

CHAPTER 5
PURCHASING

751—5.1(8D) Applicability of competitive bidding.

5.1(1) The commission shall use competitive bidding to purchase goods and services from private agencies when the estimated annual value of the contract is equal to or greater than \$5,000 or when the estimated value of the multiyear service contract in the aggregate, including any renewals, is equal to or greater than \$15,000, unless there is adequate justification for a sole-source procurement pursuant to subrule 5.1(2) or another provision of law.

a. When the estimated annual value of the contract is equal to or greater than \$5,000, but less than \$50,000, or the estimated value of the multiyear contract in the aggregate, including any renewals, does not exceed \$150,000, the commission, in its sole discretion, shall use either a formal or informal competitive selection process to procure the goods or services.

b. When the estimated annual value of the contract is equal to or greater than \$50,000 or the estimated value of the multiyear contract in the aggregate, including any renewals, exceeds \$150,000, the commission shall use a formal competitive bidding process to procure the goods or services.

c. For any single item, the commission may spend up to the maximum amount permitted by Iowa Code Supplement section 8D.11 to acquire the item. This maximum amount is not applicable to purchases under the contracting authority permitted by Iowa Code section 8D.13 or any other authority of the commission.

5.1(2) The commission shall avoid sole-source procurements unless clearly necessary and justifiable. The commission may purchase goods or services using a sole-source procurement under the following circumstances:

a. The executive director or commission's designee determines that one vendor is the only one qualified or eligible or is quite obviously the most qualified or eligible to provide the goods or perform the services; or

b. The goods or services being purchased involve work that is of such a specialized nature or related to a specific geographic location that only a single source, by virtue of experience, expertise, proximity to the project, or ownership of intellectual property rights, could most satisfactorily provide the service; or

c. The commission is hiring the services of experts, advisors, counsel, or consultants to assist in any type of legal proceeding including but not limited to testifying or assisting in the preparation of quasi-judicial or judicial proceedings; or

d. The federal government or other provider of funds for the service being purchased, other than the state of Iowa, has imposed clear and specific restrictions on the commission's use of the funds in a way that restricts the commission to only one service provider; or

e. Applicable law requires, provides for, or permits the use of a sole-source procurement; or

f. There is an immediate or emergency need for the item or service; or

g. The item is maintenance services for the network for which the vendor supplies remote maintenance service for network components or software or the vendor supplies software upgrades, patches, modifications or the like electronically or for which the service will preserve equipment or software warranties; or

h. The executive director or the commission's designee determines that the best interests of the commission will be served by exemption from the bidding process.

5.1(3) When the annual value of the contract exceeds \$5,000 or when the estimated value of the multiyear contract in the aggregate, including renewals, is equal to or greater than \$15,000, the commission shall complete a sole-source justification form. The executive director or the executive director's designee shall sign the sole-source justification form.

751—5.2(8D) Methods of obtaining bids or proposals used by the commission. The commission shall obtain bids or proposals by one of the following methods. If more than one method is applicable to the purchase of a particular item, the commission shall choose the method of bidding to be utilized.

For any method used, the commission may provide notice of the solicitation electronically and vendors may submit proposals electronically unless the bidding documents provide otherwise.

5.2(1) *Formal invitations to bid.*

a. A formal invitation to bid may be required for any item if cost is the major criterion for selection. Other criteria may also be used, provided that the commission describes the criteria in the bid documents. The commission shall prepare a written invitation-to-bid form and shall transmit the form either by mail, electronically, or digitally to selected vendors in the business of providing the goods or services sought by the commission.

b. The invitation to bid shall contain the due date and time of the bid opening, a complete description of the item needed, and any other necessary or proper items. The price quoted by the vendors shall remain binding throughout the applicable time period.

5.2(2) *Informal selection process.*

a. The commission may use an informal selection process when permitted by rule 5.1(8D). An informal selection process is a streamlined competitive bidding process in which the commission makes an effort to contact at least three prospective vendors to solicit bids or proposals to provide the goods or services sought by the commission. Informal bids or proposals may be obtained by the commission through use of a written bid form faxed or mailed to selected vendors, E-mail, posting a notice on the commission's Web site and inviting bids or proposals electronically or over the telephone.

b. Written informal bids and proposals shall be opened as received, and informal telephone bids shall be recorded as received. If a bid is received over the telephone, a telephone bid form shall be used to record the bid received. If a bid is received by E-mail, the E-mail shall be printed or stored in a secure electronic format so that the bid can be retrieved and read in machine-readable form. The information contained in the E-mail shall be recorded on a form similar to the telephone bid form. If an informal bid is received by fax, the information on the fax shall be recorded on a form similar to the form used for telephone bids.

