

APA-1
Revised 4/2018

TRANSMITTAL SHEET FOR
NOTICE OF INTENDED ACTION

Control 355 Department or Agency: Department of Finance

Rule No. 355-4-3

Rule Title: Methods of Procurement

New Amend Repeal Adopt by Reference

Would the absence of the proposed rule significantly harm or endanger the public health, welfare, or safety? No

Is there a reasonable relationship between the state's police power and the protection of the public health, safety, or welfare? N/A

Is there another, less restrictive method of regulation available that could adequately protect the public? N/A

Does the proposed rule have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree? No

Is the increase in cost, if any, more harmful to the public than the harm that might result from the absence of the proposed rule? N/A

Are all facets of the rulemaking process designed solely for the purpose of, and so they have, as their primary effect, the protection of the public? No

Does the proposed action relate to or affect in any manner any litigation which the agency is a party to concerning the subject matter of the proposed rule? No

Does the proposed rule have an economic impact? No

If the proposed rule has an economic impact, the proposed rule is required to be accompanied by a fiscal note prepared in accordance with subsection (f) of Section 41-22-23, Code of Alabama 1975.

Certification of Authorized Official

I certify that the attached proposed rule has been proposed in full compliance with the requirements of Chapter 22, Title 41, Code of Alabama 1975, and that it conforms to all applicable filing requirements of the Administrative Procedure Division of the Legislative Services Agency.

Signature of certifying officer Jacob Harper

Date 3/21/22

REC'D & FILED

MAR 21 2022

LEGISLATIVE SVC AGENCY

Department of Finance

NOTICE OF INTENDED ACTION

AGENCY NAME: Alabama Department of Finance

RULE NO. & TITLE: 355-4-3 Methods of Procurement

INTENDED ACTION: To propose a new rule.

SUBSTANCE OF PROPOSED ACTION: The new rule implements the new Alabama procurement law, enacted Act 2021-296. The rule describes the different methods of procurement.

TIME, PLACE, MANNER OF PRESENTING VIEWS: A public hearing will be held only if requested by an interested party. A written request shall be submitted to the agency contact person listed below. Interested persons may present their view in writing to the contact person listed below.

FINAL DATE FOR COMMENT AND COMPLETION OF NOTICE: The Department of Finance, Legal Division will accept comments or requests for a hearing no later than May 5, 2022 at 5 p.m.

CONTACT PERSON AT AGENCY: Jacob Harper, Department of Finance, Legal Division, 600 Dexter Avenue, Suite E-309, Montgomery, AL 36130, Phone 334-242-4520 or Jacob.Harper@finance.alabama.gov.



Jacob Harper

State of Alabama
Department of Finance
Administrative Code

Chapter 355-4-3
Methods of Procurement

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(1) Definitions.

(a) Capability, as used in Code of Ala. 1975, § 41-4-130(7) (Definitions, Responsible Bidder or Offeror) of the State Procurement Code, means, for the purpose of these Rules, capability at the time of award of the contract.

(b) Discussions, as used in the source selection process, means an exchange of information or other manner of negotiation during which the offeror and the State may alter or otherwise change the conditions, terms, and price of the proposed contract. Discussions may be conducted in

connection with competitive sealed proposals, sole source, and emergency procurement; discussions are not permissible in competitive sealed bidding (except to the extent permissible in the first phase of multi-step sealed bidding).

(c) Invitation to Bid means all documents, whether attached or incorporated by reference, utilized for soliciting bids. A request for bid or RFB is an Invitation to Bid.

(d) Prequalification for Inclusion on Bidders Lists means determining in accordance with Rule 355-4-3-.10 that a prospective bidder or offeror satisfies the criteria established for being included on the bidders list.

(e) Solicitation means an Invitation for Bids, a Request for Proposals, a request for quotations, or any other document issued by the State for the purpose of soliciting bids or proposals to perform a State contract.

(2) General Provisions

(a) Extension of Time on Indefinite Quantity Contracts.

The time of performance of an indefinite quantity contract may be extended upon agreement of the parties, provided the extension is for 90 days or less and the Chief Procurement Officer or the head of a Purchasing Agency determines in writing that it is not practical to award another contract at the time of such extension.

(b) No Acceptable Bids Received.

If no bid is received, or if all bids are rejected in accordance with Rule 355-4-3-.08(3), in response to an Invitation for Bids (including multi-step bidding), one of the following shall occur:

1. the Procurement Officer may seek quotes that are responsive to the solicitation;
2. the Procurement Officer may cancel the solicitation; or
3. if the Chief Procurement Officer determines in writing that the need for the supply or service continues and seeking quotes responsive

to the Invitation to Bid would likely be futile, the procurement may then be conducted under Rule 355-4-3-.05 (Sole Source Procurement) or 355-4-3-.06 (Emergency Procurements), as appropriate.

