

ADMINISTRATIVE SERVICES DEPARTMENT[11]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 8A.104(5), the Department of Administrative Services (DAS) proposes to amend Chapter 1, “Department Organization,” Chapter 117, “Procurement of Goods and Services of General Use,” Chapter 118, “Purchasing Standards for Service Contracts,” and Chapter 120, “Contractual Limitation of Vendor Liability Provisions,” Iowa Administrative Code.

The Department of Administrative Services is continuing its effort to review its administrative rules by amending certain central procurement rules to eliminate conflict with statute and making other actions that reflect and clarify departmental practice.

The Department of Administrative Services does not intend to grant waivers under the provisions of these rules, except as explicitly stated in the rules.

Interested persons may make written comments on the proposed amendments until 4:30 p.m. on May 5, 2015. Comments should be directed to Caleb Hunter, Department of Administrative Services, Hoover State Office Building, 1305 East Walnut Street, Des Moines, Iowa 50319-0114. Comments may be sent by fax to (515)281-6140 or by e-mail to Caleb.Hunter@iowa.gov.

A public hearing will be held on May 5, 2015, from 9 to 10 a.m. in Room 8, A Level, Hoover State Office Building, 1305 East Walnut Street, Des Moines, Iowa, at which time persons may present their views either orally or in writing. Any persons who intend to attend the public hearing and have special requirements, such as those related to hearing or mobility impairments, should contact and advise the Department of Administrative Services of specific needs by calling (515)281-3351.

After analysis and review of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code chapter 8A, subchapter III.

The following amendments are proposed.

ITEM 1. Rescind paragraph **1.4(1)“c.”**

ITEM 2. Reletter paragraphs **1.4(1)“d”** to **“f”** as **1.4(1)“c”** to **“e.”**

ITEM 3. Amend subrule 1.4(7) as follows:

1.4(7) *Central procurement and fleet services enterprise.* The chief operating officer of the enterprise is appointed by the director and directs the work of the enterprise.

a. The central procurement ~~enterprise~~ bureau is charged with procuring goods and services for agencies by pursuant to Iowa Code chapter 8A. ~~The chief operating officer of the enterprise is appointed by the director and directs the work of the enterprise.~~ These rules and applicable Iowa Code sections apply to the purchase of goods and services of general use by any unit of the state executive branch, except any agencies or instrumentalities of the state exempted by law.

b. The central procurement ~~enterprise~~ bureau shall manage statewide purchasing and electronic procurement, including managing procurement of commodities, equipment and services for all state agencies not exempted by law.

c. The fleet services bureau is responsible for the management of vehicular risk and travel requirements for state agencies not exempted by law.

ITEM 4. Amend rule 11—117.1(8A) as follows:

11—117.1(8A) General provisions.

117.1(1) Applicability.

a. Goods and services of general use. Under the provisions of Iowa Code Supplement chapter 8A, these rules apply to the purchase of goods and services of general use by any unit of the state executive branch including a commission, board, institution, bureau, office, agency or department, except items used by the state department of transportation, institutions under the control of the board of regents, the department for the blind, and any other agencies or instrumentalities of the state exempted by law.

b. Services. Procurement of services shall also meet the provisions of Iowa Administrative Code, 11—Chapters 118 and 119.

c. Information technology. Pursuant to Iowa Code Supplement chapter 8A, procurement of information technology devices and services by participating agencies shall also meet the requirements of rule ~~11—117.10(8A)~~ 11—117.11(8A). Rule ~~11—117.10(8A)~~ 11—117.11(8A) shall apply to:

(1) The process by which the department shall ensure effective and efficient compliance with standards prescribed by the department with respect to the procurement of information technology devices and services by participating agencies, and

(2) The acquisition of information technology devices and services by the department for the department, or by the department for a participating agency that has requested that the department procure information technology devices or services on the agency's behalf.

117.1(2) and 117.1(3) No change.

ITEM 5. Amend the following definitions in rule **11—117.2(8A)**:

“Master agreement” means a contract ~~arrived at~~ competitively bid and entered into by the department which establishes prices, terms, and conditions for the purchase of goods and services ~~in common~~ of general use. These contracts may involve the needs of one or more state agencies. Agencies may purchase from a master agreement without further competition. ~~These contracts may involve the needs of one or more state agencies.~~ Master agreements (also referred to as “master contracts”) for a particular item or class of items may be awarded to a single vendor or multiple vendors. The department is the sole agency authorized to enter into master agreements for goods and services of general use.

