

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. 7th Street, 3rd 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 (2) 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, 5th Floor
Little Rock, AR 72201

- Changes to Rules Under the Arkansas Procurement Law to reflect legislation passed in the 91st General Assembly, and other necessary rule changes
1. What is the short title of this rule? _____
- 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 rules for the enforcement and administration of the Arkansas Procurement Code.
2. What is the subject of the proposed rule? _____
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 be 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, §19-11-229, §19-11-231, §19-11-233, §19-11-241, §19-11-242, §19-11-244, §19-11-245, §19-11-246, §19-11-715

7. What is the purpose of this proposed rule? Why is it necessary? To promulgate the rules for the enforcement and administration of the Arkansas Procurement Code.

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/Pages/default.aspx]

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

If yes, please complete the following:

Date: [], 2017

Time: []):00 AM

[Department of Finance and
Administration Building, 1509 W. 7th
Street, 1st Floor, Little Rock, AR 72201

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

[], 2017

11. What is the proposed effective date of this proposed rule? (Must provide a date.)

[], 2017

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.

Procurement Agents, Agency Procurement Officials

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 Changes To Rules Under The Arkansas Procurement Law To Reflect Legislation Passed In The 91st General Assembly, And Other Necessary Rule Changes

1. Does this proposed, amended, or repealed rule have a financial impact? Yes ☐ No ☒
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 ☒ 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 ☒ 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

General Revenue \$0

Next Fiscal Year

General Revenue \$0

Federal Funds	<u>\$0</u>
Cash Funds	<u>\$0</u>
Special Revenue	<u>\$0</u>
Other (Identify)	<u>\$0</u>

Federal Funds	<u>\$0</u>
Cash Funds	<u>\$0</u>
Special Revenue	<u>\$0</u>
Other (Identify)	<u>\$0</u>

Total \$0 _____

Total \$0 _____

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

Current Fiscal Year

General Revenue	\$0
Federal Funds	\$0
Cash Funds	\$0
Special Revenue	\$0
Other (Identify)	\$0
Total	\$0

Next Fiscal Year

General Revenue	\$0
Federal Funds	\$0
Cash Funds	\$0
Special Revenue	\$0
Other (Identify)	\$0
Total	\$0

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

\$ \$0 _____

Next Fiscal Year

\$ \$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

\$ 0 _____

Next Fiscal Year

\$ 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.

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

R1:19-11-105. Employment of illegal immigrants—Prohibition—Certification by contractor.

(a) Prior to award of a contract, the contractor must certify ~~online at~~ www.arkansas.gov/dfa/procurement that the contractor does not, and agrees that for the aggregate term of the contract will not, employ or contract with any illegal immigrant. The instructions for certification will be provided in the contract solicitation.

(b) If the contractor violates the above certification or is found to not be in compliance during the term of the contract, the state shall require the contractor to remedy the violation within 60 days of discovery of that violation. Failure to remedy the violation within the 60 day period will result in termination for breach of contract, and the contractor shall be liable to the State for the State's actual damages.

(c) If the contractor uses a subcontractor at the time of the above certification, the subcontractor shall certify that the subcontractor does not employ or contract with an illegal immigrant. The subcontractor's certification must be submitted within 30 days after award of the contract, and the contractor is required to maintain the certification on file for the remainder of the term of the contract.

(d) In the event that the contractor learns that the subcontractor's certification is in violation of the Act, and terminates the contract with the subcontractor, the termination of the subcontract for a violation of this section will not be considered a breach of the contractor's contract with the state. However, any subcontractor subsequently hired by the contractor shall be required to provide like certification.

R1:19-11-203. Definitions of terms used in this Act.

EXEMPT COMMODITIES AND SERVICES MEANS:

(a) Under subsection (14)(D)(i) – Commodities procured for resale does not include items used to support the sale of goods or services such as reusable items or items used in preparing, serving, dispensing, or packaging, except for vendor packaging included with the item purchased.

(b) Under subsection (14)(G)(i) – Farm products includes unprocessed feed for livestock.

(c) Under subsection (14)(K) – "License" does not mean software license.

(d) Under subsection (14)(M) – Livestock breeding to include ova and semen.

(e) Under subsection (14)(N) – Technical equipment for maintenance purposes shall include, but not be limited to, medical, dental, laboratory, and health aid equipment, climate control equipment, water treatment services, elevators, musical instruments, communications equipment, data processing equipment, and specialized research equipment.

(f) Under subsection (14)(Q) – "Perishable foodstuffs" shall be limited to produce means the raw material of food before or after processing, such being liable to spoil or decay in a short duration of time, such as (but not limited to) produce, eggs, or milk.

(g) Retail gasoline credit card purchases are exempt by regulation, regardless of the amount.

(h) Renewals of termite protection contracts with the contractor who performed the initial treatment of the facility are exempt. Not exempt are termite protection contracts which include the initial treatment.

(i) Under subsection (14)(H) – Fees that are uniform and fixed in advance by an authoritative body, such as fees for membership in professional associations, court filing fees, witness fees, workshop fees for professional conferences or training, medical fees and physician fees, are exempt from Arkansas Procurement Law. Fees that are payment for professional services for which there is generally free market competition and which may reasonably be subject to negotiation, are not exempt from Arkansas Procurement Law.

R2:19-11-203. Capital Improvements.

Under subsection (14)(Y), capital improvements valued at less than the bid requirement threshold stated in Ark. Code Ann. § 22-9-202(b)(2)(C) twenty thousand dollars (\$20,000) subject to Department of Finance and Administration Building Authority Division minimum standards and criteria are exempt from the requirements of the Procurement Law.

R3:19-11-203. Proprietary Software.

Software exemption under subsection (14)(BBAA) does not apply to the initial purchase of proprietary software. Nor does the exemption apply to the purchase of software that is part of any mandatory software contract. Exempt software purchases shall include the purchase of additional proprietary software licenses, copies, license renewals, software upgrades, and proprietary software support for proprietary software after the initial purchase.

R6:19-11-203. Hidden Damages.

(a) Under subsection (14)(~~EE~~DD), “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.

R7:19-11-203. Academic Medical Center.

EXEMPT COMMODITIES AND SERVICES MEANS:

(a) Under subsection (14)(EE) and subsection 23(B)(ii), “Academic medical center” consists of a public medical school and its primary teaching hospitals and clinical programs.

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 price competition is irrelevant and/or the qualifications or specialized expertise of the vendor is the most important factor in selection. For example, an RFQ would likely be appropriate in instances where an agency is compiling a list of qualified vendors and will be offering the same contract rates to all qualified vendors, because price competition is irrelevant in such a situation. The An agency should give public notice of an RFQ is opportunity, but may also sent send notice directly to those vendors registered with the Office of State Procurement for the scope of work or services required, or vendors recommended to the Office of State Procurement whose work résumé indicates that they are the agency considers to be best-qualified and capable of suited to performing the scope of work or services required.

(b) Notification of RFQs, for which OSP is responsible, in amounts greater than seventy-five fifty thousand dollars (\$7550,000) will be made on the OSP website. 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. If the state agency or political subdivision is unable to negotiate a satisfactory contract with the vendor selected, negotiations with that vendor shall be terminated and the agency may proceed to negotiate with one or more of the other qualified vendors.

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 twenty thousand ten thousand dollars (\$2010,000): "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."

R1:19-11-217. Authority of the State Procurement Director.

QUALITY ASSURANCE, INSPECTION, AND TESTING. The State Procurement Director shall procure or supervise the procurement of all commodities and services for each state agency not having an agency procurement official and, when requested to do so by such an official, procure commodities and services not otherwise under state contract. However, in every instance the using agency or college or university receiving commodities or services under the contract shall be responsible for assuring that commodities and services conform to the necessary specifications, terms and conditions in the following situations of the contract. Unless otherwise agreed, and subject to other applicable law, where commodities are tendered or delivered or identified to the contract for sale, the using agency has a right, before payment or acceptance, to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the commodities directly to the using agency, the inspection may be

after their arrival. Using agencies are to provide assessments of the vendor's performance of services as required under Section 19-11-268 of the Arkansas Code Annotated.

- ~~(1) upon delivery, in response to a purchase order or contract award;~~
- ~~(2) before delivery when the bidder has responded to an invitation for bids and/or received a contract award;~~
- ~~(3) after a vendor(s) has submitted an alternative bid. Examination of commodities and services may, where and when necessary, include laboratory testing and/or simulation studies.~~

R2:19-11-217. Authority of the State Procurement Director.

REPORTING. The State Procurement Director ~~shall have~~ has the authority to collect information from any designee, department, agency, and all procurement official ~~and using agencies to facilitate the~~

preparation of statistical and financial reports on state government procurement activity and monitoring of compliance with Arkansas Procurement Law.

R4:19-11-217. Vendors List.

(a) **VENDORS LIST.** The Office of State Procurement and each agency procurement official ~~shall~~ will maintain a vendors list.

(b) **APPLICATION.** A business vendor ~~shall~~ must make application on the Office of State Procurement web site at www.arkansas.gov/dfa/procurement to have its name placed on the vendors lists for the commodities and services it wishes to supply or provide. The business must provide complete information requested in the application before it will be considered for placement on a vendors list.

