

Draft Findings and Recommendations Report



Ikaso Consulting

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Executive Summary

The Arkansas Legislative Council's Executive Subcommittee (ALC) contracted with Ikaso Consulting LLC (Ikaso) to review Arkansas procurement rule, policy, and practices and ensure alignment with the intention of its procurement statute, and to recommend improvements to practices where applicable.

In order to reach the findings and recommendations presented, Ikaso reviewed Arkansas's procurement statute, rule, policy, training materials, and three example solicitations. We also conducted interviews with legislators, members of the Office of State Procurement (OSP), and subject matter experts (SMEs) from procuring agencies. This review and interview process led to 16 findings and 63 recommendations. The recommendations, detailed throughout this report, include updates to rule and policy to better align them with statute. They also include opportunities to incorporate procurement best practices into statute, rule, policy, and practice. Some high level themes from our findings and recommendations are as follows:

- The State's procurement rules could be improved by increasing their alignment with statute, reducing repetition, increasing clarity, and providing additional guidance
- Policy documents and templates could be improved by expanding their scope and detail and increasing their alignment with, and explanation of, statute and rule
- Training could be improved by expanding the scope and detail of the training materials and offering more intensive training sessions
- Best practices could be introduced that will lead to better procurement outcomes

The State's procurement process is conducted by capable, experienced, and earnest professionals, both at OSP and the procuring agencies we interviewed. Improvements to clarity and the organization of information, along with additional training will help ensure the State's procurement process will consistently align to statutory requirements and result in solicitations and contracts that consistently meet the needs of the State.

In order to assist with the implementation of these recommendations, we have provided proposed redline edits to rule, where applicable, in Appendices 1.1-1.2. As Arkansas begins implementing these recommendations, Ikaso will remain available to support in implementation, including if requested for the drafting or validation of a small number of statutory updates noted in the report.

Findings and Recommendations Rosters

Findings Roster

A complete list of Ikaso’s 16 findings is provided below. Each finding informs recommendation(s) within the following subsection and is addressed throughout the report.

| Finding Overview | |
|------------------|---|
| 1 | Rules and policies do not always align to statutory requirements, and at times are in conflict with them. |
| 2 | Rules suffer in places from repetition, duplication, and are occasionally not located in the most logical order or grouping. |
| 3 | Rules and policies suffer in places from a lack of clarity, and at times contain guidance that is at risk of creating negative outcomes. |
| 4 | Rules do not always include needed or helpful guidance on how to implement and/or apply statute. |
| 5 | The State’s Procurement Manual and policies could benefit from addressing additional topics and providing further guidance in various areas. |
| 6 | Policy does not thoroughly describe statutory and regulatory requirements in a way that is useful for individuals not previously immersed in the procurement process. |
| 7 | Policy documents at times use different terminology for certain types of procurements than as seen in statute and rule. |
| 8 | Policy documents could benefit from more explanation of legislative review requirements for procurements. |
| 9 | Training materials do not fully cover the requirements of the procurement process in a way that allows individuals not previously immersed within it to lead procurements with comfort. |
| 10 | Agency staff could benefit from intensive in-person procurement training. |
| 11 | Templates contain some written inconsistencies when compared to statute and rule. |
| 12 | Templates are not available for some phases of the procurement process. |

Finding Overview

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| 13 | Two separate Request for Proposal (RFP) processes exist. Some agency staff indicate greater comfort with the “traditional” RFP process and less comfort with the Most Advantageous Proposal (MAP) RFP process. |
| 14 | The MAP RFP process may benefit from certain updates. |
| 15 | RFPs very frequently weigh cost at 30% of evaluation criteria. |
| 16 | Some procurements are out for bid for a relatively short period of time. |

Recommendation Roster

A complete list of Ikaso’s 63 recommendations is provided below.

- Each recommendation is based on the aforementioned findings.
- Each recommendation is numbered. The roman numeral of the number refers to the section of this report in which the recommendation appears.
- Each recommendation within a section is individually numbered.

Recommendation Overview

| Section I – General Findings and Observations | |
|---|---|
| I-1 | The level of depth of information covered by the Arkansas Procurement Manual and related policies should be increased so that it can serve as the central source of procurement information for all phases of the process, and so that it can direct the reader to supplemental policy documents, trainings, and templates that are necessary for the successful completion of the procurement process. As part of this practice, all related policy documents should be updated as well. |
| I-2 | A periodic review of all policy and guidance should be conducted to ensure clarity among end-users, and alignment with statute and rule after any updates to statute or rule. |
| I-3 | An increased level of detail should be provided in the available procurement training modules in support of individuals who are not already fully immersed in the procurement process. |
| I-4 | In-depth procurement training should be provided on all steps of the process, either in recurring in-person sessions or via recorded online courses, to all agencies conducting RFPs. |
| Section II – Solicitations | |

| Recommendation Overview | |
|---|--|
| II-1 | All policy documents should use consistent terminology when referring to a specific type of procurement. |
| II-2 | The "Printing Delegation Order Manual" should be updated to reflect that three bids must be obtained only when a commodity is less than or equal to \$75,000, in line with statute. |
| II-3 | Agencies should be given clear guidance, in the Procurement Manual and other locations as relevant, to approach OSP with any procurement related questions. |
| II-4 | Any agency leading a solicitation should be required to submit advance notice to OSP of the solicitation. |
| II-5 | Any agency leading a solicitation should be explicitly required to adhere to OSP's guidance and policy on technical and cost scoring. |
| II-6 | 19-11-279 should have an additional rule added that allows mandatory responses to a RFI as a precondition to respond to a subsequent Invitation for Bids (IFB) or RFP - with prior approval - similar to how Solicitation Conferences attendance may be made mandatory under 19-11-277. |
| II-7 | R1: 19-11-232(f) should be updated to make clear what is required in the case of Sole Source by Law. Currently this part of the rule appears to be a definition and does not comprise any clear guidance. |
| Section III – Procurement Method Selection | |
| III-1 | R2: 19-11-230.1 should be updated to speak to the fact that statute 19-11-229(b)(1) requires formal justification for the use of Competitive Sealed Proposals, where Competitive Sealed Bidding must be used unless a determination is made in writing that this method is not practicable and advantageous. |
| III-2 | Guidance should be developed on when to use the MAP process and when to use traditional RFPs, based on the unique characteristics of each method, and how they best fit different solicitation needs. |
| III-3 | Pending a legislative action to clarify a likely typographic error in 19-11-802(c)(2), the statute may be clarified through a new rule stating "A political subdivision shall not use competitive bidding for the procurement of other professional services without a two-thirds (2/3) vote of its governing body." |
| III-4 | R1: 19-11-249 should be updated to clarify how the economic justification should be calculated per statutory guidance in 19-11-249(a)(2)(B)(ii). |
| Section IV – Procurement Development | |

| Recommendation Overview | |
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| IV-1 | Specific training on Scope of Work development should be developed and delivered to individuals involved in the RFP process. |
| IV-2A | Policy should be updated with guidelines for solicitations with multiple scopes that may be awarded separately, to ensure award under all possible scoring scenarios is clearly laid out in the solicitation materials. |
| IV-2B | Separate scope requirements for solicitations with multiple scopes should be clearly and independently defined. |
| IV-3 | More detailed guidance should be developed and implemented in relation to expectations for respondent experience and minimum company size requirements for procurements. |
| IV-4 | More detailed guidance should be provided on establishing the timing between solicitation posting and the response deadline, including in cases where an RFP is reissued after an initial posting. In addition, the Procurement Manual should be updated to remove the guidance of a maximum 90 day posting period for RFPs. |
| Section V – Evaluation | |
| V-1 | Evaluator Training for Procurements should be standardized so that the same information is provided every time a procurement is conducted. |
| V-2 | R8: 19-11-229(2)(E) should be updated to simply refer forward to R1: 19-11-235, which specifically covers responsibility of bidders and offerors. |
| V-3A | The concept of Responsibility of Offeror contemplated in the title of R5: 19-11-230(b) should be addressed by replacing the first sentence with a simple reference forward to R1: 19-11-235, which specifically covers responsibility of bidders and offerors. |
| V-3B | The remaining content of R5: 19-11-230(b) should be re-numbered as R5: 19-11-230(c) and re-titled to "Past Performance of Offeror" to match the content of the rule. Current R5: 19-11-230(c) and R5: 19-11-230(d) should be renumbered accordingly. |
| V-4A | R9: 19-11-229(5) should be updated to make it clear that a procurement official may determine a bid is either too high (“unreasonable”) relative to the bid requirements, or too low (“unrealistic”) relative to successfully meeting the bid requirements. |
| V-4B | R6: 19-11-230(3) should be updated to make it clear that a procurement official may determine a bid is either too high (“unreasonable”) relative to the solicitation requirements, or too low (“unrealistic”) relative to successfully meeting the solicitation requirements. |
| V-5 | Formal policy should be developed for determining the reasonableness and realism of cost proposals within solicitations. |

| Recommendation Overview | |
|--------------------------------|---|
| V-6A | R8: 19-11-230.1(d) should be updated to specifically mention cost as one of the criteria that must be considered as part of establishing a competitive range. |
| V-6B | The currently recommended practice of considering the cost of all proposals during initial RFP evaluation, and not establishing the competitive range until every cost submission has been considered, should be clearly specified in policy, training, and templates. |
| V-7 | The policy on the Evaluation of Proposals should be updated in relation to cost weighting requirements to accurately specify the minimum of 30%. |
| V-8 | R8: 19-11-230.1(g)(2)(I) regarding evaluation of clarified proposals should be relocated into R5: 19-11-230(a) (Evaluation). |
| V-9A | Clarification guidance in R7: 19-11-230 should be updated to be explicit about the statutory requirement in 19-11-230(f)(2) that "A written response by an offeror under this subsection shall only clarify the submitted proposal and shall not add any substantive language to the submitted proposal or change the terms of the submitted proposal." |
| V-9B | R8: 19-11-230.1(b) should be updated to add a new third sentence in the rule to prevent contradiction with statute 19-11-230(f)(2) that disallows substantial changes to proposals as a part of proposal clarifications. |
| V-10 | R10: 19-11-229(a)(3) should be clarified to state that confirmed mistakes may be withdrawn by the bidder. Alternately, R10: 19-11-229(a)(4) should be clarified to say that "Actual" bid prices shall not be increased..." or "Bid prices (including as may be corrected following a suspected mistake under R10: 19-11-229(a)(3)) shall not be increased..." |
| V-11 | The MAP RFP process can benefit from updates, in particular to the scoring rubric. |
| V-12 | Rule R8: 19-11-230.1(g)(1)(D) regarding Best and Final Offers (BAFOs) for unclear or deficient responses should be removed. Clarifications are a separate topic from BAFOs, and any potential deficiency is already addressed by clause (A) within this rule. |
| V-13 | R8: 19-11-230.1(g)(2)(C) regarding BAFO negotiations with non-responsible offerors should be removed. Non-responsible offerors should be removed before this stage of the process. |
| V-14 | R5: 19-11-230(c) should be updated to reflect the statutory requirement in 19-11-230(g)(3). Tie scores should be resolved with award to the offeror that submitted the lowest price proposal, not settled with a coin flip. |
| Section VI – Award | |
| VI-1 | The rules for 19-11-230 should be supplemented with a rule on award parallel to R11: 19-11-229(a) for Competitive Sealed Bidding. |