(c) Only One Bid or Proposal Received.

1. One Bid Received. If only one responsive bid is received in response to an Invitation for Bids (including multi-step bidding), an award may be made to the single bidder if the Procurement Officer finds that the price submitted is fair and reasonable, and that either other prospective bidders had reasonable opportunity to respond, or there is not adequate time for re-solicitation. Otherwise, the bid may be rejected pursuant to the provisions of Rule 355-4-3-.08 and:

- (i) new bids or offers may be solicited;
- (ii) the solicitation may be cancelled; or
- (iii) if the Chief Procurement Officer determines in writing that the need for the supply or service continues, but that the price of the one bid is not fair and reasonable and there is no time for re-solicitation or re-solicitation would likely be futile, the procurement may then be conducted under Rule 355-4-3-.05 (Sole Source Procurement) or Rule 355-4-3-.06 (Emergency Procurements), as appropriate.

2. One Proposal Received. If only one proposal is received in response to a Request for Proposals, the Procurement Officer may, as such officer deems appropriate, either make an award in accordance with the procedures set forth in Code of Ala. 1975, § 41-4-133(Competitive Sealed Proposals) of the State Procurement Code and Rule 355-4-3-.03 (Competitive Sealed Proposals) or, if time permits, resolicit for the purpose of obtaining multiple competitive sealed proposals.

(d) Multiple or Alternate Bids or Proposals.

Alternative bids are multiple bids with substantive variations from the same bidder in response to an Invitation to Bid. Alternative proposals are multiple proposals with substantive variations from the same Offeror in response to a Request for Proposals. Alternative bids or proposals will be considered, unless specifically forbidden by the Solicitation. If a bidder or Offeror submits alternate bids or proposals that are forbidden in the Solicitation, the Procurement Officer will only accept the bidder's base bid or Offeror's base proposal, if that base bid or proposal is clearly identified, and will not accept any other alternate bids or proposals. If a base bid or base offer is not identified, all bids or offers will be rejected.

(e) Procuring State-Produced Supplies or Services.

Using Agency requirements may be fulfilled by procuring supplies produced or services performed incident to the State's own programs, such as industries of correctional institutions. The Chief Procurement Officer or the head of a Purchasing Agency shall determine whether such supplies or services meet the State's requirements and whether the price represents a fair market value for such supplies or services. If it is determined that such requirements cannot be met by State-produced supplies or services, or the price is not fair and reasonable, the procurement may be made from the private sector in accordance with the State Procurement Code. When such procurements are made from other State agencies, the private sector shall not be solicited to compete against State agencies.

(f) Bid and Performance Bonds for Supply Contracts or Service Contracts.

Bid and performance bonds or other security may be required for supply contracts or service contracts as the Chief Procurement Officer, the head of a Purchasing Agency, or such officer's designee deems advisable to protect the interest of the State. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of bidder or offeror responsibility.

(g) Conditioning Bids or Proposals Upon Other Awards Not Acceptable.

Any bid or proposal which is conditioned upon receiving award of both the particular contract being solicited and another State contract shall be deemed nonresponsive and not accepted.

(3) Relations Between Agencies

(a) Purchase Requests by Agencies.

Chief Procurement Officer's Authority to Reject. When the Chief Procurement Officer, after consultation with the requesting agency, decides that processing the purchase request is clearly not in the best interest of the State or that further review is needed, such officer shall return such purchase request to the requesting agency. A statement of the reasons for its return shall accompany the returned request. Examples of reasons a purchase request may be returned include, but are not limited to:

1. the request can be satisfied from existing State stocks or State contracts;
2. the request exceeds agency needs;
3. the supplies or services requested could be procured more economically at a different time without detriment to the State; or
4. the quality requested is inconsistent with State standards and usage.

(4) Unsolicited Offers

(a) An unsolicited offer is any offer other than one submitted in response to a solicitation. The Chief Procurement Officer is responsible for considering, evaluating, and accepting or rejecting an unsolicited offer and must do so in accordance with the State Procurement Code.

(5) Novation or Change of Name

(a) No Assignment. No State contract is transferable, or otherwise assignable, without the written consent of the Chief Procurement Officer or the head of a Purchasing Agency provided, however, that a contractor may assign monies receivable under a contract after due notice to the State.

