

Title 7—DEPARTMENT OF TRANSPORTATION
Division 10—Missouri Highways and Transportation Commission
Chapter 11—Procurement of Supplies

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SECRETARY OF STATE
ADMINISTRATIVE RULES

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PROPOSED AMENDMENT

7 CSR 10-11.020 Procedures for Solicitation, Receipt of Bids, and Award and Administration of Contracts. The Missouri Highways and Transportation Commission is amending sections (1) through (11), (13), (15) through (18), subsections (2)(A) through (2)(D), (3)(A) through (3)(C), (5)(B), (5)(C), and (7)(C) through (7)(M); adding a new section (4); and renumbering as necessary.

PURPOSE: This proposed amendment removes unnecessary restrictive wording, updates revised definitions from 7 CSR 10-11.010 for invitation for quotation and request for information, and adds authority to procure indefinite delivery services.

(1) **Informal Procurement Methods.** When the procurement is estimated to be less than twenty-five thousand dollars (\$25,000), an informal method of solicitation may be utilized. Informal methods of procurement may include *[request]***invitation** for quotation (*[R/IFQ]*), telephone quotes, etc.

(A) The division will establish a target date and time for submission of quotations.

(B) The division may proceed with the evaluation and award any time after the expiration of the target date and time. Quotations received after the target date and time, but before the award of a contract, may be included in the evaluation at the discretion of the division.

(2) **Request for Bid/Invitation for Bid.** A formal method of solicitation will be used *[W]*when the procurement is estimated to be twenty-five thousand dollars (\$25,000) or more. *[, a formal method of solicitation must be utilized. Formal competitive bidding shall be accomplished by utilizing]* **The formal method of solicitation will be either** an invitation for bid (IFB) or request for bid (RFB), etc.

(A) **In a *[F]*formal *[bids must be received in the division or]* solicitation, sealed responses will be submitted to the division, or** a secured electronic database, *[in a sealed format]* by the time set for the opening of bids.

(B) Formal bids received after the time set for the opening of bids *[shall be considered late and]* will not be opened.

(C) **After the bid opening, all *[B]*bids received in response to an IFB/*[RFB shall be]* are available for public review *[after the bid opening during regular working hours].***

(D) When the division decides in its discretion that all bids are unacceptable and circumstances do not permit a rebid, negotiations may be conducted by the division with only those bidders who submitted bids in response to the IFB/*[RFB]*. *[No additional bidders shall be solicited.]* Upon determination that negotiations will be conducted, the bids and related documents will be closed to public viewing in accordance with section 610.021, RSMo.

(3) **Request for Proposals.** Formal request for proposal (RFP) solicitation methods will be used *[W]*when the procurement requires the utilization of competitive negotiation, *[the formal request for proposal (RFP) solicitation method shall be utilized].*

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(A) *[Formal proposals must be received in the division]* **In response to an RFP, sealed responses will be submitted to the division** or a secured electronic database *[in a sealed format]* by the time set for the opening of the proposals.

(B) Formal proposals received after the time set for the opening of bids/proposals *[shall be considered late and]* will not be opened.

(C) Proposals received in response to an RFP *[shall not be]* **are** available for public review *[until]* after a contract is executed or all proposals are rejected.

(D) Offerors who obtain information concerning a competitor's proposal may be disqualified for consideration for a contract award.

(4) Indefinite Delivery Contracts. IDC contracts may be utilized for facility maintenance, construction, repair, rehabilitation, renovation or alteration services of a recurring nature when the delivery times and quantities are indefinite with a total cost of less than \$25,000.

(5) Single Feasible Source. The division may waive the requirement of competitive bids or proposals for supplies when the division has determined in writing that there is only a single feasible source for the supplies. Immediately upon discovering that other feasible sources exist, the division shall rescind the waiver and proceed to procure the supplies through the competitive processes as described in this rule.

