

QUESTIONNAIRE
FOR FILING PROPOSED RULES WITH THE
ARKANSAS LEGISLATIVE COUNCIL

DEPARTMENT/AGENCY _____
DIVISION _____
DIVISION DIRECTOR _____
CONTACT PERSON _____
ADDRESS _____
PHONE NO. _____ FAX NO. _____ E-MAIL _____
NAME OF PRESENTER AT COMMITTEE MEETING _____
PRESENTER E-MAIL _____

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
- D. Rule" below.
- E. Submit two (2) copies of the Questionnaire and Financial Impact Statement attached to the front of two (2) copies of the proposed rule and required documents. Mail or deliver to:

Jessica C. Sutton
Administrative Rules Review Section
Arkansas Legislative Council
Bureau of Legislative Research
One Capitol Mall, 5th Floor
Little Rock, AR 72201

1. What is the short title of this rule?

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 rule.

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 Yes No If yes, a copy of the repealed rule is to be included with your completed questionnaire.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.

7. What is the purpose of this proposed rule? Why is it necessary?

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).

9. Will a public hearing be held on this proposed rule? Yes No If yes, please complete the following:

Date: _____

Time: _____

Place: _____

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

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

12. Please provide a copy of the notice required under Ark. Code Ann. § 25-15-204(a), and proof of the publication of said notice. _____

13. Please provide proof of filing the rule with the Secretary of State as required pursuant to Ark. Code Ann. § 25-15-204(e). _____

14. 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.

FINANCIAL IMPACT STATEMENT

PLEASE ANSWER ALL QUESTIONS COMPLETELY

DEPARTMENT _____
DIVISION _____
PERSON COMPLETING THIS STATEMENT _____
TELEPHONE NO. _____ FAX NO. _____ EMAIL: _____

To comply with Ark. Code Ann. § 25-15-204(e), please complete the following Financial Impact Statement and file two (2) copies with the Questionnaire and proposed rules.

SHORT TITLE OF THIS RULE

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;
- b) The reason for adoption of the more costly rule;
- c) Whether the more costly rule is based on the interests of public health, safety, or welfare, and if so, please explain; and
- d) Whether the reason is within the scope of the agency's statutory authority, and if so, please explain.

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

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

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

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

Current Fiscal Year

Next Fiscal Year

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

General Revenue _____
Federal Funds _____
Cash Funds _____
Special Revenue _____
Other (Identify) _____

Total _____

Total _____

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

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

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

Current Fiscal Year

Next Fiscal Year

\$ _____

\$ _____

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 TRANSFORMATION AND SHARED SERVICES
OFFICE OF STATE PROCUREMENT
CHANGES TO RULES UNDER THE ARKANSAS PROCUREMENT LAW
Agency Code 006.27**

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

- (a) “Commodities” is a broad term that encompasses all personal property, except for those categories of personal property expressly exempted under Arkansas Procurement Law.

The following are specifically included as commodities under Arkansas Procurement Law:

- (i) Goods, as defined in the Arkansas Commercial Code at § 4-2-105;
- (ii) Leases of Goods, as defined in the Arkansas Commercial Code at § 4-2A-103; and
- (iii) Insurance.

Ark. Code Ann. 19-11-203(4)(B) expressly excludes real property, leases of real property, other permanent interests in real property, capital improvements, and excluded commodities and services from being considered “commodities” for purposes of Arkansas Procurement Law.

Certain types of commodities that would otherwise fall within the definition of personal property are expressly exempted from the application of Arkansas Procurement Law at Ark. Code Ann. § 19-11-203(14). State agencies not authorized to procure commodities through Arkansas Procurement Law may be authorized to do so under other applicable law. Exemption from Arkansas Procurement Law does not automatically exempt any state agency or officer from other laws governing the expenditure of public funds or the ethical restrictions at Ark. Code Ann. § 19-11-701, et. seq.

- (b) “Consulting services” means services of providing professional counsel and expert advice.
- (c) “Employment agreement” means an agreement between a state agency, as employer, and its employee in which the terms and conditions of the employee’s employment are stated. An independent contractor who, in the course of his, her, or its independent occupation or profession, provides services to a state agency pursuant to a contract is not an employee simply by virtue of having a contract with a state agency.
- (d) “Personal services” means services unique to the specific individual and personality providing them, as opposed to services that are fungible and could be provided by any person based on a set of skills or knowledge. Personal services of visiting speakers, lecturers, and performing artists may be procured without any competitive procurement because they are expressly exempted from Arkansas Procurement Law. Any personal services provided by a contract employee under an “employment agreement,” as defined below, are excluded by definition from being considered “services.”
- (e) “Professional services” means services furnished by or under the supervision of a professional who

has been specially trained to provide such services. A “professional” is a person who belongs to a learned profession or occupation that requires a high level of training, specialized knowledge, proficiency, and often a professional license. Professional services include medical, legal, financial advisory, architectural, engineering, construction management, and land surveying services. Under state law, legal, financial advisory, architectural, engineering, construction management, and land surveying services must be procured by means of a request for qualifications. Professional services of medical professionals by means of a request for qualifications is warranted and permitted by OSP rules. Absent authority from the State Procurement Director, the request for qualifications shall not be used by state agencies to procure any other professional services unless the State Procurement Director determines by rule or in writing that the request for qualifications process is warranted.

- (f) “**Services**” excludes labor, time, or effort that is inherently included in, or is merely incident to, the production or sale of a commodity or commodities.

Labor, time, or effort are “included in” the production or sale of a commodity if expended within either the production or sale of the commodity and are not set apart for separate consideration outside of the purchase price of the commodity.

Labor, time, or effort are “incident to” the production or sale of a commodity if they accompany the production or sale of the commodity as a minor consideration, even if a separate but relatively small fee is paid to the contractor for it. For example, where the purchase of a computer includes delivery and installation for a relatively small fee, the labor, time, and effort involved in the delivery and installation of the computer are incident to the sale of the commodity.

After the State’s procurement and acceptance of a commodity as conforming to the contract, subsequent labor, time, or effort furnished by a contractor with respect to the commodity are considered “**services**” for purposes of Arkansas Procurement Law if they are not incident to the original procurement of the commodity and there is a separate consideration paid for those services. Labor, time, or effort that a contractor furnishes for the customization, generation, configuration, or development of software, beyond that which is incident to the procurement, installation, maintenance, and routine technical support of the software, are considered “**services**” for purposes of Ark. Code Ann. § 19-11-265.

- (g) “**Technical and general services**” is defined at Ark. Code Ann. § 19-11-203(34)(A). It is a term that generally encompasses the broad range of services that are not professional services.

Based on the exclusionary definition in Ark. Code Ann. § 19-11-203(27)(C), the following types of contracts are excluded from being considered a “contract requiring services” within the meaning of Ark. Code Ann. § 19-11-265: (1) employment agreements; (2) collective bargaining agreements; (3) architectural or engineering contracts requiring approval of the Division of Building Authority or the Division of Higher Education; and (4) other commodities and services exempted by law.

R2:19-11-203. Definitions of exempt commodities and services used in this Act.

Certain types of services that would otherwise fall within the definition of services are expressly exempted from the application of Arkansas Procurement Law at Ark. Code Ann. § 19-11-203(14). State agencies not authorized to procure services through Arkansas Procurement Law may be authorized to do so under other applicable law. Exemption from Arkansas Procurement Law does not automatically exempt any state agency or officer from other laws governing the expenditure of public funds or the ethical restrictions at Ark. Code Ann. § 19-11-701, et. seq.

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” 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 rule 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.
- (j) 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.

~~R2~~R3:19-11-203. 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) subject to Department of Transformation and Shared Services Division of Building Authority ~~Department of Finance and Administration Building Authority Division~~ minimum standards and criteria are exempt from the requirements of the Procurement Law.

~~R3~~R4:19-11-203. Proprietary Software.

Software exemption under subsection (14)(AA) 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.

~~R4~~R5:19-11-203. Signatures defined.

The definition of “signed” for the purposes of submitting a solicitation response can be found in the Uniform Commercial Code, Ark. Code Ann. § 4-1-201(39) (General Definitions), which “...includes any symbol executed or adopted by a party with present intention to authenticate a writing.” Allowance should therefore be made for any mark or writing, whether printed or cursive, which that person uses as his signature. Electronic signatures shall also be permitted, unless otherwise prohibited by law, pursuant to Ark. Code Ann. § 25-32-107.

~~R5~~R6:19-11-203. Tax-Supported Institutions defined.

“Tax-supported institutions” means institutions that derive at least fifty percent (50%) of their revenue by appropriation from a taxing jurisdiction.

~~R6~~R7:19-11-203. Hidden Damages.

- (a) Under subsection (14)(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:~~

~~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.~~

R6:19-11-217. Roster of Expiring Contracts.

The “roster” referenced in Ark. Code Ann. § 19-11-217(c)(9) is a record of active and expiring contracts that may be an electronic record that can be printed or used to populate a list of expiring contracts for which no renewal or new procurement has been initiated by request or requisition.

