

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05A .0112

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

On line 19, please add something like "the following definitions shall apply:

In Item (3), can you just say something like "shall have the same meaning as in G.S. 143-135.9." I realize that you've changed a few words, but overall, this appears to recite statute and is unnecessary.

In Item (4), how is the "maximum authorized expenditure" determined before approval is needed? Is this set forth in statute? Is there a cross-reference available?

In Item (6), delete "reasonable" in "reasonable interpretation"

In Item (6), what is meant by "used to allow the State's reasonable interpretation"? Do you mean "used in order for the State to interpret"?

In Item (6), delete or define "material" in "material deficiencies."

In Item (7), how and by whom is it determined whether a vendor is "technically qualified"? Please delete or define "technically"

In Item (10), delete or define "materially"

In Item (10), what is meant by "unsuccessful contract performance"? Does this simply mean "that increase the risk that a vendor will be unable to meet its contractual obligations"?

In Item (16), delete or define "predominately"

In Item (19), please consider saying something like "has the same definition as in 143-48.6(b)"

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

Is Item (26) necessary? I don't see this term used anywhere except in Item (7) of this Rule. Could you delete this Item and remove "responsible" in Item (7)? If not, delete or define "fully", "sufficient", "and" and "satisfactory." Also, how will it be determined whether a vendor demonstrates "integrity, financial stability, and reliability"? Please review and clarify.

In Item (27), delete or define "material" in "material respects"

Please simplify Item (33).

In Item (34), what is a term contract? It is capitalized, but I don't see a definition.

In Item (34), what is the "small purchase benchmark"? What is your authority to set this outside of rulemaking? If you have authority to set this outside of rulemaking, where is it? I tried to find it to no avail.

In Item (35), are the approval process and standards as referenced on line 6 set forth elsewhere in rule or statute?

On line 6, delete or define "expressly"

In Item (38), I have asked about this in the tabulation rule, but what is meant by "publicly available"? Is this only upon request? Is this on a purchasing agency's website?

In Item (41), what is an "unopened bid"? What about the opened bids? With this language, I'm reading this to say that a purchasing agency can cancel a solicitation, in which case, only the opened bids would be considered. I'm confident I'm wrong. Please clarify.

Is Item (42) necessary? I only see this used in Item (10). Couldn't you essentially combine these two?

In your History Note, why is 116-31.10 cited? This pertains to the authority of the Board of Governors.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05A .0112 is amended as published in 33:23 NCAC 2240-2242 as follows:

01 NCAC 05A .0112 DEFINITIONS

~~(a) For the purpose of this Chapter, agency is defined as all departments, institutions, boards, commissions, universities, or other units of the State (including the Division of Purchase and Contract), and community colleges and local school administrative units, unless specifically exempted herein by reference. For the purpose of identifying a special responsibility constituent institution, as designated by the University Board of Governors, just the name "university(ies)" shall be used to distinguish any differences in the rules.~~

~~(b) A service contract shall mean any agreement in which an independent contractor performs services requiring specialized knowledge, experience, expertise or similar capabilities for a state agency for compensation involving an expenditure of public funds. The services may include (by way of illustration, not limitation) services such as maintenance of buildings or equipment, auditing, film production, employee training and food services, provided that the service is not primarily for review, analysis or advice in formulating or implementing improvements in programs or services (in which case rules relating to consultants shall be applicable).~~

~~(c) Where the term "Offer" is used, it refers to a bid, proposal or Offer submitted in response to an Invitation for Bids, Request for Proposals, Negotiation, or Request for Quotations.~~

~~(d) For the purpose of this Chapter, commodity(ies) is defined as any equipment, materials or supplies. It does not include services or printing.~~

For the purpose of this Chapter:

(1) "Agency" means all departments, institutions, boards, commissions, universities, community colleges or other units of the State, unless specifically exempted by statute.

(2) "Best and Final Offer" ("BAFO") is a document that memorializes the details of Negotiations between the State and a Vendor and mutually modifies the Vendor's Offer.

(3) "Best Value Procurement" means the selection of a Vendor based on a determination of which Offer provides the best trade-off between price and performance, where quality is considered an integral performance factor as defined in G.S. 143-135.9.

(4) "Bid Value Benchmark" or "General Delegation" means the maximum authorized expenditure for which an agency may contract to purchase Goods or Services without obtaining prior approval for the purchase from the Division.

(5) "Consultant Services" means contracted work or tasks performed by a Vendor or independent contractor possessing specialized knowledge, experience, expertise and professional qualifications to investigate assigned problems or projects and to provide counsel, review, analysis or advice in formulating or implementing improvements in programs or Services. This includes improvements related to the organization, planning, directing, control, evaluation and operation of a program, Agency or department.

(6) "Clarification" means communications between the State and a Vendor that may occur after receipt of Vendor's Offer made for the purpose of eliminating irregularities, informalities, or apparent

- clerical mistakes in an Offer. A Clarification may also be used to allow the State's reasonable interpretation of an Offer or Offers or to facilitate the State's evaluation of all Offers. A Clarification shall not be used to cure material deficiencies in an Offer, alter the scope of an Offer, or to negotiate.
- (7) "Competition" in purchasing exists when the available market for the Goods or Services to be acquired consists of more than one Responsible Vendor that is technically qualified and willing to submit an Offer.
- (8) "Competitive Range" means a rational grouping of the most competitive Offers as determined by the Purchasing Agency.
- (9) "Contract" means any type of agreement entered into by State Agencies, regardless of what it may be titled or called, setting out the obligations of the parties concerning a Procurement of Goods or Services.
- (10) "Deficiency" means either a failure to meet a stated requirement or a combination of weaknesses in an Offer that materially increases the risk of unsuccessful contract performance.
- (11) "Division" means the Division of Purchase and Contract.
- (12) "Electronic" means electrical, digital, magnetic, optical, electromagnetic or any other similar technology.
- (13) "Electronic Bid System" means the Division's Electronic system used variously to advertise Solicitations, notify Vendors, conduct Reverse Auctions, and post contract awards.
- (14) "Emergency Situations" means unforeseen circumstances that endanger lives, property, or the continuation of a vital program, as determined by the purchasing Agency Director, and that can be rectified only by immediate purchases or rental of Goods or Services.
- (15) "Goods" means any tangible property, including all equipment, materials, supplies and commodities. Unless the context requires otherwise, acquisition of printing shall be considered the purchase of Goods under these Rules.
- (16) "Goods Contract" means any agreement predominantly involving the Procurement of Goods from a Vendor, but which may also have ancillary Services aspects.
- (17) "Negotiation" means oral or written communications in a waived or open competitive Procurement between the State and Vendor undertaken with the intent of allowing Vendor to revise their Offers. Revisions may apply to price, schedule, technical requirements, or other terms of the proposed contract. Negotiations are specific to each Offer and shall be conducted to maximize the State's ability to obtain best value based on the evaluation factors set forth in the Solicitation. Negotiations shall be memorialized in any resulting Contract.
- (18) "Offer" means a bid, proposal, BAFO or other proposition submitted in response to any Solicitation, Negotiation, or other approved acquisition process, as well as responses to solution-based Solicitations and government-Vendor partnerships.
- (19) "Personal Service Contract" means a Contract for defined Services provided by a professional individual, corporation, or independent contractor on a temporary or occasional basis, including

- those provided by a doctor, dentist, attorney, architect, professional engineer, scientist or performer of the fine arts or similar professions. Personal Services Contracts are a type of Services Contract.
- (20) "Pressing Need" means a need arising from unforeseen causes outside the State's control, including delay by contractors, delay in transportation, breakdown in machinery, or unanticipated volume of work, which can be satisfied only by immediate purchase or rental of Goods or Services.
- (21) "Price" means the amount paid by the State to a Vendor for Goods or Services.
- (22) "Procurement" means the process of acquiring Goods or Services.
- (23) "Progressive Award" means an award of portions of a definite quantity requirement to more than one Vendor. Each portion is for a definite quantity and the sum of the portions is the total quantity procured. A Progressive Award may be in the Purchasing Agency's best interest when awards to more than one Vendor for different amounts of the same item are needed to obtain the total quantity or the time or times of delivery required.
- (24) "Public Funds" means any amount received, held, disbursed or otherwise subject to or accounted for in accordance with the State Budget Act and amounts used to acquire Goods and Services that are required to be purchased in accordance with Article 3 of Chapter 143 of the General Statutes.
- (25) "Purchasing Agency" or "Purchaser" means the Agency that issues a purchase order or otherwise acquires Goods or Services through a purchasing process.
- (26) "Responsible Vendor" means a Vendor who demonstrates in its Offer that it has the capability to perform fully the requirements of the Solicitation and who shows sufficient integrity, financial stability and reliability to perform its contract obligations in a satisfactory manner.
- (27) "Responsive Offer" means an Offer that conforms to the Requirements of the Solicitation in all material respects to be considered by the State for award.
- (28) "Requirement" is a provision of a Solicitation and any resulting Contract which prescribes the nature or details of a standard, process or procedure that must be complied with by the Vendor before any further evaluation of the Offer is conducted by the State.
- (29) "Sealed Offer" means an Offer that remains unopened until the public opening time stated in the Solicitation.
- (30) "Secretary" means the Secretary of the NC Department of Administration.
- (31) "Service Contract" means any agreement for compensation involving Services and requiring a particular or specialized knowledge, experience, expertise or similar capabilities in the Vendor. Contracts for Consultant Services and Personal Services are also types of Service Contracts. A Service Contract may also involve the ancillary purchase of Goods.
- (32) "Services" means the tasks and duties undertaken by a Vendor in a Service Contract to fulfill the requirements and Specifications of the Contract.
- (33) "Signature" means a manual autograph, an Electronic identifier or the Electronic result or an authentication technique, which is attached to or logically associated with a record and that is intended by the person using it to have the same force and effect as a manual signature.

