

APA-4
Revised 1/2018

CERTIFICATION OF EMERGENCY RULES
FILED WITH LEGISLATIVE SERVICES AGENCY
OTHNI LATHRAM, DIRECTOR

Pursuant to Code of Alabama 1975, §§41-22-5(b) and 41-22-6(c)(2)a. and b.

I certify that the attached emergency amendment is a correct copy as promulgated and adopted on the 27th day of December, 2022.

AGENCY NAME: Alabama Department of Finance

RULE NO. AND TITLE: Chapter 355-4-3-.04ER Qualification-Based Selection

EFFECTIVE DATE OF RULE: 27 December 2022

EXPIRATION DATE (If less than 120 days): 26 April 2023 (120 days), or until adopted as permanent rules under the normal rulemaking procedures.

NATURE OF EMERGENCY: To ensure the timely procurement of the best qualified expert and professional services for vital public services.

STATUTORY AUTHORITY: Code of Ala. 1975, § 41-4-133 and 41-4-144

SUBJECT OF RULE TO BE ADOPTED ON PERMANENT BASIS YES NO

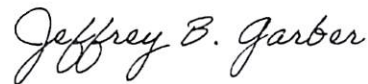
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REC'D & FILED

DEC 27 2022

LEGISLATIVE SVC AGENCY



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FILING DATE
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STATE OF ALABAMA
DEPARTMENT OF FINANCE
ADMINISTRATIVE CODE

CHAPTER 355-4-3
METHODS OF PROCUREMENT

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355-4-3-.03ER Competitive Sealed Proposals.

(1) Use of Competitive Sealed Proposals.

(a) When Competitive Sealed Bidding is Not Practicable. Competitive sealed bidding is not practicable unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the Invitation for Bids. Factors to be considered in determining whether competitive sealed bidding is not practicable include:

1. whether the contract needs to be other than a fixed-price type;

2. whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;

3. whether offerors may need to be afforded the opportunity to revise their proposals, including price;

4. whether award may need to be based upon a comparative evaluation as stated in the Request for Proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal; and

5. whether the primary consideration in determining award may not be price.

(b) When Competitive Sealed Bidding is Not Advantageous. A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the State, even though practicable, to use competitive sealed bidding. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

1. if prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the State; and

2. whether the factors listed in Rule 355-4-3-.03(1)(a) are desirable in conducting a procurement rather than necessary; if they are, then such factors may be used to support a determination that competitive sealed bidding is not advantageous.

(c) For Professional Services. Except as required in 355-4-3-.04, pProfessional Services shall be procured by competitive sealed proposals unless the Chief Procurement Officer determines otherwise in writing. Questions of whether a service is a professional service under the State Procurement Code shall be determined by the Chief Procurement Officer.

(2) Determinations. The Chief Procurement Officer or the head of a Purchasing Agency may make determinations by category of supply or service that it is either not practicable or not advantageous to the State to procure specified types of supplies or services by competitive sealed bidding. Procurements of the specified types of supplies or services may then be made by competitive sealed proposals based upon such determination. The officer who made such determination may modify or revoke it at any time, and such determination should be reviewed for current applicability from time to time.

(3) Content of the Request for Proposals. The Request for Proposals shall be prepared in accordance with Rule 355-4-3-.02(1) (The Invitation for Bids) provided that it shall also include:

1. a statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without such discussions; and

2. a statement of when and how price should be submitted.

(4) Proposal Preparation Time. Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals. A minimum of 21 days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Procurement Officer.

(5) Form of Proposal. The manner in which proposals are to be submitted, including any forms for that purpose, may be designated as a part of the Request for Proposals.

(6) Public Notice. Public notice shall be given by distributing the Request for Proposals in the same manner provided for distributing an Invitation for Bids under Rule 355-4-3-.02(4) (Public Notice). Requests for Proposal must comply with Code of Ala. 1975, §41-4-66.