| Recommendation Overview | |
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| VI-2 | The policy on the Posting of Anticipation to Award should be updated to accurately reflect the start of the protest period. In addition, statute should clarify calendar days. |
| Section VII – Protest | |
| VII-1 | The Procurement Manual should be updated to speak to administrative protest determination, ensuring that it states the reasons for the action taken as statutorily required by 19-11-244(c)(2). |
| VII-2 | R4: 19-11-244 should be updated to explicitly allow negotiations to proceed during a protest, to ensure time is not lost and the State is not fully stymied by the simple existence of a protest. |
| VII-3 | R2: 19-11-244.2 should be updated to specifically mention the statutory requirement in 19-11-244(a)(2)(B) that protesting parties must give notice to the awardee. |
| VII-4 | R4: 19-11-244 should be updated to speak to how a solicitation is affected by a solicitation protest. As it stands, this rule only addresses how a solicitation is affected by an award protest. |
| Section VIII – Negotiations | |
| VIII-1 | The negotiation process should be addressed more clearly in policy, with training and guidance on the subject for agencies conducting procurements. |
| VIII-2A | R15: 19-11-229(a) should be updated to accurately reflect statutory requirements that negotiations may only be conducted by trained personnel. |
| VIII-2B | A new statute (and corresponding rule) under 19-11-230(e) regarding negotiations for RFPs should be added to correspond to the existing statute for bids in 19-11-229(h)(2)(C)(i) and its corresponding rule (as updated per recommendation VIII-2A) in R15: 19-11-229(a). |
| VIII-3 | The elements of R8: 19-11-230.1 should be reordered to follow a more logical sequential order of: a, b, e, d, c, f. |
| VIII-4 | R8: 19-11-230.1(c)(4) should be updated to remove the words "not responsible or is otherwise" and also "responsibility and" to reflect the fact that offeror responsibility is not relevant to negotiation as addressed in this rule. |
| VIII-5 | R8: 19-11-230.1(d) should remove the clause "For example, and not by limitation, a request for proposals may provide that only the three highest ranked vendors are eligible for negotiation." to avoid the potential for arbitrary elimination of proposals that are very close in score to proposals included within a competitive range. |

| Recommendation Overview | |
|---|---|
| VIII-6 | R8: 19-11-230.1(d)(1)(5) should have the numbered list of criteria for selecting the competitive range removed in favor of simply citing the final criterion - evaluation scores. The other items in the list are not practicable to use as criteria for setting a competitive range. |
| VIII-7 | R8: 19-11-230.1(g) on BAFO Negotiation should be incorporated into R8: 19-11-230.1(c) (Negotiation) as a related subtopic. |
| VIII-8 | R8: 19-11-230.1(h) on Target Price (BAFO) should be incorporated into R8: 19-11-230.1(c) (Negotiation) as a related subtopic. |
| Section IX – Contract Management | |
| IX-1 | The fillable contract form, "Services-Contract-SRV-1-Fillable-Form-V.3.6.27.22" should be updated. Currently, the monetary benefits clause is worded differently than the requirements in statute 19-11-1012. |
| IX-2 | R3: 19-11-245(d) should be simplified to be less onerous and ensure that worthwhile debarments are not avoided due to procedural hurdles. |
| IX-3 | R1: 19-11-245 and R2: 19-11-245 should be updated to require that any agency suspension or debarment action be done in consultation with OSP. |
| IX-4 | R2: 19-11-245 should be updated to parallel R1: 19-11-245, adding a subsection (b) that addresses the provision of a written determination of debarment to the person in question. |
| IX-5 | R2: 19-11-245 should be clarified as to whether a debarment action must first be preceded by a suspension action. |
| IX-6 | R1: 19-11-246 should be updated to remove the stipulation that the "Declaration of default and/or contract termination may only be determined by the procurement official who awarded the contract". This is unnecessarily restrictive and could contradict statute 19-11-246(c)(1). |
| IX-7 | R1: 19-11-268 should be updated to ensure guidance on vendor performance reports is as-intended, given the requirement for quarterly performance reports for all contracts over \$25K is more stringent than statute and has the potential to create a large volume of paperwork that could distract attention from contracts with vendor performance issues. |
| Section X – Committee Review | |
| X-1 | Policy documents should be updated to clearly state and explain legislative review requirements for all procurements, in alignment with statute and rule. |

| Recommendation Overview | |
|--------------------------------|--|
| X-2 | Planned policy and training regarding ALC ratification requirements should proceed, and statute should be amended to expressly include all scenarios under which ratification may be sought. |
| X-3 | R1: 19-11-269 should be reconciled with R3: 19-11-1008, which overlap. R1: 19-11-269 should contain the definitive language and R3: 19-11-1008 should simply refer back to R1: 19-11-269. |

Introduction & Methodology

The State contracted with Ikaso to provide analysis of where Arkansas procurement rules and policy may be out of alignment with the intentions of Arkansas procurement statute or do not reflect a procurement best practice. This report aims to examine the breadth of Arkansas procurement-related statute, rule, and policy. The ultimate goal for this report is to inform the ALC and OSP on areas where procurement rule and policy may be updated to align with statute and improve procurement practices. This analysis is summarized by the findings and recommendations in the following sections. Ultimately, the updates to rule, policy, and practice stemming from this report aim to achieve better procurement outcomes and services for all Arkansans.

In order to reach the findings and recommendations presented in this report, Ikaso reviewed a wide range of written materials including statute, rule, policy, training, example solicitations, and conducted interviews with various State staff. These example solicitations were specifically recommended by legislators as examples of procurements that may represent misalignment with the intent of statute. We reviewed Arkansas's procurement statute and rules, approximately 85 policy documents, including training documents, and three (3) example solicitations. These example solicitations are the Department of Corrections' (DOC) Comprehensive Medical Services solicitation, the Department of Parks, Heritage, and Tourism's (DPHT) Marketing and Advertising solicitation, and the Arkansas Department of Education's (ADE) Education Freedom Accounts solicitation. Additionally, we conducted 9 interviews that included 7 members of the legislature, as well as staff from OSP and SMEs from procuring agencies. The written materials we reviewed are listed in Appendix 3, and the interviews we conducted are listed in Appendix 4. Additionally, Appendix 2 contains a list of acronyms used in this report.

The recommendations have been organized according to the steps in the procurement process, with the report broken down into 10 sections, numbered I through X. Each section begins with a brief summary of the section's findings and recommendations, followed by a detailed breakdown of our findings and observations based on rule, policy, interviews, and example solicitations. The sections conclude with a list of our recommendations based on these findings and observations. For the instances where a recommendation makes a specific proposed edit to rule, the proposed edits are shown in Appendix 1. Appendix 1 also contains a list of proposed rule changes, not included in our recommendations, that pertain to small typographical and numbering errors noted while doing the review.

I. General Findings and Observations

Section Summary:

During the course of Ikaso’s review and recommendation development, we established a set of broad recommendations based on general findings and observations which cover the span of the procurement process. These recommendations are based on information gleaned throughout all facets of our review, and include overarching themes that are reflected in other recommendations in subsequent sections. The recommendations cover training, updates to the Procurement Manual, and general best practices.

Findings and Observations:

Rule Review

No findings or recommendations at the general findings and observations level stemmed from our rule review.

Policy Review

During our review of policy, we discovered the primary State Procurement Manual could benefit from more detail in areas. As it currently stands, a number of important topics are omitted and others are covered in less detail than would be optimal for end users seeking to understand the procurement process. Consequently, recommendation I-1 seeks to address increased breadth and depth of the Procurement Manual. The Procurement Manual is a critical resource for those conducting procurements, presenting an opportunity to direct users to other policy documents. It shows which trainings, templates, and guidance files should be utilized, when to utilize them, where to find them, and how to resolve ambiguities or questions. If updated per recommendation I-1, the Procurement Manual can be a convenient starting point for all Arkansas procurements. This is especially important for the benefit of individuals not fully immersed in the procurement process as part of their daily work.

Additionally, our review of the available training modules also informed recommendation I-3. A higher level of detail in training can support more team confidence and more consistent outcomes by setting standard expectations, communicating available resources, and providing opportunities for exposure to key concepts.

Interview Findings

A recurring theme from the interviews with OSP and agency SMEs was an opportunity for additional depth within the provided procurement guidance, and an opportunity to direct readers toward specialized procurement policy materials. Interviewees noted that it would be helpful to individuals involved in the

procurement process if they could start the process with the Procurement Manual, with the manual either giving them all information required or providing complete direction toward any supplemental materials needed. If the Procurement Manual directs individuals to all training resources, templates, and policy guidance that could be relevant, this can ensure everyone running a procurement does so with the same basic knowledge, reducing risk of unplanned procedural variances. Recommendation I-1 addresses this subject.

In order to maintain a clearly organized process with clearly organized materials, recommendation I-2 encourages a periodic review of all procurement policy materials with the goal of maintaining ongoing alignment with statute and rule. We recommend a review of impacted procurement materials in the event of updates to relevant statute or rule. Additional review, with input from agency procurement staff, can ensure clarity in guidance so that individuals who are not procurement subject matter experts can confidently conduct procurements, with feedback key to contextualizing whether training materials and policy documents are useful to people new to procurement. This recommendation may be enhanced by updating statute to require policy review in instances of revision to statute and rule.

Recommendation I-3 works to build on the previous two recommendations by encouraging additional depth in the training materials. More detailed training modules could cover specific topics, such as evaluator training for both Competitive Sealed Bids and Competitive Sealed Proposals, evaluation facilitation and oversight, scope of work development (beyond specification requirements), setting the balance between cost and technical points in an RFP, or how to deploy minimum qualifications. Additionally, recommendation I-4 encourages greater engagement with training materials. Agency representatives did not perceive training materials as a primary resource to turn to for information and guidance. In-person sessions were cited as more helpful, and applying this to live training sessions for any agency representatives involved in procurement could offer increased clarity and the opportunity to address questions in the moment. Recording live sessions that cover all parts of the procurement process can provide a resource where individuals can refresh themselves at their own initiative, or get a better feel for the content beyond what is simply on the page. An update to statute to codify training expectations may help ensure consistency.

Solicitation Review

No findings or recommendations at the general findings and observations level stemmed from our solicitation review.

Recommendations:

Ikaso makes the following recommendations:

Section I Recommendation Overview

| | |
|-----|---|
| I-1 | The level of depth of information covered by the Arkansas Procurement Manual and related policies should be increased so that it can serve as the central source of procurement information for all phases of the process, and so that it can direct the reader to supplemental policy documents, trainings, and templates that are necessary for the successful completion of the procurement process. As part of this practice, all related policy documents should be updated as well. |
| I-2 | A periodic review of all policy and guidance should be conducted to ensure clarity among end-users, and alignment with statute and rule after any updates to statute or rule. |
| I-3 | An increased level of detail should be provided in the available procurement training modules in support of individuals who are not already fully immersed in the procurement process. |
| I-4 | In-depth procurement training should be provided on all steps of the process, either in recurring in-person sessions or via recorded online courses, to all agencies conducting RFPs. |

II. Solicitations

Section Summary:

In this section, we make several recommendations related to standalone elements of the procurement process that do not categorically fit into the subsequent procurement-specific sections (Sections III - VIII). Accordingly, the recommendations in this section cover a variety of topics, ranging from policy and process updates to terminology standardizations. Ultimately, these recommendations aim to tie together one-off elements of the procurement process to ensure a smooth procurement process by strengthening communication among OSP and procuring agencies.

Findings and Observations:

Rule Review

Our review of all procurement-related rules led to two recommendations: one pertaining to strengthening the existing RFI process (recommendation II-6), and one pertaining to increasing rule clarity around Sole Source by Law (recommendation II-7).

Recommendation II-6 works to build on and improve the existing rules under statute 19-11-279 by adding a new rule allowing for mandatory responses to Requests for Information (RFIs) - with prior

approval - as a precondition for entities to respond to subsequent RFPs. This proposed addition would mirror the way Solicitation Conferences may be made mandatory under 19-11-277. Currently, 19-11-279 and its associated rules are silent on the subject. Adding this allowance via rule would help to ensure that the State is able to fully access informational responses in certain circumstances where the most experienced vendors may have an incentive to intentionally skip participation in the process, and therefore avoid sharing information useful to the State. This recommendation could also be bolstered by updating statute in addition to rule to reflect this change.

Recommendation II-7 seeks to clarify the intent and written meaning of R1: 19-11-232(f). As the rule, which describes Sole Source by Law, currently stands, it does not provide a description of what it seeks to define. Clarifying the rule through an update would ensure readers of the applicable language have a clear and concise understanding of the rule's content.

Policy Review

Our review of procurement policy documents led to two recommendations focused on changes aimed at providing a higher level of clarity on certain steps of the procurement process.

First, comparisons of OSP's Procurement Manual against statute and rule uncovered a discrepancy between the naming terminology for certain procurement types, directly leading to recommendation II-1. For example, the Procurement Manual consistently refers to "small order procurements" when describing the procurement type detailed in statute 19-11-231, whereas statute consistently refers to this type of procurement as simply "small procurement". Aligning all procurement type terminology in policy with the terms in statute and rule ensures that individuals unfamiliar to the procurement process can clearly identify a type of procurement by a single, clear name.

