

## **CHAPTER 54-44.4 STATE PURCHASING PRACTICES**

### **54-44.4-01. Declaration of policy - Definitions.**

It is state policy to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons to sell to the state, each state agency and institution shall obtain its necessary commodities and services at competitive cost, consistent with quality, time, and performance requirements, except as otherwise provided by law. As used in this chapter, unless the context requires otherwise:

1. "Commodities" means all property, including equipment, supplies, materials, printing, insurance, and leases of equipment.
2. "Procurement officer" means an individual duly authorized to enter and administer purchasing contracts and make written determinations with respect thereto and also includes an authorized representative acting within the limits of authority.
3. "Professional services" means those services requiring special knowledge, education, or skills when the qualifications and experience of the individual rendering the services are of primary importance and the individual is required to exercise professional judgment. Professional services providers include appraisers, attorneys, accountants, psychologists, physicians, dentists, planners, analysts, and consultants. The term includes human services under which a person provides direct health or social welfare services to the citizens on behalf of the state. The term does not include services defined in section 54-44.7-01.
4. "Purchasing agency" means a governmental entity in the executive branch of government other than the office of management and budget which is authorized by this chapter, rules adopted under this chapter, written policy of the office of management and budget, or by way of delegation from the office of management and budget to enter purchasing contracts for commodities and services.
5. "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports that are merely incidental to the required performance. The term includes professional services.

#### **54-44.4-01.1. Elected officials - Bidder - Communication.**

The office of management and budget shall develop guidelines for a person interested in conducting business with the state. The guidelines must address communications between interested persons and purchasing agencies before, during, and after the procurement process. Procurements conducted by the office of management and budget or a purchasing agency must have a procurement officer who serves as the point of contact for all correspondence related to the procurement. A person that is interested in submitting a bid or has submitted a bid or proposal to provide commodities or services to the state in response to an active procurement should ensure all communications related to the procurement are only with the designated point of contact. This section does not restrict an interested person's communication with state officials or any member of the legislative assembly unless the state official or member of the legislative assembly is involved directly with the procurement for which the person is interested or has submitted a bid or proposal.

#### **54-44.4-02. Office of management and budget purchasing services.**

The office of management and budget shall purchase or lease or otherwise arrange for the procurement, for all state agencies and institutions in the executive branch of state government, all materials, furniture, fixtures, printing, insurance, services, and other commodities. The International Peace Garden may participate in the procurement authorized by this section. The following commodities and services, however, are not subject to the procurement requirements of this chapter:

1. Land, buildings, space, or the rental thereof.
2. Telephone and telegraph service and electrical light and power services.