“Negotiated contract” means a master agreement for a procurement that meets the requirements of Iowa Code Supplement section 8A.207(4) “b.”

“Operational standards” means information technology standards established by the department according to Iowa Code Supplement sections 8A.202 to 8A.207 that include but are not limited to specifications, requirements, processes, or initiatives that foster compatibility, interoperability, connectivity, and use of information technology devices and services among agencies.

“Responsible bidder” means a vendor that has the capability in all material respects to perform the contract requirements. In determining whether a vendor is a responsible bidder, the department may consider various factors including, but not limited to, the vendor's competence and qualification for the type of services good or service required, the vendor's integrity and reliability, the past performance of the vendor relative to the quality of the good or service, the past experience of the department in relation to the good or service vendor's performance, the relative quality of the good or service, the proposed terms of delivery, and the best interest of the state.

ITEM 6. Rescind the definition of “Services of general use” in rule **11—117.2(8A)**.

ITEM 7. Adopt the following **new** definition of “Goods and services of general use” in rule **11—117.2(8A)**:

“Goods and services of general use” means goods and services that are not unique to an agency's program or that are needed by more than one agency. This chapter applies to the purchase of goods and services of general use.

ITEM 8. Renumber rules **11—117.4(8A)** to **11—117.12(8A)** as **11—117.5(8A)** to **11—117.13(8A)**.

ITEM 9. Adopt the following new rule 11—117.4(8A):

11—117.4(8A) Master agreements.

117.4(1) Use of master agreements. The department shall enter into master agreements to procure goods and services of general use for all state agencies with the exception of those purchases made by the state department of transportation, institutions under the control of the board of regents, the department for the blind, and any other agencies exempted by law. If the department has entered into a master agreement for a good or service of general use, a state agency that is not otherwise exempt shall purchase the good or service through the master agreement, unless a comparable good or service is available from a different vendor and the quantity required or an emergency or immediate need makes it cost-effective to purchase from that vendor. If an agency or agencies routinely or on a recurring basis purchase a specific good or service not available through a master agreement, the department may establish a master agreement for that good or service in cooperation with the affected agencies.

117.4(2) Term of master agreements. The initial term of a master agreement shall be no more than three years. Following the initial term, a master agreement may be renewed by the department for periods of one to three years; provided, however, that a master agreement, including all optional renewals, shall not exceed a term of six years unless a waiver of this provision is granted pursuant to rule 11—117.21(8A) (goods) or rule 11—118.16(8A) (services).

117.4(3) Master agreements available to governmental subdivisions. Master agreements entered into by the department may be extended to and made available for the use of other governmental entities as defined in Iowa Code section 8A.101. The department shall provide a list of current master agreements to a governmental subdivision upon request. The list may be provided in an electronic format. A governmental subdivision may request a copy of a specific master agreement. The department may provide the master agreement in an electronic format and assess a copying charge when a printed copy is requested.

ITEM 10. Amend renumbered paragraph **117.6(1)“b”** as follows:

b. The department and state agencies shall make every effort to support Iowa products when making a purchase. Tied responses to solicitations, regardless of the type of solicitation, shall be decided in favor of the Iowa products. Tied bids between Iowa products shall be decided in accordance with ~~117.12(4)~~ subrule 117.13(4).

ITEM 11. Amend renumbered subrules 117.6(2) to 117.6(4) as follows:

117.6(2) Preference to Iowa-based businesses. The department and state agencies shall make every effort to support Iowa-based businesses when making a purchase. Tied responses to solicitations, regardless of the type of solicitation, shall be decided in favor of the Iowa-based business. Tied bids between Iowa-based businesses shall be decided in accordance with ~~117.12(4)~~ 117.13(4).

117.6(3) American-made products. The department and agencies shall make every effort to support American-made products when making a purchase. Tied responses to solicitations, regardless of the type of solicitation, shall be decided in favor of the American-made product. Tied bids between American-made products shall be decided in accordance with ~~117.12(4)~~ 117.13(4).

117.6(4) American-based businesses. The department and agencies shall make every effort to support American-based businesses when making a purchase. Tied responses to solicitations, regardless of the type of solicitation, shall be decided in favor of the American-based business. Tied bids between American-based businesses shall be decided in accordance with ~~117.12(4)~~ 117.13(4).

