220-RICR-30-00-6

TITLE 220 – DEPARTMENT OF ADMINISTRATION

CHAPTER 30 – PURCHASES

SUBCHAPTER 00 – N/A

PART 6 – Negotiation

6.1 General Provisions

A. Definitions

1. "Negotiation" means contracting by the provisions set forth in R.I. Gen. Laws §§ 37-2-19, 37-2-20, and 37-2-21. These sections refer to competitive negotiation, noncompetitive negotiation, and sole source and emergency procurements. (R.I. Gen. Laws § 37-2-7(13))

2. "Negotiation" means the process of establishing contractual provisions and of gaining contractual acceptance, other than solely as the result of normal competitive sealed bidding (described in Part 5). For the purpose of this definition, four (4) distinct categories of negotiation shall be recognized:

   a. “Request for proposals” or “RFP” process means a competitive procurement similar to competitive sealed bidding and described in § 5.11(D) where proposals are evaluated based on technical and cost factors and not just cost alone.

   b. "Competitive negotiation" means a specialized bidding procedure characterized by modifications to the offers of at least two (2) vendors and/or alteration of the specifications for which, or the terms and conditions under which, the State has solicited offers.

   c. "Noncompetitive negotiation" means the establishment of contractual terms and conditions, including but not limited to contract price, by discussions with a single vendor, outside of the procedures established for competitive bidding.

   d. “Best and final offer” or “BAFO” means the process outlined in § 6.3(D) for vendors to submit their best offer based on requirements in final form.

B. The objective of negotiation shall be to secure advantageous terms and conditions, and/or to exact improvements in terms and conditions offered to the State, and/or to reduce potential cost to the State.

C. Negotiation shall be used to establish or modify contractual provisions in all cases where:

1. Responsive firm, fixed pricing is not the sole determinant for award;

2. Responses to competitive bidding suggest that lower pricing, or other improvements in offers, are achievable;

3. Single or sole source procurements are made;

4. Responses to Requests for Proposal do not permit effective comparison, due to the differing nature of the responses;

5. The scope of a contract changes during the performance period, such that modification of price, or of other provisions, may be called for; or

6. The Purchasing Agent has determined in writing that a product, or the market in which a product is sold, is noncompetitive in nature.

D. Delegation means Chief Purchasing Officer may delegate authority for directing and negotiating change orders for highway and air transportation construction contracts to the Director of Transportation. Such delegation shall be in accordance with specific limitations defined by the Chief Purchasing Officer.

6.2 Competitive Negotiation

A. Applicability of R.I. Gen. Laws § 37-2-19(a) When, under Regulations issued by the Chief Purchasing Officer, the Purchasing Agent determines in writing that the use of competitive sealed bidding is not practicable, and except as provided in R.I. Gen. Laws §§ 37-2- 21 and 37-2-22, a contract may be awarded by competitive negotiation. (See Exceptions to Competitive Bidding Requirements.)

B. Under R.I. Gen. Laws § 37-2-19(c), contracts may be competitively negotiated when it is determined in writing by the Purchasing Agent that the bid prices received by competitive sealed bidding either are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which:

1. Each competitive bidder has been notified of the intention to negotiate and is given reasonable opportunity to negotiate; and

2. The negotiated price is lower than the lowest rejected bid by any competitive bidder; and

3. The negotiated price is the lowest negotiated price offered by a competitive offeror.

4. "Competitive bidder/offeror" shall mean responsible bidder or offeror.

C. Competitive negotiation may be used in any case where the scope, term, or other requirements of the procurement has not been determined at the time that a requisition is issued, or where optional offers are desired and encouraged, or where the value of the procurement has not been definitively established.

6.3 Procedures

A. Request for Proposal

1. In accordance with R.I. Gen. Laws § 37-2-19(b), adequate public notice of the request for proposals shall be given in the same manner as provided for Competitive Sealed Bidding.

2. Requests shall describe and enumerate the item(s) covered, their specification(s), contract terms(s), and any other special provisions or requirements.

   a. In accordance with R.I. Gen. Laws § 37-2-19(c), the request for proposals shall indicate the relative importance of price and other evaluation factors.

3. At a public opening of responses to RFPs, the Division of Purchases shall not be required to reveal other than the names of those responding. In the best interests of the State and in accordance with the State's Access to Public Records Act, R.I. Gen. Laws § 38-2-1 *et seq.*, the Purchasing Agent may disclose the proposals and/or formal rationale for tentative selection at or after the time of tentative selection of a vendor(s).