Additionally, reviews of supplemental policy documents uncovered a process discrepancy between policy and statute in the Printing Delegation Order Manual, leading to recommendation II-2. Currently, the aforementioned policy document indicates that individuals must always obtain three price quotes when conducting a procurement under the document's guidelines. However, per R1: 19-11-234(1), three quotes are only required if the cost of the commodity is \$75,000 or less. In line with this observation, updating the Printing Delegation Order Manual will provide alignment with statute and rule, ensuring that the procurement process is conducted as intended.

Interview Findings

Recommendations II-3, II-4, and II-5 were all informed by information provided during interviews conducted with OSP and agency SMEs. Throughout our discussions with both groups, it became apparent that improved communication channels between OSP and agencies can result in consistent processes and standards when conducting procurements. This observation directly informed

recommendations II-3 and II-4, which both aim to underscore the role of OSP for supporting agencies during the procurement process. Recommendation II-3 aims to further this goal by ensuring agencies know that OSP should be their primary resource for any procurement questions, while recommendation II-4 seeks to accomplish this by ensuring OSP is always aware when procurements are being conducted, allowing them to stay in touch with the process and be a resource for procuring agencies. In relation to II-4, there *is* currently a form in place required for agencies to request to conduct a solicitation, however it does not appear to be applied in a manner that effectively conveys the start of a new procurement to OSP. OSP may consider the optimal timing for when to require notice in advance of a solicitation. This recommendation may also benefit from an explicit statutory addition requiring agencies to submit notification to OSP ahead of any procurements. Additionally, these interview discussions also highlighted variance between OSP’s preferred approach and agencies' individual approaches to technical and cost scoring methods, helping inform recommendation II-5 that agencies leading solicitations should be explicitly required to follow OSP's guidance and policy. Throughout the interviews, it became apparent that OSP prefers the MAP process for the procurements they conduct, with their designated MAP-related technical scoring methods and cost scoring sequence. However, agencies see a use for the traditional RFP process, and in either case OSP cannot always ensure expected practices are followed by individual agencies conducting their own procurements, as they do not always know these are occurring, in line with recommendation II-4. In addition, further guidance regarding who can set cost weighting, and how that should be done, per recommendation V-7 can be supported in this way. As with recommendation II-4, this may benefit from a statutory update making this adherence to OSP requirements officially required.

Solicitation Review

No findings or recommendations on protest stemmed from our Solicitation review.

Recommendations:

Ikaso makes the following recommendations:

| Section II Recommendation Overview | |
|---|---|
| II-1 | All policy documents should use consistent terminology when referring to a specific type of procurement. |
| II-2 | The "Printing Delegation Order Manual" should be updated to reflect that three bids must be obtained only when a commodity is less than or equal to \$75,000, in line with statute. |
| II-3 | Agencies should be given clear guidance, in the Procurement Manual and other locations as relevant, to approach OSP with any procurement related questions. |

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|------|---|
| II-4 | Any agency leading a solicitation should be required to submit advance notice to OSP of the solicitation. |
| II-5 | Any agency leading a solicitation should be explicitly required to adhere to OSP's guidance and policy on technical and cost scoring. |
| II-6 | 19-11-279 should have an additional rule added that allows mandatory responses to a RFI as a precondition to respond to a subsequent IFB or RFP - with prior approval - similar to how Solicitation Conferences attendance may be made mandatory under 19-11-277. |
| II-7 | R1: 19-11-232(f) should be updated to make clear what is required in the case of Sole Source by Law. Currently this part of the rule appears to be a definition and does not comprise any clear guidance. |

III. Procurement Method Selection

Section Summary:

In this section, we make four recommendations pertaining to procurement method selection. These recommendations cover a variety of topics, including the justification needed to use the Competitive Sealed Proposals procurement method, guidance for when to use the traditional RFP process or the MAP RFP process, and two opportunities to clarify statute and add rules. Together, they provide guidance to help agency procurement teams pick the procurement method that best fits the needs of their specific solicitation.

Findings and Observations:

Rule Review

Our review of procurement rules yielded three discrete recommendations specific to procurement method selection – recommendations III-1, III-3, and III-4.

Recommendation III-1 derived from the observation that, per statute 19-11-229(b)(1), Competitive Sealed Bidding must be used unless a determination is made in writing that this method is not practicable and advantageous. Therefore, use of Competitive Sealed Proposals requires official justification. An update to R2: 19-11-230.1 poses the opportunity to clarify this expectation.

Recommendation III-3 addresses a potential typographic error in statute 19-11-802(c)(2). As currently drafted, the language may not align with statutory intent, stating “A political subdivision shall not use

competitive bidding for the procurement of other professional services with a two-thirds (2/3) vote of its governing body.” In the context of the section, including 19-11-802(c)(1), this is likely to be read “without.” Updating the current language by changing “with” to “without” in a revision of statute along with an additional rule would shore up the legal foundation for a political subdivision to pursue Competitive Bidding in select cases.

Recommendation III-4 suggests that detail be added regarding calculation of an economic justification under statute 19-11-249(a)(2)(B)(ii). R1: 19-11-249 requires an agency to include a verifiable economic justification in order to use a cooperative purchasing agreement. The statute notes that rules should be adopted to create a review policy incorporating comparison among pricing from a current State contract and pricing from a cooperative purchasing agreement, in addition to further information gleaned from a request for information. As existing rules do not further detail how such information can be leveraged to calculate an economic justification, and the statute sets the stage for further rule promulgation, there is an opportunity to clarify the economic justification sought.

Policy Review

Recommendation III-2 was informed in part by the fact that while a MAP RFP template exists, the process is not referenced in the Procurement Manual, which would be the likely place an agency end user would go for further information on when and how to conduct a MAP RFP.

Interview Findings

Recommendation III-2 was also informed by information provided in interviews with agency SMEs. The interviewees generally highlighted an absence of guidance and clarity regarding when they should utilize the MAP RFP process as opposed to the traditional RFP process. Interviewees indicated that in their experience, the MAP process works well for procurements that benefit from offerors making suggestions to potential scope approaches and related details such as performance standards that may be unknown during RFP development, or subject to differing potential approaches. At the same time, the traditional RFP process works well when the State needs to provide detailed, prescriptive requirements, such as may be required by direction from Federal partners. Maintaining both processes, and providing clear guidance on when to use the MAP RFP process and when to use traditional RFPs can ultimately help OSP and agency staff develop RFPs that best fit the needs of each specific solicitation.

Solicitation Review

No findings or recommendations on procurement method selection stemmed from our solicitation review.

Recommendations:

Ikaso makes the following recommendations:

| Section III Recommendation Overview | |
|--|--|
| III-1 | R2: 19-11-230.1 should be updated to speak to the fact that statute 19-11-229(b)(1) requires formal justification for the use of Competitive Sealed Proposals, where Competitive Sealed Bidding must be used unless a determination is made in writing that this method is not practicable and advantageous. |
| III-2 | Guidance should be developed on when to use the MAP process and when to use traditional RFPs, based on the unique characteristics of each method, and how they best fit different solicitation needs. |
| III-3 | Pending a legislative action to clarify a likely typographic error in 19-11-802(c)(2), the statute may be clarified through a new rule stating "A political subdivision shall not use competitive bidding for the procurement of other professional services without a two-thirds (2/3) vote of its governing body." |
| III-4 | R1: 19-11-249 should be updated to clarify how the economic justification should be calculated per statutory guidance in 19-11-249(a)(2)(B)(ii). |

IV. Procurement Development

Section Summary:

Agency-specific experiences provided the backbone for Ikaso’s recommendations on procurement development. Through discussions with individuals involved in procurements and through analysis of the related solicitations, we have provided five recommendations pertaining to Scope of Work development, management of procurements involving multiple scopes of work, respondent experience, and the amount of time for procurements to be publicly posted before responses are due.

Findings and Observations:

Rule Review

No findings or recommendations on procurement development stemmed from our rule review.

Policy Review

Our review of available training materials found an opportunity to further specify in training how to develop scopes of work honed to the needs of the given procurement. Subsequently, recommendation IV-1 encourages additional training on scope of work development be provided to individuals involved in procurements, so they are equipped to establish and communicate the nuances of the solution or service their agency seeks through the procurement process.

In our review of procurement policy documents, we noticed several opportunities to formalize guidance in the form of direct policy instruction for individuals involved in procurements. The documents we reviewed did not appear to provide practical guidance on setting the amount of time a procurement should be publicly posted before responses to it are due, which is a unique consideration for each procurement. The procurement manual does suggest a minimum posting window of 5 calendar days and maximum posting window of 90 calendar days, for both IFBs and RFPs, but this is only supported by statute for IFBs. In practice, RFPs should not be posted for very short periods like 5 days, due to the complexity of responding, no matter the content or dollar value. Conversely there are times when an RFP might need to be posted for longer than 90 days due to significant topical and/or response complexity. These opportunities in written policy, along with interviewee input, helped inform recommendations IV-3 and IV-4.

In recommendation IV-2A, we address a potential gap in guidance provided to individuals and agencies developing procurements. If an agency wishes to potentially award multiple scopes of work in one procurement process, then more detailed guidance should be developed to establish the wide range of award outcomes possible depending on pricing and scoring from scope to scope within the same procurement.

Interview Findings

Agency SME interviews provided further basis for recommendations IV-1, IV-3, and IV-4. Broadly, these three recommendations highlight an opportunity for further guidance to support individuals involved in the procurement process.

Recommendation IV-1 was developed partly in response to interviewees indicating specific training on Scope of Work development would be helpful. OSP indicated most Scope of Work training is provided in limited capacity via content in the Procurement Manual and supplemented as needed with one-on-one coaching. The addition of more detailed training for Scope of Work developed can provide a higher level of practical information than currently available. Scope of Work training opportunities in a stand-alone module form or recurring group session can ease the burden on OSP staff to provide individualized instruction for each individual requiring guidance.

Recommendation IV-3 was based on interviews with agency representatives, who noted that they were unsure of what respondent experience and minimum company size requirements should be specified in

their procurements. One agency procurement team discussed how they developed a procurement requiring a minimum amount of respondent experience of one year to cast a broad net for potential offerors. However, upon receipt of proposals, it became clear that this approach opened the door for underqualified offerors. Accordingly, further guidance on this topic could guard against this challenge in the future. An update to statute to require guidance for respondent experience may be beneficial.

Recommendation IV-4 was informed by agency SME interviewees indicating that a procurement was hurried after a reissuance of the procurement, leaving a limited response window for potential offerors of only two weeks. To ensure a sufficient amount of time is allowed for offerors to develop quality responses, recommendation IV-4 suggests that additional guidance be provided on standards for the timing duration between solicitation posting and the response deadline, including instances of procurement reissuance. An update to statute to require guidance for solicitation posting timing may be beneficial.

Solicitation Review

As described above in “Interview Findings,” reviews of example procurements indicated instances where the duration of time between solicitation posting and the response deadline may not have been sufficient to garner a wide range of quality responses. As a specific example, the ADE Education Freedom Accounts solicitation was publicly posted for four weeks initially, and upon reissuing, it was publicly posted for two weeks. As a fairly complex procurement, it would have benefitted from additional time for potential offerors to consider the scope and develop their proposals.

Recommendation IV-4 addresses this by suggesting further guidance on solicitation timing. With clearer expectations, the offeror community stands to strengthen their trust that business opportunities with the State of Arkansas will give them the time needed to develop thorough proposals. Provided more time to respond, more offerors are likely to propose solutions in response to State procurements, and their proposals will have the time needed to be detailed and thorough.

Recommendations IV-2A and IV-2B are connected, both driven by our review of the solicitation materials for the DPHT procurement, focused on addressing management of solicitations with multiple scopes of work. During our review, it became apparent that there was not clear guidance provided to respondents on the potential different award scenarios, despite the fact that the State indicated that they reserved the right to award to one or multiple vendors across the procurement’s multiple scopes of work. In addition, our review also showed an opportunity for more clarity within the breakdown of vendor responsibilities across the multiple scopes. With both these points in mind, our recommendations seek to establish formal processes and guidelines for multi-scope procurements. This will help avoid potential protests regarding award practices on this type of procurement.