(b) Recognition of a Successor in Interest; Novation. When in the best interest of the State, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:

1. the transferee assumes all of the transferor's obligations;
2. the transferor waives all rights under the contract as against the State; and
3. unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

(c) Change of Name. When a contractor requests to change the name in which it holds a contract with the State, the Procurement Officer responsible for the contract shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

(d) Notice to Comptroller. Before taking action on a contractor's request for assignment, recognition of a successor in interest, or change of name, the Chief Procurement Officer or head of a Purchasing Agency shall coordinate with the Comptroller's Office to ensure compliance with the State's Fiscal Policies and Procedures.

(6) Purchase of Items Separately from Construction Contract. The Chief Procurement Officer is authorized to determine whether a supply item or group of supply items shall be included as a part of, or procured separately from, any contract for construction.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-130

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

Competitive Sealed Bidding.

(1) The Invitation for Bids.

(a) Use. The Invitation for Bids is used to initiate a competitive sealed bid procurement.

(b) Content. At a minimum, the Invitation for Bids shall include the following:

1. instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the State, and any other information relevant to bid submission;

2. the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description; and

3. the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

(c) Incorporation by Reference. The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.

(d) Acknowledgement of Amendments. The Invitation for Bids shall require the acknowledgement of the receipt of all amendments issued.

(2) Bidding Time.

Bidding time is the period of time between the date of public release of the Invitation for Bids and the time and date set for receipt of bids. In each case bidding time will be set to provide bidders a reasonable time to prepare their bids. 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 Chief Procurement Officer or the head of the Purchasing Agency.

(3) Bidder Submissions

(a) Bid Form. The Invitation for Bids shall provide a form which shall include space in which the bid price shall

be inserted and which the bidder shall sign and submit along with all other information required by the Invitation for Bids to be submitted.

(b) Electronic Bids. The Invitation for Bids may state that electronic bids will be considered whenever they are received at the designated office by the time and date set for receipt of bids. Such electronic bids shall contain specific reference to the Invitation for Bids; the items, quantities, and prices for which the bid is submitted; the time and place of delivery; and a statement that the bidder agrees to all the terms, conditions, and provisions of the Invitation for Bids.

(c) Bid Samples and Descriptive Literature.

1. "Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the State to consider whether the item meets its needs.

2. "Bid sample" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

3. Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid.

4. Unless bid samples or descriptive literature are requested or allowed by the Invitation for Bids, they cannot be considered or evaluated.

(4) Public Notice.

(a) Distribution. Invitations for Bids or Notices of the Availability of Invitations for Bids shall be mailed, electronically transmitted, or otherwise furnished to a sufficient number of potential bidders for the purpose of securing competition. Notices of Availability shall indicate where, when, and for how long Invitations for Bids may be obtained; generally describe the supply or service; and may contain other appropriate information.

(b) Publication. Every Invitation to Bid more than \$25,000 shall be publicized in one or more of the following ways:

1. in a newspaper of general circulation;
2. in a newspaper of local circulation in the area pertinent to the procurement;
3. in industry media;
4. through electronic mailing lists,
5. through an agency web site or other publicly accessible electronic media,
6. in a government publication designed for giving public notice, or
7. a method preapproved by the Chief Procurement Officer in writing.

(c) Public Availability. A copy of the Invitation for Bids shall be made available for public inspection at the Chief Procurement Officer or head of the Purchasing Agency's office.

(5) Bidders Lists.

(a) Purpose. Bidders lists may be compiled to provide the State with the names of businesses that may be interested in competing for various types of State contracts. Unless otherwise provided, inclusion or exclusion of the name of a business does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a State contract.

(b) Public Availability. Names and addresses on bidders lists shall be available for public inspection as provided for in these rules.

(6) Pre-Bid Conferences.

Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received an Invitation for Bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment as provided in Rule 355-4-3-.02(7) (Amendments to Invitations for Bids).

(7) Amendments to Invitations for Bids.

Distribution. Amendments to Invitation to Bids shall reference the portions of the Invitation to Bids it amends and shall be sent to all prospective bidders known to have received an Invitation for Bids. Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such preparation, such time shall be extended, if possible, in the amendment or, if necessary, by email or telephone and confirmed in the amendment.

(8) Pre-Opening Modification or Withdrawal of Bids.

(a) Procedure. Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time and date set for bid opening. An electronic modification or withdrawal received from the bidder prior to the time and date set for bid opening will be effective provided that there is objective evidence confirming that the message was received prior to the time and date set for bid opening.

(b) Disposition of Bid Security. If a bid is withdrawn in accordance with this Section, the bid security, if any, shall be returned to the bidder.

(c) Records. All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

(9) Late Bids, Late Withdrawals, and Late Modifications.

(a) Definition. Any bid received after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received after the time and date set for opening of bids at the place designated for opening is late.

(b) Treatment. No late bid, late modification, or late withdrawal will be considered unless received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of State personnel directly serving the procurement activity.