- (34) "Small Purchase" means the purchase of Goods and Services not covered by a Term Contract where the expenditure of Public Funds is less than a Small Purchase Benchmark amount set and published by the SPO on the Division's website.
- (35) "Solicitation" means a Written or Electronic Invitation for Bids (IFB), Request for Quotations (RFQ), Request for Proposals (RFP), Best and Final Offer (BAFO), Request for Information (RFI) or other such documents approved by the SPO and expressly used to solicit or invite Vendor Offers, or to request information regarding the acquisition of Goods and Services, including all mutually agreed attachments and items incorporated by reference.
- (36) "Specification" means any description of the physical or functional characteristics of, or the nature of, the Goods or Services to be procured.
- (37) "SPO" means the State Procurement Officer.
- (38) "Tabulation" means a publicly available list of Vendors submitting Offers in response to a particular Solicitation and, if applicable, the prices Offered by each.
- (39) "Total Cost of Ownership" means a summation of all purchase, operating, and related costs to be expended during the projected lifetime of a Good or Service or both.
- (40) "Vendor" means a contractor, supplier, bidder, company, independent contractor, firm, corporation, partnership, individual or other entity submitting a response to a Solicitation.
- (41) "Voided Bid" means an Electronic bid that was submitted by a Vendor in connection with an Electronic Solicitation that has been cancelled and the unopened bids voided.
- (42) "Weakness" means a flaw in the Offer that increases the risk of unsuccessful contract performance.
- (43) "Written" or "Writing" means a communication recorded in a medium of expression that can be preserved, read, retrieved, and reproduced for an indefinite period of time, including information in a form that is electronically transmitted and stored.

History Note: Authority G.S. 116-31.10; 143-48.3; 143-48.6; 143-49; 143-53; 143-53.1; 143-57; 143-135.9; Eff. February 1, 1996;
Amended Eff. April 1, 1999;
Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.
Eff. October 1, 2019

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0103

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a), what is meant by "whatever authorized form"? Is it just "electronic, written, or verbal"? If so, please consider saying something like "All information and documentation, whether electronic, written, or verbal", relative to the development of a solicitation for a proposed or pending procurement shall be confidential."

On line 10, what is meant by "remain"? Is this language necessary here? I don't think that it is given the use of "remain" on line 11.

In (a), if you all choose to capitalize defined terms, please be consistent. I note that "purchaser" on line 10 is not capitalized, but is defined.

In (c), do you want to add "test data and other propriety information" since 143-52(a) also allows these to remain confidential? Please note this for (c)(2) as well.

Add a semi-colon at the end of (c)(1) and add the word "and"

Should line 19 be Paragraph (d)?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0103 is amended as published in 33:23 NCAC 2242-2243 as follows:

SUBCHAPTER 05B - PURCHASE PROCEDURES

SECTION .0100 - REQUISITIONING

01 NCAC 05B .0103 CONFIDENTIALITY

(a) All information and documentation in whatever authorized form, (e.g. Electronic, Written, and verbal) relative to the development of a contractual document (Request for Quotation, Invitation for Bids, Request for Proposals, Waiver of Competition, Negotiation, etc.) Solicitation for a proposed or pending Procurement procurement or contract shall be deemed remain confidential in nature, except as deemed necessary by the purchaser to develop a complete contractual document. Such material shall remain confidential until the award of contract or action has been taken by the Purchasing Agency to cancel the Procurement. (See Rules .0210, .0309, .1501 and .1518 of this Subchapter).

(b) All information and documentation relative to the development of a Specification shall be confidential until a contract is entered into by the Purchasing Agency and the Vendor in accordance with G.S. 143-52(a).

(c) Trade secrets that the Vendor does not wish disclosed shall be identified as follows:

(1) each page shall be identified in boldface at the top and bottom as "CONFIDENTIAL".

(2) if only a portion of a page marked "CONFIDENTIAL" contains trade secret information, the trade secret information shall be designated with a contrasting color or by a box around such information.

Cost information shall not be confidential.

History Note: Authority G.S. 132-1.1; 133-33; 143-52; 143-53; 143-60;

Eff. February 1, 1996;

Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

Eff. October 1, 2019

01 NCAC 05B .0207 - .0208 are repealed through readoption as published in 33:23 NCR 2243 as follows:

SECTION .0200 - SPECIFICATIONS

01 NCAC 05B .0207 COPIES OF SPECIFICATIONS

01 NCAC 05B .0208 QUALIFIED PRODUCTS LIST

History Note: Authority G.S. 143-49(2); 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. February 1, 1996.
Eff. October 1, 2019

01 NCAC 05B .0210 is repealed as published in 33:23 NCR 2243 as follows:

01 NCAC 05B .0210 CONFIDENTIALITY

History Note: Authority G.S. 133-33; 143-53; 143-60;

Eff. February 1, 1996;

Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. July 23, 2016.

Eff. October 1, 2019

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0303

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

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The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

On line 8, by G.S. 66-312, do you specifically mean 66-312(9)? Please provide a more specific cross-reference given the nature of the 66-312.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0303 is readopted as published in 33:22 NCR 2243 as follows:

SECTION .0300 - PROCUREMENT AUTHORIZATION AND PROCEDURES

01 NCAC 05B .0303 ~~TELEGRAPH~~ ELECTRONIC, FACSIMILE, AND TELEPHONE OFFERS

E-mail, ~~Telegraph~~, facsimile, and telephone ~~offers~~ Offers shall not be accepted in response to ~~solicitations~~ Solicitation
that are required to be sealed pursuant to Rule .0301 of this Section. The use of digital or Electronic Signatures on
Electronic Offers must be consistent with G.S. 66-312.

History Note: Authority G.S. 66-312; 143-49; 143-52; 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. April 1, 1999; February 1, 1996.
Eff. October 1, 2019

01 NCAC 05B .0304 is readopted as published in 33:23 NCR 2243 as follows:

01 NCAC 05B .0304 RECALL OF OFFERS

Offers may be recalled prior to opening upon Written and signed request from an authorized agent of the ~~company~~.
Vendor to the Purchasing Agency. A record of the recall shall be maintained in the bid file.

History Note: Authority G.S. 143-49; 143-52;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. February 1, 1996.
Eff. October 1, 2019

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0305

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

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The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a), the tabulation could be confidential? I read .0103 to provide confidentiality until the time of a contract, but this says that it is made public unless confidential pursuant to Rule .0103. Please review and clarify. I'm quite confused.

In (a), line 7, do you mean "otherwise marked confidential in accordance with Rule .0103(c) of this Section", or do you mean "unless otherwise confidential pursuant to G.S. 143-52(a) and Rule .0103 of this Rule"?

In (a), what is the difference between a "withdrawn" bid as referenced in this Rule and a "recalled" bid as referenced elsewhere in your Rules? Are these the same? If so, please be consistent in your terminology. If not, please define these terms.

In (a), what is meant by "publicly open and tabulate all offers"? Practically speaking, what needs to be done? If I'm an agency, I honestly have no idea what I'm supposed to do.

In (a), when is a sealed offer required? Is there a cross-reference available?

In (b), when is negotiation after receipt of offers authorized? Who makes this decision? Is there a cross-reference available?

In (c), what is the "two-step" process? Is the two-step process outlined in this Rule? When would it be applicable? Please review and clarify. I have no idea what's going on in this Paragraph.

In (c), change "will" to "shall"

In (c), evaluated for what? In accordance with what?

In (c), what is meant by "if acceptable"? How and by whom is this determination made?