State agencies have the lead role in identifying any commodities and services that they need in order to perform their respective duties. Consequently, they are in the best position to monitor and manage their contracts for commodities and services. As an essential component of managing their contracts, state agencies shall maintain a roster of their active and expiring contracts to submit to the Office of State Procurement. If a state agency wishes to renew or replace a contract expiring in twelve months or less, it should plan to renew or solicit a replacement with ample time to allow for a new contract to be procured and to avoid a disruption in service due to the expiration of its active contracts. State agencies that plan to procure commodities or services through a request for proposals should submit a requisition no later than nine (9) calendar months before the estimated start date of the contract it anticipates awarding as a result of the request for proposals.

R1:19-11-218. Appointment of assistants and other employees;
Delegation of authority by the State Procurement Director.

(A) DELEGATION. The delegation to state agencies of the authority for the procurement of commodities and services may be made by the State Procurement Director with the approval of the Secretary of Transformation and Shared Services. The delegation may be for a specific commodity or service or for all commodities and services for a specific period of time not exceeding two (2) years. Such delegation shall be made by a written order signed by the State Procurement Director or by ~~rules~~ regulations promulgated by the State Procurement Director setting forth with particularity the kind or type of procurement activity or function delegated together with any limitations or restrictions on the exercise of such authority. Delegation orders are non-transferable.

(A) (B) LIMITATIONS. All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director, or until the expiration date provided by law, whichever comes first. The term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.

(B) (C) SMALL PROCUREMENTS AND COMPETITIVE BIDDING. All state agencies shall be

authorized to make purchases according to the procedures for small purchases and competitive bidding as authorized by §§ 19-11-231 and 19-11-234 and ~~rules~~ regulations adopted pursuant thereto. All state agencies not having an agency procurement official shall designate a procurement agent for said delegated purchases and shall submit a letter signed by the administrative head of the state agency to the State Procurement Director requesting ~~designating~~ designation of each employee who shall be a procurement agent. Approval of such delegation shall be made in writing by the State Procurement Director.

-(D) A person who is requesting authority under a written delegation order issued under this section shall complete training as may be required.

(E) Delegation orders may be suspended or rescinded by the State Procurement Director. Suspended delegation orders may be reinstated, modified or rescinded in writing by the director.

R1:19-11-219. Attorney review of designated contracts.

A contract for services or commodities that, by its terms, requires or may require a state agency to expend an amount of public funds equal to or greater than seventy five thousand dollars (\$75,000) in either a calendar or fiscal year shall, prior to execution, be reviewed by any attorney employed by the state and licensed to practice law in Arkansas. The class of attorneys that can satisfy the requirement should be interpreted broadly so as to maximize the number of attorneys that can help state agencies satisfy it. This class of attorneys includes, without limitation, licensed attorneys employed by: (1) the Office of State Procurement; (2) the Office of the Attorney General; and (3) any state agency or institution of higher education.

Where the standard terms and conditions that have already been approved by the Office of State procurement ("OSP") are not used, or they are used but substantively amended, the reviewing attorney shall certify, in a writing (electronic or paper) identifying the responsible attorney, that he or she has reviewed the contract and found no term, condition, or provision that requires the state to:

- (a) subject itself to the law of any other state or to appear in any venue outside of the State other than as may be required by federal law;
- (b) indemnify a non-state party or hold a non-state party harmless;
- (c) keep records or information confidential, unless it is consistent with the Arkansas Freedom of Information Act or other applicable supervening law;
- (d) be financially obligated to make payments for commodities or services before they have been received.

R1:19-11-220. Procurement agencies.

(a) DESIGNATION. Each state agency authorized by § 19-11-220 to elect to have an agency procurement official shall submit a letter signed by the administrative head of the state agency to the State Procurement Director designating an employee who shall be the agency procurement official.

(b) INTERNAL PROCEDURES. The internal procurement procedures must ensure adequate management and control of the agency procurement functions pursuant to law and ~~rules~~ regulations. Each agency shall ensure that a current copy of its internal procurement procedures and ~~rules~~ regulations is kept on file. The internal procurement procedures established may include, but are not limited to:

(1) A method of recording and filing each transaction as follows:

- (A) legal notice where applicable;
- (B) the original invitation for bids, purchase order, internal purchase request, printing order, or other applicable document;
- (C) a list of all bidders invited to participate;
- (D) the original of all bids received;
- (E) an abstract of bids received; and
- (F) a copy of all correspondence, memos, or other documents related to the award and administration of each transaction, including administrative determinations or justifications when applicable.

(2) A file containing each vendor's application and reports regarding the vendor's performance.

(c) LIMITATIONS. Upon request of the Secretary of the Department of Transformation and Shared Services ~~Director of the Department of Finance and Administration~~ or his or her designee, the agency procurement official shall make available for audit and inspection records of any and all transactions pertaining to the procurement of commodities and services.

(d) GENERAL. A state agency having an agency procurement official may request the Office of State Procurement to procure specific commodities and services which the agency procurement official is authorized to procure or to procure all commodities and services which the agency procurement official is authorized to procure for a specific period of time.

R1:19-11-221. Sale, acquisition or use of commodities by a public procurement unit.

DEPARTMENT OF CORRECTION INDUSTRY PROGRAM.

(1) The Department of Correction is authorized to enter into contracts, purchase orders, compacts or agreements with the appropriate officials of agencies of other states or of the federal government for the buying and selling of raw materials, goods and products produced by and belonging to their respective institutions. The buying and selling of these materials will be for the purpose of producing finished products through a correctional industries program.

(2) The Department of Correction shall be governed by Ark. Code Ann. § 12-30-101 et seq., § 12-30-201 et seq., and other appropriate laws when utilizing the provisions of these rules ~~regulations~~. The procurement official/agent for the Department of Correction is authorized to enter into contracts, orders, compacts or agreements pursuant to these rules ~~regulations~~.

(3) Copies of all such contracts, orders, compacts or agreements entered into under the provisions of this rule ~~regulation~~ shall be kept by the Department of Correction with respect to all transactions, deliveries, and obligations under each contract, compact, or agreement

(4) All records and reports required pursuant to this rule ~~regulation~~ shall be available to public inspection during normal business hours, and shall be retained for a period of five (5) years after completion of the contract, compact, or agreement.

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, but a denial of a request for an exemption from a state contract may be made in any manner reasonably likely to communicate the denial to the requestor.

R2:19-11-223. Mandatory state contracts.

(a) Unless an exemption is approved by the State Procurement Director in writing, a state agency that requires commodities or services that are available under a mandatory state contract shall procure these commodities and services exclusively under the mandatory state contract. Except in the case of emergency procurements, as defined in Ark. Code Ann. § 19-11-204(4) and as provided in Ark. Code Ann. § 19-11-233, the director may only approve an exemption from a mandatory state contract awarded under this section if the state agency demonstrates that substantial savings will likely be effected by purchasing outside of the mandatory state contract.

(b) “Substantial savings” are the lesser of: (1) savings of five percent (5%) or more when compared against purchasing from the mandatory state contract; or (2) ten thousand dollars (\$10,000) or more when compared against purchasing from the mandatory state contract.

R1:19-11-224. Interest, carrying charges, and termination fees.

LIMITATIONS.

(1) Contracts may be entered into which contemplate the payment of interest or carrying charges only in the following conditions:

(A) when the interest or carrying charge is required because the term of the contract is extended over a period of time; and

(B) when a provision for termination of the contract is included in the contract, as provided in § 19-11-238(c) and the ~~regulations~~ rules promulgated pursuant thereto.

(2) Contracts may be entered into which contain a provision for the payment of the following charges on delinquent accounts: interest charges, carrying charges, late payment charges or any other charge which may be construed as a penalty, but only if incurred sixty (60) days after the due date.

(3) Service charges may be paid on credit card procurements.

R6:19-11-229. Competitive Sealed Bidding.

SOLICITATION CONFERENCES. Solicitation conferences may be held by the State Procurement Director or agency procurement official or a designee to provide information to prospective bidders. Nothing discussed during a solicitation conference will change the specifications or terms and conditions of a competitive sealed bid, nor shall anything discussed during a solicitation conference be deemed to be binding or incorporated into the specifications or terms and conditions of a competitive sealed bid.

~~R6~~ R7:19-11-229. Competitive Sealed Bidding.

BID OPENING. When practical, the names of the bidders and amounts of their bids may be read aloud. Except where it may be deemed impractical, due to the nature or complexity of an invitation for bids, an abstract of bids which contains the amount of each bid and the name of the bidder shall be prepared for each invitation for bids. An abstract of bids shall be retained in the bid file and shall be available for public inspection.

~~R7~~R8:19-11-229. 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 will be applicable to all invitations for bids issued, bids submitted, and contracts awarded for the purchase of commodities:

(A) Time discounts cannot be considered in the evaluation of a bid pursuant to A.C.A. § 19-11-229(f)(3) unless the solicitation specifically requests a time discount; ~~or cash discounts 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 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 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 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 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~~R9:19-11-229. Competitive sealed bidding.