(A) A single feasible source exists when:

1. Supplies are proprietary and only available from the manufacturer or a single distributor;

or

2. Based on past procurement experience, it is determined that only one (1) distributor services the region in which the supplies are needed; or

3. Supplies are available at a discount from a single distributor for a limited period of time.

(B) When the Single Feasible Source procurement method is utilized, *[the division shall use]* the following guidelines *[to support the Single Feasible Source determination]* **will be used:**

1. The following guidelines may be utilized to determine if supplies can be purchased as a single feasible source due to being proprietary:

A. The parts are required to maintain validity of a warranty;

B. Additions to a system must be compatible with original equipment;

C. Only one (1) type of computer software exists for a specific application;

D. Factory authorized maintenance must be utilized to maintain validity of a warranty;

E. The materials are copyrighted and are only available from the publisher or a single distributor; or

F. The services of a particular provider are unique, e.g., entertainers, authors, etc.;

2. The following guidelines may be utilized if past procurement activity indicates *[that]* only one (1) bid has been submitted in a particular region. In these situations, the division shall monitor the market for developing competition; and

3. The following guidelines may be utilized to determine if supplies may be purchased as a single feasible source due to being available at a discount for a limited period of time:

A. The discounted price *[must be]* is compared to a price established through a reasonable market analysis; and

B. The discounted price should normally be at least ten percent (10%) less than the current contract or other comparable price. A discount of less than ten percent (10%) may be acceptable under appropriate market conditions. The discount should be compared to a price which, where

feasible, *[should be no more than]* **is within the most recent** twelve (12) months *[old]*.

(C) *[On]* **The division shall post** any **proposed** single feasible source purchase *[where the]* **with an** estimated expenditure *[shall be]* of five thousand dollars (\$5,000) or *[over]* **more**, *the division shall post notice of the proposed purchase*. *[Where the estimated expenditure is twenty-five thousand dollars (\$25,000) or over, the division shall also advertise its intent to make such purchase in such places as are most likely to reach prospective bidders or offerors and may provide such information through an electronic medium available to the general public at least five (5) days before the contract is to be let.]* **If the estimated expenditure is twenty-five thousand dollars (\$25,000) or more, the intent to make such purchase will be advertised in such places as are most likely to reach prospective bidders or offerors and may provide such information through an electronic medium available to the general public at least five (5) days before the contract is to be awarded.** Other methods of advertisement, however, may be *[adopted]* used by the division when such other methods are deemed more advantageous for the supplies to be purchased. *[The requirement for a]* Advertising may be waived, if not feasible, due to the supplies being available at a discount for only a limited period of time.

([5]6) **Emergency Procurement.** When conditions meet the criteria of an emergency situation as defined in 7 CSR 10-11.010, emergency procurement procedures may be utilized. *[The requirement for ff]* Formal competitive bids or proposals may be waived. *However, the*, **but an** emergency procurement should be made with as much informal bidding as practicable. *[Emergency procedures shall only be utilized to purchase]* **Only** those supplies which are necessary to alleviate the emergency **may be purchased using emergency procedures.**

([6]7) **Cooperative Procurement.** When circumstances dictate that it would be most advantageous, the division may purchase supplies from or in cooperation with another governmental entity.

(A) Supplies purchased from another governmental entity should be limited to those supplies which are provided directly by such entity.

(B) Supplies purchased in cooperation with another governmental entity may be purchased based on contracts established in accordance with that entity's laws and regulations.

([7]8) **Applicable Procedures.** Regardless of the solicitation method utilized, the following procedures apply:

(A) *[The division shall develop]* **All solicitation documents will use** standardized terms and conditions *[to be included with the solicitation documents]*;

(B) The division may request bids/proposals for new equipment employing the trade-in of used equipment. The solicitation document may request pricing with a trade-in and without a trade-in;

(C) The division may require bid/proposal, payment, and/or performance bonds. **The solicitation document shall identify the acceptable form and amount of any required bid/proposal, payment, and/or performance bond. In addition:**

1. *[The acceptable form and amount of the bid/proposal bond shall be stipulated in the solicitation document.*

2.] The bid/proposal bond of unsuccessful vendors may be returned after the finalization of the award **to the successful vendor.** If the successful vendor fails to *[accept]* **execute** the contract **with the commission**, the amount of the bid/proposal bond **of the successful vendor** may be forfeited to the commission.

