

STATE OF ARKANSAS
DEPARTMENT OF FINANCE AND ADMINISTRATION
OFFICE OF STATE PROCUREMENT
MARKUP RULE 2013-2
CHANGES TO RULES UNDER THE ARKANSAS PROCUREMENT LAW
Agency Code 006.27

R6:19-11-203. Hidden Damages.

(a) Under subsection (14)(EE), “hidden or unknown damages” refers to damages to machinery needing repair that were not visible or readily apparent to, or were otherwise not within the knowledge of agency personnel at the time the piece of machinery was being serviced by a vendor. By way of example and not limitation, if an agency takes a piece of machinery to a vendor to repair one or more problems, and in the course of such work the vendor notices one or more additional problems that need repair, the agency may, but is not required to, authorize that vendor to undertake such additional repairs without having to solicit competitive bids.

(b) “Machinery” means mechanical devices or combinations of mechanical powers and devices purchased or constructed and used to perform some function and to produce a certain effect or result.

(c) This exemption does not apply to damages that are visible, readily apparent, or are or could be within the knowledge of agency personnel with the exercise of reasonable inspection or investigation.

R1:19-11-204. Requests for Qualification Procurement Method.

(a) The request for qualifications procurement method is used, with prior written approval from the Director of the Office of State Procurement, when the qualifications or specialized expertise of the vendor is the most important factor in selection. The RFQ is sent to those vendors whose work résumé indicates that they are best suited to perform the scope of work or services required.

(b) Notification of RFQ’s, for which the OSP is responsible, in amounts greater than ~~\$25,000~~ fifty thousand dollars (\$50,000), will be made on the OSP website, www.arkansas.gov/dfa/procurement. The agency makes its initial selection based upon the respondent’s qualifications. Only after the most qualified respondent is identified does cost become a factor in determining the award. Discussion may

be conducted with qualified vendors who, based upon qualifications submitted, are determined to reasonably be susceptible of being selected for the purpose of clarification to assure full understanding of, and responsiveness to the solicitation requirements, and to obtain best and final offers.

R2:19-11-204. Ethical Standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than ~~\$5,000~~ten thousand dollars (\$10,000): “It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies maintained by the contractor for the purpose of securing business.”

R2:19-11-229. Competitive Sealed Bidding.

CONDITIONS FOR USE.

(a) LEASE. All contracts for the lease of a commodity which exceed a cost of ~~twenty-five thousand dollars (\$25,000)~~fifty thousand dollars (\$50,000) during the initial period of the contract shall be awarded on the basis of competitive sealed bids. All contracts for the lease of a commodity ~~which~~that do not exceed ~~twenty-five thousand dollars (\$25,000)~~fifty thousand dollars (\$50,000) during the initial period of the contract but contain an option to purchase a commodity costing more than ~~twenty-five thousand dollars (\$25,000)~~fifty thousand dollars (\$50,000) shall be awarded on the basis of competitive sealed bids. No lease duration including renewals can extend beyond a seven-year period. The term “lease” shall include rent.

R7:19-11-229. Competitive Sealed Bidding.

(3) TIE BIDS. ~~In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications. An award will be made by lot (flip of a coin). The coin flip will be done in the presence of a witness by the person responsible for awarding the contract. The witness must~~

~~be an employee of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by both parties.~~

(A) Definitions: As used in this section

(i) "Arkansas company" means a domestic corporation, limited liability company, partnership, or not-for-profit organization as defined by Arkansas law; and

(ii) "Out-of-state company" means all foreign entities as defined by Arkansas law.

(B) In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications.

(C) In the event of a tie bid between two or more offers that meet the specifications as required and where one of the offerors is an Arkansas company, then the award shall be made to that Arkansas company.

(D) In the event of a tie bid between two or more offers that meet the specifications as required

(i) and where at least two of the offerors are Arkansas companies, then an award will be determined by lot (flip of a coin) between those Arkansas companies;

(ii) or if all of the offerors are out-of-state companies, then an award will be determined by lot (flip of a coin) among all the bidders.

(E) The coin flip will be done in the presence of at least one witness by the person responsible for awarding the contract. All witnesses must be employees of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by the person responsible for awarding the contract and all witnesses.

R14:19-11-229. Ethical Standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than ~~\$5,000~~ten thousand dollars (\$10,000): "It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies maintained by the contractor for the purpose of securing business."

R5:19-11-230. Competitive Sealed Proposals.