(c) **DETERMINATION.** The procurement agencies may refuse to list any prospective bidder not making proper application. The prospective bidder has the burden of showing that it meets the qualifications for inclusion on the vendors list on which it seeks to be listed. The prospective bidder will be promptly advised if its application is disapproved and the reasons for disapproval ~~shall~~ will be stated.

(d) **REAPPLICATION.** Any prospective bidder whose application is disapproved may reapply following the date of disapproval.

(e) **REMOVAL.**

(1) Any bidder who requests in writing to be removed from the vendors list ~~shall~~ will be removed.

(2) Bidders who have been suspended and/or debarred ~~shall~~ will be removed from the vendors list.

(f) Vendors seeking to contract with colleges and universities need to contact those institutions.

Note: A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.

R1:19-11-223. Commodities and services under state contract.

(a) **REQUEST FOR EXCLUSION.** State agencies having agency procurement officials may request exemption from a proposed state contract by submitting to the State Procurement Director a written justification for such exemption.

(b) DETERMINATION BY STATE PROCUREMENT DIRECTOR. Approval or denial of exemption from a state contract shall be made in writing by the State Procurement Director ~~prior to issuance of the invitation for bids.~~

R1:19-11-229. Competitive sealed bidding.

DEFINITION.

Invitations for bids for which OSP is responsible ~~shall~~ will be posted on the OSP website www.arkansas.gov/dfa/procurement in adequate time to allow response.

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 ~~seventy-five~~ fifty thousand dollars (\$~~7550,000~~) 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 that do not exceed ~~seventy-five~~ fifty thousand dollars (\$~~7550,000~~) during the initial period of the contract but contain an option to purchase a commodity costing more than ~~seventy-five~~ fifty thousand dollars (\$~~7550,000~~) ~~shall~~ will 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~~ includes rent.

(b) PURCHASE OF COMMODITIES SUBJECT TO THE ARKANSAS CONSTITUTION, AMENDMENT 54.

Commodities subject to the Arkansas Constitution, Amendment 54 (printing, stationery and supplies) may be purchased only by the State Procurement Director or his designee.

R3:19-11-229. Competitive sealed bidding.

Commodities and services which are not practicable to procure by competitive sealed bidding:

(1) Postage meter leases;

(2) Motor vehicle rentals (for thirty (30) days or less) may be procured by use of competitive bid procedures. All motor vehicle leases (over thirty days) must be approved by the State Procurement Director under the provisions of Ark. Code Ann. § 22-8-102.

(3) Agricultural equipment leases for one hundred and eighty (180) days or less may be procured by use of competitive bid procedures.

R5:19-11-229. Competitive sealed bidding.

BID SUBMISSION.

(1) Bidders shall submit bids at the place and on or before the date and time set in the invitation for bids. Bids received after the date and time designated for bid opening are late bids and shall not be considered.

(2) All bids and any modifications to bids previously filed, received prior to the date and time fixed for opening bids, shall be kept secure and unopened. If a bid is submitted and the invitation for bids number is not clearly marked to indicate the date and time of bid opening, the State Procurement Director or agency procurement official ~~shall~~ may make a reasonable attempt, including, but not limited to, opening, marking and resealing, to determine which bid the sealed submission is for corresponds to, ~~resealing it and shall open it formally at the date and time of that bid opening.~~

(3) Retrieval of a bid for purposes of modification or withdrawal shall be permitted prior to date and time of opening upon positive identification of a bona fide representative of the business.

R7:19-11-229. Competitive sealed bidding.

BID EVALUATION.

(1) Those criteria that will affect the bid price and be considered in evaluation for award shall be stated in the bid and objectively measured, such as transportation costs and total or life cycle cost. Judgmental evaluation of commodities and services may be used in determining whether the commodity or service offered by a bidder meets the specification requirements of the procurement, or the bidder is qualified to provide the service.

(2) The following matters ~~shall~~ will be applicable to all invitations for bids issued, bids submitted, and contracts awarded for the purchase of commodities:

(A) Time discounts or cash discounts ~~shall~~ will not be considered;

(B) Quantity discounts should be included in the price of the item. When not included in the item price, the discount ~~shall~~ will be considered only if the procurement agency, or the agency for whose benefit the procurement has been undertaken, deems it to be in the state's best interest. The unit price shown on the contract ~~shall~~ will be the net price, less the discount, unless otherwise indicated in the bid;

(C) An award may be made to the lowest aggregate bidder for all items, group of items, or on an individual item basis, whichever is deemed to be in the state's best interest.

(D) Only signed, sealed bids delivered prior to the date and time of bid opening ~~shall~~ will be accepted.

(E) Past Performance

(i) The past performance of a bidder on a state contract may be used by the procurement agency to determine whether the bidder is "responsible." Past performance must be supported by written documentation not greater than three years old. Documentation may be a formal Vendor Performance Report, an informal memo (signed and dated) or any other appropriate authenticated notation of performance to the vendor file. Reports, memos and files may be in electronic form. Past performance may be positive or negative.

(ii) Past performance on contracts from other Arkansas State Agencies may also be used for evaluation. Supporting documentation should be provided.

(iii) Past performance evaluation should not take the place of suspension or debarment procedures.

(3) TIE BIDS.

(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~~ will 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.

R8:19-11-229. Competitive sealed bidding.

REJECTION. Grounds for rejection of bids include but ~~shall~~ are not be limited to:

- (1) failure of a bid to conform to the essential requirements of an invitation for bids;**
- (2) any bid which does not conform to the specifications contained or referenced in any invitation for bids unless the items offered as alternatives meet the requirements specified in the invitation;**
- (3) any bid which fails to conform to a delivery schedule established in an invitation for bids, unless the invitation for bids contains provisions for acceptance of offers with alternative delivery schedules;**
- (4) a bid imposing conditions which would modify the stated terms and conditions of the invitation for bids;**
- (5) any bid determined by the procurement official in writing to be unreasonable as to price;**
- (6) bids received from bidders determined to be nonresponsible bidders;**
- (7) failure to furnish a bid guarantee when required by an invitation for bids; and**
- (8) any or all bids when the procurement official makes a written determination that it is in the best interest of the state.**

R9:19-11-229. Competitive sealed bidding.

(a) CORRECTION OR WITHDRAWAL OF BIDS.

- (1) The State Procurement Director or agency procurement official may waive technicalities (small details) or minor irregularities (something irregular in form or nature) in bids which do not affect the material substance of the bids when it is in the state's best interest to do so.**
- (2) Amendments to bids shall be allowed if the amendments are in writing and signed, are received prior to the date and time of bid opening, and clearly indicate the date and time of bid opening and bid number.**
- (3) If there is a suspected bid mistake, the State Procurement Director or agency procurement official may request confirmation of a bid and shall request the confirmation to be made in writing. The bid of any bidder who fails or refuses to clarify in writing within a reasonable time any matter contained in his bid shall be rejected. The written clarification shall become a part of the contract awarded on the basis of that bid.**
- (4) Bid prices shall be based on the unit prices and any correction of the price extension or of the price addition by the Office of State Procurement or state agency having an agency procurement official shall not be considered the correction of a bid. Bid prices shall not be increased after the date and hour of bid opening. A bid price may be decreased only after a determination has been made that the bid is low.**
- (5) An otherwise low bidder may be permitted the opportunity to furnish other information requested in the invitation for bids and not supplied due to oversight, so long as it does not affect responsiveness.**
- (6) When a mistake in a bid is claimed by the vendor prior to award and the evidence is clear and convincing that a material mistake was made in the bid, and that due to such mistake the bid submitted was not the bid intended, the bidder may be permitted to withdraw his bid. Where the evidence is clear and convincing that a material mistake has been made in a bid after the award of a contract and the contractor will sustain a financial loss (a reduction or diminution in profit margin shall not be deemed a financial loss under this subsection) if required to perform the contract, the contract may be rescinded.**
- (b) CORRECTION.** Any negotiated adjustments, as defined in Ark. Code Ann. § 19-11-229(h), will not be considered the correction of a bid.

R10:19-11-229. Competitive sealed bidding.

(a) AWARD. After a reasonable bid evaluation period, the bid shall be awarded to the responsive and responsible bidder who has submitted the lowest bid that meets the requirements and criteria set forth in the

invitation for bids. All bids may be rejected if, after evaluation of the bids, including consideration of any clarifying or explanatory information submitted by the bidders, it is determined by the procurement official that no satisfactory bid has been received.

(b) NEGOTIATION. In the event that negotiation is necessary, a bidder may be determined to be non-responsive if the bidder and agency are unable to reach a mutually agreeable negotiated adjustment. If negotiations fail or the agency is unable to reach a negotiated adjustment with the apparent low bidder, the next lowest bidder can be contacted for the purposes of entering into negotiations.

(c) UNSUCCESSFUL BID. In the event no bids are received or items bid do not meet specifications and it is apparent that further solicitation of bids would be futile, requested commodities may be purchased from any available source.