(c) Notice. Bidders submitting late bids that will not be considered for award shall be so notified as soon as practicable.

(d) Records. Records equivalent to those required in Rule 355-4-3-.02(8)(c) (Pre-Opening Modification or Withdrawal of Bids, Records) shall be made and kept for each late bid, late modification, or late withdrawal.

(10) Receipt, Opening, and Recording of Bids.

(a) Receipt. Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening. Bids submitted through electronic means shall be received in such a manner that the time and date of submittal, along with the contents of such bids shall be securely stored until the time and date set for bid opening.

(b) Opening and Recording. Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Procurement Officer, shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The names and addresses of required witnesses shall also be recorded at the opening. The opened bids shall be available for public inspection except to the extent the bidder designates Confidential Information as set forth in Subsection (c) of this Section. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Price and makes and model or catalogue of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary. Bids submitted through electronic means shall be received in such a manner that the requirements of this section can be readily met.

(c) Confidential Data. The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of Confidential Information identified in writing. If the parties do not agree as to the disclosure of Confidential Information, the Procurement Officer shall inform the bidders in writing what portions of the bids will be disclosed and that, unless the bidder protests

under Code of Ala. § 41-4-161, the bids will be so disclosed. The bids shall be open to public inspection subject to any continuing prohibition on the disclosure of Confidential Information.

(11) Mistakes in Bids.

(a) General. Bid correction or withdrawal by reason of an apparent, inadvertent mistake is permissible but only to the extent it is not contrary to the interest of the State and the fair treatment of other bidders.

(b) Mistakes Discovered Before Opening. A bidder may correct mistakes discovered before bid opening by withdrawing or correcting the bid as provided in Rule 355-4-3-.02(8) (Pre-Opening Modification or Withdrawal of Bids). The Procurement Officer has no duty to inspect bids for mistakes or to notify bidders of potential mistakes in bids before bid opening.

(c) Mistakes Discovered At or After Bid Opening But Before Award.

(1) When the Procurement Officer concludes that a mistake has been made, the bidder shall be asked to confirm the bid. Situations in which confirmation should be requested include obvious inadvertent or clerical errors on the face of the bid or a bid that is unreasonably low compared to other bids.

(2) The following types of mistakes discovered at or after bid opening may be corrected as follows:

(a). Minor Informalities. Minor informalities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible or non-existent. The Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the State. Examples include the failure of a bidder to:

(i) return the number of signed bids required by the Invitation for Bids;

(ii) sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound; or

(iii) acknowledge receipt of an amendment to the Invitation for Bids, but only if:

(A) it is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or

(B) the amendment involved had a negligible effect on price, quantity, quality, or delivery.

(b). Mistakes Where Intended Correct Bid is Evident. If the mistake and the intended correct bid are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

(c). Mistakes Where Intended Correct Bid is Not Evident. A bidder may be permitted to withdraw a low bid if:

(i) a mistake is clearly evident on the face of the bid document, but the intended correction is not similarly evident or

(ii) the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

(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 makes a written determination that it would be unconscionable not to allow the mistake to be corrected. Any corrections made after award must be accomplished through an amendment to the contract, or alternatively, the contract may be terminated and a new solicitation be issued for the required supplies and services.

(e) Actions Required. Before any action is taken under Rule 355-4-3-.02(11)(c) or (d), the Chief Procurement Officer or head of a Purchasing Agency must consult and obtain concurrence of legal counsel. When a mistake is corrected or a request for correction is denied under Rule 355-4-3-.02(11)(c) or (d), the Chief Procurement Officer or the head of a Purchasing agency shall prepare a written determination showing that the relief was granted or denied in accordance with these Rules

(12) Bid Evaluation and Award

(a) General. The contract is to be awarded "to the lowest responsible and responsive bidder whose bid meets the requirements set forth in the Invitation for Bid." See Code of Ala. § 41-4-132(g)(1). The Invitation for Bids shall set forth the requirements which will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement that is not disclosed in the Invitation for Bids.

(b) Responsibility and Responsiveness. Responsibility of prospective contractors is defined by Code of Ala. § 41-4-130(7) and Rule 355-4-3-.09 (Responsibility) of this Chapter. Responsiveness of bids is addressed in Code of Ala. § 41-4-130(8) which defines "responsive bidder" as "a person who has submitted a bid... which conforms in all material respects to the Invitation for Bid..."

(c) Product Acceptability. The Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

1. inspection or testing of a product prior to award for such characteristics as quality or workmanship;
2. examination of such elements as appearance, finish, taste, or feel; or
3. other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids. Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

(d) Determination of Lowest Bidder. Following determination of product acceptability as set forth in Subsection (c) of this Rule 355-4-3-.02(12), if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation cost and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

1. be reasonable estimates based upon information the State has available concerning future use; and
2. treat all bids equitably.