[3]2. [If a payment and/or performance bond is required, t]The bid/proposal bond of the successful vendor may be returned after the receipt of the **successful vendor's** payment and/or performance bond. [The acceptable form and amount of the payment and/or performance bond shall be stipulated in the solicitation document.] If the contractor fails to submit the payment and/or performance bond as required, the bid/proposal bond may be forfeited to the commission and the contract [shall be] voided;

(D) In the event [that] the division receives a container which is not identifiable as **responsive** to a specific bid/proposal, an authorized person within the division may open the container to determine the contents. If the contents are determined to be **responsive to a division** bid/proposal, the container will be resealed and the solicitation number, opening date, and time will be noted on the outside **and included with all bids at the official time for opening the responses**[. The container will then be filed until the official time for opening];

(E) After the bid/proposal opening, a vendor may be permitted to withdraw a bid/proposal prior to award at the sole discretion of the division if there is a verifiable error in the bid/proposal and enforcement of the bid would impose an unconscionable hardship on the vendor. This withdrawal will be considered only after receipt of a written request and supporting documentation from the vendor. [Withdrawal shall be t]The vendor's sole remedy for an error other than an obvious clerical error is **bid withdrawal**. Withdrawal of a bid/proposal may result in forfeiture of the bid/proposal bond;

(F) For bids/proposals with a value of twenty-five thousand dollars (\$25,000) or more, a **ten percent (10%) preference is given** to bidders/offerors who can certify that goods or commodities to be provided in accordance with the contract are manufactured or produced in the United States or imported in accordance with a qualifying treaty, law, agreement, or regulation [shall be entitled to a ten percent (10%) preference] over bidders whose products do not qualify. Failure to provide a certification may result in forfeiture of any preference. [The provisions in this subsection (7)(F) shall] **This preference does** not apply to bids/proposals for goods or commodities [funded by] **purchased with** federal funds;

(G) In addition to cost, subjective judgment may be utilized in the evaluation of bids/proposals provided [that] the method is published in the solicitation document;

(H) The division may request samples **to be provided free of charge** for evaluation purposes. [Any samples requested must be provided free of charge.] Samples [which are] not destroyed by testing will be returned at the vendor's expense if return of the samples is stipulated in the vendor's bid/proposal. Samples submitted by a vendor who receives the award may be kept for the duration of the contract for comparison with shipments received;

(I) During the course of a solicitation, vendors may be required to demonstrate proposed products **or services under coordination of the division**[. Such demonstration shall be coordinated by the division];

(J) **Applicable preference statutes will be applied** [W]when bids are equal in all respects[, any preferences shall be applied in accordance with applicable statute]. If [all such bidders or none qualify for the statutory preference, the contract shall be awarded by] **bids are equal in all respects after all applicable statutory preferences are applied**, a formal drawing of lot **will be used to award the contract**. Whenever practical, the drawing will be held in the presence of the vendors who are considered equal. If this is not practical, the drawing will be witnessed by a disinterested person;

(K) The division may make multiple awards from a single solicitation document when such awards are in the best interest of the commission as determined in the sole discretion of the division;

(L) [After an award is made, t]The solicitation file or facsimile thereof shall be made available

to the public for inspection at any time *[during regular working hours]* **after an award is made;** and

(M) *[Unless otherwise specified in the contract,]* **The approval of the division is required prior to shipment or performance when** substitution of items, personnel, or services *[shall require the approval of the division prior to shipment or performance]* **is proposed, unless otherwise specified in the contract.**

(/8/9) Minority and Women Business Enterprises. The division will encourage participation in the procurement process and fairness in consideration of bids/proposals submitted by Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs). Programs/procedures designed to accomplish these objectives may include: inclusion of MBE/WBE subcontractor requirements in solicitation documents, close review of bond requirements, targeted notice of procurement opportunities, utilization of minority and women personnel on evaluation committees, etc.

(/9/10) Bid Protest. A bid or proposal award protest must be *[submitted]* in writing and *[must be]* received by the division within ten (10) calendar days after the date of award. If the tenth day falls on a Saturday, Sunday, or state holiday, the period shall extend to the next state business day. A protest submitted after **expiration of** the ten (10)-calendar-day period shall not be considered. The written protest should include the following information:

- (A) Name, address, and phone number of the protester;
- (B) Signature of the protester or the protester's representative;
- (C) Solicitation number;
- (D) Detailed statement describing the grounds for the protest; and
- (E) Supporting exhibits, evidence, or documents to substantiate claim.

