

## **5-18A-4. Competitive sealed bids required.**

Contracts shall be awarded by the use of competitive sealed bids except as otherwise provided in this chapter and chapters [5-18B](#), [5-18C](#), and [5-18D](#).

## **5-18A-5. Procedures for competitive sealed bids.**

The following procedures apply to the use of competitive sealed bids:

- (1) Public notice of the invitation for bids shall be given pursuant to § [5-18A-14](#);
- (2) The invitation for bids shall include a purchase description, all contractual terms and conditions applicable to the procurement. The invitation for bids for supplies shall include the length of time, not to exceed forty-five days, between the bid opening and the award of the bid;
- (3) A bid may be submitted either manually or electronically in a manner authorized by the purchasing agency;
- (4) Each bid shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid, and other relevant information as may be specified, together with the name of each bidder shall be recorded. Except as otherwise provided by law, the record and each bid shall be open to public inspection;
- (5) Each bid shall be unconditionally accepted without alteration or correction, except as authorized in this section. Each bid shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids;
- (6) Any bid may be withdrawn by letter, by electronic communications, or in person before the time specified in the advertisement for bid. The purchasing agency may allow modification of bids by mail, facsimile, or electronic notice received at the place designated in the invitation to bid not later than the time set for the opening of bids. A modification may not reveal the bid price but shall provide the addition, subtraction, or modification so the final prices or terms will not be known to the purchasing agency until the sealed bid is opened. A modification may not be withdrawn after the time set for the opening of bids. Each modification shall be confirmed in writing by the successful bidder before award of the contract. No bid made may be changed or altered by telephone. After bid opening, no withdrawal of a bid or change in bid prices or other provisions of bids prejudicial to the interest of the purchasing agency or fair competition is permitted. The purchasing agency may waive technical irregularities in the bid or proposal of the low bidder or offeror that do not alter the price, quality, or quantity of the services, or items of tangible personal property bid or offered. Any decision to permit the correction or withdrawal of a bid, or to cancel an award or a contract based on a bid mistake, shall be supported by a written determination made by the purchasing agency, and included in the bid file;
- (7) The contract for services or public improvement shall be awarded within thirty days and the contract for supplies shall be awarded within forty-five days of the bid opening by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. The purchasing agency may reject any and all bids and readvertise for bids if none of the bids are satisfactory, or if the purchasing agency believes an agreement has been entered into by the bidders to prevent competition. If the low bidder is not responsible or the bid is not made in accordance with the requirements of this chapter and chapters [5-18B](#), [5-18C](#), and [5-18D](#) or the low bid is

withdrawn as authorized by this section, the bid of the next lowest responsible and responsive bidder may be accepted;

- (8) If it is considered impractical to initially prepare a purchase description to support an award based on price, an invitation for bids may be issued requesting the submission of unpriced offers to be followed by an invitation for bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation;
- (9) If, after advertising for bids, no firm bids are received, the purchasing agency may negotiate a contract for the purchase of the supplies, services, or public improvement projects at the most advantageous price, if the specifications of the original bid are met;
- (10) If two or more competitive sealed bids submitted are identical in price and product quality, the bids are the low bid, and no resident bidder preference is applicable, the purchasing agency may:
  - (a) Award the bid by lottery to one of the identical low bidders; or
  - (b) Reject all the bids and resolicit bids for the required supplies, services, or public improvement.

#### **5-18A-6. Competitive sealed proposals--When permitted.**

A contract may be entered into by competitive sealed proposals if the purchasing agency determines in writing that the use of competitive sealed bids is either not practicable or not advantageous.

#### **5-18A-7. Procedures for competitive sealed proposals.**

The procedures for issuing a contract through competitive sealed proposals are as follows:

- (1) The proposals shall be solicited through a request for proposals. The request for proposals shall state the relative importance of price and other factors, if any;
- (2) Public notice of the request for proposals shall be given pursuant to § 5-18A-14;
- (3) A proposal may be submitted either manually or electronically in a manner authorized by the purchasing agency;
- (4) Each proposal shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared documenting the name and address of each offeror and identifying each offeror awarded a contract. The register shall be open for public inspection after contract award;
- (5) As provided in the request for proposals, a discussion may be conducted with any responsible offeror who submitted a proposal determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Each offeror shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of a proposal. A revision may be permitted after a submission and prior to an award for the purpose of obtaining the best and final offer. In conducting any discussion, there may be no disclosure of any information derived from any proposal submitted by a competing offeror;
- (6) An award shall be made to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the purchasing agency taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The contract file shall contain the basis on which the award is made. Written notice of the award of a contract to the successful offeror shall be promptly given to each offeror. The purchasing agency may reject any and all proposals and readvertise for proposals if none of the proposals are satisfactory, or if the purchasing agency believes any agreement has been entered into by the offerors to prevent competition; and
- (7) This section does not apply to state professional service contracts issued pursuant to § 5-18A-37 and §§ 5-18D-17 to 5-18D-24, inclusive.

