a substantial error; the bidder notifies the owner before the owner has changed its position; and where enforcing the bid would work a great wrong. *National Fire Ins. Co. of Hartford v. Brown & Martin Co.*, 726 F.Supp. 1036 (D.S.C. 1989). More recently, the South Carolina Supreme Court allowed modification of a bid based on mistake, where enforcing the contract would cause the bidder to suffer a “substantial loss.” *Martin Engineering, Inc. v. Lexington County Sch. Dist. One*, 365 S.C. 1, 615 S.E.2d 110 (2005). Central to both decisions is a reluctance to allow the government to profit from a bidder’s honest and obvious mistake. New proposed R.19-445.2085A(2) authorizes the procurement officer to request confirmation of a bid that appears obviously in error. If the bidder verifies that an error has occurred, it can request correction or withdrawal in accordance with law. This proposed regulation permits early recognition of obvious mistakes and may avoid protests or other legal proceedings that would otherwise delay awarding a contract. It does not relax or change the existing and exacting requirements for correction or withdrawal of offers.

Section 2095. Competitive Sealed Proposals.

All changes are primarily technical, and affect procurement staff, not prospective offerors.

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

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

The current version of R.19-445.2095G requires OSE to oversee the evaluation process and any discussions with offerors for any procurement of construction that is not low bid. It also allows the State Engineer to excuse that oversight. The amendment prohibits the State Engineer from excusing oversight if the project exceeds two million dollars. It continues to require close involvement by OSE staff in acquisitions over \$2 million, to avoid over-use or misuse of the RFP source selection method for construction projects. The revised regulation will not require a change in OSE’s administration of these acquisitions, as staff currently remains involved in RFP selection even for projects under the new threshold.

Current R.19-445.2095J, with no substantive change, is proposed to be re-codified as standalone R.19-445.2098. See proposed new regulation and commentary, *post*.

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

New R.19-445.2095K is proposed to provide for the development of a negotiation plan prior to beginning negotiations with the highest ranked offeror for RFPs.

Section 2097. Rejection of Proposals.

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

Section 2098. Rejection of Individual Proposals.

With one minor change, new R.19-445-2098A through C re-codifies current R.19-445.2095(J) as a standalone regulation. This move aligns the structure of regulations governing RFPs with those governing sealed bids. Technical changes to subsections (A), (B), and (C) are made to comply with State Register formatting guidelines.

Proposed R.19-445.2098D makes clear that late proposals will not be accepted, and adopts the “mailroom” exception applicable to bids from R.19-445.2070(G).

Section 2122. Price Reasonableness.

This is an entirely new regulation. Its intent is to specifically authorize procurement staff to employ analytical tools to detect unreasonable pricing, especially unbalanced bidding. The proposed analytical tools are described in broad terms and leave to the chief procurement officers the task of formulating policy, guidance and training materials for use by governmental bodies.

Introductory R.19-445.2122A makes clear that adequate competition will ordinarily suffice to establish price reasonableness. When competition is absent, it also authorizes use of analytical techniques to evaluate cost or pricing data, which such data is required by existing statutory provisions.

The definitions of price analysis and cost analysis, in R.19-445.2122B, are taken from 1980 ABA Model Procurement Rules R3-403.07 to -.09.

Unbalanced pricing exists when individual line item prices are manipulated so they reflect neither their intrinsic value nor their proportion to the prices for other line items. The agency suspects that unbalanced pricing costs the State thousands of dollars each year. Rather than apply a strict mathematical formula, it relies on the procurement officer's judgment of contractual risk to determine if unbalanced pricing is unreasonable.

Section 2127. Organizational Conflicts of Interest.

This is a placeholder only.

Section 2140. Specifications.

Consistent with the Model Procurement Regulations, the Procurement Review Panel has long required that Brand-name-or-equal specifications must identify the salient characteristics of the brand name exemplar that meets the State's requirements. Proposed R.19-445.2140C(2)(a) incorporates this requirement into regulation. R.19-445.2140C(2)(b) also requires the solicitation to include language that the "or equal" specification is not intended to be restrictive. Both sections are based on 1980 ABA Model Procurement Regulations, R4-202.02.2(b).

Section 2152. Leases, Lease/Payment, Installment Purchase, and Rental of Personal Property.

Technical change only. No substantive change intended.

Section 2180. Assignment, Novation, and Change of Name.

Proposed new R.19-445.2180A provides a definition that has been missing from the regulation. This does not change established policy and practice of the Division of Procurement Services.

Section 3000. School District Procurement Codes; Model.

Technical change only. No substantive change intended.

Notice of Public Hearing and Opportunity for Public Comment:

Should a hearing be requested pursuant to Section 1-23-110(A)(3) of the S.C. Code, as amended, such hearing will be held on January 2, 2018, at 10:00 AM in Room 252 of the Edgar A. Brown Building, State House Grounds, Columbia, South Carolina. Persons desiring to make oral comment at the hearing are asked to provide written copies of their presentation for the record. If a qualifying request pursuant to Section 1-23-110(A)(3) is not timely received, the hearing will be canceled.

Written comments, requests for the text of the proposed amendments or any other information, and any requests for a public hearing, should be submitted to Office of General Counsel, Attn: Keith McCook, 1201 Main Street, Suite 420, Columbia, S.C. 29201 or to regulations@mmo.state.sc.us., on or before 5:00 PM

on December 27, 2018. Copies of the text of the proposed amendments for public notice and comment are available at <https://procurement.sc.gov/review-period-draft>.

Preliminary Fiscal Impact Statement:

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

Statement of Need and Reasonableness:

DESCRIPTION OF REGULATION: Consolidated Procurement Code.

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

Legal Authority: Title 11, Chapter 35 of the South Carolina Code of Laws.

