

DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES, OFFICE OF STATE  
PROCUREMENT

---

**SUBJECT: R8 19-11-230 Discussions**

**DESCRIPTION:** Due to legislation passed during the 91st General Assembly, the rule is being amended to bring it into compliance with legislative changes made to Ark. Code Ann. § 19-11-230.

**R8: 19-11-230 Discussions**

- R8: 19-11-230 (a) is being added to clarify discussions may be conducted with responsible offerors during a request for proposals in order to clarify a proposal or the terms of a request for proposals, and for negotiations. Such pre-award discussions should be conducted in a manner that supports public confidence in public procurement and ensures fairness.
- R8: 19-11-230 (b) is being added to elaborate upon pre-award discussions conducted for clarifications. Namely, that clarifications can be sought in areas of ambiguity, miscommunication, or misunderstanding, but that such clarifications should be documented in the procurement file.
- R8: 19-11-230 (c) is being added to elaborate upon pre-award discussions conducted for negotiations and provide guidance on how such negotiations should be conducted.
  - Provisions for how negotiations might occur should be in the relevant request for proposals, there are no minimum or maximum number of rounds of negotiations other than what could be set forth in a request for proposals;
  - Negotiations may be conducted with a group of responsible offerors identified based on an identified competitive range or just a highest ranking responsible offeror;
  - During serial negotiation with the highest ranked offeror, the procurement agency may only abandon negotiation with the highest ranked offeror if it determines, in writing and for identified cause, that the offeror is not responsible or is otherwise not reasonably susceptible of being awarded a contract;
  - Negotiation may be limited to cost only and shall be documented in the procurement file.
- R8: 19-11-230 (d) is being added to define the criteria for “competitive range” namely that such criteria should be established on a rational basis, and may include price, cost of ownership, responses that provide the best value based on evaluation criteria, responses most likely to provide greater value after negotiations, and evaluation scores.

- R8: 19-11-230 (e) is being added to provide guidance on how the state may establish a minimum score requirement for offerors to be in the competitive range, such minimum score not being unreasonably high.
- R8: 19-11-230 (f) is being added to provide guidance for how the state may elect to negotiate with a single offeror versus a multi-party negotiation, elaborating on factors the state may use to reach a decision, such being:
  - The expected dollar value of the award and length of contract;
  - The complexity of the acquisition and the variety and complexity of offered solutions; and
  - The resources available to conduct discussions versus the expected variable administrative costs of discussions;
  - The impact on lead-time for award versus the need for timely delivery;
  - The extent to which discussions with additional offerors would likely provide diminishing returns;
  - The disparity in pricing between the lowest priced offeror and the other offerors;
  - The disparity in pricing between the highest rated offeror and the other offerors.
- R8: 19-11-230 (g) is being added to establish the rules by which the state may conduct best and final offer (BAFO) negotiations if deemed advantageous to the state. Specifically:
  - The state shall determine which responsible offerors are within the competitive range according to the terms of the request for proposals
  - The state may only restrict the BAFO negotiations to a single offeror or engage in a multi-party BAFO negotiations as provided in the request for proposals and consistent with Arkansas Procurement Law, including these rules;
  - BAFO negotiation shall only be conducted with responsible offerors;
  - The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee;
  - The state may request that an offeror readdress important aspects of the proposal;
  - The procurement officer shall dispatch the BAFO request stating the elements to be covered and defining the date and time the BAFO must be returned;
  - All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer;
  - All responses to the BAFO request must be submitted timely to the procurement officer in order to be considered;
  - Only the original proposal or one properly clarified, revised through negotiation, or submitted as a best and final offer may be considered for evaluation;
  - A BAFO request to multiple offerors shall not identify either the current rank of any of the offerors or any identifiable information derived from a proposal.
- R8: 19-11-230 (h) is being added to provide guidance for the state on conducting target price BAFO, including determining the proposed pricing, comparing pricing against benchmarks, utilizing market analysis, evaluating the reasonableness of target

pricing, sending a request for revised pricing, and determining if improved pricing resulted.

**PUBLIC COMMENT:** The public comment period expired on March 22, 2019, and a public hearing was held on March 25, 2019. The agency received no comments. The proposed effective date is upon legislative review and approval.

Additionally, Kathryn Henry, an attorney with the Bureau of Legislative Research, asked the following questions:

1. In the questionnaire filed with our office on February 21, 2019, you stated that these rule changes were being made to bring the rule into compliance with legislative changes made in 2017 to Ark. Code Ann. § 19-11-230(e), concerning competitive sealed proposals. Is the Office comfortable that the proposed rule changes do not conflict with Act 419 of 2019, which again amended Ark. Code Ann. § 19-11-230, and which went into effect on July 24, 2019? **RESPONSE:** OSP reviewed the proposed rule change in light of Act 419 of 2019 upon its passage, and OSP does not see any conflict in the proposed rule with the language of Act 419 of 2019 that amended Ark. Code Ann. § 19-11-230.

2. Do you anticipate additional changes to this specific rule in light of Act 419's amendments to § 19-11-230? **RESPONSE:** No. OSP reviewed the proposed rule change in light of Act 419 of 2019 upon its passage, and in addition to not seeing any conflict in the proposed rule with the language of Act 419 of 2019 that amended Ark. Code Ann. § 19-11-230, we also do not see any additional language needing to be added to the proposed rule.

**FINANCIAL IMPACT:** There is no financial impact.

**LEGAL AUTHORIZATION:** The State Procurement Director, upon the approval of the Secretary of the Department of Transformation and Shared Services, has the authority and responsibility to promulgate rules consistent with the Arkansas Procurement Law and may also adopt rules governing the internal procedures of the Office of State Procurement. *See* Ark. Code Ann. § 19-11-217(b)(1), (2). Rules shall be promulgated by the Director in accordance with the applicable provisions of the Arkansas Procurement Law and of the Arkansas Administrative Procedure Act, § 25-15-201 et seq. *See* Ark. Code Ann. §19-11-225(a).

Per the agency, this rule change was made to bring the rule into compliance with legislative changes made to Arkansas Code Annotated § 19-11-230(e), concerning competitive sealed proposals, which was amended by Act 696 of 2017, sponsored by Senator Bart Hester.

1 State of Arkansas  
2 92nd General Assembly  
3 Regular Session, 2019  
4

As Engrossed: H2/4/19 S2/25/19

# A Bill

HOUSE BILL 1178

5 By: Representative Wardlaw  
6 By: Senator Flippo  
7

## For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO  
10 AMEND THE LAWS CONCERNING VARIOUS PROCUREMENT  
11 METHODS; TO ALLOW FOR REQUESTS FOR INFORMATION; TO  
12 AMEND THE LAW CONCERNING THE PROCUREMENT OF  
13 PROFESSIONAL SERVICES; TO PROVIDE FOR THE TRAINING  
14 AND CERTIFICATION OF PROCUREMENT OFFICIALS; TO  
15 REQUIRE THAT COST BE WEIGHTED A CERTAIN AMOUNT IN  
16 EVALUATING RESPONSES TO A REQUEST FOR PROPOSALS; TO  
17 ALLOW FOR THE USE OF PRIVATE EVALUATORS IN EVALUATING  
18 RESPONSES TO A REQUEST FOR PROPOSALS; TO REQUIRE THAT  
19 RULES PROMULGATED BY THE STATE PROCUREMENT DIRECTOR  
20 BE SUBMITTED TO AND REVIEWED BY THE REVIEW  
21 SUBCOMMITTEE OF THE LEGISLATIVE COUNCIL; TO AUTHORIZE  
22 AND REGULATE SOLICITATION CONFERENCES UNDER THE  
23 ARKANSAS PROCUREMENT LAW; TO REQUIRE THAT VENDOR  
24 TRAINING AND POLLING BE CONDUCTED UNDER THE ARKANSAS  
25 PROCUREMENT LAW; TO AMEND THE LAW CONCERNING THE  
26 NEGOTIATION OF COMPETITIVE SEALED BIDS AND  
27 COMPETITIVE SEALED PROPOSALS UNDER THE ARKANSAS  
28 PROCUREMENT LAW; TO AMEND THE LAW CONCERNING THE  
29 REJECTION OF A BID OR PROPOSAL UNDER THE ARKANSAS  
30 PROCUREMENT LAW; AND FOR OTHER PURPOSES.