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

In (c), what is a “technical offer”? What is a “cost/price offer”? I note that elsewhere, you’ve said “cost proposal” (see .1511.)

What is meant by “only the cost/price offers for such acceptable offers will then be publicly opened”?

In (c), who are “such offerors” Those whose offers are to be “publicly opened”?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

01 NCAC 05B .0305 is readopted as published in 33:23 NCR 2243 as follows:

01 NCAC 05B .0305 PUBLIC OPENING

(a) The Purchasing Agency shall publicly open and tabulate all Offers (except those that have been previously withdrawn, or Voided Bids) Advertised procurements shall be publicly opened at the time, date, and place identified in the procurement document. Solicitation. The Tabulation shall be made public at the time it is created unless otherwise confidential pursuant to Rule .0103 of this Section. There shall be at least two Purchasing Agency employees present at the opening when a Sealed Offer is required. At the time of opening, the names of the companies, the manufacturer(s) and catalog number(s) of the item(s) they have offered and the prices, deliveries and payment terms they have submitted shall be tabulated and this tabulation shall become public record, except as provided in Paragraph (b) of this Rule.

(b) When Negotiation after receipt of Offers is authorized, only the names of offerors and the Goods and Services offered shall be tabulated at the time of opening. The price Offer shall become available for public inspection at the time of the award.

~~(b)(c) Under the two-step process, the responsive technical Offers will be evaluated and, if acceptable, only the cost/price Offers for such acceptable Offers will then be publicly opened. At least two days prior notification will be given to such offerors of the time and place of the opening. Under a two-step process, the cost/price offer(s) shall not become public record until the technical offer(s) has been evaluated (first step) and then only those offerors determined by the agency which issued the solicitation document to have acceptable technical offers shall have their cost/price offers opened (second step). The cost/price offers from offerors whose technical offers were deemed unacceptable shall remain unopened. The remaining cost/price offers shall be publicly opened, and the offeror(s) with the acceptable technical offer(s) notified of the time and place for the opening. At least two agency working days notice shall be given prior to the opening. In addition, there shall be at least two agency employees present at the opening.~~

History Note: Authority G.S. 143-49; 143-52; 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. April 1, 1999; February 1, 1996.
Eff. October 1, 2019

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0306

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In reviewing this Rule, the staff recommends the following technical changes be made:

On line 9, "withdrawal" of what? The bid?

What is the difference between a withdrawn bid and a recalled bid?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0306 is readopted as published in 33:22 NCR 2243 as follows:

01 NCAC 05B .0306 LATE OFFERS, MODIFICATIONS, OR WITHDRAWALS

~~No late offer, late modification, or late withdrawal shall be considered unless received before contract award, and the offer, modification, or withdrawal would have been timely but for the action or inaction of agency personnel directly serving the procurement process. The offeror shall have his offer delivered on time, regardless of the mode of delivery used, including the U.S. Postal Service or any other delivery services available. All Offers or modifications must be received by the due date, time and location as specified in the Solicitation document. Any Offer or modification received after the specified time shall not be considered. Withdrawal must be requested in writing prior to the contract award.~~

*History Note: Authority G.S. 143-49; 143-52;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. April 1, 1999; February 1, 1996.
Eff. October 1, 2019*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0308

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In reviewing this Rule, the staff recommends the following technical changes be made:

Does the vendor have the option of saying no (as indicated by "may be requested")?

Who is making the request to extend the time? Please review and clarify.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0308 is readopted as published in 33:23 NCR 2244 as follows:

01 NCAC 05B .0308 EXTENSION OF ACCEPTANCE TIME

When in the public interest, ~~companies~~ Vendors may be requested to extend the time ~~offered for the acceptance of~~
~~offers.~~ within which an Offer is to be accepted.

History Note: Authority G.S. 143-49; 143-52;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. February 1, 1996.
Eff. October 1, 2019

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0309

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In reviewing this Rule, the staff recommends the following technical changes be made:

(c) seems to be missing something. Line 19 says "evaluation of offers shall be conducted as follows:" Then (c)(1) says "following evaluation of offers" but doesn't say how it is to be done.

Who is conducting the evaluation on line 19?

In (c)(1), how is the Division to determine whether to approve an offer? Is this set forth elsewhere in rule or statute?

Please move the semi-colon and "and" at the end of (c)(2) to (c)(1) and end (c)(2) with a period. I understand this was done as a result of pre-review, but the formatting was different on the version submitted for the pre-review.

In (d), at what point in the process might a vender be "non-responsive"? Is it always during evaluation? Is it only when there is a request for clarification or mandatory addendum and they fail to respond? If so, I think this Paragraph could be more clear.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0309 is readopted as published in 33:23 NCR 2244 as follows:

01 NCAC 05B .0309 EVALUATION

(a) In determining the award of ~~contract~~, Contract, ~~bona fide offers~~ Responsive Offers shall be considered and evaluated as provided by statute and applicable rules. The evaluation criteria to be used in determining the award of ~~contract~~ Contract shall be identified in the ~~procurement~~ Solicitation document.

~~(b) An unexecuted offer or an offer without a delivery time shall be rejected.~~

~~(c)(b) During the period of evaluation and prior to award, only the information provided in the tabulation is public record.~~ Possession of Offers, ~~offers~~, including any accompanying information submitted with the ~~offers~~ Offers, shall be limited to persons in the ~~agency~~ Purchasing Agency who are responsible for handling the ~~offers~~ Offers and accompanying information, and to others determined necessary by the ~~agency~~ Purchasing Agency ~~which issued the solicitation document~~, for the purpose of evaluation and award of Contracts, ~~contract~~. No Vendor shall participate in the evaluation process nor submit any additional information or materials during the period of evaluation, unless requested by the Purchasing Agency. Offeror participation in the evaluation process shall not be permitted. Any communication with an offeror that may be necessary for purpose of clarification of its offer shall be conducted by the agency which issued the solicitation document. After award of the contract or when the need for the item or service is canceled, the complete file shall be available to any interested party with the exception of trade secrets subject to the provisions of Rules .1501 and .1518 of this Subchapter.

(c) Evaluation of Offers shall be conducted in accordance with the following requirements:

(1) following evaluation of the Offers, the Purchasing Agency shall submit a recommendation to the Division;

(2) evaluation scoring sheets, and other materials utilized to determine the ranking or assessment of the Responsive Offers shall be retained in the Agency Procurement file; and

(d) If a Vendor is determined to be non-responsive, a written determination of such status shall be made, including the reason(s) therefore with any supporting documentation in the Procurement file. The failure of a Vendor to provide requested information to the Purchasing Agency in connection to a Clarification or mandatory addendum shall be sufficient justification for a determination of non-responsiveness.

*History Note: Authority G.S. 143-49; 143-52; 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. April 1, 1999; February 1, 1996.
Eff. October 1, 2019*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0310

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a), please add a comma in between "means" and "such as"

In (a), do you mean "Written notifications may include letter or electronic means, such as posting on the Electronic Bid System or e-mail." As currently written, it looks like the letter is serving as an example of electronic means (but I know that's not it.)

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0310 is readopted as published in 33:23 NCR 2244 as follows:

01 NCAC 05B .0310 NOTIFICATION OF AWARD

~~If a solicitation is required to be advertised through the Division of Purchase and Contract, then notice of the resulting contract award shall be posted via the Division of Purchase and Contract's home page by the agency issuing the solicitation document in accordance with Rule .0316 of this Section. In addition, after contracts are awarded, successful companies shall be notified in writing or electronically by the agency issuing the solicitation document.~~

(a) Following the award of a Contract in accordance with Rule .0301 of this Section, the Purchasing Agency shall notify the winning Vendor in writing. Written notifications may include Electronic means such as posting on the Electronic Bid System, letter or e-mail.

(b) Purchasing Agencies shall post Contract awards in the same manner described in Rule .0316 of this Section.

*History Note: Authority G.S. 143-49; 143-52; 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. February 1, 1996; May 1, 1988; July 1, 1987;
Temporary Amendment Eff. February 15, 1998;
Amended Eff. April 1, 1999.
Eff. October 1, 2019*

01 NCAC 05B .0313 is repealed through readoption as published in 33:23 NCR 2244 as follows:

01 NCAC 05B .0313 TABULATIONS AND ABSTRACTS

History Note: Authority G.S. 143-49; 143-52; 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. February 1, 1996.
Eff. October 1, 2019

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0316

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a), by "this Rule does not prevent..." Do you mean "A Purchasing Agency may also solicit bids via direct mailings or additional advertising so long as the requirements of this Paragraph are met"?

In (b), I don't understand the information in the parenthesis in either instance. Please review and clarify.