ITEM 12. Amend renumbered paragraphs **117.9(7)“b”** and **“i”** as follows:

b. Notification of ITQ solicitation. Following institution of a prequalification process, the department may select, in a competitive manner, a prequalified vendor without public notice and without further negotiation of general terms and conditions. A solicitation may be restricted only to prequalified vendors, in addition to the TSB notification required by ~~117.7(2)~~ 117.8(2).

i. Information technology purchases from a prequalified vendor. Before a participating agency may acquire an information technology device or service from a prequalified vendor, the agency

must obtain all of the required approvals from the department pursuant to rule ~~11—117.10(8A)~~ 11—117.11(8A).

ITEM 13. Adopt the following **new** subrule 117.9(9):

117.9(9) Request for information (RFI). A request for information (RFI) is a nonbinding method an agency may use to obtain market information from interested parties for a possible upcoming solicitation. Information may include, but is not limited to, best practices, industry standards, technology issues, and qualifications and capabilities of potential suppliers. Agencies considering the use of an RFI shall contact the department for information and guidance in using this process.

ITEM 14. Amend renumbered paragraph **117.11(2)“f”** as follows:

f. When a procurement is not approved, the agency contact will be notified of available options, which include modification and resubmission of the request, cancellation of the request, or requesting a waiver from the director on the recommendation of the technology governance board pursuant to subrule ~~117.10(3)~~ 117.11(3).

ITEM 15. Amend renumbered paragraph **117.12(2)“b”** as follows:

b. Bio-based hydraulic fluids, greases, and other industrial lubricants manufactured from soybeans in accordance with Iowa Code Supplement section 8A.316.

ITEM 16. Amend renumbered paragraph **117.12(6)“d”** as follows:

d. The average fuel efficiency for new passenger vehicles and light trucks, as defined in paragraph ~~117.11(6)“a,”~~ 117.12(6)“a,” that are purchased in a year shall equal or exceed the average fuel economy standard for the vehicles’ model years as published by the United States Secretary of Transportation.

ITEM 17. Rescind existing rule **11—117.13(8A)**.

ITEM 18. Amend renumbered subrule 117.13(4) as follows:

117.13(4) Tied bids and preferences. If an award is based on the highest score and there is a tied score, or if the award is based on the lowest cost and there is a tied cost, the award shall be determined by a drawing. Whenever it is practical to do so, the drawing will be held in the presence of the vendors with the tied bids. Otherwise, the drawing will be held in front of at least three noninterested parties. All drawings shall be documented.

a. ~~Whenever~~ Notwithstanding the foregoing, whenever a tie involves an Iowa vendor and a vendor outside the state of Iowa, first preference will be given to the Iowa vendor will receive preference. Whenever a tie involves one or more Iowa vendors and one or more vendors outside the state of Iowa, the drawing will be held among the Iowa vendors only. Tied bids involving Iowa-produced or Iowa-manufactured products and items produced or manufactured outside the state of Iowa will be resolved in favor of the Iowa product. If a tied bid does not include an Iowa vendor or Iowa-produced or Iowa-manufactured product, preference will be given to a vendor based in the United States or products produced or manufactured in the United States over a vendor based or products produced or manufactured outside the United States.

b. In the event of a tied bid between Iowa vendors, the department shall contact the Iowa Employer Support of the Guard and Reserve (ESGR) committee for confirmation and verification as to whether the vendors have complied with ESGR standards. Preference, in the case of a tied bid, shall be given to Iowa vendors complying with ESGR standards.

c. ~~An award shall be determined by a drawing when responses are received that are equal in all respects and tied in price. Whenever it is practical to do so, the drawing will be held in the presence of the vendors who are tied in price. Otherwise the drawing will be made in front of at least three noninterested parties. All drawings shall be documented.~~

ITEM 19. Amend subrule 117.14(4) as follows:

117.14(4) Procurements requiring additional authorization. Except where exempted by statute, the following purchases require additional approval.

a. Information technology devices, software and services, as required in Iowa Code Supplement sections 8A.202 and 8A.206 and rule ~~11—117.10(8A)~~ 11—117.11(8A).

- b. Vehicles, as prescribed in Iowa Code Supplement sections 8A.361 and 8A.362.
- c. Architectural and engineering services, except for agencies with independent authority, as prescribed in Iowa Code Supplement sections 8A.302, 8A.311, 8A.321, 218.58, and 904.315.
- d. and e. No change.