Recommendations:

Ikaso makes the following recommendations:

| Section IV Recommendation Overview | |
|---|--|
| IV-1 | Specific training on Scope of Work development should be developed and delivered to individuals involved in the RFP process. |
| IV-2A | Policy should be updated with guidelines for solicitations with multiple scopes that may be awarded separately, to ensure award under all possible scoring scenarios is clearly laid out in the solicitation materials. |
| IV-2B | Separate scope requirements for solicitations with multiple scopes should be clearly and independently defined. |
| IV-3 | More detailed guidance should be developed and implemented in relation to expectations for respondent experience and minimum company size requirements for procurements. |
| IV-4 | More detailed guidance should be provided on establishing the timing between solicitation posting and the response deadline, including in cases where an RFP is reissued after an initial posting. In addition, the Procurement Manual should be updated to remove the guidance of a maximum 90 day posting period for RFPs. |

V. Evaluation

Section Summary:

In this section, we make several recommendations relating to the evaluation process, which work to ensure that rule and policy are clear and aligned with statutory requirements, that existing areas of ambiguity are resolved, that policy is effective at guiding individuals through the evaluation process regardless of their experience with the subject matter, and that process steps are taken and enforced consistently across all procurements. These recommendations include rule clean-up and reorganization, increasing the level of specificity in rules, the development of new policy documents and the update of existing ones, and the standardization of certain key processes.

Findings and Observations:

Rule Review

Throughout our review of rule and statute, several locations were identified where rule updates could be implemented to clarify and improve the evaluation process and ensure statutory compliance.

Recommendations V-2, V-3A, V-3B, V-8, V-12, and V-13 all involve rule clean-up and reorganization, focused on ensuring clarity and consistency. V-2 and V-3A recommend replacing existing IFB- and RFP-specific language regarding the responsibility of offerors with redirection to R1: 19-11-235, which covers the subject clearly for all procurement types in one location. Linking these rules back to one single source of truth aims to provide an overall greater level of clarity to the reader. V3-B is closely related, building upon the changes recommended by V-3A by ensuring the remaining content after the proposed change can stand alone, and is aligned with the actual content of the rule - the past performance of an offeror. Furthermore, V-8 seeks to consolidate similar rules by moving a sub-component of R8: 19-11-230.1 covering evaluations to a more appropriate location under R5: 19-11-230. Finally, V-12 and V-13 both recommend the removal of specific language related to the BAFO process in R8: 19-11-230.1(g), with the goal of ensuring that unrelated or non-applicable topics do not confuse the rest of the rule's meaning and intent.

Recommendations V-4A, V-4B, and V-6A deal with clarifying the role and process for cost consideration within evaluations. Through this lens, recommendations V-4A and V-4B work together to address ambiguity around the process of determining cost reasonableness (is cost too high) and realism (is cost too low to reflect an ability of the respondent to meet the scope requirements) by clarifying the role of procurement officials within the process. Currently, the language respectively provided in R9: 19-11-229(5) and R6: 19-11-230(3) addresses a determination by a procurement official that price is unreasonable, but otherwise leaves this topic unclear. Recommendation V-6A seeks to more clearly codify cost as one of the criteria that must be considered as part of establishing a competitive range. Statute is clear on the matter, but rule is ambiguous and would benefit from the simple addition of two words. The sentence "The competitive range shall be determined based on criteria set forth in the request for proposals." in R8: 19-11-230.1(d) should add the words "including cost" at the end. This should be supported in policy (including training and template materials) per recommendation V-6B below.

Additionally, recommendations V-9A, V-9B, and V-10 all seek to clarify the process of vendor proposal clarifications. Recommendation V-9A seeks to ensure alignment with statute 19-11-230(f)(2), which disallows substantial changes to proposals as a part of proposal clarifications, by proposing updates to R7: 19-11-230, establishing that a written response by an offeror shall only clarify the submitted proposal and shall not add any substantive language to the submitted proposal or change the terms of the submitted proposal. As the rule currently stands, this statutory requirement is not clearly communicated and could result in a proposal that is significantly modified in response to a clarifying question, especially when a clarifying question could signal a lapse. Similarly, V-9B recommends the addition of new language to R8: 19-11-230.1(b) to prevent contradiction with the same statute. Currently, R8: 19-11-230.1(b) states that clarifications can be requested by a procurement agency on relevant topics "without limitation," overlooking the statutory limitation. In order to prevent misunderstandings as to the scope of changes allowed, we recommend adding a clarifying sentence in parallel to what is

recommended for R7: 19-11-230. Recommendation V-10 focuses on clearly establishing the conditions under which vendors may clarify their bids without increasing their costs. Currently R10: 19-11-229(a)(3) and R10: 19-11-229(a)(4) leave this process ambiguous, with (a)(3) allowing vendors to confirm suspected mistakes within their bid, while (a)(4) states that bid prices may not be increased after the date and hour of bid opening. As (a)(3) stands, it could be interpreted to contradict (a)(4) by allowing a vendor to increase cost if it were part of the confirmation of an error. To mitigate this concern, it should be updated to clearly state that the correction of errors may not result in an increase to cost.

Finally, recommendation V-14 seeks to clarify a contradiction related to the process by which a winner is determined when evaluation scores are tied. Currently, per statute 19-11-230(g)(3), in the case of a tie, the winner is the respondent who submitted the lowest cost proposal. However, R5: 19-11-230(c) indicates that a tie situation should be resolved via coin flip. In order to comply with statute, R5: 19-11-230(c) should be updated to award the bid with the lower cost.

Policy Review

Recommendation V-5 resulted primarily from our review of available documents, and suggests the development of formal policy regarding the process for when and how to determine the reasonableness of costs in relation to vendor proposals, as well as parallel policy addressing cost realism as a separate but related concept. This is necessary, as our review found that there are not currently materials available to inform individuals on how to determine price reasonableness (as currently established in rule), or price realism (as proposed above) of submitted proposals. The potential application of having a reasonableness policy in place can be found in the education professional learning community RFP, where the pricing for the winning respondent was four-to-five times those of the other proposers. We do not recommend these processes be applied universally, but should be a tool available to the State. This recommendation could also be supported by adding similar language to statute.

As noted above, recommendation V-6B suggests policy updates will reinforce the necessity to score cost before removing any offeror via the competitive range process. In particular the traditional RFP template indicates the competitive range is set *after* technical scores are complete, and cost is not opened until after oral presentations by the down-selected offerors, but other opportunities to make this clear in policy will help ensure statutory compliance issues do not arise in the future. This recommendation could also be strengthened by adding parallel language to statute.

Our policy review also led to recommendation V-7, which suggests updating the policy on the Evaluation of Proposals as relates to cost weighting and associated process requirements. As the document currently stands, the 30% cost weighting threshold is presented as a typical minimum, but cites a potential range of 1-50% may be used, and does not elaborate on when to go above 30%, beyond noting that cost may have higher relative importance vs. technical evaluation factors in some cases. The policy also indicates an agency procurement official may opt for a lower cost weighting than 30%, when

statute is clear this authority only resides with the State Procurement Director (and that violation of this is grounds for protest). Finally, the policy does not make clear the explicit statutory requirement that cost weighting below 30% requires legislative review before an RFP is issued.

Finally, our policy review found opportunities to improve the MAP RFP process, per recommendation V-11. As noted in recommendation III-2, the MAP RFP process is not addressed in the Procurement Manual and should be added to distinguish it from the traditional RFP process. The scoring rubric in the current MAP RFP template uses a 0/5/10 point scale, where a perfect 10 can be achieved with a proposal that establishes an offeror “is reliable and capable of fully performing the required services” - a relatively low bar. A higher standard for a perfect score in any particular subsection of a RFP evaluation, such as in the traditional RFP 0-5 scoring rubric, would be preferable. In the traditional RFP a perfect 5 is for a response area that “squarely meets the requirement and exhibits outstanding knowledge, creativity, ability or other exceptional characteristics.” Having a higher standard for a perfect score can help ensure technical merit is thoroughly considered, create finer gradations in final results, and help avoid cases - such as the aforementioned education professional learning community RFP - where a perfect technical score has the potential to override a poor cost score from a vastly higher priced proposal.

Interview Findings

Recommendation V-1 was directly driven by information identified through conversations with OSP. Through our discussions with them, it was highlighted that there is not a consistent method in place for training evaluators ahead of the procurements that they will be participating in. To ensure that the State is consistently evaluating all procurements utilizing the same process and methods, we recommend that a standardized evaluator training be developed and conducted for all evaluators on every procurement. This practice may also serve to help reduce potential protests by ensuring all procurements are evaluated in the same manner.

Recommendation V6-B, seeking to solidify the practice of considering costs for all proposals before setting a competitive range, was also informed through our interview with OSP. We learned that they have implemented a current practice of considering the cost for all proposals received during procurements run through OSP. However, this practice is not always implemented in procurements conducted outside OSP’s purview by other agencies, and is not formally established in policy. Because of this, sometimes, cost is not considered before the competitive range is set.

While primarily derived from our review of policy documents, recommendation V-5 was also driven by information obtained through the interviews we conducted. During these conversations, both OSP and agency staff indicated that there is currently no written guidance on the subject of determining cost reasonableness as currently allowed in existing rule, and that agencies currently rely on verbal guidance from OSP for this process.

During our interviews, we also learned from OSP that they always recommend cost is weighted at 30% during evaluations. However, in line with recommendation V-7, this is not currently codified in official policy.

Solicitation Review

In addition to the information learned during interviews, our review of sample solicitations also informed recommendation V-1. Across the three procurements we reviewed, based on materials shared with our team, each procurement appeared to utilize a different method for training evaluators. Consistency of training can help reduce risk of procedural error by helping to educate and update staff who do not normally engage in procurement activity.

As noted above with respect to recommendation V-6B, the DOC Comprehensive Medical Services solicitation was issued under the traditional RFP template, in which the order of operations has the competitive range set after technical scores are complete, but before cost is opened. This is further addressed in section VIII.

Recommendations:

Ikaso makes the following recommendations:

| Section V Recommendation Overview | |
|--|--|
| V-1 | Evaluator Training for Procurements should be standardized so that the same information is provided every time a procurement is conducted. |
| V-2 | R8: 19-11-229(2)(E) should be updated to simply refer forward to R1: 19-11-235, which specifically covers responsibility of bidders and offerors. |
| V-3A | The concept of Responsibility of Offeror contemplated in the title of R5: 19-11-230(b) should be addressed by replacing the first sentence with a simple reference forward to R1: 19-11-235, which specifically covers responsibility of bidders and offerors. |
| V-3B | The remaining content of R5: 19-11-230(b) should be re-numbered as R5: 19-11-230(c) and re-titled to "Past Performance of Offeror" to match the content of the rule. Current R5: 19-11-230(c) and R5: 19-11-230(d) should be renumbered accordingly. |
| V-4A | R9: 19-11-229(5) should be updated to make it clear that a procurement official may determine a bid is either too high (“unreasonable”) relative to the bid requirements, or too low (“unrealistic”) relative to successfully meeting the bid requirements. |

| | |
|------|--|
| V-4B | R6: 19-11-230(3) should be updated to make it clear that a procurement official may determine a bid is either too high (“unreasonable”) relative to the solicitation requirements, or too low (“unrealistic”) relative to successfully meeting the solicitation requirements. |
| V-5 | Formal policy should be developed for determining the reasonableness and realism of cost proposals within solicitations. |
| V-6A | R8: 19-11-230.1(d) should be updated to specifically mention cost as one of the criteria that must be considered as part of establishing a competitive range. |
| V-6B | The currently recommended practice of considering the cost of all proposals during initial RFP evaluation, and not establishing the competitive range until every cost submission has been considered, should be clearly specified in policy, training, and templates. |
| V-7 | The policy on the Evaluation of Proposals should be updated in relation to cost weighting requirements to accurately specify the minimum of 30%. |
| V-8 | R8: 19-11-230.1(g)(2)(I) regarding evaluation of clarified proposals should be relocated into R5: 19-11-230(a) (Evaluation). |
| V-9A | Clarification guidance in R7: 19-11-230 should be updated to be explicit about the statutory requirement in 19-11-230(f)(2) that "A written response by an offeror under this subsection shall only clarify the submitted proposal and shall not add any substantive language to the submitted proposal or change the terms of the submitted proposal." |
| V-9B | R8: 19-11-230.1(b) should be updated to add a new third sentence in the rule to prevent contradiction with statute 19-11-230(f)(2) that disallows substantial changes to proposals as a part of proposal clarifications. |
| V-10 | R10: 19-11-229(a)(3) should be clarified to state that confirmed mistakes may be withdrawn by the bidder. Alternately, R10: 19-11-229(a)(4) should be clarified to say that "Actual" bid prices shall not be increased..." or "Bid prices (including as may be corrected following a suspected mistake under R10: 19-11-229(a)(3)) shall not be increased...". |
| V-11 | The MAP RFP process can benefit from updates, in particular to the scoring rubric. |
| V-12 | Rule R8: 19-11-230.1(g)(1)(D) regarding Best and Final Offers (BAFOs) for unclear or deficient responses should be removed. Clarifications are a separate topic from BAFOs, and any potential deficiency is already addressed by clause (A) within this rule. |
| V-13 | R8: 19-11-230.1(g)(2)(C) regarding BAFO negotiations with non-responsible offerors should be removed. Non-responsible offerors should be removed before this stage of the process. |

| | |
|------|---|
| V-14 | R5: 19-11-230(c) should be updated to reflect the statutory requirement in 19-11-230(g)(3). Tie scores should be resolved with award to the offeror that submitted the lowest price proposal, not settled with a coin flip. |
|------|---|

VI. Award

Section Summary:

In this section, our reviews of rule and policy led to two recommendations specific to the award process. These recommendations present the opportunity to detail the award process for Competitive Sealed Proposals and reduce risk by updating award timing in rule. In recommendations VI-1 and VI-2, we encourage updating rules and policy documents on the subject of award to reduce risk in the procurement process by adding additional clarity and consistency.

