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CERTIFICATION OF EMERGENCY RULES
FILED WITH LEGISLATIVE SERVICES AGENCY
OTHNI LATHRAM, DIRECTOR

Pursuant to Code of Alabama 1975, §§41-22-5(b) and 41-22-6(c)(2)a. and b.

I certify that the attached emergency new chapter is a correct copy as promulgated and adopted on the 30th day of September, 2022.

AGENCY NAME: Alabama Department of Transportation

RULE NO. AND TITLE: 450-12-1 Transportation Procurement Procedures

EFFECTIVE DATE OF RULE: October 1, 2022

EXPIRATION DATE (If less than 120 days): _____

NATURE OF EMERGENCY:

This emergency new chapter implements the new Alabama procurement law, enacted Act 2021-296, which requires the Department to develop rules for the procurement of professional services consistent with principles that promote fairness, competition, transparency, integrity, and value in the procurement process. In addition, ALDOT has exemptions for various categories under the new Alabama procurement law, and these procedures are put in place as a structure for exempted procurements. The new Alabama procurement law goes into effect on October 1, 2022; therefore, this new emergency chapter is needed while the Department goes through the rulemaking process to adopt its permanent rules on this subject.

STATUTORY AUTHORITY: §§ 41-4-124(c) and 23-1-59, Code of Alabama 1975

SUBJECT OF RULE TO BE ADOPTED ON PERMANENT BASIS YES NO


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REC'D & FILED

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Alabama Department of Transportation

ALABAMA DEPARTMENT OF TRANSPORTATION
ADMINISTRATIVE BUREAU
ADMINISTRATIVE CODE

CHAPTER 450-12-1
TRANSPORTATION PROCUREMENT PROCEDURES

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450-12-1-.01-.01ER - Purpose. The purpose of this Chapter is to adopt rules pursuant to the Department's statutory authority under Article 5 of Chapter 4 of Title 41, Code of Alabama 1975, governing the purchase of professional services by the department which are consistent with the principles contained in Article 5 and promote fairness, competition, transparency, integrity, and value. In addition, this Chapter sets out the Department's authority and procedures to procure certain materials, supplies, and services which are exempt from procurement through the Office of the Chief Procurement Officer and exempt from the competitive requirements of Article 5. This Chapter does not apply to procurements made pursuant to authority prescribed to the Department under Alabama Code § 23-1-40(h) or Alabama Code § 23-2-144(b) or any public works project procured under Title 39 of the Code of Alabama.

Author: William F. Patty, Chief Counsel

Statutory Authority: Code of Ala. 1975, §§ 23-1-40, 23-1-48, 23-1-50, 23-1-50.1, 23-1-51, 23-1-53, 23-1-59, 23-1-62, 41-4-124, 41-4-126.

History: Filed September 30, 2022, effective October 1, 2022.

450-12-1-.02-.02ER Definitions. For the purpose of the rules of this Chapter relating to procurement of materials, supplies, and services by the Department, the following terms, words and phrases will have the meanings herein given, unless otherwise specifically defined in this Chapter, unless another intention clearly appears, or the context otherwise requires. The singular will include the plural, and the plural will include the singular.

(1) **ARCHITECT SERVICES:** services provided by a firm or individual who is legally qualified to practice architecture.

(2) **ENGINEERING SERVICES:** services provided by a firm or individual:

(a) who, by reason of his or her special knowledge of the mathematical, physical, and engineering sciences and the principles and methods of engineering analysis and design, acquired by engineering education and engineering experience, is qualified to practice engineering and has been licensed by the state board as a professional engineer, or employs individuals with such attributes, or

(b) who is a professional specialist, or employs professional specialists, in the technique of measuring land, educated in the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence and all requisites to surveying of real property, is qualified to practice land surveying, and has been licensed as a professional land surveyor by the state board.

(3) **EQUIPMENT:** self-propelled motor vehicles, machinery, tools, or other equipment used by the Department in connection with the discharge of its duties related to construction, maintenance, and repair of roads and bridges within this State.