## Subtitle

31  
32  
33 TO AMEND THE LAWS CONCERNING VARIOUS  
34 PROCUREMENT METHODS; TO PROVIDE FOR THE  
35 TRAINING AND CERTIFICATION OF PROCUREMENT  
36



1 OFFICIALS; AND TO REQUIRE ADDITIONAL  
2 LEGISLATIVE REVIEW OF PROCUREMENT RULES.

3  
4  
5 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

6  
7 SECTION 1. Arkansas Code § 19-11-217(c), concerning the powers and  
8 duties of the State Procurement Director, is amended to add additional  
9 subdivisions to read as follows:

10 (9) Shall provide for enhanced training on the drafting of  
11 specifications for procurements; and

12 (10) Shall maintain records of bids and proposals that are  
13 rejected by the office for failure to adhere to the mandatory requirements of  
14 a solicitation.

15  
16 SECTION 2. Arkansas Code § 19-11-225 is amended to read as follows:

17 19-11-225. ~~Regulations~~ Rules.

18 (a) ~~(1) Regulations shall be promulgated by the~~ The State Procurement  
19 Director shall adopt rules in accordance with the applicable provisions of  
20 this subchapter and of the Arkansas Administrative Procedure Act, § 25-15-201  
21 et seq.

22 (2) A rule promulgated by the director under this subchapter is  
23 not effective until the rule is:

24 (A) Submitted to and reviewed by the Review Subcommittee  
25 of the Legislative Council; and

26 (B) Reviewed and approved by the Legislative Council under  
27 § 10-3-309.

28 (b) ~~No regulation~~ A rule shall not change any commitment, right, or  
29 obligation of the state or of a contractor under a contract in existence on  
30 the effective date of the ~~regulation~~ rule.

31 (c) ~~(1) No clause which~~ A clause that is required by ~~regulation~~ rule to  
32 be included ~~shall be considered to be~~ is not incorporated by operation of law  
33 in any state contract without the consent of both parties to the contract to  
34 the incorporation.

35 (2) The parties to the contract may give such consent to  
36 incorporation by reference at any time after the contract has been entered

1 into and without the necessity of consideration passing to either party.

2  
3 SECTION 3. Arkansas Code § 19-11-229(d), concerning competitive sealed  
4 bidding, is amended to read as follows:

5 ~~(d)(1)~~ Notice inviting bids shall ~~be~~:

6 (1) Be given not fewer than five (5) calendar days nor more than  
7 ~~thirty (30)~~ ninety (90) calendar days preceding the date for the opening of  
8 bids by publishing the notice at least one (1) time in at least one (1)  
9 newspaper having general circulation in the state or posting by electronic  
10 media, but in all instances, adequate notice shall be given;

11 ~~(2)(A) The notice shall include~~ Include a general description of  
12 the commodities, technical and general services, or professional and  
13 consultant services to be procured; ~~and shall state~~

14 (3) State where invitations for bid bids may be obtained;

15 ~~(B) The notice also shall state~~ (4) State the date, time, and  
16 place of bid opening; and

17 (5) State the time, date, and place of the solicitation  
18 conference if a solicitation conference is to be held before the opening of  
19 bids to provide information to prospective bidders.

20  
21 SECTION 4. Arkansas Code § 19-11-229(f), concerning competitive sealed  
22 bidding, is amended to add an additional subdivision to read as follows:

23 (3)(A) A time discount may be considered in the evaluation of a  
24 bid only:

25 (i) If the state agency specifically solicits  
26 pricing that requests a time discount; and

27 (ii) Under the structured terms of the invitation  
28 for bids.

29 (B) If a bidder offers a time discount as part of its bid  
30 without the solicitation of time discounts by the state agency, the state  
31 agency shall not consider the time discount.

32  
33 SECTION 5. Arkansas Code § 19-11-229(g), concerning competitive sealed  
34 bidding, is amended to add an additional subdivision to read as follows:

35 (3)(A) The director or an agency procurement official may seek  
36 the clarification of a submitted bid.

1                   (B) A written response by a bidder under this subsection  
2 shall only clarify the submitted bid and shall not add any substantive  
3 language to the submitted bid or change the terms of the submitted bid.

4                   (C) If the bidder fails or refuses to clarify any matter  
5 questioned about the bidder's bid in writing by the deadline set by the  
6 director or agency procurement official, the bid may be rejected.

7                   (D) If the bidder clarifies the matter questioned under  
8 this subsection in writing, the clarification shall be evaluated and become a  
9 part of any contract awarded on the basis of the bidder's bid.

10  
11           SECTION 6. Effective July 1, 2021, Arkansas Code § 19-11-229(h)(2),  
12 concerning competitive sealed bidding under the Arkansas Procurement Law, is  
13 amended to add an additional subdivision read as follows:

14                   (C)(i) Negotiations under this subsection shall be  
15 conducted by a person who is trained and certified in negotiation and  
16 procurement processes.

17                   (ii)(a) The Office of State Procurement shall  
18 provide for the training and certification required under this subsection.

19                   (b) The training provided by the office shall  
20 be specific to Arkansas law.

21  
22           SECTION 7. Arkansas Code § 19-11-229(i), concerning competitive sealed  
23 bidding, is amended to read as follows:

24                   (i)(1) An invitation for ~~bid~~ bids may be cancelled or any or all bids  
25 may be rejected in writing by the director or the agency procurement  
26 official.

27                   (2) Before the rejection of a bid by the director, the decision  
28 to reject the bid may be validated with the state agency for which the  
29 procurement is being conducted.

30                   (3) A bid may be rejected for failure to adhere to mandatory  
31 requirements.

32  
33           SECTION 8. Arkansas Code § 19-11-230(d), concerning competitive sealed  
34 proposals under the Arkansas Procurement Law, is amended to read as follows:

35                   (d)(1) The request for proposals shall indicate the relative  
36 importance of price and other evaluation factors.

1 (2)(A) Except as provided in subdivision (d)(2)(B) of this  
2 section, cost shall be weighted at least thirty percent (30%) of the total  
3 evaluation score for a proposal submitted in response to the request for  
4 proposals.

5 (B)(i) The State Procurement Director may approve that  
6 cost be weighted at a lower percentage of the total evaluation score for a  
7 proposal submitted in response to a request for proposals if the director  
8 makes a written determination that the lower percentage is in the best  
9 interest of the state.

10 (ii) A state agency's failure to obtain the approval  
11 of the director under this subsection for a request for proposals with cost  
12 weighted at a lower percentage than required under subdivision (d)(2)(A) of  
13 this section is grounds for submitting a protest under § 19-11-244.

14 (C) The use of a lower percentage under subdivision  
15 (d)(2)(B) of this section and the corresponding written determination by the  
16 director shall be submitted to the Legislative Council or, if the General  
17 Assembly is in session, the Joint Budget Committee, for review before the  
18 request for proposals is issued.

19 (3) The state's prior experience with an offeror may be  
20 considered and scored as part of the offeror's proposal only:

21 (A) To the extent that the request for proposals requests  
22 that all offerors provide references; and

23 (B) If the offeror's past performance with the state  
24 occurred no more than three (3) years before the offeror submitted the  
25 proposal.

26 (4) A state agency shall not include prior experience with the  
27 state as a mandatory requirement for submitting a proposal under this  
28 section.

29  
30 SECTION 9. Arkansas Code § 19-11-230(e)(2), concerning competitive  
31 sealed proposals under the Arkansas Procurement Law, is amended to add an  
32 additional subdivision to read as follows:

33 (C)(i) Before issuing the notice of award of a contract,  
34 the director or the agency procurement official may request a best and final  
35 offer from each responsible offeror that is reasonably susceptible of being  
36 awarded the contract.



1                   (ii) In responding to a request for a best and final  
2 offer, an offeror may:

3                   (a) Resubmit the offeror's original proposal  
4 with lower pricing or additional benefits, or both, in accordance with the  
5 specifications of the request for proposals; or

6                   (b) Submit a written response that states that  
7 the offeror's original proposal, including without limitation the pricing,  
8 remains unchanged.

