



Doing Business with Public Entities in Arizona

A Vendor Guide to Understanding
Arizona Procurement Practices



I. Forward

This booklet was created by the Arizona Attorney General to provide vendors with an overview of the basic information needed to participate in procurement processes with public entities in Arizona, including State agencies and Arizona public school districts. The booklet describes the procurement rules and principles that may apply whenever a vendor seeks to contract with an Arizona public entity, regardless of whether the vendor is large or small and regardless of what materials or services the vendor has to offer.

This booklet was developed for informational purposes only. It presents only an introduction to certain terms and concepts and is not an exhaustive treatment of the legal obligations involved in public bidding or contracting with public entities in Arizona. This booklet does not constitute legal services or representation, and the Arizona Attorney General's Office hereby specifically disclaims any liability for losses incurred as a consequence of any material presented in this booklet. Despite every effort to ensure the accuracy of this booklet's contents, some errors may appear. Moreover, this booklet may not always be up to date, as laws can change and court interpretations of laws often vary. For specific and complete legal advice, please consult with a practicing attorney who is knowledgeable about Arizona procurement and contracting law and is familiar with the relevant details of your situation.

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II. Introduction

A vendor interested in providing materials or services to a government entity in Arizona must be willing to abide by Arizona's procurement laws and regulations, which generally apply to any expenditure of public monies by governmental entities under any contract for the purchase of materials, services, construction, or construction services. Whenever a vendor seeks to provide to a public entity materials or supplies, or services of any sort, from administrative, management or consulting services to construction or professional services, the procurement laws and regulations will apply.

The purpose of the procurement laws and regulations is to prevent fraud, collusion, or unjust favoritism in the award of public contracts; to ensure all vendors have an equal opportunity to compete for public contracts; to secure for the public the benefits of full and open competition; and to provide for efficiency and increased economy in the expenditure of public funds.

While the Arizona State Procurement Code applies to most State agencies, and to most procurements conducted by those agencies, there are exceptions. Some state agencies have exemptions for certain types of procurements, while others, such as the Legislature, are exempted from procurement rules altogether. Arizona political subdivisions, such as counties, municipalities, and school districts, are expressly exempted from the State Procurement Code, but even when exempted, most Arizona public entities are statutorily required to or voluntarily adopt their own procurement codes. All Arizona public school districts, for example, are subject to and must abide by the School Procurement Code and the Uniform System of Financial Records for School Districts. Regardless of which procurement code applies, all public entities in Arizona have a fiduciary obligation to conduct procurements in good faith and in the best interests of the State.

This booklet describes a number of the procedures required by both the state procurement code and the school procurement code, as many Arizona public entities are subject to one of these two codes. Since counties, municipalities and other public entities may have adopted their own procurement codes and regulations, vendors should take the time to determine what procurement code applies for the particular public entity with whom they are seeking to contract. Once that determination has been made, vendors should also become educated as to the particular requirements of the applicable procurement code. Vendors doing business with public entities are expected to know the rules that apply and, as explained later in this Booklet, act at their own peril if they contract in violation of those rules.



III. Resources

The state procurement code can be found in the Arizona Revised Statutes (“A.R.S.”), Title 41, Chapter 23 (A.R.S. § 41-2501 through § 41-2673), available online at <http://www.azleg.gov/ArizonaRevisedStatutes.asp>. Additional regulations can be found in the Arizona Administrative Code, Title 2, Chapter 7, Articles 1 through 10 (R2-7-101 through R2-7-1010), available online at http://apps.azsos.gov/public_services/Title_02/2-07.pdf.

The school procurement code can be found in the Arizona Administrative Code, Title 7, Chapter 2, Articles 10 and 11 (R7-2-1001 through R7-2-1196), available online at http://apps.azsos.gov/public_services/Title_07/7-02.pdf. Additional regulations can be found in the Uniform System of Financial Records for Arizona School Districts, available online at <http://www.azauditor.gov/sites/default/files/USFR2.pdf>.

A vendor interested in doing business with the state or a state agency should register in ProcureAZ, the State of Arizona’s online procurement portal: <https://procure.az.gov>. Vendors must be registered with ProcureAZ to receive notifications of bid opportunities or information about solicitations currently available for bid or offer, to be placed on the bidders’ list for the materials or services the vendor offers, to formally submit the vendors’ bids or offers, or to be issued purchase orders from the procuring entity. The ProcureAZ website provides step-by-step guides for registering and for responding to bids and solicitations. For additional assistance, contact the ProcureAZ Help Desk at (602) 542-7600 or by e-mail at procure@azdoa.gov.