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

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

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

DETERMINATION OF COSTS AND BENEFITS:

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

UNCERTAINTIES OF ESTIMATES:

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

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

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

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

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

Statement of Rationale:

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

~~Indicates Matter Stricken~~

Indicates New Matter

Text:

19-445. Consolidated Procurement Code.

(Statutory Authority: 1976 Code Section 11-35-10 et seq.)

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19-445.2000. State Procurement Regulations.

A. General.

These Regulations issued by the South Carolina ~~Budget and Control Board~~ State Fiscal Accountability Authority, hereafter referred to as the ~~Board~~ board, establish policies, procedures, and guidelines relating to the procurement, management, control, and disposal of supplies, services, information technology, and construction, as applicable, under the authority of the South Carolina Consolidated Procurement Code, as amended. These Regulations are designed to achieve maximum practicable uniformity in purchasing throughout state government. Hence, implementation of the Procurement Code by and within governmental bodies, as defined in Section 11-35-310(18) of the Procurement Code, shall be consistent with these Regulations. Nothing contained in these Rules and Regulations shall be construed to waive any rights, remedies or defenses the State might have under any laws of the State of South Carolina.

B. Organizational Authority.

(1) The Chief Procurement Officers acting on behalf of the ~~Board~~ board shall have the responsibility to audit and monitor the implementation of these Regulations and requirements of the South Carolina Consolidated Procurement Code. In accordance with Section 11-35-510 of the Code, all rights, powers, duties and authority relating to the procurement of supplies, services, and information technology and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services now vested in or exercised by any governmental body under the provisions of law relating thereto, and regardless of source funding, are hereby vested in the appropriate chief procurement officers. The chief procurement officers shall be responsible for developing such organizational structure as necessary to implement the provisions of the Procurement Code and these Regulations.

(2) Materials Management Office: The Materials Management Officer is specifically responsible for:

(a) developing a system of training and certification for procurement officers of governmental bodies in accordance with Section 11-35-1030;

(b) recommending differential dollar limits for direct procurements on the basis of but not limited to the following:

- (1) procurement expertise,
- (2) commodity,
- (3) service,
- (4) dollar;

(c) performing procurement audits of governmental bodies in accordance with Sections 11-35-70 and 11-35-1230 of the Procurement Code.

(d) overseeing acquisitions for the State by the State Procurement Office.

(e) coordinating with the Information Technology Management Office in accordance with Section 11-35-820;

(f) overseeing the acquisition of procurements by the State Engineer in accordance with Section 11-35-830.

(3) Office of Information Technology Management: The Office of Information Technology Management shall be responsible for all procurements involving information technology pursuant to Section 11-35-820 of the Procurement Code.

(4) Office of State Engineer: The Office of State Engineer under the direction and oversight of the Materials Management Officer shall be responsible for all procurements involving construction, architectural and engineering, construction management, and land surveying services pursuant to Section 11-35-830 of the Procurement Code.

C. Definitions

(1) "Head of purchasing agency" means the agency head, that is, the individual charged with ultimate responsibility for the administration and operations of the governmental body. Whenever the South Carolina Consolidated Procurement Code or these Regulations authorize either the chief procurement officer or the head of the purchasing agency to act, the head of the purchasing agency is authorized to act only within the limits of the governmental body's authority under Section 11-35-1550(1) or its certification as granted by Board under Section 11-35-1210(1), except with regard to acts taken pursuant to Section 11-35-1560 and 11-35-1570.

(2) "Procuring Agency" means "purchasing agency" as defined in Section 11-35-310.

(3) "Certification" means the authority delegated by the board to a governmental body to make direct procurements not under term contracts. Certification is granted pursuant to Section 11-35-1210 and R.19-445.2020. Subject to Section 11-35-1240(B), Section 11-35-1550 also authorizes governmental bodies to make direct procurements.

(4) "Responsible procurement officer" means the employee, either of the purchasing agency or the chief procurement officers, as applicable, assigned to serve as the procurement officer, as defined in Section 11-35-310, responsible for administering the procurement process. Typically, the responsible procurement officer will be identified by name in the solicitation, as amended, and any subsequent contracts, as amended.

D. Duty to Report Violations

All governmental bodies shall comply in good faith with all applicable requirements of the consolidated procurement code and these procurement regulations. When any information or allegations concerning improper or illegal conduct regarding a procurement governed by the consolidated procurement code comes to the attention of any employee of the State, immediate notice of the relevant facts shall be transmitted to the appropriate chief procurement officer.

E. Effective Date.

Except as otherwise provided herein, these regulations are effective upon publication in the State Register. The following additions or revisions to this regulation 19-445 apply only to solicitations issued after the first Monday in September following the legislative session during which they are approved: Sections 2010, -.2015, -.2050, -.2095, -.2097, -.2105, -.2120, -.2180.

19-445.2015. Ratification Unauthorized or Illegal Procurements.

A. Decision to Ratify or Declare Void

~~(1) Upon finding discovering after award either (a) that a State employee person lacking actual authority has made an unauthorized award or modification of a contract or (b) that a contract award or modification is otherwise in violation of law the Consolidated Procurement Code or these regulations, the appropriate official, as defined in section G below, may must decide to either ratify or affirm the contract in accordance with this regulation or terminate it in accordance with this section acknowledge and declare the contract null and void. The If ratified, the contract may be continued or terminated and reasonable termination costs, if any, may be awarded as provided in this section. The contract may be ratified and affirmed only if it ratification is in the best interests interest of the State. The decision required by this subsection A may be made by the chief procurement officer, the head of a purchasing agency, or a designee of either officer, above the level of the person responsible for the person committing the act. If the value of the contract exceeds one hundred thousand dollars, the chief procurement officer must concur in the written determination before any action is taken on the decision.~~

