

**DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES,
OFFICE OF STATE PROCUREMENT**

(3634)

SUBJECT: Changes to Rules Under the Arkansas Procurement Law

DESCRIPTION: Due to legislation passed during the 92nd General Assembly, as well as other rule changes deemed necessary, the following rules are being amended:

- R1:19-11-203 is being amended to provide guidance on the definitions of “commodities” and “services.” Additionally, R2:19-11-203 through R7:19-11-203 have been renumbered.
- R2:19-11-203(g) is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R3:19-11-203 is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R6:19-11-217 is being added to provide guidance on how agencies should manage the roster of expiring contracts.
- R1:19-11-218 is being amended to provide guidance for written delegation orders pursuant to changes introduced in Act 420 of 2019, and R1:19-11-218(A) and (C) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-219 is being added to provide guidance on attorney reviews of contracts.
- R1:19-11-220(b) and (c) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-221(2) to (4) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-223 is being amended concerning approvals and denials of requests for exemption from mandatory state contracts. R2:19-11-223 has been added to provide guidance for mandatory state contracts. Both rules are being promulgated due to changes introduced in Act 421 of 2019.
- R1:19-11-224(1)(B) is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R6:19-11-229 is being added to provide guidance on solicitation conferences. Consequently, R7:19-11-229 through R14:19-11-229 have been renumbered. Pursuant to statutory changes introduced in Act 419 of 2019, R8:19-11-229 is being amended to provide guidance on time discounts, R11:19-11-229 is being amended to provide guidance on training certification for negotiations, and R8:19-11-229 is being amended to provide greater clarity on grounds for rejecting bids.
- R2:19-11-230 is being amended to provide guidance for weighting cost in competitive sealed proposals. R5:19-11-230 is being amended to provide guidance for use of past performance in evaluations, and use of private evaluators. R7:19-11-230 is being amended to provide guidance on seeking clarifications from offerors.

- R1:19-11-233 is being amended to align with changes introduced in Act 419 of 2019 concerning non-critical emergencies, and to remove language related to reporting requirements that were modified by Act 417 of 2019.
- R1:19-11-238 is being added to provide guidance on contract term lengths pursuant to the statutory changes of Act 418 of 2019.
- R1:19-11-244 is being amended to provide definitions and otherwise align with changes introduced in Act 420 of 2019.
- R1:19-11-249 is being amended to align with changes introduced in Act 421 of 2019.
- R2:19-11-249 is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-251 is being amended to remove references to review thresholds and contract designations that have been removed by reporting requirement modifications of Act 417 of 2019.
- Due to reporting requirement modifications of Act 417 of 2019, R1:19-11-265 and R2:19-11-265 are being amended to provide guidance and definitions. R4:19-11-265 and R5:19-11-265 are being repealed. The rules are consequently being renumbered.
- R1:19-11-267 is being amended to reflect the changes and contract amounts introduced in Act 418 of 2019.
- R1:19-11-268 is being repealed due to the changes introduced in Act 418 of 2019.
- R1:19-11-[273] through R3:19-11-[273] have been added to provide guidance on the use of solicitation conferences.
- R1:19-11-[275] through R3:19-11-[275] have been added to provide guidance on the use of requests for information.
- R1:19-11-1006 is being repealed due to the repeal of its statutory counterpart in Act 417 of 2019.
- R1:19-11-1010 and R1:19-11-1013 are being repealed due to the repeal of their statutory counterparts in Act 418 of 2019.
- R2:19-11-1012 is being amended due to reporting requirement modifications of Act 417 of 2019.

PUBLIC COMMENT: A public hearing was held on November 15, 2019. The public comment period expired on November 15, 2019. The Office of State Procurement provided the following summary of the public comments it received:

OSP has received one comment, on November 8, 2019, that was in support of the adoption of the rule changes being promulgated and has received no comments against the adoption of the rule changes being promulgated. OSP held a public comment hearing November 15, 2019 at 9:00 AM. One question was received during the public comment hearing: Should R2:19-11-1012 reference the Department of Finance and Administration or the Department of Transformation and Shared Services, regarding the filing of contracts which are critical emergency procurements or exempted?

OSP revised the proposed rules based on the comment it received at the public hearing.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses thereto:

QUESTION #1: Is there statutory authority for the definitions of “consulting services,” “employment agreement,” “personal services,” and “professional services” in R1:19-11-203? **RESPONSE:** Yes. Thank you for the opportunity to explain. The State Procurement Director is statutorily required to procure or supervise the procurement of all commodities and services within the limits of the Arkansas Procurement Law *subchapter* and rules promulgated under the authority of that *subchapter*. See Ark. Code Ann. § 19-11-217(c)(1). The Arkansas Procurement Law *subchapter* specifically defines “services” as including: (i) consulting services; (ii) personal services; and (iii) professional services (*see* Ark. Code Ann. § 19-11-203(27)(C)) but does not define those component terms. In furtherance of his statutory duties, the State Procurement Director needs to establish a uniform understanding among procurement officials regarding the meaning of these terms so they can consistently apply Arkansas Procurement Law. Because statutory definitions of these important terms are not provided in the Arkansas Procurement Law *subchapter*, they are being promulgated under that *subchapter* to provide a uniform standard clarifying which contracts fall within these different subsets of contracts for “services” as defined in the Arkansas Procurement Law *subchapter*. Without a rule or a statutory provision in Arkansas Procurement Law providing a uniform definition of these terms, there is bound to be varying agency interpretations of the meaning of those terms and discrepant application of the law in deciding which contracts are contracts for “services” as defined in the Arkansas Procurement Law *subchapter*.

QUESTION #2: Where do the definitions of “included in” and “incident to” in R1:19-11-203(f) come from? **RESPONSE:** Act 417 of 2019 changed the statutory definition of “services” by adding new verbiage regarding the labor, time, or effort of a contractor for the development of “software and other intangible property other than technical support *incidental to* the procurement of proprietary software,” Ark. Code Ann. § 19-11-203(27)(B)(v) (emphasis added), and regarding labor, time, or effort by a contractor “that does not produce tangible commodities.” Ark. Code Ann. § 19-11-203(27)(A).

The definitions of “included in” and “incident to” in R1:19-11-203(f) come from the need to: (i) align with the Arkansas Uniform Commercial Code (as explained below); and (ii) clearly distinguish between: (a) contracts to pay contractors for furnishing “labor, time, or effort” that may result in the production of tangible commodities, but where payment is predominantly for furnishing “labor, time, or effort” and not actually conditioned on delivering commodities (in which case the contracts should be categorized as contracts for services); and (b) contracts to pay contractors for tangible commodities where the compensation is predominantly for delivery of tangible commodities and any “labor, time, or effort” furnished by the contractor in the production or sale of the commodities is merely incidental thereto or included therein (in which case the contracts should be categorized as contracts for commodities).

Under the Arkansas UCC, in circumstances where a contract calls for a combination of services and goods, the majority test for determining whether a contract is a contract for the sale of goods (and therefore subject to UCC Article 2) or a contract for services “is whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom). See *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974). See also *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923, 932 (8th Cir. 1999) (“Although the parties’ franchise agreement is a mixed contract for the sale of goods and services, the transaction at issue is fundamentally an exchange of goods. The Uniform Commercial Code ... governs such transactions [under Arkansas law].”); *B & B Hardware, Inc. v. Fastenal Co.*, 688 F.3d 917, 921 (8th Cir. 2012) (holding that even where there is a “mixed” contract for the sale of goods and services, the UCC governs where the agreement is fundamentally one for the sale of goods). This is a widely accepted distinction at law that is often referred to as the “primary purpose law.” Since both Arkansas Procurement Law and the Arkansas UCC apply to contracts for the sale of commodities (see Ark. Code Ann. § 19-11-203(4)(A)(i)), it is advisable that they be defined harmoniously and to reach the same result in order to avoid confusion as to the applicable law or result.

The proposed definitions of “included in” and “incident to” are consistent with both the Arkansas UCC and Arkansas Procurement Law. See Ark. Code Ann. § 19-11-203(27)(B)(v) (“The furnishing of labor, time, or effort by a contractor for the generation, customization, configuration, or development of software and other intangible property other than technical support incidental to the procurement of proprietary software.”) They will help procurement professionals by providing a rule for distinguishing between: (1) contracts to pay for services that may result in the production of tangible commodities (service contracts); and (2) contracts to pay for the production of tangible commodities that may require a contractor to furnish some labor, time, or effort that are merely incidental to or included in the production or sale of those tangible commodities (contracts for commodities).

QUESTION #3: Is the attorney certification provision in R1:19-11-219 required by statute? **RESPONSE:** Ark. Code Ann. § 19-11-219(c) states “The director shall adopt rules to implement this section, including without limitation rules to” before going into designated contracts and requirements for attorneys who may review contracts. The rule requiring attorneys certify they have reviewed the contract comes from the need to clarify what the attorneys who may review are reviewing in the designated contracts. As further explained below, the four items listed in the rule seek to ensure the contract remains in compliance with state law. An earlier draft of the rule provided, in relevant part, as follows:

Where the standard terms and conditions that have already been approved by OSP are not used, or they have been used but substantively amended, the reviewing attorney shall confirm, in a writing...”

OSP is seeking confirmation in writing that contracts which modify the standard terms and conditions complies with state law as discussed below.

QUESTION #4: Where does the list of certification requirements in R1:19-11-219(a)-(d) come from? **RESPONSE:** R1:19-11-219(a) comes from the doctrine of sovereign immunity. *See* Ark. Const. art. 5, § 20; *Bd. of Trustees of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616 (2018). R1:19-11-219(b) comes from the doctrine of sovereign immunity. R1:19-11-219(c) comes from the Arkansas Freedom of Information Act of 1967 (*see* Ark. Code Ann. § 25-19-101 et al.). R1:19-11-219(d) comes from Ark. Code Ann. § 19-4-1206(b)(3)(B) (“It shall be the responsibility and duty of each disbursing officer or agent to certify that the services have been performed or the goods received.”).

QUESTION #5: Is there statutory authority for the definition of “substantial savings” in R2:19-11-223? **RESPONSE:** Ark. Code Ann. § 19-11-223(d)(5)(B) states “The director shall adopt rules to include any necessary conditions, reporting, or document retention standards related to the director’s duty to promote mandatory state contract use under this subsection.” Ark. Code Ann. § 19-11-223(b)(2)(A) states, “Except as provided in § 19-11-233, the director may approve an exemption from a mandatory state contract awarded under this section only if the state agency demonstrates that substantial savings will likely be effected by purchasing outside of the mandatory state contract.” The authority to define “substantial savings” comes from the authority to adopt rules to include any necessary conditions related to the director’s duty to promote mandatory state contract use. With “substantial savings” being what agencies are required to demonstrate in order to seek an exemption from a mandatory state contract, a standard definition is vital to a non-arbitrary system of administering mandatory state contract usage. R2:19-11-223 seeks to strike a reasonable balance between an individual agency’s need to find savings, and the State’s need to maintain favorable pricing through volume purchasing. In any event, clarity is needed on what “substantial savings” an agency must demonstrate to seek exemption from a mandatory state contract.

QUESTION #6: Act 419’s training requirements (as codified at Ark. Code Ann. § 19-11-229) go into effect on July 1, 2021. Considering this fact, is proposed rule R11:19-11-229 intended to take effect on January 1, 2020, as indicated on the completed questionnaire? **RESPONSE:** Yes, because the section of the rule that pertains to training (R11:19-11-229(c)) is merely clarifying the administrative interpretation and has no practical impact until the statutory mandate it corresponds to becomes effective on July 1, 2021. OSP would rather have the rule’s guidance in place before the law becomes effective than wait until or after the effective date.

QUESTION #7: Is there statutory authority for the points allocation provision of R5:19-11-230(b)(1)? **RESPONSE:** Act 419 of 2019 added new statutory language to Ark. Code Ann. § 19-11-230. In part, it added:

(3) The state’s prior experience with an offeror may be considered and *scored* as part of the offeror’s proposal only:

- (A) To the extent that the request for proposals requests that all offerors provide references; and
- (B) If the offeror's past performance with the state occurred no more than three (3) years before the offeror submitted the proposal.
- (4) A state agency shall not include prior experience with the state as a mandatory requirement for submitting a proposal under this section.

Act 419 (emphasis added). Because this is new statutory language, it did not have a rule promulgated to correspond with its novel requirements. Under this new language, Ark. Code Ann. § 19-11-230(d)(3) limits the ways in which an offeror's past performance may be considered and "scored," and Ark. Code Ann. § 19-11-230(d)(4) provides that an offeror's past performance with the state cannot be made a mandatory prerequisite for submitting a proposal. As a practical matter, proposals have been and are "scored" by means of a point allocation system. The rule seeks to clarify for procurement officials in a practical fashion the new statutory limits on the way in which points can be used to "score" prior experience consistent with the new language in Ark. Code Ann. § 19-11-230(d)(3) and (4).

QUESTION #8: Does R1:19-11-238's seven-year term-length limit for contracts apply if a longer term is permitted by statute as implied in Ark. Code Ann. § 19-11-238(a)?

RESPONSE: No. The rule, as the statute, is only intended to apply to contracts that are not otherwise exempt from Arkansas Procurement Law. An earlier draft of the rule provided, in relevant part, as follows:

A non-exempt contract may be entered into for up to a maximum period of a total of seven (7) years.

It was abandoned, but it or a similar articulation can be adopted if you think it would more clearly convey OSP's intent not to reach contracts that are exempt from Arkansas Procurement Law or are governed by a particular law that puts them outside of the law of general application.

QUESTION #9: Is there statutory authority for the definitions in R2:19-11-265(b)?

RESPONSE: The definitions "initial contract amount" and "total projected contract amount" mirror Ark. Code Ann. § 19-11-267(b)(1), Ark. Code Ann. § 19-11-273(a). "Essential terms of a contract" is defined in conformity with Arkansas common law as to the fundamental terms that must exist to create an enforceable contract. Accordingly, this definition would seem to align with the intent of Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(c) while clarifying for agencies the definition of the term.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked additional questions in follow-up:

(1) Section R1:19-11-203(a) – The rule provides that "real property" is expressly excluded by Ark. Code Ann. § 19-11-203(4)(B); however, Act 417 of 2019, § 1, appears to have stricken the term "real property" from the section addressing what "commodities"

does not include. Can you explain the reason for the difference? **RESPONSE:** OSP wants its rules to offer clear guidance. It is trying to make something that is implicit in the law explicit in the rule. Act 417 of 2019, as codified in Ark. Code Ann. § 19-11-203(4)(B), expressly provides that the defined term “Commodities” “does not include: . . . Capital improvements.” The term “Capital improvements” means “all lands,” among other things. See Ark. Code Ann. § 19-11-203(3)(A). At law, the term “land” is understood to mean “[a]n estate or interest in real property.” See *Black’s Law Dictionary* 881 (7th ed. 1999). Similarly, it is understood at law that “real property” means “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.” See *id.* at 1234. Although this may be clear to lawyers familiar with property law, it may not be to all agency staff charged with carrying out procurement. Because the term “Commodities,” as defined in Act 417 of 2019, does not include “Capital improvements,” which term is defined to include land and structures built on it, it logically follows that the term “Commodities” cannot include “real property.” In other words, the exclusion of real property from the definition of “Commodities” is implicit in the statutory framework. The rule just makes this explicit for those people who may not be familiar with the term “Capital improvements,” but who may be familiar with the more common term “real property.” OSP regularly gets calls from people who mistakenly assume that its rules apply to contracts for the sale or purchase of real property, and OSP would like its rules to make it clear that they do not.

(2) Section R1:19-11-203(a) – Is there a reason that OSP is using the term “excluded commodities and services” when the term used in Ark. Code Ann. § 19-11-203(4)(B)(ii), as amended by Act 417, § 1, is “exempt commodities and services”? **RESPONSE:** No. If the distinction between “exempt” and “excluded” is deemed material by the Committee, there isn’t any reason why the phrase “excluded commodities and services” cannot be replaced with “exempt commodities and services.”

(3) Section R1:19-11-203(b-e) – Can you provide the origin for the definitions of these terms used by OSP in these rules? **RESPONSE:** The terms in R1:19-11-203(b)-(e), “Consulting services,” “Employment agreement,” “Personal services,” [and] “Professional services,” are all terms used in the subchapter known as Arkansas Procurement Law but which are not defined in the subchapter.

The OSP definition of “*Consulting services*” originates in the ordinary meaning of the word “consulting” in the English language. See https://www.merriam-webster.com/dictionary/consulting?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (“providing professional or expert advice”).

The OSP definition of “*Employment agreement*” is a blended definition that draws on the legal definition of the term “employment contract,” as defined in *Black’s Law Dictionary* 321 (“A contract between an employer and employee in which the terms and conditions of employment are stated.”), but which also draws on the definitions that mark the legal distinction between an employee and an independent contractor. See AMI 701 Agent—Employee—Definition (“An [agent][employee] is a person who, by agreement with another called the [principal][employer], acts for the [principal][employer] and is

subject to *[his]/[her]/[its]* control. The agreement may be oral or written or implied from the conduct of the parties and may be with or without compensation. If one person has the right to control the actions of another at a given time, the relationship of *[principal and agent]/[employer and employee]* may exist at that time, even though the right to control may not actually have been exercised.”); AMI 707 Agent or Independent Contractor (“ . . . An independent contractor is one who, in the course of *[his]/[her]* independent occupation, is responsible for the performance of certain work, uses *[his]/[her]* own methods to accomplish it, and is subject to the control of the employer only as to the result of *[his]/[her]* work.”). OSP drafted the definition comprehensively because some procurement staff might not be aware of the legal distinction between an employee and an independent contractor.

The OSP definition of “*Personal services*” originates in well-established contract law recognizing that a personal service contract is one where the identity of the person performing the service is material. See, e.g., *Redman v. Mena Gen. Hosp.*, 152 S.W.2d 542, 544 (Ark. 1941) (adopting the definition articulated in 17 C.J.S. *Contracts*, § 10, wherein “personal contract” is defined as “a contract for personal services; a contract in which the personality of one of the parties is material”). See also <http://www.duhaime.org/LegalDictionary/P/PersonalServicesContract.aspx> (explaining that “[t]he distinctive feature of a personal service contract is that it must follow the person with the skills at the root of the contract.”).

The OSP definition of “*Professional services*” is a blended definition that includes a generally accepted definition of the term “professional,” see *Black’s Law Dictionary* 1226 (“A person who belongs to a learned professional or whose occupation requires a high level of training and proficiency.”), and pulls in the professional services specifically identified in Ark. Code Ann. § 19-11-801. This is done because the statutory definition for “Technical and general services” specifically provides that “Technical and general services” shall not be construed to include the procurement of *professional services under § 19-11-801 et seq.* Ark. Code Ann. § 19-11-203(34)(B) (emphasis added).

(4) Section R1:19-11-203(f) – Is there a reason that OSP’s definition of “services” does not track that used in Ark. Code Ann. § 19-11-203(27), as amended by Act 417, § 3?

RESPONSE: Yes. An earlier version started off tracking the statute and then provided the additional clarification, but during an internal review it was decided that the language that tracked the statute verbatim was merely redundant and that only the language that further clarified and elaborated the statutory definition needed to be kept. OSP has no objection to explicitly incorporating the statutory definition to the front portion of the rule since OSP understands it to be the base on which the rule rests. However, additional clarification is needed because the root definition in the statute does not, by itself, provide enough guidance for procurement officials to reliably draw a clear distinction between labor that is incidental to a contract for the purchase of future goods and labor that is paid for under a contract requiring the production of a commodity or commodities. Although they both require some degree of labor, the contract in the first case is for the procurement of commodities and the contract in the second case is a contract for services.

The rule seeks to make this distinction clear because it is an essential distinction with significant legal consequences.

(5) Section R1:19-11-203(g) –

(a) Can you provide the origin for the definition of the term used by OSP in these rules?

(b) Is there a reason OSP chose to reference Ark. Code Ann. § 19-11-203(27)(C) under “technical and general services” when that subsection of the statute falls under the definition of “services,” which is defined in Section R1:19-11-203(f)?

RESPONSE: The definition of “technical and general services” in R1:19-11-203(g) expressly adopts the statutory definition in the statute.

In an earlier draft, the language referring to Ark. Code Ann. § 19-11-203(27)(C) was originally connected to the general definition of “services” that preceded definitions of specific types of services contracts, such as “professional services” and “technical and general services,” etc. OSP proposes restoring it to the end of the comprehensive definition of “services” as follows:

(f) “Services” is defined at Ark. Code Ann. § 19-11-203(27)(A). It refers to the labor, time, or effort that a contractor furnishes under a contract as performance for separate consideration and not labor, time, or effort included in or incident to the production or sale of a commodity or commodities.

Labor, time, or effort are “included in” the production or sale of a commodity if expended within either the production or sale of the commodity and are not set apart for separate consideration outside of the purchase price of the commodity.

Labor, time, or effort are “incident to” the production or sale of a commodity if they accompany the production or sale of the commodity as a minor consideration, even if a separate but relatively small fee is paid to the contractor for it. For example, where the purchase of a computer includes delivery and installation for a relatively small fee, the labor, time, and effort involved in the delivery and installation of the computer are incident to the sale of the commodity.

After the State’s procurement and acceptance of a commodity as conforming to the contract, subsequent labor, time, or effort furnished by a contractor with respect to the commodity are considered “services” for purposes of Arkansas Procurement Law if they are not incident to the original procurement of the commodity and there is a separate consideration paid for those services. Labor, time, or effort that a contractor furnishes for the customization, configuration, or development of software, beyond that which is incident to the procurement, installation, maintenance, and routine technical support of the software, are considered “services” for purposes of Ark. Code Ann. § 19-11-265.

Based on the exclusionary definition in Ark. Code Ann. § 19-11-203(27)(C), the following types of contracts are excluded from being considered a contract requiring “services” within the meaning of Ark. Code Ann. § 19-11-265: (1) employment

agreements; (2) collective bargaining agreements; (3) architectural or engineering contracts requiring approval of the Division of Building Authority Division of the Department of Transformation and Shared Services or higher education; and (4) other commodities and services exempted by law.

