

Agency Name: Budget and Control Board
Statutory Authority: 11-35-10 et seq.
Document Number: 3174
Proposed in State Register Volume and Issue: 31/11
Status: Proposed
Subject: SC Procurement Regulations - Pre-Bid Conferences

History: 3174

| <u>By</u> | <u>Date</u> | <u>Action Description</u> | <u>Jt. Res. No.</u> | <u>Expiration Date</u> |
|-----------|-------------|------------------------------|---------------------|------------------------|
| - | 11/23/2007 | Proposed Reg Published in SR | | |

Document No. 3174
BUDGET AND CONTROL BOARD
CHAPTER 19
Statutory Authority: 1976 Code Section 11-35-10 et seq.

19-445. South Carolina Procurement Regulations

Preamble:

The Consolidated Procurement Code authorizes the Budget and Control Board to promulgate regulations governing the procurement, management, control, and disposal 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 regards Regulation 19-445 and procurement in general.

Notice of Drafting for the proposed amendments was published in the State Register on October 26, 2007.

Section by Section Discussion

Section 2042. Pre-Bid Conferences.

A review of public notices for state procurements revealed that when pre-bid conferences are conducted, over 70% are identified as mandatory. When a potential bidder (or offeror) fails to attend a mandatory pre-bid conference, the practice has been to reject their bid if one is submitted. Since 1970, the United States' Comptroller General has ruled that the failure to attend a mandatory pre-bid conference is not grounds for rejecting a bid. In doing so, the CG presented a strong case that mandatory pre-bid conferences are anti-competitive. Pre-bid conferences cannot and do not add to or take away from the requirements of a solicitation and do not in any way bind a bidder. This can only be done by a written modification to the solicitation. Indeed, Section 2042 currently states that nothing said at a pre-bid conference, regardless of whether it is mandatory, changes the invitation for bids unless a change is made in writing. Thus, mandatory pre-bid conferences tend to limit competition without any corresponding benefit. In recognition of this, Section 2042 was modified by breaking the existing paragraph into two subparagraphs A and B. The first two sentences of the original paragraph were placed in subparagraph A and an additional sentence was added to require that notice of any pre-bid conference be placed in the notice of solicitation. The remaining sentences of the original paragraph were placed in subparagraph B and a provision added that states that a potential bidder's failure to attend an advertised pre-bid conference does not excuse its responsibility to properly estimate the difficulty and cost of successfully performing the work or for successfully performing the work at no additional cost to the state. A new subparagraph C was added that requires any agency desiring to use a pre-bid conference to make a determination that the conference is justified by the unique nature of the project and that it will not unduly restrict competition.

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 11, 2008 at 10:00 AM in the Governor's Conference Room, Wade Hampton 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 Materials Management Office, Attn: Keith McCook, 1201 Main Street, Suite 600, Columbia, SC 29201, on or before 5:00 PM on December 27, 2006. Copies of the text of the proposed amendments for public notice and comment are available at <http://www.gs.sc.gov/webfiles/gc/Resources/draftregs2008b.pdf>.

Preliminary Fiscal Impact Statement:

No additional state funding is requested. The State Budget and Control Board 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: South Carolina Procurement Regulations

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 Budget and Control Board 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 Budget and Control Board 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 these developments and to further consolidate, clarify, and modernize the law governing procurement in this State. S.C. Code Section 11-35-20(d).

Indicates Matter Stricken

Indicates New Matter

Text:

19-445.2042. Pre-Bid Conferences.

(A) Pre-bid conferences may be conducted. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Notice of the conference must be included in the notice of the solicitation required by Articles 5 or 9 of this code.

(B) Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment. A potential bidder's failure to attend an advertised pre-bid conference will not excuse its responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the State.

(C) Pre-bid conferences may not be made mandatory absent a written determination by the head of the governmental body or his designee that the unique nature of the procurement justifies a mandatory pre-bid conference and that a mandatory pre-bid conference will not unduly restrict competition.