

CHAPTER 35

South Carolina Consolidated Procurement Code

Editor's Note

2019 Act No. 41, preamble, provides as follows:

"Whereas, the General Assembly finds that it adopted a modified version of the 1979 ABA Model Procurement Code for State and Local Governments, when it enacted 1981 Act No. 148. Since then, the ABA has revised its recommended model by adopting the 2000 ABA Model Procurement Code for State and Local Governments, a primary goal of which was to encourage the competitive use of new forms of project delivery in public construction procurement. With the enactment of Act 174 in 2008, the General Assembly adopted a modified version of the changes made by the 2000 ABA Model Code. In recognition of the state's long history of reliance on the model code, the applicable official comments to the model code, and the relevant and applicable construction given to the model code, should be examined as persuasive authority for interpreting and construing the South Carolina Consolidated Procurement Code; and

"Whereas, it is the intent of the General Assembly that agencies and institutions comply with Section 11-35-1530, which limits use of this source selection method to circumstances in which the use of competitive sealed bidding is either not practicable or not advantageous to the State; accordingly, the basis for such determinations must be specified with particularity and must be documented in sufficient detail to satisfy the requirements of audit. The Materials Management Officer is responsible for controlling the use of RFPs by the respective offices of the Division of Procurement Services and for monitoring the adequacy of such determinations statewide; and

"Whereas, the General Assembly finds that thorough and considered acquisition planning, including appropriate market research, industry-government communications, requirements definitions, risk analysis, and contract administration plans, is necessary to provide increased economy in state procurement activities, to maximize to the fullest extent practicable the purchasing values of funds, and to foster effective broad-based competition for public procurement, all of which are key purposes of the procurement laws; accordingly, the head of each using agency, as defined in Section 11-35-310, is expected to have in place an effective system to implement such planning, and the State Fiscal Accountability Authority is expected to promulgate regulations, establishing guidelines for and requiring such planning, and to audit for compliance with such regulations; and

"Whereas, the General Assembly finds that acquisition policies that more closely resemble those of the commercial marketplace, encourage the acquisition of commercial items, and, where possible, allow use of terms and conditions accepted in the marketplace, will promote efficiency and economy in contracting and avoid unnecessary burdens for agencies and contractors. Accordingly, it adopts simplified procedures for the acquisition of commercially available off-the-shelf products, including higher dollar thresholds for agency purchases of those products. Now, therefore, [text of Act]."

2019 Joint Resolution 113 (H.4287) Section 10, provides as follows:

"SECTION 10. The provisions of the Consolidated Procurement Code in Chapter 35, Title 11 of the 1976 Code and any other provisions of the general law of this State in conflict with the provisions of this joint resolution are hereby suspended with regard to the activities undertaken pursuant to this joint resolution."

ARTICLE 1

General Provisions

DISPOSITION TABLE

Showing where sections in Article 1 of Chapter 35, Title 11 were recodified.

Former Section	New Section
11-35-35	11-35-5310
11-35-50	11-35-5320
11-35-55	11-35-5330
11-35-70	11-35-5340

SECTION 11-35-10. Citation.

This chapter shall be known and may be cited as the "South Carolina Consolidated Procurement Code".

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-20. Purpose and policies.

(1) This code must be construed and applied to promote underlying purposes and policies.

(2) The underlying purposes and policies of this code are:

(a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act;

(b) to foster effective broad-based competition for public procurement within the free enterprise system;

(c) to develop procurement capability responsive to appropriate user needs;

(d) to consolidate, clarify, and modernize the law governing procurement in this State and permit the continued development of explicit and thoroughly considered procurement policies and practices;

(e) to require the adoption of competitive procurement laws and practices by units of state and local governments;

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement;

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process; and

(h) to develop an efficient and effective means of delegating roles and responsibilities to the various government procurement officers.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 11; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 1, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 1, inserted (1), and inserted the (2) identifier in the previously undesignated paragraph.

SECTION 11-35-25. Supersession of conflicting laws.

If this code applies to a procurement, the provisions of this code supersede all laws or parts of laws in conflict with it to the extent of the conflict including, but not limited to, the principles of law and equity, the common law, and the Uniform Commercial Code of this State.

HISTORY: 2006 Act No. 376, Section 1.

SECTION 11-35-27. No implied repeal.

No part of this chapter may be considered to be impliedly repealed by subsequent legislative enactment if such construction of the subsequent legislative enactment can be reasonably avoided.

HISTORY: 2019 Act No. 41 (S.530), Section 2, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

SECTION 11-35-30. Obligation of good faith.

Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-35. Recodified.

HISTORY: Former Section 11-35-35, was titled Surety bonds; public entity may not designate surety company, and had the following history: 2002 Act No. 253, Section 1. Recodified by 2019 Act No. 41, Section 79, eff May 13, 2019. See now, Code 1976 Section 11-35-5310.

SECTION 11-35-40. Application of Procurement Code.

(1) General Application. This code applies only to contracts solicited or entered into after the effective date of this code unless the parties agree to its application to a contract entered into prior to its effective date.

(2) Application to State Procurement. This code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in Section 11-35-40(3) (Compliance with Federal Requirements) and except that this code does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Intergovernmental Relations). Notwithstanding the foregoing, the provisions of Article 23 (Statewide Provisions) apply as provided therein. It also shall apply to the disposal of state supplies as provided in Article 15 (Supply Management). No state agency or subdivision thereof may sell, lease, or otherwise alienate or obligate telecommunications and information technology infrastructure of the State by temporary proviso and unless provided for in the general laws of the State.

(3) Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance, grant, or contract funds, the governmental body also shall comply with federal laws (including authorized regulations) as are mandatorily applicable and which are not presently reflected in this code; however, failure to comply with the foregoing is not subject to review under Article 17. Notwithstanding, where federal assistance, grant, or contract funds are used in a procurement by a governmental body as defined in Section 11-35-310(18), this code, including any requirements that are more restrictive than federal requirements, must be followed, except to the extent such action would render the governmental body ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. In those circumstances, the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this code.

(4) The acquisition of a facility or capital improvement by a foundation or eleemosynary organization on behalf of or for the use of any state agency or institution of higher learning which involves the use of public funds in the acquisition, financing, construction, or current or subsequent leasing of the facility or capital improvement is subject to the provisions of this code in the same manner as a governmental body. The definition and application of the terms "acquisition", " financing", "construction", and "leasing" are governed by generally accepted accounting principles.

(5) The licenses granted by the Federal Communications Commission to Greenville Technical College and Trident Technical College authorizing the use of the band of the Educational Broadband Service spectrum are exempt from the requirements of this code. If Greenville Technical College and Trident Technical College enter into contracts with third parties to lease their spectrum capacity, Greenville Technical College and Trident Technical College must not impose any pricing requirements on those third parties. Any lease agreements with third parties must be designed so that Greenville Technical College and Trident Technical College receive the market rate for the spectrum capacity.

HISTORY: 1981 Act No. 148, Section 1; 1987 Act No. 170, Part II, Section 42; 1997 Act No. 153, Section 1; 2005 Act No. 164, Section 11; 2006 Act No. 376, Section 4; 2007 Act No. 110, Section 5; 2008 Act No. 208, Section 1; 2009 Act No. 72, Section 3; 2019 Act No. 41 (S.530), Section 3, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 3, in (2), inserted the third sentence; and in (3), in the second sentence, inserted "; however, failure to comply with the foregoing is not subject to review under Article 17".

SECTION 11-35-45. Payment for goods and services received by State.

(A) All vouchers for payment of purchases of services, supplies, or information technology must be delivered to the Comptroller General's office within thirty work days from acceptance of the goods or services and proper invoice. After the thirtieth work day, following acceptance or the postmark on the invoice, the Comptroller General shall levy an amount not to exceed fifteen percent each year from the funds available to the agency, this amount to be applied to the unpaid balance to be remitted to the vendor unless the vendor waives imposition of the interest penalty.

(B) All agencies and institutions of the State are required to comply with the provisions of this section. Only the lump sum institutions of higher education are responsible for the payment of all goods or services within thirty work days after the acceptance of the goods or services and proper invoice, whichever is received later, and shall pay an amount not to exceed fifteen percent per annum on any unpaid balance which exceeds the thirty work-day period, if the vendor specifies on the statement or the invoice submitted to such institutions that a late penalty is applicable if not paid within thirty work days after the acceptance of goods or services.

(C) The Comptroller General shall issue written instructions to the agencies to carry out the intent of this section. All offices, institutions, and agencies of state government shall fully cooperate with the Comptroller General in the implementation of this section.

(D) The thirty-day period shall not begin until the agency, whether or not the agency processes vouchers through the Comptroller General, certifies its satisfaction with the received goods or services and proper invoice.

HISTORY: 1982 Act No. 466, Part II, Section 9; 1992 Act No. 501, Part II, Section 41C; 1993 Act No. 178, Section 12; 1993 Act No. 181, Section 93; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 5.

SECTION 11-35-50. Recodified.

HISTORY: Former Section 11-35-50, was titled Political subdivisions required to develop and adopt procurement laws, and had the following history: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1. Recodified by 2019 Act No. 41, Section 79, eff May 13, 2019. See now, Code 1976 Section 11-35-5320.

SECTION 11-35-55. Recodified.

HISTORY: Former Section 11-35-55, was titled Purchase of goods or services from entity employing prison inmates of another state paid less than federal minimum wage prohibited, and had the following history: 1991 Act No. 171, Part II, Section 67; 1997 Act No. 153, Section 1. Recodified by 2019 Act No. 41, Section 79, eff May 13, 2019. See now, Code 1976 Section 11-35-5330.

Subarticle 1

Purposes, Construction, and Application

SECTION 11-35-60. Dissemination of regulations.

The dissemination of regulations relating to the implementation of this code shall be in accordance with Sections 1-23-10, et seq. of the 1976 Code.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-70. Recodified.

HISTORY: Former Section 11-35-70, was titled School district subject to consolidated procurement code; exemptions, had the following history: 1984 Act No. 493; 1985 Act No. 109, Section 1; 1993 Act No. 178, Section 13; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 4, eff May 13, 2019. Recodified by 2019 Act No. 41, Section 79, eff May 13, 2019. See now, Code 1976 Section 11-35-5340.

Subarticle 3

Determinations

SECTION 11-35-210. Determinations; exemption.

(A) Written determinations expressly required by the code or regulations must be retained in an official contract file of the governmental body administering the contract. These determinations must be documented in sufficient detail to satisfy the requirements of audit as provided in Section 11-35-1230.

(B) All findings, determinations, decisions, policies, and procedures allowed by this chapter are exempt from the requirements of Section 1-23-140(b).

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 6; 2019 Act No. 41 (S.530), Section 5, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 5, inserted the (A) identifier and added (B).

Subarticle 5

Definitions of Terms Used in Procurement Code

SECTION 11-35-310. Definitions.

Unless the context clearly indicates otherwise:

(1) "Information Technology (IT)" means information resources, telecommunications, and information services:

(a) "Information resources" means any equipment including interconnected systems or subsystems of equipment that is used in the automatic acquisition, creation, conversion, duplication, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the using agency.

(i) "Information resources" includes, but is not limited to, computers, ancillary equipment, including imaging peripherals, input, output, and storage devices and devices necessary for security and surveillance, peripheral equipment designed to be controlled by the central processing unit of a computer, databases, software, firmware, middleware, and application and application development software; whether owned, leased, licensed, or accessed as a service; and routine maintenance and support.

(ii) "Database" means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer.

(iii) "Software" means computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations.

(iv) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency that requires its use.

(b) "Telecommunications" means voice, data, message, and video transmissions, and includes the transmission and switching facilities of public telecommunications systems, as well as operating and network software.

(c) "Information Services" means services provided by a contractor associated with any aspect of information resources or telecommunications, except that information services does not include information resources or telecommunications.

(2) "Board" means governing body of the State Fiscal Accountability Authority.

(3) "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity.

(4) "Business day" means a day that is neither a Saturday, Sunday, nor a state or federal holiday.

(5) "Change order" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract.

(6) "Chief procurement officer" means (a) the management officer for information technology, (b) the state engineer for areas of construction, architectural and engineering, construction management, and land surveying services, and (c) the materials management officer for all other procurements.

(7) "Construction" means the process of building, altering, repairing, remodeling, improving, or demolishing a public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of an existing public infrastructure facility, including structures, buildings, or real property.

(8) "Contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, information technology, or construction.

(9) "Contract modification" means a written order signed by the procurement officer, directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor.

(10) "Contractor" means any person having a contract with a governmental body.

(11) "Cost effectiveness" means the ability of a particular product or service to efficiently provide goods or services to the State. In determining the cost effectiveness of a particular product or service, the procurement officer shall list the relevant factors in the bid notice or solicitation and use only those listed relevant factors in determining the award.

(12) "Data" means recorded information, regardless of form or characteristics.

(13) "Days" means calendar days. In computing any period of time prescribed or allowed by this code or the ensuing regulations, or by any order of the Procurement Review Panel, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period computed is to be included, unless it is a Saturday, Sunday, or a state or federal holiday, in which event the period runs to the end of the next day which is neither a Saturday, Sunday, nor such holiday.

(14) "Debarment" means the disqualification of a person to receive invitations for bids, or requests for proposals, or the award of a contract by the State, for a specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance.

(15) "Designee" means a duly authorized representative of a person with formal responsibilities under the code.

(16) "Employee" means an individual drawing a salary from a governmental body, whether elected or not, and any nonsalaried individual performing personal services for any governmental body.

(17) (Reserved)

(18) "Governmental body" means a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch. Governmental body excludes the General Assembly or its respective branches or its committees, Legislative Council, the Legislative Services Agency, and all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts or any entity created by act of the General Assembly for the purpose of erecting monuments or memorials or commissioning art that is being procured exclusively by private funds.

(19) "Grant" means the furnishing by the State or the United States government of assistance, whether financial or otherwise, to a person to support a program authorized by law. It does not include an award, the primary purpose of which is to procure specified end products, whether in the form of supplies, services, information technology, or construction. A contract resulting from such an award must not be considered a grant but a procurement contract.

(20) "Information Technology Management Officer" means the person holding the position as the head of the State Information Technology Office.

(21) "Invitation for bids" means a written or published solicitation issued by an authorized procurement officer for bids to contract for the procurement or disposal of stated supplies, services, information technology, or construction, which will ordinarily result in the award of the contract to the responsible bidder making the lowest responsive bid.

(22) "Materials Management Officer" means the person holding the position as the head of the materials management office of the State.

(23) "Person" means any business, individual, union, committee, club, other organization, or group of individuals.

(24) "Political subdivision" means all counties, municipalities, school districts, public service or special purpose districts.

(25) "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, information technology, or construction. It also includes all functions that pertain to the obtaining of any supply, service, information technology, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

(26) "Procurement officer" means any person duly authorized by the appropriate chief procurement officer or the head of the purchasing agency to enter into and administer contracts and make written determinations and findings with respect thereto. The term also includes an authorized representative of the governmental body within the scope of his authority.

(27) "Public funds" means any money or property owned by the State or a political subdivision thereof, regardless of form and whether in specie or otherwise.

(28) "Purchasing agency" means any governmental body other than the chief procurement officers authorized by this code or by way of delegation from the chief procurement officers to enter into contracts.

(29) "Real property" means any land, all things growing on or attached thereto, and all improvements made thereto including buildings and structures located thereon.

(30) "Request for proposals" (RFP) means a written or published solicitation issued by an authorized procurement officer for proposals to provide supplies, services, information technology, or construction which ordinarily result in the award of the contract to the responsible offeror making the proposal determined to be most advantageous to the State.

(31) "Services" means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or information services as defined in Section 11-35-310(1)(c).

(32) "Subcontractor" means any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with a governmental body.

(33) "Supplies" means all personal property including, but not limited to, equipment, materials, printing, and insurance.

(34) "State" means state government.

(35) "State Engineer" means the person holding the position as head of the state engineer's office.

(36) "Suspension" means the disqualification of a person to receive invitations for bids, requests for proposals, or the award of a contract by the State, for a temporary period pending the completion of an investigation and any legal proceedings that may ensue because a person is suspected upon probable cause of engaging in criminal, fraudulent, or seriously improper conduct or failure or inadequacy of performance which may lead to debarment.

(37) "Term contract" means contracts established by the chief procurement officer for specific supplies, services, or information technology for a specified time and for which it is mandatory that all governmental bodies procure their requirements during its term. As provided in the solicitation, if a governmental body is offered the same supplies, services, or information technology at a price that is at least ten percent less than the term contract price, it may purchase from the vendor offering the lower price after first offering the vendor holding the term contract the option to meet the lower price. The solicitation used to establish the term contract must specify contract terms applicable to a purchase from the vendor offering the lower price. If the vendor holding the term contract meets the lower price, then the governmental body shall purchase from the contract vendor. All decisions to purchase from the vendor offering the lower price must be documented by the procurement officer in sufficient detail to satisfy the requirements of an external audit. A term contract may be a multiterm contract as provided in Section 11-35-2030.

(38) "Using agency" means any governmental body of the State which utilizes any supplies, services, information technology, or construction purchased under this code.

HISTORY: 1981 Act No. 148, Section 1; 1986 Act No. 510, Sections 3-6; 1991 Act No. 171, Part II, Section 69B; 1993 Act No. 164, Part II, Section 9A; 1993 Act No. 178, Sections 14, 15; 1997 Act No. 153, Section 1; 2002 Act No. 333, Section 8; 2002 Act No. 356, Section 1, Part VI.P(8); 2006 Act No. 376, Sections 7, 8; 2008 Act No. 174, Section 7; 2009 Act No. 72, Section 1; 2013 Act No. 31, Section

11, eff May 21, 2013; 2014 Act No. 121 (S.22), Pt VII, Section 21, eff July 1, 2015; 2019 Act No. 41 (S.530), Section 6, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2009 Act No. 72, Section 6 provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued after that date; except that Sections 1, 2, and 4 of this act take effect upon and apply to solicitations issued after the first Monday in September following approval by the Governor."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

The 2013 amendment, in subsection (18), the definition of "Governmental Body", substituted "Legislative Services Agency" for "Office of Legislative Printing, Information and Technology Systems".

2014 Act No. 121, Section 21, in subsection (2), substituted "governing body of the State Fiscal Accountability Authority" for "State Budget and Control Board".

2019 Act No. 41, Section 6, rewrote the section, adding definitions of "Business day", "Information Technology Management Officer", "Person", and "Public funds", and amending other definitions.

Subarticle 7

Public Access to Procurement Information

SECTION 11-35-410. Public access to procurement information.

(A) Procurement information must be a public record to the extent required by Chapter 4, Title 30 (The Freedom of Information Act), except as otherwise provided by this code, and with the exception that commercial or financial information obtained in response to a request for proposals or any type of bid solicitation that is privileged and confidential need not be disclosed.

(B) Privileged and confidential information is information in specific detail not customarily released to the general public, the release of which might cause harm to the competitive position of the party supplying the information. Examples of this type of information include:

- (1) customer lists;
- (2) design recommendations and identification of prospective problem areas under an RFP;
- (3) design concepts, including methods and procedures;
- (4) biographical data on key employees of the bidder.

(C) The board shall promulgate regulations directing the public availability and disposition of documents submitted in response or with regard to a solicitation or other request where no award is made.

(D) For all documents submitted in response or with regard to any solicitation or other request, the person submitting the documents shall comply with instructions provided in the solicitation for marking information exempt from public disclosure. Information not marked as required by the applicable instructions may be disclosed to the public.

(E) A governmental body, with the approval of the appropriate chief procurement officer, may keep portions of a solicitation confidential and release the information to prospective offerors only upon execution of a nondisclosure agreement, provided the information is otherwise exempted from disclosure by law.

(F) If requested in writing before a final award by an actual bidder, offeror, contractor, or subcontractor with regard to a specific intended award or award of a contract, the procurement officer shall, within five days of the receipt of any such request, make documents directly connected to the procurement activity and not otherwise exempt from disclosure available for inspection at an office of the responsible procurement officer. Without otherwise limiting any other exemptions granted by law, and except as

provided herein, documents of and documents incidental to proposed contractual arrangements, including those used for contract negotiations, are not exempt from disclosure after the date notice of intent to award is posted, unless the notice is subsequently canceled.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 9; 2019 Act No. 41 (S.530), Section 7, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 7, in (A), inserted ", except as otherwise provided by this code, and"; rewrote (C); deleted (D), which related to an exemption for evaluative documents predecisional in nature; redesignated (E) as (D); and added (E) and (F).

Subarticle 9

Reporting of Furniture and Certain Purchases

SECTION 11-35-450. Reporting purchases.

(A) The purchase of furniture, floor coverings, wall coverings, or other decorative or ornamental items by a governmental body must be reported to the governing board, commission, or council of the respective governmental body before the purchase, when the cost of the furniture, covering, or item exceeds one thousand dollars and it is to be used in:

(1) an office or adjoining reception area utilized by an agency director or assistant agency director; or

(2) a board room or a conference room used as a board room.

(B) The reports required in subsection (A) must include the item to be purchased and its price. Upon receiving the reports, the governing board, commission, or council of the respective governmental body formally shall approve or disapprove the purchase.

HISTORY: 1989 Act No. 130, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 10.

ARTICLE 3

Procurement Organization

Subarticle 1

Committees and Management

SECTION 11-35-510. Centralization of materials management authority.

All rights, powers, duties, and authority relating to the procurement of supplies, services, and information technology and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services now vested in or exercised by a state governmental body pursuant to the provisions of law relating thereto, and regardless of source of funding, are hereby vested in the appropriate chief procurement officer, or with regard to Article 15, as provided therein. This vesting of authority is subject to Section 11-35-710 (Exemptions), Section 11-35-1250 (Authority to Contract for Auditing Services), Section 11-35-1260 (Authority to Contract for Legal Services), Section 11-35-1550 (Small Purchases), Section 11-35-1560 (Sole Source Procurement), Section 11-35-1570 (Emergency Procurements), Section 11-35-3230 (Exception for Small Architect-Engineer, and Land Surveying Services Contracts), and Section 11-35-3620 (Management of Warehouses and Inventory).

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 11; 2019 Act No. 41 (S.530), Section 8, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 8, in the first sentence, inserted ", or with regard to Article 15, as provided therein", in the second sentence, inserted "Section 11-35-1560 (Sole Source Procurement)", and made nonsubstantive changes.

SECTION 11-35-530. Advisory committees.

The following advisory committees may be established by the board for the purpose of advising the board:

(a) The board may appoint a purchasing policies and procedures advisory committee comprised of state and local government, and public members to discuss the performance of public purchasing in the State and to consider specific methods for improvement.

(b) The board may appoint an information technology and procedures advisory committee comprised of state and local government and public members to discuss the purchasing performance of information technology for government in the State and to consider specific methods for improvement.

(c) The board may appoint a construction, architect-engineer, construction management, and land surveying services advisory committee comprised of state and local government and public members to discuss the purchasing performance of these services in the State and to consider specific methods of improvement. The advisory committee shall be comprised of the following: the State Engineer, a state agency representative, a banker, an attorney, a representative of local government, a registered architect, a registered engineer, a licensed building contractor, and a licensed subcontractor.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 9, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 9, in the first undesignated paragraph, substituted "board" for "policy committee"; in (a) and (b), deleted "in accordance with regulations of the board" following "and public members"; and in (c), in the first sentence, substituted "may" for "shall" and deleted "in accordance with regulations of the board" following "public members".

SECTION 11-35-540. Authority and duties of the board.

(1) Authority to Promulgate Regulations. Except as otherwise provided in this code, the board may promulgate regulations, consistent with this code, governing the procurement, management, control, and disposal of all supplies, services, information technology, and construction to be procured by the State. These regulations are binding in all procurements made by the State.

(2) Nondelegation. The board may not delegate its power to promulgate regulations.