Findings and Observations:

Rule Review

Through our review of rule, gaps in expected structural parallels were noticed between statutes 19-11-229 and 19-11-230, which cover Competitive Sealed Bidding and Competitive Sealed Proposals, respectively, presenting opportunity for alignment. Recommendation VI-1 encourages the addition of an equivalent to R:11 19-11-229(a) as a new rule in 19-11-230 to further specify expectations for award would round out the rules. This should include addressing the requirement in statute 19-11-230(g)(1) which reads "Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, taking into consideration price, the evaluation factors set forth in the request for proposals, any best and final offers submitted, and the results of any discussions conducted with responsible offerors." As the rules currently stand, they are absent guidance on award beyond the guidance on discussions in R8: 19-11-230.1. Additional award guidance can help mitigate risk of protest on the grounds of award procedure.

Policy Review

Our review of policy directly led to recommendation VI-2, which encourages an update to the policy on the Posting of Anticipation to Award. Currently, the document implies that the 14-day protest period for non-winning respondents to contest an award begins the day of the award posting. However, per statute 19-11-244, this period is to begin the day after posting of the award. Further to the content in this statute, clauses 19-11-244(a)(5)(B) and 19-11-244(d) should have the references to "(5) days" clarified to the presumed intent of "(5) calendar days." Finally, in a different statute but on the same subject of minor date clarifications, a reference to "(5) days" in 19-11-245(e) should be updated as well.

Interview Findings

No findings or recommendations on award stemmed from interview findings.

Solicitation Review

No findings or recommendations on award stemmed from Solicitation review.

Recommendations:

Ikaso makes the following recommendations:

| Section VI Recommendation Overview | |
|---|--|
| VI-1 | The rules for 19-11-230 should be supplemented with a rule on award parallel to R11: 19-11-229(a) for Competitive Sealed Bidding. |
| VI-2 | The policy on the Posting of Anticipation to Award should be updated to accurately reflect the start of the protest period. In addition, statute should clarify calendar days. |

VII. Protest

Section Summary:

In this section, we make several recommendations regarding protest that work to ensure Arkansas is following best practices, and that rule and policy are aligned with statutory requirements. Our recommendations aim to make certain that the Procurement Manual covers administrative protest determination policy, contracts are processed and negotiated as efficiently as possible in the case of an active protest, rule covers all statutory requirements including who the protesting party must notify when submitting a protest, and rule includes the ramifications of a solicitation protest. These recommendations are detailed below and based on our rule and policy review.

Findings and Observations:

Rule Review

Our review of the rules pertaining to protest led to several recommendations. Recommendation VII-2 suggests the addition of a procurement policy best practice into the rules on protest. We recommend that R4: 19-11-244 be updated to establish that contract negotiations be allowed to proceed during an active protest. This is a procurement best practice that increases efficiency. The State may continue to negotiate - but not execute - the contract while the protest is ongoing, ensuring the least amount of time possible is lost due to the protest and the State is not fully stymied by the simple existence of a protest. Statute does not prohibit this update as it implies that negotiations can proceed based on the allowance for full execution of protested contracts in certain circumstances. That said, an update to statute to lay an explicit foundation for this practice may be beneficial.

Recommendations VII-3 and VII-4 both propose updates to the protest rules that further align them with statute. Recommendation VII-3 aims to ensure that the formal requirements for protests described in R2: 19-11-244.2 do not leave out the requirement stipulated in statute 19-11-244(a)(2)(B) that protesting parties must give notice to the awardee. Recommendation VII-4 aims to ensure that all possible protest types are covered by R4: 19-11-244 which describes how procurements are affected by protests, bringing the rule into alignment with statute and existing policy within the Procurement Manual. Currently, this rule only addresses how a solicitation is affected by an award protest; the ramifications of a solicitation protest on the procurement process should be addressed here as well.

Policy Review

Generally, procurement policy could provide more detail and guidance on addressing protests and how they affect solicitations. For example, based on recommendation VII-3, the Procurement Manual should be updated to reflect the statutory requirement that protesting parties must give notice to the awardee; it does not currently address this requirement.

Our review of protest policy and the Procurement Manual led directly to recommendation VII-1. This recommendation hits on a key element of statute that is left out of the Procurement Manual. Statute 19-11-244(c)(2) requires that the administrative protest determination state the reasons for the determination; however, this requirement is not included in the “Protest of a Solicitation” sub-sections in the Procurement Manual and should be added for clarity for all parties involved. Without this addition, someone following the Procurement Manual guidance may inadvertently address a protest contrary to statutory requirements.

Interview Findings

No findings or recommendations on protest stemmed from our interviews.

Solicitation Review

No findings or recommendations on protest stemmed from our Solicitation review.

Recommendations:

Ikaso makes the following recommendations:

| Section VII Recommendation Overview | |
|--|---|
| VII-1 | The Procurement Manual should be updated to speak to administrative protest determination, ensuring that it states the reasons for the action taken as statutorily required by 19-11-244(c)(2). |
| VII-2 | R4: 19-11-244 should be updated to explicitly allow negotiations to proceed during a protest, to ensure time is not lost and the State is not fully stymied by the simple existence of a protest. |
| VII-3 | R2: 19-11-244.2 should be updated to specifically mention the statutory requirement in 19-11-244(a)(2)(B) that protesting parties must give notice to the awardee. |
| VII-4 | R4: 19-11-244 should be updated to speak to how a solicitation is affected by a solicitation protest. As it stands, this rule only addresses how a solicitation is affected by an award protest. |

VIII. Negotiations

Section Summary:

Within this section, we make recommendations on negotiations that work towards a number of goals, including updating negotiation related policy to ensure information is comprehensive and easily accessible. Our recommendations also ensure negotiations rule and policy are aligned with statutory requirements. This includes carrying over statutory requirements on negotiations training and certification to rule, and removing an example from rule which may lead to an unnecessarily arbitrary approach to the selection of a competitive range. Additionally, our recommendations include narrowing the list of criteria that can be used to determine a competitive range for negotiations eligibility. Finally, the recommendations work to ensure that negotiations rules are structured in a logical and easily digestible manner.

Findings and Observations:

Rule Review

Our review of the rules pertaining to negotiations led to several recommendations that aim to align rule further with statute, restructure certain rules to achieve a more easily digestible structure, and ensure negotiations best practices. Recommendations VIII-2A and VIII-2B work to establish parallels in statute and align rule with statute. Recommendation VIII-2A proposes an update to R15: 19-11-229(a) to ensure it accurately reflects statutory requirements that negotiations may only be conducted by trained personnel. Rule states "Procurement officials who conduct negotiations *should* be trained...", while statute 19-11-229(h)(2)(C)(i) states, "Negotiations under this subsection *shall* be conducted by a person who is trained and certified in negotiation and procurement processes." The current language in the rule should be updated to clearly communicate that training and certifications are a statutory requirement for those conducting negotiations. Recommendation VIII-2B proposes a new statute (and corresponding rule) under 19-11-230(e) that parallels statute 19-11-229(h)(2)(C)(i).

Recommendation VIII-3 suggests a re-ordering of the sections of R8: 19-11-230.1 so that the rule is more easily digestible and follows a logical sequential order. For example, the re-ordering would have an explanation of selecting the competitive range before the negotiations section - as the selection of the competitive range occurs before negotiations, it logically follows to have competitive range selection come before negotiations in the rule. Recommendation VIII-7 and VIII-8 are related to this recommendation as well. They suggest moving both BAFO related sections of R8: 19-11-230.1 into R8: 19-11-230.1(c) (Negotiation) as a related subtopic. As a BAFO is a negotiation tool, it is logical to nest it under the larger negotiation header. A table showing the current ordering of R8: 19-11-230.1 compared to the proposed re-ordering is below:

| Current Ordering of R8: 19-11-230.1 | Proposed Re-ordering of R8: 19-11-230.1 |
|--|--|
| Discussions Generally | Discussions Generally |
| Clarification | Clarification |
| Negotiation | Minimum Score |
| Reasonably Susceptible of Being Awarded a Contract – The Competitive Range | Reasonably Susceptible of Being Awarded a Contract – The Competitive Range |
| Minimum Score | Negotiation <ul style="list-style-type: none"> ● Best and Final Offer (BAFO) Negotiation ● Target Price BAFO |
| Negotiation with Single Offeror Versus Multi-party Negotiation | Negotiation with Single Offeror Versus Multi-party Negotiation |
| Best and Final Offer (BAFO) Negotiation | |
| Target Price BAFO | |

Recommendations VIII-4, VIII-5, and VIII-6 all look to ensure procurement rule is providing clear and practical direction. Recommendation VIII-4 proposes removing mention of responsibility from the allowable reasoning behind abandoning negotiations with a vendor in a serial negotiation in R8: 19-11-230.1(c)(4). Offeror responsibility is something that should be assessed at the beginning of the evaluation process and should not factor into decisions on negotiations. In other words, any proposal from an offeror that is not responsible should be rejected before this stage of the process. Recommendation VIII-5 proposes removing the clause from R8: 19-11-230.1(d) that uses eliminating all but the three highest ranked vendors from negotiation eligibility as an example of how to set a competitive range. Following this example for setting a competitive range could cause the arbitrary elimination of proposals that are very close in score to proposals included within a competitive range. Recommendation VIII-6 proposes reducing the acceptable criteria for selecting a competitive range to only evaluation scores in R8: 19-11-230.1(d)(1)(5). The other items on the list of criteria are either not suitable to use for clearly and defensibly setting a competitive range or should already be included as part of an evaluation score. The criteria we propose to remove are:

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

Using the above criteria may inadvertently subvert the importance of evaluation scores and the evaluation process.

Policy Review

Our review of policy informed recommendation VIII-1, which calls for policy to more clearly and comprehensively address the negotiation process. As it stands, the existing procurement policy documentation provides a modest level of detail on the negotiation process and how to approach negotiations. The eLearning negotiation training module has a fair amount of content, but this information is not fully reflected in the policy documents we reviewed. As such, updates to policy are suggested. The State may also consider updates to statute to require key topics like negotiations be further expanded upon in policy.

Interview Findings

Recommendation VIII-1 was also informed by our interviews with agency SMEs in addition to our policy review. Agency representatives reported that they tended to rely on their own experience when conducting negotiations. Although the eLearning training on negotiations exists, it is important to ensure it meets the needs of end users. Increased written guidance in policy documents including the Procurement Manual may also help to alleviate this issue expressed by agency staff.

Solicitation Review

Our review of the example solicitations helped inform recommendation VIII-5. In the DOC Comprehensive Medical Services solicitation example, during the evaluation process, those leading the procurement established the competitive range with the top three scores based on their technical proposals before cost was considered. This approach to the competitive range and evaluation is not aligned with the intent of statute and is addressed elsewhere in the report, namely recommendation V-6A and V-6B.