~~(c) TIE BIDS. In the event the evaluation of criteria and awarding of points result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications. An award will be made by lot (flip of a coin). The coin flip will be done in the presence of a witness by the person responsible for awarding the contract. The witness must be an employee of the State of Arkansas. Documentation of the coin flip must be included on the abstract or proposal history sheet and be signed by both parties. (1) Definitions: As used in this section~~

~~(i) "Arkansas company" means a domestic corporation, limited liability company, partnership, or not-for-profit organization as defined by Arkansas law; and~~

~~(ii) "Out-of-state company" means all foreign entities as defined by Arkansas law.~~

~~(2) In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications.~~

~~(3) In the event of a tie bid between two or more offers that meet the specifications as required and where one of the offerors is an Arkansas company, then the award shall be made to that Arkansas company.~~

~~(4) In the event of a tie bid between two or more offers that meet the specifications as required~~

~~(i) and where at least two of the offerors are Arkansas companies, then an award will be determined by lot (flip of a coin) between those Arkansas companies;~~

~~(ii) or if all of the offerors are out-of-state companies, then an award will be determined by lot (flip of a coin) among all the bidders.~~

~~(5) The coin flip will be done in the presence of at least one witness by the person responsible for awarding the contract. All witnesses must be employees of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by the person responsible for awarding the contract and all witnesses.~~

R10:19-11-230. Ethical Standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than \$5,000ten thousand dollars (\$10,000): "It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a

state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies maintained by the contractor for the purpose of securing business.”

R1:19-11-231. Small Procurements – Conditions For Use.

(1) LEASE. All state agencies may lease commodities with the exclusion of vehicles (See Ark. Code Ann. § 22-8-102) where the cost does not exceed ~~five thousand dollars (\$5,000)~~ten thousand dollars (\$10,000) during the initial period of the contract without seeking competitive bids, provided the lease does not contain an option to purchase. Such leases may not be renewed beyond accumulated expenditures of ~~five thousand dollars (\$5,000)~~ten thousand dollars (\$10,000).

R2:19-11-232. Ethical Standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than ~~\$5,000~~ten thousand dollars (\$10,000): “It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies maintained by the contractor for the purpose of securing business.”

R1:19-11-233. Emergency Procurements.

~~(c) TIE BIDS. In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications. An award will be made by lot (flip of a coin). The coin flip will be done in the presence of a witness by the person responsible for awarding the contract. The witness must be an employee of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by both parties. (1) Definitions: As used in this section~~

(i) “Arkansas company” means a domestic corporation, limited liability company, partnership, or not-for-profit organization as defined by Arkansas law; and

(ii) “Out-of-state company” means all foreign

entities as defined by Arkansas law.

(2) In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications.

(3) In the event of a tie bid between two or more offers that meet the specifications as required and where one of the offerors is an Arkansas company, then the award shall be made to that Arkansas company.

(4) In the event of a tie bid between two or more offers that meet the specifications as required

(i) and where at least two of the offerors are Arkansas companies, then an award will be determined by lot (flip of a coin) between those Arkansas companies;

(ii) or if all of the offerors are out-of-state companies, then an award will be determined by lot (flip of a coin) among all the bidders.

(5) The coin flip will be done in the presence of at least one witness by the person responsible for awarding the contract. All witnesses must be employees of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by the person responsible for awarding the contract and all witnesses.

(d) **PROFESSIONAL AND CONSULTANT SERVICES.** Emergency procurements of professional and consultant services that total ~~\$25,000~~fifty thousand dollars (\$50,000) or less may be procured using the method as described in R1:19-11-233(A) through (C). For those PCS contracts that exceed ~~\$25,000~~fifty thousand dollars (\$50,000), the agency chief fiscal officer or equivalent or director, division director or deputy director of an agency, college or university may institute a request for emergency action review of a professional or consultant service contract by providing in writing a request to the Director of State Procurement. The request must detail that to procure using other methods would endanger human life or health, state property or the functional capability of the agency. The State Procurement Director may then approve submission of the contract to the Legislative Council. Under its emergency action procedures, the Co-chairpersons of the Legislative Council and/or the Co-chairpersons of the Legislative Council Review Committee may review PCS contracts on behalf of the Legislative Council, provided a written report of the review process is presented to the Legislative Council at its next regular meeting. ~~(This regulation implements Arkansas Legislative Council Rule # 19).~~

R2:19-11-233. Ethical Standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than ~~\$5,000~~ten thousand dollars (\$10,000): “It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies maintained by the contractor for the purpose of securing business.”