(3) Approval of Operational Procedures. Governmental bodies shall develop internal operational procedures consistent with this code; except, that the operational procedures must be approved in writing by the appropriate chief procurement officer. The operational procedures must be consistent with this chapter. Operational procedures adopted pursuant to this chapter are exempt from the requirements of Section 1-23-140.

(4) The board shall consider and decide matters of policy within the provisions of this code including those referred to it by the chief procurement officers. The board has the power to audit and monitor the implementation of its regulations and the requirements of this code.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 12; 2019 Act No. 41 (S.530), Section 10, eff May 13, 2019.

Effect of Amendment

2019 Act No. 41, Section 10, deleted (5), which related to the chief executive officer designating offices or board officers for references in this code to a "designated board office" or a "designated board officer".

Subarticle 3

Exemptions

SECTION 11-35-710. Exemptions.

(A) The board, upon the recommendation of the chief procurement officer, may exempt governmental bodies from purchasing certain items through the respective chief procurement officer's area of responsibility. The board may exempt specific supplies, services, information technology, or construction from the purchasing procedures required in this chapter and for just cause by unanimous written decision limit or may withdraw exemptions provided for in this section. The following exemptions are granted from this chapter:

(1) the construction, maintenance, and repair of bridges, highways, and roads; vehicle and road equipment maintenance and repair; and other emergency-type parts or equipment utilized by the Department of Transportation or the Department of Public Safety;

(2) the purchase of raw materials by the South Carolina Department of Corrections, Division of Prison Industries;

(3) South Carolina State Ports Authority;

(4) Division of Public Railways of the Department of Commerce;

(5) South Carolina Public Service Authority;

(6) expenditure of funds at state institutions of higher learning derived wholly from athletic or other student contests, from the activities of student organizations, and from the operation of canteens and bookstores, except as the funds are used for the procurement of construction, architect-engineer, construction-management, and land surveying services;

(7) livestock, feed, and veterinary supplies;

(8) articles for commercial sale by all governmental bodies;

(9) fresh fruits, vegetables, meats, fish, milk, and eggs;

(10) South Carolina Arts Commission and South Carolina Museum Commission for the purchase of one-of-a-kind items such as paintings, antiques, sculpture, and similar objects. Before a governmental body procures the objects, the head of the purchasing agency shall prepare a written determination specifying the need for the objects and the benefits to the State. The South Carolina Arts Commission shall review the determination and forward a recommendation to the board for approval;

(11) published books, periodicals, and technical pamphlets;

(12) South Carolina Research Authority;

(13) the purchase of supplies, services, or information technology by state offices, departments, institutions, agencies, boards, and commissions or the political subdivisions of this State from the South Carolina Department of Corrections, Division of Prison Industries;

(14) Medical University Hospital Authority, if the Medical University Hospital Authority has promulgated a procurement process in accordance with its enabling provision;

(15) if approved in writing by the State Engineer in advance, and if some aspect of the overall transaction is otherwise approved by the board in advance of the acquisition, an acquisition of construction from an eleemosynary corporation or foundation, or a wholly owned business thereof, established solely for the governmental body's benefit, but only if the eleemosynary corporation or

foundation acquires the construction on behalf of or for the use of the governmental body and does so pursuant to this code, as required by Section 11-35-40(4).

(B) The State Fiscal Accountability Authority shall maintain and post publicly a running list of all currently effective actions taken by the board pursuant to subsection (A).

HISTORY: 1981 Act No. 148, Section 1; 1984 Act No. 309, Section 4; 1993 Act No. 181, Section 94; 1995 Act No. 7, Part II, Section 51; 1996 Act No. 459, Section 7; 1997 Act No. 153, Section 1; 2000 Act No. 264, Section 4; 2006 Act No. 376, Section 13; 2019 Act No. 41 (S.530), Section 11, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 11, inserted the (A) identifier; in (A), in the first sentence, substituted "chief procurement officer" for "designated board office", and inserted (15); added (B); and made a nonsubstantive change.

Subarticle 5

Offices Created

SECTION 11-35-810. Creation of Materials Management Office.

There is hereby created, within the Division of Procurement Services, a Materials Management Office to be headed by the Materials Management Officer.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 16; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 14; 2019 Act No. 41 (S.530), Section 12, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 12, substituted "Division of Procurement Services" for "Office of General Services".

SECTION 11-35-820. Creation of Information Technology Management Office.

There is created within the Division of Procurement Services, the Information Technology Management Office to be headed by the Information Technology Management Officer. The office is responsible for administering all procurement and contracting activities undertaken for governmental bodies involving information technology in accordance with this chapter, and may establish a training and certification program in accordance with Section 11-35-1030. All procurements involving information technology, and any pre-procurement and post-procurement activities in this area, must be conducted in accordance with the regulations promulgated by the board.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 15; 2019 Act No. 41 (S.530), Section 13, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 13, in the first sentence, substituted "Division of Procurement Services" for "board", inserted the second sentence, and in the third sentence, deleted ", except as otherwise provided in this code by specific reference to the Information Technology management Office" at the end.

SECTION 11-35-830. Creation of the Office of State Engineer.

There is created within the board, the State Engineer's Office to be headed by the State Engineer. All procurements involving construction, architectural and engineering, construction management, and land surveying services, as defined in Section 11-35-2910, and any pre-procurement and post-procurement activities in this area, must be conducted in accordance with the "Manual for Planning and Execution of State Permanent Improvements" and with any regulations promulgated by the board, unless otherwise provided in this code by specific reference to the State Engineer's Office.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 16.

SECTION 11-35-835. Office of State Engineer to review completed documents within specified time.

The Office of State Engineer must review properly completed schematic design, properly completed design development, and properly completed construction documents within a total of forty-five days of submission of documents.

HISTORY: 1993 Act No. 178, Section 17; 1997 Act No. 153, Section 1.

SECTION 11-35-840. Delegation of authority.

Subject to the regulations of the board, the chief procurement officers may delegate authority to designees or to any department, agency, or official.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-845. Oversight of permanent improvement projects.

Each agency of state government that has total management capability as defined and certified by the State Engineer's Office must be allowed to oversee the administration of construction projects with the State Engineer's Office serving as an audit function. The State Engineer's Office shall assist those small agencies who do not have the necessary expertise in permanent improvements.

HISTORY: 1993 Act No. 178, Section 18; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 17.

Subarticle 7

Advisory Committees and Training

SECTION 11-35-1010. Relationship with using agencies.

The chief procurement officers shall maintain a close and cooperative relationship with the using agencies. The chief procurement officers shall afford each using agency reasonable opportunity to participate in and make recommendations with respect to procurement matters affecting the using agency.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-1020. Advisory groups.

The chief procurement officers may appoint advisory groups such as user committees to assist with respect to specifications and procurement in specific areas and with respect to any other matters within the authority of the chief procurement officers. The chief procurement officers shall develop methods for obtaining necessary and relevant information from the affected agencies, whether through user committees or by surveys and other methods. The chief procurement officers shall make every reasonable

effort to ensure that such contracts are developed as will best suit the interest of the State, giving due emphasis to user needs, total costs, and open competitive methods of public purchasing.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-1030. Procurement training and certification.

The chief procurement officers develop a system of training for procurement in accordance with regulations by the board. The training must encompass the latest techniques and methods of public procurement. If considered appropriate by the chief procurement officers, the training must include a requirement for the certification of the procurement officer of each purchasing agency.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 19; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 18.

Subarticle 9

Auditing and Fiscal Reporting

SECTION 11-35-1210. Certification.

(1) Authority. In an amount up to fifty thousand dollars in actual or potential value, individual governmental bodies may make direct procurements not under term contracts. Subject to the following and subject to any ensuing regulations:

(a) the board may assign differential dollar limits below which individual governmental bodies may make direct procurements not under term contracts. The Division of Procurement Services shall review the respective governmental body's internal procurement operation, shall certify in writing that it is consistent with the provisions of this code and the ensuing regulations, and recommend to the board those dollar limits for the respective governmental body's procurement not under term contract; and

(b) the Director of the Division of Procurement Services may authorize an individual governmental body to make direct procurements not under term contracts in an amount up to one hundred fifty thousand dollars. All authority granted pursuant to this item must be in writing, and the director shall advise the board in writing of all such authorizations.

(2) Policy. Authorizations granted by the board or the Director of the Division of Procurement Services to a governmental body are subject to the following:

(a) adherence to the provisions of this code and the ensuing regulations, particularly concerning competitive procurement methods;

(b) responsiveness to user needs;

(c) obtaining the best prices for value received.

(3) Adherence to Provisions of the Code. All procurements shall be subject to all the appropriate provisions of this code, especially regarding competitive procurement methods and nonrestrictive specifications.

(4) Subject to subsection (1), the State Board for Technical and Comprehensive Education, in coordination with the appropriate chief procurement officer, may approve a cumulative total of up to fifty thousand dollars in additional procurement authority for technical colleges, provided that the Division of Procurement Services makes no material audit findings concerning procurement. As provided by regulation, any authority granted pursuant to this paragraph is effective when certified in writing by the Division of Procurement Services.

HISTORY: 1981 Act No. 148, Section 1; 1986 Act No. 510, Section 7; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 19; 2011 Act No. 74, Pt V, Section 5, eff August 1, 2011; 2019 Act No. 41 (S.530), Section 14, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

The 2011 amendment added subsection (4) relating to additional procurement authority for technical colleges.

2019 Act No. 41, Section 14, rewrote (1); in (2), inserted "or the Director of the Division of Procurement Services", and in (c), deleted "of" following "obtaining"; and in (4), in the first sentence, substituted "chief procurement officer" for "Chief Procurement Officer, and in the first and second sentences, substituted "Division of Procurement Services" for "designated board office".

SECTION 11-35-1220. Collection of data concerning public procurement.

The chief procurement officers are authorized to prepare statistical data concerning the procurement, use, and disposition of all supplies, services, information technology, and construction. All using agencies shall furnish these reports as the chief procurement officers may require concerning use, needs, and stocks on hand, and the chief procurement officers shall prescribe forms to be used by the using agencies in requisitioning, ordering, and reporting supplies, services, information technology, and construction. The chief procurement officers shall limit requests for information to those items necessary for the effective operation of the purchasing system, but using agencies must be required to provide information as requested.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 20.

SECTION 11-35-1230. Auditing and fiscal reporting.

(1) The Division of Procurement Services, through consultation with the chief procurement officers, shall develop written plans for the auditing of state procurements.

(2) In procurement audits of governmental bodies thereafter, the auditors from the Division of Procurement Services shall review the adequacy of the governmental body's internal controls in order to ensure compliance with the requirement of this code and the ensuing regulations. A noncompliance discovered through audit must be transmitted in management letters to the audited governmental body and the board. The Division of Procurement Services shall provide in writing proposed corrective action to governmental bodies. Based upon audit recommendations, the board may revoke certification as provided in Section 11-35-1210 and require the governmental body to make all procurements through the appropriate chief procurement officer above a dollar limit set by the board, until such time as the board is assured of compliance with this code and its regulations by that governmental body.

HISTORY: 1981 Act No. 148, Section 1; 1986 Act No. 510, Section 8; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 21; 2019 Act No. 41 (S.530), Section 15, eff May 13, 2019.

Code Commissioner's Note

At the direction of the Code Commissioner, references in this section to the "Budget and Control Board", the "State Budget and Control Board" or the "board" were changed to the "State Fiscal Accountability Authority", the "authority", or the "Division of Procurement Services" of the "State Fiscal Accountability Authority", pursuant to the directive of the South Carolina Restructuring Act, 2014 Act No. 121, Section 5(B), effective July 1, 2015.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 15, in (1), substituted "Division of Procurement Services" for "designated board office"; inserted the (2) identifier in the first undesignated paragraph and deleted former (2), which related to the requirement that the Division of Budget Analysis with the Comptroller General shall assume

responsibility for certain fiscal reporting procedures; in (2), in the first sentence, substituted "Division of Procurement Services" for "designated board office" and "governmental body's" for "system's", in the second sentence, substituted "board" for "State Fiscal Accountability Authority", in the third sentence, substituted "The Division of Procurement Services" for "The auditors", and in the fourth sentence, deleted "of the designated board office" following "audit recommendations".

SECTION 11-35-1240. Administrative penalties.

(A) The board shall prescribe administrative penalties for violation of the provisions of this code and of regulations promulgated under it, excluding those matters under the jurisdiction of the Ethics Commission as provided by law.

(B) Violation of these provisions is grounds for loss of or reduction in authority delegated by either the board or this code.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 22.

SECTION 11-35-1250. Authority to contract for auditing services.

No contract for auditing or accounting services shall be awarded without the approval of the State Auditor except where specific statutory authority is otherwise provided.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-1260. Authority to contract for legal services.

No contract for the services of attorneys shall be awarded without the approval of the State Attorney General except where specific statutory authority is otherwise provided.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

ARTICLE 5

Source Selection and Contract Formation

Subarticle 1

Definitions

SECTION 11-35-1410. Definitions of terms used in this article.

Unless the context clearly indicates otherwise:

(1) "Commercial product" means supplies, other than printing, or information resources:

(a) that is of a type customarily used by the general public and that has been sold, leased, or licensed to the general public;

(b) that would satisfy the criteria in subitem (a) were it not for modifications of a type customarily available in the commercial marketplace, or minor modifications made to meet state requirements; or

(c) that is a combination of products meeting the requirements of subitem (a) or (b) that are of a type customarily combined and sold in combination to the general public.

(2) "Commercially available off-the-shelf product" means supplies, other than printing, or information resources: that is a commercial product, as defined herein, that is sold in substantial quantities in the commercial marketplace; and is offered to the State, without modification, in the same form in which it is sold in the commercial marketplace. It does not include agricultural products, petroleum products, and other items customarily sold in bulk.

(3) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this code, and paid a fee, if any.

(4) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:

(a) is regularly maintained by a manufacturer or vendor of an item;

(b) is either published or otherwise available for inspection by customers;

(c) states prices at which sales are currently or were last made to a significant number of buyers constituting the general buying public for the supplies, services, or information technology involved.

(5) "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids in accordance with the procedures set forth in Section 11-35-1520.

(6) "Purchase description" means specifications or other document describing the supplies, services, information technology, or construction to be procured.

(7) "Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

(8) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

(9) "Responsive bidder or offeror" means a person who has submitted a bid or proposal which conforms in all material aspects to the invitation for bids or request for proposals.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 20; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 23; 2019 Act No. 41 (S.530), Section 16, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 16, inserted (1) and (2), relating to definitions for "Commercial product" and "Commercially available off-the-shelf product", respectively, and redesignated (1) to (7) as (3) to (9); in (3), substituted "contract terms and the provisions of this code, and paid a fee," for "cost principles as provided in Article 13 of this chapter and a fee,"; and in (9), substituted "proposal" for "offer".

Subarticle 3

Methods of Source Selection

SECTION 11-35-1510. Methods of source selection.

Unless otherwise provided by law, all state contracts must be awarded by competitive sealed bidding, pursuant to Section 11-35-1520, except as provided in:

(1) Section 11-35-1250 (Authority to Contract for Auditing Services);

(2) Section 11-35-1260 (Authority to Contract for Legal Services);

(3) Section 11-35-1525 (Fixed Priced Bidding);

(4) Section 11-35-1528 (Competitive Best Value Bidding);

(5) Section 11-35-1529 (Competitive Online Bidding);

(6) Section 11-35-1530 (Competitive Sealed Proposals);

(7) Section 11-35-1535 (Competitive Negotiations);

(8) Section 11-35-1540 (Negotiations After Unsuccessful Competitive Sealed Bidding);

(9) Section 11-35-1550 (Small Purchases);

(10) Section 11-35-1560 (Sole Source Procurements);

(11) Section 11-35-1570 (Emergency Procurements);

(12) Section 11-35-1575 (Participation in Auction or Bankruptcy Sale);

(13) (Reserved)

(14) Section 11-35-3015 (Source Selection Methods Assigned to Project Delivery Methods);

(15) Section 11-35-3220 (Architect Engineer, Construction Management and Land Surveying Services Procurement Procedures); and

(16) Section 11-35-3230 (Exception for Small Architect-Engineer and Land Surveying Services contracts).

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2000 Act No. 387, Part II, Section 100A; 2006 Act No. 376, Section 24; 2008 Act No. 174, Section 8; 2019 Act No. 41 (S.530), Section 17, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 17, inserted (7), and redesignated (7) to (15) as (8) to (16); and in (16), substituted "contracts" for "Contracts".

SECTION 11-35-1520. Competitive sealed bidding.

(1) Condition for Use. Contracts must be awarded by competitive sealed bidding except as otherwise provided in Section 11-35-1510.

(2) Invitation for Bids. An invitation for bids must be issued in an efficient and economical manner and must include specifications and all contractual terms and conditions applicable to the procurement.

(3) Notice. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. The notice must include publications in "South Carolina Business Opportunities". Governmental bodies may charge vendors the cost incurred for copying and mailing bid or proposal documents requested in response to a procurement.

(4) Receipt and Safeguarding of Bids. All bids, including modifications, received before the time of opening must be kept secure and unopened, except as provided by regulation of the board.

(5) Bid Opening. Bids must be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids and in the manner prescribed by regulation of the board. The amount of each bid, and other relevant information as may be specified by regulation, together with the name of each bidder, must be tabulated. The tabulation must be open to public inspection at that time.

(6) Bid Acceptance and Bid Evaluation. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with the regulations of the board.

(7) Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation and re-award of awards or contracts, after award but before performance, may be permitted in accordance with regulations promulgated by the board. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.

(8) Reserved.

(9) Tie Bids. If two or more bidders are tied in price while otherwise meeting all of the required conditions, awards are determined in the following order of priority:

(a) If there is a South Carolina firm tied with an out-of-state firm, the award must be made automatically to the South Carolina firm.

(b) Tie bids involving South Carolina produced or manufactured products, when known, and items produced or manufactured out of the State must be resolved in favor of the South Carolina commodity.

(c) Tie bids involving a business certified by the South Carolina Office of Small and Minority Business Assistance as a Minority Business Enterprise must be resolved in favor of the Minority Business Enterprise.

(d) Tie bids involving South Carolina firms must be resolved in favor of the South Carolina firm located in the same taxing jurisdiction as the governmental body's consuming location.

(e) In all other situations in which bids are tied, the award must be made to the tied bidder offering the quickest delivery time, or if the tied bidders have offered the same delivery time, the tie must be resolved by the flip of a coin witnessed by the procurement officer. All responding vendors must be invited to attend.

(10) Award. Unless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice on the date and at a location specified in the invitation for bids. For contracts with a total or potential value in excess of one hundred thousand dollars, notice of an intended award of a contract must be given by posting the notice for seven business days before entering into a contract and must be sent electronically to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. The posting date shall appear on the face of all these notices. If a change to the posting date is necessary, notice of the revised posting date must be given by posting the notice for three business days at the location identified in the solicitation and must be sent electronically to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. The invitation for bids and a notice of award or notice of intent to award must contain a statement of a bidder's right to protest pursuant to Section 11-35-4210(1). When only one response is received, the notice of intent to award and the delay of award may be waived.

(11) Request for Qualifications.

(a) Before soliciting bids, the procurement officer, may issue a request for qualifications from prospective bidders. The request must contain, at a minimum, a description of the scope of work to be solicited by the invitation for bids, the deadline for submission of information, and how prospective bidders may apply for consideration. The request must require information concerning the prospective bidders' product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications must be given in the manner provided in Section 11-35-1520(3).

(b) After receipt of the responses to the request for qualifications from prospective bidders, the rank of the prospective bidders must be determined in writing from most qualified to least qualified on the basis of the information provided. Bids then must be solicited from at least the top two prospective bidders by means of an invitation for bids. The determination regarding how many bids to solicit is not subject to review under Article 17.

(12) (Reserved)

(13) Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such communication or determination shall be in writing. Examples of minor informalities or irregularities include, but are not limited to:

(a) failure of a bidder to return the number of copies of signed bids required by the solicitation;

(b) failure of a bidder to furnish the required information concerning the number of the bidder's employees or failure to make a representation concerning its size;

(c) failure of a bidder to sign its bid, but only if the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and submits evidence of that authorization, and the bid carries that signature or the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned document, such as the submission of a bid guarantee with the bid or a letter signed by the bidder with the bid referring to and identifying the bid itself;

(d) failure of a bidder to acknowledge receipt of an amendment to a solicitation, but only if:

(i) the bid received indicates in some way that the bidder received the amendment, such as where the amendment added another item to the solicitation and the bidder submitted a bid, on it, if the bidder states under oath that it received the amendment before bidding and that the bidder will stand by its bid price; or

(ii) the amendment has no effect on price or quantity or merely a trivial or negligible effect on quality or delivery, and is not prejudicial to bidders, such as an amendment correcting a typographical mistake in the name of the governmental body;

(e) failure of a bidder to furnish an affidavit concerning affiliates;

(f) failure of a bidder to execute the certifications with respect to equal opportunity and affirmative action programs;

(g) failure of a bidder to furnish cut sheets or product literature;

(h) failure of a bidder to furnish certificates of insurance;

(i) failure of a bidder to furnish financial statements;

(j) failure of a bidder to furnish references;

(k) failure of a bidder to furnish its bidder number; and

(l) notwithstanding Title 40, the failure of a bidder to indicate his contractor's license number or other evidence of licensure, except that a contract must not be awarded to the bidder unless and until the bidder is properly licensed under the laws of South Carolina.

HISTORY: 1981 Act No. 148, Section 1; 1986 Act No. 510, Section 2; 1992 Act No. 442, Section 2; 1993 Act No. 178, Section 21; 1993 Act No. 181, Section 95; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 25; 2019 Act No. 41 (S.530), Section 18, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 18, in (1), in the second sentence, deleted "greater than fifty thousand dollars" following "Contracts"; in (3), in the third sentence, deleted "or a means of central electronic advertising as approved by the designated board office" from the end; in (7), in the second sentence, substituted "or" for "bid opening, withdrawal of inadvertently erroneous bids" following "before", and made a nonsubstantive change; reserved (8), which related to certain requirements for discussion with bidders; and rewrote (10).

SECTION 11-35-1524. Resident vendor preference.

(A) For purposes of this section:

(1) "End product" means the tangible product described in the solicitation including all component parts and in final form and ready for the state's intended use.

(2) "Grown" means to produce, cultivate, raise, or harvest timber, agricultural produce, or livestock on the land, or to cultivate, raise, catch, or harvest products or food from the water which results in an end product that is locally derived from the product cultivated, raised, caught, or harvested.

(3) "Labor cost" means salary and fringe benefits.

(4) "Made" means to assemble, fabricate, or process component parts into an end product, the value of which, assembly, fabrication, or processing is a substantial portion of the price of the end product.

(5) "Manufactured" means to make or process raw materials into an end product.

(6) "Office" means a nonmobile place for the regular transaction of business or performance of a particular service which has been operated as such by the bidder for at least one year before the bid opening and during that year the place has been staffed for at least fifty weeks by at least two employees for at least thirty-five hours a week each.

(7) "Services" means services as defined by Section 11-35-310(29) and also includes services as defined in Section 11-35-310(1)(d).

(8) "South Carolina end product" means an end product made, manufactured, or grown in South Carolina.

(9) "United States end product" means an end product made, manufactured, or grown in the United States of America.

(B)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by seven percent the price of any offer for a South Carolina end product.

(2) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by two percent the price of any offer for a United States end product. This preference does not apply to an item to which the South Carolina end product preference has been applied.

(3) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product. A preference must not be applied to an item for which a bidder does not qualify.

(4) If a contract is awarded to a bidder that received the award as a result of the South Carolina end product or United States end product preference, the contractor may not substitute a nonqualifying end product for a qualified end product. A substitution in violation of this item is grounds for debarment pursuant to Section 11-35-4220. If a contractor violates this provision, the State may terminate the contract for cause and, in addition, the contractor shall pay to the State an amount equal to twice the difference between the price paid by the State and the bidder's evaluated price for a substituted item.