~~(2) The factors pertinent in determining the State's interest include, but are not limited to: (a) the seriousness of the procurement deficiency; (b) the degree of prejudice to the integrity of the competitive procurement system; (c) the good faith of the public officials and contractors involved; (d) the extent of performance; (e) the costs to the State in either terminating the contract or declaring it null and void, if any; (f) the urgency of the acquisition; and (g) the impact on the using agency's mission.~~

~~B. Decision to Continue or Terminate Contract. All decisions to ratify or terminate a contract shall be supported by a written determination of appropriateness. In addition, the appropriate official shall prepare a written determination as to the facts and circumstances surrounding the act, what corrective action is being taken to prevent recurrence, and the action taken against the individual committing the act. Any governmental body shall submit quarterly a record listing all decisions required by subsection A to the chief procurement officers. A copy of the record shall be submitted to the board on an annual basis and shall be available for public inspection. If a contract is ratified, the appropriate official must decide to either (1) continue the contract, or (2) terminate the contract and proceed as provided in section C below. A contract award or modification that is in violation of the Consolidated Procurement Code or these regulations may be continued only if the appropriate official determines an urgent and compelling need exists that cannot otherwise be met without undue burden on the State. If no such urgent and compelling need exists, the ratified contract must be terminated and the State shall proceed as provided in section C below. A contract that was ratified solely because a person lacking actual authority made an unauthorized award or modification, as described in item A(1)(a) above, does not require an urgent and compelling need to support its continuation.~~

~~C. Settlement of Terminated Contracts. Except as provided in subsection D, if If a contract is terminated pursuant to subsection A as allowed by this regulation, the State shall, where possible as appropriate and by agreement with the supplier, return the any supplies delivered for a refund at no cost to the State or at a minimal restocking charge. If a contract is terminated and a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance were completed. Anticipated profits are not allowed.~~

~~D. Settlement of Void Contracts. Upon finding after award that an award is in violation of law and that the recipient of the contract acted fraudulently or in bad faith, the appropriate chief procurement officer shall declare the contract null and void unless it is determined in writing that there is a continuing need for the supplies, services, information technology, or construction under the contract and either (i) there is no time to re-award the contract under emergency procedures or otherwise; or (ii) the contract is being performed~~

~~for less than it could be otherwise performed. If a contract is voided, the State shall endeavor to return those supplies delivered under the contract that have not been used or distributed. No~~ If a contract is acknowledged as null and void pursuant to section A above, the State shall endeavor to return those supplies delivered under the contract that have not been used or distributed, and no further payments shall be made under the contract, and In addition, the State is entitled to recover the greater of (i1) the difference between payments made under the contract and the contractor's actual costs up until the contract was voided declared null and void, or (ii2) the difference between payments under the contract and the value to the State of the supplies, services, information technology, or construction it obtained under the contract. The State may in addition claim damages under any applicable legal theory.

E. Bad Faith. Notwithstanding section D above, the State is entitled to recover all amounts paid if the appropriate official determines that the recipient of the contract acted in bad faith. Bad faith shall not be assumed. Without limitation, specific findings showing deception, dishonesty, reckless disregard of clearly applicable laws or regulations, or deliberate breach of contract scope limits, support a finding of bad faith.

EF. State's Remedies Not Limited. Regardless of its ratification and affirmation of a contract, the State shall be entitled to any damages it can prove under any theory including but not limited to contract and tort.

G. Appropriate Official. The appropriate official to make the decisions authorized by sections A, B, and E above, or the determination addressed in item H(2) below, is the chief procurement officer, the head of a purchasing agency, or, for a contract with a total potential value no greater than \$100,000, a designee of either officer, above the level of the person responsible for the person committing or authorizing the act. If a contract award or modification is made in violation of the Consolidated Procurement Code or these regulations, and the value of the contract exceeds the certification of the purchasing agency or one hundred thousand dollars, the chief procurement officer must concur in the written determination before any further action is taken, unless the contract is declared null and void. In all circumstances, the chief procurement officer must concur in any determination finding bad faith.

H. Determinations.

(1) All decisions authorized by sections A, B, and E above shall be supported by a written determination of appropriateness conforming to the requirements of Section 11-35-210.

(2) The written determination must include the facts and circumstances surrounding the improper act, what corrective action is being taken to prevent recurrence, and the action taken against the individual committing the act.

(3) In most circumstances, the decisions authorized by sections A, B, and E above are unnecessary for a contract that has been completely performed. Accordingly, the determination in those instances may be limited to the information required by subsection H(2).

I. Reporting. Every quarter, each governmental body shall submit to the Materials Management Officer a record listing all contract awards or modifications discovered as described in item A(1) above, along with copies of the applicable written determinations. The Materials Management Officer shall submit a copy of the record to the board on an annual basis and such record shall be available for public inspection.

J. Miscellaneous.

(1) In the context of an administrative review conducted under Article 17, sections G, H, and I above are inapplicable, and the appropriate official to make the decision authorized by sections A, B, and E is the chief procurement officer or Procurement Review Panel, as applicable.

(2) This Regulation does not apply to a determination pursuant to R.19-445.2085C.

19-445.2017. Pre-solicitation Procedures.

A. General.

(1) This regulation prescribes best practices for pre-solicitation activities in acquisitions of supplies, services, or information technology, including acquisition planning, market research, and exchanges with industry. Nothing in section A, B, or C of this regulation shall provide an independent basis for administrative review pursuant to Article 17.

(2) Using agencies shall perform acquisition planning and conduct market research for all acquisitions of supplies, services, or information technology. The extent of planning and research will vary, depending on such factors as estimated dollar value, complexity, and past experience, as well as the nature of the supplies, services or information technology to be acquired.