#### **5-18A-8. Unique supplies or services--Sole source procurement--Negotiations.**

A contract may be awarded for supplies or services without competition if the purchasing agency determines in writing that the supplies or services are of such a unique nature that the contractor selected is clearly and justifiably the only practicable source to provide the supplies or

services. The determination that the contractor selected is justifiably the sole source shall be based on either the uniqueness of the supplies or services or the sole availability at the location required. In such cases, the purchasing agency shall conduct negotiations, including price, delivery, and quantity to obtain the most advantageous price and shall include the written verification of the sole source in the contract file. This section does not apply to construction services or construction equipment.

**5-18A-9. Emergency procurement.**

A purchasing agency may make or authorize others to make an emergency procurement without advertising the procurement if rentals are not practicable and there exists a threat to public health, welfare, or safety or for other urgent and compelling reasons. Failure to abide by the bid provisions of this chapter and chapters 5-18B, 5-18C, and 5-18D in a timely manner is not an emergency. An emergency procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

**5-18A-10. Records of sole source procurement and emergency procurement contracts.**

The purchasing agency shall maintain a record listing each contract made under sole source procurement and emergency procurement for a minimum of five years. The record shall contain:

- (1) Each contractor's name;
- (2) The amount and type of each contract; and
- (3) A listing of the supplies, services, and public improvements procured under each contract.

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**5-18A-11. Purchases of supplies and services under twenty-five thousand dollars.**

Unless otherwise specified by statute, purchases of supplies and services under twenty-five thousand dollars shall be made as follows:

- (1) Notwithstanding other provisions of chapter 5-18A or 5-18D, the Bureau of Administration may authorize state agencies and institutions to make purchases of supplies over four thousand dollars and under twenty-five thousand dollars by obtaining three quotes from different vendors. If three quotes cannot be obtained, the Bureau of Administration may approve the purchase if in the best interest of the state, require additional quotes to be obtained, or require the purchase be advertised for bids;
- (2) State purchases of supplies under four thousand dollars may be made in accordance with procedures established by the purchasing agency in the best interests of the state;
- (3) State purchases of services under twenty-five thousand dollars may be made in accordance with procedures established by the purchasing agency in the best interests of the state; and
- (4) For all other purchasing agencies, purchases under twenty-five thousand dollars may be made in accordance with procedures established by the purchasing agency.

No purchases may be artificially divided to constitute a small purchase under this section.

**5-18A-12. Cancellation of invitation for bids or request for proposals and rejection of bids or proposals.**

An invitation for bids, a request for proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, if the purchasing agency determines it is in the best interests of the agency. The reasons for the cancellation or rejection shall be made part of the contract file.

**5-18A-13. Centralized public bid exchange created.**

There is hereby created a centralized public bid exchange. The Bureau of Administration shall establish the exchange either within the bureau or within another public or private organization. The purpose of the exchange is to facilitate the publishing of official state and political subdivision bids to provide greater notice to bidders and to the state and its political subdivisions. The exchange shall maintain a list of all state bids and proposals and all bids and proposals provided by political subdivisions which participate in the exchange. The exchange shall set and charge each bidder, offeror, or political subdivision or both a fee for participation in the exchange to defray the cost of administering the exchange.

**5-18A-14. Public improvement contracts--Supplies and services contracts--  
Advertisement for bids or proposals.**

If the purchasing agency intends to enter into a contract for any public improvement that involves the expenditure of one hundred thousand dollars or more, or a contract for the purchase of supplies or services, other than professional services, that involves the expenditure of twenty-five thousand dollars or more, the purchasing agency shall advertise for bids or proposals. The advertisement shall appear as a legal notice in the appointed legal newspaper. The advertisement shall be printed at least twice, with the first publication at least ten days before opening of bids or the deadline for the submission of proposals. The first publication shall be in each official newspaper of the purchasing agency, and the second publication may be in any legal newspaper of the state chosen by the purchasing agency. If the purchasing agency has no official newspaper, the first publication shall be made in a legal newspaper with general circulation in the jurisdiction of the purchasing agency to be selected by the purchasing agency. The advertisement shall state the time and place where the bids will be opened or the deadline for the submission of proposals. In each notice, the purchasing agency shall reserve the right to reject any or all bids or proposals.