In (b), required data for what? Is (b) setting forth the required data for each advertisement? If so, please say that. Please also consider providing this information in list form.

In (b), line 16, delete or define "short"

In (d)(1), what is meant by "shall be responsible for the advertisement and the award notice shall not be required"? Please review and clarify.

In (d)(1), some valid reasons for what? Is this intended to provide some examples as to when an agency may be unable to transmit electronically? If so, would this be more appropriate elsewhere since it appears to apply to all of (d), not just (d)(1). Also, delete or define "valid."

In (d)(1), please verify that "insufficient copies of samples for a printing job" is current and applicable.

In (d)(3), change "which will provide" to "that provides"

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0316 is readopted as published in 33:23 NCR 2244-2245 as follows:

01 NCAC 05B .0316 ADVERTISEMENT REQUIREMENTS

~~(a) Unless already required by statute, all advertisements required by rule shall be through the Division of Purchase and Contract via the Division's home page on the internet. If advertisement is required by rule, the solicitation shall be advertised at least once and at least 10 days prior to the date designated for opening. This Rule does not prevent solicitation of offers by additional direct mailings or additional advertisement by an agency.~~

(a) Unless otherwise directed by statute or excepted pursuant to Paragraph (d) of this Rule, all advertisements required by Rule .0301 of this Section shall advertise through the Division's Electronic Bid System for at least 10 calendar days, unless a memo requesting a waiver is received by the Division and approved by the SPO in accordance with the Rule .1401 of the Section. This Rules does not prevent Solicitation of Offers by additional direct mailings or additional advertisement by a Purchasing Agency.

~~(b) Agencies required by rule to advertise their solicitations shall electronically transmit the required data directly to the Division's home page. The required data shall include the complete solicitation Solicitation document (specifications, requirements, terms and conditions, etc.), with agency name, buyer name, phone number and address for accessing hard copies of the solicitation Solicitation, solicitation identification number, title (a short description of the commodity, service or printing requirement), and the opening date, time and place. If the solicitation requires potential offerors to attend a mandatory conference or mandatory site visit, this information shall also be furnished with the advertisement, to include date, time, location, contact person and the contact person's phone number.~~

~~(c) Within three agency working days from the award of a contract that has been advertised through the Division, Division's Electronic Bid System, agencies Purchasing Agencies shall electronically transmit an award notice directly to the Division's Electronic Bid System. home page on the internet. The award notice shall be posted for at least 30 consecutive calendar days. This award notice shall identify the contract and award information.~~

(d) Exceptions to this Rule are as follows:

(1) ~~When it is deemed by the agency's executive officer or the officer's designee that there is a valid reason for the agency not~~ If the Purchasing Agency is unable to transmit the advertisement or award notice electronically, that agency may submit the data to the Division, so the Division may Division to transmit it electronically, or the agency may place the advertisement (excluding the complete solicitation Solicitation document) via newspaper. If advertised via newspaper, the agency which issued the solicitation document shall be responsible for the advertisement and the award notice shall not be required. Some valid reasons include computer equipment failure, networking difficulties, or insufficient copies of samples for a printing job.

(2) ~~If there is an attachment to a solicitation that the agency determines will not be electronically transmitted, then the solicitation document, when it is electronically transmitted, shall include instructions to contact the agency which issued the solicitation to obtain the attachment. If a Purchasing Agency is unable to electronically transmit an attachment to the Solicitation, the Purchasing Agency shall include instructions to obtain the attachment in the advertisement.~~

1 (3) ~~If an agency determines that it is not feasible to electronically transmit a particular solicitation~~
2 ~~document through the Division's home page, then the agency shall electronically transmit a~~
3 ~~summary notice in the same way as if it had electronically transmitted the solicitation document.~~
4 ~~The summary notice will instruct anyone inquiring about the solicitation on the Division's home~~
5 ~~page to contact the agency for a hard copy. If a Purchasing Agency is unable to electronically~~
6 ~~transmit a Solicitation, the Purchasing Agency shall electronically transmit a summary notice which~~
7 ~~will provide interested Vendors with instructions to obtain a copy of the Solicitation.~~

8
9 *History Note: Authority G.S. 143-52; 143-53;*
10 *Temporary Adoption Eff. February 15, 1998;*
11 *Eff. April 1, 1999.*
12 *Eff. October 1, 2019*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0317

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (b), line 19, by "may", do you mean "shall"? Also, I have looked at .1402 and don't understand the approval standards. I don't see that they are set forth there. Is there a different cross-reference available?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0317 is readopted as published in 33:23 NCR 2245 as follows:

01 NCAC 05B .0317 MANDATORY CONFERENCES/SITE VISITS

~~(a) It is recommended, except in unusual cases, for agencies only to urge and caution potential offerors to attend scheduled conferences or site visits.~~

~~(a)(b)~~ When a ~~solicitation~~ Solicitation requires potential ~~offerors~~ Vendors to attend a mandatory conference or mandatory site visit, the date, time, location, and other ~~pertinent~~ details of the conference or site visit shall be given in the ~~solicitation document~~, Solicitation, and in the advertisement (if required by rule). ~~when required by Rule .0316 of this Section.~~

~~(b)(c)~~ If only one ~~potential offeror~~ Vendor attends the mandatory conference or mandatory site visit, ~~the conference or site visit may continue to be conducted, but the solicitation shall be canceled immediately following the Purchasing Agency may conduct or postpone the conference or site visit. If this occurs, the agency shall investigate why The Purchasing Agency shall review the Solicitation and factors set out in Rule .1401 of this Section to determine whether any Competition is available and why only one potential Vendor attended. offeror was in attendance and ascertain if there is any competition available. If it is determined that competition is available, the agency shall again attempt to obtain competition by following the rules of this Subchapter, unless otherwise permitted by rule. The Purchasing Agency may schedule another conference or site visit if it determines that Competition is available, and it would be in the best interest of the State. If it is determined that there is no competition~~ Competition available, then the ~~procurement~~ Procurement may be handled as a subject to approval for a waiver of Competition as permitted by rule pursuant to Rule .1402 of this Section.

~~(c)~~ The Purchasing Agency shall document details of the conference or site visit as part of the official Procurement records.

~~(d)~~ Any and all questions ~~or Clarifications~~ by a potential ~~offeror~~ Vendor regarding a ~~solicitation document~~ Solicitation shall be addressed to the ~~purchaser~~ Purchasing Agency named on the Solicitation. ~~document.~~ Any and all revisions to the ~~solicitation document~~ Solicitation shall be made only by written addendum from the ~~purchaser.~~ Purchasing Agency. ~~Verbal communications from whatever source are of no effect.~~

History Note: Authority G.S. 143-52; 143-53;

Eff. April 1, 1999.

Eff. October 1, 2019

01 NCAC 05B .0501 is readopted as published in 33:23 NCR 2245-2246 as follows:

SECTION .0500 - REJECTION OF OFFERS

01 NCAC 05B .0501 ~~BASIS FOR REJECTION OR CANCELLATION OF OFFERS~~

~~(a) In soliciting offers, any and all offers received may be rejected in whole or in part. Basis for rejection shall include, but not be limited to, the offer being deemed unsatisfactory as to quantity, quality, delivery, price or service offered; the offer not complying with conditions of the procurement document or with the intent of the proposed contract; lack of competitiveness by reason of collusion or otherwise or knowledge that reasonably available competition was not received; error(s) in specifications or indication that revision(s) would be to the state's advantage; cancellation of or changes in the intended project or other determination that the proposed requirement is no longer needed; limitation or lack of available funds; circumstances which prevent determination of the lowest responsible or most advantageous offer; any determination that rejection would be to the best interest of the state.~~

(a) Any Offers received in response to a Solicitation may be rejected. The basis for rejection may include the following:

- (1) the Offer does not address the requirements in the Solicitation for bid regarding quantity, quality, delivery, price or service;
- (2) the Offer does not comply with the conditions set forth in the Solicitation for bid;
- (3) the Purchasing Agency determines there is a lack of Competition;
- (4) the Solicitation contains errors;
- (5) cancellation of or changes to the project reference in the Solicitation;
- (6) dual or similar Offers which prevent a Best Value Procurement to be determined; or
- (7) limitation or lack of available funds of the Purchasing Agency.

(b) Negotiation may be utilized if permitted by Rule .0503 of this Section.

(c) If all Offers are rejected, a Solicitation may be cancelled in its entirety or otherwise handled in accordance with the provisions of this Chapter.

*History Note: Authority G.S. 143-52; 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. February 1, 1996.
Eff. October 1, 2019*

01 NCAC 05B .0502 is repealed through readoption as published in 33:23 NCR 2246 as follows:

01 NCAC 05B .0502 PUBLIC RECORD

History Note: Authority G.S. 143-52; 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. February 1, 1996.
Eff. October 1, 2019

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .0503

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Is all of (a) at the discretion of the purchasing agency? If so, I think it's fine, I just want to verify.

