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

BUREAU OF
LEGISLATIVE RESEARCH

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, such as 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, and 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 **standard language with** 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.

R8:19-11-230. Negotiations.

~~(a) Negotiation of Request for Proposals should be authorized in those cases where the best interests of the State are served. Negotiations are begun with the highest ranked offeror based on the scores as established in the Request for Proposals' scoring criteria. If a satisfactorily negotiated contract cannot be developed, the offeror may be declared not to be a responsible offeror, the proposal may be rejected, and time permitting, the negotiation process may be repeated with the next respondent deemed most likely to be awarded a contract.~~

~~(b) Prior to negotiation, the Request for Proposals file must include documentation giving the stated purpose for the negotiation and the objective to be achieved.~~

~~(c) An agency should investigate with the provider determined most likely to be awarded a contract, factors affecting the price, performance, and scope of services to be offered including current market conditions.~~

~~(d) Prior to initiating negotiations, the agency must develop a plan to include at least:~~
~~(1) The acceptable range of price, the desired "best" price and the highest acceptable price.~~

~~(2) Adjustments to the scheduled delivery of services that may have an impact on price.~~

~~(3) Acceptable modifications in the overall scope of work.~~

~~(4) A prioritized list of acceptable changes in services that may result in price reduction.~~

~~(5) Timetable for completion of negotiation.~~

~~(e) No part of any negotiation plan shall be revealed to bidder(s) or made available for public review until after a contract award.~~

~~(f) An acceptable negotiated contract shall list the agreed upon terms, conditions, specifications, quantities and pricing, and be signed by the agency and the provider.~~

~~(g) All proposals may be rejected if, after evaluation of the proposals, including consideration of any clarifying or explanatory information submitted by the bidders, it is determined by the procurement official that no satisfactory proposal has been received.~~

1 State of Arkansas *As Engrossed: S3/13/17 H3/17/17*

2 91st General Assembly

A Bill

3 Regular Session, 2017

SENATE BILL 448

4

5 By: Senator Hester

6 By: Representative Wardlaw

7

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For An Act To Be Entitled

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AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO
10 PROMOTE EFFICIENCY IN STATE PROCUREMENT BY EXPANDING
11 THE ABILITY OF THE STATE TO NEGOTIATE CONTRACTS; TO
12 DEFINE "COLLUSION" UNDER ARKANSAS PROCUREMENT LAW; TO
13 REQUIRE REVIEW OF A CONTRACT BEFORE IT IS RATIFIED OR
14 AFFIRMED; AND FOR OTHER PURPOSES.

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16

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Subtitle

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TO EXPAND THE ABILITY OF THE STATE TO
19 NEGOTIATE CONTRACTS; TO DEFINE
20 "COLLUSION" UNDER ARKANSAS PROCUREMENT
21 LAW; AND TO REQUIRE REVIEW OF A CONTRACT
22 BEFORE IT IS RATIFIED OR AFFIRMED.

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

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SECTION 1. Arkansas Code § 19-11-229(h)(2), concerning competitive
28 sealed bidding, is amended to read as follows:

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(2)(A) ~~In the event all bids exceed available funds as certified
30 by the appropriate fiscal officer in situations in which time or economic
31 considerations preclude resolicitation of work of a reduced scope, the *Except*
32 *with respect to a contract being procured for a construction project, the*
33 director or the head of a procurement agency may negotiate an adjustment of
34 ~~the a lower~~ bid price, including changes in the bid requirements, with the
35 lowest responsive and responsible bidder, in order to bring the bid within
36 the amount of available funds if:~~



1 (i) All bids received from responsive and
2 responsible bidders exceed available funding as certified by the appropriate
3 fiscal officer of the procurement agency; or

4 (ii) It appears that additional savings to the state
5 may result from negotiation.

6 (B)(i)(a) If negotiations with the lowest responsive and
7 responsible bidder conducted under subdivision (h)(2)(A) of this section fail
8 to result in a lower bid price, the state may negotiate for a lower bid price
9 with the next lowest responsive and responsible bidder.