R12:19-11-229. Cancellation of invitations for bids.

A When an invitation for bids is cancelled, notice of cancellation of OSP bids will shall be posted on the OSP website www.arkansas.gov/dfa/procurement. The bids may be returned if the bid is properly identified.

R134:19-11-229. 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 twenty thousand ten thousand dollars (\$~~2010~~0,000): "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."

R145:19-11-229. Negotiations.

(a) Negotiation of Competitive Sealed Bids should be used only in those cases where the best interests of the State are served, such as where the lowest bid submitted by a responsive and responsible bidder exceeds the available funding to pay for the commodity or service (as certified by the appropriate fiscal officer of the procurement agency) or can be shown to be above the fair market price available on the open market to a reasonably prudent buyer. ~~Only these p~~Procurement professionals ~~officials~~ who are trained in negotiation and procurement

~~processes should~~ who conduct negotiations should be trained in negotiation and Arkansas Procurement Law.

(b) Prior to negotiation, a written justification supporting negotiations must be included in the bid folder. The justification must include, as applicable:

(1) Bid tabulation with indication of lowest responsive and responsible bidder.

(2) Certification of available funds budgeted for the procurement by agency chief fiscal officer in instances where all bids received from responsive and responsible bidders exceed the available funding.

(3) Reason(s) precluding re-solicitation, including but not limited to time constraints and economic impact to agency.

(c) After it is determined that negotiation is necessary in the best interests of the State and permissible under Ark. Code Ann. § 19-11-229(2)(A), appropriate representatives shall will proceed with negotiations and award recommendation. Appropriate representatives shall include purchasing staff and representatives from the original requesting unit.

(d) Agency should investigate the factors affecting the price offered by the apparent low bidder to include but not be limited to cost, delivery requirements, warranty, location of supplier, volatile nature of goods or services requested and current economic condition of the market.

(e) 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) What adjustment may be made to delivery requirements that may affect price.

(3) Acceptable adjustments in quantity.

(4) A prioritized list of acceptable adjustments in specifications that may result in price reduction.

(5) Timetable for completion of negotiation.

(f) Negotiation plans shall not be revealed to bidder(s) nor made available for public review until after the anticipated award is made public in order to avoid revealing information that if disclosed would give advantage to competitors or bidders.

(g) An acceptable negotiated contract shall must be signed and in writing listing agreed upon terms, conditions, specifications, quantities and pricing.

(h) If a negotiated contract cannot be developed, the bidder may be declared non-responsive and time permitting, the negotiation process may be repeated with the next low bidder.

(i) If negotiations do not result in an acceptable contract, the Director or head of a procurement agency may authorize that a new solicitation be issued or elect to procure by special procurement (Ark. Code Ann. § 19-11-263).

R1:19-11-230. Competitive sealed proposals.

Request for Proposals for which OSP is responsible ~~shall~~ will be posted on the OSP website in adequate time to allow response.

R2:19-11-230. Competitive sealed proposals.

CONDITIONS OF USE. The key element in determining the necessity for utilization of the competitive sealed proposal method is the type of evaluation required. Where evaluation involves the relative abilities of ~~bidders~~ offerors to perform, including the degree of technical

or professional experience, and price is not the only consideration, use of competitive sealed proposals is appropriate. Further, where the types of supplies or services may require the use of comparative, judgmental evaluation, competitive sealed proposals is are the appropriate procurement method.

R3:19-11-230. Competitive sealed proposals.

PROPOSAL SUBMISSION.

(1) ~~Bidders~~ Offerors shall submit proposals at the place and on or before the date and time set in the Request for Proposal. Proposals received after the date and time designated for the proposal opening are considered late and shall not be considered.

(2) All proposals and any modifications to the proposals previously filed, received prior to the date and time fixed for opening the proposals, shall be kept secure and unopened. If a proposal is submitted and the Request for Proposals number is not clearly marked to indicate the date and time of the proposal opening the State Procurement Director or agency procurement official shall may make a reasonable attempt to determine which solicitation the sealed submission corresponds to, including, but not limited to, opening, marking and resealing, to determine which Request for Proposal the submission is for, resealing it and shall open it formally at the date and time of that proposal opening.

(3) Retrieval of a proposal for purposes of modification or withdrawal shall be permitted prior to date and time of opening upon positive identification of a bona fide representative of the offeror who submitted the proposal business.

R4:19-11-230. Competitive sealed proposals.

REQUEST FOR PROPOSALS OPENING. The names of the ~~bidders~~ offerors may be read aloud. An abstract of proposals listing the names of bidders offerors shall be prepared by the entity responsible for the RFP and shall be retained in the Request for Proposals file and shall be available for public inspection.

R5:19-11-230. Competitive sealed proposals.

(a) EVALUATION. The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. All members of evaluation committees shall participate in Evaluation Committee Training sponsored either by OSP or the college or university agency procurement official.

Evaluations will be conducted in accordance with the OSP Policy. A written recommendation shall be made by the evaluation committee and submitted by the chairperson to the State Procurement Director or agency procurement official stating the basis on which the recommendation for award was found to be most advantageous to the state.

(b) (1) RESPONSIBILITY OF OFFEROR. Past performance of an offeror may be used by the procurement agency to determine whether the offeror is "responsible." No points for past performance may be used in the evaluation scoring criteria. Past performance must be

supported by written documentation not greater than three (3) years old. Documentation may be a formal Vendor Performance Report, an informal memo (signed and dated) or any other appropriate authenticated notation of performance to the vendor file. Reports, memos and files may be in electronic form. Past performance may be positive or negative.

(i) Past performance on contracts from other Arkansas State Agencies may also be used for evaluation. Supporting documentation should be provided.

(ii) Past performance evaluation should not take the place of suspension or debarment procedures.

(2) The awarding of points for references may be used as evaluation scoring criteria if set forth in the solicitation.

(c) TIE BIDS.

(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 offerors.

(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.

R6:19-11-230. Rejection of proposals.

Grounds for rejection of proposals include but shall not be limited to:

(1) failure of a proposal to conform to the essential requirements of a Request for Proposals;

(2) a proposal imposing conditions which would modify the stated terms and conditions of the Request for Proposal;

(3) any proposal determined by the procurement official in writing to be unreasonable as to price;

(4) failure to furnish a bond when required by a Request for Proposals;

(5) the offeror's record of poor past performance or irresponsibility; and

(56) any or all proposals when the procurement official makes a written determination that it is in the best interest of the State and documents the reason(s) supporting the determination.

R7:19-11-230. Correction or withdrawal of proposals.

(a) There is a strong public interest in favor of conserving public funds in awarding public contracts, and little, if any, public benefit in disqualifying proposals for technical deficiencies in form or minor irregularities where the offeror does not derive any unfair competitive advantage therefrom. The State Procurement Director or agency procurement official may waive technicalities in proposals or minor irregularities in proposals a procurement which do not affect the material substance of the Request for Proposals when it is in the State's best interest to do so.

(b) Amendments to proposals shall be allowed if the amendments are in writing and signed, are received prior to the date and time of the proposal opening, and clearly indicate the date and time of proposal opening and Request for Proposals number.

(c) If there is a suspected proposal mistake, the State Procurement Director or agency procurement official may request confirmation of a proposal and shall request the confirmation to be made in writing. The response of any bidder offeror who fails or refuses to clarify in writing within a reasonable time any matter contained in his or her proposal shall may be rejected. The Any written clarification submitted shall become a part of the contract awarded on the basis of that proposal.

(d) Proposal prices shall not be increased after the date and hour of the proposal opening.

(e) When a mistake in a proposal is claimed by the vendor prior to award and the evidence is clear and convincing that a material mistake was made in the proposal, and that due to such mistake the proposal submitted was not the proposal intended, the bidder may be permitted to withdraw his proposal.

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 bidder offeror may be declared non-responsive 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.*

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 twenty thousand ~~ten thousand~~ dollars (\$~~20~~40,000): "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 twenty thousand ~~ten thousand~~ dollars (\$~~20~~40,000) 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 twenty thousand ~~ten thousand~~ dollars (\$~~20~~40,000).*
- (2) *PURCHASE OF COMMODITIES SUBJECT TO AMENDMENT 54 TO THE ARKANSAS CONSTITUTION. Purchase of commodities subject to Amendment 54 to the Arkansas Constitution must be procured in accordance with competitive bidding and competitive sealed bidding procedures. (See Ark. Code Ann. § 19-11-222(b) for definitions of printing, stationery, and supplies.)*
- (3) CERTIFIED MINORITY BUSINESS ENTERPRISE OR CERTIFIED WOMEN-OWNED BUSINESS ENTERPRISE. A procurement that does not exceed two (2) times the amount stated in Ark. Code Ann. § 19-11-204 (13) may be procured without seeking competitive bids or competitive sealed bids if the procurement is with a certified minority business enterprise or certified women-owned business enterprise. The certification process is administered by the Division of Minority and Women-owned Business Enterprise of the Arkansas Economic Development Commission.

R1:19-11-232. Proprietary or sole source procurements.