(6) Section R3:19-11-203 – The rule references “capital improvements valued at less than the bid requirement threshold stated in Ark. Code Ann. § 22-9-202(b)(2)(C)”; however, it appears that Act 658 of 2019, § 3, amended that language to read “[c]apital improvements valued at less than the amount stated in § 22-9-203.” Can you explain the reason for the difference? **RESPONSE:** The rule should be revised to correctly reflect the amendment required by Act 658 of 2019, § 3. The definitional section of the Arkansas Procurement Law was amended by four different Acts in 2019 and the amendment changing the citation from Ark. Code Ann. § 22-9-202(b)(2)(C) to Ark. Code Ann. § 22-9-203 got missed.

(7) Section R1:19-11-218(A) – The rule references that the delegation may be for a specific time not exceeding two years and that the delegation shall be made by a written order “or by rules.” However, Act 420 of 2019, § 1, appears to require that (a) the delegation order shall be in writing, *i.e.*, no reference to rules, and (b) shall include an expiration date. Can you explain the reason for the differences? **RESPONSE:** The current rule provides that delegation may be made by a written order “or by regulations.” OSP Rule R1:19-11-218. The word “rules” was merely substituted for the word “regulations” consistent with the global change that was recently made throughout the Arkansas Code Annotated.

Whatever the original reason may have been for the reference to “regulations” in the rule, it squares with the statutory authority granted in Ark. Code Ann. § 19-11-220(a), which expressly provides that a state agency may be authorized “by rule” to have an agency procurement official. *See* Ark. Code Ann. § 19-11-220(a) (“In addition to any state agency authorized by rule to have an agency procurement official . . .”). An agency procurement official is, by definition, a person authorized to exercise procurement authority. *See* Ark. Code Ann. § 19-11-203(1)(A). Consequently, authorizing a state agency “by rule” to have an agency procurement official necessarily entails delegating some procurement authority to the agency “by rule.” The words “or by rules” merely acknowledges that state agencies may also be authorized, by rule, to exercise some procurement authority. *See* Ark. Code Ann. § 19-11-220(a).

(8) Section R1:19-11-218(B) – This section provides that the delegations shall remain in force according to the original terms unless modified or rescinded or until the expiration date *provided by law*; however, Act 420, § 1, appears to provide that (a) the delegation *itself* must contain an expiration date and (b) that the delegation shall remain in effect under the original terms unless those terms are modified or rescinded *in writing*. Can you explain the reason for the differences? **RESPONSE:** The rule does not replace the statute; it supplements it, so the statute is not reiterated verbatim. Before the enactment of Act 420 of 2019, delegation orders did not have an expiration date imposed by law. The existing rule, which already provides that delegation orders remain in force

according to their terms or until rescinded, was simply amended to reflect the fact that now there is also an outer limit on the duration of a delegation order that is imposed by law. The existing rule would be amended by the proposed rule by adding the underlined text:

All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director, or until the expiration date provided by law, whichever comes first. The term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.

To mitigate any concern about the words “in writing” not appearing in the proposed rule, they can be inserted at the beginning of the proposed amendment to read:

All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director in writing, or until the expiration date provided by law, whichever comes first. The term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.

(9) Section R1:19-11-218(D) – The proposed rule provides that training shall be completed as *may* be required; however, Act 420, § 1, states that a person given authority “shall complete training . . . , as provided for in the subchapter and in the rules adopted by the director, before the written delegation order is issued.”

(a) Can you explain the difference between the rule and the Act as it pertains to the required training?

(b) The Act requires that the Director adopt rules to outline the procurement training required. Will these rules be promulgated separately?

RESPONSE:

(a) The rule and the Act both use the word “shall” to mandate training for a designee. Although the statute mandates training on state procurement laws, it allows for the training to be determined according to rules yet to be adopted by the Director. The rule, like the Act, also uses “shall” to reflect that completing required training is mandatory. It only uses “may” to signal that the mandate applies to whatever type of training “may” be required. The director expects different types of training will be required depending on the different types of procurement activities and authority that the director may delegate. For example, someone receiving a delegation order to perform an invitation for bids will not need the same training as someone receiving a delegation order to make a cooperative purchasing determination.

(b) Yes.

(10) Section R1:19-11-218(E) – The rule provides that delegation orders may be suspended by the Director. On what authority does the OSP rely for taking such an action? **RESPONSE:** The Act explicitly provides that written delegation orders, “Remain in effect under the original terms *unless* the terms of the written delegation order are modified or rescinded in writing by the director.” Ark. Code Ann. § 19-11-218(a)(3)(B)(iii) (emphasis added). The word “unless,” if allowed its usual meaning, signals that the authority delegated under a delegation order does not last unconditionally,

but instead only persists subject to the condition that it is not modified or rescinded. Since the Act explicitly allows the terms of a written delegation order to be modified in some fashion short of being completely rescinded, then implicitly the Director retains a degree of discretion to affect the effectiveness of a delegation order short of completely rescinding it. Suspending authority granted under a delegation order seems to be a reasonably intermediate alternative to completely rescinding an order. This also seems consistent with the State Procurement Director's statutory mandate to supervise designees and ensure compliance by designees. *See* Ark. Code Ann. § 19-11-217(c)(1) (“[The Director s]hall procure or supervise the procurement of all commodities and services for each state agency not having an agency procurement official and, when requested to do so by such an official, procure commodities and services not otherwise under state contract”); and Ark. Code Ann. § 19-11-217(c)(8) (“[The State Procurement Director s]hall ensure compliance with this subchapter and implementing rules by reviewing and monitoring procurements conducted by any designee, department, agency, or official delegated authority under this subchapter.”).

(11) Section R1:19-11-219 – On what authority is OSP relying in establishing the findings to be certified by a reviewing attorney? **RESPONSE:** Act 418 of 2019 gives the State Procurement Director a broad mandate to adopt rules implementing attorney review and designating contracts to be reviewed. In pertinent part, it provides:

- (c) The director shall adopt rules to implement this section, including without limitation rules to:
 - (1) Designate contracts that require review under this section, which may include without limitation contracts that:
 - (A) Exceed a certain dollar amount;
 - (B) Modify the standard state terms and conditions; and
 - (C) Are based on other stated criteria; and
 - (2) Identify the requirements for the attorneys who may review contracts under this section, including without limitation:
 - (A) An attorney employed with the Office of State Procurement, an institution of higher education, or the Office of the Attorney General; and
 - (B) Any other attorney employed by the state and licensed to practice law in Arkansas.

Ark. Code Ann. § 19-11-219(c). The basic list of specific items to be reviewed were developed in consultation with attorneys at the Arkansas Attorney General's offices. They address sovereign immunity, indemnification, FOIA compliance, and compliance with Arkansas constitutional provisions and public law prohibiting the State from paying for commodities and services before receipt.

(12) Section R1:19-11-223(b) – Is there a reason that the language used in the rule does not track that used in Ark. Code Ann. § 19-11-223(b)(2)(B)(ii), as amended by Act 421 of 2019, § 2? **RESPONSE:** Yes. The statutory language used in Ark. Code Ann. § 19-11-223(b)(2)(B)(ii) provides that denial of a request for an exemption is not required to be in writing, but it does not provide a clear standard for the way or ways in which

denials may be communicated. The OSP rule seeks to provide supplemental guidance as to what is permissible since the statute only clarifies what is not required.

(13) Section R2:19-11-223(a) – Is there a reason that the OSP did not enumerate the services as they are enumerated in Ark. Code Ann. § 19-11-223(b)(1), as amended by Act 421, § 2, *i.e.*, “technical and general services, and professional and consultant services”?

RESPONSE: Yes. Thanks to Act 417 of 2019, Section 3, the definition of “Services” at Ark. Code Ann. § 19-11-203(27) was amended to include technical and general services, consulting services, and professional services, thus rendering the word “Services” into an effective shorthand that encompasses all of these types of contracts without the need for enumerating each separate subcategory of services contract. As a result of this amendment, one word (services) now can take the place of nine (technical and general services, and professional and consultant services).

(14) Section R2:19-11-223(b) – Can you provide the origin for the definition of “substantial savings”? **RESPONSE:** Arkansas Procurement Law only allows the State Procurement Director to approve an exemption from a mandatory contract when an agency demonstrates “substantial savings will likely be effected by purchasing outside of the mandatory state contract.” Ark. Code Ann. § 19-11-223(b)(2)(A). However, the term “substantial savings” is not defined in Arkansas Procurement Law.

In order to have a uniform rule for administration of this statutory provision rather than arbitrary standard, OSP is proposing a rule through the promulgation process that will provide a standard essential to the orderly administration of the law. This is within the statutory mandate given to the Director to “adopt rules to include any necessary conditions, reporting, or document retention standards related to the director’s duty to promote mandatory state contract use under this subsection.” Ark. Code Ann. § 19-11-223(5)(B).

(15) Section R6:19-11-229 –

(a) On what authority does the OSP rely for its provision that a solicitation conference may be held by the State Procurement Director, as Ark. Code Ann. § 19-11-273, as amended by Act 419 of 2019, § 12, appears to permit a state agency to hold such a conference?

(b) What is the authority on which OSP relies for the second sentence of the section that concerns discussions during a solicitation conference? The statute appears to speak to statements not changing the invitation for bids, request for proposals, or request for statements of qualifications and performance data, but does not appear to reference changes to competitive sealed bids?

RESPONSE:

(a) The State Procurement Director is the principal procurement officer of the State (Ark. Code Ann. § 19-11-217(a)) and is mandated to procure or supervise the procurement of all commodities for each state agency without an agency procurement official. Ark. Code Ann. § 19-11-217(c)(1). Although Ark. Code Ann. § 19-11-273 clearly permits an agency to hold a solicitation conference in connection with a procurement, it would be bizarre to read the statute as silently prohibiting the State Procurement Director from

holding a solicitation conference, especially when the Director's approval (or that of another head of a procurement agency) is required when a solicitation seeks to make vendor participation in a solicitation conference mandatory. *See* Ark. Code Ann. § 19-11-273(b)(2). Furthermore, solicitation conferences may be required as part of an invitation for bids/competitive sealed bidding (*see* Ark. Code Ann. § 19-11-229(5)), and there has never been any question about the authority of the State Procurement Director to perform or supervise such a procurement.

(b) An invitation for bids is the same thing as a competitive sealed bidding. *See* Ark. Code Ann. § 19-11-229(a).

(16) Section R8:19-11-229(2)(A) – It appears this section is premised upon the change made by Act 419, § 4, to Ark. Code Ann. § 19-11-229(f). Is there a reason that the second prong for when a time discount may be considered was omitted, *i.e.*, “[u]nder the structured terms of the invitation for bids”? **RESPONSE:** OSP reads each procurement rule alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute alongside the rule.

(17) Section R2-19-11-230.2 – Is there a stray “if” in the introductory language?
RESPONSE: Yes.

(18) Section R2-19-11-230.2(3) – Is there a reason that the rule omitted the language from Ark. Code Ann. § 19-11-230(d)(2)(C), as amended by Act 419, § 8, that the written determination must be submitted for legislative review “before the request for proposals is issued”? **RESPONSE:** There is no substantive reason why the entirety of the statute is not repeated in the rule, but as a practical matter it does not need to be repeated by OSP in order to be effective. In this case OSP believes the matter of timing to be clearly and comprehensively addressed by the statute. OSP reads each procurement rule alongside of its corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Consequently, unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute that is to be read alongside the rule.

(19) Section R5:19-11-230(b)(1) – It appears that Act 419, § 8, amending Ark. Code Ann. § 19-11-230(d)(3), addresses the only instances in which a state's prior experience with an offeror may be considered and scored. Is there a reason that the rule does not track the language in the Act? **RESPONSE:** OSP reads each procurement rule

alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute alongside the rule.

(20) Section R5:19-11-230(d) – In the same vein, is there a reason that the language used in the rule regarding private evaluators does not track each of the requirements set forth in Ark. Code Ann. § 19-11-230(h)(2), as amended by Act 419, § 10? **RESPONSE:** OSP reads each procurement rule alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute alongside the rule.

(21) Section R1:19-11-233(a) – What is the rationale behind the striking of this subsection, when similar language was added to Ark. Code Ann. § 19-11-233, as amended by Act 419, § 11? **RESPONSE:** OSP felt the statute required no clarification, rendering R1:19-11-233(a) redundant.

(22) Section R1:19-11-233(c) – In referencing “all services contracts” must be presented for legislative review, does that mean “all” or those meeting the criteria of Ark. Code Ann. § 19-11-265, as amended by Act 417, § 7? **RESPONSE:** The sentence in question states “all services contracts must be presented for legislative review as required under Ark. Code Ann. § 19-11-265.” OSP is of the opinion that “all services contracts” is qualified by and limited to “as required under Ark. Code Ann. § 19-11-265.” Therefore, the direct answer to your question is “yes,” “all” is limited and qualified to mean all of those meeting the criteria of Ark. Code Ann. § 19-11-265.

(23) Section R1:19-11-238 – Is there a reason that the phrase “if funds for the first fiscal year of the contemplated contract are available at the time of contracting” as found in Ark. Code Ann. § 19-11-238(a) was omitted from the rule? **RESPONSE:** Since R1:19-11-238 doesn’t speak to or provide guidance on the funding condition found in the statute, OSP deemed it redundant to repeat the statutory funding condition in the rule.

(24) Section R2:19-11-242(4)(B)(i) – The summary of changes provided references this section, but I do not see it between Section R1:19-11-238 and R1-19-11-244 in the markup provided? **RESPONSE:** Thank you for spotting this error. R2:19-11-242 is not intended to be included in this rules promulgation, and was thus errantly included in the summary of changes.

(25) Sections R1:19-11-244.9 – It appears that there are two sections with this number. **RESPONSE:** Thank you for spotting this error. The second R1:19-11-244.9 should have been renumbered to R1:19-11-244.10.

(26) Section R1:19-11-249(a) – It appears that Ark. Code Ann. § 19-11-249(a)(2)(B)(ii), as amended by Act 421, § 3, requires the State Procurement Director to adopt rules to create a review policy outlining how the economic justification for using a cooperative purchasing agreement may be demonstrated. Is this review policy included in the instant rules or will separate rules be promulgated? **RESPONSE:** R1:19-11-249 requires agencies subject to the Procurement Code to seek a determination from the OSP Director that the cooperative purchasing agreement substantially meets the requirements of the Procurement Code. Part of that determination by the OSP Director includes the economic justification required by Ark. Code Ann. § 19-11-249(a)(2)(B)(ii). The form for requesting a cooperative review request requires that the requestor include a verifiable economic justification as to why using the cooperative purchasing agreement is more cost effective or is likely to realize savings when compared to conducting a solicitation.

Accordingly, OSP is of the opinion that in adopting the revised R1:19-11-249(a), a rule is being adopted that creates the policy of agencies seeking a determination from the OSP Director that includes the economic justification requirement. To that end, OSP has already implemented this approach, and is now requiring the economic justification in the determinations of whether cooperative purchasing agreements substantially meet the requirements of the Procurement Code.

(27) Section R2:19-11-249 – I see where the provision for the reporting of cooperative contract purchases of state agencies *without* an agency procurement official has been included, but what about Ark. Code Ann. § 19-11-249(b)(1)(B), as amended by Act 421, § 3, which pertains to a state agency *that has* an agency procurement official and requires an annual report to ALC or JBC. Is there a reason that this language was omitted from the rule? **RESPONSE:** R2:19-11-249 is only seeking to provide guidance for agencies required to submit the data to OSP, per Ark. Code Ann. § 19-11-249(b)(1)(A). BLR is in a better position to determine how ALC or JBC wants agencies to deliver their reports to the legislature. OSP does not want to overstep and is not seeking to provide a rule for a reporting process that, per Ark. Code Ann. § 19-11-249(b)(1)(B), happens between the agencies and the legislature. OSP limited the application of this rule to align with the statutory respective Requirements for agencies and OSP.

(28) Section R1:19-11-265(a) – Is there a reason that the rule omits the language “of one (1) or more persons” when it is included in Ark. Code Ann. § 19-11-265(a)(1), as amended by Act 417, § 7, and includes the language “before the execution of the contract” when that language is stricken? **RESPONSE:** “Services” is defined in R1:19-11-265(a) says “Contracts requiring “services” as defined in Arkansas Procurement Law and these rules,” thereby including “of one (1) or more persons” in the definition. “Before the execution of the contract” is in the rule to provide agencies with guidance,

and reduce confusion, as to what point in the procurement process the contract should be submitted to ALC or JBC.

(29) Section R1:19-11-265(b-d) – On what authority does the OSP rely for these sections? **RESPONSE:** Ark. Code Ann. § 19-11-225 gives the State Procurement Director broad discretion in adopting rules in accordance with the applicable provisions of the Procurement Code. Accordingly, the sections in R1:19-11-265(b-d) are based on caselaw and OSP policy as a result of these issues having led to confusion amongst agencies in the past, and thus necessitating a rule in OSP’s opinion.

(30) Section R2:19-11-265(a)(1)(A) – Is there a reason that the Office included the term “initial” prior to contract amount when that term is not included in Ark. Code Ann. § 19-11-365(a)(4)(A)(ii)(a), as amended by Act 417, § 7? Can you have an increase “in” the initial amount on a renewal or extension, or would it be an increase “from” the initial amount? **RESPONSE:** With an increase in total projected contract amount already expressly included in the statutory definition of “material change” at Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(b), and with total projected contract amount meaning the total possible number of years of a contract, OSP deduces Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(a) to be referring to increases in the contract amount during the initial term of a contract. The term “initial contract amount” is defined in R2:19-11-265(b)(1) as “the amount agreed to for the initial term of a contract.”

(31) Section R1:19-11-267(c) – Is there a reason that the language included in Ark. Code Ann. § 19-11-267(b)(1), as amended by Act 418, § 4, that the state agency, board, commission, or institution of higher education shall use performance-based standards “that are specifically tailored to the services being provided in the contract” was omitted from the rule? **RESPONSE:** OSP understands the statute to be the base on which the rule rests. Accordingly, OSP does not believe statutory language can be effaced by omission from a rule. The requirement that the performance standards at issue be “specifically tailored to the services being provided in the contract” remains intact and was not in need of comment in a rule. R1:19-11-267(c) is repeating the mandatory performance standards contract thresholds as the launching point for the rest of the rule, and was not intended to also dive into other content already covered by the statute. With all of that being said, OSP certainly does not oppose adding that statutory language if the Committee deems it desirable.

(32) Section R1:19-11-267(h) – On what authority does the OSP rely for exempting such contracts from using performance-based standards? **RESPONSE:** Ark. Code Ann. § 19-11-267(d)(1) gives broad discretion to the OSP Director to promulgate rules to implement and administer this section of the Procurement Code, subject to ALC or JBC approval. The substantive language of R1:19-11-267(h) was previously promulgated, and this author is surmising the original intent of the rule drafters and the ALC reviewers.

Sole source – R1:19-11-267(h)(1) states that if the contract has been awarded to a contractor with whom the state was compelled to contract with due to legal mandates, the

primary purpose behind performance standards is moot due to the inability of the State to find a different contractor.

Emergency – The intent of Ark. Code Ann. § 19-11-233 is to provide expedited processes in emergency circumstances, as defined by the statute, where time is of the essence. Given the urgency of an emergency and what is at stake in the event of delay, the time it takes to develop performance standards seems to run contrary to the statutory intent of Ark. Code Ann. § 19-11-233, leading to the R1:19-11-267(h)(2) potential exemption.

(33) Section R1:19-11-268 – The summary states that this section is being repealed due to changes introduced in Act 418; however, while Ark. Code Ann. § 19-11-1013 was repealed as duplicative in § 7 of the Act, it appears that vendor performance reports are still required in certain circumstances pursuant to Ark. Code Ann. § 19-11-268, as amended by Act 418, § 4. Is there a reason this section is being removed in its entirety?

RESPONSE: The intent of R1:19-11-268 was to reiterate the thresholds and frequency of vendor performance reports. With those specific requirements having been removed by Act 418, that iteration of the rule was incorrect. OSP is of the opinion that the statute is sufficiently clear as to its meaning and reach and does not require a new rule that would merely repeat the statute.

(34) Section R1:19-11-[273] *Solicitation Conferences* – On what authority does the OSP rely for this section? **RESPONSE:** In addition to the general rulemaking authority given to the OSP Director under 19-11-225, OSP has attempted to craft a rule that dovetails with the other forms of communications authorized in law between the state and potential contractors. In that effort, OSP listed in R1:19-11-273 the type of information that could be exchanged in a solicitation conference that remains within those confines.

(35) Section R3:19-11-[273] –

(a) As with question 15(b) above, on what authority does OSP rely for the language concerning discussions?

(b) Is this section duplicative of Section R6:19-11-229?

(c) Does this section conflict with Section R6:19-11-229 in that this section appears to include a caveat to the rule that discussions will not be binding “unless it is subsequently reduced to writing and included in the solicitation” that is not included in Section R6:19-11-229?

RESPONSE: R3:19-11-273 mirrors Ark. Code Ann. § 19-11-273(d) in expressing that statements made during solicitation conferences does not alter solicitations unless made in writing.

R6:19-11-229 is applicable only to IFBs, while R3:19-11-273 is intended to be applicable to solicitation conferences generally, and the language has been modified to better capture this general applicability.

OSP does not believe R6:19-11-229 conflicts because Ark. Code Ann. § 19-11-273(d) states changes must be written. R6:19-11-229 is simply of narrower application because that rule is particular to competitive sealed bidding, which is authorized under Ark. Code

Ann. § 19-11-229 and is one of the primary procurement methods. However, OSP would not object to R6:19-11-229 being removed since there is another rule that covers the same subject matter more broadly.