10 (b) If negotiations with the next lowest
11 responsive and responsible bidder under subdivision (h)(2)(B)(i)(a) of this
12 section fail to result in a lower bid price, the state may negotiate for a
13 lower bid price with the next lowest responsive and responsible bidder until
14 an acceptable lower bid price is negotiated or the state determines that
15 negotiations are no longer in the best interest of the state.

16 (ii) A bid price resulting from negotiations
17 conducted under this section shall not be higher than:

18 (a) The bid price originally submitted by the
19 lowest responsive and responsible bidder; or

20 (b) A price previously offered in negotiations
21 by a responsive and responsible bidder.

22 (iii) Negotiations conducted under this section do
23 not preclude the use of other methods of source selection or procurement
24 authority provided under this subchapter.

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26 SECTION 2. Arkansas Code § 19-11-230(e), concerning competitive sealed
27 proposals, is amended to read as follows:

28 (e)(1) As provided in the request for proposals and under ~~regulations~~
29 rule, discussions may be conducted with responsible offerors who submit
30 proposals determined to be reasonably susceptible of being selected for award
31 for the purpose of clarification:

32 (A) Clarifying solicitation requirements to assure full
33 understanding of, and responsiveness to, the solicitation requirements; or

34 (B) Negotiating a contract that is more advantageous to
35 the state.

36 (2)(A) Offerors If discussions conducted after the deadline for

1 the receipt of proposals necessitate material revisions of proposals, each
 2 offeror determined to be responsible and reasonably susceptible of being
 3 awarded a contract shall be accorded fair and equal treatment with respect to
 4 any provided an opportunity for discussion and revision of proposals, and
 5 such revisions may be permitted after submissions and prior to award to
 6 revise its proposal for the purpose of obtaining submitting a best and final
 7 offers offer.

8 (B) An offeror may be permitted to revise its original
 9 proposal as a result of discussions only after the original submission
 10 deadline and before award for the purpose of providing a best and final
 11 offer.

12 (3) In conducting discussions, ~~there shall be no disclosure of~~
 13 ~~any information derived from proposals~~ a proposal submitted by a competing
 14 ~~offerors~~ offeror shall not be disclosed until after a notice of anticipation
 15 to award is announced.

16
 17 SECTION 3. Arkansas Code § 19-11-240 is amended to read as follows:

18 19-11-240. Reporting of suspected collusion — Definition.

19 (a) As used in this section, "collusion" means cooperation in the
 20 restraint of free and open competition in a public procurement, including
 21 without limitation:

22 (1) Price fixing;

23 (2) Bid rigging;

24 (3) Customer or market allocation;

25 (4) Misrepresenting the independence of the relationship between
 26 colluding parties; and

27 (5) Exerting improper influence on public officials to obtain
 28 advantage in a public procurement, including without limitation:

29 (A) Offering bribes or kickbacks;

30 (B) Extortion; and

31 (C) Fraudulent misrepresentation.

32 (b) Notification to the Attorney General. When for any reason
 33 collusion is suspected among any bidders or offerors, a written notice of the
 34 relevant facts shall be transmitted to the Attorney General.

35 ~~(b) (c)(1) Retention of All Documents.~~ All documents involved in any
 36 a procurement in which collusion is suspected shall be retained until the

1 Attorney General gives notice that they may be destroyed.

2 (2) All retained documents shall be made available to the
3 Attorney General or a designee upon request and proper receipt thereof of
4 the request.

5 (d) Collusion is cause for:

6 (1) Debarment from consideration for award of a contract under §
7 19-11-245; and

8 (2) Suspension from consideration for award of a contract if
9 there is probable cause for suspecting collusion as determined by the
10 Attorney General or the State Procurement Director.

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12 SECTION 4. Arkansas Code § 19-11-247, concerning remedies for unlawful
13 solicitation or award, is amended to add an additional subsection to read as
14 follows:

15 (d) Before a contract is ratified and affirmed under subdivision
16 (c)(1)(A) of this section, a contract shall be presented to the Legislative
17 Council or, if the General Assembly is in session, to the Joint Budget
18 Committee, for review if the contract is required to be submitted for review
19 under § 19-11-1006.

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21 */s/Hester*

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24 **APPROVED: 03/27/2017**

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