5.2(3) *Formal requests for proposals.*

a. Whenever a requirement exists for an item and cost may not be the sole criterion for selection and rule 5.1(8D) requires the commission to conduct a formal competitive selection process, the commission shall issue a formal request for proposal. The purpose of a request for proposal is to provide the vendor with sufficient information about the commission's requirements and goals to allow the vendor to propose a solution to the commission's requirements.

b. The terms quoted by the vendor shall remain binding throughout the applicable time frame.

c. The commission may request best and final offers as part of the request-for-proposal process.

5.2(4) *Auctions and reverse auctions.*

a. The commission may purchase items at auction when the auction is conducted electronically, digitally or otherwise. For any single item, the commission may spend up to the maximum amount permitted by Iowa Code section 8D.11 as amended by 2007 Iowa Acts, House File 851, section 2, to acquire the item. However, the commission shall not make a bid for any item for which the bid price at the auction exceeds the reasonable market price of an item. The commission shall perform a market analysis prior to the auction to determine the market price for items available by auction. The commission shall retain the market analysis with any other documentation for the purchase of the item at the auction.

b. The commission may purchase items using a reverse auction. A reverse auction is a price negotiation technique using secure Internet-based technology. This technique involves posting a requirement on an Internet site accessible by the public that allows vendors to post bids publicly. The buyer offers to purchase a product or service for a maximum amount (reserve price), and then the sellers or suppliers bid down the purchase price the buyer will actually pay for fulfillment. Vendors are able to see the current bids (but not the identity of the bidders) and post new or revised bids that are lower, thus increasing competition. When the commission conducts a reverse auction, the following requirements shall be met:

(1) The invitation to bid or the request for proposals shall provide notification of the intent to use the reverse auction process and provide instructions for participating in that process. The bidding documents

shall also provide notification that a bidder's consent to disclosure of the bidder's bid price as part of the auction process is required in order to participate.

(2) The commission shall determine the specifications and requirements of the items to be acquired.

(3) The commission shall identify and provide notice to potential vendors concerning the proposed acquisition.

(4) The commission shall establish prequalification requirements to be met by a vendor in order to be eligible to participate in the reverse auction. The prequalification requirements shall be included in the bidding documents.

(5) Prior to conducting a reverse auction, the commission shall establish a threshold amount, which shall be the maximum amount that the commission is willing to pay for the items to be acquired.

(6) Evaluation factors other than price shall be clearly listed and explained. The commission may direct bidders to supply technical proposals or other information in order to evaluate other factors and to use the reverse auction only as a price negotiation tool.

(7) The commission shall set the time of the auction.

(8) The commission shall establish minimum bid decrements.

(9) The commission shall establish the currency for the offering of bids.

(10) The commission shall establish the language for the bids.

(11) The commission may purchase additional quantities of the item if there are additional funds left at the end of the auction. The commission shall purchase additional quantities from the successful vendor.

751—5.3(8D) Items purchased through the department of administrative services. Goods and services may be obtained by the commission through the department of administrative services whenever procurement through administrative services is appropriate and in the best interests of the commission. Items procured through administrative services may be obtained by administrative services in any manner deemed appropriate by administrative services.

751—5.4(8D) Notice of bids or requests.

5.4(1) The commission shall post solicitations of formal bids or requests on the commission's Internet Web page.

5.4(2) The commission expressly adopts 11 IAC 105.7(1) and shall enforce the notice requirements and consequences for insufficient notice contained therein.

5.4(3) All contracts of the commission shall comply with the legal notice requirements relating to targeted small businesses.

751—5.5(8D) Contract purchases. The commission may enter into contract purchase agreements for items, groups of items, or services. Contract purchase agreements are subject to the competitive bidding requirements previously outlined where applicable. The commission may also purchase items from other contracts obtained by other governmental entities if the law or the contract allows.