ITEM 20. Amend rule 11—117.15(8A) as follows:

11—117.15(8A) Thresholds for delegating procurement authority.

117.15(1) Agency direct purchasing—basic level. An agency may procure non-master agreement goods costing up to \$1,500 without competition. An agency shall procure non-master agreement goods or services costing between \$1,501 and \$5,000 per transaction in a competitive manner, using either informal or formal competition. If an informal process is chosen, the agency shall follow the process described in the definition of “informal competition” in rule 11—117.2(8A). ~~Three or more informal quotes shall be obtained, unless quotes are not reasonably available or unless the item is purchased from a targeted small business.~~ The agency shall document the quotes, or circumstances resulting in fewer than three quotes, in an electronic file attached to the order or in another format.

117.15(2) Agency direct purchasing—advanced level. An agency may procure non-master agreement goods up to \$50,000 per transaction in a competitive manner ~~only in the event~~ provided the agency personnel engaged in the purchase of goods have completed enhanced procurement training established by the director or designee.

117.15(3) Preference to targeted small businesses. Agencies shall search the TSB directory on the Web and purchase directly from the TSB source if it is reasonable and cost-effective to do so. Agencies shall comply with the TSB notification requirements in subrule ~~117.7(2)~~ 117.8(2).

117.15(4) Alternative to master agreement. ~~An agency may purchase a comparable good or service of general use available on a master agreement from a different vendor if the quantity required or an emergency or immediate need makes it cost-effective to purchase from a non-master agreement vendor. In instances where an agency or agencies routinely or on a recurring basis purchase a specific good or service not on contract, the department shall establish a master agreement for that good or service in cooperation with the affected agencies.~~

~~117.15(5)~~ 117.15(4) Misuse of agency authority.

a. Purchasing authority delegated to agencies shall not be used to avoid the use of master agreements. ~~Because it is cost-effective to purchase a good or service of general use from a master agreement, the agency shall do so.~~ The agency shall not break purchasing into smaller increments for the purpose of avoiding threshold requirements in subrules 117.15(1) and 117.15(2).

b. As a remedy, the department may recover administrative fees appropriate to the improper execution of procurement.

c. This rule is not intended to prohibit agencies from aggressively seeking competitive prices. Agencies may purchase outside of master agreements under subrule ~~117.15(4)~~ 117.4(1).

d. The department may rescind delegated authority of an agency that misuses its authority or uses the authority to procure goods or services already available on a master agreement.

ITEM 21. Amend subrule 117.16(1) as follows:

117.16(1) Competitive selection for printing. The department and state agencies shall procure printing by competitive selection according to the rules of this chapter except when the printing is produced by state printing, pursuant to 11—102.4(8A) or the procurement is otherwise exempt from competitive selection pursuant to ~~11—117.4(8A)~~ 11—117.5(8A). When an agency elects to purchase printing by competitive selection rather than using the services of state printing or a TSB, state printing and TSBs shall be part of the bidding process.

ITEM 22. Amend subrule 117.19(6) as follows:

117.19(6) Security. The department may require bid or proposal security in accordance with subrule ~~117.11(5)~~ 117.12(5). When required, security shall not be waived.

ITEM 23. Adopt the following new rule 11—117.21(8A):

11—117.21(8A) Waiver procedure.

117.21(1) Definition. For the purpose of this chapter, a “waiver or variance” means an action by the director that suspends, in whole or in part, the requirements or provisions of a rule in this chapter as applied to a state agency when the state agency establishes good cause for a waiver or variance of the rule. For simplicity, the term “waiver” shall include both a “waiver” and a “variance.”

117.21(2) Requests for waivers. A state agency seeking a waiver shall submit a written request for a waiver to the director. The written request shall identify the rule for which the state agency seeks a waiver or the contract or class of contracts for which the state agency seeks a waiver and the reasons that the state agency believes justify the granting of the waiver.

117.21(3) Criteria for waiver. In response to a request for a waiver submitted by a state agency, the director may issue an order waiving in whole or in part the requirements of a rule in this chapter if the director finds that the state agency has established good cause for the waiving of the requirements of the rule. “Good cause” includes, but is not limited to, the following: (1) the desired good or service is available from one source only, (2) the time frame required is such that an expedient purchase is in the best interest of the agency, or (3) a showing that a requirement or provision of a rule should be waived because the requirement or provision would likely result in an unintended, undesirable, or adverse consequence or outcome. An example of good cause for a waiver is when a contract duration period of longer than six years is more economically or operationally feasible than a six-year contract in light of the service being purchased by the state agency.