9                   (iii) If a best and final offer is requested, the  
10 director or the agency procurement official shall evaluate each proposal  
11 submitted in response to the request for a best and final offer in  
12 determining the proposal that is the most advantageous to the state.

13  
14           SECTION 10. Arkansas Code § 19-11-230(f) and (g), concerning  
15 competitive sealed proposals under the Arkansas Procurement Law, are amended  
16 to read as follows:

17           (f)(1) The director or an agency procurement official may seek the  
18 clarification of a submitted proposal.

19                   (2) A written response by an offeror under this subsection shall  
20 only clarify the submitted proposal and shall not add any substantive  
21 language to the submitted proposal or change the terms of the submitted  
22 proposal.

23                   (3) If the offeror fails or refuses to clarify any matter  
24 questioned about the offeror's proposal in writing by the deadline set by the  
25 director or agency procurement official, the proposal may be rejected.

26                   (4) If the offeror clarifies the matter questioned under this  
27 subsection in writing, the clarification shall be evaluated and become a part  
28 of any contract awarded on the basis of the offeror's proposal.

29           (g)(1) Award shall be made to the responsible offeror whose proposal  
30 is determined in writing to be the most advantageous to the state, taking  
31 into consideration price, the evaluation factors set forth in the request for  
32 proposals, any best and final offers submitted, and the results of any  
33 discussions conducted with responsible offerors.

34                   (2) No other factors or criteria shall be used in the  
35 evaluation.

36                   (3) If it is determined that two (2) or more responsible

1 offerors have tied scores after the evaluation of the proposals, the award  
2 shall be made to the responsible offeror that had one (1) of the tied scores  
3 and submitted the lowest price proposal.

4 (4) The director or the agency procurement official may enter  
5 into negotiations with the responsible offeror whose proposal is determined  
6 in writing to be the most advantageous to the state when the best interests  
7 of the state would be served, including without limitation when the state can  
8 obtain:

9 (A) A lower price without changes to the terms or  
10 specifications of the request for proposals; or

11 (B) An improvement to the terms or specifications, or  
12 both, of the request for proposals without increasing the price of the  
13 proposal.

14 (h)(1) The Office of State Procurement shall:

15 (A) Encourage full discussion by the evaluators who are  
16 evaluating proposals submitted in response to a request for proposals under  
17 this section; and

18 (B) Develop tools and templates to be used in evaluating  
19 proposals submitted in response to a request for proposals under this section  
20 that optimize the number of material scored attributes and provide for a  
21 limited range of possible scores for each attribute.

22 (2)(A) A state agency may use one (1) or more private evaluators  
23 to evaluate proposals submitted in response to a request for proposals under  
24 this section.

25 (B) A private evaluator used under this subsection shall  
26 be:

27 (i) Held to the same requirements and prohibitions  
28 regarding conflicts of interest as state employees;

29 (ii) A qualified volunteer, unless the state does  
30 not have the necessary expertise to evaluate the proposals, in which case a  
31 paid private evaluator may be used; and

32 (iii) Eligible for travel reimbursement if the state  
33 agency decides to make travel reimbursement available.

34 (C) The use of a private evaluator is not required.

35 (D) If a state agency uses one (1) or more private  
36 evaluators, the use of a private evaluator shall be disclosed in the

1 procurement file and in any information submitted to the Legislative Council  
 2 or, if the General Assembly is in session, the Joint Budget Committee.

3 ~~(g)~~ (i)(1) A competitive sealed proposal may be cancelled or any or  
 4 all proposals may be rejected in writing by the ~~State Procurement Director~~  
 5 director or the agency procurement official.

6 (2) Before the rejection of a proposal by the director, the  
 7 decision to reject the proposal may be validated with the evaluation  
 8 committee that evaluated the proposal.

9 (3) A proposal may be rejected for failure to adhere to  
 10 mandatory requirements.

11  
 12 SECTION 11. Arkansas Code § 19-11-233 is amended to read as follows:  
 13 19-11-233. Emergency procurements.

14 (a) The State Procurement Director, the head of a procurement agency,  
 15 or a designee of either officer may make or authorize others to make  
 16 emergency procurements as defined in § 19-11-204(4) and in accordance with  
 17 ~~regulations~~ rules promulgated by the director.

18 (b)(1) A person or state agency that makes an emergency procurement  
 19 under this section shall:

20 (A) Receive at least three (3) competitive bids unless the  
 21 emergency is a critical emergency; and

22 (B) Complete a quotation abstract that includes the:

23 (i) Names of the firms contacted;

24 (ii) Time that each firm was contacted;

25 (iii) Quoted price obtained from each contacted  
 26 firm; and

27 (iv) Method used for contacting each firm.

28 (2) As used in this subsection, "critical emergency" means an  
 29 emergency in which human life or health is imminently endangered.

30  
 31 SECTION 12. Arkansas Code Title 19, Chapter 11, Subchapter 2, is  
 32 amended to add additional sections to read as follows:

33 19-11-273. Solicitation conferences.

34 (a)(1) A state agency may hold a solicitation conference before or  
 35 after issuing an invitation for bids, a request for proposals, or a request  
 36 for statements of qualifications and performance data under § 19-11-801 et

1 seq.

2 (2) A solicitation conference may be held:

3 (A) In person; or

4 (B) Online or in another virtual format.

5 (b) Attendance by a vendor at a solicitation conference is not  
6 required for that vendor's bid, proposal, or statement of qualifications and  
7 performance data to be accepted unless the attendance requirement is:

8 (1) Explicitly stated in the invitation for bids, request for  
9 proposals, or request for statements of qualifications and performance data;  
10 and

11 (2) Approved by the State Procurement Director or the head of  
12 the procurement agency.

13 (c) A state agency holding a solicitation conference shall:

14 (1) For an invitation for bids or a request for proposals,  
15 include the date and time of the solicitation conference in the notice  
16 required under § 19-11-229;

17 (2) Require vendors in attendance at a solicitation conference  
18 to sign in at the solicitation conference or provide a registration record  
19 for an online or other virtual solicitation conference, regardless of whether  
20 attendance is required under the solicitation; and

21 (3) Maintain the sign-in sheet or registration records with the  
22 other documents related to the solicitation.

23 (d) A statement made at a solicitation conference does not change the  
24 invitation for bids, request for proposals, or request for statements of  
25 qualifications and performance data unless a change is made by written  
26 amendment to the invitation for bids, request for proposals, or request for  
27 statements of qualifications and performance data.

28 (e) A state agency is encouraged to hold a solicitation conference for  
29 a procurement that:

30 (1) Has a contract amount of at least:

31 (A) Five million dollars (\$5,000,000) for a single  
32 contract year; or

33 (B) Thirty-five million dollars (\$35,000,000) for the  
34 total anticipated term of the contract, including any extensions, based on  
35 the previous contract for the same commodities or services or, if a previous  
36 contract is not available, a contract for similar commodities or services; or

1 (2) Is of strategic importance to the state.

2  
3 19-11-274. Vendor training and polling.

4 The Office of State Procurement shall:

5 (1)(A) Develop and deliver vendor training to inform interested  
6 vendors of how to do business with the state.

7 (B) The training required under subdivision (1)(A) of this  
8 section shall:

9 (i) Be offered throughout the state; and

10 (ii) Be delivered as training sessions in person and  
11 online or in another virtual format; and

12 (2) Periodically poll vendors that have been successful in  
13 securing business with the state and vendors that have not been successful in  
14 securing business with the state to solicit procurement feedback that can be  
15 used to improve vendor training.

16  
17 19-11-275. Requests for information.

18 (a) As used in this section, "request for information" means a  
19 procedure for formally requesting information, data, comments, or reactions  
20 from prospective bidders or offerors in contemplation of a possible  
21 competitive sealed bidding procurement under § 19-11-229 or a competitive  
22 sealed proposal procurement under § 19-11-230.

23 (b) The State Procurement Director, a head of a procurement agency, or  
24 a designee of the director or of a head of a procurement agency, may issue or  
25 authorize another person to issue a request for information.

26 (c) A request for information under this section shall be published in  
27 the same manner and location as an invitation for bids, a request for  
28 proposals, or a request for qualifications.