(5) If a bidder is requesting this preference, the bidder, upon request of the procurement officer, must provide documentation that establishes the bidder's qualifications for the preference. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement pursuant to subsection (E)(6).

(C)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by seven percent if the bidder maintains an office in this State and either (i) maintains at a location in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities on which the award will be made and which have a minimum total value, based on the bid price, equal to the lesser of fifty thousand dollars or the annual amount of the contract; (ii) is a manufacturer headquartered and having an annual payroll of at least one million dollars in South Carolina and the end product is made or processed from raw materials into a finished end product by that manufacturer or its affiliate (as defined in Section 1563 of the Internal Revenue Code); or (iii) at the time of bidding, directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to bidder for those individuals to provide those services exceeds fifty percent of the bidder's total bid price.

(2) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product or work, as applicable. A preference must not be applied to an item for which a bidder does not qualify.

(3) If a bidder is requesting this preference, the bidder, upon request by the procurement officer, must provide documentation that establishes the bidder's qualifications for the preference and, for the preference claimed pursuant to subsection (C)(1)(iii), must identify the persons domiciled in South Carolina that will perform the services involved in the procurement upon which bidder relies in qualifying for the preference, the services those individuals are to perform, and documentation of the bidder's labor

cost for each person identified. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement under subsection (E)(6) below.

(D)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by two percent if:

(a) the bidder has a documented commitment from a single proposed first-tier subcontractor to perform some portion of the services expressly required by the solicitation; and

(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds twenty percent of bidder's total bid price.

(2) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by four percent if:

(a) the bidder has a documented commitment from a single proposed first-tier subcontractor to perform some portion of the services expressly required by the solicitation; and

(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds forty percent of bidder's total bid price.

(3) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of work. A preference must not be applied to an item for which a bidder does not qualify.

(4) Subject to other limits in this section, an offeror may benefit from applying for more than one of, or from multiple applications of, the preferences allowed by items (1) and (2).

(5)(a) In its bid, a bidder requesting any of the preferences allowed by items (1) and (2) must identify the subcontractor to perform the work, the work the subcontractor is to perform, and the bidder's factual basis for concluding that the subcontractor's work constitutes the required percentage of the work to be performed in the procurement.

(b) If a bidder is requesting a preference allowed by items (1) or (2), upon request by the procurement officer, the bidder shall identify the persons domiciled in South Carolina that are to perform the services involved in the procurement upon which the bidder relies in qualifying for the preference, the services those individuals are to perform, the employer of those persons, the bidder's relationship with the employer, and documentation of the subcontractor's labor cost for each person identified. Bidder's failure to provide this information promptly will be grounds to deny the preference and for enforcement pursuant to subsection (E)(6) below.

(c) If a contract is awarded to a bidder that received the award as a result of a preference allowed by items (1) or (2), the contractor may not substitute any business for the subcontractor on which the bidder relied to qualify for the preference, unless first approved in writing by the procurement officer. A substitution in violation of this subitem is grounds for debarment pursuant to Section 11-35-4220. If a contractor violates this provision, the procurement officer may terminate the contract for cause. If the contract is not terminated, the procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder, unless the substituted subcontractor qualifies for the preference.

(E)(1) A business is not entitled to any preferences unless the business, to the extent required by law, has:

(a) paid all taxes assessed by the State; and

(b) registered with the South Carolina Secretary of State and the South Carolina Department of Revenue.

(2) The preferences provided in subsections (B) and (C)(1)(i) and (ii) do not apply to a single unit of an item with a price in excess of fifty thousand dollars or a single award with a total potential value in excess of five hundred thousand dollars.

(3) The preferences provided in subsections (C)(1)(iii) and (D) do not apply to a bid for an item of work by the bidder if the annual price of the bidder's work exceeds fifty thousand dollars or the total potential price of the bidder's work exceeds five hundred thousand dollars.

(4) A solicitation must provide potential bidders an opportunity to request the preferences that apply to a procurement. By submitting a bid and requesting that a preference be applied to that bid, a business certifies that its bid qualifies for the preference for that procurement. For purposes of applying this section, a bidder is not qualified for a preference unless the bidder makes a request for the preference as required in the solicitation. If a solicitation specifies which preferences, if any, apply to a procurement, the applicability of preferences to that procurement is conclusively determined by the solicitation unless the solicitation document is timely protested as provided in Section 11-35-4210. If two or more bidders are tied after the application of the preferences allowed by this section, the tie must be resolved as provided in Section 11-35-1520(9). Price adjustments required by this section for purposes of evaluation and application of the preferences do not change the actual price offered by the bidder.

(5) This section does not apply to an acquisition of motor vehicles as defined in Section 56-15-10 or an acquisition of supplies or services relating to construction. This section does not apply to a procurement conducted pursuant to Section 11-35-1550(2)(a) or (b), Section 11-35-1530, or Article 9, Chapter 35.

(6) Pursuant to Section 11-35-4220, a business may be debarred if (i) the business certified that it qualified for a preference, (ii) the business is not qualified for the preference claimed, and (iii) the certification was made in bad faith or under false pretenses. If a contractor has invalidly certified that a preference is applicable, the chief procurement officer may terminate the contract for cause, and the chief procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder.

(7) The sum of all preferences allowed by items (D)(1) and (D)(2), when applied to the price of a line item of work, may not exceed six percent unless the bidder maintains an office in this State. Under no circumstances may the cumulative preferences applied to the price of a line item exceed ten percent.

(8) As used in items (C)(1)(iii), (D)(1)(b), and (D)(2)(b), the term "documented commitment" means a written commitment by the bidder to employ directly an individual, and by the individual to be employed by the bidder, both contingent on the bidder receiving the award.

(9) The remedies available in this section are cumulative of and in addition to all other remedies available at law and equity.

HISTORY: 1997 Act No. 153, Section 1; 2002 Act No. 333, Section 10; 2009 Act No. 72, Section 2.

Editor's Note

2009 Act No. 72, Section 6 provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued after that date; except that Sections 1, 2, and 4 of this act take effect upon and apply to solicitations issued after the first Monday in September following approval by the Governor."

SECTION 11-35-1525. Competitive fixed price bidding.

(1) **Conditions for Use.** When the procurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive fixed price bidding subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided for in this section.

(2) **Fixed Price Bidding.** The purpose of fixed price bidding is to provide multiple sources of supply for specific services, supplies, or information technology based on a preset maximum price which the State will pay for such services, supplies, or information technology.

(3) **Public Notice.** Adequate public notice of the solicitation shall be given in the same manner as provided in Section 11-35-1520(3).

(4) **Pricing.** The State shall establish, before issuance of the fixed price bid, a maximum amount the State will pay for the services, supplies, or information technology desired.

(5) Evaluation. Vendors' responses to the fixed price bid will be reviewed to determine if they are responsive and responsible.

(6) Reserved.

(7) Award. Award must be made to all responsive and responsible bidders to the state's request for competitive fixed price bidding. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit.

(8) Bids Received After Award. As provided in the solicitation, bidders not responding to the initial fixed price bid may be added to the awarded vendors' list provided the bidder furnishes evidence of responsibility and responsiveness to the state's original fixed price bid as required by the solicitation.

HISTORY: 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 26; 2019 Act No. 41 (S.530), Section 19.A, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Sections 19.B, 80, provides as follows:

"[SECTION 19.]B. The deletion of Section 11-35-1525(9) may not be interpreted as an indication that the failure of a specific offeror to receive business is grounds for a dispute."

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 19.A, in (1), in the second sentence, substituted "When the procurement officer" for "When a purchasing agency"; reserved (6), which related to discussions with responsive bidders; in (8), in the second sentence, substituted "As provided in the solicitation, bidders" for "Bidders" and "required" for "authorized"; and deleted (9), which related to remedies.

SECTION 11-35-1528. Competitive best value bidding.

(1) Conditions for Use. When the procurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive best value bidding subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided for in this section.

(2) Best Value Bidding. The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific supplies, services, or information technology based on pre-determined criteria identified by the State.

(3) Public Notice. Adequate public notice of the request for the solicitation shall be given in the same manner as provided in Section 11-35-1520(3).

(4) Bid Opening. At bid opening, the only information that will be released is the names of the participating bidders. Price information will be provided after the ranking of bidders and the issuance of award.

(5) Evaluation Factors. The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor. Price must be a factor in determination of award and cannot be weighted at less than sixty percent. Best value bid evaluation factors may include, but are not limited to, any of the following:

(a) operational costs the State would incur if the bid is accepted;

(b) quality of the product or service or its technical competency;

(c) reliability of delivery and implementation schedules;

(d) maximum facilitation of data exchange and systems integration;

(e) warranties, guarantees, and return policy;

(f) vendor financial stability;

(g) consistency of the proposed solution with the state's planning documents and announced strategic program direction;

(h) quality and effectiveness of business solution and approach;

(i) industry and program experience;

- (j) prior record of vendor performance;
- (k) vendor expertise with engagement of similar scope and complexity;
- (l) extent and quality of the proposed participation and acceptance by all user groups;
- (m) proven development methodologies and tools; and
- (n) innovative use of current technologies and quality results.

(6) Clarification of Responsive Bid. The procurement officer may ask a responsive bidder to clarify an ambiguity in its bid; however, no material modification of the bid is allowed.

(7) Selection and Ranking. Bids shall be evaluated by using only the criteria and weightings stated in the invitation for best value bids. All evaluation factors, other than price, will be considered independent of and prior to determining the effect of price on the score for each participating bidder. Once the evaluation is complete, all responsive bidders must be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the invitation for best value bids.

(8) Award. Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit.

HISTORY: 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 27; 2019 Act No. 41 (S.530), Section 20, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 20, in (1), in the second sentence, substituted "When the procurement officer" for "When a purchasing agency"; in (4), in the third sentence, substituted "Price" for "Cost"; in (5), in the third sentence, substituted "Price" for "Cost", and in the fourth sentence, deleted "as determined by the procurement officer in its sole discretion and not subject to protest" from the end; rewrote (6); and in (7), in the second sentence, substituted "and weightings stated in the invitation for best value bids" for "stated in the best value bid and by adhering to the weighting as assigned", in the third sentence, substituted "price" for "cost" in two places and inserted "independent of and", and in the fourth sentence, substituted "must" for "shall" and "invitation for best value bids" for "best value bid".

SECTION 11-35-1529. Competitive online bidding.

(1) Conditions for Use. When the procurement officer determines in writing that on-line bidding is more advantageous than competitive sealed bidding, a contract may be entered into by competitive on-line bidding, subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section.

(2) Public Notice. Adequate public notice of the request for the solicitation must be given in the same manner as provided in Section 11-35-1520(3).

(3) Bidding Process. The solicitation must designate both an Opening Date and Time and a Closing Date and Time. The Closing Date and Time need not be a fixed point in time, but may remain dependent on a variable specified in the solicitation. At the Opening Date and Time, the State must begin accepting real-time electronic bids. The solicitation must remain open until the Closing Date and Time. Before the Opening Date and Time, the State shall require bidders to register, shall register only responsible bidders, and, as a part of that registration, require bidders to agree to any terms, conditions, or other requirements of the solicitation. If less than two bidders are registered, the solicitation must be canceled. Following receipt of the first bid after the Opening Date and Time, the lowest bid price must be posted electronically to the Internet and updated on a real-time basis. At any time before the Closing Date and Time, a bidder may lower the price of its bid, except that after Opening Date and Time, a bidder may not lower its price

unless that price is below the then lowest bid. Bid prices may not be increased after Opening Date and Time. Except for bid prices, bids may be modified only as otherwise allowed by this code. A bid may be withdrawn only in compliance with Section 11-35-1520. If a bid is withdrawn, a later bid submitted by the same bidder may not be for a higher price. If the lowest responsive bid is withdrawn after the Closing Date and Time, the State may cancel the solicitation in accordance with this code or reopen electronic bidding to all pre-existing bidders by giving adequate notice to all pre-existing bidders of both the new Opening Date and Time and the new Closing Date and Time. Notice that electronic bidding will be reopened must be given as specified in the solicitation.

(4) Receipt and Safeguarding of Bids. Other than price, any information provided to the State by a bidder must be safeguarded as required by Section 11-35-1520(4).

(5) Provisions Not to Apply. Section 11-35-1524 and paragraph (5) (Bid Opening) of Section 11-35-1520 do not apply to solicitations issued pursuant to this section.

HISTORY: 2000 Act No. 387, Part II, Section 100B; 2019 Act No. 41 (S.530), Section 21, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 21, in (1), in the second sentence, substituted "When the procurement officer" for "When a purchasing agency" and "competitive sealed bidding" for "other procurement methods provided by this code", and inserted "in writing"; inserted (2), relating to public notice, and redesignated (2) to (4) as (3) to (5); and in (3), in the sixth sentence, substituted "Before the Opening Date and Time, the State shall require bidders to register, shall register only responsibly bidders," for "The State may require bidders to register before the Opening Date and Time" and inserted "require bidders", inserted the seventh sentence, in the thirteenth sentence, inserted "adequate", and made a nonsubstantive change.

SECTION 11-35-1530. Competitive sealed proposals.

(1) Conditions for Use.

(a) If the procurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive sealed proposals subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section.

(b) The board may provide by regulation that it is either not practicable or not advantageous to the State to procure specified types of supplies, services, information technology, or construction by competitive sealed bidding.

(2) Public Notice. Adequate public notice of the request for proposals must be given in the same manner as provided in Section 11-35-1520(3).

(3) Receipt of Proposals. Proposals must be opened publicly in accordance with regulations of the board. A tabulation of proposals must be prepared in accordance with regulations promulgated by the board and must be open for public inspection after contract award.

(4) Request for Qualifications.

(a) Before soliciting proposals, the procurement officer may issue a request for qualifications from prospective offerors. The request must contain at a minimum a description of the scope of the work to be solicited by the request for proposals and must state the deadline for submission of information and how prospective offerors may apply for consideration. The request must require information only on their qualifications, experience, and ability to perform the requirements of the contract.

(b) After receipt of the responses to the request for qualifications from prospective offerors, rank of the prospective offerors must be determined in writing from most qualified to least qualified on the basis of the information provided. Proposals then must be solicited from at least the top two prospective

offerors by means of a request for proposals. The determination regarding how many proposals to solicit is not subject to review pursuant to Article 17.

(5) Evaluation Factors. The request for proposals must state the relative importance of the factors to be considered in evaluating proposals but may not require a numerical weighting for each factor. Price may, but need not, be an evaluation factor.

(6) Discussion with Offerors. As provided in the request for proposals, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussions. In conducting discussions, there must be no disclosure of confidential information derived from proposals submitted by competing offerors. The board shall promulgate regulations governing discussions.

(7) Selection and Ranking. Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously. Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals.

(8) Negotiations. After proposals have been ranked pursuant to Section 11-35-1530(7), the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners indicated below, except that in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed:

(a) negotiate with the highest ranking offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both. If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion;

(b) during the negotiation process as outlined in item (a) above, if the procurement officer is unsuccessful in his first round of negotiations, he may reopen negotiations with any offeror with whom he previously negotiated; or

(c) before or after negotiations pursuant to Section 11-35-1530(8), the procurement officer may make changes to the request for proposals within the general scope of the request for proposals and may provide all responsive offerors an opportunity to submit their best and final offers, which must be reevaluated and ranked pursuant to Section 11-35-1530(7).

(9) Award. Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration the evaluation factors set forth in the request for proposals, unless the procurement officer determines to utilize one of the options provided in Section 11-35-1530(8). The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP. The contract file must contain the basis on which the award is made and must be sufficient to satisfy external audit. Procedures and requirements for the notification of intent to award the contract must be the same as those provided in Section 11-35-1520(10).

HISTORY: 1981 Act No. 148, Section 1; 1986 Act No. 510, Section 12; 1993 Act No. 178, Section 22; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 28; 2008 Act No. 174, Section 9; 2019 Act No. 41 (S.530), Section 22, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 22, rewrote the section.

SECTION 11-35-1535. Competitive negotiations.

(A) Conditions for Use.

(1) Competitive negotiations are most appropriate for complex, major acquisitions.

(2) If the procurement officer determines in writing that the use of competitive negotiations is appropriate and in the using agency's interest, a contract may be entered into by competitive negotiations subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section. This section may not be used to acquire only commercially available off-the-shelf products.

(3) Competitive negotiated acquisitions may be conducted only by the office of the appropriate chief procurement officer.

(B) Definitions. As used in this section:

(1) "Clarification" means any communication in which the procurement officer requests or accepts information that clarifies any information in a proposal. Clarification does not include the request or acceptance of any change to the terms of a contractual offer.

(2) "Competitive range" means the offeror or group of offerors selected for negotiation.

(3) "Negotiations" means any communication that invites or permits an offeror to change the terms of its contractual offer in any way.

(C) Request for qualifications. Offerors may be prequalified as provided in Section 11-35-1530(4).

(D) Requests for proposals.

(1)(a) Solicitations for competitive negotiations must be requests for proposals and must, at a minimum, describe:

(i) the state's requirements;

(ii) anticipated terms and conditions that will apply to the contract. The solicitation may authorize offerors to propose alternative terms and conditions, including alternative contract line items;

(iii) information required to be in the offerors proposal; and

(iv) evaluation factors.

(b) The request for proposals must state the relative importance of all factors to be considered in evaluating proposals but need not state a numerical weighting for each factor. Except as provided by regulation, past performance and price must be evaluated. If price is an evaluation factor, the solicitation must state whether all evaluation factors other than price, when combined, are significantly more important than, approximately equal to, or significantly less important than price.

(2) Amendments. Amendments issued after the established time and date for receipt of proposals may not exceed the general scope of the request for proposals and must be issued to those offerors that have not been eliminated from the competition.

(E) Public Notice. Adequate public notice of the request for proposals must be given in the same manner as provided in Section 11-35-1520(3).

(F) Receipt of Proposals. Proposals must be opened in accordance with regulations of the board. A tabulation of proposals must be prepared in accordance with regulations promulgated by the board and must be open for public inspection after contract award.

(G) Evaluation. Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. All proposals must be evaluated and, after evaluation, their relative qualities must be assessed solely on the factors and subfactors specified in the solicitation. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract file.

(H) Competitive Range. After complying with subsection (G), the procurement officer shall establish a competitive range comprised of the offerors that submitted the most promising offers. Ordinarily, the competitive range should not include more than three offerors. The procurement officer may select only one offeror and may select more than three. The procurement officer shall document the rationale for the selections.

(I) Exchanges with Offerors.

(1) Fairness and impartiality. The procurement officer shall treat all offerors fairly and impartially when deciding whether and when to seek clarification or to negotiate. Similarly situated offerors must be given similar opportunities to clarify and, if in the competitive range, to negotiate.

(2) Clarifications. The procurement officer may conduct clarifications at any time before the award decision.

(3) Negotiations.

(a) The procurement officer shall negotiate with each offeror in the competitive range. The primary objective is to maximize the state's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation. Subject to item (1), the scope and extent of negotiations are a matter of the procurement officer's judgement.

(b)(i) At a minimum, the procurement officer shall identify and seek the elimination of any term of a contractual offer that does not conform to a material requirement of a solicitation and any other undesirable terms in a contractual offer.

(ii) The procurement officer may negotiate with offerors to seek changes in their contractual offers that the State desires and to allow them to make other improvements.

(iii) Negotiations may include pricing.

(iv) The procurement officer may not relax or change any material term of the solicitation during negotiation except by amendment.

(v) In conducting negotiations, the procurement officer may not disclose confidential information derived from proposals submitted by competing offerors.

(c) The procurement officer shall document the using agency's prenegotiation objectives with regard to each offeror in the competitive range and shall prepare a record of each negotiation session.

(d) The procurement officer may eliminate an offeror from the competitive range after negotiation if the offeror is no longer considered to be among the most promising.

(4) The board must promulgate regulations governing exchanges with offerors.

(J) Proposal Revisions. The procurement officer may request or allow proposal revisions to clarify and document understandings reached during negotiations. If an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to that offeror's proposal may be accepted or considered. Upon the completion of negotiations, the contracting officer shall request that offerors still in the competitive range submit final proposals no later than a specified common cutoff date and time.

(K) Award.

(1) Award must be based on a comparative assessment of final proposals from offerors within the competitive range against all source selection criteria in the solicitation. Award must be made to the responsible offeror whose final proposal meets the announced requirements in all material respects and is determined in writing to provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals and, if price is an evaluation factor, any tradeoffs among price and non-price factors. As provided by regulation, the contract file must document the basis on which the award is made, and the documentation must explain and justify the rationale for any business judgments and tradeoffs made or relied on in the award determination, including benefits associated with additional costs. Section 11-35-1524 does not apply.

(2) Procedures and requirements for the notification of intent to award the contract must be the same as those provided in Section 11-35-1520(1).

HISTORY: 2019 Act No. 41 (S.530), Section 23, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

SECTION 11-35-1540. Negotiations after unsuccessful competitive sealed bidding.

When bids received pursuant to an invitation for bids under Section 11-35-1520 are considered unreasonable by the procurement officer, or are not independently reached in open competition, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and it is determined in writing by the chief procurement officer, the head of a purchasing agency, or the designee of either officer above the level of procurement officer, that time or other circumstances will not permit the delay required to resolicit competitive sealed bids, a contract may be negotiated pursuant to this section, provided that:

- (1) each responsible bidder who submitted a bid under the original solicitation is notified of the determination and is given reasonable opportunity to negotiate;
- (2) the negotiated price is lower than the lowest rejected bid by any responsible and responsive bidder under the original solicitation;
- (3) the negotiated price is the lowest negotiated price offered by any responsible and responsive offeror.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 24, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 24, in the first undesignated paragraph, substituted "procurement officer" for "procuring agency".

SECTION 11-35-1550. Small purchase procedures; when competitive bidding required.

(1) Authority. The following small purchase procedures may be utilized only in conducting procurements for governmental bodies that are up to the amounts specified herein, but not in excess of the authority granted pursuant to Section 11-35-1210. Procurement requirements must not be artificially divided by governmental bodies so as to constitute a small purchase pursuant to this section.

(2) Competition and Price Reasonableness.

(a) No Competition. Small purchases not exceeding ten thousand dollars may be accomplished without securing competitive quotations if the prices are considered reasonable. The purchasing office must annotate the purchase requisition: "Price is fair and reasonable" and sign. The purchases must be distributed equitably among qualified suppliers. When practical, a quotation must be solicited from other than the previous supplier before placing a repeat order. The administrative cost of verifying the reasonableness of the price of purchase "not in excess of" may more than offset potential savings in detecting instances of overpricing. Action to verify the reasonableness of the price need be taken only when the procurement officer of the governmental body suspects that the price may not be reasonable, comparison to previous price paid, or personal knowledge of the item involved.

(b) Three Written Quotes. Written request for written quotes from a minimum of three qualified sources of supply may be made and, unless adequate public notice is provided in the South Carolina Business Opportunities, documentation of at least three bona fide, responsive, and responsible quotes must be attached to the purchase requisition for a small purchase not in excess of twenty-five thousand dollars, or for a small purchase of commercially available off-the-shelf products not in excess of one hundred thousand dollars, or for a small purchase of construction not in excess of one hundred thousand dollars. The award must be made to the lowest responsive and responsible sources. The request for quotes must include a purchase description. Requests must be distributed equitably among qualified supplies unless advertised as provided above.

(c) Advertised Small Purchase. Written solicitation of written quotes, bids, or proposals may be made for a small purchase, other than a small purchase of construction, not in excess of one hundred thousand dollars. The procurement must be advertised at least once in the South Carolina Business Opportunities publication. A copy of the written solicitation and written quotes must be attached to the

purchase requisition. The award must be made to the lowest responsive and responsible source or, when a request for proposal process is used, the highest ranking offeror.

(3) Advertising Threshold. Except for procurements of either commercially available off-the-shelf products or construction, if conducted pursuant to item (2)(b), all competitive procurements above twenty-five thousand dollars must be advertised at least once in the South Carolina Business Opportunities publication. Governmental bodies may charge vendors the cost incurred for copying and mailing bid or proposal documents requested in response to a procurement.