(4) **MAINTENANCE:** activities of the Department to maintain the condition of the transportation system, which may be routine or preventative, or to respond to specific conditions or events that restore the highway system to a functional state of operation.

(5) **OPERATIONS:** activities of the Department where it is proactively managing state facilities to balance the capacity of the system and the prevailing demands, and

responding to out of the ordinary conditions (e.g., incidents, adverse weather, work zones, special events, emergency evacuations).

(6) PROFESSIONAL SERVICES: the services of physicians, architects, engineers, landscape architects, land surveyors, geoscientists, attorneys, teachers, artists, appraisers, and other individuals, or business entities offering the services of those individuals, who possess a high degree of scientific or specialized skill and knowledge where the experience and professional qualifications of the service provider are particularly relevant to the provision of the required service.

(7) ROAD BUILDING MATERIALS: dirt, gravel, stone, slag, borrow or other materials, in natural state or processed by crushing, grading, screening, or other means of processing, that are used for purposes of construction, maintenance, or operation of highway infrastructure or right-of-way of the Department.

(8) SERVICES: as defined by Alabama Code § 41-4-114(a)(25), or as otherwise amended.

(9) SUPPLIES: as defined by Alabama Code § 41-4-114(a)(28), or as otherwise amended.

Author: William F. Patty, Chief Counsel

Statutory Authority: Code of Ala. 1975, §§ 23-1-40, 23-1-48, 23-1-50, 23-1-50.1, 23-1-51, 23-1-53, 23-1-59, 23-1-62, 41-4-124, 41-4-126.

History: Filed September 30, 2022, effective October 1, 2022.

450-12-1-.03-.03ER Availability to Procure through Chief Procurement Officer. Notwithstanding other provisions in this Chapter, the Department may elect to use procurement procedures established by the Chief Procurement Officer for purchases of goods or services that are exempted from the Chief Procurement Officer's authority as stated in Alabama Code § 41-4-124, except where procurements under the procedures of the Chief Procurement Officer would be in conflict with the Department's requirements under federal law.

Author: William F. Patty, Chief Counsel

Statutory Authority: Code of Ala. 1975, §§ 23-1-40, 23-1-48, 23-1-50, 23-1-50.1, 23-1-51, 23-1-53, 23-1-59, 23-1-62, 41-4-124, 41-4-126.

History: Filed September 30, 2022, effective October 1, 2022.

450-12-1-.04-.04ER Contracting for Professional Services.

The Department is required by Alabama Code § 41-4-124(c) to develop rules for the procuring of professional services consistent with principles that promote fairness, competition, transparency, integrity, and value in the procurement process.

(1) Architect/Engineer Professional Services.

(a) For contracting for Architect or Engineering Services where federal funds will be used, in whole or in part, to make payment under the contract award, the Department will follow the procedures as prescribed in the Procedure for Selection of Architect and/or Engineering Services, which are procedures approved by Federal Highway Administration in compliance with 23 C.F.R. Part 172.

(b) For contracting for Architect or Engineering Service where state funds will be exclusively used to make payments under the contract award, the Department may use the procedures as prescribed in the Procedure for Selection of Architect and/or Engineering Service or alternatively the procedures for procuring other professional services in accordance with the rules in this chapter.

(c) The Procedure for Selection of Architect and/or Engineering Service is available on the Department's website.

(2) Attorney Services.

(a) Attorneys retained to represent the Department, or its officials or employees, in litigation shall be appointed by the Attorney General in consultation with the Governor from a list of attorneys maintained by the Attorney General. All attorneys interested in representing the Department, or its officials or employees, may apply to be included on the list. The selection of the attorney or law firm is based upon the level of skill, experience, and expertise required in the litigation and the fees charged

by the attorney or law firm will be taken into consideration so that the Department receives the best representation for the funds paid. Fees will be negotiated and approved by the Governor in consultation with the Attorney General. Maximum fees paid for legal representation that does not involve a contingency fee contract may be established by executive order of the Governor.