29 (d) A contract shall not be awarded directly from a request for  
30 information.

31 (e) Information provided in response to a request for information  
32 under this section is exempt from the Freedom of Information Act of 1967, §  
33 25-19-101 et seq., until:

34 (1) The bids for a competitive sealed bidding procurement are  
35 opened publicly;

36 (2) The notice of anticipation to award is given for a

1 competitive sealed proposal procurement; or

2 (3) A decision is made not to pursue a procurement based on the  
3 request for information.

4  
5 19-11-276. Training and certification of procurement personnel.

6 (a) The State Procurement Director shall establish a training and  
7 certification program to facilitate the training, continuing education, and  
8 certification of state agency procurement personnel.

9 (b) As part of the training and certification program required under  
10 this section, the director:

11 (1) Shall conduct procurement education and training for state  
12 agency employees and other public employees;

13 (2)(A) Shall establish a tiered core curriculum that outlines  
14 the minimum procurement-related training courses a state agency employee is  
15 required to complete for certification.

16 (B) The tiered core curriculum required under subdivision  
17 (b)(2)(A) of this section shall:

18 (i) Be designed to develop procurement competency;  
19 and

20 (ii) Create a uniform training approach for state  
21 agency employees ranging from entry-level procurement personnel to agency  
22 procurement officials;

23 (3) May charge a reasonable fee for each participant to cover  
24 the cost of providing the training required under this section;

25 (4) May conduct, develop, and collaborate with established  
26 training programs, if any, for the purpose of providing certifications of  
27 proficiency to state agency employees who complete the training and  
28 certification program;

29 (5) May conduct research into existing and new procurement  
30 methods; and

31 (6) May establish and maintain a state procurement library.

32 (c)(1) Beginning July 1, 2021, a state agency employee shall not  
33 conduct a procurement under this chapter unless the state agency employee is  
34 certified through the training and certification program required under this  
35 section.

36 (2) To maintain certification under this section, a state agency

1 employee shall complete a reasonable number of hours of continuing education,  
2 as provided for by rule by the director.

3 (d)(1) The director shall revoke the certification of a state agency  
4 employee who is certified under this section and who is determined to have  
5 knowingly violated state procurement laws, Arkansas Code Title 19, Chapter  
6 11.

7 (2) The director shall adopt rules regarding the procedure for  
8 revoking a state agency employee's certification under this section.

9  
10 SECTION 13. Arkansas Code § 19-11-802, concerning requests for  
11 statements of qualifications and performance data, is amended to add an  
12 additional subsection to read as follows:

13 (e)(1) A request for statements of qualifications and performance data  
14 under this section may be used for certain procurements through a request for  
15 qualifications other than legal, architectural, engineering, construction  
16 management, land surveying, and interior design services if the:

17 (A) State Procurement Director approves the use of a  
18 request for qualifications and determines that it is the most suitable method  
19 of procurement; and

20 (B) Approval of the director under subdivision (e)(1)(A)  
21 of this section is submitted to the Legislative Council for review.

22 (2) In determining whether a request for qualifications under  
23 this subsection is the most suitable method of procurement, the director  
24 shall consider, based on information submitted by the requesting state  
25 agency:

26 (A) Why the request for qualifications is the most  
27 suitable method of procurement;

28 (B) Why cost should not be considered in the procurement;  
29 and

30 (C) How the cost of the contract will be controlled if  
31 cost is not a factor in the procurement.

32  
33 SECTION 14. DO NOT CODIFY. Rules.

34 (a) When adopting the initial rules required under this act, the State  
35 Procurement Director shall file the final rules with the Secretary of State  
36 for adoption under § 25-15-204(f):

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36

(1) On or before January 1, 2021; or

(2) If approval under § 10-3-309 has not occurred by January 1, 2021, as soon as practicable after approval under § 10-3-309.

(b) The director shall file the proposed rules with the Legislative Council under § 10-3-309(c) sufficiently in advance of January 1, 2021, so that the Legislative Council may consider the rules for approval before January 1, 2021.

*/s/Wardlaw*

**APPROVED: 3/11/19**



**QUESTIONNAIRE FOR FILING PROPOSED RULES AND REGULATIONS  
WITH THE ARKANSAS LEGISLATIVE COUNCIL AND JOINT INTERIM COMMITTEE**

**DEPARTMENT/AGENCY** Department of Finance and Administration  
**DIVISION** Office of State Procurement  
**DIVISION DIRECTOR** Larry A. Walther, Director  
**CONTACT PERSON** Edward Armstrong, Administrator, Office of State Procurement  
**ADDRESS** 1509 W. 7<sup>th</sup> Street, 3<sup>rd</sup> Floor, Little Rock, AR 72201  
Edward.Armstrong@dfa.arkansas.gov  
**PHONE NO.** 501-324-9316 **FAX NO.** 501-324-9311 **E-MAIL** gov  
**NAME OF PRESENTER AT COMMITTEE MEETING** Edward Armstrong  
**PRESENTER E-MAIL** Edward.Armstrong@dfa.arkansas.gov

**INSTRUCTIONS**

- A. Please make copies of this form for future use.**
- B. Please answer each question completely using layman terms. You may use additional sheets, if necessary.**
- C. If you have a method of indexing your rules, please give the proposed citation after "Short Title of this Rule" below.**
- D. Submit two (2) copies of this questionnaire and financial impact statement attached to the front of two copies of the proposed rule and required documents. Mail or deliver to:**

**Donna K. Davis  
 Administrative Rules Review Section  
 Arkansas Legislative Council  
 Bureau of Legislative Research  
 One Capitol Mall, 5<sup>th</sup> Floor  
 Little Rock, AR 72201**

**RECEIVED**  
 FEB 21 2019  
 BUREAU OF  
 LEGISLATIVE RESEARCH

\*\*\*\*\*

1. What is the short title of this rule? R8 19-11-230 Discussions

Pursuant to the authority vested in the Director of the Office of State Procurement by Ark. Code Ann. § 19-11-217 and in compliance with the Arkansas Procedure Act, Ark. Code Ann. § 25-15-201 et seq., the Director of the Office of State Procurement, with the approval of the Director of the Department of Finance and Administration, is promulgating the following rule for the enforcement and administration of the Arkansas Procurement Code.

2. What is the subject of the proposed rule? Procurement Code.

3. Is this rule required to comply with a federal statute, rule, or regulation? Yes  No   
 If yes, please provide the federal rule, regulation, and/or statute citation. \_\_\_\_\_

4. Was this rule filed under the emergency provisions of the Administrative Procedure Act? Yes  No   
 If yes, what is the effective date of the emergency rule?

When does the emergency rule expire? \_\_\_\_\_

Will this emergency rule be promulgated under the permanent provisions of the Administrative Procedure Act? Yes  No

5. Is this a new rule? Yes  No   
If yes, please provide a brief summary explaining the regulation. \_\_\_\_\_

Does this repeal an existing rule? Yes  No   
If yes, a copy of the repealed rule is to be included with your completed questionnaire. If it is being replaced with a new rule, please provide a summary of the rule giving an explanation of what the rule does.

Is this an amendment to an existing rule? Yes  No   
If yes, please attach a mark-up showing the changes in the existing rule and a summary of the substantive changes. **Note: The summary should explain what the amendment does, and the mark-up copy should clearly labeled "mark-up."**

6. Cite the state law that grants the authority for this proposed rule? If codified, please give the Arkansas Code citation. Ark. Code Ann. §19-11-203, §19-11-216, §19-11-217.

7. What is the purpose of this proposed rule? Why is it necessary? To promulgate the rule for the enforcement and administration of the Arkansas Procurement Code, and specifically, to bring the rule into compliance with legislative changes made to Ark. Code Ann. §19-11-230.