(3) Except for procurements conducted pursuant to Section 11-35-1550, no solicitation for offers shall proceed until the using agency has certified in writing that it has complied with this regulation. If the using agency lacks authority to conduct the procurement, the using agency shall provide the responsible procurement officer the opportunity to fully participate in all aspects of any pre-solicitation activities conducted by the using agency.

(4) The using agency must document its acquisition planning and market research in sufficient detail to satisfy the requirements of an audit. This documentation shall be made a part of the procurement file.

(5) The appropriate chief procurement officer or his designee may require the using agency to conduct additional market research or provide additional documentation of the using agency's planning and research activities.

(6) The chief procurement officers shall provide guidance which shall be followed by all agencies conducting acquisition planning and market research, including considerations pertinent to determining the adequacy of planning and research activities.

B. Acquisition Planning.

(1) The purpose of acquisition planning is to ensure that the using agency meets its needs in the most effective, economical, and timely manner. The planning should promote and provide for:

(a) Clearly defining the agency's needs;

(b) Acquisition of commercially available items to the maximum extent practicable;

(c) Full and open competition to the maximum extent practicable, with due regard to the nature of the supplies, services, or information technology to be acquired;

(d) Selection of appropriate source selection method and contract type; and

(e) Appropriate consideration of the use of term contracts to fulfill the requirement, before awarding new contracts.

(2) Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of when contract award or order placement is necessary. Agency staff should avoid issuing requirements on an urgent basis or with unrealistic delivery or performance schedules, since it generally impedes advantageous outcomes, restricts competition, and increases prices.

(3) Acquisition planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. If and as commensurate with the value and complexity of the acquisition, the agency shall form a team consisting of all those who will be responsible for significant aspects of the acquisition, such as procurement, fiscal, legal, and technical personnel. If contract performance is to be in a designated operational area, the agency should also consider including operations staff or "end users," as appropriate.

C. Market Research.

(1) Acquisitions begin with a description of the agency's needs stated in terms sufficient to allow conduct of market research. Using agencies shall conduct market research appropriate to the circumstances to arrive at the most suitable approach to acquiring supplies, services, and information technology. Agencies should conduct market research when planning a new acquisition, or for a new type of supplies, services, or information technology; before requisitioning an acquisition, or requesting delegated authority to conduct an acquisition in excess of the agency's certification; and on an ongoing basis (to the maximum extent practicable), to effectively identify the capabilities of small businesses, new entrants into government contracting, and new commercially available items, for meeting the agency's requirements.

(2) Agencies should use the results of market research to determine if sources capable of satisfying the agency's requirements exist; determine if commercially available items exist that meet the agency's requirements; and determine the practices of firms engaged in producing, distributing, and supporting the supplies, services or information technology to be acquired, such as type of contract, type and relationship of businesses involved in such contracts (e.g., subcontractors, suppliers, distributors, integrators) and,

common industry contract terms or specifications, including without limitation, terms for contract duration, payment, warranties, maintenance and packaging, marking, and any other contract terms relevant to the proposed acquisition..

D. Exchanges with industry before receipt of proposals.

(1) Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with Regulation 19-445.2010, Disclosure of Procurement Information. Interested parties include potential offerors, end users, agency acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition. The purpose of exchanging information is to improve the understanding of agency requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the State's requirements, and enhancing the State's ability to obtain quality supplies, services, information technology, and construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(2) Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, responsible procurement officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria; the availability of reference documents; and any other industry concerns or questions.

(3) Techniques to promote early exchanges of information include industry conferences; public hearings; market research, as described in section C above; presolicitation notices; draft RFPs; requests for information (RFIs); presolicitation conferences; and site visits. They may also include one-on-one meetings with potential offerors. In conducting exchanges, agencies should take measures to comply with Chapter 13, Title 8 of the South Carolina Code (Ethics, Government Accountability and Campaign Reform Act); R.19-445.2010 (Disclosure of Procurement Information); R.19-445.2127 (Organizational Conflicts of Interest); and R.19-445.2165 (Gifts). However, any such meetings that are substantially involved with potential specifications or contract terms and conditions must comply with the restrictions on disclosure of information in subsection D(6) below.

(4) To encourage industry response, a using agency may publish notice of its plans to conduct pre-solicitation exchanges in South Carolina Business Opportunities and other publications likely to reach potential offerors.

(5) RFIs may be used when the agency does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted by the agency to form a binding contract. There is no required format for RFIs.

(6) General information about agency mission needs and future requirements may be disclosed at any time. In addition to the controls in R.19-445.2010, the responsible procurement officer must control any exchange with potential offerors after release of the solicitation. When specific information about a proposed acquisition that would be necessary or advantageous for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. When conducting a presolicitation conference, materials distributed at the conference should be made available to all potential offerors, upon request.

19-445.2020. Certification.

A. Review Procedures.

(1) Unless otherwise authorized by statute, any governmental body that desires to make direct agency procurements in excess of \$50,000.00, shall contact the Materials Management Officer in writing to request certification in any area of procurement, including the following four areas:

- (a) Supplies and services;
- (b) Consultant services;
- (c) Construction and related professional services;
- (d) Information technology.

(2) The Materials Management Officer shall review and report on the particular governmental body's entire internal procurement operation to include, but not be limited to the following:

- (a) Adherence to provisions of the South Carolina Consolidated Procurement Code and these Regulations;
- (b) Procurement staff and training;
- (c) Adequate audit trails and purchase order register;
- (d) Evidences of competition;
- (e) Small purchase provisions and purchase order confirmation;
- (f) Emergency and sole source procurements;
- (g) Source selections;
- (h) File documentation of procurements;
- (i) Decisions and determinations made pursuant to section 2015;
- (j) Adherence to any mandatory policies, procedures, or guidelines established by the appropriate chief procurement officers;
- (k) Adequacy of written determinations required by the South Carolina Consolidated Procurement Code and these Regulations;
- (l) Contract administration;
- (m) Adequacy of the governmental body's system of internal controls in order to ensure compliance with applicable requirements.