In (a), please remove the underline in "difference" and "negotiated"

Just to make sure that I understand, (a) is saying that if a purchasing agency receives offers, but they don't comply with the solicitation, then they can still consider the offers if they are in the competitive range? The way that I first read this, I thought "how are they going to consider offers, if they haven't received any offers."

(b) appears to be missing a word. If what is under the benchmark or delegation? The bids?

In (c), please provide some examples of what a "mutually satisfactory document" would be?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .0503 is readopted with changes as published in 33:23 NCR 2246 as follows:

01 NCAC 05B .0503 NEGOTIATION

~~If an agency does not receive a satisfactory offer in response to a solicitation and all offers are rejected, negotiations may be conducted with all known sources of supply that may be capable of satisfying the requirement, if it is determined by the agency that issued the solicitation document that soliciting offers again would serve no purpose. The negotiations shall be conducted by that agency if under their benchmark or delegation. Negotiations shall be conducted in writing and shall include standard language and terms and conditions issued by the Division of Purchase and Contract, unless otherwise provided by rule. If the negotiations are conducted with only one source or if only one source responds to the negotiations, the reason for lack of competition shall be documented in writing for public record. Negotiations may also be conducted under conditions that merit a waiver of competition, or in other situations that are advantageous as determined by the SPO.~~

(a) If the Purchasing Agency does not receive a Responsive Offer to a Solicitation and determines that soliciting Offers again would not yield a ~~difference~~ **different** result, the Purchasing Agency may negotiate with Vendors in the Competitive Range or reject all Offers and ~~negotiated~~ **negotiate** with one or more sources of supply that may be capable of satisfying the requirement. Negotiations may also be conducted under conditions that merit a waiver of Competition pursuant to Rule .1401 of this Section.

(b) Negotiations shall be conducted by the Purchasing Agency if under its Bid Value Benchmark or General Delegation. A Purchasing Agency may request the participation of the Division in any Negotiation.

(c) Negotiations shall be memorialized by a mutually satisfactory document, executed by the parties and issued by the Division.

(d) All Negotiation results shall be documented in writing for public record.

History Note: Authority G.S. 143-52; 143-53; 143-60;

Eff. February 1, 1996;

Amended Eff. April 1, 1999.

Eff. October 1, 2019

01 NCAC 05B .1108 is readopted as published in 33:23 NCR 2246 as follows:

SECTION .1100 - TERM CONTRACTS

01 NCAC 05B .1108 EXTENSION OF CONTRACT TERMINATION DATES

When in the ~~public interest,~~ best interest of the State, Vendors ~~contractors~~ may be requested to extend the scheduled termination dates of contracts. Extensions shall not result in a change in the prices stated in the original contract unless agreed to by the Purchasing Agency in writing. Extensions that result in an annual contract value exceeding a Purchasing Agency's delegation must be submitted to the Division for approval based on the determining factors set forth in Rule .1102 of this Section.

History Note: Authority G.S. 143-52; 143-49;

Eff. February 1, 1996.

Eff. October 1, 2019

01 NCAC 05B .1201 is readopted as published in 33:23 NCR 2246 as follows:

SECTION .1200 - PARTIAL AND MULTIPLE AWARDS

01 NCAC 05B .1201 USE

~~(a) Partial, progressive or multiple awards may be made by reason of insufficient funds, legislative mandates, where it is advantageous to award separately by items or where more than one supplier is needed to provide the contemplated requirements as to quantity, quality, delivery, service(s) or geographical areas.~~

~~(b) Notwithstanding the necessity for awards to more than one supplier in the case of some indefinite quantity contracts, such awards shall be limited to the number of suppliers deemed necessary to reasonably satisfy the intended requirements. Extreme care shall be exercised to protect the character and principles of competition. Quantities shall not be divided among companies on definite quantity requirements unless and except as provided in the procurement document.~~

(a) The Purchasing Agency may make a partial, multiple or Progressive award for the following reasons:

- (1) there are insufficient funds to make a full award;
- (2) a legislative mandate;
- (3) if the Purchasing Agency determines that it is in the best interests of the State to award separately by items; or
- (4) if more than one supplier is needed to meet the Specifications as to quantity, quality, delivery, services, or geographical areas as set forth in the Solicitation.

(b) Multiple awards shall be made consistent with the applicable provisions of G.S. 143-52.3(5).

*History Note: Authority G.S. 143-52.3; 143-53(6);
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. February 1, 1996.
Eff. October 1, 2019*

01 NCAC 05B .1501 is repealed through readoption as published in 33:23 NCR 2246 as follows:

SECTION .1500 - MISCELLANEOUS PROVISIONS

01 NCAC 05B .1501 CONFIDENTIALITY

History Note: Authority G.S. 143-52; 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. April 1, 1999; February 1, 1996.
Eff. October 1, 2019

01 NCAC 05B .1507 is readopted as published in 33:23 NCR 2246-2247 as follows:

01 NCAC 05B .1507 CHANGE IN CORPORATE STRUCTURE

~~Any Contract following an award to a Vendor are not instruments for sale and shall not be assigned. In cases where contractors are~~ If a Vendor is involved in corporate consolidations, acquisitions or mergers, the Purchasing Agency agency which issued the solicitation document resulting in the contract may negotiate agreements for the transfer of contractual obligations and the continuance of ~~contracts~~ Contracts if the Purchasing Agency determines that it is in the best interest of the State, within the framework of the new corporate structures but with the understanding that the state's contracts are not instruments for sale and shall not be assigned.

History Note: Authority G.S. 143-53;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. April 1, 1999; February 1, 1996.
Eff. October 1, 2019

01 NCAC 05B .1510 is repealed through readoption as published in 33:23 NCR 2247 as follows:

01 NCAC 05B .1510 USE OF PURCHASING POWER FOR PRIVATE GAIN

History Note: Authority G.S. 143-53; 143-58.1;

Eff. February 1, 1976;

Readopted Eff. February 27, 1979;

Amended Eff. April 1, 1999; February 1, 1996; July 1, 1987.

Eff. October 1, 2019

01 NCAC 05B .1511 is readopted as published in 33:23 NCR 2247 as follows:

**01 NCAC 05B .1511 ~~ANTITRUST VIOLATIONS~~ ANTICOMPETITIVE, DECEPTIVE, AND
FRAUDULENT PRACTICES**

~~In instances of identical offers or where there are otherwise indications of collusion, awards may be made in a manner intended to discourage or prevent its continuance as deemed to represent the state's best interest. Instances of suspected antitrust violation shall be reported to appropriate law enforcement authorities by the agency which issued the solicitation document.~~

(a) A Purchasing Agency shall act to prevent the continuance of anticompetitive, deceptive, or fraudulent practices. Anticompetitive practices include actions involving Vendors that restrain trade or commerce or eliminate Competition.

(b) Anticompetitive, deceptive, or fraudulent practices may be evidenced by one or more of the following:

- (1) conspiracy in restraint of trade or commerce;
- (2) combination bidding in restraint of trade or commerce;
- (3) price fixing which may include reliance upon an industry price list;
- (4) collusion;
- (5) identical bidding; or
- (6) agreements to:
 - (A) rotate Offers;
 - (B) share the profits with a Vendor who is not the low Vendor;
 - (C) sublet work in advance of bidding as a means of preventing Competition;
 - (D) refrain from bidding;
 - (E) submit prearranged Offers;
 - (F) submit complementary Offers;
 - (G) set up territories to restrict Competition;
 - (H) alternate bidding; or
 - (I) any other unlawful act in restraint of trade or commerce.

(c) Agency actions to discourage or prevent the continuance of anticompetitive, deceptive, or fraudulent practices may include the following:

- (1) rejecting the Vendor's Offer;
- (2) awarding a bid to a Vendor with a cost or technical proposal that is evaluated lower than the offending Vendor's proposal; and
- (3) recommending that the SPO debar a Vendor from doing business with the State in accordance with Rule .1520 of this Section.

(d) The Purchasing Agency shall report evidence of anticompetitive, deceptive or fraudulent practices to the Attorney General's office and any other appropriate law enforcement authority.

History Note: Authority G.S. 143-53; 143-54;

1 *Eff. February 1, 1976;*
2 *Readopted Eff. February 27, 1979;*
3 *Amended Eff. April 1, 1999; February 1, 1996.*
4 *Eff. October 1, 2019*

01 NCAC 05B .1516 is readopted as published in 33:23 NCR 2247 as follows:

01 NCAC 05B .1516 ADVERTISING

~~No contract shall be used for any advertising by the contractor. No Vendor shall advertise or otherwise use any~~
Contract for marketing purposes. A Vendor may only include the State on a listing of existing customers.