Recommendations:

Ikaso makes the following recommendations:

| Section VIII Recommendation Overview | |
|---|---|
| VIII-1 | The negotiation process should be addressed more clearly in policy, with training and guidance on the subject for agencies conducting procurements. |
| VIII-2A | R15: 19-11-229(a) should be updated to accurately reflect statutory requirements that negotiations may only be conducted by trained personnel. |
| VIII-2B | A new statute (and corresponding rule) under 19-11-230(e) regarding negotiations for RFPs should be added to correspond to the existing statute for bids in 19-11-229(h)(2)(C)(i) and its corresponding rule (as updated per recommendation VIII-2A) in R15: 19-11-229(a). |
| VIII-3 | The elements of R8: 19-11-230.1 should be reordered to follow a more logical sequential order of: a, b, e, d, c, f. |
| VIII-4 | R8: 19-11-230.1(c)(4) should be updated to remove the words "not responsible or is otherwise" and also "responsibility and" to reflect the fact that offeror responsibility is not relevant to negotiation as addressed in this rule. |
| VIII-5 | R8: 19-11-230.1(d) should remove the clause "For example, and not by limitation, a request for proposals may provide that only the three highest ranked vendors are eligible for negotiation." to avoid the potential for arbitrary elimination of proposals that are very close in score to proposals included within a competitive range. |
| VIII-6 | R8: 19-11-230.1(d)(1)(5) should have the numbered list of criteria for selecting the competitive range removed in favor of simply citing the final criterion - evaluation scores. The other items in the list are not practicable to use as criteria for setting a competitive range. |
| VIII-7 | R8: 19-11-230.1(g) on BAFO Negotiation should be incorporated into R8: 19-11-230.1(c) (Negotiation) as a related subtopic. |

| | |
|--------|---|
| VIII-8 | R8: 19-11-230.1(h) on Target Price (BAFO) should be incorporated into R8: 19-11-230.1(c) (Negotiation) as a related subtopic. |
|--------|---|

IX. Contract Management

Section Summary:

We make recommendations that aim to improve the process for contract management. This includes updating procurement rules that outline the processes for suspension and debarment to ensure alignment with one another while also coordinating alongside OSP. Additionally, we identified and made recommendations to simplify, update and clarify rule related to managing vendor contracts to ensure the State is following best practices.

Findings and Observations:

Rule Review

Our review of the rules pertaining to contract management led to several recommendations. Recommendation IX-2 suggests that the State simplify the debarment hearing process outlined in R3:19-11-245(d) to make it less onerous. The current process in place creates space for procedural hurdles and is ultimately inefficient. This could hinder debarments and allow contractors to not be held accountable for not meeting performance requirements. At the time of this report, no suspension and debarment instances are listed on the official OSP list. To the extent the hearing requirement in statute 19-11-245(b)(1)(A)(i) mandates the complexities outlined in rule, the statute may be updated to specify a simpler opportunity to challenge a suspension or debarment. Recommendation IX-2 does not have a corresponding redline in the Appendix, pending guidance on whether statute also must be updated, and deferring to the State’s preference on how much of the process complexity to possibly eliminate.

Recommendations IX-3, IX-4 and IX-5 propose updates to the processes outlined in the debarment and suspension rules for alignment and clarity. Recommendation IX-3 suggests R1: 19-11-245 and R2: 19-11-245 be updated to ensure OSP is involved in any suspension or debarment action an agency chooses to take against a contractor. The State would benefit from this change as it would ensure consistent actions are applied to contractors across the State. Additionally, involving OSP will ensure centralized records for suspensions and debarments are comprehensive. Recommendation IX-4 proposes updates to R2: 19-11-245 by adding another subsection to align it with R1: 19-11-245. In R1: 19-11-245 (b), it addresses the condition of allowing for a written determination in the case of suspension of a contractor. It would benefit the State to apply the same condition in cases of a debarment hearing to ensure consistency. Finally, Recommendation IX-5 suggests the State clarify the order in which debarment and

suspension should occur in R2: 19-11-245. As it stands currently, the procurement rule is written in a way that implies - but does not currently state that - debarment should begin with a suspension. It may be the case that the State wishes to have the option to immediately debar a contract as opposed to first issuing a suspension, thus it is important for rule to be clear.

Recommendation IX-6 proposes the removal of a stipulation mentioned in rule. The requirement that only allows the procurement official who awarded the contract to determine contract termination should be removed from R1: 19-11-246 as it restricts contract management procedures and could cause unnecessary process inefficiencies. In many cases procurement officials may not be involved with contract management. Additionally, it could contradict statute 19-11-246(c)(1) which provides more flexibility on who can render a decision related to a contractor's agreement with the State.

Recommendation IX-7 suggests an update to guidance on vendor reports. Currently, the guidance outlined in R1: 19-11-268 requires quarterly vendor performance reports for contracts with amounts of at least twenty-five thousand dollars. This requirement is more stringent than what is outlined in 19-11-268 and may create inefficiencies. It could hinder the report review process by creating a large volume of paperwork which could inadvertently distract awareness of the implementation of corrective action for specific vendors with performance issues. Recommendation IX-7 does not have a corresponding redline in the Appendix, pending guidance on the preferred details of how vendor performance reporting should work in practice.

Policy Review

Our review of policy found that there are instances where the documents and templates available do not align with the requirements outlined in statute; this led to recommendation IX-1. Currently, the monetary benefits clause in the "Services-Contract-SRV-1-Fillable-Form-V.3.6.27.22" form varies from what is required in statute. We propose that this clause be updated to match 19-11-1012 for overall alignment.

Interview Findings

No findings or recommendations on contract management stemmed from our interviews.

Solicitation Review

No findings or recommendations on contract management stemmed from our Solicitation review.

Recommendations:

Ikaso makes the following recommendations:

Section IX Recommendation Overview

| | |
|------|---|
| IX-1 | The fillable contract form, "Services-Contract-SRV-1-Fillable-Form-V.3.6.27.22" should be updated. Currently, the monetary benefits clause is worded differently than the requirements in statute 19-11-1012. |
| IX-2 | R3: 19-11-245(d) should be simplified to be less onerous and ensure that worthwhile debarments are not avoided due to procedural hurdles. |
| IX-3 | R1: 19-11-245 and R2: 19-11-245 should be updated to require that any agency suspension or debarment action be done in consultation with OSP. |
| IX-4 | R2: 19-11-245 should be updated to parallel R1: 19-11-245, adding a subsection (b) that addresses the provision of a written determination of debarment to the person in question. |
| IX-5 | R2: 19-11-245 should be clarified as to whether a debarment action must first be preceded by a suspension action. |
| IX-6 | R1: 19-11-246 should be updated to remove the stipulation that the "Declaration of default and/or contract termination may only be determined by the procurement official who awarded the contract". This is unnecessarily restrictive and could contradict statute 19-11-246(c)(1). |
| IX-7 | R1: 19-11-268 should be updated to ensure guidance on vendor performance reports is as-intended, given the requirement for quarterly performance reports for all contracts over \$25K is more stringent than statute and has the potential to create a large volume of paperwork that could distract attention from contracts with vendor performance issues. |

X. Committee Review

Section Summary:

We make recommendations on committee review that work to ensure the State clearly outlines its expectations around requirements for both ALC review and ratification. We also identified rules that were duplicative of one another with slight variations and proposed reconciliation to ensure the State is providing guidance that is clear throughout rule.

Findings and Observations:

Rule Review

Our review of the rules pertaining to legislative and committee review found instances where rules are duplicative of one another. Currently, R1: 19-11-269 and R3: 19-11-1008 outline the procedure for approving information technology products or services with slight variations from one another. We propose in recommendation X-3 that the rule be consolidated under R1: 19-11-269 with a cross reference within R3: 19-11-1008 as needed to ensure the State is providing clear guidance.

Policy Review

Our review of policy informed recommendation X-1 which calls for general updates to be made to policy documents with information regarding legislative review requirements. Currently, the existing materials provide guidelines for review; however, they do not cover the legislative review requirements for all procurements as is outlined in rule and statute as clearly as they might. For example, the “Guidelines-for-Reporting-and-Review-1.25.24.pdf” document provides the OSP reporting requirements under 19-11-274 that may lead to legislative review, but omits two key details. First in providing the stated value range of contracts for services that must be reported by (and to) OSP of \$25,000 - \$49,999.99, it does not indicate that this range applies specifically to annual contract values. In the same way it does not indicate that there is a separate threshold within statute that contracts with a multi-year total value of up to \$350,000 must also be reported and potentially reviewed. The same guideline document outlines the review requirements listed in 19-11-265, however it seems to omit a specific statutory clause that could trigger review, creating the potential for a missed review and a need for ratification. Clause 19-11-265(a)(4)(A)(ii)(e) speaks to the imposition of financial consequences under a contract as a material change that would require a review. More broadly, the Procurement Manual briefly mentions in multiple places the fact that legislative review might be required, but does not delve into details to help the reader contextualize this process and its requirements. This seems to be a subject of sufficient weight and importance that an overview (including reference to the relevant statute) would be worthwhile to provide in the central guiding document.

Interview Findings

On the subject of ratification, OSP identified an opportunity to provide additional clarity on this in policy and training. We have added recommendation X-2 understanding OSP is in the process of developing and rolling this out at the time of this report, and recognizing via discussion with OSP and Bureau of Legislative Research that the current wording in statute 19-11-247 has the potential to limit the circumstances in which ratification may be sought. As-written, 19-11-247(a) specifically addresses solicitations and awards of contracts that may violate laws. In practice ratification covers a broader range of topics that would happen after the solicitation process and award of contracts - this includes exceeding scope limits, contract expiration terms, and spending allowances. Expanding 19-11-247(a) - to

cover cases where a contract may be modified or managed contrary to law - would help ensure the ratification process is able to cover other instances that have been known to arise. In order to ensure consistency of information that is submitted for ratification, as OSP rolls out ratification policy and training, this should include templates for requesting ratification, documenting the circumstances, and establishing measures to prevent repeated issues. Finally, ratification should be also addressed in the Procurement Manual, to ensure awareness and help individuals avoid the missteps that lead to ratification. All together these steps have the potential to ultimately reduce the need for ratification.

Solicitation Review

No findings or recommendations on committee review stemmed from our Solicitation review.

Recommendations:

Ikaso makes the following recommendations:

| Section X Recommendation Overview | |
|--|--|
| X-1 | Policy documents should be updated to clearly state and explain legislative review requirements for all procurements, in alignment with statute and rule. |
| X-2 | Planned policy and training regarding ALC ratification requirements should proceed, and statute should be amended to expressly include all scenarios under which ratification may be sought. |
| X-3 | R1: 19-11-269 should be reconciled with R3: 19-11-1008, which overlap. R1: 19-11-269 should contain the definitive language and R3: 19-11-1008 should simply refer back to R1: 19-11-269. |

Appendix 1 – List of Proposed Rule Changes

Proposed Rule Updates

Language proposed for removal is in ~~red strikethrough~~

New proposed language is in *blue italics*

Language proposed to be moved is shown in ~~green strikethrough~~ in its original location and *green italics* in its new location

Throughout this appendix section, proposed redline changes to rules are listed chronologically by their applicable recommendation and relevant report section. However, within each individual report section, any distinct proposed changes to the same rule are grouped together for clarity and ease of readability. For the two cases where changes are proposed to the same rule, but in different report sections (R5: 19-11-229 and R8: 19-11-230.1), each report section’s recommendation will detail only their section-relevant changes within the redline of the text, and will not include redlines proposed from other sections. However, for these instances, a complete redline with all proposed changes spanning all report sections is provided in Appendix 1.2.

Finally, minor rule cleanup items are provided Appendix 1.3.

Appendix 1.1 – Proposed Rule Updates, by Recommendation

Recommendation II-6:

R3: 19-11-279. MANDATORY RESPONSE PROVISION.

Agencies may make RFI responses mandatory as a precondition for vendors to respond to any related subsequent procurements 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. Email is sufficient to constitute a request. Whether delivered by email or mail, the communication should be clearly marked or labeled “Request for Mandatory RFI Responses”.*
- (2) Articulate in the written request the factors and reasoning for why RFI responses should be made mandatory in these circumstances, including steps that will be taken to ensure potential future RFP competition will not be limited as a result.*
- (3) Attach a copy of the draft RFI to the written request.*

Recommendation III-1:

R2: 19-11-230. COMPETITIVE SEALED PROPOSALS.

R2: 19-11-230.1 CONDITIONS OF USE. To determine the necessity of using competitive sealed proposals, contracts exceeding an estimated purchase price of seventy-five thousand dollars (\$75,000) require formal justification via a determination in writing that competitive sealed bidding is not

practicable or advantageous. 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, 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.