(3) The report required by item (2) shall be submitted to the ~~Board~~ board, along with the recommendation of the Materials Management Officer. Upon favorable review by the Materials Management Officer and approval by the ~~Board~~ board, the particular governmental body may be certified and assigned a dollar limit below which the certified governmental body may make direct agency procurements. Such certification shall be in writing and specify:

- (a) The name of the governmental body;
- (b) Any conditions, limits or restrictions on the exercise of the certification;
- (c) The duration of the certification; and
- (d) The procurement areas in which the governmental body is certified.

(4) Using the criteria listed in item A(2) above, the office of each chief procurement officer shall be reviewed at least ~~ever~~ every five years by the audit team of the Materials Management Office. The results of the audit shall be provided to the appropriate chief procurement officer and the ~~designated board officer~~ Executive Director of the Authority.

B. Limitations.

(1) Such certification as prescribed in subsection A shall be subject to any term contracts established by the chief procurement officers which requires mandatory procurement by all governmental bodies.

(2) Such certification as prescribed in subsection A may be subject to maintaining an adequate staff of qualified or certified procurement officers.

19-445.2027. Electronic Commerce.

A. "Electronic commerce" means electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfer, and electronic data interchange.

B. General.

(1) The State may use electronic commerce whenever practicable or cost-effective. The use of terms commonly associated with paper transactions (e.g., "copy," "document," "page," "printed," "sealed envelope," and "stamped") shall not be interpreted to restrict the use of electronic commerce. The

responsible procurement officer may supplement electronic transactions by using other media to meet the requirements of any contract action governed by the Consolidated Procurement Code (e.g., transmit hard copy of drawings).

(2) Agencies may exercise broad discretion in selecting the information technology that will be used in conducting electronic commerce. However, the head of each agency shall ensure that systems, technologies, procedures, and processes used by the agency to conduct electronic commerce—

(a) Are implemented uniformly throughout the agency, to the maximum extent practicable;

(b) Are implemented only after considering the full or partial use of existing infrastructures;

(c) Facilitate access to State acquisition opportunities by as many persons as practicable, including small businesses, minority business enterprises, and socially and economically disadvantaged small businesses;

(d) Include a means of providing widespread public notice of acquisition opportunities and a means of responding to notices or solicitations electronically;

(e) Comply with applicable standards that broaden interoperability and ease the electronic interchange of information; and

(f) Are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information.

(3) Agencies using the procurement functionality of the South Carolina Enterprise Information System are deemed to have complied with subsection (B)(2) of this regulation.

(4) Consistent with provisions of the Uniform Electronic Transactions Act, Sections 26-6-10, et seq., agencies may accept electronic signatures and records in connection with State contracts.

C. Submission of Offers by Electronic Commerce. Subject to all other applicable regulations (e.g., R.19-445.2045 and -2050), the responsible procurement officer may authorize use of electronic commerce for submission of bids and proposals. If electronic submissions are authorized, the solicitation shall specify the electronic commerce method(s) that offerors may use. Offers submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation.

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

A. The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include the following, as applicable:

(1) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the individual to whom the bid is to be submitted, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the State, and any other special information;

(2) the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description;

(3) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable; and

(4) Instructions to bidders on how to visibly mark information which they consider to be exempt from public disclosure.

B. ~~(5) Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. Bidding~~ Accordingly, bidding time will be set to provide bidders a reasonable time to prepare their bids. ~~The~~ Without limiting the foregoing requirements, the date of opening may not be less than seven (7) days after notice of the solicitation is provided as required by Section 11-35-1520(3), unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Chief Procurement Officer or the head of the purchasing agency or his designee.

19-445.2040. The Official State Government Publication.

A. Specifications of Publication.

The name of the official state government publication shall be known as the “South Carolina Business Opportunities.” It shall be published by the Materials Management Office at least weekly. The purpose is to provide a listing of proposed procurements of construction, information technology, supplies, services and other procurement information of interest to the business community. Except as otherwise provided by law, the publication will be available to all interested parties by ~~subscription and distributed by mail or electronic media~~ posting on a public-facing Internet site. Contents shall be limited to inclusion of proposed procurements required by regulations and such other business information as approved by the Materials Management Officer. Publication of proposed procurements of a classified nature or emergencies may be excluded from publication.

~~B. Availability in Public Libraries.~~

~~Each publication of the “South Carolina Business Opportunities” shall be distributed to public libraries within the State.~~

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

A. Procedures Prior to Bid Opening.

All bids (including modifications) received prior to the time of opening shall be kept secure and, except as provided in subsection B below, unopened. Necessary precautions shall be taken to insure the security of the bid. Prior to bid opening, information concerning the identity and number of bids received shall be made available only to the state employees, and then only on a “need to know” basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening.

B. Unidentified Bids.

Unidentified bids may be opened solely for the purpose of identification, and then only by an official specifically designated for this purpose by the Chief Procurement Officer, the procurement officer of the governmental body, or a designee of either officer. If a sealed bid is opened by mistake, the person who opens the bid will immediately write his signature and position on the envelope and deliver it to the aforesaid official. This official shall immediately write on the envelope an explanation of the opening, the date and time opened, the invitation for bids’ number, and his signature, and then shall immediately reseal the envelope.

C. When bids or proposals are rejected, or a solicitation cancelled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders or offerors upon request, or otherwise disposed of. Unopened bids or proposals are not considered to be public information under Chapter 4 of Title 30 (Freedom of Information Act).

19-445.2060. Telegraphic Bids Repealed.

