

Structure of New Code

- Original Chapters 5-18, 5-19, 5-20 and 5-23 are repealed
- New Chapter 5-18 is now created as:
 - 5-18A General Provisions
 - 5-18B Procurement of Public Improvements
 - 5-18C Procurement by Local Government Units
 - 5-18D Procurement by State Agencies



Definitions (5-18A-1)

- **"Contract**," any type of agreement, regardless of what the agreement may be called, for the procurement of supplies, services, or construction;
- **"Construction**," and "constructed," in addition to their ordinary meaning, repair, demolition, and alteration;
- **"Environmentally preferable product**," any cleaning or maintenance product having properties that minimize potential impacts to human health and the environment, any product designed to conserve energy and water, any biobased product, and any product containing recycled materials or recovered materials;
- **"Professional Services**," services arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual;

Definitions (5-18A-1)

- **"Proposal**," any offer to enter into a contract in response to a request for proposals;
- "**Purchasing agency**," any governmental body or officer authorized by law, administrative rule, or delegated authority, to enter into contracts;
- **"Public Improvement**," the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency, and includes any local improvement for which a special assessment is to be levied;
- "Qualified Agency," any public or private non-profit corporation geographically located in the State of South Dakota that provides services for persons with disabilities and is certified by the Department of Human Services.

Definitions (5-18A-1)

- **"Resident**," any person, partnership, association, limited liability company, foreign limited liability company, corporation, or foreign corporation licensed to do business within this state that has maintained a substantial and bona fide place of business and has conducted business from within this state for at least one year prior to the date on which a contract was awarded.
- **"Sealed bid or proposal**," a response to an invitation for bids or request for proposals submitted in a manner where the contents of the bid or proposal cannot be opened or viewed before the date and time of the formal opening without leaving evidence that the bid or proposal has been opened or viewed.
- "Services," furnishing of labor, time, or effort by a contractor not involving the delivery of a specific end product other than reports which are merely incidental to the required performance;
- "Supplies," any property, including equipment, materials, and printing;

Application of Procurement Code to Contracts (5-18A-2)

 Unless otherwise authorized by law, the provisions of Chapters 5-18A, 5-18B, 5-18C and 5-18D apply to every contract issued by a purchasing agency.

Methods of Awarding Contracts (5-18A-3)

- Competitive Sealed Bids Preferred method.
- Competitive Sealed Proposals Used if a sealed bid is not practicable.
- Small Purchases Used for purchases that are not required to be advertised or sealed.
- Emergency Purchases used in cases that affect health, safety and welfare of the public
- Sole Source Purchases Used when there is only one source available for the required supplies or services

Competitive Sealed Bids (5-18A-4 and 5)

- Must be used unless written determination is made that sealed bids are not practicable for the procurement.
- Public notice required
- Public bid opening
- Paper or electronic submission of "sealed" bids authorized
- Bid may be withdrawn prior to opening, and after opening only in the case of a bid error with approval of the purchasing agency

Competitive Sealed Bids (5-18A-4 and 5)

- Bid modifications allowed prior to opening as long as actual bid price is not revealed.
- Awards must be made within 30 days of bid opening to the low bidder meeting requirements
- Multiple step bidding is authorized (separate technical and pricing steps)
- If no firm bids are received, purchasing agency may negotiate a contract as long as original specifications and terms are met, otherwise, modify the specifications and re-solicit
- In the case of a tie bid, and no residential preference is to be considered, award is made by lottery or the purchasing agency may reject all bids and re-solicit

Competitive Sealed Proposals (5-18A-6 and 7)

- Used if a purchasing agency determines in writing that competitive sealed bids are not practicable for the specific procurement
- A request for proposals (RFP) shall be used
- The relative importance of all evaluation factors, including price, shall be stated in the RFP
- Public notice required
- All proposals are confidential until an award is made. No public opening of proposals

Competitive Sealed Proposals (5-18A-6 and 7)

- A register of proposals must be prepared listing name and address of each offeror, and identifying the offeror(s) awarded a contract. The register is open for public inspection only after contract award.
- Clarification discussions, revisions, and best and final offers are allowed from each offeror determined to be susceptible of being selected for award. All are to be treated equally in this process.
- Award to responsible offeror whose proposal conforms to the solicitation and most advantageous based on stated evaluation factors.
- This section does not apply to professional service contracts issued pursuant to 5-18D-17 through 5-18D-24.