(e) Restrictions. Nothing in this Section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined under Subsection (d) of this Rule 355-4-3-.02(12). Further, this Section does not permit negotiations with any bidder, except as provided by Code of Ala. § 41-4-132(g) (1).

(13) Low Tie Bids.

(a) Definition. Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation for Bids.

(b) Award. In a tie involving only two bidders, the awardee will be determined by the Chief Procurement Officer flipping a coin. In the event of a tie among three or more bidders, award will be made by drawing lots. These tiebreaker procedures do not apply to multi-vendor awards.

(c) Record. Records shall be made of all Invitations for Bids on which tie bids are received showing at least the following information:

1. the identification number of the Invitation for Bids;
2. the supply or service; and
3. a listing of all the bidders and the prices submitted.

A copy of each such record shall be maintained in the relevant procurement file.

(14) Documentation of Award.

Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file.

(15) Publicizing Awards.

Written notice of award shall be sent to the successful bidder. Unsuccessful bidders shall be notified of the award in writing. Notice of award shall be made available to the public.

(16) Multi-Step Sealed Bidding.

(a) Definition. Multi-step sealed bidding is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the State, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder,

and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

(b) Conditions for Use. The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price. Multi-step sealed bidding may thus be used when it is considered desirable:

1. to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;

2. to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;

3. to accomplish Subsections (a) and (b) of this Rule 355-4-3-.02(16) prior to soliciting priced bids; and

4. to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

(17) Pre-Bid Conferences in Multi-Step Sealed Bidding. Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by Rule 355-4-3-.02(6) (Pre-Bid Conferences) may be conducted by the Procurement Officer. The Procurement Officer may also hold a conference of all potential bidders in accordance with Rule 355-4-3-.02(6) at any time during the evaluation of the unpriced technical offers.

(18) Procedure for Phase One of Multi-Step Sealed Bidding. (a) Form. Multi-step sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by Rule 355-4-3-.02(1) (The Invitation for Bids), except as hereinafter provided. In addition to the requirements set forth in Rule 355-4-3-.02(1), the multi-step Invitation for Bids shall state:

1. that unpriced technical offers are requested;
2. whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, such priced bids shall be submitted in a separate sealed envelope;
3. that it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;
4. the criteria to be used in the evaluation of the unpriced technical offers;
5. that the State, to the extent the Procurement Officer finds necessary, may conduct oral or written discussions of the unpriced technical offers;
6. that bidders may designate those portions of the unpriced technical offers which contain Confidential Information which are to remain confidential; and
7. that the item being procured shall be furnished generally in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids.

(b) Amendments to the Invitation for Bids. After receipt of unpriced technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted unpriced technical offers, and they shall be permitted to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the Procurement Officer, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids shall be cancelled in accordance with Rule 355-4-3-.08 (Cancellation of Solicitations; Rejection of Bids or Proposals) of this Chapter and a new Invitation for Bids issued.

(c) Receipt and Handling of Unpriced Technical Offers. Unpriced technical offers shall not be opened publicly but shall be opened in front of two or more procurement officials. Such offers shall not be disclosed

to unauthorized persons. Bidders may request nondisclosure of Confidential Information identified in writing.

(d) Evaluation of Unpriced Technical Offers. The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:

1. acceptable;
2. potentially acceptable, that is, reasonably susceptible of being made acceptable; or
3. unacceptable. The Procurement Officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.

The Procurement Officer may initiate Phase Two of the procedure if, in the Procurement Officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Procurement Officer finds that such is not the case, the Procurement Officer shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth in Subsection (e) of this Rule 355-4-3-.02(18).

(e) Discussion of Unpriced Technical Offers. The Procurement Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During the course of such discussions the Procurement Officer shall not disclose any information derived from one unpriced technical offer to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative.

(f) Notice of Unacceptable Unpriced Technical Offer. When the Procurement Officer determines a bidder's unpriced technical offer to be unacceptable, such offeror shall not be afforded an additional opportunity to supplement its technical offer.

(19) Mistakes During Multi-Step Sealed Bidding.

Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with Rule 355-4-3-.02(11) (Mistakes in Bids).

(20) Procedure for Phase Two.

(a) Initiation. Upon the completion of Phase One, the Procurement Officer shall either:

1. open priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; or

2. if priced bids have not been submitted, technical discussions have been held, or amendments to the Invitation for Bids have been issued, invite each acceptable bidder to submit a priced bid.