(4) The Division of Aeronautics of the Department of Commerce may act as its own purchasing agency for all procurements of maintenance services for aircraft and these procurements may be conducted pursuant to subsection (2)(b).

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 23; 1993 Act No. 164, Part II, Section 11A; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 29; 2011 Act No. 74, Pt V, Section 6, eff August 1, 2011; 2019 Act No. 41 (S.530), Section 25, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

The 2011 amendment, in subsections (2)(a) and (2)(b), in the second sentences, inserted "Except as provided in subitem (d) below,"; added subsection (2)(d) relating to institutions of higher learning and purchases not exceeding ten thousand dollars; in subsection (4), substituted "subsection (2)(b)" for "Section 11-35-1550"; and added subsection (5) relating to technical colleges and purchases not exceeding ten thousand dollars.

2019 Act No. 41, Section 25, rewrote the section.

SECTION 11-35-1560. Sole source procurement; public notice.

(A) A contract may be awarded for a supply, service, information technology, or construction item without competition if, under regulations promulgated by the board, the chief procurement officer, the head of a purchasing agency, or a designee of either officer, above the level of the procurement officer, determines in writing that there is only one source for the required supply, service, information technology, or construction item. Except for contracts with a total potential value of fifty thousand dollars or less, adequate public notice of the intent to award without competition must be posted in South Carolina Business Opportunities, except that public notice is not required if the appropriate chief procurement officer, after consultation with the head of the purchasing agency, determines in writing that award without such notice is in the interest of the State. Notice must contain a statement of the right to protest under Section 11-35-4210(1) and must be posted at least five business days before entering a contract. For contracts with a total potential value greater than two hundred fifty thousand dollars, such notice must be posted at least ten business days before entering a contract.

(B) Written documentation must include the determination and basis for the proposed sole source procurement. A delegation of authority by either the chief procurement officer or the head of a governmental body with respect to sole source determinations must be submitted in writing to the Materials Management Officer. In cases of reasonable doubt, competition must be solicited. Any decision by a governmental body that a procurement be restricted to one potential vendor must be accompanied by a thorough, detailed explanation as to why no other will be suitable or acceptable to meet the need.

(C) A violation of these regulations by a purchasing agency, upon recommendation of the Division of Procurement Services with approval of the majority of the board, must result in the temporary suspension, not to exceed one year, of the violating governmental body's ability to procure supplies, services, information technology, or construction items pursuant to this section.

HISTORY: 1981 Act No. 148, Section 1; 1986 Act No. 510, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 30; 2019 Act No. 41 (S.530), Section 26, eff May 13, 2019.

Code Commissioner's Note

At the direction of the Code Commissioner, references in this section to the "Budget and Control Board", the "State Budget and Control Board" or the "board" were changed to the "State Fiscal Accountability Authority", the "authority", or the "Division of Procurement Services" of the "State Fiscal Accountability Authority", pursuant to the directive of the South Carolina Restructuring Act, 2014 Act No. 121, Section 5(B), effective July 1, 2015.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 26, rewrote the section.

SECTION 11-35-1570. Emergency procurements; public notice.

(A) Notwithstanding any other provision of this code, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may award or authorize others to award emergency contracts only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

(B) When a contract entered pursuant to subsection (A) has a total or potential value in excess of fifty thousand dollars, notice of the award must be posted in South Carolina Business Opportunities (SCBO) as soon as practicable thereafter. The posted notice must contain a statement of the right to protest under Section 11-35-4210(1).

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 27, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 27, inserted the (A) identifier and added (B); and in (A), in the first sentence, substituted "award" for "make" in two places and substituted "emergency contracts" for "emergency procurements".

SECTION 11-35-1575. Participation in auction or sale of supplies from bankruptcy.

A governmental body having knowledge of either an auction or a sale of supplies from a bankruptcy may elect to participate. The governmental body shall (a) survey the needed items being offered to ascertain their condition and usefulness, (b) determine a fair market value for new like items through informal quotes, (c) determine the fair market value from similar items considering age and useful life, and (d) estimated repair cost and delivery cost, if any, of the desired items. Using this information, the governmental body shall determine the maximum price that it can pay for each item desired. At the auction or sale, the governmental body shall not exceed the maximum price so determined.

HISTORY: 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 31.

SECTION 11-35-1580. Repealed.

HISTORY: Former Section, titled Information technology procurements, had the following history: 1997 Act No. 153, Section 1. Repealed by 2019 Act No. 41, Section 77, eff May 13, 2019.

Subarticle 5
Cancellation of Solicitations

SECTION 11-35-1710. Cancellation of invitation for bids or request for proposals.

Any solicitation under this code may be cancelled, or any or all bids or proposals may be rejected in whole or part as may be specified in the solicitation, when it is in the best interest of the State. The reasons for rejection, supported with documentation sufficient to satisfy external audit, shall be made a part of the contract file.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

Subarticle 7
Responsibility of Bidders and Offerors

SECTION 11-35-1810. Responsibility of bidders and offerors.

(1) Determination of Responsibility. Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts.

(2) Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the board. The unreasonable failure of a bidder or offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.

(3) Right of Nondisclosure. Except as otherwise provided by law, information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the offices of the board, the Office of the Attorney General, the using agency, or the purchasing agency without prior written consent by the bidder or offeror.

(4) Public procurement units, as defined in Section 11-35-4610, may provide information to one another relating to the responsibility or prior performance of a bidder or offeror, or provide any other information about a bidder or offeror that is otherwise related to procurement. Any person affiliated with a public procurement unit in an official capacity, who provides such information in good faith, is immune from civil and criminal liability which might otherwise result by reason of his actions. In all such civil or criminal proceedings, good faith is a rebuttable presumption.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 29, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 29, in (3), in the second sentence, inserted "the using agency," and added (4).

SECTION 11-35-1820. Prequalification of supplies and suppliers.

The board shall be authorized to provide by regulation for prequalification of suppliers or supplies.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-1830. Cost or pricing data.

(1) Contractor Certification. A contractor shall, except as provided in subsection (3) of this section, submit cost or pricing data and shall certify that, to the best of his knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of mutually determined specified date prior to the date of:

(a) the pricing of any contract awarded by competitive sealed proposals pursuant to Section 11-35-1530, by competitive negotiations pursuant to Section 11-35-1535, or pursuant to the sole source procurement authority as provided in Section 11-35-1560 where the total contract price exceeds an amount established by the board in regulations; or

(b) the pricing of any change order or contract modification which exceeds an amount established by the board in regulations.

(2) Price Adjustment. Any contract, change order, or contract modification under which a certificate is required shall contain a provision that the price to the State, including profit or fee, shall be adjusted to exclude any significant sums by which the State finds that such price was increased because the contractor furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between parties.

(3) Cost or Pricing Data Not Required. The requirements of this section shall not apply to contracts:

(a) where the contract price is based on adequate price competition;

(b) where the contract price is based on established catalog prices or market prices;

(c) where contract prices are set by law or regulations;

(d) where it is determined in writing in accordance with regulations promulgated by the board that the requirements of this section may be waived and the reasons for such waiver are stated in writing.

HISTORY: 1981 Act No. 148, Section 1; 1986 Act No. 510, Section 9; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 30, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 30, in (1)(a), inserted ", by competitive negotiations pursuant to Section 11-35-1535," and made a nonsubstantive change.

SECTION 11-35-1840. Promulgation of regulations.

The board may promulgate regulations to prescribe responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. The aims of such regulations are preventing the existence of conflicting roles that might bias a contractor's judgement, and preventing unfair competitive advantage.

HISTORY: 2019 Act No. 41 (S.530), Section 31, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Subarticle 9

Types and Forms of Contracts

SECTION 11-35-2010. Types of contracts; contracting documents and usage instructions.

(1) Types of Contracts. Subject to the limitations of this section, any type of contract that will promote the best interests of the State may be used, except that the use of a cost-plus-a-percentage-of-cost contract must be approved by the appropriate chief procurement officer. A cost-reimbursement contract, including a cost-plus-a-percentage-of-cost contract, may be used only when a determination sufficient for external audit is prepared showing that the contract is likely to be less costly to the State than any other type or that it is impracticable to obtain the supplies, services, information technology, or construction required except under that contract.

(2)(a) As used in this section:

(i) "Contracting document" means a standardized or model instrument, or a component part of it, for use as a contract, invitation for bids, request for proposals, request for qualifications, or instruction to bidders including, but not limited to, a contract clause or solicitation provision.

(ii) "Usage instructions" means directions regarding conditions for use of a contracting document, completion of a contracting document, and the process for obtaining permission, if possible, to omit or depart from the contracting document's established content for a particular solicitation or contract.

(b) The chief procurement officers may develop contracting documents for their respective areas of responsibility. Contracting documents may be published as internal operating procedures. Contracting documents may be accompanied by usage instructions.

(c) The board may adopt formally a contracting document, as developed by the appropriate chief procurement officer, for mandatory use by all governmental bodies only after notice of the proposed adoption has been published in the State Register and the board has provided the public at least sixty days to make written comments. If a contracting document is adopted by the board, the contracting document must be published in the State Register, accompanied by usage instructions, and used by all governmental bodies in accordance with its usage instructions. The chief procurement officers are not required to submit for board approval contracting documents used in connection with either solicitations issued or contracts awarded by the board or its offices.

(d) Notwithstanding item (c) above, the board may promulgate contracting documents as regulations.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 25; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 33.

SECTION 11-35-2015. Effect of contract or amendment.

A contract or amendment thereto, including, but not limited to, a change order or contract modification, is not effective against a governmental body unless the contract or amendment is in writing and signed by an officer having actual authority to bind the governmental body.

HISTORY: 2019 Act No. 41 (S.530), Section 32, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

SECTION 11-35-2020. Approval of accounting system.

The chief procurement officer, the head of a purchasing agency, or a designee of either officer may require that:

(1) the proposed contractor's accounting system shall permit timely development of all necessary cost data in the form required by the specific contract type contemplated;

(2) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-2030. Multiterm contracts.

(1) Specified Period. Unless otherwise provided by law, a contract for supplies, services, or information technology must not be entered into for any a period of more than one year unless approved in a manner prescribed by regulation of the board. The term of the contract and conditions of renewal or extension must be included in the solicitation and funds must be available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods must be subject to the availability and appropriation of funds for them.

(2) Determination Prior to Use. Before the utilization of a multiterm contract, it must be determined in writing by the appropriate governmental body that:

(a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) such a contract serves the interest of the State by encouraging effective competition or otherwise promoting economies in state procurement.

(3) Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled.

(4) Maximum Duration. The maximum potential duration for a contract is five years. A maximum potential duration of up to seven years may be approved by the appropriate chief procurement officer.

(5) Authority Approval. Every type of contract with a maximum potential duration exceeding seven years must be approved by the board. For competitive procurements, approval of the maximum potential duration must be granted before solicitation.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 34; 2019 Act No. 41 (S.530), Section 33, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 33, in (2)(b), substituted "interest" for "best interests"; rewrote (4); and added (5).

SECTION 11-35-2040. Inapplicable laws.

The following laws are inapplicable to contracts solely for the procurement of commercially available off-the-shelf products pursuant to Section 11-35-1550:

(1) Chapter 14, Title 8, Unauthorized Aliens and Public Employment;

(2) Section 11-9-105, Contracts for Legal or Consultant Services;

(3) Section 11-35-5300, Prohibition of Contracting with Discriminatory Business;

(4) Chapter 57, Title 11, Iran Divestment Act;

(5) Chapter 107, Title 44, Drug-Free Workplace Act; and

(6) any other provision of law identified by regulation of the board, that the board determines sets forth policies, procedures, or requirements that impact the procurement of commercially available off-the-shelf products by the State, except for a provision of law that: (i) provides for criminal or civil penalties; (ii) appears in Article 17 of this chapter; or (iii) specifically refers to this section and provides that, notwithstanding this section, it is applicable to contracts for the procurement of commercially available off-the-shelf products.

HISTORY: 2019 Act No. 41 (S.530), Section 34, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

SECTION 11-35-2050. Void contract terms or conditions.

Any term or condition in any contract entered into by the State that requires the State to defend, indemnify, or hold harmless another person, must be void ab initio, unless such term is expressly authorized by law. All contracts must be governed by South Carolina law. Without limiting the applicability of Section 11-35-4230, the exclusive venue for any dispute arising out of or related to any contract is in South Carolina. Any contract containing any terms or conditions inconsistent with any of the foregoing are otherwise enforceable as if it did not contain such term or condition.

HISTORY: 2019 Act No. 41 (S.530), Section 35, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

SECTION 11-35-2060. Material changes prohibited.

A change order or a contract modification may not alter a contract in a manner or degree inconsistent with the underlying purposes and policies of this code or the regulations of the board.

HISTORY: 2019 Act No. 41 (S.530), Section 28, eff May 13, 2019.

Code Commissioner's Note

At the direction of the Code Commissioner, Section 11-35-1610, as added by 2019 Act No. 41, Section 28, was redesignated as Section 11-35-2060 and placed under Subarticle 9.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Subarticle 11

Inspection of Plant and Audit of Records

SECTION 11-35-2210. Right to inspect plant.

The appropriate chief procurement officer or his designee is authorized, at reasonable times, to inspect the part of the plant or place of business of a contractor or subcontractor which is related to the performance of a contract awarded or to be awarded by the State.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 35.

SECTION 11-35-2220. Right to audit records.

(1) Audit of Cost or Pricing Data. All state contracts shall contain a clause setting forth the state's right at reasonable times and places to audit the books and records of any contractor or subcontractor who has submitted cost or pricing data pursuant to Section 11-35-1830 to the extent that such books and records relate to such cost or pricing data. The contract shall further set forth that the contractor or subcontractor who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing by the chief procurement officer; provided, however, that such records shall be retained for additional periods of time beyond this three-year period upon request of the chief procurement officer.

(2) Contract Audit. The State shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing by the chief procurement officer.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

Subarticle 13

Determinations and Reports

SECTION 11-35-2410. Finality of determinations.

(A) The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: Section 11-35-1520(7) (Competitive Sealed Bidding: Correction or Withdrawal of Bids; Cancellation of Awards), Section 11-35-1520(11) (Competitive Sealed Bidding: Request for Qualifications), Section 11-35-1525(1) (Competitive Fixed Price Bidding: Conditions for Use), Section 11-35-1528(1) (Competitive Best Value Bidding: Conditions for Use), Section 11-35-1528(8) (Competitive Best Value Bidding: Award), Section 11-35-1529(1) (Competitive Online Bidding: Conditions for Use), Section 11-35-1530(1) (Competitive Sealed Proposals, Conditions for Use), Section 11-35-1530(4) (Competitive Sealed Proposals: Request for Qualifications), Section 11-35-1530(7) (Competitive Sealed Proposals, Selection and Ranking of Prospective Offerors), Section 11-35-1530(9) (Competitive Sealed Proposals Award), Section 11-35-1535(A) (Competitive Negotiations: Conditions for Use), Section 11-35-1535(C) (Competitive Negotiations: Request for Qualifications), Section 11-35-1535(G) (Competitive Negotiations; Evaluation), Section 11-35-1535(H) (Competitive Negotiations: Competitive Range), Section 11-35-1535(J) (Competitive Negotiations: Proposal Revisions, elimination or removal from the competitive range), Section 11-35-1535(K) (Competitive Negotiations: Award), Section 11-35-1540 (Negotiations After Unsuccessful Competitive Sealed Bidding), Section 11-35-1560 (Sole Source Procurement), Section 11-35-1570 (Emergency Procurement), Section 11-35-1710 (Cancellation of Invitation for Bids or Requests for Proposals), Section 11-35-1810 (Responsibility of Bidders and Offerors), Section 11-35-1830(3) (Cost or Pricing Data, Cost or Pricing Data Not Required), Section 11-35-2010 (Types and Forms of Contracts), Section 11-35-2020 (Approval of Accounting System), Section 11-35-2030(2) (Multiterm Contracts, Determination Prior to Use), Section 11-35-3010(1) (Choice of Project Delivery Method), Section 11-35-3020(d) (Construction Procurement Procedures: Negotiations After Unsuccessful Competitive Sealed Bidding), Section 11-35-3023 (Prequalification on State Construction), Section 11-35-3220(5) (Procurement Procedure, Selection and Ranking of the Three Most Qualified), Section 11-35-4210(7) (Stay of Procurement During Protests, Decision to Proceed), and Section 11-35-4810 (Cooperative Use of Supplies, Services, or Information Technology).

(B) The chief procurement officers or their designees shall review samples of the determinations periodically, and issue reports and recommendations on the appropriateness of the determinations made.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 26; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 36; 2008 Act No. 174, Section 10; 2019 Act No. 41 (S.530), Section 36, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 36, rewrote (A).

SECTION 11-35-2420. Reporting of anticompetitive practices; privileged communications.

(A) When any information or allegations concerning anticompetitive practices among any bidders or offerors, come to the attention of any employee of the State, immediate notice of the relevant facts shall be transmitted to the Office of the Attorney General.

(B) Communications to the Office of the Attorney General and any testimony relating to the matters described in Section 11-35-2420(A) are privileged and may not be disclosed without prior approval of the Office of the Attorney General. A person required or permitted to report pursuant to Section 11-35-2420(A) or who participates in an investigation or judicial proceedings resulting from the report, acting in good faith, is immune from civil and criminal liability which might otherwise result by reason of these actions. In all such civil or criminal proceedings, good faith is a rebuttable presumption.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 37, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 37, inserted the (A) identifier; in (A), inserted "Office of the"; and added (B).

SECTION 11-35-2430. Retention of procurement records.

All procurement records of governmental bodies shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Department of Archives and History after consultation with the Attorney General. All retained documents shall be made available to the Attorney General or a designee upon request and proper receipt therefor.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-2440. Records of procurement actions.

(1)(a) Contents of Records. A governmental body as defined in Section 11-35-310(18) shall submit quarterly a record listing all contracts made pursuant to Section 11-35-1560 (Sole Source Procurement) or Section 11-35-1570 (Emergency Procurements) to the chief procurement officers. The record must contain:

(i) each contractor's name;

(ii) the amount and type of each contract;

(iii) a listing of supplies, services, information technology, or construction procured under each contract.

(b) The chief procurement officers shall maintain these records for five years.

(2) Publication of Records. A copy of the record must be submitted to the board on an annual basis and must be available for public inspection.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 37.

ARTICLE 7
Specifications

Subarticle 1
Definitions

SECTION 11-35-2610. Definitions of terms used in this article.

As used in this article, the term "specifications" means any technical or purchase description or other description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may also include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

Subarticle 3
Specifications

SECTION 11-35-2710. Issuance of specifications; duties of the board.

The board shall promulgate regulations governing the preparation, maintenance, and content of specifications for supplies, services, information technology, and construction required by the State.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 38.

SECTION 11-35-2720. Duties of the chief procurement officers and the using agencies.

The chief procurement officers may prepare or review, issue, revise, and maintain the specifications for supplies, services, information technology, and construction required by the State, except for supplies, services, information technology, and construction items procured by the governmental bodies pursuant to Sections 11-35-1550, 11-35-1570, and 11-35-3230, the specification for which must be prepared and maintained by the using agencies in accordance with the provisions of this article and regulations promulgated under it and monitored periodically by the chief procurement officers.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 39.

SECTION 11-35-2730. Assuring competition.

All specifications shall be drafted so as to assure cost effective procurement of the state's actual needs and shall not be unduly restrictive.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-2740. Relationship with using agencies.

The chief procurement officers shall obtain advice and assistance from the personnel of the using agencies in the development of specifications, whether through user committees or through the advisory committees, and may delegate in writing to a using agency the authority to prepare and utilize its own specifications. Specifications shall be drawn in such a manner as to ensure maximally cost effective procurement, consistent with regulations promulgated by the board.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-2750. Specifications prepared by architects and engineers.

The requirements of this article regarding the nonrestrictiveness of specifications apply to each solicitation and include, among other things, all specifications prepared by architects, engineers, designers, draftsmen, and land surveyors for state contracts.

HISTORY: 1981 Act No. 148, Section 1; 1986 Act No. 510, Section 10; 1997 Act No. 153, Section 1, June 13, 1997.

ARTICLE 9

Construction, Architect-Engineer, Construction Management, and Land Surveying Services

Subarticle 1

Definitions

SECTION 11-35-2910. Definitions of terms used in this article.

(1) "Architect-engineer and land surveying services" are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture, and interior design pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.

(2) "Construction manager agent" means a business that has been awarded a separate contract with the governmental body to provide construction management services but not construction.

(3) "Construction manager at-risk" means a business that has been awarded a separate contract with the governmental body to provide both construction management services and construction using the construction management at-risk project delivery method. A contract with a construction manager at-risk may be executed before completion of design.

(4) "Construction management services" are those professional services associated with contract administration, project management, and other specified services provided in connection with the administration of a project delivery method defined in Section 11-35-3005 (Project Delivery Methods Authorized).

(5) "Construction management at-risk" means a project delivery method in which the governmental body awards separate contracts, one for architectural and engineering services to design an infrastructure facility and the second to a construction manager at-risk for both construction of the infrastructure facility according to the design and construction management services.

(6) "Design-bid-build" means a project delivery method in which the governmental body sequentially awards separate contracts, the first for architectural and engineering services to design an infrastructure facility and the second for construction of the infrastructure facility according to the design.

(7) "Design-build" means a project delivery method in which the governmental body enters into a single contract for design and construction of an infrastructure facility.

(8) "Design-build-finance-operate-maintain" means a project delivery method in which the governmental body enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. Money appropriated by the State is not used to pay for a part of the services provided by the contractor during the contract period.

(9) "Design-build-operate-maintain" means a project delivery method in which the governmental body enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the money required to pay for the services provided by the contractor during the contract period are either appropriated by the State before the award of the contract or secured by the State through fare, toll, or user charges.

(10) "Design requirements" means the written description of the infrastructure facility to be procured pursuant to this article, including:

(a) required features, functions, characteristics, qualities, and properties that are required by the State;

(b) the anticipated schedule, including start, duration, and completion; and

(c) estimated budgets as applicable to the specific procurement, for design, construction, operation, and maintenance. The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.

(11) "Independent peer reviewer services" are additional architectural and engineering services that a governmental body shall acquire, as designated in the Manual for Planning and Execution of State Permanent Improvement, in design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care. If a governmental body elects not to contract with the independent peer reviewer proposed by the successful offeror, the independent peer reviewer must be selected through competitive sealed proposals.

(12) "Infrastructure facility" means a building; structure; or networks of buildings, structures, pipes, controls, and equipment, or portion thereof, that provide transportation, utilities, public education, or public safety services. Included are government office buildings; public schools; courthouses; jails; prisons; water treatment plants, distribution systems, and pumping stations; wastewater treatment plants, collection systems, and pumping stations; solid waste disposal plants, incinerators, landfills, and related facilities; public roads and streets; highways; public parking facilities; public transportation systems, terminals, and rolling stock; rail, air, and water port structures, terminals, and equipment.

(13) "Operations and maintenance" means a project delivery method in which the governmental body enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

(14) "Proposal development documents" means drawings and other design-related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2008 Act No. 174, Section 11.

Editor's Note

2008 Act No. 174, Section 1, provides as follows:

"The General Assembly finds that:

"(1) it adopted a modified version of the 1979 ABA Model Procurement Code for State and Local Governments when it enacted 1981 Act No. 148. Since then, the ABA has revised its recommended model by adopting the 2000 ABA Model Procurement Code for State and Local Governments, which it developed in cooperation with, among others, the National Association of State Procurement Officials, the National Institute of Governmental Purchasing, the American Consulting Engineers Council, the Design Professionals Coalition, the Council on the Federal Procurement of A/E Services, the Engineers Joint Contracts Document Committee, and the National Society of Professional Engineers. One of the primary goals of the revision project was to encourage the competitive use of new forms of project delivery in public construction procurement; and

"(2) it is the intent of the General Assembly to facilitate the use of these alternate forms of project delivery by adopting, as modified herein, those portions of the new model code related to Article 5 (Procurement of Infrastructure Facilities and Services) of the model code. To that end, the relevant official comments to the model code, and the construction given to the model code, should be examined as persuasive authority for interpreting and construing the new code provisions created by this act."