R1:19-11-234. Competitive Bidding – Conditions for Use.

(1) SUPPLIES. All state agencies may purchase certain supplies subject to Amendment 54 under the following condition: If the cost of the commodity is ~~twenty-five thousand dollars (\$25,000)~~fifty thousand dollars (\$50,000) or less, the state agency must obtain, wherever possible, at least three (3) written competitive bids.

(2) PRINTING AND STATIONERY. The State Procurement Director or his designee shall purchase all printing and stationery subject to Amendment 54 under the following condition: If the cost of the commodity is ~~twenty-five thousand dollars (\$25,000)~~fifty thousand dollars (\$50,000) or less, the State Procurement Director or his designee must obtain, wherever possible at least three (3) written competitive bids.

R2:19-11-234. Competitive Bidding.

(2) All contracts for the lease of a commodity ~~which~~that exceed a cost of ~~five thousand dollars (\$5,000)~~ten thousand dollars (\$10,000) but are less than ~~twenty-five thousand dollars (\$25,000)~~fifty thousand dollars (\$50,000) during the initial period of the contract shall be awarded on the basis of competitive bidding. A purchase option and/or lease renewal is allowed as long as the accumulated expenditure does not exceed ~~twenty-five thousand dollars (\$25,000)~~fifty thousand dollars (\$50,000).

R6:19-11-234. Competitive bidding.

~~TIE BIDS. In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications. An award will be made by lot (flip of the coin). The coin flip will be done in the presence of a witness by the person responsible for awarding the contract. The witness must be an employee of the State of Arkansas. Documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by both parties. (a) Definitions: As used in this section~~

~~(1) "Arkansas company" means a domestic corporation, limited liability company, partnership, or not-for-profit organization as defined by Arkansas law; and~~

~~(2) "Out-of-state company" means all foreign entities as defined by Arkansas law.~~

~~(b) In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications.~~

~~(c) In the event of a tie bid between two or more offers that meet the specifications as required and where one of the offerors is an Arkansas company, then the award shall be made to that Arkansas company.~~

~~(d) (1) In the event of a tie bid between two or more offers that meet the specifications as required~~

~~(A) and where at least two of the offerors are Arkansas companies, then an award will be determined by lot (flip of a coin) between those Arkansas companies;~~

~~(B) or if all of the offerors are out-of-state companies, then an award will be determined by lot (flip of a coin) among all the bidders.~~

~~(2) The coin flip will be done in the presence of at least one witness by the person responsible for awarding the contract. All witnesses must be employees of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by the person responsible for awarding the contract and all witnesses.~~

R7:19-11-234. Ethical Standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than ~~\$5,000~~ten thousand dollars (\$10,000): "It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a

commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees of bona fide established commercial selling agencies maintained by the contractor for the purpose of securing business.”

R1:19-11-242. Agency Commodity Management Procedures – Disposition of Commodities Other Than Computers and Electronic Equipment.

(a) RESALE. Marketing and Redistribution (“M&R”) shall make available to agencies, ~~or tax-supported entities, or not-for-profit organizations as defined in Ark. Code Ann. § 22-1-101~~ commodities in serviceable condition and/or commodities of potential use by agencies, ~~or tax-supported entities, or not-for-profit organizations~~ for a twenty-day period prior to making them available to the general public. During the twenty-day hold period, commodities shall be sold to agencies, ~~or tax-supported entities, or not-for-profit organizations~~ by Marketing and Redistribution. Commodities that historically have not sold to agencies, ~~or tax-supported entities, or not-for-profit organizations~~ or items that are unserviceable may be offered for sale to the general public without the requirement of the twenty-day hold period. The Director may waive the 20 ~~twenty-day~~ requirement when he determines that such waiver is in the state’s best interest.

R3:19-11-242. Not-For-Profit Organizations.

“Not-for-profit organization” means a private corporation under § 4-28-201 et seq., that is an exempt organization as described in section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), and that:

(1) Has a benevolent, philanthropic, patriotic, or charitable purpose; and

(2) Performs a function that would be performed at the public expense if it were not performed by the organization.

R1:19-11-244. Protest Periods.

(b)(1) The second such period to protest is open only to those persons who actually submitted bids or responses to a solicitation. Such persons may protest the award of a contract in writing within fourteen (14) calendar days after they know or should have known of the facts giving rise to their protest.