- (a) *GENERAL. Sole source procurements of commodities and technical services shall are ~~be~~ those procurements which, by virtue of the performance specification, are available from a single source. Brand name preferences or merely aesthetic design specifications shall are ~~not be sufficient explanation justification~~ for sole source awards. Such procurements may include but shall are ~~not be~~ limited to:*
- (1) *requirements of performance compatibility with existing commodities or services; or*

(2) repairs involving hidden damage.

(b) APPROVAL. Request for approval shall be made in writing and shall include in the justification:

(1) a copy of the purchase order or requisition

(2) why the service is needed;

(3) the methods used to determine that a lack of responsible/responsive competition exists for the service;

(4) how it was determined that the provider possesses exclusive capabilities;

(5) why the service is unique;

(6) whether or not there are patent or proprietary rights which make the required service unavailable from other sources;

(7) what the agency would do if the provider/service were no longer available;

(8) any program considerations which make the use of a "Sole Source" critical to the successful completion of the agency's task; and

(9) the "Contract and Grant Disclosure and Certification Form" required by Governor's Executive Order 98-04, if applicable.

(c) Procurements under this section shall must be approved in advance by the head of a state agency having an agency procurement official or the State Procurement Director for all other state agencies, or a designee of either officer above the level of agency procurement official.

(d) SOLE SOURCE PROCUREMENTS OF PROFESSIONAL AND CONSULTANT SERVICES. The procurement from a single source, as it relates to professional and consultant service contracts, should only be used when all other methods of contracting are clearly not applicable. The agency chief fiscal officer or equivalent or director, division director or deputy director of an agency, college or university may authorize the use of sole source purchases. ~~Sole source professional and consultant service contracts, except for those exempt by law and those that are documented by sole source justification, may only be awarded after legal public notice of intent has been published in a newspaper of statewide circulation and no other provider responds. If any other provider responds and requests the opportunity to bid, then the sole source procurement method cannot be used. The notice must clearly state the nature of the contract, the contracting agency, and the deadline by which interested providers must respond. Notification must also be posted on the agency or Office of State Procurement website.~~

(e) SOLE SOURCE JUSTIFICATION. Sole source professional and consultant service contracts, except for those exempt by law, ~~and those that are published in a newspaper of statewide circulation,~~ must be accompanied by written justification and be approved by the Director of the Office of State Procurement. The justification must clearly demonstrate that to contract otherwise would not be in the best interests of the state. The justification must fully address:

(1) why the service is needed;

(2) the methods used to determine that a lack of responsible/responsive competition exists for the service;

(3) how it was determined that the provider possesses exclusive capabilities;

(4) why the service is unique;

(5) whether or not there are patent or proprietary rights which make the required service unavailable from other sources;

(6) what the agency would do if the provider/service were no longer available; and

(7) any program considerations which make the use of a "Sole Source" critical to the successful completion of the agency's task.

(f) SOLE SOURCE BY LAW. The procurement of professional and consultant services from a specific provider that results from a mandate issued by the court systems or state or federal law.

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 twenty thousand ten thousand dollars (\$~~20~~40,000): “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.

(a) BIDS. The state agency must, at a minimum, receive three (3) competitive bids unless the emergency is critical. The quotation abstract must show the names of at least three (3) firms contacted in attempting to obtain competition.

(b) APPROVAL. All emergency procurements shall must be approved in advance by the State Procurement Director, the head of a procurement agency, or a designee of either officer. Where time or circumstance does not permit prior approval, approval must be obtained at the earliest practical date. Requests for approval shall must be made in writing and shall include:

- (1) a copy of the purchase order;**
- (2) a copy of the quotation abstract; and**
- (3) a written explanation of the emergency.**

(c) TIE BIDS.

(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 will 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 with a total projected contract amount, including any amendments or possible extensions, of less than fifty thousand dollars (\$50,000) may be procured using the method as described in R1:19-11-233(A) through (C). For those PCS contracts with a total projected contract amount, including any amendments or possible extensions, of fifty thousand dollars (\$50,000) or

more, 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.

(e) TECHNICAL AND GENERAL SERVICES. Emergency procurements of technical and general services with a total projected contract amount, including any amendments or possible extensions, of less than one hundred thousand dollars (\$100,000) may be procured using the method as described in R1:19-11-233(A) through (C). For those technical and general services contracts with a total projected contract amount, including any amendments or possible extensions, of one hundred thousand dollars (\$100,000) or more, 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 technical and general services 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 technical and general services 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.

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 twenty thousand ~~ten thousand~~ dollars (\$~~20~~40,000): "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.

PURCHASE OF COMMODITIES SUBJECT TO THE ARKANSAS CONSTITUTION, AMENDMENT 54. The commodities subject to Amendment 54 to the Arkansas Constitution are printing, stationery, and supplies. (See also Ark. Code Ann. § 19-11-222(b).)

(1) SUPPLIES. All state agencies may purchase certain supplies subject to Amendment 54 under the following condition: If the cost of the commodity is seventy-five ~~fifty~~ thousand dollars (\$~~75~~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 seventy-five ~~ifty~~ thousand dollars (\$7550,000) or less, the State Procurement Director or his designee must obtain, wherever possible at least three (3) written competitive bids.

2:19-11-234. Competitive bidding.

LEASES.

(1) Lease of commodities on state contract. No contract greater than ninety (90) days for the lease of commodities on state contract ~~shall~~ will be approved unless the State Procurement Director determines in writing that it is in the best interest of the State and states the reason therefore.

(2) All contracts for the lease of a commodity that exceed a cost of twenty thousand ~~ten thousand~~ dollars (\$2010,000) but are less than seventy-five ~~ifty~~ thousand dollars (\$7550,000) during the initial period of the contract ~~shall~~ will 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 seventy-five ~~ifty~~ thousand dollars (\$7550,000).

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 twenty thousand ~~ten thousand~~ dollars (\$2010,000): "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."

**R2:19-11-241. Issuance of qualified products list specifications –
Qualified products list.**

(1) **RESTRICTIONS ON USE.** A specification for commodities may include a qualified products list only when the State Procurement Director has approved in writing the written determination of the Agency Procurement Official or Office of State Procurement that:

(A) the interests of the state require assurance before award that the desired commodity is satisfactory; and

(B) the cost or the time required to test before award would be excessive.

(2) **NOTICE OF INTENT TO ADOPT A QUALIFIED PRODUCTS LIST.** Whenever it is determined to include a qualified products list in any specification or to adopt such a list, prompt notice of the intent ~~shall~~ will be given to all reasonably known makers and suppliers of the affected commodity. Such notice ~~shall~~ must describe all requirements for achieving qualification.

(3) WRITTEN RECORDS OF EVALUATION. Detailed written records ~~shall~~ must be made of the evaluation of any and all commodities offered for inclusion on any qualified products list. Except for records which contain trade secrets or other proprietary information, those records ~~shall~~ will be made available for inspection by any member of the public upon request.

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~~ will make available to agencies, 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, 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~~ may only be sold to agencies, tax-supported entities, or not-for-profit organizations by Marketing and Redistribution. At the sole discretion of the Director or the Director’s designee at Marketing and Redistribution, commodities which the Director or the Director’s designee at Marketing and Redistribution reasonably believe to be valued at one hundred dollars (\$100) or less per individual item, or commodities that historically have not sold to agencies, 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 or the Director’s designee at Marketing and Redistribution may waive the twenty-day requirement when he determines that such waiver is in the state’s best interest.

(b) INTRASTATE AGENCY SALE. Commodities that are no longer needed by an agency may be sold to another agency by completing and submitting an Intrastate Agency Sale Form, which can be found on the M&R website under forms, to Marketing & Redistribution. This form ~~shall~~ must be completed and forwarded electronically from the selling agency to the purchasing agency, then to M&R, where it is forwarded to DFA Office of Accounting for completion and transfer of funds.

(c) DISPOSAL. When commodities have no scrap or resale value, a certificate of property disposal (“CPD”) form ~~shall~~ must be submitted to Marketing and Redistribution, which ~~shall~~ will then return to the requestor within ten (10) working days, a certificate of property disposal authorization, indicating the proper handling procedure for the commodities.

(d) CANNIBALIZATION. “Cannibalization” means the process whereby a nonexpendable surplus or excess commodity is dismantled for parts to be used as replacements or as components of other machines or devices.

(1) The disassembly of an item for use of its component parts for repair or maintenance of a similar item will only be authorized if such action has greater potential value and benefit than disposal or trade-in of the item in its existing form. Authorization for cannibalization ~~shall~~ will be approved by Marketing and Redistribution prior to any disassembly or removal of components parts. If authorized, the item will be removed from the agency’s property listing by the requesting agency. Any residual

material remaining after cannibalization must be processed through Marketing and Redistribution. Requests for authorization for cannibalization ~~shall~~ will be expedited. If properly marked, authorization should be returned to agency with ten (10) working days. It is understood that there may be no residual material remaining after cannibalization, but if any, residual material must be processed through Marketing and Redistribution.