**5-18A-15. Time for entering into contract.**

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the invitation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. The defaulting bidder or offeror shall be responsible for the difference in price.

**5-18A-16. Recovery from defaulting bidder or offeror.**

If any successful bidder or offeror fails to fulfill the conditions of an awarded contract, the purchasing agency may proceed to recover from the defaulting party whatever damages may have been sustained as a result of the default. The purchasing agency shall have all remedies provided in the contract and provided by law

**5-18A-17. Self-dealing by state officer or employee in award or terms of agency contract prohibited.**

No state officer or employee who approves, awards, or administers a contract on behalf of a state agency, may have an interest in a contract or derive a direct benefit from a contract that is within the scope of the officer's or employee's official duties, nor for a one-year period following the end of their employment or position as a state officer may the officer or employee derive a direct benefit as a result of such contract except as provided in § 5-18A-17.2. In addition, no such officer or employee may enter into any contract, other than a contract of employment, with any state agency for a period of one year following their leaving office or employment except as provided in § 5-18A-17.3. This prohibition includes any state officer or employee who, in his or her official capacity, recommends the approval or award of the contract or who supervises a person who approves, awards, or administers the contract. This prohibition does not include any state officer who serves without compensation or who may be paid per diem pursuant to § 4-7-10.4.

**5-18A-18. Specifications to promote economy and encourage competition--Circumstances under which brand name or equal specifications permitted.**

Any specification shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the purchasing agency's needs, and may not be unduly restrictive. Brand name or equal specifications may be used if the purchasing agency determines in writing that:

- (1) No other design or performance specification or qualified products list is available;
- (2) Time does not permit the preparation of another form of purchase description, not including a brand name specification;
- (3) The nature of the product or the nature of the purchasing agency's requirements makes use of a brand name or equal specification suitable for the procurement; or
- (4) Use of a brand name or equal specification is in the purchasing agency's best interests.

**5-18A-19. Requirements for brand name or equal specifications.**

Brand name or equal specifications shall seek to designate three, or as many different brands as are practicable, as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award. Unless the purchasing agency determines in writing that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required. If a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

**5-18A-21. Written contract required--Signatures.**

Each contract shall be in writing, shall have the printed name of any individual signing the contract, and shall be signed on behalf of the purchasing agency by the authorized officials. Failure to comply with the requirement for a printed name under this section does not void the terms or purpose of the contract

**5-18A-26. Resident bidder preferred over nonresident bidder from state or foreign province that has preference for resident bidders.**

A resident bidder shall be allowed a preference on a contract against the bid of any bidder from any other state or foreign province that enforces or has a preference for resident bidders. The amount of the preference given to the resident bidder shall be equal to the preference in the other state or foreign province

**5-18A-28. List of supplies, custodial services, and maintenance services provided by qualified agency.**

A qualified agency may submit a list of supplies, custodial services, and maintenance services, provided by the agency, to the Bureau of Administration. The bureau shall make the information available to purchasing agencies of the State of South Dakota on a website maintained by the bureau.

**5-18A-35. Bond or approved security.**

In the procurement of supplies or services, a purchasing agency may require a bond or an approved security to be submitted with any bid or proposal as a guarantee that the bidder will enter into a contract with the purchasing agency. No offeror or bidder may be required to leave the bond or security posted for a longer period than that allowed by § 5-18A-5 if the bid or proposal is not accepted. The bond or approved security of the successful offeror or bidder shall be returned upon the signing of the contract

**5-18A-37. Cooperation and agreements with other state and federal purchasing agencies.**

Any purchasing agency may enter into agreements with purchasing agents in this or any other state or the United States government under which any of the parties may agree to participate in, administer, sponsor, or conduct purchasing transactions under a joint agreement or contract for the purchase of supplies or contractual services. A purchasing agency may cooperate with purchasing agencies and other interested parties in any other state or the United States government to develop uniform purchasing specifications on a regional or national level to facilitate cooperative interstate purchasing transactions