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

- (1) failure of a bid to conform to the mandatory ~~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~~R10:19-11-229. 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.

~~R10R11~~R11:19-11-229. 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) TRAINED AND CERTIFIED IN NEGOTIATION AND PROCUREMENT PROCESSES means the person will have received certified training from or authorized by the Office of State Procurement.

~~——— 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.~~

~~R11R12~~R12:19-11-229. Competitive sealed bidding.

(1) LIFE CYCLE COST. Life cycle or total ownership costs may include but are not limited to, costs of operation, maintenance, repair, disposal and/or acquisition.

(2) APPLICATION. Life cycle cost formulas may be used for procurements. Certain specified commodities must be procured using life cycle cost formulas provided by the Office of State Procurement. For those specified commodities, the State Procurement Director shall provide formulas to be used in the evaluation of bids by the State Procurement Director, the agency procurement officials or the procurement agents.

~~R12~~R13:19-11-229. Cancellation of invitations for bids.

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

~~R13~~R14:19-11-229. Ethical standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than twenty thousand dollars (\$20,000): “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.”

~~R14~~R15:19-11-229. 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. Procurement officials 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 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 in the best interests of the State and permissible under Ark. Code Ann. § 19-11-229(2)(A), appropriate representatives will proceed with negotiations and award recommendation. Appropriate representatives 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 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).

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

R2-19-11-230.1 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 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 are the appropriate procurement method.

R2-19-11-230.2 THIRTY PERCENT (30%) WEIGHTED COST WAIVER. In seeking a written determination by the State Procurement Director that it is in the best interest of the state for cost to be weighted at less than thirty percent (30%) of the total evaluation score if, the requesting agency shall:

(1) Issue a written request addressed to the State Procurement Director. The written request may be delivered by email or mail, and in either case, should be clearly marked or labeled “Request for Weighted Cost Deviation.”

(2) The written request should clearly articulate the factors for why it is in the best interest of the state for cost to be weighted at a lower percentage than thirty

- percent (30%), and what percentage the requesting agency seeks. The factors articulated should be specific to the request for proposal under consideration.
- (3) If the State Procurement Director issues a written determination approving of the lower percentage, the written determination shall be submitted for review by Legislative Council or, if the General Assembly is in session, the Joint Budget Committee.

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 unless (i) past performance with the state is a non-mandatory evaluation criteria and (ii) the same amount of points allocated for past performance with the state are also made available in the evaluation scoring criteria in such a way as to not prejudice offerors without past performance history with the state. Past performance must be supported by written documentation and shall have not occurred more ~~not greater~~ than three (3) years before the proposal was submitted-~~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 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.

(d) PRIVATE EVALUATORS.

(1) An agency may use qualified evaluators from non-State governmental entities or the private sector.

(i) There is no limit on the number of private evaluators that may be used on an evaluation committee, but they must abide by all ethical standards and legal requirements a state employee or former state employee would have to meet in order to serve as an evaluator.

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 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 or the State Procurement Director or agency procurement official chooses to seek a clarification on a matter that is evaluated in the proposal, the State Procurement Director or agency procurement official may request a clarification ~~confirmation~~ of a proposal.

(1) The and shall request the response by the offeror confirmation to must be made in writing. Clarifications made verbally, in demonstration presentations, or communicated in any other matter shall not be considered a clarifying response by

the offeror, and should be reduced to a written clarification by the offeror to be considered.

(2) The response of any offeror who fails or refuses to clarify in writing within a reasonable time any matter contained in his or her proposal may be rejected.

(3) 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.

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.~~

APPROVAL. All non-critical emergency procurements 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 must be made in writing and include:

(1) a copy of the purchase order;

(2) a copy of the quotation abstract Competitive Bid Tabulation form; and

(3) a written explanation of the emergency.

(b) 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 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.

(dc) LEGISLATIVE REVIEW. Except in the case of a “critical emergency” procurement, as that term is defined in Ark. Code Ann. § 19-11-233(b)(2), all services contracts must be presented for legislative review as required under Ark. Code Ann. § 19-11-265. ~~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.

R1:19-11-238. Initial Term.

A contract may be entered into for up to a maximum period of a total of seven (7) years. It may be advantageous for agencies to have a contract expire annually unless renewed, however, they may opt to make the initial term of a contract extend for up to four (4) years before the first renewal. The aggregate number of years under a non-exempt contract remains seven (7), regardless of the length of the initial term of the contract.

R1-19-11-244 Definitions.

R1-19-11-244.6 “Grounds” of the protest are as defined in § 19-11-244(a)(4).

R1-19-11-244.7 “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.

R1-19-11-244.78 “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.

R1-19-11-244.89 “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.

R1-19-11-244.9 “Submitted” means a protest that conforms to the formal requirements as defined in these rules, that has been received by the State Procurement Director or the head of the relevant procurement agency. It is not sufficient for a protestor to merely claim a protest was submitted; evidence of actual receipt of the protest must be obtained, whether return receipt, confirmation email by the State Procurement Director or the head of the relevant procurement agency, or other adequate evidence of receipt.

R2-19-11-244 Protest Requirements.

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

R2-19-11-244.2 Formal Requirements. A protest must be ~~submitted~~ 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 ~~email/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~~ 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 award or notice of anticipation to award has been posted. In the event that both a notice of anticipation to award and an award have been posted, the protest shall be submitted in writing within fourteen (14) calendar days of whichever occurred first. 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.~~

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 Grounds ~~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 execution award ~~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 execution award ~~award~~ of the contract without delay is necessary to protect substantial interests of the State.

R1:19-11-249. Cooperative purchasing.

(a) When an agency that is subject to Arkansas Procurement Law seeks to participate in a cooperative purchasing agreement that is administered by a public procurement unit or external procurement activity that is not subject to Arkansas Procurement Law, it will first need to submit the cooperative purchasing agreement to the State Procurement Director for a determination as required by A.C.A. § 19-11-256(b) and these rules. If a determination has already been made with respect to a cooperative purchasing agreement, any other public procurement unit may rely on that determination. ~~Cooperative purchasing contracts or agreements must be approved by the Director of the Office of State Procurement prior to being entered into by a state public procurement unit.~~

R2:19-11-249. Reporting of Cooperative Contract Purchases.

Cooperative contract purchases of state agencies without an agency procurement official must be presented to the Legislative Council or Joint Budget Committee by the ~~Department of Finance and Administration~~ Office of State Procurement annually. Agencies shall submit purchases using the appropriate method as determined by the Office of State Procurement within ninety (90) days after the conclusion of the relevant fiscal year.

R1:19-11-251. Intergovernmental agreements.

(a) Intergovernmental agreements should include at a minimum:

- (1) Scope of work to be accomplished;
- (2) Amount of compensation (if any);
- (3) Delineation of responsibilities and duties of each entity;
- (4) Term of agreement; and
- (5) Authorized signatures from each entity.

~~(b) (1) Intergovernmental agreements for technical and general services with a total projected contract amount, including any amendments and possible extensions, of one hundred thousand dollars (\$100,000) or more will be submitted to the Office of State Procurement prior to contract execution for review by the Legislative Council or Joint Budget Committee.~~

~~(2) Intergovernmental agreements involving professional and consultant services with a total projected contract amount, including any amendments and possible extensions, of fifty thousand dollars (\$50,000) or more will be submitted to the Office of State Procurement prior to contract execution for review by the Legislative Council or Joint Budget Committee.~~

~~(3) Intergovernmental agreements involving commodities will not be submitted to the Office of State Procurement prior to contract execution.~~

R1:19-11-265. Submission of Contracts for Services Review Requirements of Technical and General Services Contracts that are Amended.

~~(a) Amendments to contracts that were originally reviewed by Legislative Council or Joint Budget Committee. An amendment will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and Administration and before the execution date of the amendment if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount and/or involves major changes in the objectives and scope of the contract.~~

~~(b) Amendments to contracts that originally did not require review by Legislative Council or Joint Budget Committee. Any amendment which increases the total projected contract amount, including any amendments or possible extensions, of a technical and general services contract to one hundred thousand dollars (\$100,000) or more shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration and before the execution date of the amendment. The amendment along with a copy of the original contract and any attachments thereto must be submitted to the Office of State Procurement in accordance with the time guidelines as prescribed in R5:19-11-265. Contracts that have expired cannot be amended.~~

(a) Contracts requiring “services,” as defined in Arkansas Procurement Law and these rules, are to be presented to the Legislative Council or, if the General Assembly is in session, to the Joint Budget Committee, before the execution of the contract if the contract amount is fifty thousand dollars (\$50,000) or more in any one year of the contract’s term, or if the total projected contract amount, including any amendments or possible extensions, is three hundred fifty thousand dollars (\$350,000) or more unless they are contracts for critical emergency procurements or are otherwise exempted from the submission requirements of Ark. Code Ann. § 19-11-265.