Other public entities, including school districts, may have their own online registration requirements, or may maintain prospective bidders’ lists for specific materials and services. Vendors should contact the entity’s purchasing administrator and ask to be placed on the bidders’ list for the materials or services the vendors offer. Getting placed on the bidders’ list will not automatically result in a vendor winning a contract, but it will ensure that the vendor receives notification the next time the entity seeks to procure that particular material or service.

Vendors seeking to provide materials or services to Arizona school districts should also recognize that school districts may use cooperative purchasing rather than issuing their own solicitations. Cooperative purchasing allows school districts to purchase materials or services using master contracts solicited by the State or by local purchasing cooperatives. Thus, vendors should consider registering with the local purchasing cooperatives as well as with the school districts.

IV. Useful Definitions

“Construction” means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvements of any kind to any public real property. Construction does not include the routine operation, routine repair or routine maintenance of existing facilities, structures, buildings or real property. Further, construction does not include the investigation, characterization, restoration, or remediation due to an environmental issue of existing facilities, structures, building or real property.

“Construction Services” means either of the following for construction-manager-at-risk, design-build and job-order-contracting project delivery methods: (a) construction, excluding services, through the construction-manager-at-risk or job-order-contracting project delivery methods; or (b) a combination of construction and, as elected by the purchasing agency, one or more related services, such as finance services, maintenance services, operations services, design services and preconstruction services, as those services are authorized in the definitions of construction-manager-at-risk, design-build or job-order-contracting.

“Contract” is generally defined as all types of agreements, regardless of what they may be called, for the procurement of materials, services, construction or construction services, or the disposal of materials. A contract with an Arizona public entity generally includes a combination of the Solicitation, including Uniform and Special Instructions to Offerors, the Uniform and Special Terms and Conditions, and the Specifications and Statement or Scope of Work; the Offer and any Best and Final Offers; and any Solicitation Amendments or Contract Amendments.

“Materials” means all property, including equipment, supplies, printing, insurance and leases of property, but does not include land, a permanent interest in land or real property or leasing space.

“Person” means any corporation, business, individual, union, committee, club, other organization or group of individuals.

“Procurement” means the buying, purchasing, renting, leasing, or otherwise acquiring any materials, services, construction or construction services, and in-



cludes all functions pertaining to obtaining any material, services, construction or construction services, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

“Responsible Bidder” means a vendor or contractor who has demonstrated integrity, who is of good reputation, who has a satisfactory record of experience and performance, whose financial status is such as to cause little risk, and who has the capacity and ability to supply the materials or services on a timely basis.

“Services” means the furnishing of labor, time, or effort by a contractor or subcontractor which does not involve the delivery of a specific end product other than required reports and performance. The term services does not include employment agreements or collective bargaining agreements.

“Solicitation” means an invitation for bids, a request for proposals, a request for qualifications, a request for quotations, or any other invitation or request by a purchasing entity to invite a person to submit a bid or offer.



V. Summary of Basic Procurement Processes

The procurement processes described below are some of the more common solicitation practices conducted by procuring entities, but they are not the only processes. The procurement processes that apply to a purchase will depend not only on the entity conducting the procurement, but also on the nature of the materials or services being procured and the estimated cost of those materials or services. Vendors should consult with legal counsel and become familiar with the processes that most often apply to the materials or services the vendor provides. In all cases, vendors are responsible for reading and understanding the solicitation documents; obtaining and acknowledging any solicitation amendments; providing all required information; providing required documentation or samples; signing the bid or proposal; and submitting a timely response.

Formal Solicitations (Exceeding \$100,000)

The sealed bid threshold, currently set at \$100,000, is established by the Arizona legislature. Purchases of materials or services that exceed the aggregate amount of \$100,000 must be procured through the use of a formal solicitation, such as an invitation for bids, a request for proposals, or a request for qualifications. Purchases cannot be split or fragmented in order to avoid the sealed bid threshold or the need for a formal solicitation process.

Notice of a formal solicitation should be issued at least fourteen days before the submission deadline. Such notice may be issued via ProcureAZ or on the purchasing entity's website, will be sent to registered vendors on the prospective bidders' list, and may include publication one or more times in a newspaper of general circulation.