8. Please provide the address where this rule is publicly accessible in electronic form via the Internet as required by Arkansas Code § 25-19-108(b). <http://www.dfa.arkansas.gov/offices/procurement> [http://www.sos.arkansas.gov/rules\\_and\\_regs/index.php/rules/search](http://www.sos.arkansas.gov/rules_and_regs/index.php/rules/search)

9. Will a public hearing be held on this proposed rule? Yes  No

If yes, please complete the following:

Date: March 22, 2019

Time: 9:00 AM

Department of Finance and Administration Building, 1509 W. 7th Street, 3<sup>rd</sup> Floor, Little Rock, AR 72201

10. When does the public comment period expire for permanent promulgation? (Must provide a date.)  
March 22, 2019

11. What is the proposed effective date of this proposed rule? (Must provide a date.)  
10 days following the filing of the final rule with the Secretary of State

12. Do you expect this rule to be controversial? Yes  No

If yes, please explain. \_\_\_\_\_

13. Please give the names of persons, groups, or organizations that you expect to comment on these rules? Please provide their position (for or against) if known.

Agency Procurement Officials

---

FEB 21 2013

BUREAU OF LEGISLATIVE RESEARCH

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT Department of Finance and Administration
DIVISION Office of State Procurement
PERSON COMPLETING THIS STATEMENT Edward Armstrong, Administrator, Office of State Procurement
TELEPHONE NO. 501-324-9316 FAX NO. 501-324-9311 EMAIL: Edward.Armstrong@dfa.arkansas.gov

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two copies with the questionnaire and proposed rules.

SHORT TITLE OF THIS RULE R8 19-11-230 Discussions

- 1. Does this proposed, amended, or repealed rule have a financial impact? Yes [ ] No [X]
2. Is the rule based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule? Yes [X] No [ ]
3. In consideration of the alternatives to this rule, was this rule determined by the agency to be the least costly rule considered? Yes [X] No [ ]

If an agency is proposing a more costly rule, please state the following:

- (a) How the additional benefits of the more costly rule justify its additional cost; n/a
(b) The reason for adoption of the more costly rule; n/a
(c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and; n/a
(d) Whether the reason is within the scope of the agency's statutory authority; and if so, please explain. n/a

4. If the purpose of this rule is to implement a federal rule or regulation, please state the following:

(a) What is the cost to implement the federal rule or regulation?

Current Fiscal Year

Next Fiscal Year

General Revenue \$0
Federal Funds \$0

General Revenue \$0
Federal Funds \$0

Cash Funds	\$0
Special Revenue	\$0
Other (Identify)	\$0

Cash Funds	\$0
Special Revenue	\$0
Other (Identify)	\$0

Total \$0 \_\_\_\_\_

Total \$0 \_\_\_\_\_

(b) What is the additional cost of the state rule?

**Current Fiscal Year**

**Next Fiscal Year**

General Revenue	\$0
Federal Funds	\$0
Cash Funds	\$0
Special Revenue	\$0
Other (Identify)	\$0
<b>Total</b>	<b>\$0</b>

General Revenue	\$0
Federal Funds	\$0
Cash Funds	\$0
Special Revenue	\$0
Other (Identify)	\$0
<b>Total</b>	<b>\$0</b>

5. What is the total estimated cost by fiscal year to any private individual, entity and business subject to the proposed, amended, or repealed rule? Identify the entity(ies) subject to the proposed rule and explain how they are affected.

**Current Fiscal Year**

**Next Fiscal Year**

\$ \$0 \_\_\_\_\_

\$ \$0 \_\_\_\_\_

n/a

6. What is the total estimated cost by fiscal year to state, county, and municipal government to implement this rule? Is this the cost of the program or grant? Please explain how the government is affected.

**Current Fiscal Year**

**Next Fiscal Year**

\$ 0 \_\_\_\_\_

\$ 0 \_\_\_\_\_

7. With respect to the agency's answers to Questions #5 and #6 above, is there a new or increased cost or obligation of at least one hundred thousand dollars (\$100,000) per year to a private individual, private entity, private business, state government, county government, municipal government, or to two (2) or more of those entities combined?

Yes  No

If YES, the agency is required by Ark. Code Ann. § 25-15-204(e)(4) to file written findings at the time of filing the financial impact statement. The written findings shall be filed simultaneously with the financial impact statement and shall include, without limitation, the following:

- (1) a statement of the rule's basis and purpose;
- (2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
- (3) a description of the factual evidence that:
  - (a) justifies the agency's need for the proposed rule; and

- (b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
- (4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
  - (5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
  - (6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
  - (7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
    - (a) the rule is achieving the statutory objectives;
    - (b) the benefits of the rule continue to justify its costs; and
    - (c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

RECEIVED

FEB 21 2019

STATE OF ARKANSAS  
DEPARTMENT OF FINANCE AND ADMINISTRATION  
OFFICE OF STATE PROCUREMENT

BUREAU OF  
LEGISLATIVE RESEARCH

**Summary of Rule Promulgation**

Due to legislation passed during the 91<sup>st</sup> General Assembly, the rule is being amended to bring it into compliance with legislative changes made to ACA § 19-11-230.

**R8: 19-11-230 Discussions**

- R8: 19-11-230 (a) is being added to clarify discussions may be conducted with responsible offerors during a request for proposals in order to clarify a proposal or the terms of a request for proposals, and for negotiations. Such pre-award discussions should be conducted in a manner that supports public confidence in public procurement and ensures fairness.
- R8: 19-11-230 (b) is being added to elaborate upon pre-award discussions conducted for clarifications. Namely, that clarifications can be sought in areas of ambiguity, miscommunication, or misunderstanding, but that such clarifications should be documented in the procurement file.
- R8: 19-11-230 (c) is being added to elaborate upon pre-award discussions conducted for negotiations and provide guidance on how such negotiations should be conducted.
  - Provisions for how negotiations might occur should be in the relevant request for proposals, there are no minimum or maximum number of rounds of negotiations other than what could be set forth in a request for proposals;
  - Negotiations may be conducted with a group of responsible offerors identified based on an identified competitive range or just a highest ranking responsible offeror;
  - During serial negotiation with the highest ranked offeror, the procurement agency may only abandon negotiation with the highest ranked offeror if it determines, in writing and for identified cause, that the offeror is not responsible or is otherwise not reasonably susceptible of being awarded a contract;
  - Negotiation may be limited to cost only and shall be documented in the procurement file.
- R8: 19-11-230 (d) is being added to define the criteria for “competitive range” namely that such criteria should be established on a rational basis, and may include price, cost of ownership, responses that provide the best value based on evaluation criteria, responses most likely to provide greater value after negotiations, and evaluation scores.
- R8: 19-11-230 (e) is being added to provide guidance on how the state may establish a minimum score requirement for offerors to be in the competitive range, such minimum score not being unreasonably high.



- R8: 19-11-230 (f) is being added to provide guidance for how the state may elect to negotiate with a single offeror versus a multi-party negotiation, elaborating on factors the state may use to reach a decision, such being:
  - The expected dollar value of the award and length of contract;
  - The complexity of the acquisition and the variety and complexity of offered solutions; and
  - The resources available to conduct discussions versus the expected variable administrative costs of discussions;
  - The impact on lead-time for award versus the need for timely delivery;
  - The extent to which discussions with additional offerors would likely provide diminishing returns;
  - The disparity in pricing between the lowest priced offeror and the other offerors;
  - The disparity in pricing between the highest rated offeror and the other offerors.
  
- R8: 19-11-230 (g) is being added to establish the rules by which the state may conduct best and final offer (BAFO) negotiations if deemed advantageous to the state. Specifically:
  - The state shall determine which responsible offerors are within the competitive range according to the terms of the request for proposals
  - The state may only restrict the BAFO negotiations to a single offeror or engage in a multi-party BAFO negotiations as provided in the request for proposals and consistent with Arkansas Procurement Law, including these rules;
  - BAFO negotiation shall only be conducted with responsible offerors;
  - The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee;
  - The state may request that an offeror readdress important aspects of the proposal;
  - The procurement officer shall dispatch the BAFO request stating the elements to be covered and defining the date and time the BAFO must be returned;
  - All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer;
  - All responses to the BAFO request must be submitted timely to the procurement officer in order to be considered;
  - Only the original proposal or one properly clarified, revised through negotiation, or submitted as a best and final offer may be considered for evaluation;
  - A BAFO request to multiple offerors shall not identify either the current rank of any of the offerors or any identifiable information derived from a proposal.
  
- R8: 19-11-230 (h) is being added to provide guidance for the state on conducting target price BAFO, including determining the proposed pricing, comparing pricing against benchmarks, utilizing market analysis, evaluating the reasonableness of target pricing, sending a request for revised pricing, and determining if improved pricing resulted.