(36) Section R3:19-11-[275] – Is there a reason that the OSP did not simply track the language set forth in Ark. Code Ann. § 19-11-275(e), as amended by Act 419, § 12, concerning information provided in response to a request for information being exempt from the FOIA until one of three events occurs? **RESPONSE:** R3:19-11-275 substantially mirrors Ark. Code Ann. § 19-11-275(e). As it relates to R3:19-11-275(3), an earlier iteration of this proposed rule stated “In the event a final determination is made to not proceed with a solicitation following a request for information, the issuer of the request for information should insert a note or other documentation in the solicitation file of the request for information documenting the date of the determination.” Internal concerns were raised this allowed for an open-ended ability to prolong the FOIA exemption indefinitely, and so the 24 month expiration was added to balance the exemption against the FOIA intent to provide transparency.

The proposed effective date is January 1, 2020.

FINANCIAL IMPACT: The agency stated that the amended rules have no financial impact.

LEGAL AUTHORIZATION: These rules implement Acts 417 through 421 of 2019, which made changes to the Arkansas Procurement Law, as well as incorporate changes brought about by Act 658 of 2019. The State Procurement Director has the general authority to promulgate rules implementing the Arkansas Procurement Law. *See* Ark. Code Ann. § 19-11-225(a), as amended by Act 419, § 2. *See also* Ark. Code Ann. § 19-11-217(b)(1). The Director also has the authority to “adopt rules governing the internal procedures of the Office of State Procurement.” *See* Ark. Code Ann. § 19-11-217(b)(2). The Director has specific authority to promulgate rules related to emergency procurements (Ark. Code Ann. § 19-11-233), performance-based contracts (Ark. Code Ann. § 19-11-267(d)(1)), and contract review (Ark. Code Ann. § 19-11-219(c), as amended by Act 418, § 2).

Act 417, sponsored by Representative Jim Dotson, amended the review and reporting requirements for service contracts and provided for the tracking and reporting of contracts procured by state agencies. As codified at Ark. Code Ann. § 19-11-217(c)(9), it required the Director to maintain “a roster of expiring contracts entered into by a state agency for which there is no new requisition.” Act 418, also sponsored by Representative Dotson, amended the law concerning the content, term, and review of contracts procured by the state. It also required the use of performance-based contracts and amended vendor performance report requirements.

Act 419, sponsored by Representative Jeff Wardlaw, amended the law concerning various procurement methods and provided for the training and certification of procurement officials. It also required additional legislative review of procurement rules.

The Act, as codified at Ark. Code Ann. § 19-11-276(d)(2), specifically allows the Director to promulgate rules specifying procurement certification revocation procedures.

Act 420, sponsored by Representative Wardlaw, amended the law concerning the Director's delegation authority. It also amended the law concerning protests of solicitations and awards under the Arkansas Procurement Law. The Act, as codified at Ark. Code Ann. § 19-11-218(b), specifically requires the Director to adopt rules regarding written delegation orders and procurement training.

Act 421, also sponsored by Representative Wardlaw, amended the law concerning state contracts and cooperative purchasing agreements. As codified at Ark. Code Ann. § 19-11-223(d)(5), it requires the Director to promulgate rules "related to the [D]irector's duty to promote mandatory state contract use" as detailed.

Act 658, sponsored by Representative Jack Ladyman, amended the law concerning state agency capital improvement contracts for purposes of uniformity.

STATE OF ARKANSAS
DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES
OFFICE OF STATE PROCUREMENT
CHANGES TO RULES UNDER THE ARKANSAS PROCUREMENT LAW
Agency Code 006.27

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R1:19-11-203. Definitions of terms used in this Act.

- (a) “Commodities” is a broad term that encompasses all personal property, except for those categories of personal property expressly exempted under Arkansas Procurement Law.

The following are specifically included as commodities under Arkansas Procurement Law:

- (i) Goods, as defined in the Arkansas Commercial Code at § 4-2-105;
- (ii) Leases of Goods, as defined in the Arkansas Commercial Code at § 4-2A-103; and
- (iii) Insurance.

Ark. Code Ann. 19-11-203(4)(B) expressly excludes real property, leases of real property, other permanent interests in real property, capital improvements, and excluded commodities and services from being considered “commodities” for purposes of Arkansas Procurement Law.

Certain types of commodities that would otherwise fall within the definition of personal property are expressly exempted from the application of Arkansas Procurement Law at Ark. Code Ann. § 19-11-203(14). State agencies not authorized to procure commodities through Arkansas Procurement Law may be authorized to do so under other applicable law. Exemption from Arkansas Procurement Law does not automatically exempt any state agency or officer from other laws governing the expenditure of public funds or the ethical restrictions at Ark. Code Ann. § 19-11-701, et. seq.

- (b) “Consulting services” means services of providing professional counsel and expert advice.

- (c) “Employment agreement” means an agreement between a state agency, as employer, and its employee in which the terms and conditions of the employee’s employment are stated. An independent contractor who, in the course of his, her, or its independent occupation or profession, provides services to a state agency pursuant to a contract is not an employee simply by virtue of having a contract with a state agency.

- (d) “Personal services” means services unique to the specific individual and personality providing them, as opposed to services that are fungible and could be provided by any person based on a set of skills or knowledge. Personal services of visiting speakers, lecturers, and performing artists may be procured without any competitive procurement because they are expressly exempted from Arkansas Procurement Law. Any personal services provided by a contract employee under an “employment agreement,” as defined below, are excluded by definition from being considered “services.”

- (e) “Professional services” means services furnished by or under the supervision of a professional who

has been specially trained to provide such services. A “professional” is a person who belongs to a learned profession or occupation that requires a high level of training, specialized knowledge, proficiency, and often a professional license. Professional services include medical, legal, financial advisory, architectural, engineering, construction management, and land surveying services. Under state law, legal, financial advisory, architectural, engineering, construction management, and land surveying services must be procured by means of a request for qualifications. Professional services of medical professionals by means of a request for qualifications is warranted and permitted by OSP rules. Absent authority from the State Procurement Director, the request for qualifications shall not be used by state agencies to procure any other professional services unless the State Procurement Director determines by rule or in writing that the request for qualifications process is warranted.

- (f) **“Services”** is defined at Ark. Code Ann. § 19-11-203(27)(A). It refers to the labor, time, or effort that a contractor furnishes under a contract as performance for separate consideration and not labor, time, or effort included in or incident to the production or sale of a commodity or commodities.

Labor, time, or effort are “included in” the production or sale of a commodity if expended within either the production or sale of the commodity and are not set apart for separate consideration outside of the purchase price of the commodity.

Labor, time, or effort are “incident to” the production or sale of a commodity if they accompany the production or sale of the commodity as a minor consideration, even if a separate but relatively small fee is paid to the contractor for it. For example, where the purchase of a computer includes delivery and installation for a relatively small fee, the labor, time, and effort involved in the delivery and installation of the computer are incident to the sale of the commodity.

After the State’s procurement and acceptance of a commodity as conforming to the contract, subsequent labor, time, or effort furnished by a contractor with respect to the commodity are considered **“services”** for purposes of Arkansas Procurement Law if they are not incident to the original procurement of the commodity and there is a separate consideration paid for those services. Labor, time, or effort that a contractor furnishes for the customization, generation, configuration, or development of software, beyond that which is incident to the procurement, installation, maintenance, and routine technical support of the software, are considered **“services”** for purposes of Ark. Code Ann. § 19-11-265.

Based on the exclusionary definition in Ark. Code Ann. § 19-11-203(27)(C), the following types of contracts are excluded from being considered a “contract requiring services” within the meaning of Ark. Code Ann. § 19-11-265: (1) employment agreements; (2) collective bargaining agreements; (3) architectural or engineering contracts requiring approval of the Division of Building Authority or the Division of Higher Education; and (4) other commodities and services exempted by law.

- (g) **“Technical and general services”** is defined at Ark. Code Ann. § 19-11-203(34)(A). It is a term that generally encompasses the broad range of services that are not professional services.

R2:19-11-203. Definitions of exempt commodities and services used in this Act.

Certain types of services that would otherwise fall within the definition of services are expressly exempted from the application of Arkansas Procurement Law at Ark. Code Ann. § 19-11-203(14). State agencies not authorized to procure services through Arkansas Procurement Law may be authorized to do so under other applicable law. Exemption from Arkansas Procurement Law does not automatically exempt any state agency or officer from other laws governing the expenditure of public funds or the ethical restrictions at Ark. Code Ann. § 19-11-701, et. seq.

EXEMPT COMMODITIES AND SERVICES MEANS:

- (a) Under subsection (14)(D)(i) – Commodities procured for resale does not include items used to support the sale of goods or services such as reusable items or items used in preparing, serving, dispensing, or packaging, except for vendor packaging included with the item purchased.
- (b) Under subsection (14)(G)(i) – Farm products includes unprocessed feed for livestock.
- (c) Under subsection (14)(K) – “License” does not mean software license.
- (d) Under subsection (14)(M) – Livestock breeding to include ova and semen.
- (e) Under subsection (14)(N) – Technical equipment for maintenance purposes shall include, but not be limited to, medical, dental, laboratory, and health aid equipment, climate control equipment, water treatment services, elevators, musical instruments, communications equipment, data processing equipment, and specialized research equipment.
- (f) Under subsection (14)(Q) – “Perishable foodstuffs” means the raw material of food before or after processing, such being liable to spoil or decay in a short duration of time, such as (but not limited to) produce, eggs, or milk.
- (g) Retail gasoline credit card purchases are exempt by rule regulation, regardless of the amount.
- (h) Renewals of termite protection contracts with the contractor who performed the initial treatment of the facility are exempt. Not exempt are termite protection contracts which include the initial treatment.
- (i) Under subsection (14)(H) – Fees that are uniform and fixed in advance by an authoritative body, such as fees for membership in professional associations, court filing fees, witness fees, workshop fees for professional conferences or training, medical fees and physician fees, are exempt from Arkansas Procurement Law. Fees that are payment for professional services for which there is generally free market competition and which may reasonably be subject to negotiation, are not exempt from Arkansas Procurement Law.
- (j) Under subsection (14)(EE) and subsection 23(B)(ii), “Academic medical center” consists of a public medical school and its primary teaching hospitals and clinical programs.

R2R3:19-11-203. Capital Improvements.

Under subsection (14)(Y), capital improvements valued at less than the amount stated in Ark. Code Ann. § 22-9-203 bid requirement threshold stated in Ark. Code Ann. § 22-9-202(b)(2)(C) subject to Department of Transformation and Shared Services Division of Building Authority Department of Finance

~~and Administration Building Authority Division~~ minimum standards and criteria are exempt from the requirements of the Procurement Law.

~~R3~~R4:19-11-203. Proprietary Software.

Software exemption under subsection (14)(AA) does not apply to the initial purchase of proprietary software. Nor does the exemption apply to the purchase of software that is part of any mandatory software contract. Exempt software purchases shall include the purchase of additional proprietary software licenses, copies, license renewals, software upgrades, and proprietary software support for proprietary software after the initial purchase.

~~R4~~R5:19-11-203. Signatures defined.

The definition of “signed” for the purposes of submitting a solicitation response can be found in the Uniform Commercial Code, Ark. Code Ann. § 4-1-201(39) (General Definitions), which “...includes any symbol executed or adopted by a party with present intention to authenticate a writing.” Allowance should therefore be made for any mark or writing, whether printed or cursive, which that person uses as his signature. Electronic signatures shall also be permitted, unless otherwise prohibited by law, pursuant to Ark. Code Ann. § 25-32-107.

~~R5~~R6:19-11-203. Tax-Supported Institutions defined.

“Tax-supported institutions” means institutions that derive at least fifty percent (50%) of their revenue by appropriation from a taxing jurisdiction.

~~R6~~R7:19-11-203. Hidden Damages.

- (a) Under subsection (14)(DD), “hidden or unknown damages” refers to damages to machinery needing repair that were not visible or readily apparent to, or were otherwise not within the knowledge of agency personnel at the time the piece of machinery was being serviced by a vendor. By way of example and not limitation, if an agency takes a piece of machinery to a vendor to repair one or more problems, and in the course of such work the vendor notices one or more additional problems that need repair, the agency may, but is not required to, authorize that vendor to undertake such additional repairs without having to solicit competitive bids.
- (b) “Machinery” means mechanical devices or combinations of mechanical powers and devices purchased or constructed and used to perform some function and to produce a certain effect or result.
- (c) This exemption does not apply to damages that are visible, readily apparent, or are or could be within the knowledge of agency personnel with the exercise of reasonable inspection or investigation.

~~R7:19-11-203. Academic Medical Center.~~

~~EXEMPT COMMODITIES AND SERVICES MEANS:~~

~~Under subsection (14)(EE) and subsection 23(B)(ii), “Academic medical center” consists of a public medical school and its primary teaching hospitals and clinical programs.~~

R6:19-11-217. Roster of Expiring Contracts.

The “roster” referenced in Ark. Code Ann. § 19-11-217(c)(9) is a record of active and expiring contracts that may be an electronic record that can be printed or used to populate a list of expiring contracts for which no renewal or new procurement has been initiated by request or requisition.

State agencies have the lead role in identifying any commodities and services that they need in order to perform their respective duties. Consequently, they are in the best position to monitor and manage their contracts for commodities and services. As an essential component of managing their contracts, state agencies shall maintain a roster of their active and expiring contracts to submit to the Office of State Procurement. If a state agency wishes to renew or replace a contract expiring in twelve months or less, it should plan to renew or solicit a replacement with ample time to allow for a new contract to be procured and to avoid a disruption in service due to the expiration of its active contracts. State agencies that plan to procure commodities or services through a request for proposals should submit a requisition no later than nine (9) calendar months before the estimated start date of the contract it anticipates awarding as a result of the request for proposals.

R1:19-11-218. Appointment of assistants and other employees;
Delegation of authority by the State Procurement Director.

(A) DELEGATION. The delegation to state agencies of the authority for the procurement of commodities and services may be made by the State Procurement Director with the approval of the Secretary of Transformation and Shared Services. The delegation may be for a specific commodity or service or for all commodities and services for a specific period of time not exceeding two (2) years. Such delegation shall be made by a written order signed by the State Procurement Director or by rules regulations promulgated by the State Procurement Director setting forth with particularity the kind or type of procurement activity or function delegated together with any limitations or restrictions on the exercise of such authority. Delegation orders are non-transferable.

(A) (B) LIMITATIONS. All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director in writing, or until the expiration date provided by law, whichever comes first. The

term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.

- ~~(B)~~ (C) SMALL PROCUREMENTS AND COMPETITIVE BIDDING. All state agencies shall be authorized to make purchases according to the procedures for small purchases and competitive bidding as authorized by §§ 19-11-231 and 19-11-234 and rules regulations adopted pursuant thereto. All state agencies not having an agency procurement official shall designate a procurement agent for said delegated purchases and shall submit a letter signed by the administrative head of the state agency to the State Procurement Director requesting designating designation of each employee who shall be a procurement agent. Approval of such delegation shall be made in writing by the State Procurement Director.
- ~~(D)~~ A person who is requesting authority under a written delegation order issued under this section shall complete training as may be required.
- ~~(E)~~ Delegation orders may be suspended or rescinded by the State Procurement Director. Suspended delegation orders may be reinstated, modified or rescinded in writing by the director.

R1:19-11-219. Attorney review of designated contracts.

A contract for services or commodities that, by its terms, requires or may require a state agency to expend an amount of public funds equal to or greater than seventy five thousand dollars (\$75,000) in either a calendar or fiscal year shall, prior to execution, be reviewed by any attorney employed by the state and licensed to practice law in Arkansas. The class of attorneys that can satisfy the requirement should be interpreted broadly so as to maximize the number of attorneys that can help state agencies satisfy it. This class of attorneys includes, without limitation, licensed attorneys employed by: (1) the Office of State Procurement; (2) the Office of the Attorney General; and (3) any state agency or institution of higher education.

Where the standard terms and conditions that have already been approved by the Office of State procurement ("OSP") are not used, or they are used but substantively amended, the reviewing attorney shall certify, in a writing (electronic or paper) identifying the responsible attorney, that he or she has reviewed the contract and found no term, condition, or provision that requires the state to:

- (a) subject itself to the law of any other state or to appear in any venue outside of the State other than as may be required by federal law;
- (b) indemnify a non-state party or hold a non-state party harmless;
- (c) keep records or information confidential, unless it is consistent with the Arkansas Freedom of Information Act or other applicable supervening law;
- (d) be financially obligated to make payments for commodities or services before they have been received.

R1:19-11-220. Procurement agencies.

(a) DESIGNATION. Each state agency authorized by § 19-11-220 to elect to have an agency procurement official shall submit a letter signed by the administrative head of the state agency to the State Procurement Director designating an employee who shall be the agency procurement official.

(b) INTERNAL PROCEDURES. The internal procurement procedures must ensure adequate management and control of the agency procurement functions pursuant to law and rules regulations. Each agency shall ensure that a current copy of its internal procurement procedures and rules regulations is kept on file. The internal procurement procedures established may include, but are not limited to:

- (1) A method of recording and filing each transaction as follows:
 - (A) legal notice where applicable;
 - (B) the original invitation for bids, purchase order, internal purchase request, printing order, or other applicable document;
 - (C) a list of all bidders invited to participate;
 - (D) the original of all bids received;
 - (E) an abstract of bids received; and
 - (F) a copy of all correspondence, memos, or other documents related to the award and administration of each transaction, including administrative determinations or justifications when applicable.
- (2) A file containing each vendor's application and reports regarding the vendor's performance.

(c) LIMITATIONS. Upon request of the Secretary of the Department of Transformation and Shared Services ~~Director of the Department of Finance and Administration or his or her designee~~, the agency procurement official shall make available for audit and inspection records of any and all transactions pertaining to the procurement of commodities and services.

(d) GENERAL. A state agency having an agency procurement official may request the Office of State Procurement to procure specific commodities and services which the agency procurement official is authorized to procure or to procure all commodities and services which the agency procurement official is authorized to procure for a specific period of time.

R1:19-11-221. Sale, acquisition or use of commodities by a public procurement unit.

DEPARTMENT OF CORRECTION INDUSTRY PROGRAM.

(1) The Department of Correction is authorized to enter into contracts, purchase orders, compacts or agreements with the appropriate officials of agencies of other states or of the federal government for the buying and selling of raw materials, goods and products

produced by and belonging to their respective institutions. The buying and selling of these materials will be for the purpose of producing finished products through a correctional industries program.

(2) The Department of Correction shall be governed by Ark. Code Ann. § 12-30-101 et seq., § 12-30-201 et seq., and other appropriate laws when utilizing the provisions of these rules regulations. The procurement official/agent for the Department of Correction is authorized to enter into contracts, orders, compacts or agreements pursuant to these rules regulations.

(3) Copies of all such contracts, orders, compacts or agreements entered into under the provisions of this rule regulation shall be kept by the Department of Correction with respect to all transactions, deliveries, and obligations under each contract, compact, or agreement

(4) All records and reports required pursuant to this rule regulation shall be available to public inspection during normal business hours, and shall be retained for a period of five (5) years after completion of the contract, compact, or agreement.

R1:19-11-223. Commodities and services under state contract.

(a) REQUEST FOR EXCLUSION. State agencies having agency procurement officials may request exemption from a proposed state contract by submitting to the State Procurement Director a written justification for such exemption.

(b) DETERMINATION BY STATE PROCUREMENT DIRECTOR. Approval ~~or denial~~ of exemption from a state contract shall be made in writing by the State Procurement Director, but a denial of a request for an exemption from a state contract may be made in any manner reasonably likely to communicate the denial to the requestor.

R2:19-11-223. Mandatory state contracts.

(a) Unless an exemption is approved by the State Procurement Director in writing, a state agency that requires commodities or services that are available under a mandatory state contract shall procure these commodities and services exclusively under the mandatory state contract. Except in the case of emergency procurements, as defined in Ark. Code Ann. § 19-11-204(4) and as provided in Ark. Code Ann. § 19-11-233, the director may only approve an exemption from a mandatory state contract awarded under this section if the state agency demonstrates that substantial savings will likely be effected by purchasing outside of the mandatory state contract.

(b) “Substantial savings” are the lesser of: (1) savings of five percent (5%) or more when compared against purchasing from the mandatory state contract; or (2) ten thousand dollars (\$10,000) or more when compared against purchasing from the mandatory state contract.

R1:19-11-224. Interest, carrying charges, and termination fees.

LIMITATIONS.

(1) Contracts may be entered into which contemplate the payment of interest or carrying charges only in the following conditions:

(A) when the interest or carrying charge is required because the term of the contract is extended over a period of time; and

(B) when a provision for termination of the contract is included in the contract, as provided in § 19-11-238(c) and the ~~regulations~~ rules promulgated pursuant thereto.

(2) Contracts may be entered into which contain a provision for the payment of the following charges on delinquent accounts: interest charges, carrying charges, late payment charges or any other charge which may be construed as a penalty, but only if incurred sixty (60) days after the due date.

(3) Service charges may be paid on credit card procurements.

R6:19-11-229. Competitive Sealed Bidding.

SOLICITATION CONFERENCES. Solicitation conference may be held by the State Procurement Director or agency procurement official or a designee to provide information to prospective bidders. Nothing discussed during a solicitation conference will change the specifications or terms and conditions of a competitive sealed bid, nor shall anything discussed during a solicitation conference be deemed to be binding or incorporated into the specifications or terms and conditions of a competitive sealed bid unless it is subsequently reduced to writing and included in the competitive sealed bid.

~~R6~~ R7:19-11-229. Competitive Sealed Bidding.

BID OPENING. When practical, the names of the bidders and amounts of their bids may be read aloud. Except where it may be deemed impractical, due to the nature or complexity of an invitation for bids, an abstract of bids which contains the amount of each bid and the name of the bidder shall be prepared for each invitation for bids. An abstract of bids shall be retained in the bid file and shall be available for public inspection.

~~R7~~ R8:19-11-229. Competitive sealed bidding.

BID EVALUATION.

(1) Those criteria that will affect the bid price and be considered in evaluation for award shall be stated in the bid and objectively measured, such as transportation costs and total or life cycle cost. Judgmental evaluation of commodities and services may be used in determining whether

the commodity or service offered by a bidder meets the specification requirements of the procurement, or the bidder is qualified to provide the service.