(b) Conduct. Phase Two shall be conducted as any other competitive sealed bid procurement except:

1. as specifically set forth in Rule 355-4-3-.02(16) (Multi-Step Sealed Bidding) through this Section;

2. no public notice need be given of this invitation to submit priced bids because such notice was previously given;

3. after award the unpriced technical offer of the successful bidder shall be disclosed as follows. The Procurement Officer shall examine written requests of confidentiality for Confidential Information in the technical offer of such bidder to determine the validity of any such requests. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that, unless the bidder protests under Division 6 of the State Procurement Code (Legal and Contractual Remedies), the offer will be so disclosed. Such technical offer shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data; and

4. unpriced technical offers of bidders who are not awarded the contract shall not be open to public inspection unless the Chief Procurement Officer determines in writing that public inspection of such offers is essential to assure confidence in the integrity of the procurement process; provided, however, that the provisions of Subsection (b)(3) of this Rule 355-4-3-.02(20) shall apply with respect to the possible disclosure of Confidential Information.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-132

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.03 **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 Subsections R3-203.01.1(b) through R3-203.01.1(d) of this Section 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. Professional Services shall be procured by competitive sealed proposals unless the Chief Procurement Officer determines otherwise in writing.

(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. § 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. 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. § 41-4-130(7) and Rule 355-4-3-.09 (Responsibility) of this Chapter. Responsiveness of proposals is covered by Code of Ala. § 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. § 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. 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: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.04 **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.

(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 a. 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.

(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.

Author: Department of Finance Legal Division

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

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.05 **Sole Source Procurement.**

(1) Conditions for Use of Sole Source Procurement.

Sole source procurement is not permissible unless a required supply or service is available from only a single supplier. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances which could necessitate sole source procurement:

- (a) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration;
- (b) where a sole supplier's item is needed for trial use or testing; and
- (c) where a sole supplier's item is to be procured for resale.

The determination as to whether a procurement shall be made as a sole source shall be made, in writing, by the Chief Procurement Officer. The Chief Procurement Officer may specify the application of such determination and the duration of its effectiveness. In cases of reasonable

doubt, competition should be solicited. Any request by a Using Agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

(2) Negotiation in Sole Source Procurement.

The Procurement Officer shall conduct negotiations, as appropriate, as to price, delivery, and terms.

(3) Record of Sole Source Procurement.

For the purpose of complying with Code of Ala. 1975 § 41-4-149, a record of sole source procurements shall be maintained that lists:

- (a) each contractor's name;
- (b) the amount and type of each contract;
- (c) a listing of the supplies procured under each contract; and
- (d) the identification number of each contract file.

The record for each fiscal year shall be available for public inspection, except where disclosure would be detrimental to the safety or security of persons or property or to the public interest as determined by the Chief Procurement Officer.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-135

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.06 **Emergency Procurements.**

(1) Definition of Emergency Conditions.

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, or such other reasons. The existence of such condition creates an immediate and serious need for supplies or services that cannot be met through normal

procurement methods and the lack of which would seriously threaten:

- (a) the functioning of State government;
- (b) the preservation or protection of property; or
- (c) the health or safety of any person.

(2) Scope of Emergency Procurements.

Emergency procurement shall be limited to those supplies or services necessary to meet the emergency.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-136

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.07 **Special Procurements.**

In accordance with Code of Alabama 1975 § 41-4-137, Special Procurements may be initiated when an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest. The Chief Procurement Officer or the head of a Purchasing agency shall determine when Special Procurements may be utilized, and when so utilized, the Chief Procurement Officer or head of a Purchasing Agency must prepare a written determination describing why the method was used to be included in the procurement file.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-137

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.08 **Cancellation of Invitations for Bids or Requests for Proposals.**

(1) Cancellation of Solicitation-Notice.

Each solicitation issued by the State shall state that the solicitation may be cancelled as provided in this Rule.

(2) Cancellation of Solicitation; Rejection of All Bids or Proposals.

(a) Prior to Opening.

1. As used in this Section, "opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.

2. Prior to opening, a solicitation may be cancelled in whole or in part when the Chief Procurement Officer or the head of a Purchasing Agency determines in writing that such action is in the State's best interest.

3. When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses solicited.

4. The notice of cancellation shall:

(i) identify the solicitation;

(ii) briefly explain the reason for cancellation; and

(iii) where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurements of similar supplies or services.

(b) After Opening.

1. After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Chief Procurement Officer or the head of a Purchasing Agency determines in writing that such action is in the State's best interest.

2. A notice of rejection should be sent to all businesses that submitted bids or proposals.

(c) Documentation.

The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

(3) Rejection of Individual Bids or Proposals.