(b) Labor, time, or effort included in or incident to a contractor’s production or sale of a commodity or commodities are not considered “services” for purposes of determining whether a contract is a “contract requiring services” within the meaning of Ark. Code Ann. § 19-11-265. Consequently, a contract for the procurement of a commodity or commodities is not a “contract requiring services” for purposes of Ark. Code Ann. § 19-11-265 if it only calls for labor, time, or effort included in or incident to the procurement of the commodity or commodities.

(c) Where a tangible commodity exists and is identifiable at the time of the commodity’s procurement, any labor, time, or effort expended in its production are not considered services if no separate consideration is paid beyond the purchase price of the commodity for the labor, time, and effort expended in producing the commodity. Even where a present purchase order is for a tangible commodity yet to be produced, the future labor, time, or effort to be expended in the production of the commodity will not be considered “services” if the only consideration to be paid is the purchase price of the commodity after its receipt (and incidentals, such as taxes, delivery fees, etc.), and no separate consideration is paid for the labor, time, or effort expended in the production of the commodity. However, where a contract requires a contractor to furnish labor, time, or effort to produce a commodity not yet in existence, such as a computer program, and the contract calls for consideration to be paid to the contractor based on the labor, time, or effort furnished in the production of the commodity rather than based on the finished commodity, such labor, time, or effort are considered “services.”

(d) If a contract will require procurement of a combination of commodities and services, as those terms

are defined in Arkansas Procurement Law and these rules, then it should be submitted for review under Ark. Code Ann. § 19-11-265 if the services component of the contract is fifty thousand dollars (\$50,000) or more in any one contract year, or if the total projected contract amount, including any amendments or possible extensions, is three hundred fifty thousand dollars (\$350,000) or more.

R2:19-11-265. Material changes to Contracts for Services ~~Technical and General Services Contract Form.~~

~~Each contract presented for review should be submitted using the appropriate contract form as specified by the Office of State Procurement. Contract forms are available on the OSP website.~~

- (a) A contract that has previously been presented for review does not need to be presented for legislative review again upon its renewal or extension unless it introduces a “material change.” There are two classes of material changes that trigger a duty to resubmit a contract for review at either renewal of a contract or extension of a contract term:

(1) an amendment that is a material change in contractual terms, including, without limitation:

- (A) An increase in the initial contract amount;
- (B) An increase in the total projected contract amount;
- (C) A change in any of the essential terms of the contract;
- (D) A change in any performance-based standards stated in the contract; and

(2) a material deviation by a contractor from the performance promised during the period preceding renewal or extension, such as a:

- (A) default requiring the imposition of financial consequences as the result of the contractor’s failure to satisfy performance-based standards under Ark. Code Ann. § 19–11–267 during the year preceding the renewal or extension of the contract; or
 - (B) vendor performance resulting in a vendor performance report during the year preceding the renewal or extension of the contract.
- Both of these are “material changes” that trigger the duty to re-submit a contract for review prior to a renewal or an extension.

For purposes of Ark. Code Ann. § 19-11-265, renewal refers to re-establishing an existing contract for another term, whereas extension is extending the term of an existing contract that would otherwise expire. Although technically distinguishable, they are functionally similar.

(b) Definitions.

1. “Initial contract amount” refers to the amount agreed to for the initial term of a contract.
2. “Total projected contract amount” refers to the total amount that the state is projected to expend under the contract over the entire life of the contract, which can be no more than seven (7) years

under Ark. Code Ann. § 19-11-238.

3. “Essential terms of a contract,” also called fundamental terms, are provisions that must be included for an enforceable contract to exist between the parties under any applicable statute of frauds.

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, 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 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.~~

(4) ~~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, will be considered a material breach of the terms of the contract, lease, purchase agreement, or grant and will subject the party failing to disclose, or in violation, to all legal remedies available to the agency under the provisions of existing law.~~

R4:19-11-265. Contract Dates.

———~~For each technical and general services contract form submitted, the agency is required to enter the beginning and ending date of the contract. The beginning date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract are to begin and not the date upon which the agreement was signed. This date should be arrived at with emphasis placed on the following:~~

~~(a) Any contract or amendment to a contract that requires review by the Legislative Council or Joint Budget Committee must be submitted to the Department of Finance and Administration Office of State Procurement in accordance with the time guidelines as prescribed on the Office of State Procurement website. The beginning date of the contract must not precede the date of the Arkansas Legislative Council meeting in which such contract is to be reviewed. The Legislative Council or the Joint Budget Committee shall provide the State Procurement Director with their review as to the propriety of the contract within thirty (30) days of said submission to the Legislative Council or Joint Budget Committee;~~

~~(b) All 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 unless specifically exempted, must be filed with the Department of Finance and Administration Office of State Procurement for review by the Legislative Council or Joint Budget Committee.~~

~~R5:19-11-265. 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 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. —~~

~~R6~~R3:19-11-265. Technical and General Services Contracts
on File in the Office of State Procurement.

All agencies will be required to maintain copies in accordance with current document retention laws (Ark. Code Ann. § 19-11-214), of all purchase orders issued for the procurement of technical and general services.

R1:19-11-267. Use of Performance-Based Standards in Contracts.

~~The purpose of these standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.~~

(a) The purpose of performance-based standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.

(b) It is recommended that all services contracts include performance standards.

(c) All services contracts that have a contract amount of at least one million dollars (\$1,000,000) in a single contract year or a total projected contract amount, including any amendments to or possible extensions of the contract, of at least seven million dollars (\$7,000,000), including any amendments or possible extensions, shall include performance standards.

(bd) Performance standards may be standardized for use with similar contracts or may be specifically developed for unique requirements.

(ee) Performance standards should measure, at prescribed points throughout the term of the contract, the quality, quantity, and timeliness of work being performed.

(df) Performance standards may be refined by the agency and the provider as a part of the contract negotiations.

(eg) A provider's inability to meet established performance standards may be sufficient cause for declaring default and may also result in cancellation of the contract.

(fh) Contracts that otherwise fall under Ark. Code Ann. § 19-11-267(b)(1) may be exempt from the use of performance standards ~~include if they are:~~

- (1) Sole source by law contracts in which the state is compelled as a result of court, state or federal mandate to award for services from a specific provider;:-
- (2) Emergency contracts in which the need for expediency does not permit for the development of performance standards.

~~R1:19-11-268. Reporting of Vendor Performance.~~

~~Contracts with a total projected contract amount, including any amendments and possible extensions, of twenty five thousand dollars (\$25,000) or more shall require the submission of a vendor performance report at least one (1) time every three (3) months for the entire term of the contract and at the end of the contract. Reports shall be due to the Office of State Procurement. This shall not restrict agencies from submitting an unsatisfactory vendor performance report at any time during the contract period. Agencies shall submit vendor performance reports using the appropriate method as prescribed by the Office of State Procurement.~~

R1:19-11-[273]. Solicitation Conferences. A solicitation conference may be held by an agency to provide the following information to prospective bidders:

- (1) Names and contact information of state personnel who will serve as points of contact to bidders during the solicitation process;.
- (2) Times, dates, locations and other relevant information pertaining to the procurement calendar and process;
- (3) A description of the services or commodities sought, as well as the agency's objectives;
- (4) A review of the specifications and pricing model being sought;
- (5) And to take questions from attendees

R2:19-11-[273]. Mandatory Solicitation Conferences. Agencies may make attendance at a solicitation conference mandatory by obtaining approval from the State Procurement Director or the head of the procurement agency. In seeking such approval, the agency shall:

- (1) Issue a request letter, addressed to the State Procurement Director or the head of the procurement agency. Email is sufficient to constitute a request. Whether delivered by email or mail, the communication should be clearly marked or

labeled “Request for a Mandatory Solicitation Conference.”

- (2) The written request should clearly articulate the factors and reasoning for why the solicitation conference should be made mandatory, as well as a citation to the mandatory language for a solicitation conference in the invitation for bids, request for proposals, or request for statements of qualifications and performance data.
- (3) A copy of the draft invitation for bids, request for proposals, or request for statements of qualifications and performance data should be attached with the written request.

R3:19-11-[273]. Nothing discussed during a solicitation conference will augment or change the specifications or terms and conditions of a competitive sealed bid, nor shall anything discussed during a solicitation conference be deemed to be binding or incorporated into the specifications or terms and conditions of a competitive sealed bid, unless it is subsequently reduced to writing and included in the solicitation.

R1:19-11-[275]. CONDITIONS OF USE. A request for information (“RFI”) solicitation may be issued by an agency for the purposes of information gathering and planning while contemplating a possible competitive sealed bid procurement or competitive sealed proposal procurement. A RFI is not, and should not be construed as, a commitment by the agency to issue a solicitation in the future. Agencies should not seek, and vendors should not provide, proposals or bids. A response to a RFI should be treated by the agency as informational only, and should not be considered a proposal or bid, nor should any contract be awarded directly from a RFI.