(2) Motor vehicles eligible to be registered for highway use (cars and trucks), whether registered or not, may be cannibalized after obtaining authorization from Marketing and Redistribution. These vehicles **WILL NOT** be removed from the property listing until the

carcass of the vehicle has been disposed of by Marketing and Redistribution. In no event shall should more than ninety days (90) elapse between the authorization of cannibalization and processing of the carcass by Marketing and Redistribution. These procedures do not exempt an agency from compliance with any other requirements relating to the disposal or acquisition of motor vehicles.

(e) HANDLING OF SURPLUS EQUIPMENT. Agencies with surplus items must contact Marketing and Redistribution to schedule a delivery or pick-up date. A Surplus Disposal Form ("SDF") shall must be transmitted by the agency showing the agency name, address, phone number, contact person and listing of all items with serial and property numbers (if available). The Surplus Disposal Form will be processed by Marketing and Redistribution when the surplus items are delivered or picked up.

R2:19-11-242. Auction and on-site sales.

DISPOSITION OF COMMODITIES AFTER ~~HOLDING PERIOD~~.

(1) GENERAL REQUIREMENTS. ~~Commodities having no foreseeable use to an agency or tax-supported entity or commodities that have~~ are not subject to or have completed the twenty-day hold period, pursuant to R1:19-11-242 (a), may be offered for sale. Furniture or equipment may be loaned or rented to a state agency with the approval of the owning agency. The rental fee(s) less applicable handling fee(s) will be remitted to the owning agency.

(2) NOTICE REQUIRED. Public notice of commodities sold by competitive sealed bid shall should be given at least five days prior to the date established for the sale. The notice will include publication in any electronic or printed medium.

(3) PUBLIC AUCTION.

(A) Public auction whether electronic or traditional may be used when deemed in the best interest of the State. Auction costs will be paid from proceeds. In a traditional auction, if proceeds do not cover the costs, the agency requesting the auction will be responsible for any expenses not covered from the proceeds. Any cost associated with an electronic auction will be covered by proceeds from the sale.

(B) PROCEDURES. In a traditional auction a licensed auctioneer will be used. The solicitation to bidders shall must stipulate, at a minimum: all terms and conditions of any sale, that the purchaser must remove all items purchased within a stated time, and that the state retains the right to reject any and all bids. In an electronic auction ~~items~~ the purchaser must pick up or otherwise cause the items purchased to be removed within a stated time. ~~will be shipped to the successful bidder, unless the bidder wishes to pick up the item.~~

(4) COMPETITIVE SEALED BIDDING.

(A) Competitive sealed bidding will be used when:

(i) the value of the item cannot be determined based on market value or past history of same or similar items sold; or

(ii) it is determined by Marketing and Redistribution that it is in the best interest of the State.

(B) PROCEDURES.

(i) When surplus commodities are to be sold by competitive sealed bidding, the procedures followed shall must be in accordance with Ark. Code Ann. § 19-11-204, § 19-11-228, § 19-11-229 and the regulations promulgated hereunder except:

(ii) the award shall will be made to the highest bidder with the state retaining the right to accept or reject any or all bids when in the best interest of the State.

(5) ONSITE SALES.

- (A) **DEFINITION.** Onsite sales includes the process of (1) internet auctioning and (2) sale of commodities to the general public from the Marketing and Redistribution office, a satellite location and/or other agency locations when approved by Marketing and Redistribution.
- (B) Onsite sales will be used for surplus items not purchased by other state agencies or tax supported entities.
- (C) **PROCEDURE.** Selling price will be established by Marketing and Redistribution based upon demand, condition of commodities, past experience gained from auction or competitive sealed bid sales; and prevailing retail prices for same or similar commodities in the local market.
- (6) **NEGOTIATED SALE.** Negotiated sale may be used if no acceptable bids were received during the bid process and an offer is made "after the fact" for the item. Offers will only be accepted from bidders that participated in the sealed bid offering the item.
- (7) **TRADE-IN.** Surplus commodities may be traded in when the Marketing and Redistribution Manager or Assistant Marketing and Redistribution Manager determines that the trade-in value is expected to exceed the value estimated to be obtained through the sale of the commodity less administrative expenses incurred during a sale.
- (8) **LEASE OR DONATION.** Surplus commodities ~~property~~ may be leased or donated to tax supported entities or non-profit organizations, etc. when requested in writing by the owning agency and approved by the Director of the Office of State Procurement Marketing and Redistribution.
- (A) ~~Written requests communication~~ must be submitted to the Marketing and Redistribution Manager identifying the equipment by name, serial number, property number, the benefit to the public in cases of proposed donations, and lease terms in cases of proposed property leasing etc. to the Marketing and Redistribution Manager. The Marketing and Redistribution Manager will estimate the property value and forward the request to the Director of the Office of State Procurement for his approval/disapproval.
- (B) The Director of the Office of State Procurement will respond in written communication to the requesting agency on a case-by-case basis.
- (C) The requesting agency must maintain a copy of the original written request ~~for the donation~~ and the written approval/disapproval from the Director of the Office of State Procurement for audit purposes.
- (D) Copies of the request and approval/disapproval will also be maintained at Marketing and Redistribution.
- (9) The Arkansas State Highway and Transportation Department may dispose of commodities without the assistance of the Office of State Procurement, but it ~~shall~~ must comply with the procedures outlined herein for said disposition. Nothing herein is intended to prohibit the use of the Office of State Procurement for the disposition of those commodities, and the Department may request the Office of State Procurement make the disposition.
- (10) Excess commodities in remote locations and/or property too heavy or expensive to transport to Marketing and Redistribution.
- (A) Excess commodities that are in remote locations and/or commodities where the cost to transport to Marketing and Redistribution would be prohibitive should be reported by written communication to Marketing and Redistribution with a complete description and details of the condition of the equipment. Marketing and Redistribution will make one of the following recommendations:
- (i) The commodity should be redistributed for state use and Marketing and Redistribution will notify agencies and/or tax- supported entities that could utilize the commodity. When the property is sold, the receiving agency will be responsible for the removal of the item(s), with the expense of moving being taken into consideration when price is determined.
- (ii) Marketing and Redistribution will prepare an invitation for bids or authorize the agency to prepare an invitation for bids with inspection being held at the agency location.

(iii) A certificate of property disposal will be transmitted to the owning agency designated as follows:

(a) The property identified is authorized for cannibalization by the Marketing and Redistribution Manager who hereby authorizes the agency to perform the cannibalization.

(b) The property identified is authorized for destruction by the Marketing and Redistribution manager who hereby authorizes the agency to perform the destruction.

(c) Property that has a material content of lead, copper, brass, iron, etc.

will be disposed of by sale to a local scrap dealer(s) at local prices. Payment(s) received are to be sent and made payable to: Marketing and Redistribution with a copy of the Certificate of Property Disposal authorizing the sale.

(d) Property with resale value that is not feasible for transport to Marketing and Redistribution may be disposed of by obtaining quote bids "as is, where is." Owning agencies should attempt to obtain (3) bids. A copy of the bid quotes, a copy of the Certificate of Property Disposal authorizing the sale and the proceeds are to be sent and made payable to Marketing and Redistribution.

(11) Specialized commodities may be offered for trade-in with the trade-in price offered being forwarded in a written transmission to Marketing and Redistribution for determination of price acceptability.

(12) If none of the above procedures are applicable, the Director of the Office of State Procurement shall will make an individual determination.

R3:19-11-242. Definitions of terms used in this section Not-For-Profit Organizations.

(1) "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:

(A1) Has a benevolent, philanthropic, patriotic, or charitable purpose; and

(B2) Performs a function that would be performed at the public expense if it were not performed by the organization.

(2) "Lease" means a transfer of the right to possession and use of surplus commodities, for a specified term length not to exceed a seven-year period, for a monetary fee or other consideration, while retaining ownership and title in the surplus commodities. Monetary fees or other consideration may not be nominal.

(3) "Donation", as used in R2:19-11-242 (8), means a transfer of ownership and title in surplus commodities for no monetary fees or consideration.

R1-19-11-244 Definitions.

R1-19-11-244.1 "Aggrieved in connection with the award of a contract" is the condition of being an actual bidder, offeror, or contractor who has been denied the award of a contract as the result of the improper or unlawful award of the contract.

R1-19-11-244.2 "Aggrieved in connection with a solicitation" is the condition of being an actual or prospective bidder, offeror, or contractor interested in submitting a bid, offer, or qualifications (as applicable) in response to a solicitation, but who is denied the opportunity to

compete fairly for award of a contract because of improper or unlawful solicitation terms or conduct.

R1-19-11-244.3 “Anticipation to award a contract” means the State’s identification of the person (or persons) it anticipates contracting with as the result of a solicitation.

R1-19-11-244.4 “Award of a Contract” means the State’s process for formally accepting a responsive bid, proposal, or qualifications as the basis for a contract with the State. Award of a contract is generally preceded by notice of the State’s anticipation to award a contract.