Sole Source Purchases (5-18A-8)

- Written determination that the supplies and services are so unique, that there is only one practicable source
- Availability to the location required can be used to justify
- Negotiations of price, delivery and quantity to obtain most advantageous price
- Does not apply to construction services or construction equipment

Emergency Purchases (5-18A-9)

- Threat to public health, welfare or safety
- Failing to follow bid requirements does not create an emergency purchase requirement
- Use as much competition as is possible
- Written determination of the emergency must be in the procurement file

Record of Sole Source and Emergency Contracts (5-18A-10)

- Purchasing agency must keep a record listing for 5 years showing:
 - Contractor name
 - Amount and type of contract
 - Listing of supplies, services or public improvements procured



- <\$25,000 Informal purchases. No advertisement for bids required.</p>
 - State agencies must get three quotes for purchases over \$1,000 and under \$25,000.
 - Supplies require requisition and approval from OPM
 - Agencies responsible for service contracts

Centralized Bid Exchange (5-18A-13)

- BOA will establish a centralized bid exchange
- Allow all government agencies in SD to post bids/rfps on the exchange
- Establish fees for use by government users and bidders
- Use will be permissive, not mandatory

Advertisement for Bids or Proposals (5-18A-14)

- Advertisement required for
 - Public improvements of \$50,000 or more
 - Supplies or services (not professional services) of \$25,000 or more

Advertisement for Bids or Proposals (5-18A-14)

- Advertise in appointed legal newspaper
 - Must appear at least twice
 - First time at least 10 days before bid opening or deadline for submission of proposals, in each official newspaper of the purchasing agency
 - Second publication in any legal newspaper in South Dakota.
 - If an agency has no official newspaper
 - First publication shall be made in a legal newspaper with general circulation in the jurisdiction of the purchasing agency

Time for Entering Into Contract (5-18A-15)

- Successful bidder/offeror must enter into contract within the time specified in the IFB or RFP
- If bidder fails to enter into contract, purchasing agency may go to the next low bidder or offeror
- Defaulting bidder is responsible for the difference in price.

Recovery From Defaulting Bidder (5-18A-16)

 Purchasing agency is authorized to recover damages from any defaulting contractor, using all remedies provided in the contract and in law

Officer or Employee Interest in Contract Prohibited (5-18A-17)

 No officer or employee who approves, awards or administers a contract may have an interest in the contract that is in the scope of their duties.

Officer or Employee Interest in Contract Prohibited (5-18A-17)

 No officer or employee who approves, awards or administers a contract may have an interest in the contract that is in the scope of their duties.

Specifications (5-18A-18)

 Must encourage and not limit competition or be unduly restrictive

Brand Name or Equal Specification (5-18A-18)

- Brand name or equal specifications may be used with written determination by the purchasing agency that:
 - There is no other design or performance specification or qualified products list available
 - There is not enough time to prepare a specification that doesn't use a brand name
 - The nature of the product or agency requirements make the use of the brand name or equal specification suitable
 - Use of the brand name or equal specification is in the agency's best interests

Requirements for Brand Name or Equal Specification (5-18A-19)

- Designate three, or as many as are practicable, different brand names as "or equal" references.
- State that substantially equivalent products to those designated will be considered for award.
- Should include a description of the particular design, functional or performance characteristics required.
- If used, language must be included that the use of the brand name is for the purpose of describing the standard of quality, performance and characteristics desired, and not intended to restrict competition.

Brand Name Only Specifications (5-18A-20)

- Written determination that only the identified brand name will satisfy the agency's needs
- Multiple sources of the brand name items need to be identified and use as much competition as possible.
- If only one source is available, then sole source procurement provisions should be used.

Written Contract Required (5-18A-21)

 All contracts must be in writing and signed by an authorized official of the purchasing agency.