(1/0/1) Award. *[The award of a]* **A contract or purchase order [shall be] is awarded** based on the terms and conditions *[set forth]* in the solicitation document. The director's discretion may be utilized in the evaluation of bids/proposals provided *[that]* the evaluation categories and the relative percentage of impact are published in the solicitation document.

(A) Any bid/proposal failing to agree to, and comply with, all terms, conditions, and specifications stated in the solicitation document *[shall be]* **is considered [as]** nonresponsive to the solicitation and shall not be considered for the award of a contract or purchase order.

(B) The commission may reject all bids/proposals and may waive any minor informality or irregularity in a bid/proposal. The commission also may make multiple awards from a single solicitation document when permitted by the solicitation document.

(1/1/2) Corrections to Bid/Proposal Documents. When preparing a bid/proposal, a bidder/offeror may correct an error by marking it out or erasing it. The change should be initialed by the person signing the bid/proposal. *[No bid/proposal shall be altered or amended]* **Alterations or amendments to bid/proposals cannot be made** after the time and date specified for the opening of bids/proposals. In the case of errors in the extension of price, the unit price will govern.

(1/2/3) Cancellation of Solicitation. The division may cancel a solicitation document at any time without cause.

(1/3/4) New Supplies. All supplies and equipment offered and furnished must be new and of current production unless the solicitation document specifically permits the offer of used items. *[Remanufactured or reconstructed items shall not be considered new.]*

(1/4/5) Rejection of Supplies. Products, equipment, or items delivered that do not meet the specifications of the contract may be rejected. When rejected, the vendor must make immediate replacement in accordance with the specifications of the contract.

(1/5/6) Inspection. All materials, equipment, and supplies *[shall]* **may** be *[subject to]* inspect*[ion]*ed and test*[s]*ed by the department. Items that do not meet the specifications of a contract may be rejected. **The contractor is not relieved of any liability under the contract if the division fail*[ure]*s to reject upon receipt or after part or all of the items have been consumed *[shall not relieve the contractor of any liability under the contract].***

(1/6/7) Services. Services which have not been performed in accordance with specifications or the scope of work of a contract may be rejected. **The vendor is not relieved of any liability under the contract if the division fail*[ure]*s to reject upon receipt or after part or all of those services have been performed *[shall not relieve the vendor of any liability under the contract].***

(1/7/8) Assignment. *[Permission from the commission to a]* **A contractor must request permission from the commission, in writing,** to assign a contract or order *[must be requested by the contractor in writing]*. **The division, acting on behalf of the commission, will provide written permission, if the division agrees to the request.** *[A contractor shall not assign its interest in a contract or order to another party without receiving written permission from the division acting on behalf of the commission.]*

(1/8/9) Arbitration. The commission, unless specifically agreed upon by the parties in writing, shall not be bound by a compulsory arbitration or other compulsory dispute resolution provision which is present in any of vendor's forms or boilerplate.

AUTHORITY: sections 226.020, 226.130, 227.030, and 227.210, RSMo 2000. Original rule filed April 5, 1993, effective Oct. 10, 1993. Rescinded and readopted: Filed June 5, 2009, effective Jan. 30, 2010. Amended: Filed May 4, 2018.*

**Original authority: 226.020, RSMo 1939; 226.130, RSMo 1939, amended 1993, 1995; 227.030, RSMo 1939; and 227.210, RSMo 1939.*

PUBLIC COST: This proposed amendment will not cost state agencies or political subdivisions more than five hundred dollars (\$500) in the aggregate.

PRIVATE COST: This proposed amendment will not cost private entities more than five hundred dollars (\$500) in the aggregate.

*NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed amendment with the Missouri Highways and Transportation Commission, Pamela J. Harlan, Secretary to the Commission, 105 W. Capitol Avenue, PO Box 270, Jefferson City, Missouri 65102 or Pamela.Harlan@modot.mo.gov. To be considered, comments must be received within thirty (30) days after publication of this notice in the **Missouri Register**. No public hearing is scheduled.*