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

Subarticle 3

Construction Services

SECTION 11-35-3005. Project delivery methods authorized.

(1) The following project delivery methods are authorized for procurements relating to infrastructure facilities:

- (a) design-bid-build;
- (b) construction management at-risk;
- (c) operations and maintenance;
- (d) design-build;
- (e) design-build-operate-maintain; and
- (f) design-build-finance-operate-maintain.

(2) In addition to those methods identified in item (1), the board, by regulation, and the State Engineer, in accordance with Section 11-35-3010, may:

(a) approve as an alternate project delivery method any combination of design, construction, finance, and services for operations and maintenance of an infrastructure facility; and

(b) allow or require the governmental body to follow any of the additional procedures established by Section 11-35-3024.

(3) Participation in a report or study that is later used in the preparation of design requirements for a project does not disqualify a firm from participating as a member of a proposing team in a construction management at-risk, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless the participation provides the business with a substantial competitive advantage. In the Manual for Planning and Execution of State Permanent Improvements, the State Engineer may establish guidance for the application of this item by governmental bodies.

HISTORY: 2008 Act No. 174, Section 2.

Editor's Note

2008 Act No. 174, Section 1, provides as follows:

"The General Assembly finds that:

"(1) it adopted a modified version of the 1979 ABA Model Procurement Code for State and Local Governments when it enacted 1981 Act No. 148. Since then, the ABA has revised its recommended model by adopting the 2000 ABA Model Procurement Code for State and Local Governments, which it developed in cooperation with, among others, the National Association of State Procurement Officials, the National Institute of Governmental Purchasing, the American Consulting Engineers Council, the Design Professionals Coalition, the Council on the Federal Procurement of A/E Services, the Engineers Joint Contracts Document Committee, and the National Society of Professional Engineers. One of the primary goals of the revision project was to encourage the competitive use of new forms of project delivery in public construction procurement; and

"(2) it is the intent of the General Assembly to facilitate the use of these alternate forms of project delivery by adopting, as modified herein, those portions of the new model code related to Article 5 (Procurement of Infrastructure Facilities and Services) of the model code. To that end, the relevant official comments to the model code, and the construction given to the model code, should be examined as persuasive authority for interpreting and construing the new code provisions created by this act."

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

SECTION 11-35-3010. Choice of project delivery method.

(1) Selection of Method. The project delivery method used for a state construction project must be that method which is most advantageous to the State and results in the most timely, economical, and successful completion of the construction project. The governmental body shall select, in accordance with regulations of the board, the appropriate project delivery method for a particular project and shall state in writing the facts and considerations leading to the selection of that particular method.

(2) State Engineer's Office Review. The governmental body shall submit its written report stating the facts and considerations leading to the selection of the particular project delivery method to the State Engineer's Office for its review.

(3) Approval or Disagreement by State Engineer's Office. The State Engineer's Office has ten days to review the data submitted by the governmental body to determine its position with respect to the particular project delivery method recommended for approval by the governmental body, and to notify the governmental body of its decision in writing. If the State Engineer's Office disagrees with the project delivery method selected, it may contest it by submitting the matter to the board for decision. Written notification by the State Engineer's Office to the governmental body of its intention to contest the project delivery method selected must include its reasons. The board shall hear the contest at its next regularly scheduled meeting after notification of the governmental body. If the board rules in support of the State Engineer's Office position, the governmental body shall receive written notification of the decision. If the board rules in support of the governmental body, the governmental body must be notified in writing and by that writing be authorized to use that project delivery method as previously recommended by the governmental body on the particular construction project.

(4) In addition to the requirement of subsection (1), use of the project delivery methods authorized by Section 11-35-3005(1)(e), (1)(f), and (2) must be approved by the board if the total potential value of the overall transaction exceeds twenty-five million dollars.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2008 Act No. 174, Section 12; 2019 Act No. 41 (S.530), Section 38, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 38, added (4).

SECTION 11-35-3015. Source selection methods assigned to project delivery methods.

(1) Scope. This section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section 11-35-3005 (Project delivery methods authorized), except as provided in Sections 11-35-1550 (Small Purchases), 11-35-1560 (Sole Source Procurement), 11-35-1570 (Emergency Procurements), 11-35-3230 (Exception for small architect-engineer, and land surveying services contract), 11-35-3310 (Indefinite quantity contracts for architectural-engineering, and land surveying services), and 11-35-3320 (Indefinite quantity contracts for construction).

(2) Design-bid-build:

(a) Design. Architect-engineer, construction management, and land surveying services. The qualifications based selection process in Section 11-35-3220 (Qualifications Based Selection Procedures) must be used to procure architect-engineer, construction management, and land surveying services, unless those services are acquired in conjunction with construction using one of the project delivery methods provided in Section 11-35-3015 (3), (5), (6), (7), and (8).

(b) Construction. Competitive sealed bidding, as provided in Section 11-35-1520 (Competitive Sealed Bidding), must be used to procure construction in design-bid-build procurements.

(3) Construction Management at-risk. Contracts for construction management at-risk must be procured as provided in either Section 11-35-1520 (Competitive Sealed Bidding) or Section 11-35-1530 (Competitive Sealed Proposals).

(4) Operations and Maintenance. Contracts for operations and maintenance must be procured as set forth in Section 11-35-1510 (Methods of Source Selection).

(5) Design-build. Contracts for design-build must be procured by competitive sealed proposals, as provided in Section 11-35-1530 (Competitive Sealed Proposals) or competitive negotiation, as provided in Section 11-35-1535 (Competitive Negotiations).

(6) Design-build-operate-maintain. Contracts for design-build-operate-maintain must be procured by competitive sealed proposals, as provided in Section 11-35-1530 (Competitive Sealed Proposals) or competitive negotiation, as provided in Section 11-35-1535 (Competitive Negotiations).

(7) Design-build-finance-operate-maintain. Contracts for design-build-finance-operate-maintain must be procured by competitive sealed proposals, as provided in Section 11-35-1530 (Competitive Sealed Proposals) or Section 11-35-1535 (Competitive Negotiations).

(8) Other. Contracts for an alternate project delivery method approved pursuant to Section 11-35-3005(2) must be procured by a source selection method provided in Section 11-35-1510, as specified by the authority approving the alternative project delivery method.

HISTORY: 2008 Act No. 174, Section 3; 2019 Act No. 41 (S.530), Section 39, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 39, rewrote (1); rewrote (5); in (6), added "or competitive negotiation, as provided in Section 11-35-1535 (Competitive Negotiations)"; and in (7), added "or Section 11-35-1535 (Competitive Negotiations)".

SECTION 11-35-3020. Additional bidding procedures for construction procurement.

Exceptions in Competitive Sealed Bidding Procedures. The process of competitive sealed bidding as required by Section 11-35-3015(2)(b) must be performed in accordance with the procedures outlined in Article 5 of this code subject to the following exceptions:

(a) Invitation for Bids. Each governmental body is responsible for developing a formal invitation for bids for each state construction project. The invitation must include, but not be limited to, all contractual terms and conditions applicable to the procurement. A copy of each invitation for bids must be filed with the State Engineer's Office and must be advertised formally in an official state government publication. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. The manner in which this official state government publication must be published, the content of the publication itself, the frequency of the publication, the method of subscription to the publication, and the manner by which the publication is distributed must be established by regulation of the board.

(b) Bid Acceptance. Instead of Section 11-35-1520(6), the following provision applies. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The governmental body's invitation for bids must set forth all requirements of the bid including, but not limited to:

(i) The governmental body, in consultation with the architect-engineer assigned to the project, shall identify by license classification or subclassification in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid. In addition, the governmental body, in consultation with the architect-engineer assigned to the project, may identify by license classification or subclassification in the invitation for bids a subcontractor who is expected to perform work which is vital to the project. The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section 11-35-4210 or another

provision of this code. A bidder in response to an invitation for bids shall clearly identify in his bid only those subcontractors to perform the work as identified in the invitation for bids. If the bidder determines to use his own employees to perform a portion of the work for which he would otherwise be required to list a subcontractor and if the bidder is qualified to perform that work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid and not subcontract that work except with the approval of the governmental body for good cause shown.

(ii) Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive.

(iii) The governmental body shall send all responsive bidders a copy of the bid tabulation within ten working days following the bid opening.

(c) Instead of Section 11-35-1520(10), the following provisions apply:

(i) Unless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an intended award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location that is specified in the invitation for bids. The invitation for bids and the posted notice must contain a statement of the bidder's right to protest pursuant to Section 11-35-4210(1) and the date and location of posting must be announced at bid opening. In addition to posting notice, the governmental body promptly shall send all responsive bidders a copy of the notice of intended award and of the bid tabulation. The mailed notice must indicate the posting date and must contain a statement of the bidder's right to protest pursuant to Section 11-35-4210(1).

(ii) After five business days' notice is given, the governmental body may enter into a contract with the bidder named in the notice in accordance with the provisions of this code and of the bid solicited. The procurement officer must comply with Section 11-35-1810.

(iii) If, at bid opening, only one bid is received and determined to be responsive and responsible and within the governmental body's construction budget, award may be made without the five-day waiting period.

(d) Negotiations after Unsuccessful Competitive Sealed Bidding. Instead of Section 11-35-1540, the following provisions apply:

(i) If bids received pursuant to an invitation for bids exceed available funds, and it is determined in writing by the governmental body that circumstances do not permit the delay required to resolicit competitive sealed bids, and the base bid, less deductive alternates, does not exceed available funds by an amount greater than ten percent of the construction budget established for that portion of the work, a contract may be negotiated pursuant to this section with the lowest responsible and responsive bidder. The governmental body may change the scope of the work to reduce the price to be within the established construction budget but may not reduce the price below the established construction budget more than ten percent without a written request by the agency and the written approval of the chief procurement officer based on the interest of the State.

(ii) If the lowest base bid received pursuant to an invitation for bids exceeds approved available funds and the governmental body is able to identify additional funds for the project, as certified by the appropriate fiscal officers, in the amount of the difference between the lowest base bid and the approved available funds for the project, the governmental body shall submit a request to use those additional funds in accordance with Chapter 47, Title 2.

HISTORY: 1981 Act No. 148, Section 1; 1981 Act No. 179 Section 16; 1992 Act No. 442, Section 1; 1993 Act No. 178, Section 27; 1993 Act No. 164, Part II, Section 65; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 40; 2008 Act No. 174, Section 13; 2019 Act No. 41 (S.530), Section 40, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 40, in (a), inserted the fifth sentence; in (b)(i), in the first and second sentences, substituted "license classification or subclassification" for "specialty", and in the fourth sentence, substituted "clearly identify in his bid" for "set forth in his bid the name of"; in (c), in (ii), in the first sentence, substituted "five business" for "ten", and in (iii), substituted "five-day" for "ten-day"; and in (d), in (i), in the second sentence, substituted "price" for "cost" in two places and substituted "interest of the State" for "best interest of the State", and in (ii), substituted "in accordance with Chapter 47, Title 2" for "to the board and the Joint Bond Review Committee in accordance with Sections 2-47-40 and 2-47-50", and made a nonsubstantive change.

SECTION 11-35-3021. Subcontractor substitution.

(1) After notice of an award or intended award has been given, whichever is earlier, the prospective contractor identified in the notice may not substitute a business as subcontractor in place of a subcontractor listed in the prospective contractor's bid or proposal, except for one or more of the following reasons:

(a) upon a showing satisfactory to the governmental body by the prospective contractor that:

(i) the listed subcontractor is not financially responsible;

(ii) the listed subcontractor's scope of work did not include a portion of the work required in the plans and specifications, and the exclusion is not clearly set forth in the subcontractor's original bid;

(iii) the listed subcontractor was listed as a result of an inadvertent clerical error, but only if that request is made within four working days of opening;

(iv) the listed subcontractor failed or refused to submit a performance and payment bond when requested by the prospective contractor after the subcontractor had represented to the prospective contractor that the subcontractor could obtain a performance and payment bond; and

(v) the listed subcontractor must be licensed and did not have the license at the time required by law;

(b) if the listed subcontractor fails or refuses to perform his subcontract;

(c) if the work of the listed subcontractor is found by the governmental body to be substantially unsatisfactory;

(d) upon mutual agreement of the contractor and subcontractor; and

(e) with the consent of the governmental body for good cause shown.

(2) The request for substitution must be made to the governmental body in writing. This written request does not give rise to a private right of action against the prospective contractor in the absence of actual malice.

(3) If substitution is allowed, the prospective contractor, before obtaining prices from another subcontractor, must attempt in good faith to negotiate a subcontract with at least one subcontractor whose bid was received before the submission of the prospective contractor's offer. This section does not affect a contractor's ability to request withdrawal of a bid in accordance with the provisions of this code and the regulations promulgated pursuant to it.

(4) This section applies to a procurement conducted using the source selection methods authorized by Section 11-35-3015(2)(b), (3), (5), (6), (7), and (8).

HISTORY: 2008 Act No. 174, Section 4.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

SECTION 11-35-3023. Prequalification on state construction.

In accordance with this section, the applicable section of Article 5, and procedures published by the State Engineer, a governmental body may limit participation in a solicitation for construction to only those businesses, including potential subcontractors, that are prequalified. The prequalification process may be used only with the approval and supervision of the State Engineer's Office. If fewer than two businesses are prequalified, the prequalification process must be canceled.

HISTORY: 2008 Act No. 174, Section 4; 2019 Act No. 41 (S.530), Section 41, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 41, rewrote the section.

SECTION 11-35-3024. Additional procedures applicable to procurement of certain project delivery methods.

(1) Applicability. In addition to the requirements of Section 11-35-1530 (Competitive Sealed Proposals) or Section 11-35-1535 (Competitive Negotiations), the procedures in this section apply as provided in items (2), (3), and (4) below.

(2) Content of Request for Proposals. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:

(a) must include design requirements;

(b) must solicit proposal development documents; and

(c) may, if the governmental body determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:

(i) prequalify offerors in accordance with Section 11-35-3023 by issuing a request for qualifications in advance of the request for proposals;

(ii) select, pursuant to procedures designated in the Manual for Planning and Execution of State Permanent Improvements, a short list of responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award before discussions and evaluations pursuant to Section 11-35-1530, if the number of proposals to be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or

(iii) pay stipends to unsuccessful offerors, if the amount of the stipends and the terms under which stipends are paid are stated in the Request for Proposals.

Subsection (2)(c)(ii) is inapplicable if competitive negotiations are conducted pursuant to Section 11-35-1535.

(3) Evaluation Factors. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain must:

(a) state the relative importance of (i) demonstrated compliance with the design requirements, (ii) offeror qualifications, (iii) financial capacity, (iv) project schedule, (v) price, or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements, and (vi) other factors, if any; and

(b) in circumstances designated in the Manual for Planning and Execution of State Permanent Improvements, require each offeror to identify an Independent Peer Reviewer whose competence and qualifications to provide that service must be an additional evaluation factor in the award of the contract.

(4) Unless excused by the State Engineer, the State Engineer's Office shall oversee the evaluation process for a procurement of construction if factors other than price are considered in the evaluation of a proposal.

HISTORY: 2008 Act No. 174, Section 4; 2019 Act No. 41 (S.530), Section 42, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 42, in (1), inserted "or Section 11-35-1535 (Competitive Negotiations)"; and in (2), added the last undesignated paragraph.

SECTION 11-35-3030. Bond and security.

(1) Bid Security.

(a) Requirement for Bid Security. Bid security is required for all competitive sealed bidding for construction contracts in a design-bid-build procurement in excess of one hundred thousand dollars and other contracts as may be prescribed by the State Engineer's Office. Bid security is a bond provided by a surety company meeting the criteria established by the regulations of the board or otherwise supplied in a form that may be established by regulation of the board.

(b) Amount of Bid Security. Bid security must be in an amount equal to at least five percent of the amount of the bid at a minimum.

(c) Rejection of Bids for Noncompliance with Bid Security Requirements. When the invitation for bids requires security, noncompliance requires that the bid be rejected except that a bidder who fails to provide bid security in the proper amount or a bid bond with the proper rating must be given one working day from bid opening to cure the deficiencies. If the bidder is unable to cure these deficiencies within one working day of bid opening, his bid must be rejected.

(d) Withdrawal of Bids. After the bids are opened, they must be irrevocable for the period specified in the invitation for bids. If a bidder is permitted to withdraw its bid in accordance with regulations promulgated by the board, action must not be had against the bidder or the bid security.

(2) Contract Performance Payment Bonds.

(a) When Required-Amounts. Contracts for construction must require the following bonds or security:

(i) a performance bond satisfactory to the State, executed by a surety company meeting the criteria established by the board in regulations, or otherwise secured in a manner satisfactory to the State, in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;

(ii) a payment bond satisfactory to the State, executed by a surety company meeting the criteria established by the board in regulations, or otherwise secured in a manner satisfactory to the State, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond must be in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;

(iii) in the case of a construction contract valued at fifty thousand dollars or less, the governmental body may waive the requirements of subitems (i) and (ii) above, if the governmental body has protected the State;

(iv) in the case of a construction manager at-risk contract, the solicitation may provide that bonds or security are not required during the project's preconstruction or design phase, if construction does not

commence until the requirements of subitems (i) and (ii) above have been satisfied. Additionally, the solicitation may provide that bonds or security as described in subitems (i) and (ii) above may be furnished for one or more designated portions of the project, in an amount equal to one hundred percent of the value of the construction of each designated portion, and also may prescribe the time of delivery of the bonds or security. In no event may construction of any portion of the work commence until the appropriate bonds or security have been delivered to the governmental body;

(v) in the case of a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract, the solicitation may provide that bonds or security as described in subitems (i) and (ii) above may be furnished for one or more designated portions of the project, in an amount equal to one hundred percent of the value of the design and construction of each designated portion, and also may prescribe the time of delivery of the bonds or security. In no event may design or construction of any portion of the work commence until the appropriate bonds or security have been delivered to the governmental body.

(b) Authority to Require Additional Bonds. Item (2) does not limit the authority of the board to require a performance bond or other security in addition to these bonds, or in circumstances other than specified in subitem (a) of that item in accordance with regulations promulgated by the board.

(c) Suits on Payment Bonds-Right to Institute. A person who has furnished labor, material, or rental equipment to a bonded contractor or his subcontractors for the work specified in the contract, and who has not been paid in full for it before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by the person or material or rental equipment was furnished or supplied by the person for which the claim is made, has the right to sue on the payment bond for the amount, or the balance of it, unpaid at the time of institution of the suit and to prosecute the action for the sum or sums justly due the person. A remote claimant has a right of action on the payment bond only upon giving written notice to the contractor within ninety days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material or rental equipment upon which the claim is made, stating with substantial accuracy the amount claimed as unpaid and the name of the party to whom the material or rental equipment was furnished or supplied or for whom the labor was done or performed. The written notice to the bonded contractor must be served personally or served by mailing the notice by registered or certified mail, postage prepaid, in an envelope addressed to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation. The aggregate amount of a claim against the payment bond by a remote claimant may not exceed the amount due by the bonded contractor to the person to whom the remote claimant has supplied labor, materials, rental equipment, or services, unless the remote claimant has provided notice of furnishing labor, materials, or rental equipment to the bonded contractor. The written notice to the bonded contractor must generally conform to the requirements of Section 29-5-20(B) and sent by certified or registered mail to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation. After receiving the notice of furnishing labor, materials, or rental equipment, payment by the bonded contractor may not lessen the amount recoverable by the remote claimant. The aggregate amount of claims on the payment bond may not exceed the penal sum of the bond. A suit under this section must not be commenced after the expiration of one year after the last date of furnishing or providing labor, services, materials, or rental equipment.

For purposes of this section, "bonded contractor" means the contractor or subcontractor furnishing the payment bond, and "remote claimant" means a person having a direct contractual relationship with a subcontractor or supplier of a bonded contractor, but no expressed or implied contractual relationship with the bonded contractor. Any payment bond surety for the bonded contractor must have the same rights and defenses of the bonded contractor as provided in this section.

(d) Suits on Payment Bonds-Where and When Brought. Every suit instituted upon a payment bond must be brought in a court of competent jurisdiction for the county or circuit in which the construction contract was to be performed; except that a suit must not be commenced after the expiration of one year

after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in the suit.

(3) Bonds Forms and Copies.

(a) Bonds Forms. The board shall promulgate by regulation the form of the bonds required by this section.

(b) Certified Copies of Bonds. A person may request and obtain from the governmental body a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond is prima facie evidence of the contents, execution, and delivery of the original.

(4) Retention.

(a) Maximum amount to be withheld. In a contract or subcontract for construction which provides for progress payments in installments based upon an estimated percentage of completion, with a percentage of the contract's proceeds to be retained by the State or general contractor pending completion of the contract or subcontract, the retained amount of each progress payment or installment must be no more than three and one-half percent.

(b) Release of Retained Funds. When the work to be performed on a state construction project or pursuant to a state construction contract is to be performed by multiple prime contractors or by a prime contractor and multiple subcontractors, the work contracted to be done by each individual contractor or subcontractor is considered a separate division of the contract for the purpose of retention. As each division of the contract is certified as having been completed, that portion of the retained funds which is allocable to the completed division of the contract must be released forthwith to the prime contractor, who, within ten days of its receipt, shall release to the subcontractor responsible for the completed work the full amount of retention previously withheld from him by the prime contractor.

(5) Bonds for Bid Security and Contract Performance. The requirement of a bond for bid security on a construction contract, pursuant to subsection (1), and a construction contract performance bond, pursuant to subsection (2), may not include a requirement that the surety bond be furnished by a particular surety company or through a particular agent or broker.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Sections 29-31; 1993 Act No. 164, Part II, Section 10A; 1997 Act No. 153, Section 1; 2000 Act No. 240, Section 2; 2002 Act No. 253, Section 3; 2005 Act No. 97, Section 1; 2006 Act No. 376, Section 41; 2008 Act No. 174, Section 14; 2014 Act No. 264 (S.1026), Section 3, eff June 6, 2014; 2019 Act No. 41 (S.530), Section 43, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2014 Act No. 264, Section 3, in subsection (c), fourth sentence from the end, substituted "generally conform to the requirements of Section 29-5-20(B) and sent by certified or registered mail" for "be served personally or sent by fax or by electronic mail or by registered or certified mail, postage prepaid," and added the last sentence relating to time for bringing suit.

2019 Act No. 41, Section 43, in (1), in (a), in the second sentence, substituted "one hundred thousand dollars" for "fifty thousand dollars", and in (d), in the third sentence, substituted "in accordance with regulations promulgated by the board" for "before bid opening pursuant to Section 11-35-1520(7)"; and in (2), rewrote (a), in (iii), inserted "subitems", in (iv), in the first sentence, inserted "subitems" and added the second and third sentences, and added (5).

SECTION 11-35-3035. Errors and omissions insurance.

Regulations shall be promulgated that specify when a governmental body shall require offerors to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in Section 11-35-3005(1)(a), (d), (e), and (f).

HISTORY: 2008 Act No. 174, Section 5.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

SECTION 11-35-3037. Other forms of security.

The governmental body may require one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately or as one element of another project delivery method:

(a) operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations;

(b) letters of credit in an amount appropriate to cover the cost to the governmental body of preventing infrastructure service interruptions for a period up to twelve months; and

(c) appropriate written guarantees from the contractor, or depending upon the circumstances, from a parent corporation, to secure the recovery of reprocurement costs to the governmental body if the contractor defaults in performance.

HISTORY: 2008 Act No. 174, Section 5.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

SECTION 11-35-3040. Contract clauses and their administration.