Exemptions (5-18A-22)

- Combination of exemptions from former SDCL 5-18 and 5-23
- General Services Administration (GSA) contracts
- Active contracts established by a governmental entity through competitive sealed bids or proposals or competitively solicited and awarded in the past twelve months.
- Equipment repair contracts
- Electric power, water, natural gas; chemical and biological products; laboratory apparatus and appliances; published books, maps, periodicals and technical pamphlets; works of art for museum and public display; medical supplies; communications technologies, computer hardware and software, peripheral equipment, and related connectivity; tableware or perishable foods.

Exemptions (5-18A-22)

- Supplies, services and professional services required for externally funded research projects at BOR institutions
- Property or liability insurance or performance bonds. BOA supervises procurement of these for state agencies.
- Supplies needed by SDDHS or Prison Industries for manufacturing products
- Printing involving student activities, conducted by student organizations and paid out of student fees at BOR institutions
- Surplus property purchased from another purchasing agency

Exemptions (5-18A-22)

- Animal purchases
- School district purchases of perishable food, raw materials for construction or manufacture of products for resale, or transportation of students
- Authorities established by SDCL 1-16A, B, E, G, H, 5-12 or 11-11 are exempt
- Supplies used in the operation of farms by institutions under the control of the Board of Regents
- Supplies purchased for any utility owned or operated by a municipality as long as the purchase doesn't exceed the limits in 5-18A-14
- For political subdivisions, contracts for asbestos removal in emergency response actions and any contract for consultants, audits, legal services, ambulance services, architectural services and engineering, insurance, real estate services or auction services.

Purchase of Foreign Meat Food Products (5-18A-23)

 Except for canned meat products not available from domestic sources, no purchasing agency may purchase meat food products of any foreign country that are imported from outside the United States

Preference for Grade A Milk Processors (5-18A-24)

 Milk processors licensed pursuant to SDCL 39-6-7, when bidding milk products under a competitive solicitation, receive a 5% preference over any bidder that is not a licensed processor

Residential Preference (5-18A-25)

- After reviewing bids or proposals, if all things are equal, considering the cost of transportation in the price, contract award is made as follows:
 - To a "qualified agency" against any other non-qualified agency
 - To a resident business against a non-resident business
 - To a resident manufacturer against a resident non-manufacturer
 - To a resident business whose principal place of business is in South Dakota against a resident business whose principal place of business is outside South Dakota
 - To a non-resident business using supplies or services found in South Dakota against a non-resident that is not using supplies or services found in South Dakota.

Reciprocal Residential Preference (5-18A-26 and 27)

 If a non-resident bidder's home state or province gives them a preference, we apply that preference against them when bidding against South Dakota resident bidders.

 BOA list of preferences laws of other states is available on the OPM website: http://www.state.sd.us/boa/opm/Preferences.htm

Supplies and Services from Qualified Agencies (5-18A-28)

- A qualified agency may submit a list of supplies and services provided by the agency to BOA
- BOA shall make the list of supplies available to purchasing agencies in South Dakota on the BOA website
Persons with Disabilities (5-18A-29)

 No provision of 5-18A, 5-18B, 5-18C or 5-18D may be construed as to prohibit a person with a disability from negotiating a contract for service or supplies or in any other manner doing business with any purchasing agency

Preference for Recycled or Biobased Products (5-18A-30)

 A purchasing agency may give up to 5% preference to the purchase of supplies manufactured from recycled or biobased materials.

Information From Bidders Regarding Preferences (5-18A-31)

 A purchasing agency may require a bidder to provide information regarding whether or not the bidder is entitled to a preference of any kind or is subject to having a preference enforced against them.

Procurements Using Federal Funds (5-18A-32)

 In addition to the provisions of 5-18A, B, C and D, any procurement using federal funds is subject to any federal statutes and regulations governing the use of those funds

Non-complying Bid or Offer (5-18A-33)

- Any bidder or offeror that fails to comply with the provisions of 5-18A, B, C or D, or who provides false information in submitting their bid or offer, is subject to having their bid or offer disallowed.
- Any contract entered into in violation of 5-18A, B, C or D is null and void

BOA is the State Central Procurement Agency (5-18A-34)

- The Bureau of Administration is the central procurement agency for the State of SD
- Legislative and Judicial branches responsible for their own purchases of supplies, services and public improvements

BOA is the State Central Procurement Agency (5-18A-34)

- BOA procures or authorizes the procurement of all supplies and public improvements for state government
- No claim for these types of procurements may be paid unless authorized by BOA
- Individual state agencies and other local units of government are responsible for complying with the statute for the procurement of services.