History Note: Authority G.S. 143-53; 143-60;

Eff. February 1, 1996.

Eff. October 1, 2019

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .1519

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a)(1), line 6, change "day" to "days"

In (a)(2) and (b)(2), what is meant by "as soon as possible thereafter"? Does this required an agreement from the vendor? Do you mean something like "within 30 days, unless mutually agreed"

In (a)(2) and (b)(2), what are the appeal rights? Is there a cross-reference available? Given your history note, does this come to OAH under Article 3 of 150B?

In your History Note, delete the references to 150B.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .1519 is readopted as published in 33:23 NCR 2247-2248 as follows:

01 NCAC 05B .1519 PROTEST PROCEDURES

~~(a) To insure fairness to all offerors and to promote open competition, agencies and the Division of Purchase and Contract shall actively follow up and be consistent in responding to an offeror's protest over contract awards~~

~~(b) This Rule applies only to contracts with an actual or estimated dollar value over ten thousand dollars (\$10,000). Agencies may establish procedures to handle an offeror's concerns for contracts with less dollar value.~~

~~(c) When an offeror wants to protest a contract awarded by an agency over ten thousand dollars (\$10,000) in value, the agency and the offeror shall comply with the following:~~

~~(1) The offeror shall submit a written request for a protest meeting to the agency's executive officer which shall be received by the agency's executive officer's office within 30 consecutive calendar days from the date of the contract award. The executive officer shall furnish a copy of this letter to the SPO within five consecutive calendar days of receipt. The offeror's letter shall contain specific reasons and any supporting documentation for why it has a concern with the award. If the letter does not contain this information, or if the executive officer determines that a meeting would serve no purpose, then the executive officer may, within 10 consecutive calendar days from the date of receipt of the letter, respond in writing to the offeror and refuse the protest meeting request. A copy of the executive officer's letter shall be forwarded to the SPO.~~

~~(2) If the protest meeting is granted, the executive officer shall attempt to schedule the meeting within 30 consecutive calendar days after receipt of the letter, or as soon as possible thereafter. Within 10 consecutive calendar days from the date of the protest meeting, the executive officer shall respond to the offeror in writing with the executive officer's decision. A copy of the executive officer's letter shall be forwarded to the SPO.~~

~~(3) The agency shall notify the SPO in writing of any further administrative or judicial review of the contract award.~~

~~(4) The executive officer may appoint a designee to act on the executive officer's behalf under this Rule.~~

~~(d) When an offeror wants to protest a contract awarded by the Secretary over ten thousand dollars (\$10,000) in value, the SPO and the offeror shall comply with the following:~~

~~(1) The offeror shall submit a written request for a protest meeting to the SPO which shall be received by the Division within 30 consecutive calendar days from the date of the contract award. The offeror's letter shall contain specific reasons and any supporting documentation for why it has a concern with the award. If the letter does not contain this information, or if the SPO determines that a meeting would serve no purpose, then the SPO may, within 10 consecutive calendar days from the date of receipt of the letter, respond in writing to the offeror and refuse the protest meeting request.~~

~~(2) If the protest meeting is granted, the SPO shall attempt to schedule the meeting within 30 consecutive calendar days after receipt of the letter, or as soon as possible thereafter. Within 10~~

~~consecutive calendar days from the date of the protest meeting, the SPO shall respond to the offeror in writing with the SPO's decision.~~

(a) When a Vendor wants to protest a Contract awarded by a Purchasing Agency valued at less than the amount set forth in G.S. 143-53, the Purchasing Agency and Vendor shall comply with the following:

(1) The Vendor shall submit a written request for a protest meeting to the Agency's executive officer or his or her designee within 30 calendar day from the date of the Contract award. The executive officer shall furnish a copy of this letter to the SPO within five calendar days of receipt. The Vendor's request shall contain reasons why it has a concern with the award and any supporting documentation. If the request does not contain this information, or if the executive officer determines that the protest is meritless so that a meeting would serve no purpose, then the executive officer may, within 10 calendar days from the date of receipt of the request, respond in writing to the Vendor and refuse the protest meeting request. A copy of the executive officer's decision letter shall be forwarded to the SPO.

(2) If the protest meeting is granted, the executive officer shall schedule the meeting within 30 calendar days after receipt of the request, or as soon as possible thereafter. Within 10 calendar days from the date of the protest meeting, the executive officer shall respond to the Vendor in writing with the executive officer's decision and appeal rights. A copy of the executive officer's decision letter shall be forwarded to the SPO.

(3) The Purchasing Agency shall notify the SPO in writing of any further administrative or judicial review of the Contract award.

(b) When a Vendor wants to protest a Contract awarded by the Secretary valued over the amount set forth in G.S. 143-53, the SPO and Vendor shall comply with the following:

(1) The Vendor shall submit a written request for a protest meeting to the SPO within 30 calendar days from the date of the Contract award. The Vendor's request shall contain reasons why it has a concern with the award and any supporting documentation. If the request does not contain this information, or if the SPO determines that the protest is meritless so that a meeting would serve no purpose, then the SPO may, within 10 calendar days from the date of receipt of the request, respond in writing to the Vendor and refuse the protest meeting request.

(2) If the protest meeting is granted, the SPO shall schedule the meeting within 30 calendar days after receipt of the request, or as soon as possible thereafter. Within 10 calendar days from the date of the protest meeting, the SPO shall respond to the Vendor in writing with the SPO's decision and appeal rights.

(3) The SPO shall notify the Secretary of any further administrative or judicial review of the Contract award.

*History Note: Authority G.S. 150B-2; 150B-22; 150B-23; 143-53;
Eff. February 1, 1996;*

1 *Temporary Amendment Eff. February 15, 1998;*
2 *Amended Eff. April 1, 1999.*
3 *Eff. October 1, 2019*

RRC STAFF OPINION

Please Note: This communication is either 1) only the recommendation of an RRC staff attorney as to action that the attorney believes the Commission should take on the cited rule at its next meeting, or 2) an opinion of that attorney as to some matter concerning that rule. The agency and members of the public are invited to submit their own comments and recommendations (according to RRC rules) to the Commission.

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .1520

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- ☒ Object, based on:
 - ☒ Lack of statutory authority
 - ☒ Unclear or ambiguous
 - ☐ Unnecessary
 - ☐ Failure to comply with the APA
- ☐ Extend the period of review

COMMENT:

Staff is recommending objection to this Rule for lack of statutory authority and ambiguity.

Staff believes that as written, the agency lacks statutory authority for Paragraphs (a), (b), and (c) of this Rule. This Rule applies to the debarment of vendors from State Contracts. It is Staff's understanding that this "debarment" will make a vendor ineligible "from receiving an award under a State Contract or conducting future business with the State" for up to one year. Further, Paragraph (c) indicates that the "SPO may remove the Vendor from any distribution lists for up to one year." Staff does not believe that the agency has the authority to promulgate rules regarding the "debarment" of a vendor as eligibility and ineligibility requirements for vendors are specifically set forth in Statute. Specifically, G.S. 143-59.1 and 143-59.2 address eligibility of vendors. G.S. 143-59.1 sets forth eligibility requirements for foreign vendors. G.S. 143-59.2 indicates when vendors are prohibited from contracting with the State.

In addition to rulemaking authority pursuant to G.S. 143-49, 143-52, 143-53, and 143-60, the agency has provided as authority G.S. 143-746 and 147-64.6. G.S. 143-746 addresses audits by an internal auditor of a State agency. As applied to this Rule, Staff believes this would be the purchasing agency. G.S. 147-64.6(c)(21) addresses audits by the State Auditor's office. Both 143-746 and 147-64.6 provide that if an audit "results in a finding that a private person or entity has received public funds as a result of fraud, misrepresentation, or other deceptive acts or practices while doing business" with the State, the auditor is required to send a written report of its findings to the SPO. The report "may include a recommendation that the private person or entity be debarred"; however,

there is no other authority cited that provides this agency authority regarding debarment and eligibility. Essentially there appears to be a gap between these Statutes and the authority of the agency to debar or determine eligibility of vendors. Even if these Statutes provide authority to the SPO regarding debarment, Staff believes that it would be limited to circumstances where an auditor makes this recommendation to the SPO following an audit. As written, this Rule goes well beyond these limited statutory circumstances.

Because none of the cited authority in the History Note of this Rule gives specific authority to the SPO regarding debarment or eligibility requirements of vendors, Staff does not believe that the agency has the authority to create additional grounds for debarment and ineligibility beyond the circumstances set forth in Statute.