(1) Contract Clauses. State construction contracts and subcontracts may include clauses providing for adjustments in prices, time of performance, and other appropriate contract provisions including, but not limited to:

(a) the unilateral right of a governmental body to order in writing:

(i) all changes in the work within the general scope of the contract; and

(ii) all changes in the time of performance of the contract which do not alter the general scope of the contract work;

(b) variations occurring between estimated quantities of work in the contract and actual quantities;

(c) suspension of work ordered by the governmental body;

(d) site conditions differing from those indicated in the contract or ordinarily encountered.

(2) Price Adjustments.

(a) Adjustments in price pursuant to clauses adopted or promulgated pursuant to Section 11-35-2010 must be computed and documented with a written determination. The price adjustment agreed upon must approximate the actual cost to the contractor and all costs incurred by the contractor must be justifiably compared with prevailing industry standards, including reasonable profit. Costs must be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon after that as practicable, and must be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor:

(i) by unit prices specified in the contract or subsequently agreed upon;

(ii) by the costs attributable to the events or situations under those clauses with adjustment of profits or fee, all as specified in the contract or subsequently agreed upon;

(iii) by agreement on a fixed price adjustment;

(iv) in another manner as the contracting parties may mutually agree; or
(v) in the absence of agreement by the parties, through unilateral determination by the governmental body of the costs attributable to the events or situations under those clauses, with adjustment of profit or fee, all as computed by the governmental body in accordance with applicable sections of the regulations issued pursuant to this chapter and subject to the provisions of Article 17 of this chapter.

(b) A contractor is required to submit cost or pricing data if an adjustment in contract price is subject to the provisions of Section 11-35-1830.

(3) Additional Contract Clauses. The construction contracts and subcontracts may include clauses providing for appropriate remedies that cover as a minimum:

(a) specified excuses for delay or nonperformance;

(b) termination of the contract for default;

(c) termination of the contract in whole or in part for the convenience of the governmental body.

(4) Modification of Required Clauses. The chief procurement officer may vary the clauses promulgated by the board pursuant to subsection (1) and subsection (3) of this section for inclusion in a particular construction contract if the variations are supported by a written determination that states the circumstances justifying the variations, if notice of a material variation is stated in the invitation for bids.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 42; 2019 Act No. 41 (S.530), Section 44, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 44, in (1)(a), in (i) and (ii), inserted "general" and made a nonsubstantive change.

SECTION 11-35-3050. Cost principles regulations for construction contractors.

The board may promulgate regulations setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under provisions in construction contracts which provide for the reimbursement of costs.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-3060. Fiscal responsibility.

Every contract modification, change order, or contract price adjustment under a construction contract with the State is subject to Sections 2-47-40 and 2-47-50.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 43.

SECTION 11-35-3070. Approval of architectural, engineering, or construction changes which do not alter general scope or intent or exceed approved budget.

Consistent with any applicable regulation of the board, a governmental body may approve and pay for amendments to architectural/engineering contracts and change orders to construction contracts, within the governmental body's authority, which do not alter the general scope or intent of the project and which do not exceed the previously approved project budget.

HISTORY: 2008 Act No. 174, Section 6; 2019 Act No. 41 (S.530), Section 45, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 45, substituted "Consistent with any applicable regulation of the board, a" for "A", "authority" for "certification" and "general scope" for "original scope".

Subarticle 5

Architect-Engineer, Construction Management, and Land Surveying Services

SECTION 11-35-3210. Policy.

Policy. It is the policy of this State to announce publicly all requirements for architect-engineer, construction management, and land surveying services and to negotiate contracts for such services on the basis of demonstrated competence and qualification for the particular type of services required and at fair and reasonable prices.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 32; 1997 Act No. 153, Section 1; 2008 Act No. 174, Section 15.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

SECTION 11-35-3215. Preference for resident design service; definitions; exceptions.

(A) As used in this section:

(1) "Design services" means architect-engineer, construction management, or land surveying services as defined in Section 11-35-2910 and awarded pursuant to Section 11-35-3220.

(2) "Resident" means a business that employs, either directly or through consultants, an adequate number of persons domiciled in South Carolina to perform a majority of the design services involved in the procurement.

(B) A business responding to an invitation involving design services shall submit a certification with its response stating whether the business is a resident for purposes of the procurement. Submission of a certification under false pretenses is grounds for suspension or debarment.

(C) An award to a nonresident of a contract involving design services must be supported by a written determination explaining why the award was made to the selected firm.

(D) In an evaluation conducted pursuant to Section 11-35-3220, a resident firm must be ranked higher than a nonresident firm if the agency selection committee finds the two firms otherwise equally qualified.

(E) This section does not apply to a procurement if either the procurement does not involve construction or the design services are a minor accompaniment to a contract for nondesign services.

HISTORY: 2006 Act No. 375, Section 1; 2009 Act No. 72, Section 4.

Editor's Note

2009 Act No. 72, Section 6 provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued after that date; except that Sections 1, 2, and 4 of this act take effect upon and apply to solicitations issued after the first Monday in September following approval by the Governor."

SECTION 11-35-3220. Qualifications based selection procedures.

(1) Agency Selection Committee. A governmental body shall establish its own architect-engineer, construction management, and land surveying services selection committee, referred to as the agency selection committee, which must be composed of those individuals the agency head determines to be qualified to make an informed decision as to the most competent and qualified firm for the proposed project. The head of the governmental body or his qualified responsible designee shall sit as a permanent member of the agency selection committee for the purpose of coordinating and accounting for the committee's work. To assist an agency selection committee in the selection of firms to be employed for significant or highly technical projects and to facilitate prompt selections, the agency selection committee may invite the State Engineer or his designee to sit as a nonvoting member of the committee.

(2)(a) Advertisement of Project Description. The agency selection committee is responsible for:

- (i) developing a description of the proposed project;
- (ii) enumerating all required professional services for that project; and
- (iii) preparing a formal invitation to firms for submission of information.

(b) The invitation must include, but not be limited to, the project title, the general scope of work, a description of all professional services required for that project, the submission deadline, and how interested firms may apply for consideration. The agency selection committee shall file a copy of the project description and the invitation with the State Engineer's Office. Adequate notice of the invitation must be given at a reasonable time before the date set forth in it for receipt of responses. The invitation must be advertised formally in an official state government publication. The manner in which this official state government publication must be published, the content of the publication itself, the frequency of the publication, the method for subscription to the publication, and the manner by which the publication is distributed must be established by regulation of the board.

(3) Response to Invitation. The date for submission of information from interested persons or firms in response to an invitation must not be less than fifteen days after publication of the invitation. Interested architect-engineer, construction management, and land surveying persons or firms shall respond to the invitation with the submission of a current and accurate Federal Standard Form 330, Architect-Engineer and Related Services Questionnaire, or successor form or similar information as the State Engineer may specify in the Manual for Planning and Execution of State Permanent Improvement Projects, Part II, and other information that the particular invitation may require.

(4) Interviews with Interested Firms. Following receipt of information from all interested persons and firms, the agency selection committee shall hold interviews with at least three persons or firms who respond to the committee's advertisement and who are considered most qualified on the basis of information available before the interviews. A list of firms selected for interview must be sent to all firms that submitted information in response to the advertisement, before the date selected for the interviews. If less than three persons or firms respond to the advertisement, the committee shall hold interviews with those that did respond. The agency selection committee's determination as to which are to be interviewed must be in writing and based upon its review and evaluation of all submitted materials. The written report of the committee must list specifically the names of all persons and firms that responded to the advertisement and enumerate the reasons of the committee for selecting those to be interviewed. The purpose of the interviews is to provide the further information that may be required by the agency selection committee to fully acquaint itself with the relative qualifications of the several interested firms.

(5) Selection and Ranking of the Three Most Qualified.

(a) The agency selection committee shall evaluate each of the persons or firms interviewed in view of their:

- (i) past performance;
- (ii) the ability of professional personnel;
- (iii) demonstrated ability to meet time and budget requirements;
- (iv) location and knowledge of the locality of the project if the application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project;
- (v) recent, current, and projected workloads of the firms;
- (vi) creativity and insight related to the project;

(vii) related experience on similar projects;
(viii) volume of work awarded by the using agency to the person or firm during the previous five years, with the objective of effectuating an equitable distribution of contracts by the State among qualified firms including Minority Business Enterprises certified by the South Carolina Office of Small and Minority Business Assistance and firms that have not had previous state work; and
(ix) any other special qualification required pursuant to the solicitation of the using agency.

(b) Based upon these evaluations, the agency selection committee shall select the three persons or firms that, in its judgment, are the best qualified, ranking the three in priority order. The agency selection committee's report ranking the three chosen persons or firms must be in writing and include data substantiating its determinations.

(6) Notice of Selection and Ranking. When it is determined by the agency that the ranking report is final, written notification of the highest ranked person or firm must be sent immediately to all firms interviewed.

(7) Negotiation of Contract. The governing body of the governmental body or its designee shall negotiate a contract for services with the most qualified person or firm at a compensation that is fair and reasonable to the State. If the governing body of the governmental body or its designee is unable to negotiate a satisfactory contract with this person or firm, negotiations must be terminated formally. Negotiations must commence in the same manner with the second and then the third most qualified until a satisfactory contract is negotiated. If an agreement is not reached with one of the three, additional persons or firms in order of their competence and qualifications must be selected after consultation with the agency selection committee, and negotiations must be continued in the same manner until agreement is reached.

(8) State Engineer's Office Review. The head of the governmental body shall submit the following documents to the State Engineer's Office for its review:

(a) the written report of the agency selection committee, listing the persons or firms that responded to the invitation to submit information and enumerating the reasons of the committee for selecting the particular ones to be interviewed;

(b) the written ranking report of the agency selection committee and all data substantiating the determinations made in that report; and

(c) the tentative contract between the governmental body and the selected person or firm.

(9) Approval or Disagreement by State Engineer's Office. The State Engineer's Office has ten days to review the data submitted by the agency selection committee, and to determine its position with respect to the particular person or firm recommended for approval by the agency. If the State Engineer's Office disagrees with the proposal, it may contest the proposal by submitting the matter to the board for decision. In the event of approval, the State Engineer's Office shall notify immediately in writing the governmental body and the person or firm selected of the award and authorize the governmental body to execute a contract with the selected person or firm. In the event of disagreement, the State Engineer's Office immediately shall notify the governmental body in writing of its intention to contest the ranking and the reasons for it. All contract negotiations by the governing body must be suspended pending a decision by the board concerning a contested ranking. The board shall hear contests at its next regularly scheduled meeting after notification of the governmental body. If the board rules in support of the State Engineer's Office position, the governmental body shall submit the name of another person or firm to the State Engineer's Office for consideration, selected in accordance with the procedures prescribed in this section. If the board rules in support of the governmental body, the governmental body must be notified in writing and authorized to execute a contract with the selected person or firm.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 33; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 44; 2008 Act No. 174, Section 16; 2019 Act No. 41 (S.530), Section 46, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 46, in (2)(b), inserted the third sentence; and in (3), in the third sentence, substituted "Form 330" for "Form 254", and "or successor form or similar information as the State Engineer may specify in the Manual for Planning and Execution of State Permanent Improvement Projects, Part II" for "and Federal Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project, or their successor forms or similar information as the board may prescribe by regulation".

SECTION 11-35-3230. Exception for small architect-engineer, construction management and land surveying services contract.

(1) Procurement Procedures for Certain Contracts. A governmental body securing architect-engineer, construction management, or land surveying services which are estimated not to exceed fifty thousand dollars may award contracts by direct negotiation and selection, taking into account:

- (a) the nature of the project;
- (b) the proximity of the architect-engineer or land surveying services to the project;
- (c) the capability of the architect, engineer, or land surveyor to produce the required service within a reasonable time;
- (d) past performance; and
- (e) ability to meet project budget requirements.

(2) Maximum Value of Small Contracts with One Person or Firm. The total value of contracts awarded to a single architectural engineering, construction management, or land surveying firm by a single governmental body pursuant to subsection (1) may not exceed one hundred fifty thousand dollars in a twenty-four-month period. Persons or firms seeking to render professional services pursuant to this section shall furnish the governmental body with whom the firm is negotiating a list of professional services, including fees paid for them, performed for the governmental body during the fiscal year immediately preceding the fiscal year in which the negotiations are occurring and during the fiscal year in which the negotiations are occurring.

(3) Submission of Contracts to State Engineer's Office. Copies of contracts, including the negotiated scope of services and fees, awarded pursuant to this section must be submitted to the State Engineer's Office for information.

(4) Splitting of Larger Projects Prohibited. A governmental body may not break a project into small projects for the purpose of circumventing the provisions of Section 11-35-3220 and this section.

(5) When negotiating a contract pursuant to this section, a governmental body may not negotiate with a firm unless any unsuccessful negotiations with a different firm have been concluded in writing. Once negotiations with a firm have been concluded, negotiations may not be reopened.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 34; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 45; 2008 Act No. 174, Section 17; 2019 Act No. 41 (S.530), Section 47, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 47, rewrote the section.

SECTION 11-35-3240. Manual for planning and execution of state permanent improvements.

As relates to this code and the ensuing regulations, a "Manual for Planning and Execution of State Permanent Improvements" may be published by the board or its designee for use by governmental bodies and included, by reference, in the regulations of the board. The manual may be revised as the board considers necessary, except that proposed changes are not effective until the board has provided the public at least sixty days to make written comments after notice of the proposed changes is published in South Carolina Business Opportunities.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 46.

SECTION 11-35-3245. Architect, engineer, or construction manager; performance of other work.

(a) An architect or engineer performing design work, or a construction manager performing construction management services, both as described in Section 11-35-2910(1) and (3), under a contract awarded pursuant to the provisions of Section 11-35-3220 or Section 11-35-3230, may not perform other work, by later amendment or separate contract award, on that project as a contractor or subcontractor either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest.

(b) For purposes of this section, safety compliance and other incidental construction support activities performed by the construction manager are not considered work performed as a contractor or subcontractor. If the construction manager performs or is responsible for safety compliance and other incidental construction support activities, and these support activities are in noncompliance with the provisions of Section 41-15-210, then the construction management firm is subject to all applicable fines and penalties.

(c) This section applies only to procurements for construction using the design-bid-build project delivery method.

HISTORY: 1991 Act No. 4, Section 1; 1994 Act No. 345, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 47; 2008 Act No. 174, Section 18.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

ARTICLE 10

Indefinite Quantity Contracts

SECTION 11-35-3305. Establishment of indefinite quantity contracts.

With the approval of the appropriate chief procurement officer, and in accordance with any applicable regulations, a procurement officer may establish contracts providing for an indefinite quantity, within state maximum or minimum limits, of specified supplies, service, or information technology, to be furnished during a fixed period, and that provide for the issuance of orders for delivery or performance of individual requirements during the period of the contract. The appropriate chief procurement officer may establish the contracts on behalf of any governmental body or for use by any public procurement unit.

HISTORY: 2019 Act No. 41 (S.530), Section 48, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

SECTION 11-35-3310. Indefinite quantity contracts.

(1) General Applicability. Indefinite quantity contracts may be awarded on an as-needed basis for architectural-engineering and land-surveying services pursuant to Section 11-35-3220.

(2) Architectural-Engineering and Land-Surveying Services. When architectural-engineering and land-surveying services contracts are awarded, each contract must be limited to a total expenditure of three hundred thousand dollars for a two-year period with individual project expenditures not to exceed one hundred thousand dollars; however, for public institutions of higher learning, and for technical college service contracts authorized by the State Board for Technical and Comprehensive Education, these limits shall be five hundred thousand dollars for total expenditures and two hundred thousand dollars for individual expenditures within the time periods specified.

(3) Small Indefinite Quantity Contracts. Small indefinite quantity contracts for architectural-engineering and land-surveying services may be procured as provided in Section 11-35-3230. A contract established under this section must be subject to Section 11-35-3230, and any applicable regulations.

HISTORY: 1993 Act No. 178, Section 35; 1997 Act No. 153, Section 1; 2008 Act No. 174, Section 19; 2011 Act No. 74, Pt V, Section 7, eff August 1, 2011; 2019 Act No. 41 (S.530), Section 49, eff May 13, 2019.

Editor's Note

2008 Act No. 174, Section 21, provides as follows:

"This act takes effect upon approval by the Governor and applies to solicitations issued on or after January 1, 2008."

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

The 2011 amendment rewrote the section.

2019 Act No. 41, Section 49, in (1), in the second sentence, substituted "quantity contracts" for "delivery contracts" and deleted "construction services pursuant to the procedures in Section 11-35-3015(2)(b) and for" following "as-needed basis for", deleted (a), which related to construction services, and redesignated (b) as (2) and (2) as (3); and in (3), in the first sentence, substituted "Quantity Contracts" for "Delivery Contracts", in the second sentence, substituted "quantity contracts" for "delivery contracts" and in the third sentence, substituted "applicable regulations" for "regulations promulgated except that for public institutions of higher learning, and for technical college delivery contracts authorized by the State Board for Technical and Comprehensive Education, the individual and total contract limits shall be fifty thousand and one hundred fifty thousand dollars, respectively".

SECTION 11-35-3320. Task order contracts.

(A) The term "task order contract" means a contract that does not procure or specify a firm quantity of services, other than a minimum or maximum quantity, and that provides for the issuance of task orders for the performance of tasks during the period of the contract. Subject to the requirements of this section and other applicable law, a governmental body may enter into task order contracts to acquire construction services when the exact time or exact quantities of future tasks are not known at the time of contract award. In accordance with Section 11-35-4810, the State Engineer may award task order contracts on behalf of any governmental body and for use by any state public procurement unit authorized by the State Engineer.

(B) At any given time, a governmental body may enter into task order contracts with four businesses for each geographic area for each licensing classification and subclassification for construction. Licensing

classification and subclassification has the meaning provided by Chapter 11, Title 40. Except as otherwise provided in this section, a task order contract for construction must be procured as provided in Section 11-35-1530, not including paragraph (4) (Request for Qualifications) or paragraph (8) (Negotiations). All evaluations must be conducted by a panel composed of at least three members. A governmental body shall invite the State Engineer or his designee to serve as one of the panel members. Except as provided by regulation, award must be made to the four responsible offerors whose proposals are determined in writing to be the most advantageous to the State, taking into consideration the evaluation factors set forth in the request for proposals. The contract file must contain the basis on which the awards will be made and must be sufficient to satisfy external audit. Procedures and requirements for the notification of intent to award the contracts must be the same as those provided in Section 11-35-1520(1) (Award). Section 11-35-3023 does not apply to contracts awarded pursuant to this section.

(C) Limitations on task order contracts.

(1) A task order contract awarded for geographic area may not be used to perform services at a different geographic area.

(2) A task order contract may not exceed five years, including extensions.

(3) Total expenditures pursuant to all task order contracts for construction resulting from a single solicitation may not exceed four million dollars.

(4) The total construction cost of a single project performed using multiple task orders or task orders in combination with other types of contracts may not exceed five hundred thousand dollars. Projects may not be divided artificially to avoid this limitation.

(5) A single project must not be performed using task order contracts for construction in combination with contracts awarded pursuant to Section 11-35-1550. Standards for determining whether work constitutes a single project must be established in the Manual for Planning and Execution of State Permanent Improvements.

(D) Limitations on task orders.

(1) A task order must clearly specify all tasks to be performed or property to be delivered under the order so the full price for the performance of the work can be established when the order is placed. All task orders must be issued on a fixed-price basis.

(2) A quote request for construction must be provided to all task order contractors. A task order for construction may not be issued unless the governmental body receives at least two responsive, bona fide, fixed-price quotes. Any award must be issued to the contractor submitting the lowest responsive quote.

(3) All task orders must be issued within the period of the contract and must be within the scope and maximum value of the contract.

(4) A task order for construction may not be less than ninety thousand dollars and may not exceed three hundred fifty thousand dollars. Work may not be aggregated or divided artificially in order to avoid these limits.

(E) Any solicitation for a task order contract must include the following:

(1) the period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any;

(2) the maximum dollar value of the services to be procured under the contract;

(3) the minimum and maximum dollar value of the services to be procured under a single task order;

(4) a description that reasonably describes the licensing classification and the general scope, nature, complexity, and purposes of the services to be procured under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(5) the procedures that the governmental body will use for requesting fixed price quotes and for issuing orders, a restriction on communications between contractors regarding pending quote requests, and a requirement that all contractors must respond to all quote requests;

(6) the geographic area to which the task order contract applies. Ordinarily, a geographically contiguous area should not be subdivided; and

(7) the number of task order contracts to be awarded.

(F) Every award of a task order contract must be approved by the Office of the State Engineer and is subject to procedures or guidelines established in the Manual for Planning and Execution of State Permanent Improvements. A governmental body shall submit to the Office of the State Engineer any reports required by the Manual for Planning and Execution of State Permanent Improvements.

(G) Administrative review under Article 17 is not available for the award of an individual task order, except for a protest of the award of a task order on the ground that the order increases the scope, period, or maximum value of the task order contract under which the order is issued.

HISTORY: 2019 Act No. 41 (S.530), Section 50, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

ARTICLE 11

Modifications and Termination of Contracts for Supplies and Services

SECTION 11-35-3410. Contract clauses and their administration.

(1) Contract Clauses. The board may promulgate regulations requiring the inclusion in state supplies, services, and information technology contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

(a) the unilateral right of a governmental body to order in writing changes in the work within the general scope of the contract and temporary stopping of the work or delaying performance; and

(b) variations occurring between estimated quantities of work in a contract and actual quantities.

(2)(a) Price Adjustments. Adjustments in price pursuant to clauses promulgated under subsection (1) of this section shall be computed and documented with a written determination. The price adjustment agreed upon shall approximate the actual cost to the contractor, and all costs incurred by the contractor shall be justifiable compared with prevailing industry standards, including a reasonable profit. Costs shall be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon thereafter as practicable, and shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor:

(i) by unit prices specified in the contract or subsequently agreed upon;

(ii) by the costs attributable to the events or situations under such clauses with adjustment for profit or fee, all specified in the contract or subsequently agreed upon;

(iii) by agreement on a fixed price adjustment;

(iv) by rates determined by the Public Service Commission and set forth in the applicable tariffs;

(v) in such other manner as the contracting parties may mutually agree; or

(vi) in the absence of agreement by the parties, through unilateral determination by the governmental body of the costs attributable to the events or situations under such clauses, with adjustment of profit or fee, all as computed by the governmental body in accordance with applicable sections of the regulations issued under Article 13 of this chapter, if any, and subject to the provisions of Article 17 of this chapter.

(b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 11-35-1830.

(3) Additional Contract Clauses. The board shall be authorized to promulgate regulations requiring the inclusion in state supplies, services, and information technology contracts of clauses providing for appropriate remedies and covering the following subjects:

(a) specified excuses for delay or nonperformance;

(b) termination of the contract for default; and

(c) termination of the contract in whole or in part for the convenience of the governmental body.

(4) Modification of Clauses. The chief procurement officer may vary the clauses promulgated by the board under subsection (1) and subsection (3) of this section for inclusion in any particular state contract; provided, that any variations are supported by a written determination that states the circumstances justifying such variations; and provided, further, that notice of any such material variations shall be stated in the invitation for bids or request for proposals.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 48; 2019 Act No. 41 (S.530), Sections 51.A, 51.B, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 51.A, in (1)(a), substituted "general scope of the contract" for scope of the contract.

2019 Act No. 41, Section 51.B, in (2)(a)(vi), inserted ", if any,".

ARTICLE 13 Cost Principles

SECTION 11-35-3510. Cost principles required for supplies and services contracts.

The board may promulgate regulations setting forth cost principles that must be used to determine the allowability of incurred costs for the purpose of reimbursing costs under provisions in supplies, services, and information technology contracts that provide for the reimbursement of costs.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 49.

ARTICLE 15 Supply Management

Subarticle 1

Warehouses and Inventory

SECTION 11-35-3620. Management of warehouses and inventory.