(7) Use of Bidders Lists. Bidders lists compiled and maintained in accordance with Rule 355-4-3-.02(5) (Bidders Lists) may serve as a basis for soliciting competitive sealed proposals.

(8) Pre-Proposal Conferences. Pre-proposal conferences may be conducted in accordance with Rule 355-4-3-.02(6) (Pre-Bid Conferences). Any such conference should be held prior to submission of initial proposals.

(9) Amendments to Requests for Proposals. Amendments to Requests for Proposals may be made in accordance with Rule 355-4-3-.02(7) (Amendments to Invitations for Bids) prior to submission of proposals. After submission of proposals, amendments may be made in accordance with Rule 355-4-3-.02(18)(b) (Procedure for Phase One of Multi-Step Sealed Bidding, Amendments to the Invitation for Bids).

(10) Modification or Withdrawal of Proposals.

Proposals may be modified or withdrawn prior to the established due date in accordance with Rule 355-4-3-.02(8) (Pre-Opening Modification or Withdrawal of Bids). For the purposes of this Section and Rule 355-4-3-.03(11) (Late Proposals, Late Withdrawals, and Late Modifications), the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and

final offers must be submitted, provided that only offerors who submitted proposals by the time announced for receipt of proposals may submit best and final offers.

(11) Late Proposals, Late Withdrawals, and Late Modifications. Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. See Rule 355-4-3-.03(10) (Modification or Withdrawal of Proposals) for the definition of "established due date." They may only be considered in accordance with Rule 355-4-3-.02(9) (Late Bids, Late Withdrawals, and Late Modifications).

(12) Receipt and Registration of Proposals. Proposals shall not be opened publicly but shall be opened in the presence of one or more procurement officials. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. Proposals submitted through electronic means shall be received in such a manner that the time and date of submittal, along with the contents of such proposal shall be securely stored until the time and date set for bid opening. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the supply or service offered. Proposals and the Register of Proposals shall be open to public inspection only after award of the contract. Prior to award, proposals and modifications shall be shown only to State personnel having a legitimate interest in them.

(13) Evaluation of Proposals.

(a) Evaluation Factors in the Request for Proposals. The Request for Proposals shall state all of the evaluation factors (and subfactors), including price, and their relative importance.

(b) Evaluation. The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems may be used but are not required. Factors not specified in the Request for Proposals shall not be considered.

(c) Responsibility and Responsiveness. Responsibility of prospective contractors is defined by covered by Code of Ala. 1975, §41-4-130(7) and Rule 355-4-3-.09 (Responsibility) of this

Chapter. Responsiveness of proposals is covered by Code of Ala. 1975, §41-4-130(8) which defines responsive offeror as "a person who has submitted a[n] ... offer which conforms in all material respects to the ... Request for Proposals."

(d) Classifying Proposals. For the purpose of conducting discussions under Rule 355-4-3-.03(14) (Proposal Discussions with Individual Offerors), proposals shall be initially classified as:

1. acceptable;
2. potentially acceptable, that is, reasonably susceptible of being made acceptable; or
3. unacceptable.

Offerors whose proposals are unacceptable shall be so notified promptly.

(14) Proposal Discussions with Individual Offerors.

(a) "Offerors" Defined. For the purposes of Code of Ala. 1975, §41-4-133(f) of the State Procurement Code and this Section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.

(b) Purposes of Discussions. Discussions are held to:

1. promote understanding of the State's requirements and the offerors' proposals; and
2. facilitate arriving at a contract that will be most advantageous to the State taking into consideration price and the other evaluation factors set forth in the Request for Proposals.

(c) Conduct of Discussions. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Procurement Officer should establish procedures and schedules for conducting discussions. If during discussions there is a need for any substantial clarification of or change in the Request for Proposals, the Request shall be amended to incorporate such clarification or change. Auction techniques (revealing one

offeror's price to another) and disclosure of any information derived from competing proposals are prohibited. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror. The Procurement Officer shall keep a record of the date, place, and purpose of any meeting with an Offeror to discuss a proposal.

