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4

As Engrossed: H2/4/19 S2/25/19

A Bill

HOUSE BILL 1178

5 By: Representative Wardlaw
6 By: Senator Flippo
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS PROCUREMENT LAW; TO
10 AMEND THE LAWS CONCERNING VARIOUS PROCUREMENT
11 METHODS; TO ALLOW FOR REQUESTS FOR INFORMATION; TO
12 AMEND THE LAW CONCERNING THE PROCUREMENT OF
13 PROFESSIONAL SERVICES; TO PROVIDE FOR THE TRAINING
14 AND CERTIFICATION OF PROCUREMENT OFFICIALS; TO
15 REQUIRE THAT COST BE WEIGHTED A CERTAIN AMOUNT IN
16 EVALUATING RESPONSES TO A REQUEST FOR PROPOSALS; TO
17 ALLOW FOR THE USE OF PRIVATE EVALUATORS IN EVALUATING
18 RESPONSES TO A REQUEST FOR PROPOSALS; TO REQUIRE THAT
19 RULES PROMULGATED BY THE STATE PROCUREMENT DIRECTOR
20 BE SUBMITTED TO AND REVIEWED BY THE REVIEW
21 SUBCOMMITTEE OF THE LEGISLATIVE COUNCIL; TO AUTHORIZE
22 AND REGULATE SOLICITATION CONFERENCES UNDER THE
23 ARKANSAS PROCUREMENT LAW; TO REQUIRE THAT VENDOR
24 TRAINING AND POLLING BE CONDUCTED UNDER THE ARKANSAS
25 PROCUREMENT LAW; TO AMEND THE LAW CONCERNING THE
26 NEGOTIATION OF COMPETITIVE SEALED BIDS AND
27 COMPETITIVE SEALED PROPOSALS UNDER THE ARKANSAS
28 PROCUREMENT LAW; TO AMEND THE LAW CONCERNING THE
29 REJECTION OF A BID OR PROPOSAL UNDER THE ARKANSAS
30 PROCUREMENT LAW; AND FOR OTHER PURPOSES.

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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.

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

35 (D) If a state agency uses one (1) or more private
36 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.

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/s/Wardlaw

APPROVED: 3/11/19