(2) The following matters will be applicable to all invitations for bids issued, bids submitted, and contracts awarded for the purchase of commodities:

(A) Time discounts cannot be considered in the evaluation of a bid pursuant to A.C.A. § 19-11-229(f)(3) unless the solicitation specifically requests a time discount; ~~or cash discounts will not be considered;~~

(B) Quantity discounts should be included in the price of the item. When not included in the item price, the discount will be considered only if the procurement agency, or the agency for whose benefit the procurement has been undertaken, deems it to be in the state's best interest. The unit price shown on the contract will be the net price, less the discount, unless otherwise indicated in the bid;

(C) An award may be made to the lowest aggregate bidder for all items, group of items, or on an individual item basis, whichever is deemed to be in the state's best interest.

(D) Only signed, sealed bids delivered prior to the date and time of bid opening will be accepted.

(E) Past Performance

(i) The past performance of a bidder on a state contract may be used by the procurement agency to determine whether the bidder is "responsible." Past performance must be supported by written documentation not greater than three years old. Documentation may be a formal Vendor Performance Report, an informal memo (signed and dated) or any other appropriate authenticated notation of performance to the vendor file. Reports, memos and files may be in electronic form. Past performance may be positive or negative.

(ii) Past performance on contracts from other Arkansas State Agencies may also be used for evaluation. Supporting documentation should be provided.

(iii) Past performance evaluation should not take the place of suspension or debarment procedures.

(3) TIE BIDS.

(A) Definitions: As used in this section

(i) "Arkansas company" means a domestic corporation, limited liability company, partnership, or not-for-profit organization as defined by Arkansas law; and

(ii) "Out-of-state company" means all foreign entities as defined by Arkansas law.

(B) In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications.

(C) In the event of a tie bid between two or more offers that meet the specifications as required and where one of the offerors is an Arkansas company, then the award will be made to that Arkansas company.

(D) In the event of a tie bid between two or more offers that meet the specifications as required

(i) and where at least two of the offerors are Arkansas companies, then an award will be determined by lot (flip of a coin) between those Arkansas companies;

(ii) or if all of the offerors are out-of-state companies, then an award will be determined by lot (flip of a coin) among all the bidders.

(E) The coin flip will be done in the presence of at least one witness by the person responsible for awarding the contract. All witnesses must be employees of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by the person responsible for awarding the contract and all witnesses.

~~R8~~R9:19-11-229. Competitive sealed bidding.

REJECTION. Grounds for rejection of bids include but are not be limited to:

- (1) failure of a bid to conform to the mandatory ~~essential~~ requirements of an invitation for bids;
- (2) any bid which does not conform to the specifications contained or referenced in any invitation for bids unless the items offered as alternatives meet the requirements specified in the invitation;
- (3) any bid which fails to conform to a delivery schedule established in an invitation for bids, unless the invitation for bids contains provisions for acceptance of offers with alternative delivery schedules;
- (4) a bid imposing conditions which would modify the stated terms and conditions of the invitation for bids;
- (5) any bid determined by the procurement official in writing to be unreasonable as to price;
- (6) bids received from bidders determined to be nonresponsible bidders;
- (7) failure to furnish a bid guarantee when required by an invitation for bids; and
- (8) any or all bids when the procurement official makes a written determination that it is in the best interest of the state.

~~R9~~R10:19-11-229. Competitive sealed bidding.

(a) CORRECTION OR WITHDRAWAL OF BIDS.

- (1) The State Procurement Director or agency procurement official may waive technicalities (small details) or minor irregularities (something irregular in form or nature) in bids which do not affect the material substance of the bids when it is in the state's best interest to do so.
- (2) Amendments to bids shall be allowed if the amendments are in writing and signed, are received prior to the date and time of bid opening, and clearly indicate the date and time of bid opening and bid number.
- (3) If there is a suspected bid mistake, the State Procurement Director or agency procurement official may request confirmation of a bid and shall request the confirmation to be made in writing. The bid of any bidder who fails or refuses to clarify in writing within a reasonable time any matter contained in his bid shall be rejected. The written clarification shall become a part of the contract awarded on the basis of that bid.
- (4) Bid prices shall be based on the unit prices and any correction of the price extension or of the price addition by the Office of State Procurement or state agency

having an agency procurement official shall not be considered the correction of a bid. Bid prices shall not be increased after the date and hour of bid opening. A bid price may be decreased only after a determination has been made that the bid is low.

(5) An otherwise low bidder may be permitted the opportunity to furnish other information requested in the invitation for bids and not supplied due to oversight, so long as it does not affect responsiveness.

(6) When a mistake in a bid is claimed by the vendor prior to award and the evidence is clear and convincing that a material mistake was made in the bid, and that due to such mistake the bid submitted was not the bid intended, the bidder may be permitted to withdraw his bid. Where the evidence is clear and convincing that a material mistake has been made in a bid after the award of a contract and the contractor will sustain a financial loss (a reduction or diminution in profit margin shall not be deemed a financial loss under this subsection) if required to perform the contract, the contract may be rescinded.

(b) CORRECTION. Any negotiated adjustments, as defined in Ark. Code Ann. § 19-11-229(h), will not be considered the correction of a bid.

~~R40~~R11:19-11-229. Competitive sealed bidding.

(a) AWARD. After a reasonable bid evaluation period, the bid shall be awarded to the responsive and responsible bidder who has submitted the lowest bid that meets the requirements and criteria set forth in the invitation for bids. All bids may be rejected if, after evaluation of the bids, including consideration of any clarifying or explanatory information submitted by the bidders, it is determined by the procurement official that no satisfactory bid has been received.

(b) NEGOTIATION. In the event that negotiation is necessary, a bidder may be determined to be non-responsive if the bidder and agency are unable to reach a mutually agreeable negotiated adjustment. If negotiations fail or the agency is unable to reach a negotiated adjustment with the apparent low bidder, the next lowest bidder can be contacted for the purposes of entering into negotiations.

(c) TRAINED AND CERTIFIED IN NEGOTIATION AND PROCUREMENT PROCESSES means the person will have received certified training from or authorized by the Office of State Procurement.

~~——— UNSUCCESSFUL BID. In the event no bids are received or items bid do not meet specifications and it is apparent that further solicitation of bids would be futile, requested commodities may be purchased from any available source.~~

~~R41~~R12:19-11-229. Competitive sealed bidding.

(1) LIFE CYCLE COST. Life cycle or total ownership costs may include but are not limited to, costs of operation, maintenance, repair, disposal and/or acquisition.

(2) APPLICATION. Life cycle cost formulas may be used for procurements. Certain specified commodities must be procured using life cycle cost formulas provided by the

Office of State Procurement. For those specified commodities, the State Procurement Director shall provide formulas to be used in the evaluation of bids by the State Procurement Director, the agency procurement officials or the procurement agents.

~~R12~~R13:19-11-229. Cancellation of invitations for bids.

When an invitation for bids is cancelled, notice of cancellation of OSP bids will be posted on the OSP website www.arkansas.gov/dfa/procurement. The bids may be returned if the bid is properly identified.

~~R13~~R14:19-11-229. Ethical standards.

In accordance with Ark. Code Ann. § 19-11-708(a), (b), and (c), the following statement must be conspicuously set forth in all contracts and solicitations costing more than twenty thousand dollars (\$20,000): "It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies maintained by the contractor for the purpose of securing business."

~~R14~~R15:19-11-229. Negotiations.

(a) Negotiation of Competitive Sealed Bids should be used only in those cases where the best interests of the State are served, such as where the lowest bid submitted by a responsive and responsible bidder exceeds the available funding to pay for the commodity or service (as certified by the appropriate fiscal officer of the procurement agency) or can be shown to be above the fair market price available on the open market to a reasonably prudent buyer. Procurement officials who conduct negotiations should be trained in negotiation and Arkansas Procurement Law.

(b) Prior to negotiation, a written justification supporting negotiations must be included in the bid folder. The justification must include, as applicable:

- (1) Bid tabulation with indication of lowest responsive and responsible bidder.
- (2) Certification of funds budgeted for the procurement by agency chief fiscal officer in instances where all bids received from responsive and responsible bidders exceed the available funding.
- (3) Reason(s) precluding re-solicitation, including but not limited to time constraints and economic impact to agency.

(c) After it is determined that negotiation is in the best interests of the State and permissible under Ark. Code Ann. § 19-11-229(2)(A), appropriate representatives will

proceed with negotiations and award recommendation. Appropriate representatives include purchasing staff and representatives from the original requesting unit.

(d) Agency should investigate the factors affecting the price offered by the apparent low bidder to include but not be limited to cost, delivery requirements, warranty, location of supplier, volatile nature of goods or services requested and current economic condition of the market.

(e) The agency must develop a plan to include at least:

(1) The acceptable range of price, the desired “best” price and the highest acceptable price.

(2) What adjustment may be made to delivery requirements that may affect price.

(3) Acceptable adjustments in quantity.

(4) A prioritized list of acceptable adjustments in specifications that may result in price reduction.

(5) Timetable for completion of negotiation.

(f) Negotiation plans shall not be revealed to bidder(s) nor made available for public review until after the anticipated award is made public in order to avoid revealing information that if disclosed would give advantage to competitors or bidders.

(g) An acceptable negotiated contract must be signed and in writing listing agreed upon terms, conditions, specifications, quantities and pricing.

(h) If a negotiated contract cannot be developed, the bidder may be declared non-responsive and time permitting, the negotiation process may be repeated with the next low bidder.

(i) If negotiations do not result in an acceptable contract, the Director or head of a procurement agency may authorize that a new solicitation be issued or elect to procure by special procurement (Ark. Code Ann. § 19-11-263).

R2:19-11-230. Competitive sealed proposals.

R2-19-11-230.1 CONDITIONS OF USE. The key element in determining the necessity for utilization of the competitive sealed proposal method is the type of evaluation required. Where evaluation involves the relative abilities of offerors to perform, including the degree of technical or professional experience, and price is not the only consideration, use of competitive sealed proposals is appropriate. Further, where the types of supplies or services may require the use of comparative, judgmental evaluation, competitive sealed proposals are the appropriate procurement method.

R2-19-11-230.2 THIRTY PERCENT (30%) WEIGHTED COST WAIVER. In seeking a written determination by the State Procurement Director that it is in the best interest of the state for cost to be weighted at less than thirty percent (30%) of the total evaluation score, the requesting agency shall:

(1) Issue a written request addressed to the State Procurement Director. The written

request may be delivered by email or mail, and in either case, should be clearly marked or labeled "Request for Weighted Cost Deviation."

(2) The written request should clearly articulate the factors for why it is in the best interest of the state for cost to be weighted at a lower percentage than thirty percent (30%), and what percentage the requesting agency seeks. The factors articulated should be specific to the request for proposal under consideration.

(3) If the State Procurement Director issues a written determination approving of the lower percentage, the written determination shall be submitted for review by Legislative Council or, if the General Assembly is in session, the Joint Budget Committee.

R5:19-11-230. Competitive sealed proposals.

(a) EVALUATION. The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. All members of evaluation committees shall participate in Evaluation Committee Training sponsored either by OSP or the college or university agency procurement official. Evaluations will be conducted in accordance with the OSP Policy. A written recommendation shall be made by the evaluation committee and submitted by the chairperson to the State Procurement Director or agency procurement official stating the basis on which the recommendation for award was found to be most advantageous to the state.

(b) (1) RESPONSIBILITY OF OFFEROR. Past performance of an offeror may be used by the procurement agency to determine whether the offeror is "responsible." No points for past performance may be used in the evaluation scoring criteria unless (i) past performance with the state is a non-mandatory evaluation criteria and (ii) the same amount of points allocated for past performance with the state are also made available in the evaluation scoring criteria in such a way as to not prejudice offerors without past performance history with the state. Past performance must be supported by written documentation and shall have not occurred more not greater than three (3) years before the proposal was submitted-~~old~~. Documentation may be a formal Vendor Performance Report, an informal memo (signed and dated) or any other appropriate authenticated notation of performance to the vendor file. Reports, memos and files may be in electronic form. Past performance may be positive or negative.

(i) Past performance on contracts from other Arkansas State Agencies may also be used for evaluation. Supporting documentation should be provided.

(ii) Past performance evaluation should not take the place of suspension or debarment procedures.

(2) The awarding of points for references may be used as evaluation scoring criteria if set forth in the solicitation.

(c) TIE BIDS.

(1) Definitions: As used in this section

(i) "Arkansas company" means a domestic corporation, limited liability company, partnership, or not-for-profit organization as defined by Arkansas law; and

(ii) "Out-of-state company" means all foreign entities as defined by Arkansas law.

(2) In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications.

(3) In the event of a tie bid between two or more offers that meet the specifications as required and where one of the offerors is an Arkansas company, then the award shall be made to that Arkansas company.

(4) In the event of a tie bid between two or more offers that meet the specifications as required

(i) and where at least two of the offerors are Arkansas companies, then an award will be determined by lot (flip of a coin) between those Arkansas companies;

(ii) or if all of the offerors are out-of-state companies, then an award will be determined by lot (flip of a coin) among all the offerors.

(5) The coin flip will be done in the presence of at least one witness by the person responsible for awarding the contract. All witnesses must be employees of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by the person responsible for awarding the contract and all witnesses.

(d) PRIVATE EVALUATORS.

(1) An agency may use qualified evaluators from non-State governmental entities or the private sector.

(i) There is no limit on the number of private evaluators that may be used on an evaluation committee, but they must abide by all ethical standards and legal requirements a state employee or former state employee would have to meet in order to serve as an evaluator.

R7:19-11-230. Correction or withdrawal of proposals.

(a) There is a strong public interest in favor of conserving public funds in awarding public contracts, and little, if any, public benefit in disqualifying proposals for technical deficiencies in form or minor irregularities where the offeror does not derive any unfair competitive advantage therefrom. The State Procurement Director or agency procurement official may waive technicalities in proposals or minor irregularities in a procurement which do not affect the material substance of the Request for Proposals when it is in the State's best interest to do so.

(b) Amendments to proposals shall be allowed if the amendments are in writing and signed, are received prior to the date and time of the proposal opening, and clearly indicate the date and time of proposal opening and Request for Proposals number.

(c) If there is a suspected proposal mistake or the State Procurement Director or agency procurement official chooses to seek a clarification on a matter that is evaluated in the proposal, the State Procurement Director or agency procurement official may request a clarification ~~confirmation~~ of a proposal.

(1) ~~The and shall request the response by the offeror confirmation to must be made in writing. Clarifications made verbally, in demonstration presentations, or communicated in any other matter shall not be considered a clarifying response by the offeror, and should be reduced to a written clarification by the offeror to be considered.~~

(2) The response of any offeror who fails or refuses to clarify in writing within a reasonable time any matter contained in his or her proposal may be rejected.

(3) Any written clarification submitted shall become a part of the contract awarded on the basis of that proposal.

(d) Proposal prices shall not be increased after the date and hour of the proposal opening.

(e) When a mistake in a proposal is claimed by the vendor prior to award and the evidence is clear and convincing that a material mistake was made in the proposal, and that due to such mistake the proposal submitted was not the proposal intended, the bidder may be permitted to withdraw his proposal.

R1:19-11-233. Emergency procurements.

(a) ~~BIDS. The state agency must, at a minimum, receive three (3) competitive bids unless the emergency is critical. The quotation abstract must show the names of at least three (3) firms contacted in attempting to obtain competition.~~

APPROVAL. All non-critical emergency procurements must be approved in advance by the State Procurement Director, the head of a procurement agency, or a designee of either officer. Where time or circumstance does not permit prior approval, approval must be obtained at the earliest practical date. Requests for approval must be made in writing and include:

- (1) a copy of the purchase order;
- (2) a copy of the quotation abstract Competitive Bid Tabulation form; and
- (3) a written explanation of the emergency.

(b) TIE BIDS.

(1) Definitions: As used in this section

(i) "Arkansas company" means a domestic corporation, limited liability company, partnership, or not-for-profit organization as defined by Arkansas law; and

(ii) "Out-of-state company" means all foreign entities as defined by Arkansas law.

(2) In the event the lowest prices offered result in a tie bid, the person responsible for awarding a contract must ensure that all offers meet specifications.

(3) In the event of a tie bid between two or more offers that meet the specifications as required and where one of the offerors is an Arkansas company, then the award will be made to that Arkansas company.

(4) In the event of a tie bid between two or more offers that meet the specifications as required

(i) and where at least two of the offerors are Arkansas companies, then an award will be determined by lot (flip of a coin) between those Arkansas companies;

(ii) or if all of the offerors are out-of-state companies, then an award will be determined by lot (flip of a coin) among all the bidders.

(5) The coin flip will be done in the presence of at least one witness by the person responsible for awarding the contract. All witnesses must be employees of the State of Arkansas. A documentation of the coin flip must be included on the tabulation or bid history sheet and be signed by the person responsible for awarding the contract and all witnesses.

(dc) LEGISLATIVE REVIEW. Except in the case of a “critical emergency” procurement, as that term is defined in Ark. Code Ann. § 19-11-233(b)(2), all services contracts must be presented for legislative review as required under Ark. Code Ann. § 19-11-265. ~~PROFESSIONAL AND CONSULTANT SERVICES~~. Emergency procurements of professional and consultant services with a total projected contract amount, including any amendments or possible extensions, of less than fifty thousand dollars (\$50,000) may be procured using the method as described in R1:19-11-233(A) through (C). For those PCS contracts with a total projected contract amount, including any amendments or possible extensions, of fifty thousand dollars (\$50,000) or more, the agency chief fiscal officer or equivalent or director, division director or deputy director of an agency, college or university may institute a request for emergency action review of a professional or consultant service contract by providing in writing a request to the Director of State Procurement. The request must detail that to procure using other methods would endanger human life or health, state property or the functional capability of the agency. The State Procurement Director may then approve submission of the contract to the Legislative Council. Under its emergency action procedures, the Co-chairpersons of the Legislative Council and/or the Co-chairpersons of the Legislative Council Review Committee may review PCS contracts on behalf of the Legislative Council, provided a written report of the review process is presented to the Legislative Council at its next regular meeting.

(e) ~~TECHNICAL AND GENERAL SERVICES~~. Emergency procurements of technical and general services with a total projected contract amount, including any amendments or possible extensions, of less than one hundred thousand dollars (\$100,000) may be procured using the method as described in R1:19-11-233(A) through (C). For those technical and general services contracts with a total projected contract amount, including any amendments or possible extensions, of one hundred thousand dollars (\$100,000) or more, the agency chief fiscal officer or equivalent or director, division director or deputy director of an agency, college or university may institute a request for emergency action review of a technical and general services contract by providing in writing a request to the Director of State Procurement. The request must detail that to procure using other methods would endanger human life or health, state property or the functional capability of the agency. The State Procurement Director may then approve submission of the contract to the Legislative Council. Under its emergency action procedures, the Co-chairpersons of the Legislative Council and/or the Co-chairpersons of the Legislative Council Review Committee may review technical and general services contracts on behalf of the Legislative Council, provided a written report of the review process is presented to the Legislative Council at its next regular meeting.

R1:19-11-238. Initial Term.

A contract may be entered into for up to a maximum period of a total of seven (7) years. It may be advantageous for agencies to have a contract expire annually unless renewed, however, they may opt to make the initial term of a contract extend for up to four (4) years before the first renewal. The aggregate number of years under a non-exempt contract remains seven (7), regardless of the length of the initial term of the contract.

R1-19-11-244 Definitions.

R1-19-11-244.6 "Grounds" of the protest are as defined in § 19-11-244(a)(4).

R1-19-11-244.7 "Interested Party", when used in relation to a protest in connection with a solicitation, means any actual or prospective bidder, offeror, or contractor actually or prospectively participating in a solicitation. When used in relation to a protest in connection with the award of a contract, it means a bidder, offeror, or contractor who actually submitted a bid or offer or who holds a contract to provide the commodities or services solicited.

R1-19-11-244.78 "Protest" means a written objection from a person setting forth facts showing that the person is an interested party who has been aggrieved in connection with: (a) the solicitation of a contract; or (b) the award of a contract.

R1-19-11-244.89 "Solicitation" means an instance of soliciting bids, proposals, or qualifications for a contract for commodities or services, and includes "competitive bidding," "competitive sealed bidding," "competitive sealed proposals," and "request for qualifications," as those terms are defined in Arkansas Procurement Law.

R1-19-11-244.10 "Submitted" means a protest that conforms to the formal requirements as defined in these rules, that has been received by the State Procurement Director or the head of the relevant procurement agency. It is not sufficient for a protestor to merely claim a protest was submitted; evidence of actual receipt of the protest must be obtained, whether return receipt, confirmation email by the State Procurement Director or the head of the relevant procurement agency, or other adequate evidence of receipt.

R2-19-11-244 Protest Requirements.

R2-19-11-244.1 Substantive Requirements. A protest must set forth facts showing that the protestor: (i) is an interested party with standing to protest under Ark. Code Ann. § 19-11-244(a); (ii) who has been aggrieved: (a) in connection with a solicitation, or (b) in connection with the award of a contract, and (iii) has Grounds.

R2-19-11-244.2 Formal Requirements. A protest must be ~~submitted~~ Submitted in writing to the State Procurement Director or the head of the relevant procurement agency. To expedite handling of protests, if delivered by mail, the envelope containing a protest should be clearly labeled "Protest." Protests delivered by ~~email/electronic means~~ should be identified as a protest in the subject line and marked as important. A protest shall include, as a minimum, the following:

- (a) The name and address of the protestor (or the protestor's attorney);
- (b) Appropriate identification of the solicitation by reference to its number, if a number has been assigned; and

- (c) Unless good cause is shown for its absence, a copy of any documents or supporting evidence upon which the protest is based, attached to or enclosed with the protest as an exhibit. Where such documents or supporting evidence substantiating any claims made in a protest are believed or known to exist, but are not available with reasonable diligence to include as an exhibit within the time for submitting a protest, the anticipated documents must be described in the protest so as to explain how they are expected to support the protest and when the protestor reasonably anticipates they will be available, if ever. Failure to provide such supporting exhibits without good cause or within a reasonable time may result in the protest not being sustained.