Until such time as the General Assembly may act upon the warehousing and inventory management plan, all powers and responsibilities for management of warehouses and inventory shall be vested in the agency owning, renting, or leasing the warehouses or inventory.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

Subarticle 3

Regulations For Sale, Lease, Transfer, and Disposal

SECTION 11-35-3810. Regulations for sale, lease, transfer and disposal.

Subject to existing provisions of law, the board shall promulgate regulations governing:

(1) the sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate methods designated by such regulations;

(2) the transfer of excess supplies between agencies and departments.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-3820. Allocation of proceeds for sale or disposal of surplus supplies.

Except as provided in Section 11-35-3830 and the regulations pursuant thereto, the sale of all state-owned supplies, or personal property not in actual public use must be conducted and directed by the Department of Administration. The sales must be held at such places and in a manner as in the judgment of the department is most advantageous to the State. Unless otherwise determined, sales must be by either public auction or competitive sealed bid to the highest bidder. Each governmental body shall inventory and report to the division all surplus personal property not in actual public use held by that governmental body for sale. The department shall deposit the proceeds from the sales, less expense of the sales, in the state general fund or as otherwise directed by regulation. This policy and procedure applies to all governmental bodies unless exempt by law.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 50; 2014 Act No. 121 (S.22), Pt V, Section 7.U, eff July 1, 2015; 2019 Act No. 41 (S.530), Section 52, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2014 Act No. 121, Section 7.U, substituted "Division of General Services of the Department of Administration" for "designated board office"; substituted "Division of General Services" for "designated board office"; substituted "report to the division" for "report to the designated board office"; and substituted "The division shall deposit" for "The designated board office shall deposit".

2019 Act No. 41, Section 52, in the first sentence, deleted "Section 11-35-1580 and" following "Except as provided in", substituted "thereto" for "to them", and deleted "Division of General Services of the" preceding "Department of Administration", in the second sentence, substituted "department" for "Division of General Services", and in the fifth sentence, substituted "department" for "division".

SECTION 11-35-3830. Trade-in sales.

(1) Trade-in Value. Unless otherwise provided by law, governmental bodies may trade-in personal property, the trade-in value of which may be applied to the procurement or lease of like items. The trade-in value of such personal property shall not exceed an amount as specified in regulations promulgated by the board.

(2) Approval of Trade-In Sales. When the trade-in value of personal property of a governmental body exceeds the specified amount, the Department of Administration shall have the authority to determine whether:

(a) the subject personal property shall be traded in and the value applied to the purchase of new like items; or

(b) the property shall be classified as surplus and sold in accordance with the provisions of Section 11-35-3820. The department's determination shall be in writing and be subject to the provisions of this chapter.

(3) Record of Trade-In Sales. Governmental bodies shall submit quarterly to the Division of Procurement Services a record listing all trade-in sales made under subsections (1) and (2) of this section, including any applicable written determinations.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 53, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 53, in (2), substituted "Department of Administration" for "board", and in (b), in the second sentence, substituted "The department's" for "The board's"; and in (3), substituted "Division of Procurement Services" for "materials management officer" and inserted ", including any applicable written determinations".

SECTION 11-35-3840. Licensing for public sale of certain publications and materials.

The Division of Procurement Services may license for public sale publications, including South Carolina Business Opportunities, materials pertaining to training programs, and information technology products that are developed during the normal course of its activities. The items must be licensed at reasonable costs established in accordance with the cost of the items. All proceeds from the sale of the publications and materials must be deposited in the State Treasury in a special account and expended only for the costs of providing the goods and services, and such funds may be retained and expended for the same purposes.

HISTORY: 1982 Act No. 466, Part II, Section 26; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 51; 2014 Act No. 121 (S.22), Pt V, Section 7.U, eff July 1, 2015; 2019 Act No. 41 (S.530), Section 54, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2014 Act No. 121, Section 7.U, substituted "The division" for "The State Budget and Control Board", and substituted "normal course of its activities" for "normal course of the board's activities".

2019 Act No. 41, Section 54, in the first sentence, substituted "Division of Procurement Services" for "division", and rewrote the third sentence.

SECTION 11-35-3850. Sale of unserviceable supplies.

Governmental bodies approved by the Department of Administration may sell any supplies owned by it after the supplies have become entirely unserviceable and can properly be classified as "junk", in accordance with procedures established by the department. All sales of unserviceable supplies by the governmental body must be made in public to the highest bidder, after advertising for fifteen days, and the funds from the sales must be credited to the account of the governmental body owning and disposing of the unserviceable supplies.

HISTORY: 2006 Act No. 376, Section 2; 2019 Act No. 41 (S.530), Section 55, eff May 13, 2019.

Editor's Note

This section was formerly codified as Section 11-35-4020.

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 55, in the first sentence, substituted "Department of Administration" for "board" and "department" for "designated board office".

ARTICLE 17

Legal and Contractual Remedies

Subarticle 1

Administrative Resolution Of Controversies

SECTION 11-35-4210. Right to protest; procedure; duty and authority to attempt to settle; administrative review; stay of procurement.

(1) Right to Protest.

(a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with a solicitation shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) within fifteen days of the date of issuance of the Invitation For Bids Request for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Requests for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.

(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall notify the appropriate chief procurement officer in writing of its intent to protest within seven business days of the date that award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code. Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract and has timely notified the appropriate chief procurement officer of its intent to protest, may protest to the appropriate chief procurement officer in the manner stated in subsection (2) within fifteen days of the date award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code; except that a matter that could have been raised pursuant to subitem (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(c) Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract pursuant to Section 11-35-1560 or Section 11-35-1570 shall notify the appropriate chief procurement officer in writing of its intent to protest within five business days of the date that award or notification of intent to award, whichever is earlier, is posted in accordance with this code. Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of such a contract and has timely notified the appropriate chief procurement officer of its intent to protest, may protest to the appropriate chief procurement officer in the manner stated in subsection (2) within fifteen days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to subitem (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(d) The rights and remedies granted by subsection (1) and Section 11-35-4410(1)(b) are not available for contracts with an actual or potential value of up to fifty thousand dollars.

(2) Protest Procedure. A protest pursuant to subsection (1) must be in writing, filed with the appropriate chief procurement officer, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The protest must be received by the appropriate chief procurement officer within the time provided in subsection (1).

(3) Duty and Authority to Attempt to Settle Protests. Before commencement of an administrative review as provided in subsection (4), the appropriate chief procurement officer, the head of the purchasing agency, or their designees may attempt to settle by mutual agreement a protest of an aggrieved bidder, offeror, contractor, or subcontractor, actual or prospective, concerning the solicitation or award of the contract. The appropriate chief procurement officer has the authority to approve any settlement reached by mutual agreement.

(4) Administrative Review and Decision. If in the opinion of the appropriate chief procurement officer, after reasonable attempt, a protest cannot be settled by mutual agreement, the appropriate chief procurement officer shall conduct promptly an administrative review. The appropriate chief procurement officer or his designee shall commence the administrative review no later than fifteen business days after the deadline for receipt of a protest has expired and shall issue a decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

(5) Notice of Decision. A copy of the decision under subsection (4) along with a statement of appeal rights pursuant to Section 11-35-4210(6) must be mailed or otherwise furnished immediately to the protestant and other party intervening. The appropriate chief procurement officer, or his designee, also shall post a copy of the decision at a date and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section 11-35-4210(6).

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

(7) Automatic Stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the appropriate chief procurement officer, after consultation with the head of the using agency, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the interest of the State.

(8) Notice of Chief Procurement Officer Address. Notice of the address of the appropriate chief procurement officer must be included in every notice of an intended award and in every invitation for bids, request for proposals, or other type solicitation.

HISTORY: 1981 Act No. 148, Section 1; 1985 Act No. 109, Section 2; 1993 Act No. 178, Section 36; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 52; 2019 Act No. 41 (S.530), Section 56, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 56, rewrote (1); in (2), deleted the (a) identifier, in the second sentence, substituted "subsection (1)" for "subsection (1)(a)", and deleted (b), which related to requirements for protests pursuant to subsection (1)(b); in (3), in the third sentence, deleted ", or his designee" following "chief procurement officer"; and in (7), in the second sentence, substituted "interest of the State" for "best interests of the State".

SECTION 11-35-4215. Posting of bond or irrevocable letter of credit.

The agency may request that the appropriate chief procurement officer require any bidder or offeror who files an action protesting the intended award or award of a contract solicited under Article 5 of this code and valued at one million dollars or more to post with the appropriate chief procurement officer a bond or irrevocable letter of credit payable to the State of South Carolina in an amount equal to one percent of the total potential value of the contract as determined by the appropriate chief procurement officer. The chief procurement officer's decision to require a bond or irrevocable letter of credit is not appealable under Article 17. The bond or irrevocable letter of credit shall be conditioned upon the payment of all reasonable reimbursement costs which may be adjudged against the bidder or offeror filing the protest in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. For protests of sole source or emergency procurements, the bond or irrevocable letter of

credit shall be in an amount equal to one percent of the requesting agency's estimate of the contract amount for the sole source or emergency procurement requested. In lieu of a bond or irrevocable letter of credit, the appropriate chief procurement officer may accept a cashier's check or money order in the amount of the bond or irrevocable letter of credit. If, after completion of the administrative hearing process and any appellate court proceedings, the agency prevails, it may request that the Procurement Review Panel allow it to recover all reasonable reimbursement costs and charges associated with the protest which shall be included in the final order or judgment, excluding attorney's fees. Upon payment of such costs and charges by the bidder or offeror protesting the intended award or award of a contract, the bond, irrevocable letter of credit, cashier's check, or money order shall be returned to the bidder or offeror. Failure to pay such costs and charges by the bidder or offeror protesting the intended award or award of a contract shall result in the forfeiture of the bond, irrevocable letter of credit, cashier's check, or money order to the extent necessary to cover the payment of all reasonable reimbursement costs adjudged against the protesting bidder or offeror. If the bidder or offeror prevails in the protest, the cost of providing the bond, irrevocable letter of credit or cashier's check may be sought from the agency requesting the bond or irrevocable letter of credit; provided that in no event may the amount recovered exceed fifteen thousand dollars.

HISTORY: 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 57, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 57, in the second sentence, substituted "Article 17" for "Section 11-35-4210", in the fourth sentence, deleted "intended award or award of a contract of the purchasing agency's request for" following "For protests of", and in the ninth sentence, inserted "; provided that in no event may the amount recovered exceed fifteen thousand dollars".

SECTION 11-35-4220. Authority to debar or suspend.

(1) Authority. After reasonable notice to the person or firm involved, and a reasonable opportunity for that person or firm to be heard, the appropriate chief procurement officer has the authority to debar a person for cause from consideration for award of contracts or subcontracts. The appropriate chief procurement officer has authority to suspend a person or firm from consideration for award of contracts or subcontracts during an investigation if there is probable cause for debarment. The period of debarment or suspension is as prescribed by the appropriate chief procurement officer.

(2) Causes for Debarment or Suspension. The causes for debarment shall include, but not be limited to:

(a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

(b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or another offense indicating a lack of business integrity or professional honesty which currently, seriously, and directly affects responsibility as a state contractor;

(c) conviction under state or federal antitrust laws arising out of the submission of bids or proposals;

(d) violation of contract provisions, as set forth below, of a character regarded by the appropriate chief procurement officer to be so serious as to justify debarment action:

(i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; except, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor must not be considered a basis for debarment;

(e) violation of an order of a chief procurement officer or the Procurement Review Panel;

(f) violation of the Ethics, Government Accountability, and Campaign Reform Act of 1991, as amended, as determined by the State Ethics Commission, as an incident to obtaining or attempting to obtain a public contract or subcontract, or in the performance of the contract, or subcontract; and

(g) any other cause the appropriate chief procurement officer determines to be so serious and compelling as to affect responsibility as a state contractor or subcontractor, including debarment by another governmental entity for any cause listed in this subsection.

(3) Decision. The appropriate chief procurement officer shall issue a written decision to debar or suspend within ten days of the completion of his administrative review of the matter. The decision must state the action taken, the specific reasons for it, and the period of debarment or suspension, if any.

(4) Notice of Decision. A copy of the decision pursuant to subsection (3) and a statement of appeal rights pursuant to Section 11-35-4220(5) must be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening. The appropriate chief procurement officer also shall post a copy of the decision at a time and place communicated to all parties participating in the administrative review and the posted decision must indicate the date of posting on its face and shall be accompanied by a statement of the right to appeal provided in Section 11-35-4220(5).

(5) Finality of Decision. A decision pursuant to subsection (3) is final and conclusive, unless fraudulent or unless the debarred or suspended person requests further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1), within ten days of the posting of the decision in accordance with Section 11-35-4220(4). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body must have the opportunity to participate fully in any review or appeal, administrative or legal.

(6) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organization elements, or commodities. The debarment official may extend the debarment decision to include any principals and affiliates of the contractor if they are specifically named and given written notice of the proposed debarment and an opportunity to respond. For purposes of this section, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indications of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment. For purposes of this section, the term "principals" means officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including, but not limited to, a general manager, plant manager, head of a subsidiary, division, or business segment, and similar positions.

(7)(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or

acquiescence of these contractors. Acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(8) The chief procurement officers shall maintain and update a list of debarred and suspended persons, and shall make the list publicly available.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 36; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 53; 2019 Act No. 41 (S.530), Section 58, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 58, in (1), in the second sentence, deleted "if doing so is in the best interest of the State and there is probable cause for debarment" from the end, in the third sentence, substituted "has authority to" for "also may", and made nonsubstantive changes; in (2), deleted "or suspension" following "debarment", inserted (f), redesignated (f) as (g), and made a nonsubstantive change; and added (7) and (8).

SECTION 11-35-4230. Authority to resolve contract and breach of contract controversies.

(1) Applicability. This section applies to controversies between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, concerning a contract governed by the provisions of the South Carolina Consolidated Procurement Code. On behalf of any governmental body or South Carolina public procurement unit that participates in a multiagency, term, or cooperative contract awarded by or under the authority of a chief procurement officer, the Division of Procurement Services may initiate and pursue resolution of any contract controversy which arises under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

(2) Request for Resolution; Time for Filing. Either the contracting state agency or the contractor or subcontractor, when the subcontractor is the real party in interest, may initiate resolution proceedings before the appropriate chief procurement officer by submitting a request for resolution to the appropriate chief procurement officer in writing setting forth the specific nature of the controversy and the specific relief requested with enough particularity to give notice of every issue to be decided. A request for resolution of contract controversy must be filed within one year after the date the contractor last performs work under the contract or within one year after the claim accrues, whichever is later; except that in the case of latent defects a request for resolution of a contract controversy must be filed within three years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.

(3) Duty and Authority to Attempt to Settle Contract Controversies. Before commencement of an administrative review as provided in subsection (4), the appropriate chief procurement officer or his designee shall attempt to settle by mutual agreement a contract controversy brought pursuant to this section. The appropriate chief procurement officer has the authority to approve any settlement reached by mutual agreement.

(4) Administrative Review and Decision. If, in the opinion of the appropriate chief procurement officer, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the appropriate chief procurement officer or his designee promptly shall conduct an administrative review and issue a decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

(5) Notice of Decision. A copy of the decision pursuant to subsection (4) and a statement of appeal rights under Section 11-35-4230(6) must be mailed or otherwise furnished immediately to all parties participating in the administrative review proceedings. The appropriate chief procurement officer also shall post a copy of the decision at a time and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section 11-35-4230(6).

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 178, Section 36; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 54; 2019 Act No. 41 (S.530), Section 59, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 59, in (1), in the third sentence, substituted "governed by" for "solicited and awarded pursuant to", and added the fourth sentence; and in (2), in the third sentence, substituted "one year after the date" for "one year of the date" and inserted "or within one year after the claim accrues, whichever is later".

Subarticle 2

Remedies

SECTION 11-35-4310. Solicitations or awards in violation of the law.

(1) Applicability. The provisions of this section apply where it is determined by either the appropriate chief procurement officer or the Procurement Review Panel, upon administrative review, that a solicitation or award of a contract is in violation of the law. The remedies set forth herein may be granted by either the appropriate chief procurement officer, only after review under Section 11-35-4210, or by the Procurement Review Panel, only after review under Section 11-35-4410(1).

(2) Remedies Prior to Award. If, prior to award of a contract, it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award may be:

- (a) canceled;
- (b) revised to comply with the law and rebid; or
- (c) awarded in a manner that complies with the provisions of this code.

(3) Remedies After Award. If, after an award of a contract, it is determined that the solicitation or award is in violation of law:

- (a) the contract may be ratified and affirmed, provided it is in the interest of the State; or
- (b) the contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded.

(4) Entitlement to Costs. In addition to or in lieu of any other relief, when a protest submitted under Section 11-35-4210 is sustained, and it is determined that the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror may

request and be awarded a reasonable reimbursement amount, including reimbursement of its reasonable bid preparation costs.

HISTORY: 1993 Act No. 178, Section 36; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 60, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 60, in (1), in the third sentence, inserted ", only" in two places and made a nonsubstantive change; and in (3), in (a), substituted "interest of the State" for "best interests of the State", and made a nonsubstantive change.

SECTION 11-35-4315. Unauthorized award or modification of a contract.

The board may provide by regulation for appropriate action where it is discovered either: (a) that a person lacking actual authority has made an unauthorized award or modification of a contract, or (b) that a contract award or modification is otherwise in violation of the Consolidated Procurement Code or these regulations.

HISTORY: 2019 Act No. 41 (S.530), Section 61, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

SECTION 11-35-4320. Contract controversies.

Remedies available in a contract controversy brought under the provisions of Section 11-35-4230. The appropriate chief procurement officer or the Procurement Review Panel, in the case of review under Section 11-35-4410(1), may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law.

HISTORY: 1993 Act No. 178, Section 36; 1997 Act No. 153, Section 1.

SECTION 11-35-4330. Frivolous protests.

(1) Signature on Protest Constitutes Certificate. The signature of an attorney or party on a request for review, protest, motion, or other document constitutes a certificate by the signer that the signer has read the document, to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and it is not interposed for an improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation.

(2) Sanctions for Violations. If a request for review, protest, pleading, motion, or other document that is filed with the chief procurement officer or the Procurement Review Panel is signed in violation of this subsection, the Procurement Review Panel, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction that may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the protest, pleading, motion, or other paper, including a reasonable attorney's fee.

(3) Filing. A motion regarding a matter that is not otherwise before the panel may not be filed until after a final decision has been issued by the appropriate chief procurement officer. A motion for sanctions pursuant to this section must be filed with the panel no later than fifteen days after the later of either the

filing of a request for review, protest, motion, or other document signed in violation of this section, or the issuance of an order that addresses the request for review, protest, motion, or other document that is the subject of the motion for sanctions.

HISTORY: 1993 Act No. 178, Section 36; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 55.

SECTION 11-35-4340. Rights and remedies.

There is no remedy against the State other than those provided in this chapter in any case involving a procurement subject to this code. The rights and remedies granted in this article are to the exclusion of all other rights and remedies against the State for matters arising out of or related to this code.

HISTORY: 2019 Act No. 41 (S.530), Section 62, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Subarticle 3

Review Panel

SECTION 11-35-4410. Procurement Review Panel.

(1) Creation. There is created the South Carolina Procurement Review Panel which is charged with the responsibility to review and determine de novo:

(a) requests for review of written determinations of the chief procurement officers pursuant to Sections 11-35-4210(6), 11-35-4220(5), and 11-35-4230(6); and

(b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

(2) Membership. The panel must be composed of:

(a) [Reserved]

(b) [Reserved]

(c) [Reserved]

(d) [Reserved]

(e) five members appointed by the Governor from the State at large who must be representative of the professions governed by this title including, but not limited to:

(i) goods and services;

(ii) information technology procurements;

(iii) construction;

(iv) architects and engineers;

(v) construction management; and

(vi) land surveying services;

(f) two state employees appointed by the Governor.

(3) Chairperson and Meetings. The panel shall elect a chairman from the members at large and shall meet as often as necessary to afford a swift resolution of the controversies submitted to it. Four members present and voting shall constitute a quorum. In the case of a tie vote, the decision of the chief procurement officer is final. At-large members of the panel must be paid per diem, mileage, and

subsistence as provided by law for members of boards, commissions, and committees. State employee members must be reimbursed for meals, lodging, and travel in accordance with current state allowances.

(4) Jurisdiction. (a) Notwithstanding the provisions of Chapter 23, Title 1 or another provision of law, the Administrative Procedures Act does not apply to administrative reviews conducted by either a chief procurement officer or the Procurement Review Panel. The Procurement Review Panel is vested with the authority to:

(i) establish its own rules and procedures for the conduct of its business and the holding of its hearings;

(ii) issue subpoenas;

(iii) interview any person it considers necessary; and

(iv) record all determinations.

(b) A party aggrieved by a subpoena issued pursuant to this provision shall apply to the panel for relief.

(5) Procedure. Within fifteen days of receiving a grievance filed pursuant to Section 11-35-4210(6), 11-35-4220(5), 11-35-4230(6), or 11-35-4410(1)(b), the chairman shall either convene the review panel to conduct an administrative review or schedule a hearing to facilitate its administrative review. Except for grievances filed pursuant to Section 11-35-4230(6), the review panel shall record its determination within ten working days and communicate its decision to those involved in the determination. In matters designated by the review panel as complex, the review panel shall record its determination within thirty days.

(6) Finality. Notwithstanding another provision of law, including the Administrative Procedures Act, the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the court of appeals pursuant to Section 1-23-380, and the filing of an appeal does not stay a decision of the panel.

HISTORY: 1981 Act No. 148, Section 1; 1982 Act No. 431, Section 1; 1993 Act No. 178, Section 36; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 56; 2006 Act No. 387, Section 11; 2019 Act No. 41 (S.530), Section 63, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 63, rewrote (6).

SECTION 11-35-4420. Participation in review.

The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully as a party in a matter pending before the Procurement Review Panel and in an appeal of a decision of the Procurement Review Panel, whether administrative or judicial.

HISTORY: 2006 Act No. 376, Section 3.

SECTION 11-35-4425. Final order not appealed.

If a final order of a chief procurement officer or the Procurement Review Panel is not appealed in accordance with the provisions of this code, upon request of a party to the proceedings, the chief procurement officer or Procurement Review Panel may file a certified copy of the final ruling with a clerk of the circuit court, or a court of competent jurisdiction, as requested. After filing, the certified ruling has the same effect as a judgment of the court where filed and may be recorded, enforced, or satisfied in the same manner as a judgment of that court.

HISTORY: 2019 Act No. 41 (S.530), Section 64, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

SECTION 11-35-4430. Communication of panel members.

Unless required for the disposition of ex parte matters authorized by law, members or employees of the panel assigned to render a decision or to make findings of fact and conclusions of law in a matter pending before the panel shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. A panel member: (a) may communicate with other members of the panel, and (b) may have the aid and advice of one or more personal assistants. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not more than two hundred fifty dollars or imprisoned for not more than six months.

HISTORY: 2019 Act No. 41 (S.530), Section 64, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

ARTICLE 19

Intergovernmental Relations

Subarticle 1

Definitions

SECTION 11-35-4610. Definitions of terms used in this article.

As used in this article, unless the context clearly indicates otherwise:

(1) "Cooperative purchasing" means procurement conducted by, or on behalf of, more than one public procurement unit, or by a public procurement unit with an external procurement activity.

(2) "External procurement activity" means:

(a) any buying organization not located in this State which, if located in this State, would qualify as a public procurement unit;

(b) buying by the United States government.

(3) "Local public procurement unit" means any political subdivision or unit of this State which expends public funds for the procurement of supplies, services, information technology, or construction.

(4) "Mandatory opting" is the requirement for a local procurement unit to choose whether to utilize a state contract before it is established as prescribed in regulation by the board.

(5) "Public procurement unit" means any of the following:

(a) a local public procurement unit;

(b) a state public procurement unit;

(c) an external procurement activity; or

(d) any not-for-profit entity comprised only of more than one activity or unit listed in subitems (a), (b), or (c), if and as approved in writing by the Materials Management Officer.