R2:19-11-[275]. PRICING INFORMATION. A request for information solicitation may request general pricing models, but specific pricing should be expressly prohibited in the RFI solicitation, and if provided unsolicited, should not be considered.

R3:19-11-[275]. The exemption of public records from the Freedom of Information Act of 1967 corresponding to a request for information (“RFI”) is limited, expiring upon either: (1) the public opening of bids for a competitive sealed bid procurement that followed the relevant RFI; (2) notice being posted of the anticipated award for a competitive sealed proposal that followed the relevant RFI; or (3) upon an agency making a determination (either formally or through failure to initiate a solicitation within twenty-four (24) months of the RFI) not to proceed with a solicitation following the relevant RFI.

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

~~Professional and consultant service contracts between state agencies for which the total projected contract amount, including any amendments or possible extensions, is fifty thousand dollars (\$50,000) or more, must be presented to the Performance Evaluation and Expenditure Review Committee (PEER) or Joint Budget Committee by the Department of Finance and Administration prior to the execution date of such contract.~~

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

~~(a) AMENDMENTS TO CONTRACTS THAT WERE ORIGINALLY REVIEWED BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. An amendment will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and Administration and before the execution date of the amendment if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount and/or involves major changes in the objectives and scope of the contract.~~

~~(b) AMENDMENTS TO CONTRACTS THAT ORIGINALLY DID NOT REQUIRE REVIEW BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. Any amendment that increases the total projected contract amount, including any amendments or possible extensions, of a professional or consultant service contract to fifty thousand dollars (\$50,000) or more shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration and before the execution date of the amendment. The amendment, along with a copy of the original contract and any attachments thereto, must be submitted to the Office of State Procurement in accordance with the time guidelines as prescribed in R12:11-19-1012. Contracts that have expired cannot be amended.~~

~~R3:19-11-1006. Reporting of Professional and Consultant Service Contracts.~~

~~Professional and consultant service contracts with a total projected contract amount, including any amendments or possible extensions, of ten thousand dollars (\$10,000) but less than fifty thousand dollars (\$50,000) shall be reported to the Legislative Council or the Joint Budget Committee monthly. Agencies shall submit contracts using the appropriate method as determined by the Office of State Procurement.~~

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

~~(a) All professional and consultant service contracts shall include performance standards. The purpose of these standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.~~

~~(b) Performance standards may be standardized for use with similar contracts or may be specifically developed for unique requirements.~~

~~(c) — Performance standards should measure, at prescribed points throughout the term of the contract, the quality, and quantity, and timeliness of work being performed.~~

~~(d) — Performance standards may be refined by the agency and the provider as a part of the contract negotiations.~~

~~(e) — A provider's inability to meet established performance standards may be sufficient cause for declaring default and may also result in cancellation of the contract.~~

~~(f) — Contracts that may be exempt from the use of performance standards include:~~

~~(1) Sole source by law contracts in which the state is compelled as a result of court, state or federal mandate to award for services from a specific provider.~~

~~(2) Emergency contracts in which the need for expediency does not permit for the development of performance standards.~~

~~Architectural and Engineering contracts that are awarded using Building Authority Division criteria or similar criteria developed by those colleges and universities which are exempt from Building Authority Division review.~~

R2:19-11-1012. Contract Dates.

For each professional and consultant service contract form submitted, the agency is required to enter the beginning and ending date of the contract. The beginning date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract are to begin and not the date upon which the agreement was signed. This date should be arrived at with emphasis placed on the following:

(a) Any contract or amendment to a contract that requires review by the Legislative Council or Joint Budget Committee must be submitted to the Department of Finance and Administration; Office of State Procurement; in accordance with the time guidelines as prescribed on the Office of State Procurement website. The beginning date of the contract must not precede the date of the Arkansas Legislative Council meeting in which such contract is to be reviewed. The Legislative Council or the Joint Budget Committee shall provide the State Procurement Director with their review as to the propriety of the contract within thirty (30) days of said submission to the Legislative Council or Joint Budget Committee;

~~(b) All professional and consultant service contracts with fifty thousand dollars (\$50,000) or more in any one year of the contract's term, or if the total projected contract amount, including any amendments or possible extensions, is three hundred fifty thousand dollars (\$350,000) or more unless they are contracts for critical emergency procurements or are otherwise exempted from the submission requirements of Ark. Code Ann. § 19-11-265, must be filed with the Department of Finance and Administration for review by the Legislative Council or Joint Budget Committee. a total projected contract amount, including any amendments or possible extensions, of fifty thousand dollars (\$50,000) or more, unless specifically excepted, must be filed with the Department of Finance and Administration for review by the Legislative Council or Joint Budget Committee.~~

R1:19-11-1013. Reporting of Vendor Performance.

~~Contracts with a total projected contract amount, including any amendments and possible extensions, of twenty five thousand dollars (\$25,000) or more shall require the submission of a vendor performance report at least one (1) time every three (3) months for the entire term of the contract and at the end of the contract. Reports shall be due to the Office of State Procurement. This shall not restrict agencies from submitting an unsatisfactory vendor performance report at any time during the contract period. Agencies shall submit vendor performance reports using the appropriate method as prescribed by the Office of State Procurement.~~

**STATE OF ARKANSAS
DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES
OFFICE OF STATE PROCUREMENT
CHANGES TO RULES UNDER THE ARKANSAS PROCUREMENT LAW
Agency Code 006.27**

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

- (a) “**Commodities**” is a broad term that encompasses all personal property, except for those categories of personal property expressly exempted under Arkansas Procurement Law.

The following are specifically included as commodities under Arkansas Procurement Law:

- (i) Goods, as defined in the Arkansas Commercial Code at § 4–2–105;
- (ii) Leases of Goods, as defined in the Arkansas Commercial Code at § 4-2A-103; and
- (iii) Insurance.

Ark. Code Ann. 19-11-203(4)(B) expressly excludes real property, leases of real property, other permanent interests in real property, capital improvements, and excluded commodities and services from being considered “commodities” for purposes of Arkansas Procurement Law.

Certain types of commodities that would otherwise fall within the definition of personal property are expressly exempted from the application of Arkansas Procurement Law at Ark. Code Ann. § 19-11-203(14). State agencies not authorized to procure commodities through Arkansas Procurement Law may be authorized to do so under other applicable law. Exemption from Arkansas Procurement Law does not automatically exempt any state agency or officer from other laws governing the expenditure of public funds or the ethical restrictions at Ark. Code Ann. § 19-11-701, *et. seq.*

- (b) “**Consulting services**” means services of providing professional counsel and expert advice.
- (c) “**Employment agreement**” means an agreement between a state agency, as employer, and its employee in which the terms and conditions of the employee’s employment are stated. An independent contractor who, in the course of *his, her, or its* independent occupation or profession, provides services to a state agency pursuant to a contract is not an employee simply by virtue of having a contract with a state agency.
- (d) “**Personal services**” means services unique to the specific individual and personality providing them, as opposed to services that are fungible and could be provided by any person based on a set of skills or knowledge. Personal services of visiting speakers, lecturers, and performing artists may be procured without any competitive procurement because they are expressly exempted from Arkansas Procurement Law. Any personal services provided by a contract employee under an “employment agreement,” as defined below, are excluded by definition from being considered “services.”

(e) **“Professional services”** means services furnished by or under the supervision of a professional who has been specially trained to provide such services. A “professional” is a person who belongs to a learned profession or occupation that requires a high level of training, specialized knowledge, proficiency, and often a professional license. Professional services include medical, legal, financial advisory, architectural, engineering, construction management, and land surveying services. Under state law, legal, financial advisory, architectural, engineering, construction management, and land surveying services must be procured by means of a request for qualifications. Professional services of medical professionals by means of a request for qualifications is warranted and permitted by OSP rules. Absent authority from the State Procurement Director, the request for qualifications shall not be used by state agencies to procure any other professional services unless the State Procurement Director determines by rule or in writing that the request for qualifications process is warranted.

(f) **“Services”** means labor, time, or effort that is inherently included in, or is merely incident to, the production or sale of a commodity or commodities.

Labor, time, or effort are “included in” the production or sale of a commodity if expended within either the production or sale of the commodity and are not set apart for separate consideration outside of the purchase price of the commodity.

Labor, time, or effort are “incident to” the production or sale of a commodity if they accompany the production or sale of the commodity as a minor consideration, even if a separate but relatively small fee is paid to the contractor for it. For example, where the purchase of a computer includes delivery and installation for a relatively small fee, the labor, time, and effort involved in the delivery and installation of the computer are incident to the sale of the commodity.

After the State’s procurement and acceptance of a commodity as conforming to the contract, subsequent labor, time, or effort furnished by a contractor with respect to the commodity are considered **“services”** for purposes of Arkansas Procurement Law if they are not incident to the original procurement of the commodity and there is a separate consideration paid for those services. Labor, time, or effort that a contractor furnishes for the customization, generation, configuration, or development of software, beyond that which is incident to the procurement, installation, maintenance, and routine technical support of the software, are considered **“services”** for purposes of Ark. Code Ann. § 19-11-265.