(a) General. This Section applies to rejections of individual bids or proposals in whole or in part.

(b) Notice in Solicitation. Each solicitation issued by the State shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the State as provided in this Rule.

(c) Reasons for Rejection.

1. Bids. As used in this Subsection, "bid" means any bid submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding and includes submissions under Rule 355-4-3-.04 (Small Purchases) if no changes in offers are allowed after submission. Reasons for rejecting a bid include but are not limited to:

(i) the business that submitted the bid is nonresponsible as determined under Rule 355-4-3-.09;

(ii) the bid is not responsive, that is, it does not conform in all material respects to the Invitation for Bids; see Rule 355-4-3-.02(12) (Bid Evaluation and Award, Responsibility and Responsiveness); or

(iii) the supply or service offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids; See Rule 355-4-3-.02(12) (Bid Evaluation and Award, Product Acceptability).

2. Proposals. As used in this Subsection, "proposal" means any offer submitted in response to any solicitation, including an offer under Rule 355-4-3-.04 (Small Purchases), except a bid as defined in Rule 355-4-3-.08(3)(c)(1). Unless

the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and the State's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

(i) the business that submitted the proposal is nonresponsible as determined under Code of Ala. § 41-4-139;

(ii) the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or

(iii) the proposed price is clearly unreasonable.

(d) Notice of Rejection. Upon request, unsuccessful bidders or offerors shall be advised of the reasons therefor.

(4) "All or None" Bids or Proposals.

Only when provided by the solicitation may a bid or proposal limit acceptance to the entire bid or proposal offering. Otherwise, such bids or proposals shall be deemed to be nonresponsive. If the bid or proposal is properly so limited, the State shall not reject part of such bid or proposal and award on the remainder.

(5) Disposition of Bids or Proposals.

When bids or proposals are rejected, or a solicitation cancelled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders or offerors upon request, or otherwise disposed of.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-138

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.09 **Responsibility of Bidders and Offerors.**

(1) Application.

A determination of responsibility or nonresponsibility shall be governed by this Rule.

(2) Standards of Responsibility.

(a) Standards. Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

1. available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
2. a satisfactory record of performance;
3. a satisfactory record of integrity;
4. qualified legally to contract with the State;
and
5. supplied all necessary information in connection with the inquiry concerning responsibility.

(b) Information Pertaining to Responsibility. The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor nonresponsible if such failure is unreasonable.

(3) Ability to Meet Standards.

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

(a) evidence that such contractor possesses such necessary items;

(b) acceptable plans to subcontract for such necessary items; or

(c) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

(4) Duty Concerning Responsibility.

Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.

(5) Written Determination of Nonresponsibility Required.

If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the Chief Procurement Officer or the head of a Purchasing Agency. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the procurement file.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-139

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.10 **Prequalification of Suppliers.**

Prospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified. The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-140

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

Substantiation of Offered Prices.

(1) Meaning of Terms Not Defined in the State Procurement Code

(a) Adequate Price Competition. Price competition exists if competitive sealed proposals are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the Procurement Officer determines in writing that such competition is not adequate.

(b) Established Market Price means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

(c) Prices Set by Law or Regulation. The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the State and other customers.

(2) Submission of Substantiating Data.

(a) Time and Manner. When factual information is requested by the Procurement Officer to substantiate that the price or cost offered, or some portion of such price or cost, is reasonable, the offeror shall submit such data to the Procurement Officer prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the Procurement Officer. Such information shall either be actually submitted or specifically identified in writing.

(b) Refusal to Submit Data. A refusal by the offeror to supply the requested information may be grounds to disqualify the offeror or to defer award pending further review and analysis. In the event the Procurement Officer decides to enter into the contract without first receiving the requested information, the Procurement Officer shall make a written determination setting forth the reasons for

the award, which shall be made a part of the procurement file.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-141

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.12 **Types of Contracts.**

(1) Prohibition of Cost-Plus-a-Percentage-of-Cost Contracting.

Except for a cost-plus-a-percentage-of-cost contract, which is prohibited by Code of Ala. 1975 § 41-4-143, the use of any type of contract is permissible. Questions of whether a contract type is permitted or prohibited will be determined by the Chief Procurement Officer and such determinations are not subject to review. Permitted contract types include, but are not limited to, the following:

- (a) Fixed price contracts (with contract specified adjustments);
- (b) Firm fixed-price contracts;
- (c) Fixed-price contracts with price adjustment;
- (d) Cost-reimbursement contracts;
- (e) Allowable Cost Contracts;
- (f) Cost-Plus-Fixed Fee Contracts;
- (g) Cost Incentive Contracts;
- (h) Fixed-Price Cost Incentive Contracts;
- (i) Cost-Reimbursement Contracts with Cost Incentive Fee;
- (j) Performance Incentive contracts;
- (k) Time and Materials Contracts;
- (l) Labor Hour Contracts;
- (m) Definite Quantity contracts;
- (n) Indefinite Quantity contracts;
- (o) Requirements Contracts;
- (p) Leases;
- (q) Lease with Purchase Option.