Invitation for Bids ("IFB"): With an Invitation for Bids, a procuring entity must award a contract to the lowest responsible bidder whose bid conforms in all material respects to the requirements and evaluation criteria set forth in the IFB. The IFB will describe the procuring entity's requirements, the characteristics or specifications of the materials being sought, and the evaluation criteria. Proprietary specifications that identify a product by brand name or that are so restrictive as to exclude all but a brand name product should not

be used. Persons preparing or assisting in the preparation of specifications may not submit bids in response or otherwise receive any direct benefit. Only those bid requirements and evaluation criteria set forth in the IFB shall be applied in evaluating bids. A bid that takes exception to a mandatory specification or fails to meet a material requirement in an IFB is not a responsive bid.

Request for Proposals (“RFP”): With a Request for Proposals, a procuring entity may award a contract to a responsible offeror whose proposal is determined to be the most advantageous to the procuring entity based upon the RFP evaluation factors. RFPs may be used to procure materials and services, but may not be used to procure construction, construction services, or specified professional services. The RFP will describe the pro-

curing entity’s requirements, specifications or a scope of work, evaluation factors and the relative importance of such factors, and contract terms and conditions. Only those evaluation factors identified in the RFP may be considered in evaluating the proposals and those factors cannot be modified after the RFP is issued. Discussions may be conducted with responsible offerors who submit proposals. If discussions are conducted, they must be conducted with all responsible of-

ferors reasonable susceptible of being selected for award. Following such discussions, the procuring entity must issue a written request for best and final offers to any offeror determined to be reasonably susceptible of being selected for award. Offerors may then submit best and final offers or confirm their original offers are final.

Request for Qualifications (“RFQ”): For construction and construction services, both the state procurement code and the school procurement code authorize Alternative Project Delivery Methods (“APDM”), such as construction-manager-at-risk, design-build, or job-order-contracting. Such contracts are procured through a Request for Qualifications. The RFQ



procurement process is very detailed and complex and cannot be effectively summarized here. Vendors seeking to provide construction or construction services should carefully examine the RFQ requirements in the state procurement code and the school procurement code, and should consult with an attorney experienced in APDM procurements.

Sole Source Procurements: A contract may be awarded without competition if the Director of the Department of Administration (for the state) or the Governing Board (for a school district) makes a written determination that there is only one source for the required material, service or construction item. A vendor’s self-serving declaration that it is a sole source is not determinative. Sole source procurements are to be avoided except when no reasonable alternative sources exist.

Emergency Procurements: A contract may be awarded without competition if an emergency makes compliance with the procurement codes impracticable, unnecessary or contrary to the public interest. An emergency only exists if there is a serious and imminent threat to public health, welfare or safety. An emergency procurement must be limited to only those materials or services necessary to address the emergency.

Informal Solicitations (Under \$100,000)

For purchases by state agencies estimated to cost between \$10,000 and \$100,000, the Director of the Department of Administration has promulgated rules requiring the agency chief procurement officer to issue a request for quotations, following the procedures set forth in the administrative code. Such procurements shall be restricted, where practicable, to small businesses as defined by the Director of the Department of Administration.

For purchases by a school district, the Auditor General has issued guidelines governing purchases that do not exceed an aggregate dollar amount of \$100,000. These guidelines, set forth in the Uniform System of Financial Records for Arizona School Districts, require a school district to obtain written price quotations from at least three vendors for purchases costing at least \$50,000 but not more than \$100,000. For purchases costing at least \$10,000 but less than \$50,000, a school district must obtain three oral price quotations.

VI. Contracts with Arizona public entities

A vendor's bid or proposal in response to a solicitation is an offer to contract upon the terms and conditions contained in the solicitation, but it is not a contract until the procuring entity accepts the bid or proposal and awards a contract to the vendor. The awarded contract consists of both the solicitation and any amendments, and the bid or proposal submitted by the vendor in response to the solicitation. In the event of a conflict in language between the solicitation and the vendor's bid or proposal, the provisions and requirements set forth in the solicitation govern.