FEB 21 2013

STATE OF ARKANSAS  
DEPARTMENT OF FINANCE AND ADMINISTRATION  
OFFICE OF STATE PROCUREMENT  
CHANGES TO RULES UNDER THE ARKANSAS PROCUREMENT LAW  
Agency Code 006.27

BUREAU OF  
LEGISLATIVE RESEARCH

R8:19-11-230.1 Discussions

(a) DISCUSSIONS GENERALLY. During a request for proposals procurement, Arkansas Procurement Law allows for discussions with responsible offerors whose proposals have been determined to be reasonably susceptible to being selected for award. Discussions may be used to clarify a proposal or the terms of a request for proposals, and for the purpose of negotiation. Pre-award discussions with any offeror or offerors should be conducted in a manner that supports public confidence in the procedures followed in public procurement, ensures fairness in proposal improvement, and fosters effective competition. To safeguard against discussions being used to provide an offeror an unfair competitive advantage:

(1) A request for proposals shall outline how discussions will be held, if at all; and

(2) There shall be no disclosure to any offeror of any information derived from any proposal by any competing offeror during discussions.

(b) CLARIFICATION. While conducting discussions, a procurement agency may identify areas of a proposal that require further clarification, such as areas where it appears that there may have been ambiguity, miscommunication or misunderstanding as to the State's evaluation factors, specifications, or requirements. The State may seek clarification of a proposal or proposals through written questions, demonstrations, or during negotiations, but shall document any such discussion for the procurement file. Any oral clarification made by an offeror during discussions shall be reduced to writing and adopted by the offeror as a binding statement before it may be considered in evaluating whether the offeror's proposal is responsive or the most advantageous to the State. Note that a clarification sought by the State may be unique to an individual offeror based on unique aspects of the offeror's proposal.

(c) NEGOTIATION. Negotiation is a discretionary type of discussion permitted under Ark. Code. Ann. § 19-11-230 that can be used to seek a proposal or proposals more advantageous to the State than the proposal or proposals initially submitted in response to the solicitation. During a solicitation, the State may only have pre-award discussions with an offeror as provided in the request for proposals and as permitted under procurement rules.

(1) Because negotiation is a type of discussion, a procurement agency interested in the possibility of negotiation in connection with the solicitation of proposals shall include provisions in its request for proposals outlining how negotiation, if any, may be conducted.

(2) Because negotiation is optional and at the discretion of the State, there is no minimum number of negotiation rounds and no maximum number of negotiation rounds that may be conducted other than any that may have been set forth in the request for proposals.

(3) If and as permitted by the request for proposals, negotiations may be conducted with a group of responsible offerors identified based on an established competitive range (those reasonably susceptible of being awarded a contract based on the evaluation factors set forth in the request for proposals), or just with the highest ranked responsible offeror reasonably susceptible of being awarded a contract.

(4) If a request for proposals only allows for serial negotiation with the highest ranked offeror, then the procurement agency may only abandon negotiation with the highest ranked offeror if it determines, in writing and for identified cause, that the offeror is not responsible or is otherwise not reasonably susceptible of being awarded a contract. The procurement agency may proceed to additional rounds of negotiation with another offeror or offerors if not prohibited by the request for proposals. The procurement agency shall apply the same standard of responsibility and evaluation factors fairly to any subsequent offeror or offerors.

(5) Negotiation may be limited to cost only. All cost only negotiations shall be documented for the procurement file. During cost only negotiation rounds, responsible offerors are not obligated to meet or beat target prices but will not be allowed to increase prices submitted on the initial price sheet.

(d) REASONABLY SUSCEPTIBLE OF BEING AWARDED A CONTRACT – THE COMPETITIVE RANGE. Given the number of proposals and the broad range of competitiveness of responses, it may not be practicable to engage in negotiations with each and every offeror. If the procurement agency receives multiple proposals, it may shorten the list of offerors to negotiate with to a “competitive range” of responsible offerors reasonably susceptible of being awarded a contract. That is the range of responsible offerors that fall within the “competitive range.” The competitive range shall be determined based on criteria set forth in the request for proposals. For example, and not by limitation, a request for proposals may provide that only the three highest ranked vendors are eligible for negotiation. The criteria for selecting the competitive range included in the request for proposals may be established on any rational basis, including, without limitation, one or more of the following:

(1) Price; or

(2) Cost of Ownership; or

(3) Responses that appear to provide the best value based on evaluation criteria in the solicitation; or

(4) Responses most likely to provide greater value after negotiations based on the same criteria; or

(5) Evaluation scores.

(e) MINIMUM SCORE. The agency procurement official, in conjunction with the requesting agency as appropriate, may establish a minimum score in the request for proposals that an offeror must achieve before the offeror will be considered in the competitive range and thus eligible for additional negotiation. However, to foster competition, any such minimum score shall not be set unreasonably high. In the interest of protecting competition, the State Procurement Director may waive the minimum score if it eliminates all but one responsible offeror or otherwise unreasonably narrows the competitive range, and if he or she determines it to be in the best interest of the State.

(f) NEGOTIATION WITH SINGLE OFFEROR VERSUS MULTI-PARTY NEGOTIATION. When deciding whether to structure a request for proposals that limits negotiation to just the highest evaluated responsible offeror instead of engaging in multi-party negotiations, the procurement agency should consider the following:

(1) The expected dollar value of the award and length of contract. Increased dollar value and a lengthy duration weigh in favor of greater competition; and

(2) The complexity of the acquisition and the variety and complexity of offered solutions, in terms of impact on the likely breadth and depth of the discussions. Increased complexity may signal that more time for negotiation is needed, which may weigh in favor of limiting negotiations to the competitive range of highest ranked vendors if there was not enough lead time to allow for lengthy negotiations; and

(3) The resources available to conduct discussions versus the expected variable administrative costs of discussions; and

(4) The impact on lead-time for award versus the need for timely delivery; and

(5) The extent to which discussions with additional offerors would likely provide diminishing returns; and

(6) The disparity in pricing between the lowest priced offeror and the other offerors; and

(7) The disparity in pricing between the highest rated offeror and the other offerors.

(g) BEST AND FINAL OFFER (BAFO) NEGOTIATION. Best and final offer (BAFO) negotiation is an optional step to help obtain an offer that is more advantageous for the State, such as enhanced value or the most cost-effective pricing available.

(1) The BAFO process may be useful when:

(A) No single response addresses all the specifications; or

(B) The cost submitted by all offerors is too high (e.g., exceeds the State's estimate of expected costs, budget, etc.); or

(C) The scores of two or more offerors are very close after the initial evaluation; or

(D) All offerors submitted responses that are unclear or deficient in one or more areas.

(2) The following rules shall apply to BAFO negotiations:

(A) The procurement agency shall determine if the BAFO process will be conducted and, if so, shall determine which responsible offerors are within the competitive range according to the terms of the request for proposals for receipt of the State's BAFO request; and

(B) The procurement agency may only restrict the BAFO negotiations to a single offeror or engage in a multi-party BAFO negotiation as provided in the request for proposals and consistent with Arkansas Procurement Law, including these rules; and

(C) BAFO negotiation shall only be conducted with responsible offerors. Any offeror determined to be non-responsible shall be excluded. Any offeror whose proposal is rejected as non-responsive or is outside of the competitive range defined in the request for proposals shall be excluded from participation in a BAFO negotiation unless circumstances change which result in their falling within the competitive range; and

(D) The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee; and

(E) A procurement agency may request that an offeror readdress important aspects of the proposal, including, without limitation, implementation schedule, level of support, amount of resources proposed, terms and conditions or cost; and

(F) The procurement officer shall dispatch the BAFO request stating the elements to be covered and defining the date and time the BAFO must be returned; and

(G) All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer; and

(H) All responses to the BAFO request must be submitted timely to the procurement officer in order to be considered. BAFO's submitted after the deadline shall not be considered, unless the procurement officer or director determines that:

(i) the submission was timely, but that delivery was prevented by a force majeure; or

(ii) the delay in delivery is not substantial and does not prejudice the State; or

(iii) that waiver of the deadline is in the best interest of the

State; and

(I) Only the original proposal or one properly clarified, revised through negotiation, or submitted as a best and final offer may be considered for evaluation; and

(J) A BAFO request to multiple offerors shall not identify either the current rank of any of the offerors or any identifiable information derived from a proposal.