(g) **“Technical and general services”** is defined at Ark. Code Ann. § 19-11-203(34)(A). It is a term that generally encompasses the broad range of services that are not professional services.

Based on the exclusionary definition in Ark. Code Ann. § 19-11-203(27)(C), the following types of contracts are excluded from being considered a “contract requiring services” within the meaning of Ark. Code Ann. § 19-11-265: (1) employment agreements; (2) collective bargaining agreements; (3) architectural or engineering contracts requiring approval of the Division of Building Authority or the Division of Higher Education; and (4) other commodities and services exempted by law.

R2:19-11-203. Definitions of exempt commodities and services used in this Act.

Certain types of services that would otherwise fall within the definition of services are expressly exempted from the application of Arkansas Procurement Law at Ark. Code Ann. § 19-11-203(14). State agencies not authorized to procure services through Arkansas Procurement Law may be authorized to do so under other applicable law. Exemption from Arkansas Procurement Law does not automatically exempt any state agency or officer from other laws governing the expenditure of public funds or the ethical restrictions at Ark. Code Ann. § 19-11-701, *et. seq.*

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” 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 [rule] 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.
- (j) 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.

R3:19-11-203. 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) subject to Department of Transformation and Shared Services Division of Building Authority minimum standards and criteria are exempt from the requirements of the Procurement Law.

R4:19-11-203. Proprietary Software.

Software exemption under subsection (14)(AA) 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.

R5:19-11-203. Signatures defined.

The definition of “signed” for the purposes of submitting a solicitation response can be found in the Uniform Commercial Code, Ark. Code Ann. § 4-1-201(39) (General Definitions), which “...includes any symbol executed or adopted by a party with present intention to authenticate a writing.” Allowance should therefore be made for any mark or writing, whether printed or cursive, which that person uses as his signature. Electronic signatures shall also be permitted, unless otherwise prohibited by law, pursuant to Ark. Code Ann. § 25-32-107.

R6:19-11-203. Tax-Supported Institutions defined.

“Tax-supported institutions” means institutions that derive at least fifty percent (50%) of their revenue by appropriation from a taxing jurisdiction.

R7:19-11-203. Hidden Damages.

- (a) Under subsection (14)(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.

R6:19-11-217. Roster of Expiring Contracts.

The “roster” referenced in Ark. Code Ann. § 19-11-217(c)(9) is a record of active and expiring contracts that may be an electronic record that can be printed or used to populate a list of expiring contracts for which no renewal or new procurement has been initiated by request or requisition.

State agencies have the lead role in identifying any commodities and services that they need in order to perform their respective duties. Consequently, they are in the best position to monitor and manage their contracts for commodities and services. As an essential component of managing their contracts, state agencies shall maintain a roster of their active and expiring contracts to submit to the Office of State Procurement. If a state agency wishes to renew or replace a contract expiring in twelve months or less, it should plan to renew or solicit a replacement with ample time to allow for a new contract to be procured and to avoid a disruption in service due to the expiration of its active contracts. State agencies that plan to procure commodities or services through a request for proposals should submit a requisition no later than nine (9) calendar months before the estimated start date of the contract it anticipates awarding as a result of the request for proposals.

R1:19-11-218. Appointment of assistants and other employees;
Delegation of authority by the State Procurement Director.

- (A) DELEGATION. The delegation to state agencies of the authority for the procurement of commodities and services may be made by the State Procurement Director with the approval of the Secretary of Transformation and Shared Services. The delegation may be for a specific commodity or service or for all commodities and services for a specific period of time not exceeding two (2) years. Such delegation shall be made by a written order signed by the State Procurement Director or by rules promulgated by the State Procurement Director setting forth with particularity the kind or type of procurement activity or function delegated together with any limitations or restrictions on the exercise of such authority. Delegation orders are non-transferable.
- (B) LIMITATIONS. All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director, or until the expiration date provided by law, whichever comes first. The term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.
- (C) SMALL PROCUREMENTS AND COMPETITIVE BIDDING. All state agencies shall be authorized to make purchases according to the procedures for small purchases and competitive bidding as authorized by §§ 19-11-231 and 19-11-234 and rules adopted pursuant thereto. All state agencies not having an agency procurement official shall designate a procurement agent for said delegated purchases and shall submit a letter signed by the administrative head of the state agency to the State Procurement Director requesting designation of each employee who shall be a procurement agent. Approval of such delegation shall be made in writing by the State Procurement Director.

(D) A person who is requesting authority under a written delegation order issued under this section shall complete training as may be required.

(E) Delegation orders may be suspended or rescinded by the State Procurement Director. Suspended delegation orders may be reinstated, modified or rescinded in writing by the director.

R1:19-11-219. Attorney review of designated contracts.

A contract for services or commodities that, by its terms, requires or may require a state agency to expend an amount of public funds equal to or greater than seventy five thousand dollars (\$75,000) in either a calendar or fiscal year shall, prior to execution, be reviewed by any attorney employed by the state and licensed to practice law in Arkansas. The class of attorneys that can satisfy the requirement should be interpreted broadly so as to maximize the number of attorneys that can help state agencies satisfy it. This class of attorneys includes, without limitation, licensed attorneys employed by: (1) the Office of State Procurement; (2) the Office of the Attorney General; and (3) any state agency or institution of higher education.

Where the standard terms and conditions that have already been approved by the Office of State Procurement are not used, or they are used but substantively amended, the reviewing attorney shall certify, in writing (electronic or paper), identifying the responsible attorney, that he or she has reviewed the contract and found no term, condition, or provision that requires the state to:

- (a) subject itself to the law of any other state or to appear in any venue outside of the State other than as may be required by federal law;
- (b) indemnify a non-state party or hold a non-state party harmless;
- (c) keep records or information confidential, unless it is consistent with the Arkansas Freedom of Information Act or other applicable supervening law;
- (d) be financially obligated to make payments for commodities or services before they have been received.

R1:19-11-220. Procurement agencies.

(a) DESIGNATION. Each state agency authorized by § 19-11-220 to elect to have an agency procurement official shall submit a letter signed by the administrative head of the state agency to the State Procurement Director designating an employee who shall be the agency procurement official.

(b) INTERNAL PROCEDURES. The internal procurement procedures must ensure adequate management and control of the agency procurement functions pursuant to law and ~~rules regulations~~. Each agency shall ensure that a current copy of its internal procurement procedures and ~~rules-regulations~~ is kept on file. The internal procurement procedures established may include, but are not limited to:

- (1) A method of recording and filing each transaction as follows:
 - (A) legal notice where applicable;
 - (B) the original invitation for bids, purchase order, internal purchase request, printing order, or other applicable document;
 - (C) a list of all bidders invited to participate;
 - (D) the original of all bids received;
 - (E) an abstract of bids received; and
 - (F) a copy of all correspondence, memos, or other documents related to the award and administration of each transaction, including administrative determinations or justifications when applicable.
- (2) A file containing each vendor's application and reports regarding the vendor's performance.

(c) LIMITATIONS. Upon request of the Secretary of the Department of Transformation and Shared Services his or her designee, the agency procurement official shall make available for audit and inspection records of any and all transactions pertaining to the procurement of commodities and services.

(d) GENERAL. A state agency having an agency procurement official may request the Office of State Procurement to procure specific commodities and services which the agency procurement official is authorized to procure or to procure all commodities and services which the agency procurement official is authorized to procure for a specific period of time.

R1:19-11-221. Sale, acquisition or use of commodities by a public procurement unit.

DEPARTMENT OF CORRECTION INDUSTRY PROGRAM.

(1) The Department of Correction is authorized to enter into contracts, purchase orders, compacts or agreements with the appropriate officials of agencies of other states or of the federal government for the buying and selling of raw materials, goods and products produced by and belonging to their respective institutions. The buying and selling of these materials will be for the purpose of producing finished products through a correctional industries program.

(2) The Department of Correction shall be governed by Ark. Code Ann. § 12-30-101 et seq., § 12-30-201 et seq., and other appropriate laws when utilizing the provisions of these rules. The procurement official/agent for the Department of Correction is authorized to enter into contracts, orders, compacts or agreements pursuant to these rules.

(3) Copies of all such contracts, orders, compacts or agreements entered into under the provisions of this rule shall be kept by the Department of Correction with respect to all transactions, deliveries, and obligations under each contract, compact, or agreement

(4) All records and reports required pursuant to this rule shall be available to

public inspection during normal business hours, and shall be retained for a period of five (5) years after completion of the contract, compact, or agreement.

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 of exemption from a state contract shall be made in writing by the State Procurement Director, but a denial of a request for an exemption from a state contract may be made in any manner reasonably likely to communicate the denial to the requestor.

R2:19-11-223. Mandatory state contracts.