ITEM 24. Amend **11—Chapter 117**, implementation sentence, as follows:

These rules are intended to implement Iowa Code sections 8A.201 to 8A.203, 8A.206, 8A.207, 8A.301, 8A.302, 8A.311 as amended by 2005 Iowa Acts, House File 814, 8A.341 to 8A.344, 73.1 and 73.2.

ITEM 25. Amend subrule 118.2(1) as follows:

118.2(1) When a state agency that is also a “participating agency” as defined by rule 11—117.2(8A) intends to procure “information technology services” as defined by rule 11—117.2(8A), the provisions of rule ~~11—117.10(8A)~~ 11—117.11(8A) shall also apply to procurement of the services.

ITEM 26. Amend rule **11—118.3(8A)**, definition of “Agency,” as follows:

“Agency” or “state agency” means a unit of state government, which is an authority, board, commission, committee, council, department, examining board, or independent agency as defined in Iowa Code section 7E.4, including but not limited to each principal central department enumerated in Iowa Code Supplement section 7E.5. However, “agency” or “state agency” does not mean any of the following:

1. The office of the governor or the office of an elective constitutional or statutory officer.
2. The general assembly, or any office or unit under its administrative authority.
3. The judicial branch, as provided in Iowa Code section 602.1102.
4. A political subdivision of the state or its offices or units, including but not limited to a county, city, or community college.

ITEM 27. Adopt the following new definition of “Director” in rule **11—118.3(8A)**:

“Director” means the director of the department of administrative services or the director’s designee.

ITEM 28. Amend subrule 118.8(2) as follows:

118.8(2) Special procedures required for emergency procurements.

a. The head of a state agency shall sign all emergency contracts and amendments regardless of value or length of term. If the head of a state agency is not available, a designee may sign an emergency contract or amendment. Use of an emergency procurement does not relieve a state agency from negotiating a fair and reasonable price and documenting the procurement action.

b. When the value of the service contract exceeds \$5,000, a state agency shall be required to complete an emergency justification form. The ~~director~~ head of the state agency or ~~the director's~~ designee shall sign the emergency justification form.

c. If an emergency procurement results in the extension of an existing contract that contains performance criteria, the contract extension shall comply with rule 11—119.4(8,8A), uniform terms and conditions for service contracts, or rule 11—119.5(8,8A), special terms and conditions.

ITEM 29. Amend subrule 118.11(3) as follows:

118.11(3) A service contract should be competitively selected on a regular basis so that a state agency obtains the best value for the funds spent, avoids inefficiencies, waste or duplication and may take advantage of new innovations, ideas and technology. A service contract, including all optional renewals, shall not exceed a term of six years; however, service contracts entered into by the office of chief information officer may have a term length not to exceed ten years. Service contracts shall not exceed the term lengths set forth herein unless the state agency obtains a waiver of this provision pursuant to rule 11—118.16(8A).

ITEM 30. Amend subrule 118.16(3) as follows:

118.16(3) Criteria for waiver. In response to a request for a waiver submitted by a state agency, the director may issue an order waiving in whole or in part the requirements of a rule in this chapter if the director finds that the state agency has established good cause for waiving the requirements of the rule. “Good cause” includes, but is not limited to, a showing that a requirement or provision of a rule should be waived because the requirement or provision would likely result in an unintended, undesirable, or adverse consequence or outcome. An example of good cause for a waiver is when a contract duration period of longer than six years is more economically or operationally feasible than a six-year contract in light of the service being purchased by the state agency.

ITEM 31. Amend **11—Chapter 118**, implementation sentence, as follows:

These rules are intended to implement Iowa Code ~~Supplement~~ sections 8A.101, 8A.104, 8A.301, 8A.302, and 8A.311.

ITEM 32. Amend subrule 120.5(2) as follows:

120.5(2) For information technology procurements, the director authorizes the competitive selection documents and the resulting contract to include a contractual limitation of vendor liability clause that limits the vendor’s liability for consequential, incidental, indirect, special, or punitive damages to the extent the vendor’s liability for such damages arises does not arise out of the items identified in paragraphs 120.5(1) “a” to “d.”