(3) All BAFO requests shall contain the following:

(A) Specific information on what is being requested. Offerors may be asked to provide additional clarification to specific sections of their response and to rework their proposal content or cost proposal; and

(B) Submission requirements with time lines; and

(C) Specifics on how the offer or offers will be evaluated and outline the process that will be used to determine the successful offeror, as applicable; and

(D) Language stating the procurement officer or the evaluation committee will evaluate and score the BAFO offer(s) after considering the new content of the BAFO proposal(s); and

(E) Notice to offerors that they are not required to submit a BAFO proposal and may submit a written response stating that their response remains as originally submitted.

(4) All scoring worksheets (e.g., original evaluation scores, best and final scores, etc.) shall be retained for inclusion in the procurement file. Scores for the BAFO responses shall be entered into a new score sheet/summary worksheet by the procurement officer.

(h) TARGET PRICE BAFO. A target price BAFO request is a BAFO request that is limited to allowing responsible offerors an opportunity to improve upon their responses by offering more competitive pricing. Proposers are not obligated to meet or beat target prices, but shall not be allowed to increase overall prices in a target price BAFO negotiation. All communications, clarifications and negotiations shall be conducted in a manner that supports fairness in the proposal improvement and does not reveal individual offeror pricing. The State's target price may be reached by considering factors such as the current/last contract price paid for the service, benchmarks, industry standards, budgets, raw materials that influence the pricing of the product, or market trends. If the State opts to engage in target price BAFO negotiation, then after the initial responses have been received the procurement officer shall:

(1) Determine the lowest proposed cost for each line item, as applicable; and

(2) Compare the lowest proposed cost for each line item against current/past contract price and other benchmarks; and

(3) Use market analysis to set a target price for each line item in a spreadsheet; and

(4) Evaluate the reasonableness of the target price for each line item and for the total target price overall; and

(5) Send standard language with a request for revised pricing and a target price spreadsheet to offerors deemed responsible and responsive; and

(6) Receive target cost proposals; and

(7) Determine if target price negotiation resulted in improved cost proposals; and

(8) If the receipt of target price proposals did not result in one or more cost proposals at or below the State's target price, the procurement officer shall evaluate whether an additional round of target price negotiation will result in one or more cost proposals at or below the State's target price.

**~~R8:19-11-230. Negotiations.~~**

~~(a) Negotiation of Request for Proposals should be authorized in those cases where the best interests of the State are served. Negotiations are begun with the highest ranked offeror based on the scores as established in the Request for Proposals' scoring criteria. If a satisfactorily negotiated contract cannot be developed, the offeror may be declared not to be a responsible offeror, the proposal may be rejected, and time permitting, the negotiation process may be repeated with the next respondent deemed most likely to be awarded a contract.~~

~~(b) Prior to negotiation, the Request for Proposals file must include documentation giving the stated purpose for the negotiation and the objective to be achieved.~~

~~(c) An agency should investigate with the provider determined most likely to be awarded a contract, factors affecting the price, performance, and scope of services to be offered including current market conditions.~~

~~(d) Prior to initiating negotiations, the agency must develop a plan to include at least:  
(1) The acceptable range of price, the desired "best" price and the highest acceptable price.~~

~~(2) Adjustments to the scheduled delivery of services that may have an impact on price.~~

~~(3) Acceptable modifications in the overall scope of work.~~

~~(4) A prioritized list of acceptable changes in services that may result in price reduction.~~

~~(5) Timetable for completion of negotiation.~~

~~(e) No part of any negotiation plan shall be revealed to bidder(s) or made available for public review until after a contract award.~~

~~(f) An acceptable negotiated contract shall list the agreed upon terms, conditions, specifications, quantities and pricing, and be signed by the agency and the provider.~~

~~(g) All proposals may be rejected if, after evaluation of the proposals, including consideration of any clarifying or explanatory information submitted by the bidders, it is determined by the procurement official that no satisfactory proposal has been received.~~

MAY 02 2019

STATE OF ARKANSAS  
DEPARTMENT OF FINANCE AND ADMINISTRATION  
OFFICE OF STATE PROCUREMENT  
BUREAU OF LEGISLATIVE RESEARCH  
CHANGES TO RULES UNDER THE ARKANSAS PROCUREMENT LAW  
Agency Code 006.27

R8:19-11-230.1 Discussions

(a) DISCUSSIONS GENERALLY. During a request for proposals procurement, Arkansas Procurement Law allows for discussions with responsible offerors whose proposals have been determined to be reasonably susceptible to being selected for award. Discussions may be used to clarify a proposal or the terms of a request for proposals, and for the purpose of negotiation. Pre-award discussions with any offeror or offerors should be conducted in a manner that supports public confidence in the procedures followed in public procurement, ensures fairness in proposal improvement, and fosters effective competition. To safeguard against discussions being used to provide an offeror an unfair competitive advantage:

(1) A request for proposals shall outline how discussions will be held, if at all; and

(2) There shall be no disclosure to any offeror of any information derived from any proposal by any competing offeror during discussions.

(b) CLARIFICATION. While conducting discussions, a procurement agency may identify areas of a proposal that require further clarification. such as This includes without limitation, areas where it appears that there may have been ambiguity, miscommunication or misunderstanding as to the State's evaluation factors, specifications, or requirements. The State may seek clarification of a proposal or proposals through written questions, demonstrations, or during negotiations, but shall document any such discussion for the procurement file. Any oral clarification made by an offeror during discussions shall be reduced to writing and adopted by the offeror as a binding statement before it may be considered in evaluating whether the offeror's proposal is responsive or the most advantageous to the State. Note that a clarification sought by the State may be unique to an individual offeror based on unique aspects of the offeror's proposal.

(c) NEGOTIATION. Negotiation is a discretionary type of discussion permitted under Ark. Code. Ann. § 19-11-230 that can be used to seek a proposal or proposals more advantageous to the State than the proposal or proposals initially submitted in response to the solicitation. During a solicitation, the State may only have pre-award discussions with an offeror as provided in the request for proposals and as permitted under procurement rules.

(1) Because negotiation is a type of discussion, a procurement agency interested in the possibility of negotiation in connection with the solicitation of proposals shall include provisions in its request for proposals outlining how negotiation, if any, may be conducted.



(2) Because negotiation is optional and at the discretion of the State, there is no minimum number of negotiation rounds and no maximum number of negotiation rounds that may be conducted other than any that may have been set forth in the request for proposals.

(3) If and as permitted by the request for proposals, negotiations may be conducted with a group of responsible offerors identified based on an established competitive range (those reasonably susceptible of being awarded a contract based on the evaluation factors set forth in the request for proposals), or just with the highest ranked responsible offeror reasonably susceptible of being awarded a contract.

(4) If a request for proposals only allows for serial negotiation with the highest ranked offeror, then the procurement agency may only abandon negotiation with the highest ranked offeror if it determines, in writing and for identified cause, that the offeror is not responsible or is otherwise not reasonably susceptible of being awarded a contract. The procurement agency may proceed to additional rounds of negotiation with another offeror or offerors if not prohibited by the request for proposals. The procurement agency shall apply the same standard of responsibility and evaluation factors fairly to any subsequent offeror or offerors.

(5) Negotiation may be limited to cost only. All cost only negotiations shall be documented for the procurement file. During cost only negotiation rounds, responsible offerors are not obligated to meet or beat target prices but will not be allowed to increase prices submitted on the initial price sheet.

(d) REASONABLY SUSCEPTIBLE OF BEING AWARDED A CONTRACT – THE COMPETITIVE RANGE. Given the number of proposals and the broad range of competitiveness of responses, it may not be practicable to engage in negotiations with each and every offeror. If the procurement agency receives multiple proposals, it may shorten the list of offerors to negotiate with to a “competitive range” of responsible offerors reasonably susceptible of being awarded a contract. That is the range of responsible offerors that fall within the “competitive range.” The competitive range shall be determined based on criteria set forth in the request for proposals. For example, and not by limitation, a request for proposals may provide that only the three highest ranked vendors are eligible for negotiation. The criteria for selecting the competitive range included in the request for proposals may be established on any rational basis, including, without limitation, one or more of the following:

(1) Price; or

(2) Cost of Ownership; or

(3) Responses that appear to provide the best value based on evaluation criteria in the solicitation; or

(4) Responses most likely to provide greater value after negotiations based on the same criteria; or

(5) Evaluation scores.