(d) Best and Final Offers. The Procurement Officer shall establish a common date and time for the submission of best and final offers. Best and final offers shall be submitted only once; provided, however, the Chief Procurement Officer or the head of a Purchasing Agency may make a written determination that it is in the State's best interest to conduct additional discussions or change the State's requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award. Offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

(15) Mistakes in Proposals.

(a) Modification or Withdrawal of Proposals. Proposals may be modified or withdrawn as provided in Rule 355-4-3-.03(10) (Modification or Withdrawal of Proposals).

(b) Confirmation of Proposal. When the Procurement Officer knows or has reason to conclude before award that a mistake has been made, such officer should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in Subsections (c) through (d) of this Section are met.

(c) Mistakes Discovered After Receipt of Proposals but Before Award. This Subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.

1. During Discussions; Prior to Best and Final Offers. Once discussions are commenced with any offeror or after best and final offers are requested, any offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

2. Minor Informalities. Minor informalities, unless otherwise corrected by an offeror as provided in this Section, shall be treated as they are under competitive sealed bidding. See Rule 355-4-3-.02(11) (Mistakes in Bids, Mistakes Discovered At or After Opening but Before Award).

3. Correction of Mistakes. If discussions are not held or if the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if, in the sole discretion of the Chief Procurement Officer or head of a Purchasing Agency, it is determined:

(i) the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn; or

(ii) the mistake is not clearly evident on the face of the proposal, but the offeror submits proof of evidentiary value which clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not be contrary to the fair and equal treatment of other offerors.

4. Withdrawal of Proposals. If discussions are not held, or if the best and final offers upon which award will be made have been received, the offeror may be permitted to withdraw the proposal if, in the sole discretion of the Chief Procurement Officer or head of a Purchasing Agency, it is determined:

(i) the mistake is clearly evident on the face of the proposal and the intended correct offer is not;

(ii) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made but does not demonstrate the intended correct offer; or

(iii) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates the intended correct offer, but to allow correction would be contrary to the fair and equal treatment of the other offerors.

(d) Mistakes Discovered After Award. Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer or the head of a Purchasing Agency finds it would be unconscionable not to allow the mistake to be corrected.

(16) Review by the Contract Review Permanent Legislative Oversight Committee. In accordance with Code of Ala. 1975, §29-2-40 et seq., contracts for personal or professional services are subject to review by the Contract Review Permanent Legislative Oversight Committee. Personal services contracts are contracts where an employer-employee relationship is created. The Chief Procurement Officer (or head of a Purchasing Agency) shall determine if an employer-employee relationship is created by evaluating the factors listed in the Alabama Fiscal Policy and Procedures Manual. If only one agency will use the contract, that agency will present the contract to the committee, unless otherwise determined by the Chief Procurement Officer. If multiple agencies will use the contract, the Chief Procurement Officer may designate a using agency to present the contract to the committee.

Author: Department of Finance, Legal Division

Statutory Authority: Code of Ala. 1975, §41-4-133.

History: New Rule: Published June 30, 2022; effective August 14, 2022; operative October 1, 2022; Published as emergency rule December 27, 2022.

355-4-3-.04ER Qualification-Based Selection

Professional services of architects, landscape architects, engineers, land surveyors, geoscience, and other similar professionals shall be procured in accordance with competitive, qualification-based selection policies and procedures. Selection shall be based on factors to be developed by the procuring state entity which may include, among others, the following:

- (a) Specialized expertise, capabilities, and technical competence, as demonstrated by the proposed approach and methodology to meet project requirements.
- (b) Resources available to perform the work, including any specialized services within the specified time limits for the project.
- (c) Record of past performance, quality of work, ability to meet schedules, cost control, and contract administration.
- (d) Availability to and familiarity with the project locale.
- (e) Proposed project management techniques.

(f) Ability and proven history in handling special project contracts.