Additionally, Staff is recommending objection to this Rule for ambiguity. Paragraph (a) of this Rule states that the “SPO may debar the vendor from receiving an award under a State Contract or conducting further business with the State for up to a one year term in accordance with this Rule.” However, while this Rule does provide circumstances upon which this determination may be applicable, this Rule does not provide factors that the SPO will use in determining whether and for how long a Vendor will be debarred.

Further, it is unclear in Subparagraph (b)(1) what “deliberate failure without good cause” means and how it will be determined.

§ 143-49. Powers and duties of Secretary.

The Secretary of Administration has the power and authority, and it is the Secretary's duty, subject to the provisions of this Article:

- (1) To canvass sources of supply, including sources of goods with recycled content, and to purchase or to contract for the purchase, lease and lease-purchase of all goods required by the State government, or any of its departments, institutions or agencies under competitive bidding or other suitable means authorized by the Secretary including, without limitation, negotiations, reverse auctions, a best value procurement method such as that defined in G.S. 143-135.9(a)(1), and the solicitation, offer, and acceptance of electronic bids. For purposes of this Article, the term "goods" includes, without limitation, all commodities, supplies, materials, equipment, and other tangible personal property.
- (2) To establish and enforce specifications which shall apply to all goods and services to be purchased or leased for the use of the State government or any of its departments, institutions or agencies.
- (3) To purchase or to contract for, by sealed, competitive bidding or other suitable means authorized by the Secretary including, without limitation, negotiations, reverse auctions, a best value procurement method such as that defined in G.S. 143-135.9(a)(1), and the solicitation, offer, and acceptance of electronic bids, all services of the State government, or any of its departments, institutions, or agencies; or to authorize any department, institution or agency to purchase or contract for such services.
- (3a) To notify the Attorney General of pending contracts for contractual services exceeding a cost of five million dollars (\$5,000,000) and that are not otherwise excepted by this subdivision. Upon notification, the Attorney General shall assign a representative from within the office of the Attorney General, the Contract Management Section of the Division of Purchase and Contract, Department of Administration, or other qualified counsel to assist in negotiation for the award of the contract. It is the duty of the representative to assist and advise in obtaining the most favorable contract for the State, to evaluate all proposals available from prospective contractors for that purpose, to interpret proposed contract terms and to advise the Secretary or his representatives of the liabilities of the State and validity of the contract to be awarded. An attorney from within the office of the Attorney General shall review all contracts and drafts of contracts, and the office shall retain copies for a period of three years following the termination of the contracts. The term "contractual services" as used in this subsection and G.S. 143-52.2 means work performed by an independent contractor requiring specialized knowledge, experience, expertise or similar capabilities wherein the service rendered does not consist primarily of acquisition by this State of equipment or materials and the rental of equipment, materials and supplies. This subdivision does not apply to contracts entered into or to be entered into as a result of a competitive bidding process. In order to be valid, any contract for services reviewed pursuant to this subdivision must include the signature and title of the attorney designated from within the office of the Attorney General to review the contract. If the contract commences without the required signature, the State has the right to terminate the contract, and the other party or parties to the contract shall only be entitled to the value of all services provided to the State prior to the termination. The Secretary is not required to

notify the Attorney General for the appointment of a representative for any contracts for contractual services to be entered into by the constituent institutions of The University of North Carolina pursuant to G.S. 114-8.3(b), or for contracts to be entered into by the Department of Treasurer pursuant to G.S. 114-8.3(b1), unless requested to do so by the General Counsel of The University of North Carolina or the General Counsel of the Department of State Treasurer, respectively.

- (4) To have general supervision of all storerooms and stores operated by the State government, or any of its departments, institutions or agencies and to have supervision of inventories of all tangible personal property belonging to the State government, or any of its departments, institutions or agencies. The duties imposed by this subdivision shall not relieve any department, institution or agency of the State government from accountability for equipment, materials, supplies and tangible personal property under its control.
- (5) To make provision for or to contract for all State printing, including all printing, binding, paper stock, recycled paper stock, supplies, and supplies with recycled content, or materials in connection with the same.
- (6) To make available to nonprofit corporations operating charitable hospitals, to local nonprofit community sheltered workshops or centers that meet standards established by the Division of Vocational Rehabilitation of the Department of Health and Human Services, to private nonprofit agencies licensed or approved by the Department of Health and Human Services as child placing agencies, residential child-care facilities, private nonprofit rural, community, and migrant health centers designated by the Office of Rural Health and Resource Development, to private higher education institutions that are described as nonprofit postsecondary educational institutions in G.S. 116-280 and to counties, cities, towns, local school administrative units, governmental entities and other subdivisions of the State and public agencies thereof in the expenditure of public funds, the services of the Department of Administration in the purchase of goods and services under such rules, regulations and procedures as the Secretary of Administration may adopt. In adopting rules and regulations any or all provisions of this Article may be made applicable to such purchases and contracts made through the Department of Administration, and in addition the rules and regulations shall contain a requirement that payment for all such purchases be made in accordance with the terms of the contract.
- (7) To evaluate the nonprofit qualifications and capabilities of qualified work centers to manufacture commodities or perform services.
- (8) To establish and maintain a procurement card program for use by State agencies, community colleges, and nonexempted constituent institutions of The University of North Carolina. The Secretary of Administration may adopt temporary rules for the implementation and operation of the program in accordance with the payment policies of the State Controller, after consultation with the Department of Information Technology. These rules would include the establishment of appropriate order limits that leverage the cost savings and efficiencies of the procurement card program in conjunction with the fullest possible use of the North Carolina E-Procurement Service. Prior to implementing the program, the Secretary shall consult with the State Controller, the UNC System Office, the Community Colleges System Office, the State Auditor, the Department of Public Instruction, a representative

chosen by the local school administrative units, and the Department of Information Technology. The Secretary may periodically adjust the order limit authorized in this section after consulting with the State Controller, the UNC System Office, the Community Colleges System Office, the Department of Public Instruction, and the Department of Information Technology.

- (9) To include a standard clause in all contracts awarded by the State and departments, agencies, and institutions of the State, providing that the State Auditor and internal auditors of the affected department, agency, or institution may audit the records of the contractor during and after the term of the contract to verify accounts and data affecting fees or performance.
- (10) To monitor and enforce the terms and conditions of statewide term contracts. The Secretary of Administration shall not delegate the power and authority granted under this subdivision to any other department, agency, or institution of the State.
- (11) To develop rules, regulations, and procedures specifying the manner in which departments, agencies, and institutions of the State shall monitor and enforce agency term and non-term contracts.
- (12) To consult with the Attorney General or the Attorney General's designee in developing rules, regulations, and procedures providing for the orderly and efficient submission of proposed contracts to the Attorney General for review as provided in G.S. 114-8.3 and G.S. 143-52.2.
- (13) Repealed by Session Laws 2013-234, s. 2, effective October 1, 2013, and applicable to contracts entered into on or after that date.
- (14) To work in conjunction with the Office of State Human Resources to create a Contracting Specialist career path to provide for the designation of one or more employees within each department, agency, or institution of the State to serve as the Contracting Specialist for the department, agency, or institution. Employees on the Contracting Specialist career path shall receive training and guidance as to the provisions of this Article.
- (15) To work in conjunction with the Office of State Human Resources, the Division of Purchase and Contract, and the University of North Carolina School of Government to develop a rigorous contract management training and certification program for State employees. Certification in the contract management training program is mandatory for all State employees who are responsible for awarding contracts or monitoring contract compliance. The program shall be administered by the Office of State Human Resources.
- (16) To work in conjunction with the University of North Carolina School of Government to study and recommend improvements to State procurement laws, including the feasibility of adopting the provisions of the American Bar Association Model Procurement Code. The recommendations shall be reported by the Secretary to the Joint Legislative Commission on Governmental Operations and the Program Evaluation Division by June 30, 2014.
- (17) To establish procedures to permit State government, or any of its departments, institutions, or agencies, to join with any federal, State, or local government agency, entity, or subdivision, or any nonprofit organization in cooperative purchasing plans, projects, arrangements, or agreements if the interest of the State would be served thereby. (1931, c. 261, s. 2; 1951, c. 3, s. 1; c. 1127, s. 1; 1957, c. 269, s. 3; 1961, c. 310; 1971, c. 587, s. 1; 1975, c. 580; c. 879, s. 46; 1977, c. 733; 1979, c. 759, s. 1; 1983, c. 717, ss. 60, 62; 1985 (Reg. Sess.,

1986), c. 955, ss. 79-82; 1989, c. 408; 1991, c. 358, s. 1; 1993, c. 256, s. 1; 1995, c. 265, ss. 1, 5; 1996, 2nd Ex. Sess., c. 18, s. 24.17; 1997-443, s. 11A.118(a); 1999-20, s. 1; 2000-67, s. 10.9(a); 2001-424, s. 15.6(a); 2001-424, s. 15.6(d); 2001-513, s. 28(b); 2003-147, s. 8; 2004-203, s. 72(b); 2005-213, s. 2; 2006-203, s. 82; 2010-194, s. 21; 2011-145, s. 9.18(h); 2011-326, s. 15(w); 2011-338, s. 1; 2013-234, s. 2; 2013-382, s. 9.1(c); 2015-241, s. 7A.4(p); 2017-102, s. 42.1; 2018-5, s. 31.1(a); 2018-12, s. 16.)