R1-19-11-244.5 “Constructive knowledge”, as used in these rules, means knowledge or information that a protestor would have by a given date if the protestor had exercised reasonable care or diligence, regardless of whether the protestor actually had the knowledge or information. It includes knowledge of:

- (i) applicable provisions of Arkansas Procurement Law and other applicable law and administrative rules;
- (ii) solicitation instructions, criteria, deadlines, and requirements contained in solicitation documents or otherwise available to persons interested in the solicitation or provided in a mandatory pre-solicitation meeting;
- (iii) available public records kept in connection with a solicitation or award of a contract;
- (iv) communications or actions regarding the solicitation to any person whose knowledge is imputed to the protestor under the law of agency, fiduciaries, partnership, respondeat superior, or otherwise;
- (v) facts not subject to reasonable dispute that are generally known or ascertained by resort to readily available sources whose accuracy cannot reasonably be questioned;
- and
- (vi) any other applicable information discoverable by the exercise of reasonable care or diligence, such as a request for information.

R1-19-11-244.6 “Interested Party”, when used in relation to a protest in connection with a solicitation, means any actual or prospective bidder, offeror, or contractor actually or prospectively participating in a solicitation. When used in relation to a protest in connection with the award of a contract, it means a bidder, offeror, or contractor who actually submitted a bid or offer or who holds a contract to provide the commodities or services solicited.

R1-19-11-244.7 “Protest” means a written objection from a person setting forth facts showing that the person is an interested party who has been aggrieved in connection with: (a) the solicitation of a contract; or (b) the award of a contract.

R1-19-11-244.8 “Solicitation” means an instance of soliciting bids, proposals, or qualifications for a contract for commodities or services, and includes “competitive bidding,” “competitive sealed bidding,” “competitive sealed proposals,” and “request for qualifications,” as those terms are defined in Arkansas Procurement Law.

R1-19-11-244. Protest Periods.

(a) The statute allows for two periods in which protests may be lodged. The first such period to protest is open to any “actual or prospective bidder, offeror, or contractor” who takes issue

~~with the specifications contained in a solicitation. Such person may protest the solicitation in writing no later than seventy-two (72) hours before the date and time specified in the solicitation.~~

~~(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.~~

R2-19-11-244 Protest Requirements.

R2-19-11-244.1 Substantive Requirements. A protest must set forth facts showing that the protestor is an interested party with standing to protest under Ark. Code Ann. § 19-11-244(a), who has been aggrieved: (i) in connection with a solicitation, or (ii) in connection with the award of a contract.

R2-19-11-244.2 Formal Requirements. A protest must be submitted in writing to the State Procurement Director or the head of the relevant procurement agency. To expedite handling of protests, if delivered by mail, the envelope containing a protest should be clearly labeled "Protest." Protests delivered by electronic means should be identified as a protest in the subject line and marked as important. A protest shall include as a minimum the following:

- (a) The name and address of the protestor (or the protestor's attorney);
- (b) Appropriate identification of the solicitation by reference to its number, if a number has been assigned; and
- (c) Unless good cause is shown for its absence, a copy of any documents or supporting evidence upon which the protest is based, attached to or enclosed with the protest as an exhibit. Where such documents or supporting evidence substantiating any claims made in a protest are believed or known to exist, but are not available with reasonable diligence to include as an exhibit within the time for submitting a protest, the anticipated documents must be described in the protest so as to explain how they are expected to support the protest and when the protestor reasonably anticipates they will be available, if ever. Failure to provide such supporting exhibits without good cause or within a reasonable time may result in the protest not being sustained.

R2-19-11-244.3 Time Periods for Submission. There are two types of protests permitted under Ark. Code Ann. § 19-11-244: (i) a protest in connection with the solicitation of a contract; and (ii) a protest in connection with the award of a contract. To be timely, a protest, must be submitted in writing to the State Procurement Director or the head of the procurement agency conducting the procurement:

- (a) at least seventy-two (72) hours before the deadline for submitting a response to the solicitation, if it is a protest in connection with the solicitation of a contract; or
- (b) within fourteen (14) calendar days after the aggrieved person knows or should have known of the facts giving rise to the grievance, if it is a protest in connection with the award of a contract. The phrase "should have known" indicates that constructive knowledge, and not just actual knowledge, is considered in determining the timeliness of a protest in connection with the award of a contract.

R2-19-11-244.4 Informing Other Interested Parties. A protestor or other interested party should serve every other known interested party with a copy of any protest or other document that party submits to the State Procurement Director or the head of the relevant procurement agency in response to a protest. A protest or other document responding to a protest should manifest or certify compliance with this rule.

~~**R2-19-11-244. Authority to resolve protested solicitations and awards.**~~

- ~~(a) COUNSEL. Before agreeing to settle any protest by the award of costs, the State Procurement Director or head of a procurement agency shall consult the Attorney General or legal counsel.~~
- ~~(b) AWARD. The award of costs shall be allowed only to compensate a party for reasonable expenses incurred in preparation and submission of a bid or proposal for which that party was wrongfully denied a contract award, and shall be allowed only by filing a claim with the Claims Commission for the agreed costs.~~
- ~~(c) COSTS. The costs which are allowable shall be those which the party is able to prove that are incurred in preparation and submission of the bid or proposal in question, but exclude travel and production costs that may result from participation in pre-bid conferences; attending on-site inspections, and demonstrations or presentations made in responding to formal solicitations issued by the State. No party can recover profit which it anticipates would have been made if that party had been awarded the contract. Attorney's fees associated with the filing and prosecution of the protest are not recoverable.~~

R3-19-11-244 Burden of Supporting a Protest and Supplying Requested Information.

A party submitting a protest has the burden of stating facts showing that the protestor has been aggrieved in connection with a solicitation or in connection with the award of a contract. The State Procurement Director or the head of a procurement agency determining a protest may, but has no duty to, request a protestor or other interested party to submit documentation or information relevant to the protest. Failure of any person to comply expeditiously with a request for documents or information by the State Procurement Director or the head of a procurement agency determining a protest may result in the protest being determined without consideration of the requested information. Delivery of requested documents or information after three business days from the request is generally not considered expeditious, but the State Procurement Director or the head of a procurement agency may allow additional time for good cause.

R4-19-11-244 Stay of Procurements During Protest.

When a protest has been timely submitted, no award of the contract shall be made until the protest has been settled or determined by the State Procurement Director or relevant procurement agency head, unless the State Procurement Director or relevant procurement

agency head makes a written determination, after consulting with the head of the using agency or the head of the procurement agency, that the award of the contract without delay is necessary to protect substantial interests of the State.

R5-19-11-244 Making Information on Protests Available.

In the interest of transparency, a person who is an interested party in a solicitation should be given the same access to solicitation documents that are public records (as defined in Ark. Code. Ann. § 25-19-103(7)) as a citizen of the State of Arkansas is entitled to under the Arkansas Freedom of Information Act of 1967.

R6-19-11-244 Decision by the State Procurement Director or the Head of a Procurement Agency.

R6-19-11-244.1 Time for Decisions. A decision on a protest shall be made by the State Procurement Director or the head of a procurement agency with reasonable promptness after receiving all relevant and requested information, or upon determining that information requested by the State Procurement Director or the head of a procurement agency will not be made readily available. If a protest is sustained, the available remedies include, but are not limited to, those set forth in Ark. Code Ann. § 19-11-244(g), and Ark. Code Ann. § 19-11-247.

R6-19-11-244.2 Remedies for Successful Protestor. When a protest is sustained and the successfully protesting bidder or offeror denied the contract award, the protesting bidder or offeror may submit a claim for the reasonable costs incurred in connection with the solicitation, including bid preparation costs, through the Arkansas Claims Commission (the "Commission"). The Commission regulates the procedure by which such claims are submitted and determined.

R3:19-11-245. Authority to debar or suspend.

(a) GENERAL. Any bidder or contractor to the State of Arkansas who, except for good cause shown, ~~shall have~~ has done engaged in any of the ~~matters conduct~~ listed in subsection (2) may be suspended or debarred from consideration for award of contracts.

(b) CAUSES FOR DEBARMENT OR SUSPENSION. The causes for debarment or suspension include, but are not limited to, the following:

obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(2) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a state contractor;

(3) conviction under state or federal antitrust statutes arising out of submission of bids or proposals;

(4) violation of contract provisions, as set forth below, of a character which is regarded by the State Procurement Director or the head of a procurement agency to be so serious as to justify debarment action:

(A) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(B) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor ~~shall~~ will not be considered to be a basis for debarment;

(5) continuous failure to post bid or performance bonds, or to provide alternate bid or performance guarantee in the form acceptable to the procurement agency in lieu of a bond, as required by an invitation for bids or a solicitation for proposals;

(6) substitution of commodities without the prior written approval of the contracting authority;

(7) failure to replace inferior or defective commodities within a reasonable time after notification by the procurement agency or the agency to which such commodity has been delivered;

(8) refusal to accept a contract awarded pursuant to the terms and conditions of the contractor's bid;

(9) falsifying invoices, or making false representations to any state agency or state official, or untrue statements about any payment under a contract or to procure award of a contract, or to induce a modification in the price or the terms of a contract to the contractor's advantage;

(10) collusion or collaboration with another bidder or other bidders in the submission of a bid or bids for the purpose of lessening or reducing competition;

(11) falsifying information in the submission of an application for listing on a state vendor's list;

(12) repeated failure of a vendor or any of its owners to pay all outstanding tax liabilities to the State of Arkansas;

(A) "repeated failure" ~~shall~~ includes, but is not be limited to,

(i) the existence of seven (7) or more certificates of indebtedness, liens, or other evidence of tax indebtedness that are in the public record during any biennial period;

(ii) the suspension or revocation of a state excise tax permit or any other state permit for non-payment of taxes;

(iii) the existence of three (3) or more writs of garnishment issued for non-payment of taxes during any biennial period;

(B) This rule ~~shall~~ does not apply to

(i) tax debts that are the subject of an administrative or judicial proceeding contesting the validity of such debt until such proceedings are concluded and such tax debts are adjudicated to be valid, or

(ii) any outstanding individual tax liability of a non-owner employee of a vendor or that of non-controlling, individual shareholders in a Subchapter C corporation;

(13) any other cause the State Procurement Director or head of a procurement agency determines to be so serious and compelling as to affect responsibility as a state contractor, including debarment by any other governmental entity for any cause; or violation of the ethical standards set forth in Ark. Code Ann. § 19-11-708.

