

30 PROPOSED REGULATIONS

Document No. 4861
STATE FISCAL ACCOUNTABILITY AUTHORITY
CHAPTER 19
Statutory Authority: 1976 Code Sections 11-35-10 et seq.

19-445. Consolidated Procurement Code.

Preamble:

The Consolidated Procurement Code authorizes the State Fiscal Accountability Authority to promulgate regulations governing the procurement, management, and control of any and all supplies, services, information technology, and construction to be procured by the State and any other regulations relating to implementation of Title 11, Chapter 35 (Sections 11-35-60 & -540(1)). The proposed regulation will address various matters regarding Regulation 19-445 and procurement in general.

Notice of Drafting for the proposed amendments was published in the *State Register* on September 28, 2018.

Section-by-Section Discussion

Section 2000. State Procurement Regulations.

Technical changes are made to reflect the Code Commissioner's reference to the authority's five-member board. No substantive change intended.

Two definitions—"certification" and "responsible procurement officer"—have been added for clarity.

Section 2015. Unauthorized or Illegal Procurements.

According to the South Carolina Supreme Court, contracts entered into in violation of public procurement laws are void. While this rule may be fundamentally necessary, the results can be unduly harsh – depending on the facts. A regulation allowing the ratification of improperly awarded contracts allows the government to avoid some of these harsh results. Unfortunately, it also opens a Pandora's box – it permits officials to use ratification to achieve otherwise prohibited results. In order to work, such a regulation must be clear with regard to when a contract remains void, when a contract can be ratified, and if ratified, when performance can continue. To illustrate, some contracts – say, shortly after award – should simply be declared void. Some should be ratified, then terminated; this approach avoids the challenges of voiding a contract by maintaining existing rights, such as warranties for equipment in use, but honors the procurement policies by stopping the contract at that time. In some instances, the overall urgency and necessity of the state require that it continue with the contract notwithstanding its award in violation of law. For each set of facts, the regulation must properly address the parties' rights and responsibilities after improper conduct is discovered.

The current regulation was last modified in 2007, when an attempt was made to address similar concerns. Lessons learned since then demonstrate that the regulation overly favors ratification, has not achieved results consistent with the purposes and policies of the Code, and lacks clarity. For these reasons, the regulation has been rewritten to provide clearer instructions on what options are available when an unauthorized or otherwise illegal contract is identified.

Section 2017. Pre-Solicitation Procedures.

This regulation is completely new. It furnishes valuable tools for procurement professionals that should increase the efficiency and economy of the procurement process. It will result in both faster and better acquisitions from the State's perspective, and closer cooperation with the private sector to better align the State's needs with commercially available products and services. The regulation includes three substantive parts: Acquisition Planning, Market Research, and Exchanges with Industry. R.19-445.2017B requires acquisition planning, a vital step in the procurement process that is all too often overlooked. This proposed regulation does not apply to acquisitions of construction. R.19-445.2017C requires market research, another step in the acquisition cycle that helps agencies ensure they adopt strategies appropriate to the market for the specific

supplies or services they are purchasing. R.19-445.2017D addresses interaction between purchasing agencies and the private sector. There is a widespread misconception among State personnel that there should be little or no contact with private sector representatives about anticipated acquisitions. The new section is intended to dispel that myth and to encourage closer communication between the State and its prospective offerors, so that agency needs and expectations can be better aligned with market realities. Additional safeguards are included to avoid inappropriate communications or disclosure of information that might favor one offeror over another. *See* R.19-445.2017D(6).

Section 2020. Certification.

Technical changes only. No substantive change intended.

Section 2027. Electronic Commerce.

Electronic commerce has been recognized in South Carolina since at least 2004 by the Uniform Electronic Transactions Act, 2004 S.C. Act No. 279, § 1, codified at S.C. Code Ann. §§ 26-6-10, *et seq.* (“UETA”). By its terms UETA applies to government agencies. The current procurement regulations pre-date electronic commerce. This new regulation explicitly authorizes widespread existing practices among governmental bodies currently using e-commerce solutions, including for issuing solicitations, amendments and other notices; receiving offers and related documents in response to solicitations; and providing required notices, including awards or intents to award, for contracts governed by the Consolidated Procurement Code.

R.19-445.2027B(3) stipulates that the procurement modules in SCEIS meet the new requirements.

If electronic commerce is used, R.19-445.2027C(1) requires the solicitation to specify the methods to be used. The last sentence makes clear that only the method(s) specified in the solicitation is acceptable. For example, an invitation to submit bids through SCEIS does not permit an offeror to e-mail her bid to the procurement officer. If an offer is submitted by a method other than that specified in the solicitation, it will be rejected as non-responsive.

Section 2030. Competitive Sealed Bidding—The Invitation for Bids.