3. Public books, maps, periodicals, resource materials, and technical pamphlets.
4. Department of transportation materials, equipment, and supplies in accordance with section 24-02-16.
5. Procurements by the industrial commission for energy-related programs under chapters 17-05, 54-17.5, 54-17.6, 54-17.7, 54-63, and 54-63.1 and under those statutes in title 38 authorizing the industrial commission to perform well and hole pluggings, reclamation work, equipment removal, leak prevention, and similar work.
6. Services for the maintenance or servicing of equipment by the manufacturer or authorized servicing agent of that equipment when the maintenance or servicing can best be performed by the manufacturer or authorized service agent, or when such a contract would otherwise be advantageous to the state.
7. Emergency purchases the office of management and budget or a purchasing agency cannot make within the required time and which involve public health or public safety, or when immediate expenditures are necessary for repairs of state property to protect it against further loss or damage, or to prevent or minimize serious disruption in state services.
  - a. Emergency purchases made under this subsection must treat all bidders fairly and promote competition as is practicable under the circumstances;
  - b. The procurement file must contain a written determination of:
    - (1) The basis for the emergency; and
    - (2) The basis for the selection of the particular contractor.
  - c. If the emergency circumstances warrant a noncompetitive purchase, the office of management and budget or the purchasing agency shall document within the procurement file a written determination of the basis for the noncompetitive purchase, including the circumstances that justified the noncompetitive purchase.
  - d. If the emergency purchase is subject to federal funding reimbursement, the office of management and budget or the purchasing agency shall ensure the procurement procedures and documentation are adequate to satisfy requirements for federal reimbursement.
  - e. If time allows, emergency purchases for commodities under this subsection may require a sample for use in determining whether an offered product meets specifications.
8. Commodities and services costing less than a specified amount as determined by written directive by the director of the office of management and budget.
9. Specified commodities and services as determined by written directive by the director of the office of management and budget.
10. Employee benefit services, trust-related services, and investment management services obtained by an agency with a fiduciary responsibility regarding those services. Nothing in this subsection may be construed to allow an agency to create or renew a contract perpetually and without limitation.
11. Services to extract, tow, store, and dispose of abandoned or submerged vehicles as defined in chapter 23.1-15.
12. Contracts by the agriculture commissioner for agricultural market news services under cooperative agreements with the United States department of agriculture, ombudsmen for pipeline restoration under section 4.1-01-17, environmental impact mitigation services under section 4.1-01-21.1, ombudsmen for wind property issues under section 4.1-01-23, weed control inspection agents under section 4.1-14-02, and hemp testing under section 4.1-18.1-04.2.
13. Contracts by the state auditor for audits of computer systems under section 54-10-29.
14. Contracts by the attorney general with experts under section 10-33-145.
15. Contracts by the department of health and human services for online virtual mental health and suicide prevention simulation-based training programs under subsection 28 of section 50-06-05.1 and brain injury informal supports under section 50-06.4-07.

All purchases made by the office of management and budget or a state agency or institution to which authority to purchase has been delegated by the office of management and budget must

be made in accordance with this chapter, rules adopted under this chapter, and written policies of the office of management and budget.

**54-44.4-02.1. Procurement of services.**

All services purchased by the office of management and budget or by an agency or institution in the executive branch of state government must comply with the standards and guidelines for procurement of services established by the office of management and budget.

**54-44.4-02.2. Specified exempt commodities and services - Report to the budget section.**

The director of the office of management and budget shall report to the budget section in December of even-numbered years on specified commodities and services exempted by written directive of the director from the procurement requirements of chapter 54-44.4.

**54-44.4-03. Director of the office of management and budget may delegate purchasing authority.**

The director of the office of management and budget or the director's designee may delegate to state agencies and institutions the authority to make purchases of items not otherwise exempted by law. Any delegation of purchasing authority must be in writing and must specify what may be purchased by the agency or institution and the duration of the delegation.

**54-44.4-04. Office of management and budget - Rules.**

The office of management and budget shall adopt, in accordance with the procedures provided by chapter 28-32, rules necessary to administer this chapter. The written directives issued by the director exercising authority provided in sections 54-44.4-02 and 54-44.4-03 need not be adopted in accordance with chapter 28-32.

**54-44.4-05. Competitive, limited competitive, noncompetitive, and negotiated purchases - Exempt records.**

1. Except as otherwise provided in sections 12-48-03.1 and 44-08-01, chapter 25-16.2, and this chapter, purchasing contracts must be awarded through a competitive bidding process to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability, unless it is determined to be advantageous to the state to select a contractor through a competitive proposal process pursuant to section 54-44.4-10 using other or additional criteria. Notwithstanding this section, the director of the office of management and budget or the director's designee may determine a different procurement process is in the best interest of the state and shall document the circumstances, procurement process, and basis for contract award in the procurement file.
2. The procurement officer may reject any or all bids or proposals or negotiate for a lower price with a successful bidder or offeror. Each bid or proposal received, with the name of the bidder or offeror, must be recorded. The office of management and budget may enter into term contracts for the acquisition of commodities or services and may make multiple awards for term commodity or service contracts when it deems a multiple award to be in the best interests of the state.
3. All bids received under this chapter pursuant to a competitive sealed bid are exempt records under subsection 5 of section 44-04-17.1 until the date and time the bids are opened.
4. The office of management and budget shall adopt rules specifying the circumstances under which competition may be waived or limited, when negotiation may be used, and specifying the required justifications and procedures for using those methods of purchasing. The office of management and budget shall adopt rules related to sending notice of intent to make limited competitive, noncompetitive, and negotiated purchases in accordance with this chapter. The notice must describe the needed commodity or service and the intended procurement method and must state that persons are

permitted to submit bids or proposals for contracts to be awarded under this section. The circumstances that may permit limited competitive, noncompetitive, or negotiated purchases include:

- a. The commodity or service is available from only one source.
- b. The commodity or service is to be purchased for experimentation or trial.
- c. No acceptable bid or proposal was received pursuant to a competitive bidding or competitive proposal process.
- d. Commodities are being purchased for over-the-counter resale.
- e. Acceptable commodities or services are produced or provided by correctional institutions or other government agencies or a work activity center as defined in section 25-16.2-01.
- f. The anticipated cost of purchasing specified commodities or services is less than an amount determined by the office of management and budget which would justify the expense of a competitive bidding or competitive proposal process.
- g. A used commodity is advantageous to the state and the commodity is available only on short notice.
- h. The commodity is a component or replacement part for which there is no commercially available substitute and which can be obtained only from the manufacturer.
- i. Compatibility with equipment currently owned by the state is essential to the proper functioning of that equipment.
- j. The agency provides documentation indicating that the services or the circumstances are of such a nature that deviation from the procurement procedure is appropriate.
- k. Recurring support costs associated with implemented information technology solutions, including licensing, service agreements, maintenance, and subscriptions for software as a service, platform as a service, and infrastructure as a service.
- l. Contracts for specialized equipment, machinery, and materials required for manufacturing, production, and distribution by the North Dakota mill and elevator association under section 54-18-02.
- m. Purchases of copyrighted printed and electronic books, periodicals, subscriptions to publications, subscriptions to information services, prerecorded audio and video materials, state library materials, and state library online resources.

#### **54-44.4-05.1. Resolution of tie bids or proposals.**

In the event that two or more bids or proposals contain identical pricing or receive identical evaluation scores, preference must be given to a resident North Dakota bidder, seller, vendor, offeror, or contractor as defined in section 44-08-02.

#### **54-44.4-06. All purchases to be made in accordance with specifications - Multistep sealed bids.**

1. For purposes of this chapter, specification means a description of all required physical, design, performance, functional, and other characteristics of a commodity or service the purchaser requires and, consequently, what a bidder must offer. The office of management and budget and institutions of higher education shall develop similar specifications for purchases of commodities and services of high common usage. State agencies and institutions shall provide such assistance as may be requested by the office of management and budget and the institutions of higher education in the development of specifications. The office of management and budget and the institutions of higher education shall implement such procedures as are necessary for the inspection, testing, and acceptance of commodities or services to determine that those received are in conformity with contract specifications.
2. When it is determined to be impractical to initially prepare a purchase description to support an award based on price, a solicitation may be issued requesting the submission of unpriced offers to be followed by a competitive bidding or competitive

proposal process limited to those bidders or offerors found to be qualified under the criteria set forth in the first solicitation.

**54-44.4-07. Procurement of environmentally preferable products.**

1. The office of management and budget, the institutions of higher education, and any other state agency or institution that has authority to purchase products are encouraged to purchase environmentally preferable products.
  - a. When practicable, specifications for purchasing newsprint printing services should specify the use of soybean-based ink. The North Dakota soybean council and the agriculture commissioner shall assist the office of management and budget in locating suppliers of soybean-based inks and in collecting data on the purchase of soybean-based inks.
  - b. When practicable, biobased products should be specified.
2. The office of management and budget, in coordination with the state board of higher education, shall develop guidelines for a biobased procurement program.

**54-44.4-08. Purchase of recycled paper products.**

When practicable, the office of management and budget, and any state agency or institution that has authority to purchase paper and paper products, should specify at least twenty-five percent recycled material.