- (a) Unless an exemption is approved by the State Procurement Director in writing, a state agency that requires commodities or services that are under a mandatory state contract shall procure these commodities and services exclusively under the mandatory state contract. Except in the case of emergency procurements, as defined in Ark. Code Ann. § 19-11-204(4) and as provided in Ark. Code Ann. § 19-11-233, the director may only approve an exemption from a mandatory state contract awarded under this section if the state agency demonstrates that substantial savings will likely be effected by purchasing outside of the mandatory state contract.
- (b) "Substantial savings" are the lesser of: (1) savings of five percent (5%) or more when compared against purchasing from the mandatory state contract; or (2) ten thousand dollars (\$10,000) or more when compared against purchasing from the mandatory state contract.

R1:19-11-224. Interest, carrying charges, and termination fees.

LIMITATIONS.

(1) Contracts may be entered into which contemplate the payment of interest or carrying charges only in the following conditions:

(A) when the interest or carrying charge is required because the term of the contract is extended over a period of time; and

(B) when a provision for termination of the contract is included in the contract, as provided in § 19-11-238(c) and the rules promulgated pursuant thereto.

(2) Contracts may be entered into which contain a provision for the payment of the following charges on delinquent accounts: interest charges, carrying charges, late payment charges or any other charge which may be construed as a penalty, but only if incurred sixty (60) days after the due date.

(3) Service charges may be paid on credit card procurements.

R6:19-11-229. Competitive Sealed Bidding.

SOLICITATION CONFERENCES. Solicitation conference may be held by the State Procurement Director or agency procurement official or a designee to provide information to prospective bidders. Nothing discussed during a solicitation conference will change the specifications or terms and conditions of a competitive sealed bid, nor shall anything discussed during a solicitation conference be deemed to be binding or incorporated into the specifications or terms and conditions of a competitive sealed bid.

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

BID OPENING. When practical, the names of the bidders and amounts of their bids may be read aloud. Except where it may be deemed impractical, due to the nature or complexity of an invitation for bids, an abstract of bids which contains the amount of each bid and the name of the bidder shall be prepared for each invitation for bids. An abstract of bids shall be retained in the bid file and shall be available for public inspection.

R8:19-11-229. 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 will be applicable to all invitations for bids issued, bids submitted, and contracts awarded for the purchase of commodities:

(A) Time discounts cannot be considered in the evaluation of a bid pursuant to A.C.A. § 19-11-229(f)(3) unless the solicitation specifically requests a time discount;

(B) Quantity discounts should be included in the price of the item. When not included in the item price, the discount 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 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 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 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.

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

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

(1) failure of a bid to conform to the mandatory 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.

R10:19-11-229. 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.

R11:19-11-229. 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) **TRAINED AND CERTIFIED IN NEGOTIATION AND PROCUREMENT PROCESSES** means the person will have received certified training from or authorized by the Office of State Procurement.

R12:19-11-229. Competitive sealed bidding.

(1) **LIFE CYCLE COST.** Life cycle or total ownership costs may include but are not limited to, costs of operation, maintenance, repair, disposal and/or acquisition.

(2) **APPLICATION.** Life cycle cost formulas may be used for procurements. Certain specified commodities must be procured using life cycle cost formulas provided by the Office of State Procurement. For those specified commodities, the State Procurement Director shall provide formulas to be used in the evaluation of bids by the State Procurement Director, the agency procurement officials or the procurement agents.

R13:19-11-229. Cancellation of invitations for bids.

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

R14:19-11-229. Ethical standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than twenty thousand dollars (\$20,000): "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.”

R15:19-11-229. 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. Procurement officials 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 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 in the best interests of the State and permissible under Ark. Code Ann. § 19-11-229(2)(A), appropriate representatives will proceed with negotiations and award recommendation. Appropriate representatives 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 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).

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

R2-19-11-230.1 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 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 are the appropriate procurement method.

R2-19-11-230.2 THIRTY PERCENT (30%) WEIGHTED COST WAIVER. In seeking a written determination by the State Procurement Director that it is in the best interest of the state for cost to be weighted at less than thirty percent (30%) of the total evaluation score if, the requesting agency shall:

- (1) Issue a written request addressed to the State Procurement Director. The written request may be delivered by email or mail, and in either case, should be clearly marked or labeled "Request for Weighted Cost Deviation."
- (2) The written request should clearly articulate the factors for why it is in the best interest of the state for cost to be weighted at a lower percentage than thirty percent (30%), and what percentage the requesting agency seeks. The factors articulated should be specific to the request for proposal under consideration.
- (3) If the State Procurement Director issues a written determination approving of the lower percentage, the written determination shall be submitted for review by Legislative Council or, if the General Assembly is in session, the Joint Budget Committee.

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 unless (i) past performance with the state is a non-mandatory evaluation criteria and (ii) the same amount of points allocated for past performance with the state are also made available in the evaluation scoring criteria in such a way as to not prejudice offerors without past performance history with the state. Past performance must be supported by written documentation and shall have not occurred more than three (3) years before the proposal was submitted. 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 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.

(d) PRIVATE EVALUATORS.

(1) An agency may use qualified evaluators from non-State governmental entities or the private sector.

(i) There is no limit on the number of private evaluators that may be used on an evaluation committee, but they must abide by all ethical standards and legal requirements a state employee or former state employee would have to meet in order to serve as an evaluator.

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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 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 or the State Procurement Director or agency procurement official chooses to seek a clarification on a matter that is evaluated in the proposal, the State Procurement Director or agency procurement official may request a clarification of a proposal.

(1) The response by the offeror must be made in writing. Clarifications made verbally, in demonstration presentations, or communicated in any other matter shall not be considered a clarifying response by the offeror, and should be reduced to a written clarification by the offeror to be considered.

(2) The response of any offeror who fails or refuses to clarify in writing within a reasonable time any matter contained in his or her proposal may be rejected.

(3) 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.

R1:19-11-233. Emergency procurements.

(a) APPROVAL. All non-critical emergency procurements 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 must be made in writing and include:

- (1) a copy of the purchase order;
 - (2) a copy of the quotation abstract Competitive Bid Tabulation form; and
 - (3) a written explanation of the emergency.
- (b) 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 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.
- (c) LEGISLATIVE REVIEW. Except in the case of a “critical emergency” procurement, as that term is defined in Ark. Code Ann. § 19-11-233(b)(2), all services contracts must be presented for legislative review as required under Ark. Code Ann. § 19-11-265.

R1:19-11-238. Initial Term.

A contract may be entered into for up to a maximum period of a total of seven (7) years. It may be advantageous for agencies to have a contract expire annually unless renewed, however, they may opt to make the initial term of a contract extend for up to four (4) years before the first renewal. The aggregate number of years under a non-exempt contract remains seven (7) regardless of the length of the initial term of the contract.

R1-19-11-244 Definitions.

R1-19-11-244.6 “Grounds” of the protest are as defined in § 19-11-244(a)(4).

R1-19-11-244.7 “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.

R1-19-11-244.8 “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.

R1-19-11-244.9 “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.

R1-19-11-244.9 “Submitted” means a protest that conforms to the formal requirements as defined in these rules, that has been received by the State Procurement Director or the head of the relevant procurement agency. It is not sufficient for a protestor to merely claim a protest was submitted; evidence of actual receipt of the protest must be obtained, whether return receipt, confirmation email by the State Procurement Director or the head of the relevant procurement agency, or other adequate evidence of receipt.

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, (ii) has been aggrieved: (a) in connection with a solicitation, or (b) in connection with the award of a contract, and (iii) has Grounds.

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 email 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 award or notice of anticipation to award has been posted. In the event that both a notice of anticipation to award and an award have been posted, the protest shall be submitted in writing within fourteen (14) calendar days of whichever occurred first.

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 Grounds 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 execution 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 execution of the contract without delay is necessary to protect substantial interests of the State.

R1:19-11-249. Cooperative purchasing.

(a) When an agency that is subject to Arkansas Procurement Law seeks to participate in a cooperative purchasing agreement that is administered by a public procurement unit or external procurement activity that is not subject to Arkansas Procurement Law, it will first need to submit the cooperative purchasing agreement to the State Procurement Director for a determination as required by A.C.A. § 19-11-256(b) and these rules. If a determination has already been made with respect to a cooperative purchasing agreement, any other public procurement unit may rely on that determination.

R2:19-11-249. Reporting of Cooperative Contract Purchases.

Cooperative contract purchases of state agencies without an agency procurement official must be presented to the Legislative Council or Joint Budget Committee by the Office of State Procurement annually. Agencies shall submit purchases using the appropriate method as determined by the Office of State Procurement within ninety (90) days after the conclusion of the relevant fiscal year.

R1:19-11-251. Intergovernmental agreements.

(a) Intergovernmental agreements should include at a minimum:

- (1) Scope of work to be accomplished;
- (2) Amount of compensation (if any);
- (3) Delineation of responsibilities and duties of each entity;
- (4) Term of agreement; and
- (5) Authorized signatures from each entity.