(6) "State public procurement unit" means the offices of the chief procurement officers, any purchasing agency of this State, and any other unit of South Carolina state government.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 65, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 65, in (2)(a), inserted ", if located in this State,"; in (3), substituted "of this State" for "thereof" and inserted "information technology,"; rewrote (5); and in (6), substituted ", any purchasing agency of this State, and any other unit of South Carolina state government" for "and any other purchasing agency of this State".

Subarticle 3

Cooperative Purchasing

SECTION 11-35-4810. Cooperative purchasing authorized.

(1) Any public procurement unit may participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any supplies, services, technology information, or construction with one or more public procurement units in accordance with an agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multi-party contracts between public procurement units and open-ended state public procurement unit contracts which shall be made available to local public procurement units, except as provided in Section 11-35-4820 or except as may otherwise be limited by the appropriate chief procurement officer.

(2) Without limiting other requirements of this code, all cooperative purchasing with other states conducted under this article must be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 5 and, as applicable, Article 9 of this code, and consistent with the requirements of Section 11-35-2730 (Assuring Competition).

(3) The offices of the chief procurement officers, and any other purchasing agency of this State, may participate in cooperative purchasing as provided in Section 11-35-4810(1) only if the appropriate chief procurement officer determines in writing: (i) that participation is in the interest of the State, (ii) that the procurement will conform to subsection (2), if applicable, and (iii) that any entities responsible for the management and administration of the procurement, other than another state's central procurement office, have in place appropriate and adequate internal controls to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process. In making his determination, the chief procurement officer shall evaluate and consider the impact on South Carolina businesses.

(4) Thirty days' prior notice of a proposed multistate solicitation must be provided in accordance with Section 11-35-1520(3). Supplies acquired pursuant to such contracts may be distributed only through vendors with an in-state office, as defined in Section 11-35-1524(A)(6), when available; provided, however, that the provisions of this paragraph do not apply to public institutions of higher learning if the institution demonstrates a cost savings to the appropriate chief procurement officer in regard to the multistate solicitation and procurement.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2011 Act No. 74, Pt V, Section 8, eff August 1, 2011; 2019 Act No. 41 (S.530), Section 66, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

The 2011 amendment in the second undesignated paragraph substituted "days" for "days", substituted "must" for "shall", and added the exception at the end relating to demonstrated cost savings.

2019 Act No. 41, Section 66, rewrote the section, providing that certain cooperative purchasing with other states must be through contracts awarded through full and open competition.

SECTION 11-35-4820. Selective mandatory opting.

As prescribed in regulation by the board, any local public procurement unit may purchase from or through the State at any time; provided, however, that the board may impose a requirement upon the localities for mandatory opting in or out of any particular contract before it is established. Mandatory opting shall be imposed only where it is necessary to obtain more cost effective contracts for the State.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-4830. Sale, acquisition, or use of supplies by a public procurement unit.

Any public procurement unit may sell to, acquire from, or use any supplies belonging to another public procurement unit independent of the requirements of Articles 5 and 15 of this chapter; provided, that such procurement shall take place only when the procuring entities have good reason to expect the intergovernmental procurement to be more cost effective than doing their own procurement.

HISTORY: 1981 Act No. 148, Section 1; 1982 Act No. 431, Section 2; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 67, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 67, substituted "independent of" for "or external procurement activity in accordance with".

SECTION 11-35-4840. Cooperative use of supplies or services.

Any public procurement unit may enter into an agreement independent of the requirements of Articles 5 and 15 of this chapter with any other public procurement unit for the cooperative use of supplies, services, or information technology under the terms agreed upon between the parties; provided, that such cooperative use of supplies, services, or information technology shall take place only when the public procurement units have good reason to expect the cooperative use to be more cost effective than utilizing their own supplies and services.

HISTORY: 1981 Act No. 148, Section 1; 1982 Act No. 431, Section 3; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 68, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 68, substituted "independent of" for "in accordance with", deleted "or external procurement activity" following "public procurement unit", and substituted ", services, or information technology" for "or services" in two places.

SECTION 11-35-4850. Joint use of facilities.

Any public procurement unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another public procurement unit or an external procurement activity under the terms agreed upon between the parties.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-4860. Supply of personnel, information, and technical services.

(1) Supply of Personnel. Any public procurement unit is authorized, in its discretion, upon written request from another public procurement unit or external procurement activity, to provide personnel services to the requesting public procurement unit or external procurement activity with or without pay by the recipient governmental unit as may be agreed upon by the parties involved.

(2) Supply of Services. The informational, technical, and other services of any public procurement unit may be made available to any other public procurement unit or external procurement activity provided, that the requirements of the public procurement unit tendering the services shall have precedence over the requesting public procurement unit or external procurement activity. The payment shall be in accordance with an agreement between the parties.

(3) State Information Services. Upon request, the chief procurement officers may make available to public procurement units or external procurement activities the following services among others:

- (a) standard forms;
- (b) printed manuals;
- (c) product specifications and standards;
- (d) quality assurance testing services and methods;
- (e) qualified product lists;
- (f) source information;
- (g) common use commodities listings;
- (h) supplier prequalification information;
- (i) supplier performance ratings;
- (j) debarred and suspended bidders lists;
- (k) forms for invitations for bids, requests for proposals, instruction to bidders, general contract provisions and other contract forms;
- (l) contracts; or
- (m) published summaries of contracts, including price and time of delivery information.

(4) State Technical Services. The State, through the chief procurement officers, may provide the following technical services among others:

- (a) development of products specifications;
- (b) development of quality assurance test methods, including receiving, inspection, and acceptance procedures;
- (c) use of product testing and inspection facilities;
- (d) use of personnel training programs.

(5) Fees. The chief procurement officers may enter into contractual arrangements and publish a schedule of fees for the services provided under subsections (3) and (4) of this section. All proceeds from the sale of such services must be deposited in the State Treasury in a special account and expended only for the costs of providing the goods and services, and such funds may be retained and expended for the same purposes.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153; 2019 Act No. 41 (S.530), Section 69, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 69, in (3), rewrote (l) and added (m); and in (5), added the third sentence.

SECTION 11-35-4870. Use of payments received by a supplying public procurement unit.

All payments from any public procurement unit or external procurement activity received by the Division of Procurement Services in connection with sponsoring or administering a cooperative purchase, must be deposited in the State Treasury in a special account and expended only for the costs of providing the goods and services, and such funds may be retained and expended for the same purposes.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 70, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 70, rewrote the section, providing that certain payments must be deposited in a special revenue account.

SECTION 11-35-4880. Public procurement units in compliance with code requirements.

Where the public procurement unit administering a cooperative purchase complies with the requirements of this code, any public procurement unit participating in such a purchase shall be deemed to have complied with this code. Public procurement units shall not enter into a cooperative purchasing agreement for the purpose of circumventing this code.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2019 Act No. 41 (S.530), Section 71, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 71, in the first sentence, deleted "or external procurement activity" following "Where the public procurement unit".

SECTION 11-35-4890. Review of procurement requirement.

To the extent possible, the chief procurement officers may collect information concerning the type, cost, quality, and quantity of commonly used supplies, services, or construction being procured or used by local public procurement units, which shall be required to respond appropriately as a precondition for participation in state contracts as governed by regulations promulgated by the board. The chief procurement officers shall make available all such information to any public procurement unit upon request.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-4900. Intergovernmental acquisitions.

(1) Any procurement by a governmental body from any other public procurement unit must be approved in advance of contracting by the applicable chief procurement officer unless either the supply, service, or information technology is expressly authorized by the enabling legislation of the governmental body supplying the item, or the board has exempted the type of procurement from such approval. Upon recommendation of the division, the board may establish criteria for approval. Absent approval, any procurement by a governmental body from any other public procurement unit must be in accordance with the other articles of this code.

(2) Any procurement by a governmental body from any other public procurement unit must be reported to the Division of Procurement Services quarterly. The division shall determine the means and content of the information to be reported. The division shall report to the board annually on such procurements.

HISTORY: 2019 Act No. 41 (S.530), Section 72, eff May 13, 2019.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

ARTICLE 21

Assistance to Minority Businesses

Subarticle 1

Definitions and Certification

SECTION 11-35-5010. Definitions of terms used in this article.

The board may promulgate regulations establishing detailed definitions of the following terms using, in addition to the criteria set forth in this section, such other criteria as it may deem desirable.

(1) "Minority person" for the purpose of this article, means a United States citizen who is economically and socially disadvantaged.

(a) "Socially disadvantaged individuals" means those individuals who have been subject to racial or ethnic prejudice or cultural bias because of their identification as members of a certain group, without regard to their individual qualities. Such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts and Native Hawaiians), Asian Pacific Americans, and other minorities to be designated by the board or designated agency.

(b) "Economically disadvantaged individuals" means those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

(2) A "socially and economically disadvantaged small business" means any small business concern which:

(a) is at least fifty-one percent owned by one or more citizens of the United States who are determined to be socially and economically disadvantaged.

(b) in the case of a concern which is a corporation, fifty-one percent of all classes of voting stock of such corporation must be owned by an individual determined to be socially and economically disadvantaged.

(c) in the case of a concern which is a partnership, fifty-one percent of the partnership interest must be owned by an individual or individuals determined to be socially and economically disadvantaged and whose management and daily business operations are controlled by individuals determined to be socially and economically disadvantaged. Such individuals must be involved in the daily management and operations of the business concerned.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

Subarticle 3

Assistance to Minority Businesses

SECTION 11-35-5210. Statement of policy and its implementation.

(1) Statement of Policy. The South Carolina General Assembly declares that business firms owned and operated by minority persons have been historically restricted from full participation in our free enterprise

system to a degree disproportionate to other businesses. The General Assembly believes that it is in the state's best interest to assist minority-owned businesses to develop fully as a part of the state's policies and programs which are designed to promote balanced economic and community growth throughout the State. The General Assembly, therefore, wishes to ensure that those businesses owned and operated by minorities are afforded the opportunity to fully participate in the overall procurement process of the State. The General Assembly, therefore, takes this leadership role in setting procedures that will result in awarding contracts and subcontracts to minority business firms in order to enhance minority capital ownership, overall state economic development and reduce dependency on the part of minorities.

(2) Implementation. Chief procurement officers shall implement the policy set forth in subsection (1) of this section in accordance with the provisions of Section 11-35-5220.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1.

SECTION 11-35-5220. Duties of the chief procurement officers.

(1) Assistance from the Chief Procurement Officers. The chief procurement officers shall provide appropriate staffs to assist minority businesses with the procurement procedures developed pursuant to this code.

(2) Special Publications. The chief procurement officers in cooperation with other appropriate private and state agencies may issue supplementary instructions designed to assist minority businesses with the state procurement procedures.

(3) Source Lists. Chief procurement officers shall maintain special source lists of minority business firms detailing the products and services which they provide. These lists shall be made available to agency purchasing personnel.

(4) Solicitation Mailing Lists. The chief procurement officers shall include and identify minority business on the state's bidders' list and shall ensure that these firms are solicited on an equal basis within nonminority firms.

(5) Training Programs. The chief procurement officers shall work with appropriate state offices and minority groups in conducting seminars to assist minority business owners in learning how to do business with the State.

(6) Fee Waivers. Upon request by an MBE certified by the Small and Minority Business Assistance Office, user or subscription fees for services provided by the chief procurement officers may be waived for an MBE.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 57.

SECTION 11-35-5230. Regulations for negotiation with state minority firms.

(A) The board shall promulgate regulations that designate such procurement contracts as it may deem appropriate for negotiation with certified, South Carolina-based minority firms, as defined by this subarticle. Among the criteria that shall be used to determine such designations are:

(1) The total dollar value of procurement in South Carolina.

(2) The availability of South Carolina-based minority firms.

(3) The potential for breaking the contracts into smaller units, where necessary, to accommodate such firms.

(4) Insuring that the State shall not be required to sacrifice quality of goods or services.

(5) Ensuring that the price has been determined to be fair and reasonable, and competitive both to the State and to the contractor.

(B)(1) Firms with state contracts that subcontract with minority firms shall be eligible for an income tax credit equal to four percent of the payments to minority subcontractors for work pursuant to a state contract. Such subcontractors must be certified as to the criteria of a minority firm as defined in Section 11-35-5010 of this code and any regulations which may be promulgated thereunder.

(2) The tax credit is limited to a maximum of fifty thousand dollars annually. A firm is eligible to claim a tax credit for a period of ten years from the date the first income tax credit is claimed.

(3) Any firm desiring to be certified as a minority firm shall make application to the Small and Minority Business Assistance Office (SMBAO) as defined by Section 11-35-5270, on such forms as may be prescribed by that office.

(4) Firms claiming the income tax credit shall maintain evidence of work performed for a state contract by minority subcontractors and shall present such evidence on a form and in a manner prescribed by the Department of Revenue at the time of filing its state income tax return and claim such credit at the time of filing. All records shall be available for audit by the Department of Revenue in accordance with prevailing tax statutes.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 181, Section 96; 1995 Act No. 76, Section 8; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 58.

Editor's Note

1995 Act No. 76, Section 25, provides as follows:

"Upon approval by the Governor, this act is effective for taxable years beginning after 1995."

SECTION 11-35-5240. Minority business enterprise (MBE) Utilization Plan.

(1) To emphasize the use of minority small businesses, each agency director shall develop a Minority Business Enterprise (MBE) Utilization Plan. The MBE Utilization Plan must include, but not be limited to:

- (a) the name of the governmental body;
- (b) a policy statement expressing a commitment by the governmental body to use MBEs in all aspects of procurement;
- (c) the name of the coordinator responsible for monitoring the MBE Utilization Plan;
- (d) goals that include expending with Minority Business Enterprises certified by the Office of Small and Minority Business Assistance an amount equal to ten percent of each governmental body's total dollar amount of funds expended;
- (e) solicitation of certified minority vendors, a current list of which must be supplied by the Office of Small and Minority Business Assistance, in each commodity category for which the minority vendor is qualified. The current listing of qualified minority vendors must be made available by the Office of Small and Minority Business Assistance on a timely basis;
- (f) procedures to be used when it is necessary to divide total project requirements into smaller tasks which will permit increased MBE participation;
- (g) procedures to be used when the governmental body subcontracts the scope of service to another governmental body; the responsible governmental body may set goals for the subcontractor in accordance with the MBE goal and the responsible governmental body may allow the subcontractor to present a MBE Utilization Plan detailing its procedure to obtain minority business enterprise participation.

(2) MBE utilization plans must be submitted to the SMBAO for approval no later than July thirtieth, annually. Upon petition by the governmental body, SMBAO may authorize an MBE utilization plan that establishes a goal of less than ten percent of the governmental body's total dollar amount of funds expended. Progress reports must be submitted to the SMBAO no later than thirty days after the end of each fiscal quarter and contain the following information:

- (a) number of minority firms solicited;
- (b) number of minority bids received;
- (c) total dollar amount of funds expended on contracts awarded to minority firms certified pursuant to Section 11-35-5230; and
- (d) total dollar amount of funds expended.

(3) For purposes of this section, and notwithstanding the Administrative Procedures Act, the executive director of the board shall establish a definition for the phrase "total dollar amount of funds expended".

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 59.

SECTION 11-35-5250. Progress payments and letters of credit.

(1) Progress Payments. The chief procurement officers may make special provisions for progress payments and letters of credit, as deemed reasonable to assist minority businesses to carry out the terms of a state contract pursuant to regulations which may be promulgated by the board.

(2) Letter of Contract Award. When a minority business firm certified by the Department of Revenue receives a contract with the State, the appropriate chief procurement officer shall furnish a letter, upon request, stating the dollar value and duration of, and other information about the contract, which may be used by the minority firm in negotiating lines of credit with lending institutions.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 181, Section 97; 1997 Act No. 153, Section 1.

SECTION 11-35-5260. Reports of number and dollar value of contracts awarded to minority firms.

The Small and Minority Business Assistance Office shall report annually in writing to the Governor concerning the number and dollar value of contracts awarded for each governmental body to a firm certified as a minority firm pursuant to Section 11-35-5230 during the preceding fiscal year. These records must be maintained to evaluate the progress of this program.

HISTORY: 1981 Act No. 148, Section 1; 1995 Act No. 145, Part II, Section 15; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 60.

SECTION 11-35-5270. Division of Small and Minority Business Contracting and Certification.

The Division of Small and Minority Business Contracting and Certification must be established within the Department of Administration to assist the Department of Administration and the Department of Revenue in carrying out the intent of this article. The responsibilities of the division include, but are not limited to, the following:

- (1) assisting the chief procurement officers and governmental bodies in developing policies and procedures which will facilitate awarding contracts to small and minority firms;
- (2) assisting the chief procurement officers in aiding small and minority-owned firms and community-based business in developing organizations to provide technical assistance to minority firms;
- (3) assisting with the procurement and management training for small and minority firm owners;
- (4) assisting in the identification of responsive small and minority firms;
- (5) receiving and processing applications to be registered as a minority firm in accordance with Section 11-35-5230(B);
- (6) revoking the certification of any firm that has been found to have engaged in any of the following:
 - (a) fraud or deceit in obtaining the certification;
 - (b) furnishing of substantially inaccurate or incomplete information concerning ownership or financial status;
 - (c) failure to report changes which affect the requirements for certification;
 - (d) gross negligence, incompetence, financial irresponsibility, or misconduct in the practice of his business; or
 - (e) wilful violation of any provision of this article.
- (7) After a period of one year, the division may reissue a certificate of eligibility provided acceptable evidence has been presented to the commission that the conditions which caused the revocation have been corrected.

HISTORY: 1981 Act No. 148, Section 1; 1993 Act No. 181, Section 98; 1997 Act No. 153, Section 1; 2006 Act No. 376, Section 61; 2014 Act No. 121 (S.22), Pt V, Section 7.V, eff July 1, 2015.

Effect of Amendment

2014 Act No. 121, Section 7.V, rewrote the section.

ARTICLE 23
Statewide Provisions

SECTION 11-35-5300. Prohibition of contracting with discriminatory business.

(A) A public entity may not enter into a contract with a business to acquire or dispose of supplies, services, information technology, or construction unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in this article.

(B) For purposes of this section:

(1) "Boycott" means to blacklist, divest from, or otherwise refuse to deal with a person or firm when the action is based on race, color, religion, gender, or national origin of the targeted person or entity. "Boycott" does not include:

(a) a decision based on business or economic reasons, or the specific conduct of a targeted person or firm;

(b) a boycott against a public entity of a foreign state when the boycott is applied in a nondiscriminatory manner; and

(c) conduct necessary to comply with applicable law in the business's home jurisdiction.

(2) "Public entity" means the State, or any political subdivision of the State, including a school district or agency, department, institution, or other public entity of them.

(3) A "jurisdiction with whom South Carolina can enjoy open trade" includes World Trade Organization members and those with which the United States has free trade or other agreements aimed at ensuring open and nondiscriminatory trade relations.

(C) This section does not apply if a business fails to meet the requirements of subsection (A) but offers to provide the goods or services for at least twenty percent less than the lowest certifying business. Also, this section does not apply to contracts with a total potential value of less than ten thousand dollars.

(D) Failure to comply with a provision of this section is not grounds for a protest filed pursuant to Section 11-35-4210 or any other preaward protest process appearing in a procurement ordinance adopted by a political subdivision pursuant to Section 11-35-5320 or Section 11-35-5340, or similar law.

HISTORY: 2015 Act No. 63 (H.3583), Section 1, eff June 4, 2015.

Editor's Note

2015 Act No. 63, Section 5, provides as follows:

"SECTION 5. This act takes effect upon approval by the Governor and does not apply to contracts entered into before the effective date of this act."

SECTION 11-35-5310. Surety bonds; public entity may not designate surety company.

If the State, or county, city, public service district, or other political subdivision of the State, or agency, department, institution, or other public entity of the State, enters into a procurement contract and requires the bidder to provide a surety bond to secure the bid or the performance or payment of the contract, the state political subdivision of the State, or public entity of the State may not exact that the surety bond be furnished by a particular surety company or through a particular agent or broker.

HISTORY: 2002 Act No. 253, Section 1. Formerly Code 1976 Section 11-35-35, recodified by 2019 Act No. 41, Section 79, eff May 13, 2019.

SECTION 11-35-5320. Political subdivisions required to develop and adopt procurement laws.

All political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983. The State Fiscal Accountability Authority, in cooperation with the Procurement Policy Committee and subdivisions concerned, shall

create a task force to draft model ordinances, regulations, and manuals for consideration by the political subdivisions. The expenses of the task force shall be funded by the General Assembly. The task force shall complete its work no later than January 1, 1982. A political subdivision's failure to adopt appropriate ordinances, procedures, or policies of procurement is not subject to the legal remedies provided in this code.

HISTORY: 1981 Act No. 148, Section 1; 1997 Act No. 153, Section 1. Formerly Code 1976 Section 11-35-50, recodified by 2019 Act No. 41, Section 79, eff May 13, 2019.

Code Commissioner's Note

At the direction of the Code Commissioner, references in this section to the "Budget and Control Board", the "State Budget and Control Board" or the "board" were changed to the "State Fiscal Accountability Authority", the "authority", or the "Division of Procurement Services" of the "State Fiscal Accountability Authority", pursuant to the directive of the South Carolina Restructuring Act, 2014 Act No. 121, Section 5(B), effective July 1, 2015.

SECTION 11-35-5330. Purchase of goods or services from entity employing prison inmates of another state paid less than federal minimum wage prohibited.

A governmental body procuring goods or services under the Consolidated Procurement Code, and any agency or department of a political subdivision of this State procuring goods or services under the Consolidated Procurement Code or its own procurement code, may not accept any proposals from or procure any goods or services from an entity which employs or uses inmates of a correctional system of another state who are not paid at least the required federal minimum wage for work performed in the manufacturing, processing, or supplying of those goods or services.

HISTORY: 1991 Act No. 171, Part II, Section 67; 1997 Act No. 153, Section 1. Formerly Code 1976 Section 11-35-55, recodified by 2019 Act No. 41, Section 79, eff May 13, 2019.

SECTION 11-35-5340. School district subject to consolidated procurement code; exemptions.

Irrespective of the source of funds, any school district whose budget of total expenditures, including debt service, exceeds seventy-five million dollars annually is subject to the provisions of Chapter 35, Title 11, and shall notify the Director of the Division of Procurement Services of the State Fiscal Accountability Authority of its expenditures within ninety days after the close of its fiscal year. However, if a district has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the South Carolina Consolidated Procurement Code, the district is exempt from the provisions of the South Carolina Consolidated Procurement Code except for a procurement audit which must be performed every three years by an audit firm approved by the Division of Procurement Services. Costs associated with the internal review and audits are the responsibility of the school district and will be paid to the entity performing the audit.

HISTORY: 1984 Act No. 493; 1985 Act No. 109, Section 1; 1993 Act No. 178, Section 13; 1997 Act No. 153, Section 1. Formerly Code 1976 Section 11-35-70, amended and recodified by 2019 Act No. 41 (S.530), Sections 4 and 79, eff May 13, 2019.

Code Commissioner's Note

At the direction of the Code Commissioner, references in this section to the "Budget and Control Board", the "State Budget and Control Board" or the "board" were changed to the "State Fiscal Accountability Authority", the "authority", or the "Division of Procurement Services" of the "State Fiscal Accountability Authority", pursuant to the directive of the South Carolina Restructuring Act, 2014 Act No. 121, Section 5(B), effective July 1, 2015.

Editor's Note

2019 Act No. 41, Section 80, provides as follows:

"SECTION 80. This act takes effect upon approval by the Governor and applies to solicitations issued after that date."

Effect of Amendment

2019 Act No. 41, Section 4, in the first sentence, substituted "Director of the Division of Procurement Services" for "Director of the Office of General Services", and in the second sentence, substituted "Division of Procurement Services" for "Office of General Services" in two places.