Notice of need for professional services shall be widely disseminated to the professional community in a full and open manner. Procuring state entities shall evaluate such professionals that respond to the notice of need based on such state entity's qualification-based selection process criteria. Any such procuring state entity shall then make a good faith effort to negotiate a contract for professional services from the selected professional after first discussing and refining the scope of services for the project with such professional. Where the Division of Construction Management of the Department of Finance has set a fee schedule for the professional services sought, fees shall not exceed the schedule without approval of the Director of the Division of Construction Management and the Governor.

Author: Department of Finance, Legal Division

Statutory Authority: Code of Ala. 1975, §41-4-134.

History: New Rule: Published as emergency rule December 27, 2022.

355-4-3-.045ER Small Purchases.

(1) Application. In accordance with Code of Ala. 1975, §41-4-134 (Small Purchases), this Rule establishes \$25,000 as the amount for supplies or services below which small purchase procedures may be used for procurements, except as otherwise provided in this Rule.

(2) Authority to Make Small Purchases.

(a) Amount. The Office of the Chief Procurement Officer or a Purchasing Agency may use this Rule if the procurement is to be less than \$25,000 for supplies or services. If these methods are not used, the other methods of source selection provided in Code of Ala. 1975, §41-4-131 (Methods of Source Selection) shall apply except as otherwise provided in this Rule.

(b) Existing State Contract for Item. Supplies or services which may be obtained under current State contracts shall be procured under such agreements in accordance with the

terms of such contracts. Further, supplies or services available from State stocks shall not be procured under this Rule. Operational procedures and contract terms may provide for waivers or exceptions to this Subsection.

(c) Available from One Business Only. If the supply or service is available from only one business, the sole source procurement method set forth in Rule 355-4-3-.05 (Sole Source Procurement) of these Rules shall be used even if the procurement is a small purchase as specified in Subsection (2)(a) of this Rule.

(3) Competition for Small Purchases of Supplies or Services Between \$5,000 and \$25,000.

(a) Procedure. For small purchases of supplies or services between \$5,000 and \$25,000, no less than three businesses shall be solicited to submit written quotations that are recorded, including the date and amount of each quotation, and placed in the procurement file. Award shall be made to the business offering the lowest acceptable quotation.

(4) [Reserved.]

(5) Small Purchases of \$5,000 or Less. The Chief Procurement Officer or the head of a Purchasing Agency shall adopt operational procedures for making small purchases of less than \$5,000. Such operational procedures shall provide for obtaining adequate and reasonable competition such as obtaining quotations and for making records to properly account for funds and to facilitate auditing of the Purchasing Agency.

(6) Procurement of Experts and Non-biddable Items.

Procurement of the following supplies or services shall be considered Small Purchases under the dollar amount set forth below, shall not be aggregated for purposes of this Rule, and shall not be subject to the competition requirements in this Rule:

(a) Experts retained for the purposes of litigation, or avoidance of litigation, below \$200,000 per expert.

(b) Physicians retained to provide medical services, below \$100,000 per physician. Such physicians shall be selected by the Purchasing Agency from a list of qualified physicians maintained by the Alabama Medical Licensure

Commission. All physicians interested in providing medical services to the State of Alabama may apply and shall be included on the listing.

(c) Physicians, pharmacists, dentists, optometrists, opticians, nurses, and other health professionals retained by the Alabama Medicaid Agency which involve only service on agency task forces, boards, or committees, below \$25,000 per professional.

(d) Supplies or services which by their very nature are impossible of award by competitive procurement, as determined in writing by the Chief Procurement Officer or head of a Purchasing Agency. This subsection shall only apply to supplies or services at or below \$50,000 per supply or service, unless determined otherwise in writing by the Chief Procurement Officer or head of a Purchasing Agency.

Author: Department of Finance, Legal Division

Statutory Authority: Code of Ala. 1975, §41-4-134.

History: New Rule: Published June 30, 2022; effective August 14, 2022; operative October 1, 2022; published as emergency rule December 27, 2022.