751—5.6(8D) Blanket purchase agreements. If the commission foresees a requirement for frequent purchases of off-the-shelf items, the commission may establish blanket purchase agreements. A blanket purchase agreement is a formally approved charge account that is designed to reduce paperwork and the number of checks issued. Blanket purchase agreements are subject to the competitive bidding requirements previously outlined where applicable.

751—5.7(8D) Prospective vendor selection.

5.7(1) Any firm or business legally transacting business within Iowa at the time the contract for goods or services is executed, may request placement on the approved vendor list for a particular service or commodity by filing a vendor application form with the commission. The commission may mail copies of solicitation documents to vendors on the list for a particular item or to any other vendor which the commission chooses to contact. A vendor may be refused placement on the list or suspended or permanently removed from the list for any of the following reasons:

- a. Failure to respond to three consecutive solicitations;
- b. Failure to deliver within specified delivery dates;
- c. Failure to deliver in accordance with specifications;
- d. Attempts to influence the decision of any state employee involved in the procurement process;
- e. Evidence of agreements by the vendor to restrain trade or impede competitive bidding;
- f. Any other activities of the vendor which the commission determines would render the vendor unsuitable; and
- g. Failure to pay subcontractors.

5.7(2) The executive director shall notify a vendor in writing prior to refusing placement on the list, suspending the vendor from the list, or permanently removing the vendor from the list. The vendor shall be provided a reasonable opportunity to explain and cure any misconduct identified by the executive director. If the executive director ultimately refuses placement on the list or removes the vendor from the list, the vendor may appeal the executive director's action to the commission pursuant to the criteria for vendor appeals contained in these rules.

5.7(3) The commission shall select vendors to receive solicitation documents based on the commission's knowledge of the vendors in the particular market. The initial vendor selection shall be designed to promote the competitive bidding process, the set-aside procurement programs, and the best interests of the commission. The commission shall also provide solicitation documents to qualified vendors upon request when the request is made during the solicitation period. The vendor is solely responsible for ensuring that solicitation documents are received by the vendor.

751—5.8(8D) Bids and proposals to conform with specifications. All bids and proposals must conform to the specifications indicated by the commission. Bids and proposals which do not conform to the specifications stated may be rejected. The commission reserves the right to waive deficiencies in the bids or proposals if in the judgment of the commission the best interests of the commission would be served by the waiver.

751—5.9(8D) Time of delivery. When evaluating bids or proposals the commission may consider the time of delivery when determining the successful vendor.

751—5.10(8D) Cash discounts. When evaluating bids or proposals the commission may consider cash discounts.

751—5.11(8D) Tie bids. The commission shall resolve ties among bids or proposals which are equal in all respects by drawing lots unless only one of the tied bidders is an Iowa business. If only one of the bidders tied for an award is an Iowa business, the Iowa business shall be given preference over all tied out-of-state businesses. An Iowa business is a resident of the state of Iowa. If it is necessary to draw lots, the drawing shall be held in the presence of the vendors who submitted the tied bids or proposals whenever practical. If the tied vendors are not present, the drawing shall be held in front of at least two persons, and the commission shall document the drawing.

751—5.12(8D) Time of submission. Vendors shall submit all formal bids and proposals in sufficient time to actually reach the commission prior to the date and time set for the opening of the bids or proposals. Vendors shall submit all informal bids in time to reach the commission prior to the time specified by the commission. Bids and proposals received after the date and time set for opening or for submission shall be returned to the vendor unopened. The commission shall notify all vendors to which invitations to bid or requests for proposals were sent of any changes in the time of submission. If a formal invitation to bid or request for proposal is canceled prior to the time set for opening the bids or proposals, the commission shall return unopened any responses already received. If an informal invitation to bid is canceled prior to the time set for receiving bids, the commission shall destroy any bids already received.

751—5.13(8D) Modification or withdrawal of bids or proposals. Vendors may modify or withdraw bids or proposals prior to the time and date set for the bid or proposal opening. Modifications or

withdrawals shall be in writing and delivered in a sealed envelope which properly identifies the correct bid or proposal to be modified or withdrawn. Vendors may withdraw a bid or proposal after opening only with the approval of the commission if the commission finds that an honest error was made by the vendor which will cause undue financial hardship to the vendor and which will not cause undue financial hardship or inconvenience to the commission.