Contracts with public entities in Arizona must conform to certain statutory requirements, including but not limited to the following:

- Contracts must be governed and interpreted by the laws of the State of Arizona and the applicable Arizona procurement codes.
- Contractors must comply, and ensure their subcontractors comply, with federal immigration laws and regulations that relate to their employees (the e-Verify program).
- The payment obligations of the State or of Arizona school districts are conditioned upon the availability of funds appropriated or allocated for the payment of such obligations. If funds are not appropriated, the State or school district may terminate the contract.
- Provisions in construction contracts that make the contract subject to the laws of another state or require any litigation, arbitration, or other dispute resolution proceeding to be conducted in another state are void and unenforceable.
- Agreements in construction contracts that purport to indemnify, hold harmless, or defend the contractor from or against liability for loss or damage resulting from the contractor's own negligence are against public policy and void.
- Cost-plus-a-percentage-of-cost contracts are prohibited.

VII. When Things Go Wrong

When things go wrong with a procurement process, the consequences can be serious, both for the procuring entity and for the vendors involved. Those consequences can include delays and administrative remedies, such as cancellation of the procurement process or nullification of the contract; civil investigation and remedies, such as recovery of any public monies paid, penalties, interest and attorneys' fees; and under some circumstances, even criminal prosecution.

Vendors who think a solicitation or contract award is improper or that the procurement process is unfair have a right under both the state procurement code and the school procurement code to file a protest; however, there is only a limited time to protest and the vendor must be prepared to prove its case. If the protest is based upon improprieties in the solicitation that were apparent when the solicitation was issued, the protest must be filed before the solicitation due date and time. In other cases, the protest must be filed within ten (10) days after the procuring entity makes the procurement file available for public inspection. If it is determined that the procurement process was defective, then any contract resulting from that procurement process will be void and unenforceable.

Additionally, any person, including vendors, who contracts in violation of procurement code requirements is personally liable for the recovery of all public monies paid plus twenty percent of such amount, along with legal interest from the date of payment and all costs and damages arising out of the violation. See A.R.S. § 41-2616(A). Furthermore, if the procurement code violations are found to be intentional or knowing, then criminal penalties may apply. See A.R.S. § 41-2616(B).

Vendors who engage in collusion, bid rigging or other anticompetitive behaviors may also be prosecuted under the Uniform State Antitrust Act. See A.R.S. §§ 44-1401 through 44-1416. A vendor who violates Arizona's antitrust laws could be subject to civil penalties of up to \$150,000 per violation, as well as injunctions, damages, costs, and attorneys' fees.

VIII. Vendor Ethics

It is critical that government purchasing remain independent, fair and impartial, and free of obligation or suspicion. Credibility and public confidence in the process are vital, and any suggestion of favoritism, partiality or corruption in the process is harmful. Responsibility for maintaining integrity in the procurement process rests with all participants in the procurement process – including vendors. Vendors must seek to maintain the highest standards of ethical behavior, keeping in mind these key points:

Communications: Solicitations will include the name and contact information for the procuring entity's authorized purchasing agent. All vendor communications relating to the procurement must go through the authorized purchasing agent. Vendor communications with other employees at the procuring entity for the purposes of obtaining additional information, influencing the procurement, or gaining an advantage over competitors is prohibited.

Conflicts of Interest: It is a conflict of interest for a public officer or employee who has or whose family member has a substantial interest in any contract, sale, purchase, service or decision of the public entity to participate in any manner in that contract, sale, purchase, service or decision. Vendors with relatives or employees working at the procuring entity must be careful not to involve those relatives or employees in the procurement process in any manner.

Future Employment: Vendors must not discuss or offer future employment to any public officers or employees who are involved, directly or indirectly, in the procurement process. State officers and employees involved in procurement activities are prohibited for one year from the date of purchase from accepting or having discussions concerning employment with any vendor who responded to a solicitation.

Gifts and Donations: Vendors may not offer or give any gift, directly or indirectly, to a procuring entity or its officers or employees, or their families. Gift means a payment, distribution, expenditure, advance, deposit or donation of money, any intangible personal property or any kind of tangible personal or real property. Gifts include entertainment expenditures, such as trips, tickets, and meals. Vendors also may not pay contingent or referral fees to any public officers or employees.



Non-Collusion: Vendors must independently construct their bids and proposals, including their prices, without collusion, consultation, communication or agreement with any other competing vendors for the purpose of restricting competition. Vendors should not disclose their bids or proposals to competing vendors prior to the solicitation deadlines. Vendors must not attempt to induce competing vendors to refrain from submitting bids or proposals or to submit false bids or proposals.