**54-44.4-09. Bidders list.**

1. The office of management and budget shall establish and maintain a bidders list of persons that desire to be informed of government procurement opportunities. The office of management and budget or the purchasing agency shall notify those on the list when issuing invitation for bids or request for proposals over the amount established for small purchases, except as otherwise provided in this section. The office of management and budget or the purchasing agency shall notify those on the list when sending notice of intent to make cooperative, limited competitive, noncompetitive, and negotiated purchases.
2. To be placed on the bidders list a person shall file an application with the office of management and budget. The application must contain information requested by the office of management and budget, including business and persons' names, telephone numbers, addresses, type of business organization, the types of commodities or services for which the applicant is interested in receiving solicitations, and other business information the office of management and budget determines relevant.
3. The office of management and budget or purchasing agency additionally may send notice of procurement opportunities to persons that are not on the bidders list.

**54-44.4-09.1. Secretary of state registration.**

A person that has a registration requirement with the secretary of state must be registered before the contract award and the registration must remain active for the duration of the contract period.

**54-44.4-10. Competitive sealed proposals - Exempt records.**

1. A contract for commodities or services may be entered by competitive sealed proposals when a determination is made that the use of competitive sealed bidding is either not practicable or not advantageous to the state. The request for proposal must state the relative importance of price and other factors and subfactors, if any.
2. Proposals must be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. All proposals received pursuant to a competitive sealed proposal process are exempt records under subsection 5 of section 44-04-17.1 until an award is made.
3. Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of

clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before award for the purpose of obtaining best and final offers. In conducting discussions, there may be no disclosure of any information derived from proposals submitted by competing offerors.

4. Unless all proposals are rejected, award must be made 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 may be used in the evaluation. The contract file must contain the basis on which the award is made. Written notice of the award of the contract to the successful offeror must be promptly given to all offerors.

#### **54-44.4-11. Small purchases.**

1. A procurement not exceeding the amount established by written directive of the director of the office of management and budget or by the state board of higher education under subsection 5 of section 15-10-17 may be made in accordance with small purchase procedures.
2. A small purchase need not be made through competitive sealed bidding or competitive sealed proposals. However, small purchases must be made with competition that is practicable under the circumstances.
3. Procurement requirements may not be artificially divided as to constitute a small purchase under this section.

#### **54-44.4-12. Resolution of protested solicitations and awards.**

1. An interested party may protest the award of a contract, the notice of intent to award a contract, or a solicitation for commodities or services by the office of management and budget or purchasing agency under this chapter. The protest must be submitted in writing to the procurement officer responsible for the contract or solicitation within seven calendar days after the protestor knows or should have known of the facts giving rise to the protest.
2. If a contract has been awarded, the procurement officer immediately shall give notice of a protest to the contractor. In the case of pending award, a stay of award may be requested. A stay must be granted unless a written determination is made that the award of the contract without delay is necessary to protect the interests of the state.
3. If the protest is not resolved by mutual agreement, the procurement officer promptly shall send by certified mail to the protestor a written decision containing the basis for the decision and inform the protestor of the protestor's right to appeal.
4. The protestor may file an appeal of the decision rendered by the procurement officer with the director of the office of management and budget or designee. An appeal must be filed in writing within seven calendar days after the protestor receives the decision rendered by the procurement officer of the office of management and budget or the purchasing agency. The appeal must include a copy of the decision being appealed and the basis for the appeal. Within seven calendar days the director of the office of management and budget or the director's designee shall send by certified mail written notice of the decision to the protestor.

#### **54-44.4-13. Cooperative purchasing.**

1. The office of management and budget shall purchase commodities or services as requested by agencies and institutions under the jurisdiction of the state board of higher education and the legislative and judicial branches of state government.
2. The office of management and budget and the agencies and institutions under the jurisdiction of the state board of higher education shall make joint purchases of like commodities or services of high common usage when the office of management and

budget and the state board of higher education determine it is in the best interest of the state.