B. Review and Discussion

1. In accordance with R.I. Gen. Laws § 37-2-19(d), in the event an award is not made based on the submitted proposals, written or oral discussion shall be conducted with all responsible offerors who submit proposals determined in writing to be reasonably susceptible of being selected for award. Discussions shall not disclose any information derived from proposals submitted by competing offerors. Discussions need not be conducted:

   a. With respect to prices, where such prices are fixed by law or Regulation, except that consideration shall be given to competitive terms and conditions; or

   b. Where time of delivery or performance will not permit discussions; or

c. Where it can be clearly demonstrated and documented from the existence of adequate competition or accurate prior cost experience with the particular supply, service, or construction item, that acceptance of an initial offer without discussion would result in fair and reasonable prices, and the request for proposals notifies all offerors of the possibility that award may be made on the basis of the initial offers.

2. Responsibility of bidders shall be determined in accordance with § 5.12 of this Subchapter.

3. Responses to the Request for Proposal shall be evaluated:

   a. To determine non-responsive offers, which shall be eliminated from further consideration,

   b. To determine the lowest-cost combination of options, terms, and conditions, establishing a base-line, and

   c. To establish a cost ranking of responses to that base-line.

4. Under R.I. Gen. Laws § 37-2-20(b), where there is more than one (1) bidder, competitive negotiations shall be conducted with the three (3) (two (2) if there are only two (2)) bidders determined in writing to be the lowest responsive and responsible bidders to the competitive sealed bid invitation. Such competitive negotiations shall be conducted under the following restrictions:

   a. If discussions pertaining to the revision of the specifications or quantities are held with any potential offeror, all other potential offerors shall be afforded an opportunity to take part in such discussions.

   b. A request for proposals, based upon revised specifications or quantities, shall be issued as promptly as possible, shall provide an expeditious response to the revised requirements, and shall be awarded upon the basis of the lowest bid price or lowest evaluated bid price submitted by any responsive and responsible offeror.

   c. The provisions of R.I. Gen. Laws § 37-2-20(b) may be waived in any case where the lowest-cost response is ten percent (10%) or more lower than the next lowest cost offered.

C. Under R.I. Gen. Laws § 37-2-54(b), the Chief Purchasing Officer is not prohibited from negotiating with vendors who maintain a General Service Administration price agreement with the United States of America or any agency thereof, provided, however, that no contract executed under this provision shall authorize

a price higher than is contained in the contract between General Service Administration and the vendor affected.

D. Request for Best and Final Offer

1. On the basis of submitted proposals and/or discussions with offerors, a request for Best and Final Offer, which describes the requirements of the procurement in the final form, may be issued to all offerors still under consideration.

2. Each offeror shall submit a Best and Final Offer, which defines their best price, and other terms, for the procurement.

3. Best and Final Offers shall be evaluated in the same fashion as detailed herein.

   a. [R.I. Gen. Laws § 37-2-19(e)] Award shall be made to the responsible offeror whose proposal 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.

6.4 Noncompetitive Negotiation

A. In the event that all sealed bids submitted through a formal solicitation result in bid prices in excess of the funds available for the purchase, and the Chief Purchasing Officer determines in writing that there are no additional funds available from any source so as to permit an award to the lowest responsive and responsible bidder and the best interest of the State will not permit the delay attendant to a re-solicitation under revised specification, or for revised quantities, under competitive sealed bidding, then a negotiated award may be made as set forth in this Section. R.I. Gen. Laws § 37-2-20(a).

B. Noncompetitive negotiation may be used to improve the price offered of the evaluated lowest-cost response to any competitive bid.

C. The Chief Purchasing Officer may authorize the award of a contract on the basis of noncompetitive negotiation, where the Purchasing Agent has determined in writing that:

1. A single or sole source procurement is involved, or

2. The product, or market in which a product is sold, is noncompetitive in nature, or

3. Collusive or exclusionary selling practices are in evidence.

D. Noncompetitive negotiation may be used to modify a contract during its performance, provided that no attempt is made to reduce the contractual

obligations of the supplier, vendor, or contractor, or the contract term is not extended except in response to a request by the supplier, vendor, or contractor in consideration for other substantive changes, and where such extension of term of contract is determined in writing by the Purchasing Agent to be in the best interest of the State.

E. In all negotiation, the conduct of noncompetitive negotiation including, but not limited to, issues discussed, options considered, the rationale applied to decisions made and agreements reached shall be documented in summary form and placed in the purchase order file.