Bid Bond or Security – Supplies and Services (5-18A-35)

- Bid bonds or security no longer required for supplies and services, but are permitted.
- Bid bonds or security may not be held for longer than 30 days, if the bid or offer is not accepted
- The bid bond of the successful bidder or offeror shall be returned upon signing of contract.

Performance and Payment Bond or Security – (5-18A-36)

- For public improvements performance and payment bonds required pursuant to chapter 5-21
- Performance bonds not required for contracts for supplies and services, but allowed if desired
- If required, the bond or security shall be returned upon satisfactory completion of contract

Cooperative Purchasing (5-18A-37)

- Purchasing agencies may:
 - Enter into agreements with purchasing agents in this or any other state for cooperative purchasing
 - Cooperate with the federal government or other purchasing agencies to establish uniform specifications to establish regional or national cooperative purchasing transactions

Environmentally Preferable Products (5-18A-38)

- Should be purchased when practicable
- BOA will promulgate rules for state agencies regarding specifications, requirements and certification standards
- EPA regulated disinfectants, disinfecting cleaners, sanitizers and other antimicrobial products may not be prohibited as long as they are required to protect public health...



SDCL 5-18B

Public Improvements

- <\$50,000 No advertisement for bids required.</p>
- >\$50,000 Advertisement for sealed bids or proposals required
 - New code does not distinguish between new construction/renovation and other public improvements (increases "other" public improvements from \$25,000 to \$50,000)

Bid Bonds Required

- Bid bonds required if contract is over \$50,000
 - Certified Check or Cashier's Check for 5% of Bid
 - Bid Bond for 10% of Bid

Bid Securities

- must be returned within 30 days of bid opening to unsuccessful bidders
- are returned to the successful bidder upon execution of the contract
- the purchasing agency cannot require a certain surety provider to be used
- forfeited securities accrue to funds provided for the construction of the public improvement

Bond Waivers

Bid Bonds

- If the public improvement is <\$50,000</p>
 - Existing code only allows local governmental units to waive the bid bond requirement if the contract is <\$25,000
- Performance and Payment Bonds (SDCL 5-21)
 - State may waive if <\$50,000</p>
 - Locals may waive if <\$25,000</p>

Bid Advertisements

- Advertise in newspaper 2 times
 - 1st advertisement in each official newspaper of the purchasing agency within 10 days of bid opening
 - If the purchasing agency does not have an official newspaper the 1st ad must have general circulation in the PA's jurisdiction
 - 2nd advertisement in any state newspaper.

Bid Advertisements

Must state:

- Time and place of bid opening
- location where plans and specifications can be examined
- Plans and specifications must be available from 1st advertisement until completion of the project

Plans and Specifications

- Purchasing Agency must furnish at least one copy at no charge to resident contractors wishing to bid
 - Must include fair market value of taxable tangible property if the contractor will use purchasing agency's property.

Contracts Awarded

- Bids must be awarded within 30 days of bid opening
- Purchasing agency may negotiate with the low bidder if the bid exceeds the project estimate

Requirements for Contract Execution

- Signed agreement
- Contractor is required to pay unemployment compensation
- Contractor has excise tax license
- Performance and Payment Bond

Requirements for Contract Execution

- Contractor must certify that either:
 - no more than 20% of labor cost used will be from nonresident bidders; or
 - more than 20% of labor cost used will be from nonresident bidders because resident bidders are not available and at competitive prices

 An architect / engineer may not be a contractor on public improvement projects > \$100,000

Project Superintendent

- Purchasing agency may appoint A/E to provide superintendent services
- Must report every 30 days on contractor's work progress