~~The Invitation for Bids may state that electronic, telegraphic, and mailgram bids will be considered whenever they are received in hand at the designated office by the time and date set for receipt of bids. Such electronic, telegraphic, or mailgram bids shall contain specific reference to the Invitation for Bids; the items, quantities, and prices for which the bid is submitted; the time and place of delivery; and a statement that the bidder agrees to all the terms, conditions, and provisions of the Invitation for Bids.~~

19-445.2065. Rejection of Bids.

A. Unless there is a compelling reason to reject one or more bids, award will be made to the lowest responsible and responsive bidder. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule after opening, an invitation for bids should not be canceled and readvertised due solely to increased quantities of the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.

B. Cancellation of Bids Prior to Award.

(1) When it is determined prior to the issuance of an award or notification of intent to award, whichever is earlier, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the invitation for bids shall be cancelled. Invitations for bids may be cancelled after opening, but prior to award, when such action is consistent with subsection A above and 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, services, information technology, or construction 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 the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (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.

(2) Determinations to cancel invitations for bids shall state the reasons therefor.

C. Extension of Bid Acceptance Period.

Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement.

~~D. Return of Bids~~

~~If an invitation for bids is canceled, bids shall be returned to the bidders.~~

19-445.2070. Rejection of Individual Bids.

A. General Application.

Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

B. Alternate Bids.

Any bid which does not conform to the specifications contained or referenced in the invitation for bids may be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation.

C. Any bid which fails to conform to the delivery schedule, to permissible alternates thereto stated in the invitation for bids, or to other material requirements of the solicitation may be rejected as nonresponsive.

D. Modification of Requirements by Bidder.

(1) Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the State, since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids should be rejected in which the bidder:

- (a) attempts to protect himself against future changes in conditions, such as increased costs, if total possible cost to the State cannot be determined;
- (b) fails to state a price and in lieu thereof states that price shall be "price in effect at time of delivery;"
- (c) states a price but qualified such price as being subject to "price in effect at time of delivery;"
- (d) when not authorized by the invitation, conditions or qualifies his bid by stipulating that his bid is to be considered only if, prior to date of award, bidder receives (or does not receive) award under a separate procurement;
- (e) requires the State to determine that the bidder's product meets state specifications; or
- (f) limits the rights of the State under any contract clause.

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

E. Price Unreasonableness.

Any bid may be rejected if the responsible procurement officer determines in writing that it is unreasonable as to price.

F. Bid Security Requirement.

When a bid security is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected.

G. Exceptions to Rejection Procedures.

Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the location specified in the solicitation or the governmental bodies' mail room which services that location prior to the bid opening.

19-445.2085. Correction or Withdrawal of Bids; Cancellation of Awards.

A. General Procedure.

(1) A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's or offeror's mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either.

(2) Confirmation of Bid. When the responsible procurement officer knows or has reason to conclude that a mistake may have been made, she should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. Consistent with R.19-445.2010, -2050C, and -2095C, the responsible procurement officer should only disclose information that is publicly available when confirming a bid. If the bidder asserts a mistake, the bid may be corrected or withdrawn only if allowed by regulation (e.g., R.19-445.2085A and B and R.19-445.2095I(2)(d)).

B. Correction Creates Low Bid.

To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition.

C. Cancellation Of Award Prior To Performance.

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer determines in writing that:

- (1) Inadequate or ambiguous specifications were cited in the invitation;
- (2) Specifications have been revised;
- (3) The supplies, services, information technology, or construction being procured are no longer required;
- (4) 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;
- (5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;
- (7) Administrative error of the purchasing agency discovered prior to performance, or
- (8) For other reasons, cancellation is clearly in the best interest of the State.

19-445.2095. Competitive Sealed Proposals.

A. Request for Proposals.

The provisions of ~~Regulation~~ Regulations 19-445.2030(B) and 19-445.2040 shall apply to implement the requirements of Section 11-35-1530 (2), Public Notice.

B. Receipt, ~~and Safeguarding, and Disposition~~ of Proposals.

The provisions of Regulation 19-445.2045 shall apply ~~for the receipt and safeguarding of~~ to competitive sealed proposals.

C. Receipt of Proposals.

The provisions of Regulation 19-445.2050(B) shall apply to ~~the receipt and safeguarding of~~ competitive sealed proposals. For the purposes of implementing Section 11-35-1530 (3), Receipt of Proposals, the following requirements shall be followed:

(1) Proposals shall be opened publicly by the procurement officer or his designee in the presence of one or more witnesses at the time and place designated in the request for proposals. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the item offered. The Register of Proposals shall be certified in writing as true and accurate by both the person opening the proposals and the witness. The Register of Proposals shall be open to public inspection only after the issuance of an award or notification of intent to award, whichever is earlier. Proposals and modifications shall be shown only to State personnel having a legitimate interest in them and then only on a "need to know" basis. Contents and the identity of competing offers shall not be disclosed during the process of opening by state personnel.

(2) As provided by the solicitation, offerors must visibly mark all information in their proposals that they consider to be exempt from public disclosure.

D. [Repealed]

E. Clarifications and Minor Informalities in Proposals.

The provisions of Sections 11-35-1520(8) and 11-35-1520(13) shall apply to competitive sealed proposals.

F. Specified Types of Construction.

Consistent with Section 48-52-670, which allows the use of competitive sealed proposals, it is generally not practicable or advantageous to the State to procure guaranteed energy, water, or wastewater savings contracts by competitive sealed bidding.

G. Procedures for Competitive Sealed Proposals.

The appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies using the competitive sealed proposal method of acquisition. Unless excused by the State Engineer for procurements with a total potential value below two million dollars, the staff of the Office of State Engineer shall oversee (1) the evaluation process for any procurement of construction if factors other than price are considered in the evaluation of a proposal, ~~and~~ (2) any discussions with offerors conducted pursuant to Section 11-35-1530(6) or subsection I below, and (3) any negotiations conducted pursuant to Section 11-35-1530.

