

# ARKANSAS REGISTER

## Transmittal Sheet

Use only for **FINAL** and **EMERGENCY RULES**



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For Office

Use Only:

Effective Date \_\_\_\_\_ Code Number \_\_\_\_\_

Name of Agency \_\_\_\_\_

Department \_\_\_\_\_

Contact \_\_\_\_\_ E-mail \_\_\_\_\_ Phone \_\_\_\_\_

Statutory Authority for Promulgating Rules \_\_\_\_\_

Rule Title: \_\_\_\_\_

### Intended Effective Date

(Check One)

Date

☐ Emergency (ACA 25-15-204) Legal Notice Published ..... \_\_\_\_\_

☐ 10 Days After Filing (ACA 25-15-204) Final Date for Public Comment ..... \_\_\_\_\_

☐ Other \_\_\_\_\_ Reviewed by Legislative Council ..... \_\_\_\_\_  
(Must be more than 10 days after filing date.)

Adopted by State Agency ..... \_\_\_\_\_

Electronic Copy of Rule e-mailed from: (Required under ACA 25-15-218)

Contact Person

E-mail Address

Date

## CERTIFICATION OF AUTHORIZED OFFICER

I Hereby Certify That The Attached Rules Were Adopted  
In Compliance with the Arkansas Administrative Act. (ACA 25-15-201 et. seq.)

Signature

Phone Number

E-mail Address

Title

Date

**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**

R8:19-11-230.1 Discussions

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

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

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

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

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

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

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

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

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

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

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

- (1) Price; or
- (2) Cost of Ownership; or
- (3) Responses that appear to provide the best value based on evaluation criteria in the solicitation; or
- (4) Responses most likely to provide greater value after negotiations based on the same criteria; or

(5) Evaluation scores.

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

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

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

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

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

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

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

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

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

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

(1) The BAFO process may be useful when:

- (A) No single response addresses all the specifications; or
- (B) The cost submitted by all offerors is too high (e.g., exceeds the State's estimate of expected costs, budget, etc.); or
- (C) The scores of two or more offerors are very close after the initial evaluation; or
- (D) All offerors submitted responses that are unclear or deficient in one or more areas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) All BAFO requests shall contain the following:

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

(B) Submission requirements with time lines; and

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

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

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

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

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

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

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

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

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

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

(6) Receive target cost proposals; and

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

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