Change Orders Allowed

- Bidding not required if:
 - contract contains unit prices for the type of work needed
 - the change is reasonably unforeseen at the time the contract was awarded
 - the sum of change orders do not exceed:
 - contracts <\$500,000 (\$25,000 or 15%)
 - contracts >\$500,000 <\$2,500,000 (\$75,000 or 10%)
 - contracts >\$2,500,000 (\$250,000 or 5%)

Progress Payments

- Based on the superintendent's report:
 - Progress payments will be made as outlined in the contract documents for completed work
 - No payment constitutes acceptance of the project

Occupancy before completion and acceptance

 Purchasing agency may occupy the public improvement before final acceptance

Retainages Allowed

- 2X the amount needed to complete the project; or
- 1% of the contract price; >\$300
- bond or deposit of securities in lieu of sums retained from the contractor

Final Payment

- Must be made within 30 days after final acceptance
 - If not, contractor is owed interest not to exceed the category E rate of interest established in Section 54-3-16 (4 percent / year)

Design-Build Contracts Allowed

- If the purchasing agency determines it is in their best interest
 - design and construction is faster than the traditional delivery method will allow; or
 - project complexity; or
 - early cost commitments required;
 - ability to specify all requirements; and
 - all other laws governing public improvements are followed.

Design-Build Contracts Allowed

- A/E and Contractor "team up" to complete the project
- Qualifications Based
- Procurement procedures are published
- Performance Criteria Developer is used
- Design-Build Projects to be advertised

Construction Manager

- Any purchasing agency may engage a construction manager to:
 - assist the owner in project development, review, coordination, and project management involving the A/E and the contractor

Construction Manager at Risk

- Qualifications Based
- CM-R contracts directly with subcontractors and suppliers
- Works with A/E early in the design to provide the owner a Guaranteed Maximum Price (GMP)



Transportation of Students

 No contract for the transportation of students may exceed 5 years

Food Services

- No food service contract may exceed 1 year
- May be renewed for four years
- Changes can be made during the term of the contract if allowed contractually
Public Sale Exemption

- Local governments are exempted from bidding if:
 - able to purchase supplies at a substantial savings at a public sale or auction
 - attempt to obtain 3 competitive quotes

Additional Cost for utilities exempt

 If the municipality requires larger capacity of underground utilities than the developer needs, then the price difference does not need to be bid

County Highway System and Secondary Highways

 Nothing in the procurement chapter may be construed to prevent counties and townships from constructing or maintaining the county highway system or the construction of dams associated with water conservation projects if material costs do not exceed \$25,000

Purchase of Fuel

- Bid requirements do not apply for purchase of fuel for local governmental units
 - May negotiate a contract at the most advantageous cost
 - attempt to obtain 3 quotes

Municipal Garbage Disposal Contracts

- For contracts associated with garbage collection, the local government may include a procedure for adjusting prices to meet changing market conditions not within the control of the vendor
 - may not result in profit increases
 - written justification

Purchases from state contract

- Any local government may purchase supplies from a willing vendor at or below the price listed on state contract
 - If below the state contract price, must note the fact, name of vendor, and price.



Bureau of Administration

- Classifies supplies based on the National Institute of Governmental Purchasing (NIGP) commodity code. (5-18D-1)
- Agencies shall submit estimates to BOA of planned purchases. BOA may change or modify estimates in the best interest of the State. (5-18D-2)
- BOA may pool estimated needs of several agencies into one contract. (5-18D-3)
- Maintains an electronic bid and response system. Sealed bids or proposals may only be submitted through the authorized BOA system. (5-18D-4)

Bureau of Administration

- May obtain expert advice and assistance from any state officer or employee to establish specifications and evaluate bids or proposals. (5-18D-5)
- Shall maintain a state contract listing of supplies or services available in contracts established by BOA. (5-18D-6)
- May establish a state bidder list for bidders wishing to be notified of bid opportunities. (5-18D-7)
- Apportions all expenses incurred in the administration of the procurement management system to all state departments, agencies and institutions... (5-18D-8)
- May reject all bids or proposals and purchase elsewhere, than from those submitting bids or proposals, if more advantageous. (5-18D-9)