(b) Attorneys retained by the Department to render nonlitigation legal services will be selected from a list of attorneys maintained by the Legal Advisor to the Governor. All attorneys interested in representing the Department may apply and shall be included on the list. The selection of the attorney or law firm is based upon the level of skill, experience, and expertise required for the services, but the fees charged by the attorney or law firm will be taken into consideration so that the Department receives the best representation for the funds paid. Fees for such services will be negotiated by the Department and will be subject to the review and approval of the Governor or the Director of Finance when so designated by the Governor.

(3) Other Professional Services

(a) Unless determined otherwise by the Director, professional services will be procured by competitive sealed proposals through the Department. This process is referred to as Transportation Request for Proposals (TRFP).

(b) Proposals will be solicited through a request for proposals.

(c) Adequate public notice of the request for proposals will be given a reasonable time prior to the date set forth in the opening the received proposals. The Director, or his/her designee, may, at his discretion, shorten the time for public notice where the shortened notice period is in the best interest of the Department.

(d) Proposals will be opened so as to avoid disclosure of contents to competing offerors prior to contract award. A register of proposals will be prepared and will be open for public inspection after award of the contract.

(e) A request for proposals will state the relative importance of price and other factors and subfactors, if any.

(f) Discussions may be conducted with responsible offerors who submit proposals determined by the Director, or his designee, to be reasonably competitive for award to assure full understanding of, and responsiveness to, the solicitation requirements. Any determinations of the Director are not subject to review. Offerors will be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. Revisions of proposals may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there may not be disclosure of any information derived from proposals submitted by competing offerors.

(g) Contracts will be awarded to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the state, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria will be used in the evaluation. Public notice of the award of a contract will be given in the manner described in the request for sealed proposals.

(h) The Director, or his/her designee, in his/her discretion may provide debriefings that furnish the basis for the source selection decision and contract award.

(i) -

1. Before soliciting proposals, the Director, or his/her designee, may authorize issuance of a request for qualifications from prospective offerors. The request will contain, at a minimum, a description of the scope of work to be solicited by the request for proposals, the deadline for submission of information, and how prospective offerors may apply for consideration. The request will require information concerning the prospective offeror's product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications will be given in the same manner as provided in subsection (c) of this rule.

2. After receipt of the responses to the request for qualifications from prospective offerors, all qualified offerors, as determined by the Director, or his/her designee, will have an opportunity to submit proposals. The determination regarding which offerors are qualified is not subject to review.

3. If a professional service provider is prohibited by law or policy from submitting proposals in response to a request for proposals, the Director may utilize the request for qualifications process to determine the awardee.

(4) Any agreement entered into pursuant to this section where payment is made on a cost-plus-fixed fee basis is not a cost-plus contract as described in Alabama Code § 41-4-143 and is thus not prohibited by that provision.

Author: William F. Patty, Chief Counsel

Statutory Authority: Code of Ala. 1975, §§ 23-1-40, 23-1-48, 23-1-50, 23-1-50.1, 23-1-51, 23-1-53, 23-1-59, 23-1-62, 41-4-124, 41-4-126.

History: Filed September 30, 2022, effective October 1, 2022.

450-12-1-.05-.05ER Contracting for Supplies and Services.

The Department will utilize the following purchase procedures when contracting for purchases of equipment or repairs of equipment used in the construction and maintenance of highways as described in Alabama Code § 41-4-126(k); road building materials used for transportation infrastructure including dirt, gravel, stone, slag, or borrow materials, in natural state or processed by crushing, grading, or screening processes as described in Alabama Code § 41-4-126(m); and supplies and services for the maintenance and operation of highway infrastructure and right-of-way as described in Alabama Code § 41-4-126(n). The purchasing method selected for procurement under this section should be the method that best meets the needs of the Department while promoting fairness, transparency, and good stewardship of State resources.

(1) When contracting for purchases of equipment or repairs of equipment, the Director, or his/her designee, may select equipment or repair facilities from the nearest or most cost-effective seller, parts supplier, or mechanic.