Recommendation III-3:

R2: 19-11-802. USE OF COMPETITIVE BIDDING BY A POLITICAL SUBDIVISION.

A political subdivision shall not use competitive bidding for the procurement of other professional services without a two-thirds (2/3) vote of its governing body.

Recommendation III-4:

R1: 19-11-249. COOPERATIVE PURCHASING.

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. In seeking the determination from the State Procurement Director, the agency must include a verifiable economic justification as to why using the cooperative purchasing agreement is more cost effective or likely to realize savings than conducting a solicitation. *A verifiable economic justification includes a comparison of current State contract pricing and the pricing under a cooperative purchasing agreement, or a comparison of information obtained from a request for information and pricing under a cooperative purchasing agreement. The justification should include a comparison of a sufficient proportion of the spend to extrapolate an expected overall savings.* If a determination has already been made with respect to a cooperative purchasing agreement, any other public procurement unit may rely on that determination.

Recommendation V-2:

R8: 19-11-229. COMPETITIVE SEALED BIDDING.

(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) See RI: 19-11-235

~~(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.~~

Recommendations V-3A, V3-B, and V14:

[see also – Appendix 1.2 – Proposed Consolidated Rule Changes for R5: 19-11-230 and R8: 19-11-230.1 – R5: 19-11-230. - (Consolidation of recommendations V3-A, V3-B, V-8, and V-14)]

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.” See RI: 19-11-235.~~

(c) PAST PERFORMANCE OF OFFEROR.

(1) 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.

~~(e)~~(d) 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)~~ *the lowest cost proposal* 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)~~ *the lowest cost proposal* 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)~~(e) 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.

Recommendation V-4A:

R9: 19-11-229. COMPETITIVE SEALED BIDDING.

REJECTION: Grounds for rejection of bids include but are not 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 *or unrealistic* as to price;
 - (i) *An unreasonable price is one determined in writing to be too high relative to bid requirements.*
 - (ii) *An unrealistic price is one that is determined in writing to be too low to indicate the respondent's ability to successfully meet scope requirements.*
- (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.

Recommendation V-4B:

R6: 19-11-230. REJECTION OF PROPOSALS.

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

- (1) failure of a proposal to conform to the essential requirements of a Request for Proposals;
- (2) a proposal imposing conditions which would modify the stated terms and conditions of the Request for Proposal;
- (3) any proposal determined by the procurement official in writing to be unreasonable *or unrealistic* as to price;
 - (i) *An unreasonable price is one determined in writing to be too high relative to bid requirements.*
 - (ii) *An unrealistic price is one that is determined in writing to be too low to indicate the respondent's ability to successfully meet scope requirements.*
- (4) failure to furnish a bond when required by a Request for Proposals; and
- (5) the offeror's record of poor past performance or irresponsibility; and

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

Recommendations V-6A, V-8, V9B, V-12, and V-13:

[see also – Appendix 1.2 – Proposed Consolidated Rule Changes for R5: 19-11-230 and R8: 19-11-230.1 – R8: 19-11-230.1. - (Consolidation of recommendations V-6A, V-8, V9B, V-12, V-13, VIII-3, VIII-4, VIII-5, VIII-6, VIII-7, and VIII-8)]

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. *Clarifications to the content of submitted proposals must only address specific elements of the proposal, without adding substantive language, and may not allow modifications to the terms of the submitted proposal.* 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, *including cost*. 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) (1) Cost of Ownership; or~~
 - ~~(3) (2) Responses that appear to provide the best value based on evaluation criteria in the solicitation; or~~
 - ~~(4) (3) Responses most likely to provide greater value after negotiations based on the same criteria; or~~
 - ~~(5) (4) 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)~~ (C) The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee; and
- ~~(E)~~ (D) 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)~~ (E) 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)~~ (F) All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer; and
- ~~(H)~~ (G) 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)~~ (H) 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.

R5: 19-11-230. COMPETITIVE SEALED PROPOSALS.

(a) EVALUATION.

- (1) 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.
- (2) *Only the original proposal, or one properly clarified, or submitted as a best and final offer may be considered for evaluation.*

Recommendation V-9A:

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.
 - (4) A written clarification shall only clarify the submitted proposal and shall not add any substantive language to the submitted proposal or change the terms of the submitted 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.

Recommendation V-10:

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 may be rejected. The written clarification shall become a part of the contract awarded on the basis of that bid. *If a mistake is confirmed, the bidder may be permitted to withdraw that portion of their 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.

–OR–

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 may 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. *Actual b*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.

–OR–

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 may 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 *(including as may be corrected following a suspected mistake under R10: 19-11-229(a)(3))* 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.

Recommendation VI-1:

R9: 19-11-230. COMPETITIVE SEALED PROPOSAL AWARD.

After a reasonable proposal evaluation period, the Request for Proposals shall be awarded to the responsive and responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price, all evaluation factors set forth in the Request for Proposals, any best and final offers submitted, and the results of any discussions conducted with responsible offerors. All proposals may be rejected if, after evaluation of the proposals, including consideration of any clarifying or explanatory information submitted by the offerors, it is determined by the procurement official that no satisfactory proposal has been received.

R10 ~~R9~~: 19-11-230. CANCELLATION OF THE REQUEST FOR PROPOSALS.

A notice of cancellation of an OSP Request for Proposals shall be posted on the OSP website. The proposals may be returned if properly identified.

R11 ~~R10~~: 19-11-230. ETHICAL STANDARDS.

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

Recommendation VII-2 and VII-4:

R4: 19-11-244. STAY OF PROCUREMENTS DURING PROTEST.

(a) When a solicitation protest has been timely submitted, no award shall be issued until after a protest determination has been issued 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 issuance of the award without delay is necessary to protect substantial interests of the State.

*(b) When an award 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. *During an active protest, contract negotiations may still proceed with the awarded offeror.**

Recommendation VII-3:

R2: 19-11-244. PROTEST REQUIREMENTS.

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. *The person submitting the protest must also give notice of the protest to the person named in the anticipation to award a contract by sending the person a copy of the protest by electronic mail and regular mail.* 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.

Recommendation VIII-2A:

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 ~~must should~~ be trained *and certified* in negotiation and Arkansas Procurement Law.

Recommendations VIII-2B, VIII-3, VIII-4, VIII-5, VIII-6, VIII-7, and VIII-8:

[see also – Appendix 1.2 – Proposed Consolidated Rule Changes for R5: 19-11-230 and R8: 19-11-230.1 – R8: 19-11-230.1. - (Consolidation of recommendations V-6A, V-8, V9B, V-12, V-13, VIII-3, VIII-4, VIII-5, VIII-6, VIII-7, and VIII-8)]

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.~~

- (c) (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.

- ~~(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 should be established based on evaluation scores. 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)~~ **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. *Procurement officials who conduct negotiations must be trained and certified in negotiation and Arkansas Procurement Law.*

- (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.
- ~~(6)~~ **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.

~~(A)~~ **(1)** The BAFO process may be useful when:

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

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

- ~~(i)~~ **(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
- (ii) ~~(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
 - (iii) ~~(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
 - (iv) ~~(D)~~ The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee; and
 - (v) ~~(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
 - (vi) ~~(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
 - (vii) ~~(G)~~ All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer; and
 - (viii) ~~(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:
 - (a) ~~(i)~~ the submission was timely, but that delivery was prevented by a force majeure; or
 - (b) ~~(ii)~~ the delay in delivery is not substantial and does not prejudice the State; or
 - (c) ~~(iii)~~ that waiver of the deadline is in the best interest of the State; and
 - (ix) ~~(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
 - (x) ~~(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.
- (C) ~~(3)~~ All BAFO requests shall contain the following:
- (i) ~~(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
 - (ii) ~~(B)~~ Submission requirements with time lines; and
 - (iii) ~~(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
 - (iv) ~~(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

~~(v)(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.

~~(D)(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.

~~(7)(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:

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

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

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

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

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

~~(F)(6)~~ Receive target cost proposals; and

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

~~(H)(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.

(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-responsive 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) Specifies 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.~~

Recommendations IX-3:

R1: 19-11-245. SUSPENSION.

- (a) Any agency suspension action must be done in consultation with the Office of State Procurement*
- ~~(a)~~ *(b) Prior to any suspension, the contractor will be afforded an opportunity to discuss with the Director or head of a procurement agency the circumstances which led to the possible suspension and to potentially reach a settlement.*
- ~~(b)~~ *(c) SUSPENSION. In the event a bidder is suspended, a written determination shall be made by the State Procurement Director or head of a procurement agency concerning the facts of any allegation or claim that a bidder has done any action in R3:19-11-245(b) and shall be sent to the bidder at the address shown in the procurement agency's records.*

Recommendations IX-3, IX-4, and IX-5:

R2: 19-11-245. DEBARMENT.

- (a) Any agency debarment action must be done in consultation with the Office of State Procurement*
- (b) Prior to any debarment hearing, the ~~suspended~~ contractor will be afforded an opportunity to discuss with the Director or head of a procurement agency the circumstances which led to the suspension and to potentially reach a settlement.*
- (c) DEBARMENT. In the event a bidder is debarred, a written determination shall be made by the State Procurement Director or head of a procurement agency concerning the facts of any allegation or claim that a bidder has done any action in R3:19-11-245(b) and shall be sent to the bidder at the address shown in the procurement agency's records.*

–OR–

R2: 19-11-245. DEBARMENT.

- (a) Debarment actions must first be preceded by a suspension action*
- (b) Any agency debarment action must be done in consultation with the Office of State Procurement*
- (c) Prior to any debarment hearing, the ~~suspended~~ contractor will be afforded an opportunity to discuss with the Director or head of a procurement agency the circumstances which led to the suspension and to potentially reach a settlement.*
- (d) DEBARMENT. In the event a bidder is debarred, a written determination shall be made by the State Procurement Director or head of a procurement agency concerning the facts of any allegation or*

claim that a bidder has done any action in R3:19-11-245(b) and shall be sent to the bidder at the address shown in the procurement agency's records.

Recommendation IX-6:

R1: 19-11-246. AUTHORITY TO RESOLVE CONTRACT AND BREACH OF CONTRACT CONTROVERSIES.

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

Recommendation X-3:

R1: 19-11-269. PROCEDURES FOR APPROVAL OF INFORMATION TECHNOLOGY PRODUCTS OR SERVICES.

Agencies must submit to the Department of Finance and Administration Office of Intergovernmental Services State Technology Planning (STP) any *Invitation for Bid (IFB)*, *Request for Proposal (RFP)*, *Request for Qualifications (RFQ)*, bid solicitation, sole source, exempt by law purchase, intergovernmental agreement, or cooperative contract purchase for 96 Information Technology products or services where the total projected contract amount, including any amendments or possible extensions, is one hundred thousand dollars (\$100,000) or more. In addition, any *IFB*, *RFP*, *RFQ*, bid solicitation, sole source, exempt by law purchase, intergovernmental agreement, or cooperative contract purchase that includes Information Technology products or services as part of the purchase, where that part is anticipated to have a total projected contract amount, including any amendments or possible extensions, of one hundred thousand dollars (\$100,000.00) or more must be submitted to STP for approval. *If approved by STP*, STP will provide *a letter of approval to the Office of State Procurement prior to processing the procurement.* ~~approval through the state's financial management system.~~ STP shall have ten (10) business days from receipt of the documents to complete the necessary reviews. If the STP review is not completed within the time frame allowed, the agency and STP must mutually agree to an

extension of the review process. *In the event a state agency and STP are unable to resolve a dispute, the matter shall jointly be referred to the director of the Department of Finance and Administration for resolution.*

R3:19-11-1008 Procedures for approval of information technology products or services. *See RI: 19-11-269 Agencies must submit to the Department of Finance and Administration Office of Intergovernmental Services State Technology Planning (STP) any Invitation for Bid (IFB), Request for Proposal (RFP) or Request for Qualifications (RFQ) for Information Technology products or services where the anticipated cost is One Hundred Thousand Dollars (\$100,000) or more. In addition, any IFB, RFP or RFQ that includes Information Technology products or services as part of the IFB, RFP or RFQ, where that part may be One Hundred Thousand Dollars (\$100,000) or more, must be submitted to STP for approval. Documentation regarding sole source and emergency procurements that include Information Technology products or services of One Hundred Thousand Dollars (\$100,000) or more must also be submitted to STP for approval. If approved by STP, STP will provide a letter of approval to the Office of State Procurement prior to processing the procurement. STP shall have ten (10) business days from receipt of the documents to complete the necessary review. If the STP review is not completed within the timeframe allowed, the agency and STP must mutually agree to an extension of the review process. In the event a state agency and STP are unable to resolve a dispute, the matter shall jointly be referred to the director of the Department of Finance and Administration for resolution.*

Appendix 1.2 – Proposed Consolidated Rule Changes for R5: 19-11-230 and R8: 19-11-230.1

R5: 19-11-230. - (Consolidation of recommendations V-3A, V-3B, V-8, and V-14)

R5: 19-11-230. COMPETITIVE SEALED PROPOSALS.