(c) DEBARMENT. Prior to any action for debarment, the Office of State Procurement or agency procurement official ~~shall~~ must notify the bidder of the opportunity for a hearing at least fourteen (14) days prior to said hearing. Such notification ~~shall~~ must state the facts of any allegation or claim. The State Procurement Director or the head of a procurement agency ~~shall~~ must consult with the Attorney General or his designee prior to debarring a person for cause from consideration for award of contracts.

(d) DEBARMENT HEARING.

(1) The director or head of a procurement agency ~~shall~~ must form a Committee composed of three qualified individuals, from government and private industry to hear the Debarment proceedings.

- (2) *The Attorney General or his designee representing the Director or the head of a procurement agency will have the right to present evidence and elicit testimony from witnesses and cross examine opposing witnesses before the Committee.*
- (3) *The Contractor may be heard in person or by counsel, may cross-examine witnesses and may offer witnesses, documentary evidence and/or evidentiary depositions in defense of the debarment charges. The committee will subpoena witnesses for the Contractor upon timely request. Should Contractor fail to appear, the Committee shall proceed to hear the state's evidence and make its recommendations to the Director or head of a procurement agency.*
- (4) *After hearing the evidence the Committee will make recommendations to the Director or head of the procurement agency.*
- (5) *The Director or head of a procurement agency will receive the recommendation and review the record of the hearing and make a decision regarding the debarment.*
- (e) *DECISION. The written decision concerning debarment will be sent to the contractor within 14 days and shall must state the reasons for the action taken and shall inform the debarred person involved of his rights to judicial review.*
- (f) *OTHER REMEDIES. The procedures in this section shall do not preclude the taking of other action by the state, based on the same facts, as may be otherwise available, either at law or in equity.*
- (g) *DISTRIBUTION OF DECISIONS. All agency procurement officials shall must send a copy of any determination of debarment to the Office of State Procurement and the Office of State Procurement shall must post the results of any debarment on the OSP website.*

R1:19-11-246. Authority to resolve contract and breach of contract controversies.

- (a) *GENERAL. Any contract ~~contractor who~~ which is determined in writing by the State Procurement Director, or the procurement official, or a designee of either officer, to be terminable due to a in breach of any of the terms and conditions of the a contract, mistake, misrepresentation, or other cause, may be terminated as a result of such cause. ~~held by such contractor shall, at the discretion of the procurement official, be declared in default and such contract may be terminated as a result of such default. Declaration of default and/or contract termination may only be determined by the procurement official who awarded the contract, and only after the contractor has been afforded the opportunity, to discuss with the Director or agency procurement official circumstances giving rise to the potential~~ cause for termination and potential cures ~~breach of contract to cure the breach of contract.~~*
- (b) *DEFAULT. A default in performance by a contractor for which a contract may be terminated shall include, but shall not necessarily be limited to, failure to perform the contract according to its terms, conditions and specifications, or failure to make delivery within the time specified or according to a delivery schedule fixed by the contract.*
- (c) *CONTRACTOR'S LIABILITY. The contractor and/or his surety, if a performance or payment bond has been required under the contract, shall be jointly and severally liable to the State for any and all loss or damage as provided in the contract between the State and the contractor as a result of the contractor's default; provided, however, that a contractor's surety's liability shall not exceed the final sum specified in the contractor's bond.*

R3:19-11-265. Disclosure Requirements for

Technical and General Service Contracts.

(1) No contract for Technical or general services greater than the dollar limit established by Executive Order 98-04, ~~shall~~ will be awarded, extended, amended, or renewed by any agency to any contractor who has not disclosed as required in Executive Order 98-04. However, contracts with another government entity such as a state agency, public education institution, federal government entity, or body of a local government are exempt from Executive Order 98-04 disclosure requirements.

(2) No contract for technical or general services greater than the dollar limit established by the ACA § 19-11-105 Illegal Immigrant Certification program ~~shall~~ will be awarded extended, amended or renewed by any agency to any contractor or subcontractor who has not completed the proper certification.

(3) No contract for technical or general services greater than the dollar limit established by the ACA § 25-1-503 Certification program will be awarded by any agency to any contractor who has not completed the proper certification.

(43) The failure of any person or entity to disclose as required under any term of Executive Order 98-04, the ACA § 19-11-105 Illegal Immigrant Certification requests, the ACA § 25-1-503 Certification program or the violation of any rule, regulation or policy promulgated by the Department of Finance and Administration pursuant to this Order, ~~shall~~ will be considered a material breach of the terms of the contract, lease, purchase agreement, or grant and ~~shall~~ will subject the party failing to disclose, or in violation, to all legal remedies available to the agency under the provisions of existing law.

R6:19-11-265. Reporting of Technical and General Services Contracts.

(1) Technical and general services contracts with a total projected contract amount, including any amendments and possible extensions, of twenty-five thousand dollars (\$25,000) and less than one hundred thousand dollars (\$100,000) shall be reported to the Legislative Council or the Joint Budget Committee monthly. Agencies shall must report contracts using the appropriate method as determined by the Office of State Procurement.

(2) Maintenance contracts are not considered services of one (1) or more individuals for regular full-time or part-time weekly work, and do not require reporting to the Legislative Council or the Joint Budget Committee. Maintenance contracts are narrowly defined as providing help or assistance needed to support the continuous operation of procured commodities according to the commodities' original functionality and specifications, including but not limited to software maintenance contracts. Agencies should not apply maintenance contracts so broadly as to frustrate the legislative intent of statutes requiring reporting of certain consulting services or professional service contracts.

(3) Under subsection (a)(1), "regular" is defined by giving the word its ordinary and usually accepted meaning in common language, which in the context of subsection (a)(1) shall be constituted, conducted, scheduled, or done in conformity with established or prescribed usages, rules, or discipline.

R1:19-11-715. Requesting an advisory opinion or waiver.

(1) Requests for advisory opinions or requests for waivers must be submitted in writing to the Director of the Department of Finance and Administration, and should clearly and concisely state whether the request is for an advisory opinion under Ark. Code Ann. § 19-11-715 (b), a waiver under Ark. Code Ann. § 19-11-715 (c), or both. To expedite handling of requests, if delivered by

mail, the envelope containing a request should be clearly labeled as a request for an advisory opinion or a request for a waiver, as the case may be. Requests delivered by electronic means should be identified as a request for an advisory opinion or a request for a waiver, as the case may be, in the subject line and marked as important.

(2) Requests for advisory opinions or requests for waivers shall include as a minimum the following:

- (a) The name and address of the requester (or the requester's attorney);
- (b) Appropriate identification of the proposed contract by reference to its contract number or solicitation number, if a number has been assigned;
- (c) Sufficient information and relevant background facts so that it is not necessary to infer any aspect of the situation on which the request is based, including but not limited to (i) the nature of the disclosed potential conflict of interest, including the relevant persons, relationships, financial interests, and direct or indirect participation in the procurement of the contract; (ii) information regarding the relevant state employee, including the employing state agency, employee's dates of hire and termination, employee's job scope and duties, and employee's potential conflict of interest; (iii) information regarding the proposed contract, including the contracting state agency, contract value, work to be done under the contract, and procurement method; (iv) information regarding the contractor relevant to the contract and potential conflict of interest, including ownership interests and positions of control. Failure to provide such supporting information may result in the request being denied; and
- (d) The using agency shall act to coordinate the individuals, requests, and documents involved and ensure sufficient information and relevant background facts are submitted.

(3) Requests for a waiver must additionally articulate why the interests of the state so require a waiver and granting of permission to proceed with the proposed transaction, or that the ethical conflict is insubstantial or remote.

R1:19-11-802. Request for Qualifications (RFQ) Procurement Method Used in the Establishment of Professional and Consultant Service Contracts.