R1:19-11-265. Submission of Contracts for Services

- (a) Contracts requiring “services,” as defined in Arkansas Procurement Law and these rules, are to be presented to the Legislative Council or, if the General Assembly is in session, to the Joint Budget Committee, before the execution of the contract if the contract amount is fifty thousand dollars (\$50,000) or more in any one year of the contract’s term, or if the total projected contract amount, including any amendments or possible extensions, is three hundred fifty thousand dollars (\$350,000) or more unless they are contracts for critical emergency procurements or are otherwise exempted from the submission requirements of Ark. Code Ann. § 19-11-265.
- (b) Labor, time, or effort included in or incident to a contractor’s production or sale of a commodity or commodities are not considered “services” for purposes of determining whether a contract is a “contract requiring services” within the meaning of Ark. Code Ann. § 19-11-265. Consequently, a contract for the procurement of a commodity or commodities is not a “contract requiring services” for purposes of Ark. Code Ann. § 19-11-265 if it only calls for labor, time, or effort included in or incident to the procurement of the commodity or commodities.

- (c) Where a tangible commodity exists and is identifiable at the time of the commodity's procurement, any labor, time, or effort expended in its production are not considered services if no separate consideration is paid beyond the purchase price of the commodity for the labor, time, and effort expended in producing the commodity. Even where a present purchase order is for a tangible commodity yet to be produced, the future labor, time, or effort to be expended in the production of the commodity will not be considered "services" if the only consideration to be paid is the purchase price of the commodity after its receipt (and incidentals, such as taxes, delivery fees, etc.), and no separate consideration is paid for the labor, time, or effort expended in the production of the commodity. However, where a contract requires a contractor to furnish labor, time, or effort to produce a commodity not yet in existence, such as a computer program, and the contract calls for consideration to be paid to the contractor based on the labor, time, or effort furnished in the production of the commodity rather than based on the finished commodity, such labor, time, or effort are considered "services."
- (d) If a contract will require procurement of a combination of commodities and services, as those terms are defined in Arkansas Procurement Law and these rules, then it should be submitted for review under Ark. Code Ann. § 19-11-265 if the services component of the contract is fifty thousand dollars (\$50,000) or more in any one contract year, or if the total projected contract amount, including any amendments or possible extensions, is three hundred fifty thousand dollars (\$350,000) or more.

R2:19-11-265. Material changes to Contracts for Services

- (a) A contract that has previously been presented for review does not need to be presented for legislative review again upon its renewal or extension unless it introduces a "material change." There are two classes of material changes that trigger a duty to resubmit a contract for review at either renewal of a contract or extension of a contract term:
 - (1) an amendment that is a material change in contractual terms, including, without limitation:
 - (A) An increase in the initial contract amount;
 - (B) An increase in the total projected contract amount;
 - (C) A change in any of the essential terms of the contract;
 - (D) A change in any performance-based standards stated in the contract; and
 - (2) a material deviation by a contractor from the performance promised during the period preceding renewal or extension, such as a:
 - (A) default requiring the imposition of financial consequences as the result of the contractor's failure to satisfy performance-based standards under Ark. Code Ann. § 19-11-267 during the year preceding the renewal or extension of the contract; or
 - (B) vendor performance resulting in a vendor performance report during the year preceding the renewal or extension of the contract.Both of these are "material changes" that trigger the duty to re-submit a contract for review prior to a renewal or an extension.

For purposes of Ark. Code Ann. § 19-11-265, renewal refers to re-establishing an existing contract for another term, whereas extension is extending the term of an existing contract that would otherwise expire. Although technically distinguishable, they are functionally similar.

(b) Definitions.

1. “Essential terms of a contract,” also called fundamental terms, are provisions that must be included for an enforceable contract to exist between the parties under any applicable statute of frauds.
2. “Initial contract amount” refers to the amount agreed to for the initial term of a contract.
3. “Total projected contract amount” refers to the total amount that the state is projected to expend under the contract over the entire life of the contract, which can be no more than seven (7) years under Ark. Code Ann. § 19-11-238.

R3:19-11-265. Technical and General Services Contracts
on File in the Office of State Procurement.

All agencies will be required to maintain copies in accordance with current document retention laws (Ark. Code Ann. § 19-11-214), of all purchase orders issued for the procurement of technical and general services.

R1:19-11-267. Use of Performance-Based Standards in Contracts.

(a) The purpose of performance-based standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.

(b) It is recommended that all services contracts include performance standards.

(c) All services contracts that have a contract amount of at least one million dollars (\$1,000,000) in a single contract year or a total projected contract amount, including any amendments to or possible extensions of the contract, of at least seven million dollars (\$7,000,000), including any amendments or possible extensions, shall include performance standards.

(d) Performance standards may be standardized for use with similar contracts or may be specifically developed for unique requirements.

(e) Performance standards should measure, at prescribed points throughout the term of the contract, the quality, quantity, and timeliness of work being performed.

(f) Performance standards may be refined by the agency and the provider as a part of the contract negotiations.

(g) A provider’s inability to meet established performance standards may be sufficient cause for declaring default and may also result in cancellation of the contract.

(h) Contracts that otherwise fall under Ark. Code Ann. § 19-11-267(b)(1) may be exempt from the use of performance standards if they are:

- (1) Sole source by law contracts in which the state is compelled as a result of court, state or federal mandate to award for services from a specific provider.
- (2) Emergency contracts in which the need for expediency does not permit for the development of performance standards.

R1:19-11-[273]. Solicitation Conferences. A solicitation conference may be held by an agency to provide the following information to prospective bidders:

- (1) Names and contact information of state personnel who will serve as points of contact to bidders during the solicitation process;
- (2) Times, dates, locations and other relevant information pertaining to the procurement calendar and process;
- (3) A description of the services or commodities sought, as well as the agency's objectives;
- (4) A review of the specifications and pricing model being sought;
- (5) And to take questions from attendees

R2:19-11-[273]. Mandatory Solicitation Conferences. Agencies may make attendance at a solicitation conference mandatory by obtaining approval from the State Procurement Director or the head of the procurement agency. In seeking such approval, the agency shall:

- (1) Issue a request letter, addressed to the State Procurement Director or the head of the procurement agency. Email is sufficient to constitute a request. Whether delivered by email or mail, the communication should be clearly marked or labeled "Request for a Mandatory Solicitation Conference."
- (2) The written request should clearly articulate the factors and reasoning for why the solicitation conference should be made mandatory, as well as a citation to the mandatory language for a solicitation conference in the invitation for bids, request for proposals, or request for statements of qualifications and performance data.
- (3) A copy of the draft invitation for bids, request for proposals, or request for statements of qualifications and performance data should be attached with the written request.

R3:19-11-[273]. Nothing discussed during a solicitation conference will augment or change the specifications or terms and conditions of a competitive sealed bid, nor shall anything discussed during a solicitation conference be deemed to be binding or incorporated into the specifications or terms and conditions of a competitive sealed bid, unless it is subsequently reduced to writing and included in the solicitation.

R1:19-11-[275]. CONDITIONS OF USE. A request for information (“RFI”) solicitation may be issued by an agency for the purposes of information gathering and planning while contemplating a possible competitive sealed bid procurement or competitive sealed proposal procurement. A RFI is not, and should not be construed as, a commitment by the agency to issue a solicitation in the future. Agencies should not seek, and vendors should not provide, proposals or bids. A response to a RFI should be treated by the agency as informational only, and should not be considered a proposal or bid, nor should any contract be awarded directly from a RFI.

R2:19-11-[275]. PRICING INFORMATION. A RFI solicitation may request general pricing models, but specific pricing should be expressly prohibited in the RFI, and if provided unsolicited, should not be considered.

R3:19-11-[275]. The exemption of public records from the Freedom of Information Act of 1967 corresponding to a RFI exemption is limited, expiring upon either: (1) the public opening of bids for a competitive sealed bid procurement that followed the relevant RFI; (2) notice being posted of the anticipated award for a competitive sealed proposal that followed the relevant RFI; or (3) upon an agency making a determination (either formally or through failure to initiate a solicitation within twenty-four (24) months of the relevant RFI) not to proceed with a solicitation following the relevant RFI.

R2:19-11-1012. Contract Dates.

For each professional and consultant service contract form submitted, the agency is required to enter the beginning and ending date of the contract. The beginning date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract are to begin and not the date upon which the agreement was signed. This date should be arrived at with emphasis placed on the following:

(a) Any contract or amendment to a contract that requires review by the Legislative Council or Joint Budget Committee must be submitted to the Department of Finance and Administration, Office of State Procurement, in accordance with the time guidelines as prescribed on the Office of State Procurement website. The beginning date of the contract must not precede the date of the Arkansas Legislative Council meeting in which such contract is to be reviewed. The Legislative Council or the Joint Budget Committee shall provide the State Procurement Director with their review as to the propriety of the contract within thirty (30) days of said submission to the Legislative Council or Joint Budget Committee;

(b) All professional and consultant service contracts with a total projected contract amount, including any amendments or possible extensions, of seventy five thousand dollars (\$75,000) or more, unless specifically excepted, must be filed with the Department of Finance and Administration for review by the Legislative Council or Joint Budget Committee.