Bureau of Administration

- All state contracts drawn or approved to form by the Attorney General and signed by BOA Commissioner or designee (5-18-10)
- May cancel or adjust contract that becomes unreasonable due to market conditions out of the vendor's control. (5-18-11)
- May suspend or debar vendors for cause after notice. (5-18-12)

State Government Printing Projects

- Contracts to include penalty for failure to deliver on time. BOA applies the penalty for printing projects not delivered as specified (5-18-13)
- No state printing office may accept printing jobs from the public. (5-18D-14)
- Printing projects must contain inscription as per administrative rule, listing the publisher, number of copies published, and approximate cost per copy. (5-18D-15)
- BOA may purchase soybean based inks and require use in state printing projects (5-18D-16)

Professional Services Contracts over \$50,000 (5-18D-17)

- No professional services contract exceeding \$50,000 may be awarded or renewed without complying with the statute.
- RFP process must be used and posted on the State's eprocurement system
- RFP must include the procedures for the solicitation and award of the contract.
- Evaluation criteria must be included in the RFP and relative importance of each criteria stated.
- Negotiate with highest ranked contractor
- Prepare register of proposals

Professional Services RFP Evaluation Criteria (5-18D-18)

- Evaluation criteria must be included in the RFP and relative importance of each criteria stated.
- Required criteria:
 - Specialize expertise, capabilities and technical competence
 - Resources available to perform the work
 - Record of past performance
 - Availability to project locale
 - Proposed project management techniques
 - Ability and proven history in handling special project constraints

Professional Services RFP Discussions/Negotiations (5-18D-19)

- Agency may discuss and refine scope of services with highest ranked contractor
- May negotiate terms, including compensation and performance schedule
- Compensation level must be fair and reasonable, as determined by the agency
- If agreement cannot be reached on compensation, the agency may terminate negotiations and then negotiate with the next highest ranked contractor.
- May continue negotiations with additional contractors until an acceptable agreement can be reached.

Professional Services RFP Register of Proposals (5-18D-20)

- A Register of Proposals must be prepared for every RFP issued for professional services
- Register must contain the names of all that were considered, and the name of the awarded contractor
- A copy of the contract and the basis for the contract are public information
- Information submitted by any offeror not awarded a contract is confidential even after award.

Professional Services RFP Exemptions (5-18D-21)

- Unique services that are clearly sole source
- Emergency services to protect public health, safety or resources
- Services required by law to be awarded through a different selection process
- Professional legal services
- Expert witnesses, hearing officers, administrative law judges,
- Services involving "pass through" financial assistance
- Medical, home and community based services
- Services performed for a state agency by another state or local agency, or contracts made by a state agency with a local government agency to provide public services
- Entertainers at the State Fair.

Professional Services RFP – Contested Case (5-18D-22)

 An agency required to issue a decision in a contested case proceeding in one year may increase its statutory deadline for issuing the decision by sixty (60) days in order to enter into a professional services contract.

Property/Liability Insurance and Performance Bonds (5-18D-23)

- BOA must publish notice of intent to purchase property or liability insurance or performance bonds.
- Display advertisement in at least three papers at least sixty days prior to purchase
- Doesn't apply to purchases under \$5,000

BOA (OPM) Records (5-18D-24)

 BOA (OPM) maintains records of requisitions, bid advertisements, bids/proposals, surety, contracts, purchase orders, and other related documents.

Purchase of Motor Vehicles (5-18D-25)

 State of South Dakota motor vehicles shall ONLY be from authorized dealers licensed by the State of South Dakota.

State Auditor and State Contracts (5-18D-26 and 27)

- Auditor may stop the letting or execution of a contract with the State.
- Written notice is required stating reasons why the contract is illegal, unauthorized or improper
- Any person may appeal the auditor's decision to the State Board of Finance within 20 days of stop order.
- Board of Finance decision is final and binding on the agency

Questions

Public Improvements: Kristi Honeywell, P.E. Office of the State Engineer Phone: 605-773-3466 Email: Kristi.Honeywell@state.sd.us

Supplies & Services

Jeff Holden, Director Office of Procurement Management Phone: 605-773-4280 Email: Jeff.Holden@state.sd.us