H. Other Applicable Provisions.

The provisions of the following Regulations shall apply to competitive sealed proposals:

- (1) Regulation 19-445.2042, Pre-Bid Conferences,
- (2) Regulation 19-445.2060, Telegraphic and Electronic Bids,
- (3) Regulation 19-445.2075, All or None Qualifications,
- (4) Regulation 19-445.2085, Correction or Withdrawal of Bids; Cancellation of Awards, and Cancellation of Awards Prior to Performance.
- (5) Regulation 19-445.2137, Food Service Contracts.

I. Discussions with Offerors

- (1) Classifying Proposals.

For the purpose of conducting discussions under Section 11-35-1530(6) and item (2) below, proposals shall be initially classified in writing as:

- (a) acceptable (i.e., reasonably susceptible of being selected for award);
 - (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or
 - (c) unacceptable.
- (2) Conduct of Discussions.

If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:

- (a) Control all exchanges;
- (b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;
- (c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;
- (d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.
- (e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above.

(3) Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

(4) Communications authorized by Section 11-35-1530(6) and items (1) through (3) above may be conducted only by procurement officers authorized by the appropriate chief procurement officer.

J. Rejection of Individual Proposals Delay in Posting Notice of Intent to Award or Award.

~~(1) Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:~~

- ~~(a) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810;~~
- ~~(b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or~~
- ~~(c) the proposed price is clearly unreasonable.~~

~~(2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.~~

Regulation 19-445.2090B shall apply to competitive sealed proposals.

K. Negotiations.

A negotiation plan, commensurate with the anticipated scope of negotiations and such factors as estimated dollar value, complexity, and past experience, should be developed prior to initiating negotiations under Section 11-35-1530(8).

19-445.2097. Rejection of Proposals.

A. Unless there is a compelling reason to reject one or more proposals, award will be made to the highest ranked responsible offeror or otherwise as allowed by Section 11-35-1530. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective offerors of any resulting modification or cancellation.

B. Cancellation of Solicitation Prior to Award.

(1) When it is determined prior to the issuance of an award or notification of intent to award, whichever is earlier, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the request for proposals shall be cancelled. A request for proposals may be cancelled after opening, but prior the issuance of an award or notification of intent to award, whichever is earlier, when such action is consistent with subsection A above and the procurement officer determines in writing that:

- (a) inadequate or ambiguous specifications were cited in the solicitation;
- (b) specifications have been revised;
- (c) the supplies, services, information technology, or construction being procured are no longer required;
- (d) the solicitation 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) proposals received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the proposals were requested;
- (f) all otherwise acceptable proposals received are at unreasonable prices;
- (g) the proposals 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.

(2) Determinations to cancel a request for proposals shall state the reasons therefor.

C. Extension of Bid Acceptance Period.

Should administrative difficulties be encountered after opening which may delay award beyond offeror's acceptance periods, the relevant offerors should be requested, before expiration of their offers, to extend the acceptance period (with consent of sureties, if any).

~~D. Return of Proposals~~

~~If a request for proposals is canceled, proposals shall be returned to the offerors.~~

19-445.2098. Rejection of Individual Proposals.

A. Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal.

B. Reasons for rejecting proposals include but are not limited to:

- (1) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810;
- (2) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or
- (3) the proposed price is unreasonable.

C. The reasons for rejection shall be made a part of the procurement file and shall be available for public inspection.

D. Exceptions to Rejection Procedures.

Any proposal received after the procurement officer of the governmental body or his designee has declared that the time set for opening has arrived, shall be rejected unless the proposal had been delivered to the location specified in the solicitation or the governmental body's mail room which services that location prior to the bid opening.

19-445.2122. Price Reasonableness.

A. General. The objective of offer analysis is to ensure that the final contract price is fair and reasonable. The procurement officer is responsible for evaluating the reasonableness of the offered prices. Normally, competition establishes price reasonableness. Therefore, when contracting on a firm-fixed-price basis, comparison of the proposed prices will usually satisfy the requirement to perform a price analysis, and a

cost analysis need not be performed. In limited situations, a cost analysis (see subsection B(2)) may be appropriate to establish reasonableness of the otherwise successful offeror's price. The analytical techniques and procedures described in this regulation may be used, singly or in combination with others, to ensure that the final price is fair and reasonable. In addition, they should be used to analyze cost or pricing data required by Section 11-35-1830. The complexity and circumstances of each acquisition should determine the appropriate level of detail for the analysis. The appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies conducting offer analysis. The responsible procurement officer may request the advice and assistance of other experts to ensure that an appropriate analysis is performed.

B. Analytical techniques include, but are not limited to, the following:

(1) Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. Examples of price analysis criteria include but are not limited to: (a) price submissions of prospective bidders or offerors in the current procurement; (b) prior price quotations and contract prices charged by the bidder, offeror, or contractor; (c) prices published in catalogues or price lists; (d) prices available on the open market; and (e) in-house estimates of cost. The responsible procurement officer may use various price analysis techniques and procedures to ensure a fair and reasonable price.

(2) Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price, and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate: (a) specific elements of costs; (b) the necessity for certain costs; (c) the reasonableness of amounts estimated for the necessary costs; (d) the reasonableness of allowances for contingencies; (e) the basis used for allocation of indirect costs; (f) the appropriateness of allocations of particular indirect costs to the proposed contract; and (g) the reasonableness of the total cost or price. The responsible procurement officer may use various cost analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances of the acquisition.

C. Unbalanced pricing. All offers with separately priced line items or subline items shall be analyzed to determine if the prices are unbalanced. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly over or understated as indicated by the application of cost or price analysis techniques. If the responsible procurement officer determines that unbalanced pricing may increase performance risk (e.g., it is so unbalanced as to be tantamount to allowing an advance payment) or could result in payment of unreasonably high prices, she may conclude that the offer is unreasonable as to price.