6.5 Truth in Negotiation Requirements – Cost or Pricing Data

A. Under R.I. Gen. Laws § 37-2-28(a), a contractor shall submit cost or pricing data and shall certify that, to the best of his knowledge and belief, the cost or pricing data submitted were accurate, complete, and current as of a mutually determined specified date prior to the date of:

1. The pricing of any negotiated contract where the total contract price is expected to exceed fifty thousand dollars ($50,000.00); or

2. The pricing of any change order or contract modification which is expected to exceed twenty-five thousand dollars ($25,000.00), or such lesser amount in either instance as may be prescribed by the Purchasing Agent and approved by the Budget Office.

B. Applicability

1. The requirements of the law apply to all purchase order supplements over twenty-five thousand dollars ($25,000.00) incorporating an aggregate of changes equal to this value, e.g., an additive charge of twenty thousand dollars ($20,000.00) and a deductive change of eleven thousand dollars ($11,000.00) are equal to an aggregate change value of thirty-one thousand dollars ($31,000.00) and thus are subject to the requirements of this Section.

2. Under R.I. Gen. Laws § 37-2-28(c), the requirements of this section need not be applied to contracts where the price negotiated is based on adequate price competition, established catalogue or market prices of commercial items sold in substantial quantities to the general public, prices set by law or Regulation, or in exceptional cases where it is determined in writing by the Chief Purchasing Officer that the requirements of this section may be waived, and the reasons for such waiver are stated in writing.

C. Cost or pricing data may include such verifiable factors as all vendor quotations, nonrecurring costs, changes in production methods and production or

procurement volume, data in support of contractor projection of business prospects and objectives, together with related costs of operations, unit cost trends such as those associated with labor efficiency, make-or-buy decisions and estimated resources to attain business goals and any other management decisions which reasonably could be expected to have a significant bearing on costs under a proposed contract.

D. The requirement for submission of cost or pricing data is met when all data reasonably available to the contractor have been submitted or identified in writing at the time of agreement on price. The availability of books, records, and other documents without specific identification and explanation shall not be considered submission for the purposes of verification and agreement.

6.6 Subcontracting - Requirements

A. Prime contractors shall require subcontractors to submit cost or pricing data for procurements in excess of fifty thousand dollars ($50,000.00) unless exempted herein.

B. Certification – Prime contractors shall require subcontractors to certify that cost and pricing data submitted are accurate, complete, and current as of the date of agreement on price.

C. Under R.I. Gen. Laws § 37-2-28(b), any contract, change, or modification thereto under which a certificate is required shall contain a provision that the price to the State, including profit or fee, shall be adjusted to exclude any significant sums by which the Purchasing Agent finds that such price was increased because the contractor furnished cost or pricing data, as of the date agreed upon between the parties, was inaccurate, incomplete, or not current.

D. Prime contractors must agree that the prime contract price shall be reduced in any significant amounts by which the prime contract price was overstated because a subcontractor did not submit accurate, complete, and current cost or pricing data when required by law.

6.7 Guidelines in Negotiations

A. The purchasing official responsible for the negotiation shall prepare a written statement at the conclusion of each negotiation phase setting forth the principal elements of the price negotiation.

1. Sufficient detail shall be recorded to reflect the most significant considerations controlling the establishment of the price.

2. If cost and pricing data were not required, a statement detailing the basis for determining that the price was fair and reasonable and the extent to

which the data submitted were not a factor in the price negotiated shall be recorded.

B. Contracts shall contain an audit clause which provides that if, after award, the Purchasing Agent obtains information that submitted data were inaccurate, incomplete or not current, or if the data were not adequately verified at the time of negotiation, then a post-award audit shall be undertaken.

C. Contracts shall contain to the extent possible language which provides for unit pricing for potential change orders.

D. The Division of Purchases shall conduct or shall obtain price analyses to ascertain whether the price quoted is fair and reasonable in relation to comparable procurements when the absence of open market competition precludes the use of competitive sealed bidding.

E. In the negotiation of settlements of contracts which have been terminated:

1. Contract settlement shall be made in accordance with terms specified in the purchase order.

2. In the absence of appropriate contract language, the vendor shall be paid for costs incurred, plus a reasonable profit, until the contract was terminated.

3. Penalties due to the State in accordance with a contract may be deducted from any payment to which a vendor is entitled.

F. To determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, reimbursements shall be made only upon the presentation of documented, auditable evidence to the State that the vendor has incurred an eligible expense.

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