(2) When contracting for road building materials, road building materials may be purchased from private landowners or commercial providers from the nearest or most

cost-effective source available for the particular application.

(3) Transportation Invitations to Bid (TITB).

(a) Except as otherwise provided in this chapter, contracts will be awarded by competitive sealed bidding.

(b) An invitation to bid will be issued and will include a purchase description and all contractual terms and conditions applicable to the procurement.

(c) Adequate public notice of the invitation to bid will be given a reasonable time prior to the date set forth in the invitation for the opening of bids.

(d) Bids will be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation to bid. The amount of each bid, the name of each bidder, and any other information required will be recorded. The record and each bid will be open to public inspection to the extent the bid does not contain any confidential or proprietary information or otherwise excluded from disclosure under an open records request.

(e) Bids will be unconditionally accepted without alteration or correction, except as authorized in this section. Bids will be evaluated based on the requirements set forth in the invitation to bid, which may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Any criteria that will affect the bid price and will be considered in evaluation for award will be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The invitation to bid will set forth the evaluation criteria to be used. No criteria may be used in bid evaluations that are not set forth in the invitation to bid.

(f) -

1. When a bid is submitted that contains an error, the Director, or his/her designee, may authorize the correction or withdrawal of the bid or may cancel the award of the contract.

2. After a bid has been opened, with the exception of price negotiations with the lowest responsible bidder, no changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition will be permitted.

(g) -

1. Unless there is a compelling reason to reject bids, notice of intent to award to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation to bid will be given by posting the notice on the Department's website or at a location specified in the invitation to bid which the Department determines to provide the greatest visibility and access to prospective bidders. Before posting the notice of intent to award, the Director, or his/her designee, may negotiate with the lowest responsive and responsible bidder to lower the bid price within the scope of the invitation to bid.

2. The Director, or his/her designee, may award multiple purchase contracts resulting from a single invitation to bid where the specifications of the items of supplies or services intended to be purchased by a requisitioning agency or agencies are determined, in whole or in part, by technical compatibility and operational requirements. In order to make multiple awards under this rule, the Department will include in the invitation to bid a notice that multiple awards may be made and the specific technical compatibility or operational requirements necessitating multiple awards. Multiple awards of purchase contracts with unique technical compatibility or operational specifications will be made to the lowest responsible bidder complying with the unique technical compatibility or operational specifications.

(h) When it is considered impractical by the Director, or his/her designee, to initially prepare a purchase description to support an award based on price, an invitation to bid may be issued requesting the submission of unpriced offers to be followed by an invitation to bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

(i) -

1. Before soliciting bids, the Director, or his/her designee, may authorize issuance of a request for qualifications from prospective bidders. The request will contain, at a minimum, a description of the scope of work to be solicited by the invitation for bids, the deadline for submission of information, and how prospective bidders may apply for consideration. The request will require information concerning the prospective bidders' product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications will be given in the manner provided in subsection (c).

2. After receipt of the responses to the request for qualifications from prospective bidders, all qualified bidders, as determined by the Director, or his/her designee, will have an opportunity to bid. The determination regarding which bidders are qualified is not subject to review.

(4) Transportation Request for Proposals (TRFP). A contract for supplies or services may be entered into by competitive sealed proposals when the Director, or his/her designee, determines that the use of competitive sealed bidding is either not practicable or not advantageous to the state. Contracts for goods and services entered into by competitive sealed proposal will follow the requirements proscribed in Alabama Administrative Code § 450-12-2(3) for procurement of other professional services by competitive sealed proposals.

(5) Transportation Small Purchases (TSMP). Any procurement not exceeding the small purchase amount as defined in Alabama Administrative Code § 355-4-3-.04 may be made in accordance with small purchase procedures as prescribed under that chapter. A procurement may not be artificially divided so as to constitute a small purchase under this rule. Small purchases require the solicitation of at least three (3) quotes from any entity known for supplying the needed supply or service, and the Department may select the returned quote for the purchase that will be of best value for the Department.