R2-19-11-244.3 Time Periods for Submission. There are two types of protests permitted under Ark. Code Ann. § 19-11-244: (i) a protest in connection with the solicitation of a contract; and (ii) a protest in connection with the award of a contract. To be timely, a protest, must be ~~submitted~~ Submitted in writing to the State Procurement Director or the head of the procurement agency conducting the procurement:

- (a) at least seventy-two (72) hours before the deadline for submitting a response to the solicitation, if it is a protest in connection with the solicitation of a contract; or
- ~~(b) within fourteen (14) calendar days after the award or notice of anticipation to award has been posted. In the event that both a notice of anticipation to award and an award have been posted, the protest shall be submitted in writing within fourteen (14) calendar days of whichever occurred first. aggrieved person knows or should have known of the facts giving rise to the grievance, if it is a protest in connection with the award of a contract. The phrase "should have known" indicates that constructive knowledge, and not just actual knowledge, is considered in determining the timeliness of a protest in connection with the award of a contract.~~

R3-19-11-244 Burden of Supporting a Protest and Supplying Requested Information.

A party submitting a protest has the burden of stating facts showing that the protestor has Grounds ~~been aggrieved~~ in connection with a solicitation or in connection with the award of a contract. The State Procurement Director or the head of a procurement agency determining a protest may, but has no duty to, request a protestor or other interested party to submit documentation or information relevant to the protest. Failure of any person to comply expeditiously with a request for documents or information by the State Procurement Director or the head of a procurement agency determining a protest may result in the protest being determined without consideration of the requested information. Delivery of requested documents or information after three business days from the request is generally not considered expeditious, but the State Procurement Director or the head of a procurement agency may allow additional time for good cause.

R4-19-11-244 Stay of Procurements During Protest.

When a protest has been timely submitted, no execution ~~award~~ of the contract shall be made until the protest has been settled or determined by the State Procurement Director or relevant procurement agency head, unless the State Procurement Director or relevant procurement agency head makes a written determination, after consulting with the head of the using agency or the head of the procurement agency, that the execution ~~award~~ of the contract without delay is necessary to protect substantial interests of the State.

R1:19-11-249. Cooperative purchasing.

(a) When an agency that is subject to Arkansas Procurement Law seeks to participate in a cooperative purchasing agreement that is administered by a public procurement unit or external procurement activity that is not subject to Arkansas Procurement Law, it will first need to submit the cooperative purchasing agreement to the State Procurement Director for a determination as required by A.C.A. § 19-11-256(b) and these rules. If a determination has already been made with respect to a cooperative purchasing agreement, any other public procurement unit may rely on that determination. Cooperative purchasing contracts or agreements must be approved by the Director of the Office of State Procurement prior to being entered into by a state public procurement unit.

R2:19-11-249. Reporting of Cooperative Contract Purchases.

Cooperative contract purchases of state agencies without an agency procurement official must be presented to the Legislative Council or Joint Budget Committee by the Department of Finance and Administration Office of State Procurement annually. Agencies shall submit purchases using the appropriate method as determined by the Office of State Procurement within ninety (90) days after the conclusion of the relevant fiscal year.

R1:19-11-251. Intergovernmental agreements.

(a) Intergovernmental agreements should include at a minimum:

- (1) Scope of work to be accomplished;
- (2) Amount of compensation (if any);
- (3) Delineation of responsibilities and duties of each entity;
- (4) Term of agreement; and
- (5) Authorized signatures from each entity.

~~(b) (1) Intergovernmental agreements for technical and general services with a total projected contract amount, including any amendments and possible extensions, of one hundred thousand dollars (\$100,000) or more will be submitted to the Office of State Procurement prior to contract execution for review by the Legislative Council or Joint Budget Committee.~~

~~(2) Intergovernmental agreements involving professional and consultant services with a total projected contract amount, including any amendments and possible extensions, of fifty thousand dollars (\$50,000) or more will be submitted to the Office of State Procurement prior to contract execution for review by the Legislative Council or Joint Budget Committee.~~

~~(3) Intergovernmental agreements involving commodities will not be submitted to the Office of State Procurement prior to contract execution.~~

R1:19-11-265. Submission of Contracts for Services Review Requirements of Technical and General Services Contracts that are Amended.

~~(a) — Amendments to contracts that were originally reviewed by Legislative Council or Joint Budget Committee. An amendment will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and Administration and before the execution date of the amendment if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount and/or involves major changes in the objectives and scope of the contract.~~

~~(b) — Amendments to contracts that originally did not require review by Legislative Council or Joint Budget Committee. Any amendment which increases the total projected contract amount, including any amendments or possible extensions, of a technical and general services contract to one hundred thousand dollars (\$100,000) or more shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration and before the execution date of the amendment. The amendment along with a copy of the original contract and any attachments thereto must be submitted to the Office of State Procurement in accordance with the time guidelines as prescribed in R5:19-11-265. Contracts that have expired cannot be amended.~~

(a) Contracts requiring “services,” as defined in Arkansas Procurement Law and these rules, are to be presented to the Legislative Council or, if the General Assembly is in session, to the Joint Budget Committee, before the execution of the contract if the contract amount is fifty thousand dollars (\$50,000) or more in any one year of the contract’s term, or if the total projected contract amount, including any amendments or possible extensions, is three hundred fifty thousand dollars (\$350,000) or more unless they are contracts for critical emergency procurements or are otherwise exempted from the submission requirements of Ark. Code Ann. § 19-11-265.

(b) Labor, time, or effort included in or incident to a contractor’s production or sale of a commodity or commodities are not considered “services” for purposes of determining whether a contract is a “contract requiring services” within the meaning of Ark. Code Ann. § 19-11-265. Consequently, a contract for the procurement of a commodity or commodities is not a “contract requiring services” for purposes of Ark. Code Ann. § 19-11-265 if it only calls for labor, time, or effort included in or incident to the procurement of the commodity or commodities.

(c) Where a tangible commodity exists and is identifiable at the time of the commodity’s procurement, any labor, time, or effort expended in its production are not considered services if no separate consideration is paid beyond the purchase price of the commodity for the labor, time, and effort expended in producing the commodity. Even where a present purchase order is for a tangible commodity yet to be produced, the future labor, time, or effort to be expended in the production of the commodity will not be considered “services” if the only consideration to be paid is the purchase price of the commodity after its receipt (and incidentals, such as taxes, delivery fees, etc.), and no separate consideration is paid for the labor, time, or effort expended in the production of the commodity. However, where a contract requires a contractor to furnish labor, time, or effort to produce a commodity not yet in existence, such as a computer program, and the contract calls for consideration to be paid to the contractor based on the labor, time, or effort furnished in the production of the commodity rather than based on the finished commodity, such labor, time, or

effort are considered “services.”

- (d) If a contract will require procurement of a combination of commodities and services, as those terms are defined in Arkansas Procurement Law and these rules, then it should be submitted for review under Ark. Code Ann. § 19-11-265 if the services component of the contract is fifty thousand dollars (\$50,000) or more in any one contract year, or if the total projected contract amount, including any amendments or possible extensions, is three hundred fifty thousand dollars (\$350,000) or more.

R2:19-11-265. Material changes to Contracts for Services Technical and General Services Contract Form.

Each contract presented for review should be submitted using the appropriate contract form as specified by the Office of State Procurement. Contract forms are available on the OSP website.

- (a) A contract that has previously been presented for review does not need to be presented for legislative review again upon its renewal or extension unless it introduces a “material change.” There are two classes of material changes that trigger a duty to resubmit a contract for review at either renewal of a contract or extension of a contract term:

(1) an amendment that is a material change in contractual terms, including, without limitation:

- (A) An increase in the contract amount;
- (B) An increase in the total projected contract amount;
- (C) A change in any of the essential terms of the contract;
- (D) A change in any performance-based standards stated in the contract; and

(2) a material deviation by a contractor from the performance promised during the period preceding renewal or extension, such as a:

- (A) default requiring the imposition of financial consequences as the result of the contractor’s failure to satisfy performance-based standards under Ark. Code Ann. § 19–11–267 during the year preceding the renewal or extension of the contract; or
- (B) vendor performance resulting in a vendor performance report during the year preceding the renewal or extension of the contract.

Both of these are “material changes” that trigger the duty to re-submit a contract for review prior to a renewal or an extension.

For purposes of Ark. Code Ann. § 19-11-265, renewal refers to re-establishing an existing contract for another term, whereas extension is extending the term of an existing contract that would otherwise expire. Although technically distinguishable, they are functionally similar.

(b) Definitions.

1. “Initial contract amount” refers to the amount agreed to for the initial term of a contract.

2. “Total projected contract amount” refers to the total amount that the state is projected to expend under the contract over the entire life of the contract, which can be no more than seven (7) years under Ark. Code Ann. § 19-11-238.
3. “Essential terms of a contract,” also called fundamental terms, are provisions that must be included for an enforceable contract to exist between the parties under any applicable statute of frauds.

~~R3:19-11-265. Disclosure Requirements for
Technical and General Service Contracts.~~

~~(1) — No contract for Technical or general services greater than the dollar limit established by Executive Order 98-04, will be awarded, extended, amended, or renewed by any agency to any contractor who has not disclosed as required in Executive Order 98-04. However, contracts with another government entity such as a state agency, public education institution, federal government entity, or body of a local government are exempt from Executive Order 98-04 disclosure requirements.~~

~~(2) — No contract for technical or general services greater than the dollar limit established by the ACA § 19-11-105 Illegal Immigrant Certification program will be awarded extended, amended or renewed by any agency to any contractor or subcontractor who has not completed the proper certification.~~

~~(3) — No contract for technical or general services greater than the dollar limit established by the ACA § 25-1-503 Certification program will be awarded by any agency to any contractor who has not completed the proper certification.~~

~~(4) — The failure of any person or entity to disclose as required under any term of Executive Order 98-04, the ACA § 19-11-105 Illegal Immigrant Certification requests, the ACA § 25-1-503 Certification program or the violation of any rule, regulation or policy promulgated by the Department of Finance and Administration pursuant to this Order, will be considered a material breach of the terms of the contract, lease, purchase agreement, or grant and will subject the party failing to disclose, or in violation, to all legal remedies available to the agency under the provisions of existing law.~~

~~R4:19-11-265. Contract Dates.~~

~~—— For each technical and general services contract form submitted, the agency is required to enter the beginning and ending date of the contract. The beginning date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract are to begin and not the date upon which the agreement was signed. This date should be arrived at with emphasis placed on the following:~~

~~(a) Any contract or amendment to a contract that requires review by the Legislative Council or Joint Budget Committee must be submitted to the Department of Finance and Administration Office of State Procurement in accordance with the time guidelines as prescribed on the Office of State Procurement website. The beginning date of the contract must not precede the date of the Arkansas Legislative Council meeting in which such contract is to be reviewed. The Legislative Council or the Joint Budget Committee~~

shall provide the State Procurement Director with their review as to the propriety of the contract within thirty (30) days of said submission to the Legislative Council or Joint Budget Committee;

~~(b) All technical and general services contracts with a total projected contract amount, including any amendments or possible extensions, of one hundred thousand dollars (\$100,000) or more unless specifically exempted, must be filed with the Department of Finance and Administration Office of State Procurement for review by the Legislative Council or Joint Budget Committee.~~

~~R5:19-11-265. Reporting of Technical and General Services Contracts.~~

~~(1) Technical and general services contracts with a total projected contract amount, including any amendments and possible extensions, of twenty-five thousand dollars (\$25,000) and less than one hundred thousand dollars (\$100,000) shall be reported to the Legislative Council or the Joint Budget Committee monthly. Agencies must report contracts using the appropriate method as determined by the Office of State Procurement.~~

~~(2) Maintenance contracts are not considered services of one (1) or more individuals for regular full-time or part-time weekly work, and do not require reporting to the Legislative Council or the Joint Budget Committee. Maintenance contracts are narrowly defined as providing help or assistance needed to support the continuous operation of procured commodities according to the commodities' original functionality and specifications, including but not limited to software maintenance contracts. Agencies should not apply maintenance contracts so broadly as to frustrate the legislative intent of statutes requiring reporting of certain consulting services or professional service contracts.~~

~~(3) Under subsection (a)(1), "regular" is defined by giving the word its ordinary and usually accepted meaning in common language, which in the context of subsection (a)(1) shall be constituted, conducted, scheduled, or done in conformity with established or prescribed usages, rules, or discipline. —~~

~~R6R3:19-11-265. Technical and General Services Contracts on File in the Office of State Procurement.~~

All agencies will be required to maintain copies in accordance with current document retention laws (Ark. Code Ann. § 19-11-214), of all purchase orders issued for the procurement of technical and general services.

~~R1:19-11-267. Use of Performance-Based Standards in Contracts.~~

~~The purpose of these standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.~~

- ~~(a) The purpose of performance-based standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.~~
- ~~(b) It is recommended that all services contracts include performance standards.~~
- ~~(c) All services contracts that have a contract amount of at least one million dollars~~

~~(\$1,000,000) in a single contract year or a total projected contract amount, including any amendments to or possible extensions of the contract, of at least seven million dollars (\$7,000,000), including any amendments or possible extensions, shall include performance standards.~~

~~(bd)~~ Performance standards may be standardized for use with similar contracts or may be specifically developed for unique requirements.

~~(ee)~~ Performance standards should measure, at prescribed points throughout the term of the contract, the quality, quantity, and timeliness of work being performed.

~~(df)~~ Performance standards may be refined by the agency and the provider as a part of the contract negotiations.

~~(eg)~~ A provider's inability to meet established performance standards may be sufficient cause for declaring default and may also result in cancellation of the contract.

~~(fh)~~ Contracts that otherwise fall under Ark. Code Ann. § 19-11-267(b)(1) may be exempt from the use of performance standards ~~include if they are:~~

- ~~(1) Sole source by law contracts in which the state is compelled as a result of court, state or federal mandate to award for services from a specific provider;~~
- ~~(2) Emergency contracts in which the need for expediency does not permit for the development of performance standards.~~

~~R1:19-11-268. Reporting of Vendor Performance.~~

~~Contracts with a total projected contract amount, including any amendments and possible extensions, of twenty five thousand dollars (\$25,000) or more shall require the submission of a vendor performance report at least one (1) time every three (3) months for the entire term of the contract and at the end of the contract. Reports shall be due to the Office of State Procurement. This shall not restrict agencies from submitting an unsatisfactory vendor performance report at any time during the contract period. Agencies shall submit vendor performance reports using the appropriate method as prescribed by the Office of State Procurement.~~

~~R1:19-11-[273]. Solicitation Conferences. A solicitation conference may be held by an agency to provide the following information to prospective bidders:~~

- ~~(1) Names and contact information of state personnel who will serve as points of contact to bidders during the solicitation process;~~
- ~~(2) Times, dates, locations and other relevant information pertaining to the procurement calendar and process;~~
- ~~(3) A description of the services or commodities sought, as well as the agency's objectives;~~
- ~~(4) A review of the specifications and pricing model being sought;~~
- ~~(5) And to take questions from attendees~~

~~R2:19-11-[273]. Mandatory Solicitation Conferences. Agencies may make attendance at a solicitation conference mandatory by obtaining approval from the State Procurement Director or the head of the procurement agency. In seeking such approval, the agency shall:~~

- (1) Issue a request letter, addressed to the State Procurement Director or the head of the procurement agency. Email is sufficient to constitute a request. Whether delivered by email or mail, the communication should be clearly marked or labeled "Request for a Mandatory Solicitation Conference."
- (2) The written request should clearly articulate the factors and reasoning for why the solicitation conference should be made mandatory, as well as a citation to the mandatory language for a solicitation conference in the invitation for bids, request for proposals, or request for statements of qualifications and performance data.
- (3) A copy of the draft invitation for bids, request for proposals, or request for statements of qualifications and performance data should be attached with the written request.

R3:19-11-[273]. Nothing discussed during a solicitation conference will augment or change the specifications or terms and conditions of a solicitation, nor shall anything discussed during a solicitation conference be deemed to be binding or incorporated into the specifications or terms and conditions of a solicitation, unless it is subsequently reduced to writing and included in the solicitation.

R1:19-11-[275]. CONDITIONS OF USE. A request for information ("RFI") solicitation may be issued by an agency for the purposes of information gathering and planning while contemplating a possible competitive sealed bid procurement or competitive sealed proposal procurement. A RFI is not, and should not be construed as, a commitment by the agency to issue a solicitation in the future. Agencies should not seek, and vendors should not provide, proposals or bids. A response to a RFI should be treated by the agency as informational only, and should not be considered a proposal or bid, nor should any contract be awarded directly from a RFI.

R2:19-11-[275]. PRICING INFORMATION. A request for information solicitation may request general pricing models, but specific pricing should be expressly prohibited in the RFI solicitation, and if provided unsolicited, should not be considered.

R3:19-11-[275]. The exemption of public records from the Freedom of Information Act of 1967 corresponding to a request for information ("RFI") is limited, expiring upon either: (1) the public opening of bids for a competitive sealed bid procurement that followed the relevant RFI; (2) notice being posted of the anticipated award for a competitive sealed proposal that followed the relevant RFI; or (3) upon an agency making a determination (either formally or through failure to initiate a solicitation within twenty-four (24) months of the RFI) not to proceed with a solicitation following the relevant RFI.

~~R1:19-11-1006. Performance Evaluation and Expenditure Review of Professional and Consultant Service Contracts.~~

~~Professional and consultant service contracts between state agencies for which the total projected contract amount, including any amendments or possible extensions, is fifty thousand dollars (\$50,000) or more, must be presented to the Performance Evaluation and Expenditure Review Committee (PEER) or Joint Budget Committee by the Department of Finance and Administration prior to the execution date of such contract.~~

~~R2:19-11-1006. Review Requirements of Professional and Consultant Service Contracts that Are Amended.~~

~~(a) AMENDMENTS TO CONTRACTS THAT WERE ORIGINALLY REVIEWED BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. An amendment will require review by Legislative Council or Joint Budget Committee prior to approval by the Department of Finance and Administration and before the execution date of the amendment if the original contract was reviewed by Legislative Council or Joint Budget Committee and the amendment increases the dollar amount and/or involves major changes in the objectives and scope of the contract.~~

~~(b) AMENDMENTS TO CONTRACTS THAT ORIGINALLY DID NOT REQUIRE REVIEW BY LEGISLATIVE COUNCIL OR JOINT BUDGET COMMITTEE. Any amendment that increases the total projected contract amount, including any amendments or possible extensions, of a professional or consultant service contract to fifty thousand dollars (\$50,000) or more shall require review by the Legislative Council or Joint Budget Committee, prior to the approval of the Department of Finance and Administration and before the execution date of the amendment. The amendment, along with a copy of the original contract and any attachments thereto, must be submitted to the Office of State Procurement in accordance with the time guidelines as prescribed in R12:11-19-1012. Contracts that have expired cannot be amended.~~

~~R3:19-11-1006. Reporting of Professional and Consultant Service Contracts.~~

~~Professional and consultant service contracts with a total projected contract amount, including any amendments or possible extensions, of ten thousand dollars (\$10,000) but less than fifty thousand dollars (\$50,000) shall be reported to the Legislative Council or the Joint Budget Committee monthly. Agencies shall submit contracts using the appropriate method as determined by the Office of State Procurement.~~

~~R1:19-11-1010. Use of Performance-Based Standards in Professional and Consultant Service Contracts.~~

~~(a) All professional and consultant service contracts shall include performance standards. The purpose of these standards is to allow the agency to effectively measure the level of performance provided by the contractor at various stages of the contract.~~

~~(b) — Performance standards may be standardized for use with similar contracts or may be specifically developed for unique requirements.~~

~~(c) — Performance standards should measure, at prescribed points throughout the term of the contract, the quality, and quantity, and timeliness of work being performed.~~

~~(d) — Performance standards may be refined by the agency and the provider as a part of the contract negotiations.~~

~~(e) — A provider's inability to meet established performance standards may be sufficient cause for declaring default and may also result in cancellation of the contract.~~

~~(f) — Contracts that may be exempt from the use of performance standards include:~~

~~(1) — Sole source by law contracts in which the state is compelled as a result of court, state or federal mandate to award for services from a specific provider.~~

~~(2) — Emergency contracts in which the need for expediency does not permit for the development of performance standards.~~

~~Architectural and Engineering contracts that are awarded using Building Authority Division criteria or similar criteria developed by those colleges and universities which are exempt from Building Authority Division review.~~

R2:19-11-1012. Contract Dates.

For each professional and consultant service contract form submitted, the agency is required to enter the beginning and ending date of the contract. The beginning date of all contracts shall be defined as the date upon which performance of the services to be rendered under the contract are to begin and not the date upon which the agreement was signed. This date should be arrived at with emphasis placed on the following:

(a) Any contract or amendment to a contract that requires review by the Legislative Council or Joint Budget Committee must be submitted to the ~~Department of Finance and Administration~~, Office of State Procurement, in accordance with the time guidelines as prescribed on the Office of State Procurement website. The beginning date of the contract must not precede the date of the Arkansas Legislative Council meeting in which such contract is to be reviewed. The Legislative Council or the Joint Budget Committee shall provide the State Procurement Director with their review as to the propriety of the contract within thirty (30) days of said submission to the Legislative Council or Joint Budget Committee;

(b) All professional and consultant service contracts with fifty thousand dollars (\$50,000) or more in any one year of the contract's term, or if the total projected contract amount, including any amendments or possible extensions, is three hundred fifty thousand dollars (\$350,000) or more unless they are contracts for critical emergency procurements or are otherwise exempted from the submission requirements of Ark. Code Ann. § 19-11-265, must be filed with the Office of State Procurement for review by the Legislative Council or Joint Budget Committee. a total projected contract amount, including any amendments or possible extensions, of fifty thousand dollars (\$50,000) or more, unless specifically excepted, must be filed with the Department of Finance and Administration for review by the Legislative Council or Joint Budget Committee.

R1:19-11-1013. Reporting of Vendor Performance.