(e) MINIMUM SCORE. The agency procurement official, in conjunction with the requesting agency as appropriate, may establish a minimum score in the request for proposals that an offeror must achieve before the offeror will be considered in the competitive range and thus eligible for additional negotiation. However, to foster competition, any such minimum score shall not be set unreasonably high. In the interest of protecting competition, the State Procurement Director may waive the minimum score if it eliminates all but one responsible offeror or otherwise unreasonably narrows the competitive range, and if he or she determines it to be in the best interest of the State.

(f) NEGOTIATION WITH SINGLE OFFEROR VERSUS MULTI-PARTY NEGOTIATION. When deciding whether to structure a request for proposals that limits negotiation to just the highest evaluated responsible offeror instead of engaging in multi-party negotiations, the procurement agency should consider the following:

(1) The expected dollar value of the award and length of contract. Increased dollar value and a lengthy duration weigh in favor of greater competition; and

(2) The complexity of the acquisition and the variety and complexity of offered solutions, in terms of impact on the likely breadth and depth of the discussions. Increased complexity may signal that more time for negotiation is needed, which may weigh in favor of limiting negotiations to the competitive range of highest ranked vendors if there was not enough lead time to allow for lengthy negotiations; and

(3) The resources available to conduct discussions versus the expected variable administrative costs of discussions; and

(4) The impact on lead-time for award versus the need for timely delivery; and

(5) The extent to which discussions with additional offerors would likely provide diminishing returns; and

(6) The disparity in pricing between the lowest priced offeror and the other offerors; and

(7) The disparity in pricing between the highest rated offeror and the other offerors.

(g) BEST AND FINAL OFFER (BAFO) NEGOTIATION. Best and final offer (BAFO) negotiation is an optional step to help obtain an offer that is more advantageous for the State, such as enhanced value or the most cost-effective pricing available.

(1) The BAFO process may be useful when:

(A) No single response addresses all the specifications; or

(B) The cost submitted by all offerors is too high (e.g., exceeds the State's estimate of expected costs, budget, etc.); or

(C) The scores of two or more offerors are very close after the initial evaluation; or

(D) All offerors submitted responses that are unclear or deficient in one or more areas.

(2) The following rules shall apply to BAFO negotiations:

(A) The procurement agency shall determine if the BAFO process will be conducted and, if so, shall determine which responsible offerors are within the competitive range according to the terms of the request for proposals for receipt of the State's BAFO request; and

(B) The procurement agency may only restrict the BAFO negotiations to a single offeror or engage in a multi-party BAFO negotiation as provided in the request for proposals and consistent with Arkansas Procurement Law, including these rules; and

(C) BAFO negotiation shall only be conducted with responsible offerors. Any offeror determined to be non-responsible shall be excluded. Any offeror whose proposal is rejected as non-responsive or is outside of the competitive range defined in the request for proposals shall be excluded from participation in a BAFO negotiation unless circumstances change which result in their falling within the competitive range; and

(D) The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee; and

(E) A procurement agency may request that an offeror readdress important aspects of the proposal, including, without limitation, implementation schedule, level of support, amount of resources proposed, terms and conditions or cost; and

(F) The procurement officer shall dispatch the BAFO request stating the elements to be covered and defining the date, and time, and place the BAFO must be returned; and

(G) All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer; and

(H) All responses to the BAFO request must be submitted timely to the procurement officer in order to be considered. BAFO's submitted after the deadline shall not be considered, unless the procurement officer or director determines that:

(i) the submission was timely, but that delivery was prevented by a force majeure; or

(ii) the delay in delivery is not substantial and does not prejudice the State; or

(iii) that waiver of the deadline is in the best interest of the

State; and

(I) Only the original proposal or one properly clarified, revised through negotiation, or submitted as a best and final offer may be considered for evaluation; and

(J) A BAFO request to multiple offerors shall not identify either the current rank of any of the offerors or any identifiable information derived from a proposal.

(3) All BAFO requests shall contain the following:

(A) Specific information on what is being requested. Offerors may be asked to provide additional clarification to specific sections of their response and to rework their proposal content or cost proposal; and

(B) Submission requirements with time lines; and

(C) Specifics on how the offer or offers will be evaluated and outline the process that will be used to determine the successful offeror, as applicable; and

(D) Language stating the procurement officer or the evaluation committee will evaluate and score the BAFO offer(s) after considering the new content of the BAFO proposal(s); and

(E) Notice to offerors that they are not required to submit a BAFO proposal and may submit a written response stating that their response remains as originally submitted.

(4) All scoring worksheets (e.g., original evaluation scores, best and final scores, etc.) shall be retained for inclusion in the procurement file. Scores for the BAFO responses shall be entered into a new score sheet/summary worksheet by the procurement officer.

(h) TARGET PRICE BAFO. A target price BAFO request is a BAFO request that is limited to allowing responsible offerors an opportunity to improve upon their responses by offering more competitive pricing. Proposers are not obligated to meet or beat target prices, but shall not be allowed to increase overall prices in a target price BAFO negotiation. All communications, clarifications and negotiations shall be conducted in a manner that supports fairness in the proposal improvement and does not reveal individual offeror pricing. The State's target price may be reached by considering factors such as the current/last contract price paid for the service, benchmarks, industry standards, budgets, raw materials that influence the pricing of the product, or market trends. If the State opts to engage in target price BAFO negotiation, then after the initial responses have been received the procurement officer shall:

(1) Determine the lowest proposed cost for each line item, as applicable; and

(2) Compare the lowest proposed cost for each line item against current/past contract price and other benchmarks; and

(3) Use market analysis to set a target price for each line item in a spreadsheet; and

(4) Evaluate the reasonableness of the target price for each line item and for the total target price overall; and

(5) Send standard language with a request for revised pricing and a target price spreadsheet to offerors deemed responsible and responsive; and

(6) Receive target cost proposals; and

(7) Determine if target price negotiation resulted in improved cost proposals; and

(8) If the receipt of target price proposals did not result in one or more cost proposals at or below the State's target price, the procurement officer shall evaluate whether an additional round of target price negotiation will result in one or more cost proposals at or below the State's target price.

***R8:19-11-230. Negotiations.***

~~(a) Negotiation of Request for Proposals should be authorized in those cases where the best interests of the State are served. Negotiations are begun with the highest ranked offeror based on the scores as established in the Request for Proposals' scoring criteria. If a satisfactorily negotiated contract cannot be developed, the offeror may be declared not to be a responsible offeror, the proposal may be rejected, and time permitting, the negotiation process may be repeated with the next respondent deemed most likely to be awarded a contract.~~

~~(b) Prior to negotiation, the Request for Proposals file must include documentation giving the stated purpose for the negotiation and the objective to be achieved.~~

~~(c) An agency should investigate with the provider determined most likely to be awarded a contract, factors affecting the price, performance, and scope of services to be offered including current market conditions.~~

~~(d) Prior to initiating negotiations, the agency must develop a plan to include at least:  
(1) The acceptable range of price, the desired "best" price and the highest acceptable price.~~

~~(2) Adjustments to the scheduled delivery of services that may have an impact on price.~~

~~(3) Acceptable modifications in the overall scope of work.~~

~~(4) A prioritized list of acceptable changes in services that may result in price reduction.~~

~~(5) Timetable for completion of negotiation.~~

~~(e) No part of any negotiation plan shall be revealed to bidder(s) or made available for public review until after a contract award.~~

~~(f) An acceptable negotiated contract shall list the agreed upon terms, conditions, specifications, quantities and pricing, and be signed by the agency and the provider.~~

~~(g) All proposals may be rejected if, after evaluation of the proposals, including consideration of any clarifying or explanatory information submitted by the bidders, it is determined by the procurement official that no satisfactory proposal has been received.~~