3. The director of the office of management and budget or the director's designee may agree to purchase commodities or services under contracts entered into by the United States general services administration or contracts of other government entities if it is determined to be in the best interest of the state after consideration of price, contractual terms and conditions, and the availability of competition.
4. The director of the office of management and budget or the director's designee may participate in, sponsor, or administer a cooperative purchasing agreement with one or more government entities or a nonprofit organization established on behalf of public entities for the procurement of commodities or services in accordance with an agreement entered into between the participants.
5. The director of the office of management and budget or the director's designee may coordinate with the director of the department of transportation or the director's designee to establish or participate in contracts which may be made available to entities that have been determined by the department of transportation to be transportation providers under chapter 39-04.2 eligible to receive state funds or federal funds for public transportation.
6. Cooperative purchasing may include open-ended contracts that are available to other government entities, nonprofit organizations established on behalf of public entities, tribal agencies, or transportation providers determined to be eligible under this section.
7. Before entering into a cooperative purchasing agreement under this section, the office of management and budget must determine that the contracts were awarded through full and open competition or source selection methods specified in section 54-44.4-05 and shall send notice to the bidders list of the office's intent to make a cooperative purchase in accordance with this chapter.

#### **54-44.4-13.1. Purchases - Payment.**

The purchasing agency and the vendor may negotiate payment terms for all commodities and services procured. If a date for payment is not specified by the contract, payment must be made pursuant to section 13-01.1-01.

#### **54-44.4-14. Procurement information - Website.**

1. The office of management and budget shall establish and maintain a procurement information website on the internet. This procurement information website must provide current information regarding North Dakota government procurement opportunities in order to inform potential vendors of the commodities and services sought by state agencies and institutions. Notwithstanding section 54-44.4-09, for each purchase of services or commodities over the amount established for small purchases, the office of management and budget and every purchasing agency shall provide procurement information on the website. The time period and manner of providing procurement information on the website must be in accordance with rules adopted by the office of management and budget. The office of management and budget may contract with a third party to assist in providing or maintaining the procurement information website.
2. A state agency or institution may elect to use the procurement information website for the purchase of services and commodities that are not subject to the procurement requirements of this chapter, including:
  - a. Commodities and services exempted under section 54-44.4-02;
  - b. Public improvements under title 48;
  - c. Architect, engineer, construction management, and land surveying services under chapter 54-44.7; and
  - d. Concessions under chapter 48-09.
3. The office of management and budget shall establish and maintain a standardized procedure for the submission of electronic bids and proposals through the procurement information website. The office of management and budget, in

consultation with the office of the attorney general, shall develop standardized solicitation documents. The documents must be made available on the procurement information website. When drafting a solicitation, the office of management and budget and purchasing agencies shall use their best efforts to minimize the length of the solicitation by ensuring only those sections from the standardized solicitation documents applicable to the procurement are included.

**54-44.4-15. Purchasing contracts - Prohibition - Israel boycott.**

1. As used in this section:
  - a. "Boycott Israel" means engaging in refusals to deal, terminating business activities, or other similar commercial actions intended to limit commercial relations with persons doing business in Israel or in Israeli-controlled territories when the actions are taken:
    - (1) In compliance or adherence to calls for a boycott of Israel, other than those boycotts under Public Law No. 96-72 [50 U.S.C. 2407(c)]; or
    - (2) In a manner that discriminates on the basis of nationality, national origin, or religion.
  - b. "Company" means any organization, association, corporation, partnership, joint venture, limited partnership, limited liability company, or other entity or business association, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate.
2. A state entity that enters a contract that includes a provision prohibiting discrimination shall require the contract to include a provision prohibiting a party to the contract from boycotting Israel for the duration of the contract. The office of management and budget or purchasing agency may waive the requirement in this subsection if the waiver is in the best interest of the state. A waiver under this subsection may not affect the enforceability of a contract.
3. **If the state receives evidence that a company boycotts Israel, the state shall determine whether the company boycotts Israel. If accompanied by the conduct described under subsection 1, a company statement that indicates the company is participating in a boycott of Israel or has taken boycott action at the request, in compliance with, or in furtherance of calls for a boycott of Israel, may be considered as one type of evidence that the company is participating in a boycott of Israel. An expressive activity, alone, directed at a specific person or a governmental action may not be considered evidence of a boycott of Israel.**
4. This section does not apply to:
  - a. A contract with a value of less than one hundred thousand dollars; or
  - b. A contract with a company that has fewer than ten full-time employees.