

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
92nd General Assembly
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As Engrossed: H2/4/19 S2/25/19
A Bill

HOUSE BILL 1178

By: Representative Wardlaw

By: Senator Flippo

For An Act To Be Entitled

AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO AMEND THE LAWS CONCERNING VARIOUS PROCUREMENT METHODS; TO ALLOW FOR REQUESTS FOR INFORMATION; TO AMEND THE LAW CONCERNING THE PROCUREMENT OF PROFESSIONAL SERVICES; TO PROVIDE FOR THE TRAINING AND CERTIFICATION OF PROCUREMENT OFFICIALS; TO REQUIRE THAT COST BE WEIGHTED A CERTAIN AMOUNT IN EVALUATING RESPONSES TO A REQUEST FOR PROPOSALS; TO ALLOW FOR THE USE OF PRIVATE EVALUATORS IN EVALUATING RESPONSES TO A REQUEST FOR PROPOSALS; TO REQUIRE THAT RULES PROMULGATED BY THE STATE PROCUREMENT DIRECTOR BE SUBMITTED TO AND REVIEWED BY THE REVIEW SUBCOMMITTEE OF THE LEGISLATIVE COUNCIL; TO AUTHORIZE AND REGULATE SOLICITATION CONFERENCES UNDER THE ARKANSAS PROCUREMENT LAW; TO REQUIRE THAT VENDOR TRAINING AND POLLING BE CONDUCTED UNDER THE ARKANSAS PROCUREMENT LAW; TO AMEND THE LAW CONCERNING THE NEGOTIATION OF COMPETITIVE SEALED BIDS AND COMPETITIVE SEALED PROPOSALS UNDER THE ARKANSAS PROCUREMENT LAW; TO AMEND THE LAW CONCERNING THE REJECTION OF A BID OR PROPOSAL UNDER THE ARKANSAS PROCUREMENT LAW; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE LAWS CONCERNING VARIOUS PROCUREMENT METHODS; TO PROVIDE FOR THE TRAINING AND CERTIFICATION OF PROCUREMENT



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

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) Complete a quotation abstract that includes the:

(i) Names of the firms contacted;

(ii) Time that each firm was contacted;

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

(iv) Method used for contacting each firm.

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

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

19-11-273. Solicitation conferences.

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

seq.

(2) A solicitation conference may be held:

(A) In person; or

(B) Online or in another virtual format.

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

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

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

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

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

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

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

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

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

(1) Has a contract amount of at least:

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

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

(2) Is of strategic importance to the state.

19-11-274. Vendor training and polling.

The Office of State Procurement shall:

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

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

(i) Be offered throughout the state; and

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

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

19-11-275. Requests for information.

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

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

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

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

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

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

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

competitive sealed proposal procurement; or

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

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

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

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

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

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

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

(i) Be designed to develop procurement competency;
and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SECTION 14. DO NOT CODIFY. Rules.

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

(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