These changes are technical and merely restate existing law. The text proposed to be added to current paragraph (5) is taken verbatim from Section 11-35-1520(3).

Section 2040. The Official State Government Publication.

No print edition of SCBO has been published in nearly ten years. The proposed amendment reflects that SCBO currently exists only in electronic form. Distribution to public libraries and others is by posting on the SCBO website, at <https://scbo.sc.gov/>(.) Since subsection (B), dealing with “copies” furnished to public libraries, is proposed to be deleted, the heading for R.19-445.2040A is no longer required.

Section 2045. Receipt, Safeguarding, and Disposition of Bids.

Subsection C is added to reflect current practice, as articulated in 2002 ABA Model Procurement Regulation R3-301.05; and to provide for disposition of electronic offers.

Section 2060. Telegraphic Bids.

This regulation has been repealed. Proposed new R.19-445.2027, Electronic Commerce, *ante*, renders it unnecessary.

Section 2065. Rejection of Bids.

Proposed R.19-445.2045C eliminates the need for section D.

Section 2070. Rejection of Individual Bids.

Technical change only.

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Section 2085. Correction or Withdrawal of Bids; Cancellation of Awards.

A federal court in South Carolina has held that our state would follow the majority rule, that a bidder on a public project can withdraw its bid, even after opening and regardless of contract provisions to the contrary, if the bid is affected by a substantial error; the bidder notifies the owner before the owner has changed its position; and where enforcing the bid would work a great wrong. *National Fire Ins. Co. of Hartford v. Brown & Martin Co.*, 726 F.Supp. 1036 (D.S.C. 1989). More recently, the South Carolina Supreme Court allowed modification of a bid based on mistake, where enforcing the contract would cause the bidder to suffer a “substantial loss.” *Martin Engineering, Inc. v. Lexington County Sch. Dist. One*, 365 S.C. 1, 615 S.E.2d 110 (2005). Central to both decisions is a reluctance to allow the government to profit from a bidder’s honest and obvious mistake. New proposed R.19-445.2085A(2) authorizes the procurement officer to request confirmation of a bid that appears obviously in error. If the bidder verifies that an error has occurred, it can request correction or withdrawal in accordance with law. This proposed regulation permits early recognition of obvious mistakes and may avoid protests or other legal proceedings that would otherwise delay awarding a contract. It does not relax or change the existing and exacting requirements for correction or withdrawal of offers.

Section 2095. Competitive Sealed Proposals.

All changes are primarily technical, and affect procurement staff, not prospective offerors.

R.19-445-2095A clarifies that the reasonable notice required by the Consolidated Procurement Code and current regulations for preparation of bids also applies to competitive sealed proposals.

R.19-445.2095B and -2095C make technical changes to the current sections.

The current version of R.19-445.2095G requires OSE to oversee the evaluation process and any discussions with offerors for any procurement of construction that is not low bid. It also allows the State Engineer to excuse that oversight. The amendment prohibits the State Engineer from excusing oversight if the project exceeds two million dollars. It continues to require close involvement by OSE staff in acquisitions over \$2 million, to avoid over-use or misuse of the RFP source selection method for construction projects. The revised regulation will not require a change in OSE’s administration of these acquisitions, as staff currently remains involved in RFP selection even for projects under the new threshold.

Current R.19-445.2095J, with no substantive change, is proposed to be re-codified as standalone R.19-445.2098. *See* proposed new regulation and commentary, *post*.

New subsection J incorporates notice provisions in R.19-445.2090(B), applicable when posting an award on competitive sealed bids is delayed, to like delays in awarding on competitive sealed proposals.

New R.19-445.2095K is proposed to provide for the development of a negotiation plan prior to beginning negotiations with the highest ranked offeror for RFPs.

Section 2097. Rejection of Proposals.

R.19-445.2095B makes R.19-445.2045C applicable to RFPs, thus eliminating the need for section D.

Section 2098. Rejection of Individual Proposals.

With one minor change, new R.19-445-2098A through C re-codifies current R.19-445.2095(J) as a standalone regulation. This move aligns the structure of regulations governing RFPs with those governing sealed bids. Technical changes to subsections (A), (B), and (C) are made to comply with State Register formatting guidelines.

Proposed R.19-445.2098D makes clear that late proposals will not be accepted, and adopts the “mailroom” exception applicable to bids from R.19-445.2070(G).

Section 2122. Price Reasonableness.

This is an entirely new regulation. Its intent is to specifically authorize procurement staff to employ analytical tools to detect unreasonable pricing, especially unbalanced bidding. The proposed analytical tools are described in broad terms and leave to the chief procurement officers the task of formulating policy, guidance and training materials for use by governmental bodies.

Introductory R.19-445.2122A makes clear that adequate competition will ordinarily suffice to establish price reasonableness. When competition is absent, it also authorizes use of analytical techniques to evaluate cost or pricing data, which such data is required by existing statutory provisions.