REQUEST FOR QUALIFICATIONS (RFQ): The Request for Qualifications is, in the absence of sole-source justification, the procurement method recommended when contracting for architectural, engineering, land surveying, legal, and interior design services. It may also be used, with prior approval from the Office of State Procurement, as the selection method for other PCS contracts when it is determined to be the most suitable method of contracting. The RFQ is sent to those vendors registered with the Office of State Procurement for the scope of work or services required, or vendors recommended to the Office of State Procurement as whose work résumé indicates they are best suited to perform the work specified. Notification to the public shall must be in accordance with the provisions of Ark. Code Ann. § 19-11-229(d). 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. Discussions may be conducted with responsible offerors who, based upon qualifications submitted, are determined to be reasonably 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.

R1: 25-1-503 Prohibition From Public Entities Contracting With Companies That Boycott Israel

- (a) The contractor must certify that the contractor is not currently engaged in, and agrees that for the aggregate term of the contract will not engage in, a boycott of Israel. The instructions for certification on contracts over seventy-five thousand dollars (\$75,000) will be provided in the contract solicitation. The instructions for certification on contracts under seventy-five thousand dollars (\$75,000) will be provided on the OSP website.**
- (b) If the contractor violates the above certification or is found to not be in compliance during the term of the contract, the state may require the contractor to remedy the violation within 60 days of discovery of that violation. Failure to remedy the violation within the 60 day period may result in termination for breach of contract, and the contractor may be liable to the State for the State's actual damages.**
- (c) This rule applies to written contracts only and is to be applied prospectively. Any written contract entered into prior to August 1, 2017 does not require certification.**
- (d) Vendors are not required to submit a certificate for commodity purchases made with a p-card as they do not require a written contract.**
- (e) Certification is required at the time a written contract is entered into, renewals or extensions of contracts do not require certification.**
- (f) This Rule does not apply to: (1) A company that fails to meet the requirements under Act 710 subdivision (a)(1) of this section but offers to provide the goods or services for at least twenty percent (20%) less than the lowest certifying business; or (2) Contracts with a total potential value of less than one thousand dollars (\$1,000).**

R1:15-4-3803 Definitions

- (a) Local farm or food products includes Arkansas agricultural products that have met the requirements of the "Arkansas Grown Branding Program" administered through the Arkansas Agriculture Department.**
- (b) Packaged and Processed means bottled, canned, cartoned, securely bagged, or securely wrapped, whether packaged in a food service establishment or a food processing plant.**
- (c) Packaged and Processed does not include a wrapper, carry-out box, or other nondurable container used to containerize food with the purpose of facilitating food protection during service and receipt of the food by the consumer or recipient.**
- (d) On campus-cafeteria does not include a franchise as defined by Ark. Code Ann. § 4-72-202.**

R2:15-4-3803 Procurement Goal-Preference

Method of Procurement for Purchase of Food Products

- (a) An agency should utilize an appropriate method of procurement as prescribed in Arkansas Procurement law for the purchase of food products. This may be a competitive sealed bid if price alone is being considered as the determinative factor, or a request for proposals if other factors, such as a history of health code violations, are being considered. A cooperative purchasing agreement may also be an appropriate**

mechanism for procuring local farm or food products as a means of reducing the administrative cost of food procurement.

- (b) In the event an agency utilizes a procurement method wherein a contract is to be awarded to the lowest responsive bidder, such as competitive sealed bidding, the lowest bid should be accepted only if the bid does not exceed the lowest bid from a provider of local food or farm products by more than ten percent (10%) and if the bidder submitting the lowest bid is not a provider of local farm or food products.**

APPENDIX 8

PROCUREMENT CODES

NOTE: All codes that begin with "M" designate minority vendor purchases to assist agencies with minority expenditure reporting. "Minority" is defined by Arkansas Code Annotated § 15-4-303 as a lawful permanent resident of this state who is: African American, Hispanic American, American Indian, Asian American, Pacific Islander American or a Service Disabled Veteran as designated by the United States Department of Veterans Affairs.

CODE	CODE DESCRIPTION	EXPLANATION
EI	Exempt Item	Used for payroll items
EL ML	Exempt from Procurement Law	Procurements listed as exempt in ACA § 19-11-203
EM MM	Emergency Procurements	Acquisitions of commodities or services greater than \$10,000 which, if not immediately initiated will endanger human life, health, state property or the functional capability of a state agency. ACA §19-11-233
SS MS	Sole Source	Procurements greater than \$10,000 which by virtue of performance specification are available from a single source. ACA §19-11-232
SO MO	Small Order	Purchases not subject to Amendment 54 to the Arkansas Constitution not included on state contract and costing \$10,000 or less. ACA §19-11-231
SPECIAL	Special Procurements	Procurements greater than \$10,000, which by virtue of unusual or unique situations, which may make the application of all requirements of competitive bidding, competitive sealed bidding, or competitive sealed proposals contrary to the public interest. ACA §19-11-263
SPECIAL- APPR	Special Procurements Previously Approved By DFA-OSP	To be used on purchase orders that tie to a previously approved Special Outline Agreement. Code SPECIAL-APPR is to only be used with Purchase Orders.

QC MC	Quote Constitutional Item	Procurements of printing and supplies subject to Amendment 54 of the Arkansas Constitution not included on state contract and costing \$50,000 or less. Whenever possible, at least three competitive bids must be obtained. Quotations in this category may be obtained by state agencies <u>only</u> if issued a delegation order for this specific purpose. —OSP Rule R1:19-11-234
CB MB	Competitive Bid	Procurements not subject to Amendment 54 to the Arkansas Constitution, not included on state contracts, and costing between \$10,000 and \$50,000. ACA §19-11-234

WS	Workshop Products	Items procured from a disabled or blind work center in accordance with § 19-11-901 et seq.
ST MT	State Term	Procurements made under a term contract issued by the Office of State Procurement
CODE	CODE DESCRIPTION	EXPLANATION
SE MF	State Firm	Procurements made under a firm contract issued by the Office of State Procurement
AA MA	Agency Contract Award	Procurements made under a term contract by a state agency having an Agency Procurement Official
AX MX	Agency Quantity Fixed	Procurements made under a fixed quantity contract by a state agency having an Agency Procurement Official
BU MU	Bid Unsuccessful	Procurements authorized by the Office of State Procurement or an Agency Procurement Official when the competitive sealed bid process has produced no satisfactory results
FE ME	Funds Exempt	Procurements from auxiliary and restricted funds
RP MP	Resale Purchase	Items procured for resale in cafeterias, bookstores, etc.; however, these items cannot be transferred or sold to a department or agency in order to circumvent applicable procurement procedures. Commodities & raw material purchased by AR Correctional Industries intended for use in goods for resale. ACA §19-11-203 (14)
SSA MSS	Sole Source previously approved	To be used on purchase orders that tie to a previously approved sole source outline agreement. <i>Note: Code SSA is only to be used in Purchase Orders, DocType NB or PB.</i>
PSC* MSC*	Professional or Consultant Services Contracts	Used for contracts where the relationship between the contractor and an agency is that of an independent contractor. The services rendered consist of the personal services of an individual that are professional in nature and the agency does not have direct managerial control over the day to day activities of the individual providing the services; the contract specifies the scope of work and measurable results expected from contract rather than detailing the manner in which the services shall be rendered.
<p><i>* For ALL PSC Design Professional Contracts on Outline Agreements, enter "PV" in the "agreement type" AASIS field (Prof Svc Contract).</i></p> <p><i>For ALL PSC Design Professional Contracts on Purchase Orders, enter "PB" in the "order type" AASIS field (Professional Svc PO).</i></p>		
PSA MSA	Professional or Consultant Services previously approved.	To be used on purchase orders that tie to a previously approved Professional or Consultant Services outline agreement. <i>Note: Code PSA is only to be used in Purchase Orders, DocType NV.</i>

IG	Intergovernmental	Contracts occurring between two or more governmental entities. ACA § 19-11-251
SG	Sub-grants	Used for all sub-grant expenditures. Does not require State Procurement approval. <i>Note: Code SG is only to be used in DocType NB and NV.</i>
DFA BUILDING AUTHORITY DIVISION RELATED CODES		
CODE	CODE DESCRIPTION	EXPLANATION
ABA-SO ABA-MO	Capital improvement small order	Capital improvement projects which cost \$5,000 or less. ABAMSC 3-101(B)
ABA-QB ABA-MB	Capital improvement quote bid	Capital improvement projects which cost between \$5,000 and \$20,000.00. ABAMSC 3-101(C)
ABA**	Capital Improvement Projects	All capital improvement projects which exceed \$20,000, whether with a minority vendor or not. Agencies must request authorization to begin this process from ABA. The request & public advertisement must be approved by ABA (ACA § 22-9-203/19-4-1405 and ABAMSC Sections 2 & 3).
** On Outline Agreements, enter “NV” in the “agreement type” AASIS field. (Term Contract) On Purchase Orders, enter “NB” in the “order type” AASIS field. (Standard PO)		
PL MPL	Real Property Leases	Lease agreements and amendments involving office space, buildings, structures, land, parking lots, etc., which are contracted through ABA (A.C.A. § 22-2-114). Payments made pursuant to the lease do not need ABA approval. <i>Note: Code PL is only to be used in DocType NB and NV.</i>

Codes Effective May 9, 2016.