19-445.2127. Organizational Conflicts of Interest. [Reserved]

19-445.2140. Specifications.

A. Definitions.

(1) "Brand Name Specification" means a specification limited to one or more items by manufacturers' names or catalogue number.

(2) "Brand Name or Equal Specification" means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet state requirements, and which provides for the submission of equivalent products.

(3) "Qualified Products List" means an approved list of supplies, services, information technology, or construction items described by model or catalogue number, which, prior to competitive solicitation, the State has determined will meet the applicable specification requirements.

(4) "Specification" means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, information technology, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service or construction item for

delivery. Unless the context requires otherwise, the terms “specification” and “purchase description” are used interchangeably throughout the Regulations.

(5) “Specification for a Common or General Use Item” means a specification which has been developed and approved for repeated use in procurements.

B. Issuance of Specifications.

The purpose of a specification is to serve as a basis for obtaining a supply, service, information technology, or construction item adequate and suitable for the State’s needs in a cost effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs. It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. Specification shall be drafted with the objective of clearly describing the State’s requirements. All specifications shall be written in a non restrictive manner as to describe the requirements to be met.

C. Use of Functional or Performance Descriptions.

(1) Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies, services, and information technology. Such preference is often not practicable in construction, apart from the procurement of supply type items for a construction project.

(2) Brand Name or Equal Specifications.

(a) Brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.

(b) Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

D. Preference for Commercially Available Products.

It is the general policy of this State to procure standard commercial products whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable.

~~E. [Repealed]~~

~~F. [Repealed]~~

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

A. Justification. A governmental body proposing to enter into an agreement other than an outright purchase is responsible for the justification of such action. Lease, lease/purchase, installment purchase, or rental agreements are subject to the procedures of the Procurement Code and these Regulations.

B. Procedures. Upon written justification by the procurement officer of the governmental body of such alternate method, the following procedures will be followed:

(1) The State of South Carolina Standard Equipment Agreement will be used in all cases unless modifications are approved by the ~~designated board officer~~ Director of the Division of Procurement Services or his designee. A purchasing agency may enter into an agreement for the rental of equipment without using the Standard Equipment Agreement when the agreement has a total potential value of fifteen thousand dollars or less or the agreement does not exceed ninety days in duration.

(2) Installment purchases will require the governmental body to submit both a justification and purchase requisition to the appropriate chief procurement officer or his designee for processing.

(3) All lease/purchase and installment sales contracts must contain an explicitly stated rate of interest to be incurred by the State under the contract.

19-445.2180. Assignment, Novation, and Change of Name.

A. “Novation agreement” is a contractual amendment by which the State recognizes a successor in interest to a State contract as provided in this regulation. The successor in interest assumes all the obligations under the contract and the transferor, when still in existence, typically guarantees the performance of the contract by the transferee.

AB. No Assignment.

No State contract is transferable, or otherwise assignable, without the written consent of the Chief Procurement Officer, the head of a purchasing agency, or the designee of either; provided, however, that a contractor may assign monies receivable under a contract after due notice from the contractor to the State.

BC. Recognition of a Successor in Interest; Novation.

When in the best interest of the State, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:

- (1) the transferee assumes all of the transferor’s obligations;
- (2) the transferor waives all rights under the contract as against the State; and
- (3) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

CD. Change of Name.

When a contractor requests to change the name in which it holds a contract with the State, the procurement officer responsible for the contract may, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

19-445.3000. School District Procurement Codes; Model.

A. Application.

Under Section 11-35-70, a school district is exempt from the South Carolina Consolidated Procurement Code (except for a procurement audit) if the district has its own procurement code which is, in the written opinion of the ~~Office of General Services of the State Budget and Control Board~~ Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the Consolidated Procurement Code and regulations in effect at the time the opinion is issued.

B. Delegation.

The authority and responsibilities under Section 11-35-70 are hereby delegated to the Materials Management Officer.

C. Substantially Similar.

To qualify for approval, a district code should largely mirror, but need not be identical to, the Consolidated Procurement Code. Because a district code needs only to be substantially similar to the consolidated procurement code and regulations, a district code may accommodate the differing context of school districts (e.g., differences between state government and local school district operations, including size, purchasing staff resources, volume and type of procurements, and structure of its governing body and executive hierarchy) as long as it preserves the sound procurement policies and practices underlying the rules found in the consolidated procurement code and regulations.

D. Definitions.

Covered District means a school district subject to the requirements of Section 11-35-70. Model code means a model school district procurement code and any subsequent modifications to the model code, including instructions regarding how each district may customize the model code to an individual district’s organizational structure.

E. Guidelines; Model Code.

By requiring a written opinion, Section 11-35-70 provides for an exercise of judgment. The best interest of the state is served by exercising this judgment in a consistent manner. Accordingly, the Materials Management Office may publish guidance regarding its exercise of this judgment, including publication of a model code. In developing a model code, the Materials Management Officer should consult with all

covered districts and the State Department of Education. Any model should be designed to serve and comply with the purposes and policies enumerated in Section 11-35-20 in the specific context of local school district operations, with due regard for minimizing administrative costs of compliance with the model code. Prior to publishing a model code, the Materials Management Officer must determine in writing that the model code is substantially similar to the provisions of the South Carolina Consolidated Procurement Code and these procurement regulations. Any school district may adopt the model code.

F. Duration of Written Opinion.

A written opinion issued pursuant to Section 11-35-70 remains valid for a covered district's procurement code until the covered district seeks and receives a written opinion for modifications to its procurement code.

G. Effect of Adoption.

A procurement code adopted by a school district in accordance with all applicable law shall have the full force and effect of law.