(2) Option Provisions.

(a) Contract Provision. When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. Exercise of the option is always at the State's discretion only, and not subject to agreement or acceptance by the contractor.

(b) Exercise of Option. Before exercising any option for renewal, extension, or purchase, the Procurement Officer should attempt to ascertain whether a competitive procurement is practical, in terms of pertinent competitive and cost factors, and would be more advantageous to the State than renewal or extension of the existing contract.

(c) Lease with Purchase Option. A purchase option in a lease for supplies may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals, or the leased supply is the only supply that can meet the State's requirements, as determined in writing by an officer above the level of the Procurement Officer. Before exercising such an option, the Procurement Officer shall:

1. investigate alternative means of procuring comparable supplies, and
2. compare estimated costs and benefits associated with the alternative means and the exercise of such option, for example, the benefit of buying new state-of-the-art equipment compared to the estimated, initial savings associated with exercise of a purchase option.

(3) Policy Regarding Selection of Contract Types.

(a) General. The selection of an appropriate contract type depends on factors such as the nature of the supplies or services to be procured, the uncertainties which may be involved in contract performance, and the extent to which the State or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor.

Among the factors that may be considered in selecting any type of contract are:

1. the type and complexity of the supply or service being procured;
2. the difficulty of estimating performance costs such as the inability of the State to develop definitive specifications, to identify the risks to contractor inherent in the nature of the work to be performed, or otherwise to clearly establish the requirements of the contract;
3. the administrative costs to both parties;
4. the degree to which the State must provide technical coordination during the performance of the contract;
5. the effect of the choice of the type of contract on the amount of competition to be expected;
6. the stability of material or commodity market prices or wage levels;
7. the urgency of the requirement; and
8. the length of contract performance.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-143

History: New Rule: Filed March 21, 2022; effective October 1, 2022.

355-4-3-.13 **Multi-Year Contracts.**

(1) Duration

Multi-year contracts may not exceed five years in duration, including any extensions or renewals, unless determined otherwise in writing by the Chief Procurement Officer.

(2) Multi-Term Contract Procedure.

(a) Solicitation. The solicitation shall state:

1. the amount of supplies or services required for the proposed contract period;
2. that a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);

3. that the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the State's rights or the contractor's rights under any termination clause in the contract;

4. whether bidders or offerors may submit prices for:

(i) the first fiscal period only;

(ii) the entire time of performance only; or

(iii) both the first fiscal period and the entire time of performance;

5. that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared

(b) Award. Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to "buy in", that is, give such bidder or offeror an undue competitive advantage in subsequent procurements.

(c) Cancellation.

1. "Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise make available. The contract for the first fiscal period shall not be cancelled, except in the event of proration declared by the Governor. Cancellation results when the Procurement Officer notifies the contractor of nonavailability of funds for contract performance for any fiscal period subsequent to the first.

2. These provisions on cancellation of multi-term contracts do not limit the rights of the State or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this Subsection.

(3) Multiple Award.

(a) General. A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror when the State is obligated to order all of its actual requirements for the specified supplies or services from those contractors. The obligation to order the State's actual requirements is limited by the provisions of Uniform Commercial Code Section 2-306(1).

(b) Limitations on Use. A multiple award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple award shall be made in accordance with the provisions of Rule 355-4-3-.02 (Competitive Sealed Bidding), Rule 355-4-3-.03 (Competitive Sealed Proposals), Rule 355-4-3-.04 (Small Purchases), and Rule 355-4-3-.06 (Emergency Procurements), as applicable. Multiple awards shall not be made when a single award will meet the State's needs without sacrifice of economy or service.

(c) Contract and Solicitation Provisions. All eligible users of the contract shall be named in the solicitation, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract, provided, that:

1. the State shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its norm or an amount specified in the contract;

2. the State shall reserve the right to take bids separately if the Chief Procurement Officer or the head of a Purchasing Agency approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the State; and

3. the contract shall allow the State to procure supplies produced, or services performed, incidental to the State's own programs, such as industries of correctional institutions, when such supplies or services satisfy the need.

(d) Intent to Use. If a multiple award is anticipated prior to issuing a solicitation, the State shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

Author: Department of Finance Legal Division

Statutory Authority: Code of Ala. 1975, § 41-4-144

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