(a) EVALUATION.

(1) 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.

(2) Only the original proposal, or one properly clarified, or submitted as a best and final offer may be considered for evaluation.

(b)(1) **RESPONSIBILITY OF OFFEROR.** ~~Past performance of an offeror may be used by the procurement agency to determine whether the offeror is “responsible.” See RI: 19-11-235.~~

(c) PAST PERFORMANCE OF OFFEROR.

(1) 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.

~~(e)~~(d) 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)~~ *the lowest cost proposal* 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)~~ *the lowest cost proposal* 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)~~(e) 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.

R8: 19-11-230.1. - (Consolidation of recommendations V-6A, V-8, V-9B, V-12, V-13, VIII-3, VIII-4, VIII-5, VIII-6, VIII-7, and VIII-8)

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. *Clarifications to the content of submitted proposals must only address specific elements of the proposal, without adding substantive language, and may not allow modifications to the terms of the submitted proposal.* 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.~~

~~(c) (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.~~

~~(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, including cost. ~~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~~ should be established based on evaluation scores. ~~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) ~~(e)~~ 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. Procurement officials who conduct negotiations must be trained and certified in negotiation and Arkansas Procurement Law.

(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.

- ~~(6)(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.*
- ~~(A)(1)~~ *The BAFO process may be useful when:*
- ~~(i)(A)~~ *No single response addresses all the specifications; or*
 - ~~(ii)(B)~~ *The cost submitted by all offerors is too high (e.g., exceeds the State's estimate of expected costs, budget, etc.); or*
 - ~~(iii)(C)~~ *The scores of two or more offerors are very close after the initial evaluation; or*
 - ~~(iv)(D)~~ *All offerors submitted responses that are unclear or deficient in one or more areas.*
- ~~(B)(2)~~ *The following rules shall apply to BAFO negotiations:*
- ~~(i)(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*
 - ~~(ii)(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*
 - ~~(iii)(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*
 - ~~(iv)(D)~~ *The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee; and*
 - ~~(v)(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*
 - ~~(vi)(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*
 - ~~(vii)(G)~~ *All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer; and*
 - ~~(viii)(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:
 - ~~(a)(i)~~ *the submission was timely, but that delivery was prevented by a force majeure; or*
 - ~~(b)(ii)~~ *the delay in delivery is not substantial and does not prejudice the State; or*
 - ~~(c)(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*

- (ix)(~~3~~) 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.*
- (C)(~~3~~) All BAFO requests shall contain the following:*
- (i)(~~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*
 - (ii)(~~B~~) Submission requirements with time lines; and*
 - (iii)(~~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*
 - (iv)(~~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*
 - (v)(~~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.*
- (D)(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.*
- (7)(~~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:*
- (A)(~~1~~) Determine the lowest proposed cost for each line item, as applicable; and*
 - (B)(~~2~~) Compare the lowest proposed cost for each line item against current/past contract price and other benchmarks; and*
 - (C)(~~3~~) Use market analysis to set a target price for each line item in a spreadsheet; and*
 - (D)(4) Evaluate the reasonableness of the target price for each line item and for the total target price overall; and*
 - (E)(~~5~~) Send a request for revised pricing and a target price spreadsheet to offerors deemed responsible and responsive; and*
 - (F)(~~6~~) Receive target cost proposals; and*
 - (G)(~~7~~) Determine if target price negotiation resulted in improved cost proposals; and*
 - (H)(~~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.

- (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.~~

Appendix 1.3 – Proposed Rule Cleanup

- R2: 19-11-230 should be corrected to fix a typo ("the lower")
- R4: 19-11-241 should be deleted as it is a duplication of R2: 19-11-241.
- R1: 19-11-245 should be updated to replace the word "bidder" with "person."
- R2: 19-11-245 should be updated to replace the word "contractor" with "person."
- R4: 19-11-265 has a typo in the spelling of the word rescinded.
- R6: 19-11-265 can be deleted as it is a duplication of R5: 19-11-265(1).
- R1: 19-11-268 has a typo in the third sentence, the number 6 can be removed.
- R6: 19-11-902 should be updated to ensure the link at the end is working.
- R1: 19-11-1008 should be reconciled with R2: 19-11-1008, where both rules duplicatively address the same subjects with very minor discrepancies.
- R2: 19-11-1012(b) should be deleted or made to simply reference R1: 19-11-265(a) (Submission of Contracts for Services), as it is a duplication of the same topic.
- R3: 19-11-1008 should be made to simply reference R1: 19-11-269 (Procedures for Approval of Information Technology Products or Services), as it is a duplication of the same topic.

Appendix 2 - Acronym Glossary

| Name | Acronym |
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| Arkansas Department of Education | ADE |
| Arkansas Legislative Council | ALC |
| Best and Final Offer | BAFO |
| Bureau of Legislative Research | BLR |
| Department of Corrections | DOC |
| Department of Parks, Heritage, and Tourism | DPHT |
| Invitation for Bid | IFB |
| Most Advantageous Proposal | MAP |
| Office of State Procurement | OSP |
| Request for Information | RFI |
| Request for Proposals | RFP |
| Request for Qualifications | RFQ |
| State Technology Planning | STP |
| Subject Matter Expert | SME |

Appendix 3 – List of Written Materials Reviewed

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| <p>Procurement Statute and Rule</p> | <ul style="list-style-type: none"> • Arkansas Code <ul style="list-style-type: none"> ○ Title 19, Chapter 11, Subchapter 2 ○ Title 19, Chapter 11, Subchapter 3 ○ Title 19, Chapter 11, Subchapter 8 ○ Title 19, Chapter 11, Subchapter 9 ○ Title 19, Chapter 11, Subchapter 10 ○ Title 19, Chapter 11, Subchapter 11 ○ Title 19, Chapter 11, Subchapter 14 |
| <p>Policies and Procedures</p> | <ul style="list-style-type: none"> • OSP-Policy-Anticipation-to-Award-121523 • Authorization-to-Solicit-for-Vehicle-Policy-121523 • OSP-Policy-Cooperative-Procurements-121523 • OSP-Policy-Evaluation-of-Proposals-121523 • OSP-Policy-Split-Purchasing-020224 • OSP-Policy-Solicitation-Review-Requirements-121523 • Solicitation-Terms-and-Conditions • technologyAccessClause • General-Delegation-FY-2025 • Higher-Education-Delegation-FY-2025 • eo9804 • OSP-Procedures-Critical-Emergency-Procurement-121523 • OSP-Procedures-Emergency-Procurement-121423 • OSP-Procedures-Multiple-Award-0524 • Request-for-Proposals-Request-Procedures-1023 • OSP-Procedures-Request-for-Qualifications-121823 • OSP-Procedures-Sole-Source-Procurements-121523 • OSP-Procedures-Special-Procurements-121523 • Printing-Delegation-Order-Manual-072424 • Arkansas-Procurement-Manual-Updated-100324 • Guidelines-for-Reporting-and-Review-1.25.24 • EvaluationScoreSpshtsInstructions • Bid Template Instructions • SolicitationReviewInst.Revised-04.25.23 • Amendment-to-Services-Contract-SRV-1A-Instructions • "Instructions-for-Combined-Certifications-Form-102423" • RFPBoycottIsraelInstforAgencies • "Services-Contract-SRV-1-Instructions" • Instructions-to-Agencies-for-Bid-Solicitation-Postings07.14.22-1 • FrequentlyUsedProcurementReports • 1.9 Creating an Outline Agreement • 1.9A Approving an Outline Agreement |

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| | <ul style="list-style-type: none"> • 1.10 Instructions for Creating a Purchasing Order • 1.10A Approving a Purchase Order • Combined-Certifications-Form-060424.pdf |
| <p style="text-align: center;">Trainings and Certifications</p> | <ul style="list-style-type: none"> • 1.1 Introduction to Procurement and Certification • 1.2 Procurement Overview Course • 1.3 Creating a Purchase Requisition • 1.4 Basic Concepts for Buyers • 1.5 Executing a Small Order Procurement • 1.6 Executing a Competitive Bid Procurement • 1.7 Negotiation • 1.8 Using State & Cooperative Contracts • Contract Expiration Report Training |
| <p style="text-align: center;">Forms and Supplementary Materials</p> | <ul style="list-style-type: none"> • Cooperative-Compliance-Checklist-0824 • Checklist-for-Contract-Submission-Final-5.15.24 • DisclosureForms_SubmissionRequirementChecklist_11122019 • Request-for-Proposals-Request-Form-052324 • Request-for-Qualifications-Request-Form-0824 • RFP-Solicitation-Template-Agency-051024 • Technical-Proposal-Packet-Agency-050324 • RFP-Proposal-Tabulation-Sheet • EvaluationScoreSpsheets • Solicitation-Review-Memo-04.27.23-1 • MASTER-FOR-WEBSITE-DEPARTMENTS-RFQ-Solicitation-Template-4-27-21 • MASTER-FOR-WEBSITE-DEPARTMENTS-RFQ-Response-Packet-Template-4-27-21 • MAP-RFP-Solicitation-Template-Agency-101124 • MAP-Technical-Proposal-Packet-Agency-061424 • MAP-RFP-Individual-Scoresheet-043024 • RFP-Consensus-Scoresheet-3.25.24 • CB-Solicitation-Template-Agency-051424 • CB-Bid-Response-Packet-050324 • CB-Bid-Tabulation-Sheet-9.1.23 • CB-Official-Bid-Price-Sheet-9.1.23 • IFB-Solicitation-Template-Agency-051024 • IFB-Bid-Response-Packet-050324 • IFB-Bid-Tabulation-Sheet • Official-Bid-Price-Sheet • ContractReviewForm-9.30.21-Fillable (1) • Services-Contract-SRV-1-Fillable-Form-V.3.6.27.22 • Standard-Commodities-Contract-Template-6.18.20 • SRV-1A-Fillable-Form-v.2.05.11.22 |

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| | <ul style="list-style-type: none"> • StandardAmendedCommoditiesContractTemplate • contgrantform • "Illegal-Immigrant-Certification-120423" • "Israel-Boycott-Certification-052324" • Critical-Emergency-Procurement-Justification-Form-1024 • Emergency-Procurement-Justification-Form-052324 • Multiple-Award-Request-Form-052324 • Sole-Source-Procurement-Justification-Form-052324 • Special-Procurement-Justification-Form-052324 • ATAPosting.Updated.9.15.22.pdf • "Form-OSP-0001-Solicitation-Posting-Request-102523" • Form-OSP-0002-Solicitation-Posting-Update-Request-102523 • Request-for-authority-to-solicit-bids-for-vehicle-v.1 |
| Solicitations | <ul style="list-style-type: none"> • Department of Corrections' Comprehensive Medical Services Solicitation - (DOC-24-004) • Department of Parks, Heritage, and Tourism's Marketing and Advertising Solicitation - (S000000310) • Arkansas Department of Education's Education Freedom Accounts Solicitation - (S000000284), (S000000313) |

Appendix 4 – List of Interviews Conducted

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| Legislators | <ul style="list-style-type: none"> • Senator Jimmy Hickey, Jr. • Representative Frances Cavanaugh • Representative Howard M. Beaty, Jr. • Representative Jeffrey Wardlaw • Representative Carlton Wing • Representative Keith Brooks • Representative Lee Johnson |
| Office of State Procurement | <ul style="list-style-type: none"> • Jessica Patterson - Director • Tanya Freeman - Deputy Director • Brandy Schroeder - Procurement Manager |
| Department of Corrections | <ul style="list-style-type: none"> • Heather Bailey - Chief Procurement Officer |
| Department of Education | <ul style="list-style-type: none"> • Greg Rogers - Chief Fiscal Officer • Judi Free - Agency Fiscal Manager |