(6) Transportation Sole Source (TSS). A contract may be awarded for a supply or service without competition when the Director, or his/her designee, determines in writing that there is only one source for the required supply or

service. Sole source contracts may not exceed one year unless the Director determines in writing that there continues to be only one source for the required supply or service.

(7) Transportation Special Procurements (TSP). Notwithstanding any other provision of this chapter, the Director, or his/her designee, may initiate a procurement when the Director, or his/her designee, determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest. Any special procurement under this section shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the selection of the particular contractor shall be included by the Director, or his/her designee, in the contract file.

(8) Transportation Emergency Purchases (TEP). Notwithstanding any other provision of this chapter, the Department may make emergency procurements of supplies and services when there is a threat to public health, welfare, or safety under emergency conditions, as determined by the Director, or his/her designee. Emergency procurements made under this section will be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor will be included in the contract file. Emergency purchases require the solicitation of at least three (3) quotes from any entity known for supplying the needed supply or service, and the Department may select the returned quote for the purchase that will be of best value for the Department. If the emergency situation creates an immediate and serious need for supplies or services that cannot be met through normal procurement methods and the lack of which would seriously threaten (a) the functioning of the Department, (b) the preservation or protection of state right-of-way, or (c) the health or safety of any person, then the Department may take action to immediately address the emergency without solicitation of quotes.

(9) Any agreement entered into pursuant to this section where payment is made on a cost-plus-fixed fee basis is not a cost-plus contract as described in Alabama

Code § 41-4-143 and is thus not prohibited by that provision.

Author: William F. Patty, Chief Counsel

Statutory Authority: Code of Ala. 1975, §§ 23-1-40, 23-1-48, 23-1-50, 23-1-50.1, 23-1-51, 23-1-53, 23-1-59, 23-1-62, 41-4-124, 41-4-126.

History: Filed September 30, 2022, effective October 1, 2022.

450-12-1-.06-.06ER Protests, Disputes, and Appeals.

(1) In the event of any dispute between the parties to any contracts or purchases made under this chapter, exclusive of contracts for engineering and architectural services prescribed in Alabama Administrative Code § 450-12-1-.04(1), both parties shall meet and engage in a good faith attempt to resolve the dispute. Should that effort fail, and the dispute involves the payment of money, a party's sole remedy is the filing of a claim with the Board of Adjustment of the State of Alabama.

(2) For any and all other disputes arising under the terms of contracts or purchases made under this chapter, exclusive of contracts for engineering and architectural services prescribed in Alabama Administrative Code § 450-12-1-.04(1), which are not resolved by negotiation, the parties will utilize appropriate forms of non-binding alternative dispute resolution including, but not limited to, mediation. Such dispute resolution shall occur in Montgomery, Alabama utilizing where appropriate, mediators selected from the roster of mediators maintained by the Center For Dispute Resolution of the Alabama State Bar. In the event that the non-binding alternative dispute resolution is unsuccessful in resolving the issues between the Department and the contracting party under this section, the Director shall make a final decision, which includes the relevant facts and rationale, on the protest or dispute.

Author: William F. Patty, Chief Counsel

Statutory Authority: Code of Ala. 1975, §§ 23-1-40, 23-1-48, 23-1-50, 23-1-50.1, 23-1-51, 23-1-53, 23-1-59, 23-1-62, 41-4-124, 41-4-126.

History: Filed September 30, 2022, effective October 1, 2022.

450-12-1-.07-.07ER Previous Procurement Procedures. The rules set forth in this Chapter govern all contracts solicited and entered into on or after October 1, 2022. Contracts solicited before October 1, 2022, will continue to be governed by the procurement procedures in effect before October 1, 2022, until such contracts expire or are terminated at which time the procurement procedures in effect before October 1, 2022 shall be replaced by this Chapter.

Author: William F. Patty, Chief Counsel

Statutory Authority: Code of Ala. 1975, §§ 23-1-40, 23-1-48, 23-1-50, 23-1-50.1, 23-1-51, 23-1-53, 23-1-59, 23-1-62, 41-4-124, 41-4-126.

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