751—5.14(8D) Financial security. The commission may require bid security, litigation security, and performance security on formal bids or proposals. When required, security may be by certified check, cashier's check, certificate of deposit, or letter of credit made payable to the commission, or any other form specified by the commission.

751—5.15(8D) Rejection of bids and proposals. The commission reserves the right to reject any or all bids or proposals. The commission may reject bids and proposals because of faulty specifications, abandonment of the project, insufficient funds, evidence of unfair or flawed bidding procedures, failure of a vendor to meet the commission's requirements, insufficient evidence of a vendor's financial capability to perform the contract, or for any other reason if the commission determines that the best interests of the commission will be served by rejecting any or all bids. Following the rejection of bids or proposals, the commission may request new bids or proposals at any time deemed convenient by the commission.

751—5.16(8D) Background and informational statements. Bidders may be required to describe their organizational structure, to identify key personnel and to submit personnel to criminal history checks and background investigations. Any changes in key personnel during the bidding process or during the contract term must be reported to the commission before the change occurs.

751—5.17(8D) Vendor appeals. Any vendor whose bid or proposal has been timely filed and that is aggrieved by the commission's notice of intent to award may appeal the decision by filing a written notice of appeal before the Iowa telecommunications and technology commission, within five days of the date of the notice of intent to award, exclusive of Saturdays, Sundays, and legal state holidays. The commission's address is listed in 751—subrule 1.6(1). The commission must actually receive the notice of appeal at this address within the specified time frame to be considered timely. The notice shall state the following:

1. The relief demanded and the facts and law relied upon for relief;
2. The particular provisions of the statutes and rules involved with specific reference to the grounds identified in Iowa Code section 17A.19(10);
3. On whose behalf the petition is filed; and
4. The name, address and telephone number of the petitioner and the petitioner's attorney, if any.

751—5.18(8D) Procedures for vendor appeal. The vendor appeal shall be a contested case proceeding and shall be conducted in accordance with 751 IAC 4, unless the provisions of this rule provide otherwise.

5.18(1) Hearing. Upon receipt of a notice of vendor appeal, the commission shall contact the department of inspections and appeals to arrange for a hearing. The department of inspections and appeals shall send a written notice of the date, time and location of the appeal hearing to the aggrieved vendor or vendors. The presiding officer shall hold a hearing on the vendor appeal within 45 days of the date the notice of appeal was received by the commission.

5.18(2) Discovery. The parties shall serve any discovery requests upon the other parties at least 20 days prior to the date set for hearing. The parties must serve responses to discovery at least 10 days prior to the date set for the hearing.

5.18(3) Witnesses and exhibits. The parties shall contact each other regarding witnesses and exhibits at least ten days prior to the time set for the hearing. The parties must meet prior to the hearing regarding the evidence to be presented in order to avoid duplication or the submission of extraneous materials.

5.18(4) Evidence for a telephone or network hearing. If the hearing is conducted by telephone or on the fiberoptic network, the parties must deliver all exhibits to the office of the presiding officer three days

prior to the time the hearing is conducted. Any exhibits which have not been served on the opposing party should be served at least seven days prior to the hearing.

5.18(5) Contents of decision. The administrative law judge shall issue a proposed decision in writing that includes findings of fact and conclusions of law stated separately. The decision shall be based on the record of the contested case and shall conform with Iowa Code chapter 17A. The decision shall be sent to all parties by first-class mail.

5.18(6) Record requirements. The record of the contested case shall include all materials specified in Iowa Code subsection 17A.12(6). The record shall also include any request for a contested case hearing and other relevant procedural documents regardless of their form.

a. Method of recording. Oral proceedings in connection with a vendor appeal shall be recorded either by mechanized means or by certified shorthand reporters. Parties requesting that the hearing be recorded by certified shorthand reporters shall bear the costs.

b. Transcription. Oral proceedings in connection with a hearing in a case or any portion of the oral proceedings shall be transcribed at the request of any party with the expense of the transcription charged to the requesting party.

c. Tapes. Copies of tapes of oral proceedings may be obtained from the presiding officer at the requester's expense.

d. Retention time. The recording or stenographic notes of oral proceedings or the transcription shall be filed and maintained by the commission for at least five years from the date of the proposed decision.