(2) The word “actual” in the phrase “actual bidder,

offeror, or contractor” modifies each noun in the phrase, so that the second protest period is open only to actual bidders or actual offerors, as opposed to those persons or vendors that did not submit a bid or make an offer, and actual contractors, not merely subcontractors or potential subcontractors, whether named or unnamed. Persons or vendors that may have an interest in a particular solicitation or contract but that did not actually submit a bid are not eligible to protest an award of a contract.

R1:19-11-264. Submission of Contracts with Members of the General Assembly.

~~It shall be the responsibility of state agencies and colleges and universities to submit all contracts and disclosure forms to the Office of State Procurement prior to the execution of the contract where the total contract amount exceeds \$25,000 if the contract is with a member of the General Assembly, his or her spouse, or with any business in which such a person or his or her spouse is an officer, a director, or a stockholder owning more than ten percent (10%) of the stock in the business.~~

(a) All contracts or amendments to contracts with a member of the General Assembly, his or her spouse, or with any business in which such a person or his or her spouse is an officer, a director, or a stockholder owning more than ten percent (10%) of the stock in the business must be presented to the Legislative Council or the Joint Budget Committee, if the General Assembly is in session.

(b) Such contracts or amendments to contracts must be submitted to the Office of State Procurement in accordance with all applicable policies and guidelines as prescribed on the Office of State Procurement website.

R1:19-11-1006. Performance Evaluation and Expenditure Review of Professional and Consultant Service Contracts.

Professional and consultant service contracts between state agencies where the total contract amount exceeds ~~twenty-five thousand dollars (\$25,000.00)~~ fifty thousand dollars (\$50,000); must be presented to the Performance Evaluation and Expenditure Review Committee (PEER) or Joint Budget Committee by the Department of Finance and Administration prior to the execution date of such contract.

R2:19-11-1006. Review Requirements of Professional and Consultant Service Contracts That Are Amended.

(b) AMENDMENTS TO CONTRACTS THAT ORIGINALLY DID NOT REQUIRE REVIEW BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. Any amendment ~~which~~that increases the total dollar amount of a professional or consultant service contract to exceed the sum of ~~\$25,000~~fifty thousand dollars (\$50,000), shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration and before the execution date of the amendment. The amendment, along with a copy of the original contract and any attachments thereto, must be submitted to the Office of State Procurement in accordance with the time guidelines as prescribed in R1:11-19-1012. Contracts ~~which~~that have expired cannot be amended.

R1:19-11-1010. Use of Performance-Based Standards in Professional and Consultant Service Contracts.

(a) All PCS contracts ~~over \$25,000~~greater than fifty thousand dollars (\$50,000), other than those listed herein and those specifically exempted by the Director of the Office of State Procurement, will include performance standards. Agencies are encouraged, however, as a matter of good procurement principle, to include performance standards in all professional and consultant service contracts. The purpose of these standards will be to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.

R2:19-11-1012. Contract Dates.

(b) All contracts ~~greater than \$25,000~~greater than fifty thousand dollars (\$50,000), unless specifically excepted, must be filed with the Department of Finance and Administration and/or the Office of Construction of the Arkansas Building Authority.

R1:19-11-1202. Definitions.

~~(a) "ESCO" means an energy service company which makes recommendations to the agencies regarding energy efficiency upgrades, provides labor to perform energy upgrades, finances the energy improvements and guarantees energy savings to the agencies.~~

~~(b) —“Energy consultant” means a company which assists the agencies in developing their energy cost savings project bid documents, evaluates proposals and makes recommendations for award.~~

~~(c) —Energy consultants are prohibited from performing the tasks of an ESCO and vice versa.~~

~~**R1:19-11-1203. Procurement Authorization.**~~

~~The State Procurement Director may authorize solicitations on behalf of state agencies for the purpose of developing a guaranteed energy cost savings contract.~~

~~**R1:19-11-1204. Procurement Method.**~~

~~All energy cost savings contracts, unless specifically exempted by the Director of the Office of State Procurement, will be developed in accordance with procedures issued by the Office of State Procurement.~~

~~**R1:25-36-104. Data recording and tracking.**~~

~~(a) —Agency Procurement Officials shall submit reports monthly to the Office of State Procurement, of data regarding minority participation in that agencies contracts which exceed \$25,000 (www.state.ar.us/dfa/procurement).~~

~~(b) —The Director of the Office of State Procurement shall gather the above information and similar information regarding all other state agencies and submit a report semi annually to the Governor and to the co-chairs of the Legislative Council and to the Legislative Joint Audit Committee and the Minority Business Advisory Council.~~