~~Contracts with a total projected contract amount, including any amendments and possible extensions, of twenty five thousand dollars (\$25,000) or more shall require the submission of a vendor performance report at least one (1) time every three (3) months for the entire term of the contract and at the end of the contract. Reports shall be due to the Office of State Procurement. This shall not restrict agencies from submitting an unsatisfactory vendor performance report at any time during the contract period. Agencies shall submit vendor performance reports using the appropriate method as prescribed by the Office of State Procurement.~~

State of Arkansas
92nd General Assembly
Regular Session, 2019

A Bill

HOUSE BILL 1572

By: Representative Ladyman
By: Senator L. Eads

For An Act To Be Entitled

AN ACT TO AMEND THE LAW CONCERNING STATE AGENCY
CAPITAL IMPROVEMENT CONTRACTS FOR PURPOSES OF
UNIFORMITY; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE LAW CONCERNING STATE AGENCY
CAPITAL IMPROVEMENT CONTRACTS FOR
PURPOSES OF UNIFORMITY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 18-44-503(a), concerning public buildings and improvements, is amended to read as follows:

(a) No A contract in any a sum exceeding ~~twenty thousand dollars~~ (\$20,000) the amount stated in § 22-9-203 providing for the repair, alteration, or erection of any public building, public structure, or public improvement shall not be entered into by the State of Arkansas or any subdivision ~~thereof~~ of the state, by any county, municipality, school district, or other local taxing unit, or by any agency of ~~any of the foregoing the state~~, a subdivision of the state, a county, a municipality, a school district, or any other local taxing unit, unless the contractor shall furnish to the party letting the contract a bond in a sum equal to the amount of the contract.

SECTION 2. Arkansas Code § 19-4-1405(d)(1), concerning the bidding procedure for the construction of buildings and facilities, is amended to



1 read as follows:

2 (d)(1)(A) Every bid submitted on state agency construction contracts
3 for projects over the amount of ~~twenty thousand dollars (\$20,000)~~ shall be
4 stated in § 22-9-203 is void unless accompanied by a cashier's check drawn
5 upon a bank or trust company doing business in this state or by a corporate
6 bid bond and the agent's power of attorney as his or her authority.

7 (B) ~~No bid Bid security shall be~~ is not required for
8 projects under or equal to the amount of ~~twenty thousand dollars (\$20,000)~~
9 stated in § 22-9-203.

10
11 SECTION 3. Arkansas Code § 19-11-203(14)(Y), concerning the definition
12 of "exempt commodities and services" under the Arkansas Procurement Law, is
13 amended to read as follows:

14 (Y) Capital improvements valued at less than ~~twenty~~
15 ~~thousand dollars (\$20,000)~~ the amount stated in § 22-9-203, subject to
16 minimum standards and criteria of the Building Authority Division of the
17 Department of Finance and Administration;

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20 APPROVED: 4/2/19
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1 State of Arkansas

As Engrossed: S2/20/19

2 92nd General Assembly

A Bill

3 Regular Session, 2019

HOUSE BILL 1161

5 By: Representatives Dotson, Wardlaw

6 By: Senator Flippo

For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW AND THE
10 LAWS CONCERNING PROFESSIONAL AND CONSULTANT SERVICES
11 CONTRACTS; TO AMEND THE LAWS CONCERNING STATE AGENCY
12 PROCUREMENTS; TO AMEND THE DEFINITIONS UNDER THE
13 ARKANSAS PROCUREMENT LAW; TO AMEND THE REVIEW AND
14 REPORTING REQUIREMENTS FOR SERVICE CONTRACTS PROCURED
15 BY THE STATE; TO AMEND THE LAW CONCERNING VEHICLE
16 LEASES BY STATE AGENCIES; TO AMEND AND PROVIDE FOR
17 THE TRACKING AND REPORTING OF CONTRACTS PROCURED BY
18 STATE AGENCIES; TO REPEAL AS OBSOLETE THE REPORTING
19 REQUIREMENT FOR RECYCLED PAPER PRODUCTS; AND FOR
20 OTHER PURPOSES.

Subtitle

24 TO AMEND THE REVIEW AND REPORTING
25 REQUIREMENTS FOR SERVICE CONTRACTS; TO
26 AMEND THE LAW CONCERNING VEHICLE LEASES
27 BY STATE AGENCIES; AND TO PROVIDE FOR THE
28 TRACKING AND REPORTING OF CONTRACTS
29 PROCURED BY STATE AGENCIES.

32 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

34 SECTION 1. Arkansas Code § 19-11-203(4), concerning the definitions to
35 be used under the Arkansas Procurement Law, is amended to read as follows:

36 (4)(A) "Commodities" means all personal property, including, but



1 ~~not limited to, equipment, printing, stationery, supplies, and insurance, but~~
2 ~~excluding leases without limitation:~~

3 (i) Goods, as defined in § 4-2-105;

4 (ii) Leases, as defined in § 4-2A-103; and

5 (iii) Insurance.

6 (B) "Commodities" does not include:

7 (i) A lease on real property, real property, or a
8 permanent interest in real property, exempt;

9 (ii) Exempt commodities and services, and capital;
10 and

11 (iii) Capital improvements;
12

13 SECTION 2. Arkansas Code § 19-11-203(14)(AA), concerning the
14 definition of "exempt commodities and services" under the Arkansas
15 Procurement Law, is amended to read as follows:

16 (AA) The following commodities and services relating to
17 proprietary software after the initial procurement:

18 (i) Technical support incidental to supporting the
19 continuous operation of proprietary software;

20 (ii) Renewals;

21 (iii) Additional copies; and

22 (iv) License upgrades;
23

24 SECTION 3. Arkansas Code § 19-11-203(27), concerning the definitions
25 to be used under the Arkansas Procurement Law, is amended to read as follows:

26 (27)(A) "Services" means the furnishing of labor, time, or
27 effort by a contractor, ~~not involving the delivery of a specific end product~~
28 ~~other than reports which are merely incidental to the required performance~~
29 that does not produce tangible commodities.

30 (B) "Services" includes without limitation:

31 (i) Consulting services;

32 (ii) Personal services;

33 (iii) Professional services;

34 (iv) Technical and general services; and

35 (v) The furnishing of labor, time, or effort by a
36 contractor for the generation, customization, configuration, or development

1 of software and other intangible property other than technical support
2 incidental to the procurement of proprietary software.

3 (C) "Services" shall does not include employment
4 agreements, collective bargaining agreements, exempt commodities and
5 services, or architectural or engineering contracts requiring approval of the
6 Building Authority Division of the Department of Finance and Administration
7 or higher education;

8
9 SECTION 4. Arkansas Code § 19-11-217(c), concerning the powers and
10 duties of the State Procurement Director, is amended to add an additional
11 subdivision to read as follows:

12 (9) Shall create a roster of expiring contracts entered into by
13 a state agency for which there is no new requisition.

14
15 SECTION 5. Arkansas Code § 19-11-249, concerning cooperative
16 purchasing, is amended to add an additional subsection to read as follows:

17 (c) A contractor shall cooperate with the director in providing
18 information necessary for the director to complete the report required under
19 subsection (b) of this section.

20
21 SECTION 6. Arkansas Code § 19-11-260 is repealed.

22 ~~19-11-260. Recycled paper products — Preference.~~

23 ~~(a) The State Procurement Director shall issue a recycled paper~~
24 ~~content specification for each type of paper product.~~

25 ~~(b)(1) The goal of state agencies for the percentage of paper products~~
26 ~~to be purchased that utilize recycled paper shall be:~~

27 ~~(A) Ten percent (10%) in fiscal year 1991;~~

28 ~~(B) Twenty five percent (25%) in fiscal year 1992;~~

29 ~~(C) Forty-five percent (45%) in fiscal year 1993; and~~

30 ~~(D) Sixty percent (60%) by calendar year 2000.~~

31 ~~(2)(A) The Office of State Procurement shall prepare a~~
32 ~~semiannual report of the state's progress in meeting the goals for the~~
33 ~~purchase of paper products with recycled content.~~

34 ~~(B) The report shall be made to the Governor.~~

35 ~~(c)(1) Whenever a bid is required, a preference for recycled paper~~
36 ~~products shall be exercised if the use of the products is technically~~

feasible and price is competitive.

(2)(A) For the purpose of procurement of recycled paper products, "competitive" means the bid price does not exceed the lowest qualified bid of a vendor offering paper products manufactured or produced from virgin material by ten percent (10%).

(B) An additional one percent (1%) preference shall be allowed for products containing the largest amount of postconsumer materials recovered within the State of Arkansas.

(3) A bidder receiving a preference under this section shall not be entitled to an additional preference under § 19-11-259.

SECTION 7. Arkansas Code § 19-11-265 is amended to read as follows:

19-11-265. Submission of contracts required.

(a)(1) A Except for critical emergency procurements and as otherwise provided in this section, a contract requiring the service services of one (1) or more individuals for regular full-time or part-time weekly work persons shall be presented to the Legislative Council or, if the General Assembly is in session, to the Joint Budget Committee, before the execution of the contract if the annual contract amount is at least fifty thousand dollars (\$50,000) in any one (1) contract year or if the total initial contract amount or the projected contract amount, including any amendments or possible extensions, is at least one hundred thousand dollars (\$100,000) three hundred fifty thousand dollars (\$350,000).

(2) The Legislative Council or the Joint Budget Committee shall provide the State Procurement Director with its review as to the propriety of the contract within thirty (30) days after receipt of the proposed contract.

(3) The contract shall not be submitted to the Legislative Council or to the Joint Budget Committee until the Office of State Procurement has reviewed the contract and provided the Legislative Council or the Joint Budget Committee with a recommendation regarding the legality of the contract.

(4)(A)(i) A contract that does not have a material change upon renewal or extension shall be included in the monthly report required under § 19-11-273 instead of being submitted to the Legislative Council or the Joint Budget Committee for review under this subsection.

(ii) As used in this subdivision (a)(4), "material

1 change" includes without limitation:

2 (a) An increase in the contract amount;

3 (b) An increase in the total projected
4 contract amount;

5 (c) A change in any of the essential terms of
6 the contract;

7 (d) A change in any performance-based
8 standards stated in the contract;

9 (e) The imposition of financial consequences
10 as the result of a failure to satisfy performance-based standards under § 19-
11 11-267 during the year preceding the renewal or extension of the contract;
12 and

13 (f) The submission of a vendor performance
14 report during the year preceding the renewal or extension of the contract.

15 (B) However, a state agency may elect to submit a contract
16 for review under this subsection if the state agency is uncertain whether the
17 contract has a material change.

18 (5) A contract that is submitted for review under this
19 subsection and that has a total projected contract amount of at least three
20 hundred fifty thousand dollars (\$350,000) shall have a cover sheet that
21 provides the following information:

22 (A) A description of the services being procured;

23 (B) A description of the procurement process followed,
24 including without limitation the method used for the procurement; and

25 (C) The outcome of any protests.

26 (b) The Legislative Council or the Joint Budget Committee may review
27 or exempt from review any contract or group of contracts contemplated by this
28 section.

29 ~~(c)(1) In addition to the contracts presented to the Legislative~~
30 ~~Council or to the Joint Budget Committee under subsection (a) of this~~
31 ~~section, the director shall compile a monthly report of all executed~~
32 ~~contracts requiring the service of one (1) or more individuals for regular~~
33 ~~full-time or part-time weekly work if the total initial contract amount or~~
34 ~~the total projected contract amount, including any amendments or possible~~
35 ~~extensions, is at least twenty-five thousand dollars (\$25,000) and less than~~
36 ~~one hundred thousand dollars (\$100,000).~~

~~(2) The monthly report required under this subsection shall include without limitation:~~

~~(A) The name of the contractor;~~

~~(B) The state agency name;~~

~~(C) The contact information for the contractor or state agency;~~

~~(D) The total initial cost of the contract, the cost of any commodities included in the contract, and the cost of the services;~~

~~(E) The type of commodities and services contracted;~~

~~(F) The quantity of commodities and services contracted;~~

~~(G) The procurement method;~~

~~(H) The total projected contract amount that includes any amendments and all available extensions; and~~

~~(I) Any other information requested by the Legislative Council or the Joint Budget Committee.~~

~~(3) The director shall remit the report required under this subsection each month to the Legislative Council or to the Joint Budget Committee as directed by the Legislative Council.~~

~~(d) (c)~~ A contract that is procured by a state agency with that has a state agency procurement official or procurement authority under a delegation order is subject to the reporting and presentment requirements under this section.

~~(e) (d)~~ It is a violation of state procurement laws, Arkansas Code Title 19, Chapter 11, for a state agency official to procure services in an incremental or split purchase arrangement to avoid the reporting or presentment requirements of this section.

SECTION 8. Arkansas Code Title 19, Chapter 11, Subchapter 2, is amended to add additional sections to read as follows:

19-11-273. Reporting requirements.

(a) The State Procurement Director shall compile a monthly report of all executed contracts for services that have a total initial contract amount or a total projected contract amount, including any amendments or possible extensions, of at least twenty-five thousand dollars (\$25,000) but less than an annual contract amount of fifty thousand dollars (\$50,000) in any one (1) contract year or a total projected contract amount, including any amendments

1 or possible extensions, of three hundred fifty thousand dollars (\$350,000).

2 (b) A contract that is procured by a state agency that has a state
3 agency procurement official or procurement authority under a delegation order
4 is subject to the reporting requirements under this section.

5 (c) The State Procurement Director shall adopt rules to:

6 (1) Prescribe a cover sheet for the report required under this
7 section that sorts and identifies contracts within the report that may be
8 candidates for review;

9 (2) Create instructions for completing the cover sheet
10 prescribed under subdivision (c)(1) of this section; and

11 (3) Provide for the identification of any contracts included in
12 the report that may need to be reviewed under § 19-11-265.

13 (d) It is a violation of state procurement laws, Arkansas Code Title
14 19, Chapter 11, for a state agency official to procure services in an
15 incremental or split purchase arrangement to avoid the reporting requirements
16 of this section.

17
18 19-11-274. Tracking requirements.

19 (a) The State Procurement Director, each agency procurement official,
20 and any state agency with procurement authority under a delegation order
21 shall track the following for the procurements they conduct and the contracts
22 they execute:

23 (1) Each protest received and the resolution of the protest;

24 (2) The outcome of any negotiations under this chapter; and

25 (3) The anticipated procurement needs of the state agency based
26 on the contracts that:

27 (A) Are set to expire during the next twelve (12) months;

28 and

29 (B) Will require a new solicitation in the next twelve
30 (12) months.

31 (b) Each agency procurement official and each state agency with
32 procurement authority under a delegation order shall report the information
33 obtained under subsection (a) of this section to the Office of State
34 Procurement.

35
36 SECTION 9. Arkansas Code § 19-11-1006 is repealed as duplicative.

1 ~~19-11-1006. Submission of contracts required.~~

2 ~~(a)(1) A professional services contract or consultant services~~
3 ~~contract shall be presented to the Legislative Council or, if the General~~
4 ~~Assembly is in session, to the Joint Budget Committee, before the execution~~
5 ~~of the professional services contract or consultant services contract if the~~
6 ~~total initial amount or the total projected amount, including any amendments~~
7 ~~or possible extensions, of the professional services contract or consultant~~
8 ~~services contract is at least fifty thousand dollars (\$50,000).~~

9 ~~(2) The Legislative Council or the Joint Budget Committee shall~~
10 ~~provide the State Procurement Director with its review as to the propriety of~~
11 ~~the professional services contract or consultant services contract within~~
12 ~~thirty (30) days after receipt of the proposed professional services contract~~
13 ~~or consultant services contract.~~

14 ~~(3) The professional services contract or consultant services~~
15 ~~contract shall not be submitted to the Legislative Council or to the Joint~~
16 ~~Budget Committee until the Department of Finance and Administration has~~
17 ~~reviewed the professional services contract or consultant services contract~~
18 ~~and provided the Legislative Council or the Joint Budget Committee with a~~
19 ~~recommendation regarding the legality of the professional services contract~~
20 ~~or consultant services contract.~~

21 ~~(b) The Legislative Council or the Joint Budget Committee may review~~
22 ~~or exempt from review any professional services contract or consultant~~
23 ~~services contract or group of professional services contracts or consultant~~
24 ~~services contracts contemplated by this subchapter.~~

25 ~~(c)(1) Funds from grants and contracts to a state institution of~~
26 ~~higher education may be used for the purpose of subcontracting with~~
27 ~~institutions under the performance conditions of the grants or contracts.~~

28 ~~(2) Subcontracts for research that are derived from grants and~~
29 ~~contracts to a state institution of higher education require the prior~~
30 ~~approval of the director and a review by the Legislative Council or by the~~
31 ~~Joint Budget Committee.~~

32 ~~(d)(1) In addition to the professional services contracts and~~
33 ~~consultant services contracts presented to the Legislative Council or to the~~
34 ~~Joint Budget Committee under subsection (a) of this section, the director~~
35 ~~shall compile a monthly report of all executed professional services~~
36 ~~contracts and consultant services contracts if the total initial amount or~~

1 ~~the total projected amount, including any amendments or possible extensions,~~
2 ~~of the professional services contract or consultant services contract is at~~
3 ~~least ten thousand dollars (\$10,000) and less than fifty thousand dollars~~
4 ~~(\$50,000).~~

5 ~~(2) The monthly report required under this subsection shall~~
6 ~~include without limitation:~~

7 ~~(A) The name of the contractor;~~

8 ~~(B) The state agency name;~~

9 ~~(C) The contact information for the contractor or state~~
10 ~~agency;~~

11 ~~(D) The total initial cost of the professional services~~
12 ~~contract or consultant services contract;~~

13 ~~(E) The type of services contracted;~~

14 ~~(F) The quantity of services contracted;~~

15 ~~(G) The procurement method;~~

16 ~~(H) The total projected amount of the professional~~
17 ~~services contract or consultant services contract that includes any~~
18 ~~amendments and all available extensions; and~~

19 ~~(I) Any other information requested by the Legislative~~
20 ~~Council or the Joint Budget Committee.~~

21 ~~(3) The director shall remit the report each month to the~~
22 ~~Legislative Council or to the Joint Budget Committee as directed by the~~
23 ~~Legislative Council.~~

24 ~~(e) A contract that is procured by a state agency with a state agency~~
25 ~~procurement official is subject to the reporting and presentment requirements~~
26 ~~under this section.~~

27 ~~(f) It is a violation of state procurement laws, Arkansas Code Title~~
28 ~~19, Chapter 11, for a state agency official to procure services in an~~
29 ~~incremental or split purchase arrangement to avoid the reporting or~~
30 ~~presentment requirements of this section.~~

31
32 SECTION 10. Arkansas Code § 22-8-102 is amended to read as follows:

33 22-8-102. Leasing and renting of vehicles by state agencies –
34 Definitions.

35 (a) ~~For purposes of~~ As used in this section:

36 (1) "Lease" means obtaining the use of a motor vehicle from any

1 source for a monetary fee, for a period of thirty-one (31) days or more; ~~and~~

2 (2) "Rental" means obtaining the use of a motor vehicle from any
3 source for a monetary fee for a period of thirty (30) days or less; and

4 (3) "State agency" means the same as defined in § 19-11-203.

5 (b)(1) Before any state agency ~~shall lease~~ leases any motor vehicle or
6 ~~renew~~ renews any existing lease for a motor vehicle, the state agency shall
7 submit a written request to the State Procurement Director identifying the
8 motor vehicles sought to be leased by the state agency and all facts and
9 circumstances the director may request to enable him or her to determine the
10 economics, need, and feasibility of leasing the motor vehicle.

11 (2) Upon receipt, the director shall review the request to lease
12 the motor vehicle, and if he or she determines that the lease is in the best
13 interest of the State of Arkansas and that the state agency has adequate
14 funds to pay the lease, he or she may approve the request but only if ~~he or~~
15 ~~she has first received the approval of the proposed lease has been reviewed~~
16 by the Legislative Council or, if the General Assembly is in session, the
17 Joint Budget Committee.

18 (3) ~~After receiving the approval of~~ If, after the Legislative
19 Council or the Joint Budget Committee has reviewed the proposed lease of the
20 motor vehicle, the director approves the proposed lease of the motor vehicle,
21 the director shall stamp his or her approval on the request and return it to
22 the state agency, which may ~~then~~ proceed to enter into the lease as proposed
23 and approved by the director.

24 ~~(4) In emergency situations, the director may approve a~~
25 ~~temporary lease of a motor vehicle, not to exceed thirty (30) days, but only~~
26 ~~if he or she has sought the advice of the cochairs of the Legislative Council~~
27 ~~and scheduled the temporary lease of a motor vehicle for consideration at the~~
28 ~~next meeting of the Legislative Council.~~

29 (c) If the director disapproves a proposed lease of a motor vehicle,
30 he or she shall stamp his or her disapproval on the request and return it to
31 the state agency, and it shall be unlawful for the state agency to proceed to
32 lease the motor vehicle.

33 (d) If federal assistance requirements or federal contract
34 requirements conflict with this section, this section shall not prevent a
35 state agency from complying with the terms and conditions of the federal
36 assistance requirements or the federal contract requirements.

1 (e) It is a violation of state procurement laws, Arkansas Code Title
2 19, Chapter 11, for a state agency official to conduct multiple rentals of a
3 motor vehicle to avoid the approval and review requirements of this section.
4

5 SECTION 11. DO NOT CODIFY. Rules.

6 (a) When adopting the initial rules required under this act, the State
7 Procurement Director shall file the final rules with the Secretary of State
8 for adoption under § 25-15-204(f):

9 (1) On or before January 1, 2020; or

10 (2) If approval under § 10-3-309 has not occurred by January 1,
11 2020, as soon as practicable after approval under § 10-3-309.