5.18(7) Dismissal. A ruling dismissing all of a party's claims or a voluntary dismissal is a proposed decision under Iowa Code section 17A.15.

5.18(8) Stay of agency action for vendor appeal.

a. When available.

(1) Any party appealing the issuance of a notice of intent to award a contract may petition the presiding officer for a stay of the award pending its review. The petition for stay shall be filed with the notice of appeal and shall state the reasons justifying a stay.

(2) Any party adversely affected by a final decision and order may petition the commission which issued the decision for a stay of that decision and order pending judicial review. The petition for stay shall be filed with the executive director within ten days of receipt of the final decision and order and shall state the reasons justifying a stay.

b. When granted. The presiding officer or commission, as appropriate, shall grant a stay when it concludes that the movant has satisfied the standards for the grant of a stay included in 751—subrule 4.29(2).

c. Vacation. A stay may be vacated by the issuing authority upon application of the commission or any other party.

751—5.19(8D) Review of proposed decision.

5.19(1) The proposed decision shall become the final decision of the commission 15 days after mailing of the proposed decision, unless prior to that time a party submits an appeal from, or a commission member requests a review of the proposed decision.

5.19(2) A party appealing the proposed decision shall mail a copy of the notice of an appeal to all other parties. If a commission member requests a review of the proposed decision, the commission will mail a copy of the request for review to all parties. Within 15 days after mailing of a notice of appeal or of a request for review, any party may submit to the commission (in an original and eight copies) exceptions to and a brief in support of or opposition to the proposed decision, copies of which exceptions or brief shall be mailed by the submitting party to all other parties to the proceeding. The executive director shall notify the parties if the commission deems oral arguments by the parties to be appropriate. The executive director will schedule review of the proposed decision at the next commission meeting occurring not less than 30 days after mailing of the notice of appeal or request for review.

5.19(3) A party appealing a proposed decision shall mail or deliver the notice of appeal to the executive director of the Iowa telecommunications and technology commission at the ICN main office

location as listed in 751—subrule 1.6(1). Failure to request review will preclude judicial review unless the commission reviews a decision on its own motion. Notice of the review will be sent to all parties participating in the appeal.

5.19(4) The commission shall review the proposed decision based on the record and limited to issues raised in the hearing. The commission shall not take any further evidence and shall not consider issues that were not raised at the hearing. The issues shall be specified in the party's request for review. The party seeking review shall be responsible for transcribing any tape of the proceeding before the presiding officer and file the transcript as part of the record for review. The party seeking review shall bear the cost of the transcription regardless of the method used to transcribe the tape.

5.19(5) Each party shall have opportunity to file exceptions to the proposed decision and to present briefs in support of or in opposition to the proposed decision. The commission may set a deadline for submission of briefs. When the commission consents, oral arguments may be presented. A party wishing to make an oral argument shall specifically request it. All parties shall be notified in advance of the scheduled time and place.

5.19(6) Requests for rehearing shall be made to the commission within 20 days of issuing a final decision. A rehearing may be granted when new legal issues are raised, new evidence is available, an obvious mistake is corrected, or when the decision fails to include adequate findings or conclusions on all issues. A request for rehearing is not necessary to exhaust administrative remedies.

5.19(7) Judicial review of the commission's final decisions may be sought in accordance with Iowa Code section 17A.19.

751—5.20(8D) Purchasing cooperative or consortium.

5.20(1) Membership. The commission may join a purchasing cooperative or consortium composed of public or private entities, or both, for the purpose of reducing overall telecommunications business costs for the commission and its authorized users.

5.20(2) Prior to joining a purchasing cooperative or consortium, the commission shall review membership obligations to ensure that the commission's membership obligations are not inconsistent with the laws and rules governing the commission.

5.20(3) Notwithstanding the provisions of subrules 5.20(1) and 5.20(2), the commission may purchase goods and services through the cooperative or consortium without conducting a separate competitive bidding process so long as the cooperative or consortium uses or used a competitive bidding process or procedure.

These rules are intended to implement Iowa Code sections 8D.3(3) "b" and 8D.11.

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