The definitions of price analysis and cost analysis, in R.19-445.2122B, are taken from 1980 ABA Model Procurement Rules R3-403.07 to -.09.

Unbalanced pricing exists when individual line item prices are manipulated so they reflect neither their intrinsic value nor their proportion to the prices for other line items. The agency suspects that unbalanced pricing costs the State thousands of dollars each year. Rather than apply a strict mathematical formula, it relies on the procurement officer's judgment of contractual risk to determine if unbalanced pricing is unreasonable.

Section 2127. Organizational Conflicts of Interest.

This is a placeholder only.

Section 2140. Specifications.

Consistent with the Model Procurement Regulations, the Procurement Review Panel has long required that Brand-name-or-equal specifications must identify the salient characteristics of the brand name exemplar that meets the State's requirements. Proposed R.19-445.2140C(2)(a) incorporates this requirement into regulation. R.19-445.2140C(2)(b) also requires the solicitation to include language that the "or equal" specification is not intended to be restrictive. Both sections are based on 1980 ABA Model Procurement Regulations, R4-202.02.2(b).

Section 2152. Leases, Lease/Payment, Installment Purchase, and Rental of Personal Property.

Technical change only. No substantive change intended.

Section 2180. Assignment, Novation, and Change of Name.

Proposed new R.19-445.2180A provides a definition that has been missing from the regulation. This does not change established policy and practice of the Division of Procurement Services.

Section 3000. School District Procurement Codes; Model.

Technical change only. No substantive change intended.

Notice of Public Hearing and Opportunity for Public Comment:

Should a hearing be requested pursuant to Section 1-23-110(A)(3) of the S.C. Code, as amended, such hearing will be held on January 2, 2018, at 10:00 AM in Room 252 of the Edgar A. Brown Building, State House Grounds, Columbia, South Carolina. Persons desiring to make oral comment at the hearing are asked to provide written copies of their presentation for the record. If a qualifying request pursuant to Section 1-23-110(A)(3) is not timely received, the hearing will be canceled.

Written comments, requests for the text of the proposed amendments or any other information, and any requests for a public hearing, should be submitted to Office of General Counsel, Attn: Keith McCook, 1201 Main Street, Suite 420, Columbia, S.C. 29201 or to regulations@mmo.state.sc.us, on or before 5:00 PM on December 27, 2018. Copies of the text of the proposed amendments for public notice and comment are available at <https://procurement.sc.gov/review-period-draft>.

Preliminary Fiscal Impact Statement:

No additional state funding is requested. The State Fiscal Accountability Authority estimates that no additional costs will be incurred by the State and its political subdivisions in complying with the proposed revisions to Regulation 19-445.

Statement of Need and Reasonableness:

DESCRIPTION OF REGULATION: Consolidated Procurement Code.

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Purpose: These regulations are proposed to clarify and improve the procedures used in procurement.

Legal Authority: Title 11, Chapter 35 of the South Carolina Code of Laws.

Plan for Implementation: The proposed amendments would be incorporated within R.19-445 upon publication in the State Register as a final regulation. The proposed amendments will be implemented in the same manner in which the existing regulation is implemented. As part of its routine training program, the State Fiscal Accountability Authority will offer training classes to inform government officials regarding the impact of the proposed regulations.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

As reflected in Section 11-35-20, the Consolidated Procurement Code was enacted to consolidate, clarify, and modernize the law governing procurement in this State and to permit the continued development of explicit and thoroughly considered procurement policies and practices. These regulations are designed to achieve those purposes and policies, consistent with best practices developed through experience. Accordingly, the State Fiscal Accountability Authority determined that the proposed amendments to the state's procurement regulations are needed and reasonable.

DETERMINATION OF COSTS AND BENEFITS:

There will be no increased cost to the State or its political subdivisions, nor will the proposed amendments result in any increased cost to the business community. The proposed amendments will benefit covered governmental entities by enhancing the integrity of the process, improving efficiency, and allowing sound procurement practices that enable government to acquire better value for the taxpayer's dollars.

UNCERTAINTIES OF ESTIMATES:

There are no uncertainties of estimates relative to the costs to the State or its political subdivisions

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

The proposed regulations have no effect on the environment or on public health.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

There will be no detrimental effect on the environment or public health if the regulations are not implemented.

Statement of Rationale:

The Consolidated Procurement Code expressly contemplates the continued development of explicit and thoroughly considered procurement policies and practices. The proposed changes are needed to accommodate developments in the law and in best practices for government procurement, and to further consolidate, clarify, and modernize the law governing procurement in this State. S.C. Code Section 11-35-20(d).

Text:

The full text of this regulation is available on the South Carolina General Assembly Home Page: <http://www.scstatehouse.gov/regnsrch.php>. Full text may also be obtained from the promulgating agency.