12 (b) The director shall file the proposed rules with the Legislative
13 Council under § 10-3-309(c) sufficiently in advance of January 1, 2020, so
14 that the Legislative Council may consider the rules for approval before
15 January 1, 2020.
16

17
18 /s/Dotson
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21 APPROVED: 3/11/19
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1 State of Arkansas As Engrossed: S2/20/19

2 92nd General Assembly

A Bill

3 Regular Session, 2019

HOUSE BILL 1162

5 By: Representatives Dotson, Wardlaw

6 By: Senator Flippo

For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO
10 AMEND THE LAW CONCERNING THE CONTENT, TERM, AND
11 REVIEW OF CONTRACTS PROCURED BY THE STATE; TO PROVIDE
12 CERTAIN COMPLIANCE REQUIREMENTS FOR PERSONS
13 CONTRACTING WITH THE STATE; TO REQUIRE AND REGULATE
14 THE USE OF PERFORMANCE-BASED CONTRACTS; TO AMEND THE
15 REQUIREMENT CONCERNING VENDOR PERFORMANCE REPORTS; TO
16 ELIMINATE DUPLICATIVE PROVISIONS IN THE LAW; AND FOR
17 OTHER PURPOSES.

Subtitle

21 TO AMEND THE LAW CONCERNING THE CONTENT,
22 TERM, AND REVIEW OF CONTRACTS PROCURED BY
23 THE STATE; TO REQUIRE THE USE OF
24 PERFORMANCE-BASED CONTRACTS; AND TO AMEND
25 VENDOR PERFORMANCE REPORT REQUIREMENTS.

28 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

30 SECTION 1. Arkansas Code § 19-11-217(c), concerning the powers and
31 duties of the State Procurement Director, is amended to add an additional
32 subdivision to read as follows:

33 (9) Shall analyze information captured in state systems to
34 measure and track the contract routing process to identify stakeholders that
35 may be contributing to the elongation of the contracting process; and

36 (10) Ensure that vendor performance reports are available to and



1 searchable by state agencies.

2

3 SECTION 2. Arkansas Code § 19-11-219 is amended to read as follows:
4 19-11-219. Legal counsel – Contract review.

5 (a) The Attorney General shall act as counsel for the State
6 Procurement Director in preparation of necessary contracts and in all legal
7 matters.

8 (b)(1) A contract that the director has designated as requiring review
9 shall be reviewed by a person employed as an attorney with a state agency.

10 (2) The review required under this subsection shall occur before
11 the contract is executed.

12 (c) The director shall adopt rules to implement this section,
13 including without limitation rules to:

14 (1) Designate contracts that require review under this section,
15 which may include without limitation contracts that:

16 (A) Exceed a certain dollar amount;

17 (B) Modify the standard state terms and conditions; and

18 (C) Are based on other stated criteria; and

19 (2) Identify the requirements for the attorneys who may review
20 contracts under this section, including without limitation:

21 (A) An attorney employed with the Office of State
22 Procurement, an institution of higher education, or the Office of the
23 Attorney General; and

24 (B) Any other attorney employed by the state and licensed
25 to practice law in Arkansas.

26

27 SECTION 3. Arkansas Code § 19-11-238(c), concerning multiyear
28 contracts, is amended to read as follows:

29 (c) Termination Due to Unavailability of Funds in Succeeding Years.

30 (1) Original terms of such multiyear contracts shall terminate
31 on the last day of the current biennium, and any renewals by the state based
32 upon continuing appropriation shall not exceed the next succeeding biennium
33 not exceed four (4) years.

34 (2) When funds are not appropriated or otherwise made available
35 to support continuation of performance in a subsequent year of a multi-year a
36 multiyear contract, the contract for such subsequent year shall be terminated

1 and the contractor may be reimbursed for the reasonable value of any
2 nonrecurring costs incurred but not amortized in the price of the commodities
3 or services delivered under the contract.

4 (3) The cost of termination under subdivision (c)(2) of this
5 section may be paid from:

6 ~~(1)~~ (A) Appropriations currently available for performance
7 of the contract;

8 ~~(2)~~ (B) Appropriations currently available for procurement
9 of similar commodities or services and not otherwise obligated; or

10 ~~(3)~~ (C) Appropriations made specifically for the payment
11 of such termination costs.

12

13 SECTION 4. Arkansas Code §§ 19-11-267 and 19-11-268 are amended to
14 read as follows:

15 19-11-267. Development and use of performance-based contracts –
16 Findings.

17 (a) The General Assembly finds that:

18 (1) Performance-based contracts provide an effective and
19 efficient method of monitoring and evaluating the overall quality of services
20 provided; and

21 (2) The practice of including benchmark objectives that the
22 provider must attain at specific intervals during the term of the contract is
23 an essential requirement for measuring performance.

24 (b)(1) A state agency, board, commission, or institution of higher
25 education that enters into a contract under this ~~subchapter~~ chapter to
26 procure services that has a contract amount of at least one million dollars
27 (\$1,000,000) in a single contract year or a total projected contract amount,
28 including any amendments to or possible extensions of the contract, of at
29 least seven million dollars (\$7,000,000) shall use performance-based
30 standards in the contract that are specifically tailored to the services
31 being provided under the contract.

32 (2) The performance-based standards used under this subsection
33 shall include performance measures based on objective factors.

34 (3) A state agency, board, commission, or institution of higher
35 education is encouraged to use performance-based standards that are based on
36 objective factors in any other contract in which it would serve the best

1 interest of the state.

2 (c)(1) A state agency, board, commission, or institution of higher
3 education that enters into a contract with performance-based standards:

4 (1)(A) Shall monitor the vendor's performance and adherence to
5 the performance-based standards in the contract.

6 (B) For state contracts, the Office of State Procurement
7 shall be the state agency that monitors each vendor's performance under this
8 subdivision (c)(1); and

9 (2) May impose financial consequences, as identified in the
10 contract, on a vendor that is party to a contract with performance-based
11 standards for failure to satisfy the performance-based standards, including
12 without limitation withholding payment or pursuing liquidated damages to the
13 extent allowed by law.

14 (d)(1) The State Procurement Director shall promulgate rules necessary
15 to implement and administer this section.

16 (2) Rules promulgated under this subsection are subject to
17 approval by the Legislative Council or, if the General Assembly is in
18 session, the Joint Budget Committee.

19

20 19-11-268. Vendor performance reporting.

21 (a)(1) A state agency shall report a vendor's performance under a
22 contract executed under this subchapter that has a total initial contract
23 amount or total projected contract amount, including any amendments to or
24 possible extensions of the contract, of at least twenty-five thousand dollars
25 (\$25,000) chapter if the vendor fails to satisfy the performance-based
26 standards stated in the contract in a manner that represents a material
27 deviation.

28 (2) A state agency shall use the a form prescribed by the State
29 Procurement Director and approved by the Legislative Council or, if the
30 General Assembly is in session, the Joint Budget Committee, to report a
31 vendor's performance under this section.

32 (b) The report required under this section shall be:

33 (1) ~~Completed and submitted:~~

34 (A) ~~At least one (1) time every three (3) months for the~~
35 ~~entire term of the contract; and~~

36 (B) ~~At the end of the contract;~~

1 (2) Filed with the Office of State Procurement and maintained
2 for a minimum of three (3) years from the termination of the relevant
3 contract, including any extensions and amendments; and

4 (3) (2) Signed by the director of the state agency or his or her
5 designee; and

6 (3) Filed monthly until the vendor has performed satisfactorily
7 under the contract for a period of at least ninety (90) consecutive days.

8 (c) A state agency may report a vendor's performance in the manner
9 prescribed under this section for any contract that would not require
10 reporting of a vendor's performance under this section if the state agency
11 encounters an issue with the vendor's performance of a contract.

12 (d) A state agency may use a vendor performance report submitted under
13 this section to evaluate an offeror to the extent that the past performance
14 of an offeror may be considered under the law and the rules adopted by the
15 office.

16
17 SECTION 5. Arkansas Code Title 19, Chapter 11, Subchapter 2, is
18 amended to add an additional section to read as follows:

19 19-11-273. Compliance.

20 (a) A contractor shall ensure, in cooperation with a state agency,
21 that the contract between the contractor and the state agency adheres to the
22 requirements of this chapter, including without limitation the inclusion of
23 any mandatory language and the submission of the contract for any required
24 review.

25 (b) The signature of a contractor on a contract with a state agency
26 serves as an acknowledgement that the contractor is:

27 (1) Equally responsible with the state agency for adhering to
28 the requirements of this chapter related to the content and review of the
29 contract; and

30 (2) Subject to the relevant ethical provisions of § 19-11-701 et
31 seq.

32
33 SECTION 6. Arkansas Code § 19-11-1010 is repealed as duplicative.
34 19-11-1010. Development and use of performance-based contracts—
35 Findings.

36 (a) Performance-based contracts provide an effective, efficient method

~~of monitoring and evaluating the overall quality of services provided.~~

~~(b) The practice of including benchmark objectives that the provider must attain at specific intervals during the term of the contract is an essential requirement for measuring performance.~~

~~(c) Under regulations promulgated by the State Procurement Director, all state agencies, boards, commissions, and institutions of higher education shall use performance-based standards in professional and consultant service contracts.~~

SECTION 7. Arkansas Code § 19-11-1013 is repealed as duplicative.

~~19-11-1013. Vendor performance reporting.~~

~~(a)(1) A state agency shall report a vendor's performance under a contract issued under this subchapter that has a total initial contract amount or total projected contract amount, including any amendments to or possible extensions of the contract, of at least twenty-five thousand dollars (\$25,000) for contracts.~~

~~(2) A state agency shall use the form prescribed by the State Procurement Director and approved by the Legislative Council or, if the General Assembly is in session, the Joint Budget Committee, to report a vendor's performance under this section.~~

~~(b) The report required under this section shall be:~~

~~(1) Completed and submitted:~~

~~(A) At least one (1) time every three (3) months for the entire term of the contract; and~~

~~(B) At the end of the contract;~~

~~(2) Filed with the Office of State Procurement and maintained for a minimum of three (3) years from the termination of the relevant contract, including any extensions and amendments; and~~

~~(3) Signed by the director of the state agency or his or her designee.~~

SECTION 8. DO NOT CODIFY. Rules.

(a) When adopting the initial rules required under this act, the State Procurement Director shall file the final rules with the Secretary of State for adoption under § 25-15-204(f):

(1) On or before January 1, 2020; or

(2) If approval under § 10-3-309 has not occurred by January 1, 2020, as soon as practicable after approval under § 10-3-309.

(b) The director shall file the proposed rules with the Legislative Council under § 10-3-309(c) sufficiently in advance of January 1, 2020, so that the Legislative Council may consider the rules for approval before January 1, 2020.

/s/Dotson

APPROVED: 3/11/19

State of Arkansas *As Engrossed: H2/4/19 S2/25/19*
92nd General Assembly **A Bill**
Regular Session, 2019

HOUSE BILL 1178

By: Representative Wardlaw
By: Senator Flippo

For An Act To Be Entitled

AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO
AMEND THE LAWS CONCERNING VARIOUS PROCUREMENT
METHODS; TO ALLOW FOR REQUESTS FOR INFORMATION; TO
AMEND THE LAW CONCERNING THE PROCUREMENT OF
PROFESSIONAL SERVICES; TO PROVIDE FOR THE TRAINING
AND CERTIFICATION OF PROCUREMENT OFFICIALS; TO
REQUIRE THAT COST BE WEIGHTED A CERTAIN AMOUNT IN
EVALUATING RESPONSES TO A REQUEST FOR PROPOSALS; TO
ALLOW FOR THE USE OF PRIVATE EVALUATORS IN EVALUATING
RESPONSES TO A REQUEST FOR PROPOSALS; TO REQUIRE THAT
RULES PROMULGATED BY THE STATE PROCUREMENT DIRECTOR
BE SUBMITTED TO AND REVIEWED BY THE REVIEW
SUBCOMMITTEE OF THE LEGISLATIVE COUNCIL; TO AUTHORIZE
AND REGULATE SOLICITATION CONFERENCES UNDER THE
ARKANSAS PROCUREMENT LAW; TO REQUIRE THAT VENDOR
TRAINING AND POLLING BE CONDUCTED UNDER THE ARKANSAS
PROCUREMENT LAW; TO AMEND THE LAW CONCERNING THE
NEGOTIATION OF COMPETITIVE SEALED BIDS AND
COMPETITIVE SEALED PROPOSALS UNDER THE ARKANSAS
PROCUREMENT LAW; TO AMEND THE LAW CONCERNING THE
REJECTION OF A BID OR PROPOSAL UNDER THE ARKANSAS
PROCUREMENT LAW; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE LAWS CONCERNING VARIOUS
PROCUREMENT METHODS; TO PROVIDE FOR THE
TRAINING AND CERTIFICATION OF PROCUREMENT



1 OFFICIALS; AND TO REQUIRE ADDITIONAL
2 LEGISLATIVE REVIEW OF PROCUREMENT RULES.
3
4

5 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
6

7 SECTION 1. Arkansas Code § 19-11-217(c), concerning the powers and
8 duties of the State Procurement Director, is amended to add additional
9 subdivisions to read as follows:

10 (9) Shall provide for enhanced training on the drafting of
11 specifications for procurements; and

12 (10) Shall maintain records of bids and proposals that are
13 rejected by the office for failure to adhere to the mandatory requirements of
14 a solicitation.
15

16 SECTION 2. Arkansas Code § 19-11-225 is amended to read as follows:

17 19-11-225. ~~Regulations~~ Rules.

18 (a)(1) ~~Regulations shall be promulgated by the~~ The State Procurement
19 Director shall adopt rules in accordance with the applicable provisions of
20 this subchapter and of the Arkansas Administrative Procedure Act, § 25-15-201
21 et seq.

22 (2) A rule promulgated by the director under this subchapter is
23 not effective until the rule is:

24 (A) Submitted to and reviewed by the Review Subcommittee
25 of the Legislative Council; and

26 (B) Reviewed and approved by the Legislative Council under
27 § 10-3-309.

28 (b) ~~No regulation~~ A rule shall not change any commitment, right, or
29 obligation of the state or of a contractor under a contract in existence on
30 the effective date of the ~~regulation~~ rule.

31 (c)(1) ~~No clause which~~ A clause that is required by ~~regulation~~ rule to
32 be included ~~shall be considered to be~~ is not incorporated by operation of law
33 in any state contract without the consent of both parties to the contract to
34 the incorporation.

35 (2) The parties to the contract may give such consent to
36 incorporation by reference at any time after the contract has been entered

1 into and without the necessity of consideration passing to either party.

2
3 SECTION 3. Arkansas Code § 19-11-229(d), concerning competitive sealed
4 bidding, is amended to read as follows:

5 (d)~~(1)~~ Notice inviting bids shall be:

6 (1) Be given not fewer than five (5) calendar days nor more than
7 thirty (30) ninety (90) calendar days preceding the date for the opening of
8 bids by publishing the notice at least one (1) time in at least one (1)
9 newspaper having general circulation in the state or posting by electronic
10 media, but in all instances, adequate notice shall be given;

11 ~~(2)(A) The notice shall include~~ Include a general description of
12 the commodities, technical and general services, or professional and
13 consultant services to be procured; ~~and shall state~~

14 (3) State where invitations for bid bids may be obtained;

15 ~~(B) The notice also shall state~~ (4) State the date, time, and
16 place of bid opening; and

17 (5) State the time, date, and place of the solicitation
18 conference if a solicitation conference is to be held before the opening of
19 bids to provide information to prospective bidders.

20
21 SECTION 4. Arkansas Code § 19-11-229(f), concerning competitive sealed
22 bidding, is amended to add an additional subdivision to read as follows:

23 (3)(A) A time discount may be considered in the evaluation of a
24 bid only:

25 (i) If the state agency specifically solicits
26 pricing that requests a time discount; and

27 (ii) Under the structured terms of the invitation
28 for bids.

29 (B) If a bidder offers a time discount as part of its bid
30 without the solicitation of time discounts by the state agency, the state
31 agency shall not consider the time discount.

32
33 SECTION 5. Arkansas Code § 19-11-229(g), concerning competitive sealed
34 bidding, is amended to add an additional subdivision to read as follows:

35 (3)(A) The director or an agency procurement official may seek
36 the clarification of a submitted bid.

1 (B) A written response by a bidder under this subsection
2 shall only clarify the submitted bid and shall not add any substantive
3 language to the submitted bid or change the terms of the submitted bid.

4 (C) If the bidder fails or refuses to clarify any matter
5 questioned about the bidder's bid in writing by the deadline set by the
6 director or agency procurement official, the bid may be rejected.

7 (D) If the bidder clarifies the matter questioned under
8 this subsection in writing, the clarification shall be evaluated and become a
9 part of any contract awarded on the basis of the bidder's bid.

10
11 SECTION 6. Effective July 1, 2021, Arkansas Code § 19-11-229(h)(2),
12 concerning competitive sealed bidding under the Arkansas Procurement Law, is
13 amended to add an additional subdivision read as follows:

14 (C)(i) Negotiations under this subsection shall be
15 conducted by a person who is trained and certified in negotiation and
16 procurement processes.

17 (ii)(a) The Office of State Procurement shall
18 provide for the training and certification required under this subsection.

19 (b) The training provided by the office shall
20 be specific to Arkansas law.

21
22 SECTION 7. Arkansas Code § 19-11-229(i), concerning competitive sealed
23 bidding, is amended to read as follows:

24 (i)(1) An invitation for bid bids may be cancelled or any or all bids
25 may be rejected in writing by the director or the agency procurement
26 official.

27 (2) Before the rejection of a bid by the director, the decision
28 to reject the bid may be validated with the state agency for which the
29 procurement is being conducted.

30 (3) A bid may be rejected for failure to adhere to mandatory
31 requirements.

32
33 SECTION 8. Arkansas Code § 19-11-230(d), concerning competitive sealed
34 proposals under the Arkansas Procurement Law, is amended to read as follows:

35 (d)(1) The request for proposals shall indicate the relative
36 importance of price and other evaluation factors.

1 (2)(A) Except as provided in subdivision (d)(2)(B) of this
2 section, cost shall be weighted at least thirty percent (30%) of the total
3 evaluation score for a proposal submitted in response to the request for
4 proposals.

5 (B)(i) The State Procurement Director may approve that
6 cost be weighted at a lower percentage of the total evaluation score for a
7 proposal submitted in response to a request for proposals if the director
8 makes a written determination that the lower percentage is in the best
9 interest of the state.

10 (ii) A state agency's failure to obtain the approval
11 of the director under this subsection for a request for proposals with cost
12 weighted at a lower percentage than required under subdivision (d)(2)(A) of
13 this section is grounds for submitting a protest under § 19-11-244.

14 (C) The use of a lower percentage under subdivision
15 (d)(2)(B) of this section and the corresponding written determination by the
16 director shall be submitted to the Legislative Council or, if the General
17 Assembly is in session, the Joint Budget Committee, for review before the
18 request for proposals is issued.

19 (3) The state's prior experience with an offeror may be
20 considered and scored as part of the offeror's proposal only:

21 (A) To the extent that the request for proposals requests
22 that all offerors provide references; and

23 (B) If the offeror's past performance with the state
24 occurred no more than three (3) years before the offeror submitted the
25 proposal.

26 (4) A state agency shall not include prior experience with the
27 state as a mandatory requirement for submitting a proposal under this
28 section.

29
30 SECTION 9. Arkansas Code § 19-11-230(e)(2), concerning competitive
31 sealed proposals under the Arkansas Procurement Law, is amended to add an
32 additional subdivision to read as follows:

33 (C)(i) Before issuing the notice of award of a contract,
34 the director or the agency procurement official may request a best and final
35 offer from each responsible offeror that is reasonably susceptible of being
36 awarded the contract.

1 (ii) In responding to a request for a best and final
2 offer, an offeror may:

3 (a) Resubmit the offeror's original proposal
4 with lower pricing or additional benefits, or both, in accordance with the
5 specifications of the request for proposals; or

6 (b) Submit a written response that states that
7 the offeror's original proposal, including without limitation the pricing,
8 remains unchanged.

9 (iii) If a best and final offer is requested, the
10 director or the agency procurement official shall evaluate each proposal
11 submitted in response to the request for a best and final offer in
12 determining the proposal that is the most advantageous to the state.
13

14 SECTION 10. Arkansas Code § 19-11-230(f) and (g), concerning
15 competitive sealed proposals under the Arkansas Procurement Law, are amended
16 to read as follows:

17 (f)(1) The director or an agency procurement official may seek the
18 clarification of a submitted proposal.

19 (2) A written response by an offeror under this subsection shall
20 only clarify the submitted proposal and shall not add any substantive
21 language to the submitted proposal or change the terms of the submitted
22 proposal.

23 (3) If the offeror fails or refuses to clarify any matter
24 questioned about the offeror's proposal in writing by the deadline set by the
25 director or agency procurement official, the proposal may be rejected.

26 (4) If the offeror clarifies the matter questioned under this
27 subsection in writing, the clarification shall be evaluated and become a part
28 of any contract awarded on the basis of the offeror's proposal.

29 (g)(1) Award shall be made to the responsible offeror whose proposal
30 is determined in writing to be the most advantageous to the state, taking
31 into consideration price, the evaluation factors set forth in the request for
32 proposals, any best and final offers submitted, and the results of any
33 discussions conducted with responsible offerors.

34 (2) No other factors or criteria shall be used in the
35 evaluation.

36 (3) If it is determined that two (2) or more responsible

offerors have tied scores after the evaluation of the proposals, the award shall be made to the responsible offeror that had one (1) of the tied scores and submitted the lowest price proposal.

(4) The director or the agency procurement official may enter into negotiations with the responsible offeror whose proposal is determined in writing to be the most advantageous to the state when the best interests of the state would be served, including without limitation when the state can obtain:

(A) A lower price without changes to the terms or specifications of the request for proposals; or

(B) An improvement to the terms or specifications, or both, of the request for proposals without increasing the price of the proposal.

(h)(1) The Office of State Procurement shall:

(A) Encourage full discussion by the evaluators who are evaluating proposals submitted in response to a request for proposals under this section; and

(B) Develop tools and templates to be used in evaluating proposals submitted in response to a request for proposals under this section that optimize the number of material scored attributes and provide for a limited range of possible scores for each attribute.

(2)(A) A state agency may use one (1) or more private evaluators to evaluate proposals submitted in response to a request for proposals under this section.

(B) A private evaluator used under this subsection shall be:

(i) Held to the same requirements and prohibitions regarding conflicts of interest as state employees;

(ii) A qualified volunteer, unless the state does not have the necessary expertise to evaluate the proposals, in which case a paid private evaluator may be used; and

(iii) Eligible for travel reimbursement if the state agency decides to make travel reimbursement available.

(C) The use of a private evaluator is not required.

(D) If a state agency uses one (1) or more private evaluators, the use of a private evaluator shall be disclosed in the

1 procurement file and in any information submitted to the Legislative Council
2 or, if the General Assembly is in session, the Joint Budget Committee.

3 ~~(g)~~ (i)(1) A competitive sealed proposal may be cancelled or any or
4 all proposals may be rejected in writing by the State Procurement Director
5 director or the agency procurement official.

6 (2) Before the rejection of a proposal by the director, the
7 decision to reject the proposal may be validated with the evaluation
8 committee that evaluated the proposal.

9 (3) A proposal may be rejected for failure to adhere to
10 mandatory requirements.

11
12 SECTION 11. Arkansas Code § 19-11-233 is amended to read as follows:
13 19-11-233. Emergency procurements.

14 (a) The State Procurement Director, the head of a procurement agency,
15 or a designee of either officer may make or authorize others to make
16 emergency procurements as defined in § 19-11-204(4) and in accordance with
17 regulations rules promulgated by the director.

18 (b)(1) A person or state agency that makes an emergency procurement
19 under this section shall:

20 (A) Receive at least three (3) competitive bids unless the
21 emergency is a critical emergency; and

22 (B) Complete a quotation abstract that includes the:
23 (i) Names of the firms contacted;
24 (ii) Time that each firm was contacted;
25 (iii) Quoted price obtained from each contacted
26 firm; and

27 (iv) Method used for contacting each firm.

28 (2) As used in this subsection, "critical emergency" means an
29 emergency in which human life or health is imminently endangered.

30
31 SECTION 12. Arkansas Code Title 19, Chapter 11, Subchapter 2, is
32 amended to add additional sections to read as follows:

33 19-11-273. Solicitation conferences.

34 (a)(1) A state agency may hold a solicitation conference before or
35 after issuing an invitation for bids, a request for proposals, or a request
36 for statements of qualifications and performance data under § 19-11-801 et

1 seq.

2 (2) A solicitation conference may be held:

3 (A) In person; or

4 (B) Online or in another virtual format.

5 (b) Attendance by a vendor at a solicitation conference is not
6 required for that vendor's bid, proposal, or statement of qualifications and
7 performance data to be accepted unless the attendance requirement is:

8 (1) Explicitly stated in the invitation for bids, request for
9 proposals, or request for statements of qualifications and performance data;
10 and

11 (2) Approved by the State Procurement Director or the head of
12 the procurement agency.

13 (c) A state agency holding a solicitation conference shall:

14 (1) For an invitation for bids or a request for proposals,
15 include the date and time of the solicitation conference in the notice
16 required under § 19-11-229;

17 (2) Require vendors in attendance at a solicitation conference
18 to sign in at the solicitation conference or provide a registration record
19 for an online or other virtual solicitation conference, regardless of whether
20 attendance is required under the solicitation; and

21 (3) Maintain the sign-in sheet or registration records with the
22 other documents related to the solicitation.

23 (d) A statement made at a solicitation conference does not change the
24 invitation for bids, request for proposals, or request for statements of
25 qualifications and performance data unless a change is made by written
26 amendment to the invitation for bids, request for proposals, or request for
27 statements of qualifications and performance data.

28 (e) A state agency is encouraged to hold a solicitation conference for
29 a procurement that:

30 (1) Has a contract amount of at least:

31 (A) Five million dollars (\$5,000,000) for a single
32 contract year; or

33 (B) Thirty-five million dollars (\$35,000,000) for the
34 total anticipated term of the contract, including any extensions, based on
35 the previous contract for the same commodities or services or, if a previous
36 contract is not available, a contract for similar commodities or services; or

1 (2) Is of strategic importance to the state.

2
3 19-11-274. Vendor training and polling.

4 The Office of State Procurement shall:

5 (1)(A) Develop and deliver vendor training to inform interested
6 vendors of how to do business with the state.

7 (B) The training required under subdivision (1)(A) of this
8 section shall:

9 (i) Be offered throughout the state; and

10 (ii) Be delivered as training sessions in person and
11 online or in another virtual format; and

12 (2) Periodically poll vendors that have been successful in
13 securing business with the state and vendors that have not been successful in
14 securing business with the state to solicit procurement feedback that can be
15 used to improve vendor training.

16
17 19-11-275. Requests for information.

18 (a) As used in this section, "request for information" means a
19 procedure for formally requesting information, data, comments, or reactions
20 from prospective bidders or offerors in contemplation of a possible
21 competitive sealed bidding procurement under § 19-11-229 or a competitive
22 sealed proposal procurement under § 19-11-230.

23 (b) The State Procurement Director, a head of a procurement agency, or
24 a designee of the director or of a head of a procurement agency, may issue or
25 authorize another person to issue a request for information.

26 (c) A request for information under this section shall be published in
27 the same manner and location as an invitation for bids, a request for
28 proposals, or a request for qualifications.

29 (d) A contract shall not be awarded directly from a request for
30 information.

31 (e) Information provided in response to a request for information
32 under this section is exempt from the Freedom of Information Act of 1967, §
33 25-19-101 et seq., until:

34 (1) The bids for a competitive sealed bidding procurement are
35 opened publicly;

36 (2) The notice of anticipation to award is given for a

1 competitive sealed proposal procurement; or

2 (3) A decision is made not to pursue a procurement based on the
3 request for information.

4
5 19-11-276. Training and certification of procurement personnel.

6 (a) The State Procurement Director shall establish a training and
7 certification program to facilitate the training, continuing education, and
8 certification of state agency procurement personnel.

9 (b) As part of the training and certification program required under
10 this section, the director:

11 (1) Shall conduct procurement education and training for state
12 agency employees and other public employees;

13 (2)(A) Shall establish a tiered core curriculum that outlines
14 the minimum procurement-related training courses a state agency employee is
15 required to complete for certification.

16 (B) The tiered core curriculum required under subdivision
17 (b)(2)(A) of this section shall:

18 (i) Be designed to develop procurement competency;
19 and

20 (ii) Create a uniform training approach for state
21 agency employees ranging from entry-level procurement personnel to agency
22 procurement officials;

23 (3) May charge a reasonable fee for each participant to cover
24 the cost of providing the training required under this section;

25 (4) May conduct, develop, and collaborate with established
26 training programs, if any, for the purpose of providing certifications of
27 proficiency to state agency employees who complete the training and
28 certification program;

29 (5) May conduct research into existing and new procurement
30 methods; and

31 (6) May establish and maintain a state procurement library.

32 (c)(1) Beginning July 1, 2021, a state agency employee shall not
33 conduct a procurement under this chapter unless the state agency employee is
34 certified through the training and certification program required under this
35 section.

36 (2) To maintain certification under this section, a state agency

1 employee shall complete a reasonable number of hours of continuing education,
2 as provided for by rule by the director.

3 (d)(1) The director shall revoke the certification of a state agency
4 employee who is certified under this section and who is determined to have
5 knowingly violated state procurement laws, Arkansas Code Title 19, Chapter
6 11.

7 (2) The director shall adopt rules regarding the procedure for
8 revoking a state agency employee's certification under this section.

9
10 SECTION 13. Arkansas Code § 19-11-802, concerning requests for
11 statements of qualifications and performance data, is amended to add an
12 additional subsection to read as follows:

13 (e)(1) A request for statements of qualifications and performance data
14 under this section may be used for certain procurements through a request for
15 qualifications other than legal, architectural, engineering, construction
16 management, land surveying, and interior design services if the:

17 (A) State Procurement Director approves the use of a
18 request for qualifications and determines that it is the most suitable method
19 of procurement; and

20 (B) Approval of the director under subdivision (e)(1)(A)
21 of this section is submitted to the Legislative Council for review.

22 (2) In determining whether a request for qualifications under
23 this subsection is the most suitable method of procurement, the director
24 shall consider, based on information submitted by the requesting state
25 agency:

26 (A) Why the request for qualifications is the most
27 suitable method of procurement;

28 (B) Why cost should not be considered in the procurement;
29 and

30 (C) How the cost of the contract will be controlled if
31 cost is not a factor in the procurement.

32
33 SECTION 14. DO NOT CODIFY. Rules.

34 (a) When adopting the initial rules required under this act, the State
35 Procurement Director shall file the final rules with the Secretary of State
36 for adoption under § 25-15-204(f):

1 (1) On or before January 1, 2021; or

2 (2) If approval under § 10-3-309 has not occurred by January 1,
3 2021, as soon as practicable after approval under § 10-3-309.

4 (b) The director shall file the proposed rules with the Legislative
5 Council under § 10-3-309(c) sufficiently in advance of January 1, 2021, so
6 that the Legislative Council may consider the rules for approval before
7 January 1, 2021.

8

9 /s/Wardlaw

10

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12 APPROVED: 3/11/19

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State of Arkansas

As Engrossed: S2/20/19

92nd General Assembly

A Bill

Regular Session, 2019

HOUSE BILL 1179

By: Representative Wardlaw

By: Senator Flippo

For An Act To Be Entitled

AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO
AMEND ARKANSAS PROCUREMENT LAWS CONCERNING THE
DELEGATION AUTHORITY OF THE STATE PROCUREMENT
DIRECTOR; TO AMEND THE LAW CONCERNING PROTESTS OF
SOLICITATIONS AND AWARDS UNDER THE ARKANSAS
PROCUREMENT LAW; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND THE DELEGATION AUTHORITY OF THE
STATE PROCUREMENT DIRECTOR; AND TO AMEND
THE LAW CONCERNING PROTESTS OF
SOLICITATIONS AND AWARDS UNDER THE
ARKANSAS PROCUREMENT LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 19-11-218 is amended to read as follows:

19-11-218. Assistants and designees — Written delegation orders.

(a) Subject to the provisions of the Uniform Classification and
Compensation Act, § 21-5-201 et seq., the State Procurement Director may:

- (1) Employ and supervise such assistants and other persons as
may be necessary;
- (2) Fix their compensation as provided by law; and
- (3)(A) Delegate authority to such designees or to any a state
agency ~~as the director may deem appropriate~~ by issuing a written delegation
order, within the limitations of state law and the state procurement



1 regulations.

2 (B) A written delegation order issued under this section
3 shall:

4 (i) Include an expiration date for the written
5 delegation order;

6 (ii) Be publicly posted on the official website of
7 the Office of State Procurement;

8 (iii) Remain in effect under the original terms
9 unless the terms of the written delegation order are modified or rescinded in
10 writing by the director;

11 (iv) Not be issued for a term that exceeds two (2)
12 years; and

13 (v) Be narrowly tailored if the written delegation
14 order is based on the type of commodity or service being procured.

15 (C) The director shall maintain records of each written
16 delegation order issued under this section.

17 (D) A person who is to be given authority under a written
18 delegation order issued under this section shall complete training on state
19 procurement laws, as provided for in this subchapter and in the rules adopted
20 by the director, before the written delegation order is issued.

21 (b) The director shall adopt rules to:

22 (1) Implement the requirements for written delegation orders
23 under this section; and

24 (2) Outline the procurement training required under this
25 section.

26
27 SECTION 2. Arkansas Code § 19-11-244(a)(3), concerning the resolution
28 of protested solicitations and awards under the Arkansas Procurement Law, is
29 amended to read as follows:

30 (3) The protest shall be submitted in writing within fourteen
31 (14) calendar days after the aggrieved person knows or should have known of
32 the facts giving rise to the grievance award or notice of anticipation to
33 award has been posted.

34 (4) A protest submitted by an aggrieved person under this
35 section shall:

36 (A) Be limited to one (1) or more of the following

1 grounds:

2 (i) The award of the contract exceeded the authority
3 of the director or the procurement agency;

4 (ii) The procurement process violated a
5 constitutional, statutory, or regulatory provision;

6 (iii) The director or the procurement agency failed
7 to adhere to the rules of the procurement as stated in the solicitation, and
8 the failure to adhere to the rules of the procurement materially affected the
9 contract award;

10 (iv) The procurement process involved responses that
11 were collusive, submitted in bad faith, or not arrived at independently
12 through open competition; or

13 (v) The award of the contract resulted from a
14 technical or mathematical error made during the evaluation process; and

15 (B) State facts that substantiate each ground on which the
16 protest is based.

17
18 SECTION 3. Arkansas Code § 19-11-244(f), concerning the resolution of
19 protested solicitations and awards under the Arkansas Procurement Law, is
20 amended to read as follows:

21 (f) In the event of a timely protest under subsection (a) of this
22 section, the state shall not ~~proceed further with the solicitation or with~~
23 ~~the award of the contract until~~ execute a contract that is the result of the
24 protested solicitation or award unless the director or the head of a the
25 relevant procurement agency makes a written determination that the award
26 execution of the contract without delay is necessary to protect substantial
27 interests of the state.

28
29 SECTION 4. Arkansas Code § 19-11-244, concerning the resolution of
30 protested solicitations and awards under the Arkansas Procurement Law, is
31 amended to add an additional subsection to read as follows:

32 (h) An actual or prospective bidder, offeror, or contractor who is
33 aggrieved by a protest submitted under this section that was without merit or
34 intended purely to delay the award of a contract may bring a private cause of
35 action for tortious interference with a business expectancy against the
36 person or entity that submitted the protest.

SECTION 5. DO NOT CODIFY. Rules.

(a) When adopting the initial rules required under this act, the State Procurement Director shall file the final rules with the Secretary of State for adoption under § 25-15-204(f):

(1) On or before January 1, 2020; or

(2) If approval under § 10-3-309 has not occurred by January 1, 2020, as soon as practicable after approval under § 10-3-309.

(b) The director shall file the proposed rules with the Legislative Council under § 10-3-309(c) sufficiently in advance of January 1, 2020, so that the Legislative Council may consider the rules for approval before January 1, 2020.

/s/Wardlaw

APPROVED: 3/11/19

State of Arkansas

As Engrossed: S2/20/19

92nd General Assembly

A Bill

Regular Session, 2019

HOUSE BILL 1180

By: Representative Wardlaw

By: Senator Flippo

For An Act To Be Entitled

AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO
AMEND THE LAW CONCERNING STATE CONTRACTS; TO AMEND
THE LAW CONCERNING COOPERATIVE PURCHASING; AND FOR
OTHER PURPOSES.

Subtitle

TO AMEND THE ARKANSAS PROCUREMENT LAW; TO
AMEND THE LAW CONCERNING STATE CONTRACTS;
AND TO AMEND THE LAW CONCERNING
COOPERATIVE PURCHASING.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 19-11-206(1), concerning the definitions relating to intergovernmental relations under the Arkansas Procurement Law, is amended to read as follows:

(1) ~~"Cooperative procurement"~~ "Cooperative purchasing agreement" means an agreement entered into as the result of a procurement conducted by, or on behalf of, more than one (1) public procurement unit or by a public procurement unit with an external procurement activity;

SECTION 2. Arkansas Code § 19-11-223 is amended to read as follows:

19-11-223. Commodities, technical and general services, and professional and consultant services under state contract.

(a)(1) In addition to establishing a state contract for those commodities, technical and general services, and professional and consultant



1 services within the exclusive jurisdiction of the State Procurement Director
2 under § 19-11-222, the director may award a mandatory state contract for
3 other commodities, technical and general services, and professional and
4 consultant services ~~in those instances when substantial savings may be~~
5 ~~effected by quantity purchasing of commodities, technical and general~~
6 ~~services, or professional and consultant services in general use by several~~
7 state agencies when the director determines that combining the collective
8 purchasing power of the state would be beneficial to the state.

9 (2) The director shall submit a mandatory state contract that is
10 not for commodities or services within the exclusive jurisdiction of the
11 director to the Legislative Council or, if the General Assembly is in
12 session, to the Joint Budget Committee, for review.

13 ~~(b)(1) State contracts shall be limited to those commodities on which,~~
14 ~~by virtue of custom or trade, substantial savings may be realized.~~

15 ~~(2) In those instances in which substantial savings are not~~
16 ~~effected, the letting of state contracts for those commodities shall be~~
17 ~~discontinued.~~

18 ~~(c)(1) Except for the procurement of commodities, technical and~~
19 ~~general services, and professional and consultant services within the~~
20 ~~exclusive jurisdiction of the director, state agencies with agency~~
21 ~~procurement officials that can demonstrate a geographical or volume buying~~
22 ~~advantage need not participate in the state contract.~~

23 ~~(2) However, if the commodities, technical and general services,~~
24 ~~or professional and consultant services obtained are procured at a~~
25 ~~substantially higher price during the same state contract period, that state~~
26 ~~agency must participate in the state contract upon expiration of the state~~
27 ~~agency's contract.~~

28 ~~(d) Except as authorized in this section, all state agencies which~~
29 ~~require (b)(1) Unless an exemption is approved by the director under~~
30 subdivision (b)(2) of this section, a state agency that requires commodities,
31 technical and general services, and professional and consultant services that
32 are under a mandatory state contract shall procure these commodities,
33 technical and general services, and professional and consultant services
34 exclusively under such the mandatory state contract.

35 (2)(A) Except as provided in § 19-11-233, the director may
36 approve an exemption from a mandatory state contract awarded under this

1 section only if the state agency demonstrates that substantial savings will
2 likely be effected by purchasing outside of the mandatory state contract.

3 (B)(i) Approval of an exemption from a mandatory state
4 contract under this section shall be in writing.

5 (ii) Denial of a request for an exemption from a
6 mandatory state contract under this section is not required to be in writing.

7 ~~(e)~~ (c) All contracts concerning commodities, technical and general
8 services, and professional and consultant services shall disclose a projected
9 total cost, including, ~~but not limited to,~~ without limitation expenditures
10 that may be incurred under all available periods of extension if the
11 extensions were executed.

12 (d) The director shall:

13 (1) Identify and prioritize opportunities for awarding mandatory
14 state contracts under this section;

15 (2) Conduct mandatory state contract procurements under this
16 section that would produce savings for the state;

17 (3) Attempt to invite the participation of the potentially
18 affected state agencies in the development and evaluation of a mandatory
19 state contract procurement;

20 (4) Post notice of his or her intent to procure a mandatory
21 state contract on the official website of the Office of State Procurement;
22 and

23 (5)(A) Promote the use of mandatory state contracts among county
24 and city governments, including without limitation making information about
25 the mandatory state contracts readily available and searchable.

26 (B) The director shall adopt rules to include any
27 necessary conditions, reporting, or document retention standards related to
28 the director's duty to promote mandatory state contract use under this
29 subsection.

30
31 SECTION 3. Arkansas Code § 19-11-249 is amended to read as follows:
32 19-11-249. Cooperative purchasing.

33 (a)(1) A public procurement unit may participate in, sponsor, conduct,
34 or administer a cooperative purchasing agreement for the acquisition of
35 commodities or services ~~with one (1) or more public procurement units or~~
36 ~~external procurement activities~~ in accordance with an agreement entered into

1 between the participants.

2 (2)(A) ~~A cooperative purchasing agreement under this section may~~
3 ~~include without limitation a joint or multiparty contract between public~~
4 ~~procurement units and an open-ended state public procurement unit contract~~
5 ~~that is made available to local public procurement units. A cooperative~~
6 purchasing agreement is limited to commodities and services for which the
7 public procurement unit may realize savings or material economic value, or
8 both.

9 (B)(i) For cooperative purchasing agreements entered into
10 by a state agency, the State Procurement Director shall consider the economic
11 justification for using a cooperative purchasing agreement when granting or
12 withholding approval for the cooperative purchasing agreement.

13 (ii) The State Procurement Director shall adopt
14 rules to create a review policy outlining how the economic justification
15 required under this section may be demonstrated, including without limitation
16 a comparison of:

17 (a) Current state contract pricing and the
18 pricing under a cooperative purchasing agreement; or

19 (b) Information obtained from a request for
20 information and pricing under a cooperative purchasing agreement.

21 (C) The State Procurement Director and the Director of the
22 Department of Finance and Administration shall submit any request for the
23 Office of State Procurement or the Department of Finance and Administration,
24 respectively, to participate in a cooperative purchasing agreement to the
25 Governor for approval.

26 (b)(1)(A) The State Procurement Director shall present a quarterly an
27 annual report of all purchases made under cooperative purchasing agreements
28 by a state agency without an agency procurement official under this section
29 to the Legislative Council or, if the General Assembly is in session, to the
30 Joint Budget Committee.

31 (B) A state agency that has an agency procurement official
32 shall present an annual report of all purchases made under cooperative
33 purchasing agreements under this section to the Legislative Council or, if
34 the General Assembly is in session, to the Joint Budget Committee.

35 (2) The report reports required under this subsection shall be
36 in the format required by the Legislative Council and shall include the

1 following:

- 2 (A) The name of the contractor;
3 (B) The name of the procuring agency;
4 (C) The contact information for the contractor and
5 procuring agency;
6 (D) The total cost of the contract, including all
7 available extensions;
8 (E) A description of the goods or services procured; and
9 (F) Any other information requested by the Legislative
10 Council or the Joint Budget Committee.

11
12 SECTION 4. DO NOT CODIFY. Rules.

13 (a) When adopting the initial rules required under this act, the State
14 Procurement Director shall file the final rules with the Secretary of State
15 for adoption under § 25-15-204(f):

- 16 (1) On or before January 1, 2020; or
17 (2) If approval under § 10-3-309 has not occurred by January 1,
18 2020, as soon as practicable after approval under § 10-3-309.

19 (b) The director shall file the proposed rules with the Legislative
20 Council under § 10-3-309(c) sufficiently in advance of January 1, 2020, so
21 that the Legislative Council may consider the rules for approval before
22 January 1, 2020.

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24
25 /s/Wardlaw

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28 APPROVED: 3/11/19