§ 143-52. Competitive bidding procedure; consolidation of estimates by Secretary; bids; awarding of contracts; cost plus percentage of cost contracts strictly prohibited.

(a) The Secretary of Administration shall compile and consolidate all estimates of goods and services needed and required by State departments, institutions and agencies to determine the total requirements of any given commodity. Where the total requirements will involve an expenditure in excess of the expenditure benchmark established under the provisions of G.S. 143-53.1 and where the competitive bidding procedure is employed as hereinafter provided, sealed bids shall be solicited by advertisement in a newspaper widely distributed in this State or through electronic means, or both, as determined by the Secretary to be most advantageous, at least once and at least 10 days prior to the date designated for opening. Except as otherwise provided under this Article, contracts for the purchase of goods and services shall be based on competitive bids and suitable means authorized by the Secretary as provided in G.S. 143-49. The acceptance of bid(s) most advantageous to the State shall be determined upon consideration of the following criteria: prices offered; best value, as the term is defined in G.S. 143-135.9(a)(1); the quality of the articles offered; the general reputation and performance capabilities of the bidders; the substantial conformity with the specifications and other conditions set forth in the request for bids; the suitability of the articles for the intended use; the personal or related services needed; the transportation charges; the date or dates of delivery and performance; and such other factor(s) deemed pertinent or peculiar to the purchase in question, which if controlling shall be made a matter of record. Competitive bids on contracts shall be received in accordance with rules and regulations to be adopted by the Secretary of Administration, which rules and regulations shall prescribe for the manner, time and place for proper advertisement for such bids, the time and place when bids will be received, the articles for which such bids are to be submitted and the specifications prescribed for the articles, the number of the articles desired or the duration of the proposed contract, and the amount, if any, of bonds or certified checks to accompany the bids. Bids shall be publicly opened. Any and all bids received may be rejected. Each and every bid conforming to the terms of the invitation, together with the name of the bidder, shall be tabulated and that tabulation shall become public record in accordance with the rules adopted by the Secretary. All contract information shall be made a matter of public record after the award of contract. Provided, that trade secrets, test data and similar proprietary information may remain confidential. A bond for the faithful performance of any contract may be required of the successful bidder at bidder's expense and in the discretion of the Secretary of Administration. When the dollar value of a contract for the purchase, lease, or lease/purchase of goods exceeds the benchmark established by G.S. 143-53.1, the contract shall be reviewed by the State Purchasing Officer pursuant to G.S. 143-52.1 prior to the contract being awarded. After contracts have been awarded, the Secretary of Administration shall certify to the departments, institutions and agencies of the State government the sources of supply and the contract price of the goods so contracted for.

(b) Expired.

(c) Neither the Department of Administration nor any department, agency, or institution of the State may award a cost plus percentage of cost contract for any purpose, except as provided in G.S. 18C-150. (1931, c. 261, s. 5; 1933, c. 441, s. 1; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, ss. 2, 3; 1983, c. 717, s. 61; 1985 (Reg. Sess., 1986), c. 955, ss. 83-86; 1989 (Reg. Sess., 1990), c. 936, s. 3(a); 1997-412, s. 2; 1999-434, s. 12; 2006-203, s. 83; 2009-475, s. 1; 2010-194, s. 22; 2011-338, s. 3; 2013-234, s. 8.)

§ 143-53. Rules.

- (a) The Secretary of Administration may adopt rules governing the following:
- (1) Prescribing the routine and procedures to be followed in canvassing bids and awarding contracts, and for reviewing decisions made pursuant thereto, and the decision of the reviewing body shall be the final administrative review. The Division of Purchase and Contract shall review and decide a protest on a contract valued at twenty-five thousand dollars (\$25,000) or more. The Secretary shall adopt rules or criteria governing the review of and decision on a protest on a contract of less than twenty-five thousand dollars (\$25,000) by the agency that awarded the contract.
 - (2) **(See Editor's note)** Prescribing the routine, including consistent contract language, for securing bids on items that do not exceed the bid value benchmark established under the provisions of G.S. 143-53.1, 115D-58.14, or 116-31.10. The bid value benchmark for securing offers for each State department, institution, and agency established under the provisions of G.S. 143-53.1 shall be determined by the Director of the Division of Purchase and Contract following the Director's consultation with the State Budget Officer and the State Auditor. The Director for the Division of Purchase and Contract may set or lower the benchmark, or raise the benchmark upon written request by the agency, after consideration of their overall capabilities, including staff resources, purchasing compliance reviews, and audit reports of the individual agency. The routine prescribed by the Secretary shall include contract award protest procedures and consistent requirements for advertising of solicitations for securing offers issued by State departments, institutions, universities (including the special responsibility constituent institutions of The University of North Carolina), agencies, community colleges, and the public school administrative units.
 - (3) Repealed by Session Laws 2011-338, s. 4, effective July 1, 2011.
 - (4) Prescribing items and quantities, and conditions and procedures, governing the acquisition of goods and services which may be delegated to departments, institutions and agencies, notwithstanding any other provisions of this Article.
 - (5) Prescribing conditions under which purchases and contracts for the purchase, installment or lease-purchase, rental or lease of goods and services may be entered into by means other than competitive bidding, including, but not limited to, negotiation, reverse auctions, and acceptance of electronic bids. Notwithstanding the provisions of subsections (a) and (b) of this section, any waiver of competition for the purchase, rental, or lease of goods and services is subject to prior review by the Secretary, if the expenditure exceeds ten thousand dollars (\$10,000). The Division may levy a fee, not to exceed one dollar (\$1.00), for review of each waiver application.
 - (6) Prescribing conditions under which partial, progressive and multiple awards may be made.
 - (7) Prescribing conditions and procedures governing the purchase of used goods.
 - (8) Providing conditions under which bids may be rejected in whole or in part.
 - (9) Prescribing conditions under which information submitted by bidders or suppliers may be considered proprietary or confidential.

- (10) Prescribing procedures for making purchases under programs involving participation by two or more levels or agencies of government, or otherwise with funds other than State-appropriated.
- (11) Prescribing procedures to encourage the purchase of North Carolina farm products, and products of North Carolina manufacturing enterprises.
- (12) Repealed by Session Laws 1987, c. 827, s. 216.

(b) In adopting the rules authorized by subsection (a) of this section, the Secretary shall include special provisions for the purchase of goods and services, which provisions are necessary to meet the documented training, work, or independent living needs of persons with disabilities according to the requirements of the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act, as amended. The Secretary may consult with other agencies having expertise in meeting the needs of individuals with disabilities in developing these provisions. These special provisions shall establish purchasing procedures that:

- (1) Provide for the involvement of the individual in the choice of particular goods, service providers, and in the methods used to provide the goods and services;
- (2) Provide the flexibility necessary to meet those varying needs of individuals that are related to their disabilities;
- (3) Allow for purchase outside of certified sources of supply and competitive bidding when a single source can provide multiple pieces of equipment, including adaptive equipment, that are more compatible with each other than they would be if they were purchased from multiple vendors;
- (4) Permit priority consideration for vendors who have the expertise to provide appropriate and necessary training for the users of the equipment and who will guarantee prompt service, ongoing support, and maintenance of this equipment;
- (5) Permit agencies to give priority consideration to suppliers offering the earliest possible delivery date of goods or services especially when a time factor is crucial to the individual's ability to secure a job, meet the probationary training periods of employment, continue to meet job requirements, or avoid residential placement in an institutional setting; and
- (6) Allow consideration of the convenience of the provider's location for the individual with the disability.

In developing these purchasing provisions, the Secretary shall also consider the following criteria: (i) cost-effectiveness, (ii) quality, (iii) the provider's general reputation and performance capabilities, (iv) substantial conformity with specifications and other conditions set forth for these purchases, (v) the suitability of the goods or services for the intended use, (vi) the personal or other related services needed, (vii) transportation charges, and (viii) any other factors the Secretary considers pertinent to the purchases in question.

(c) The purpose of rules promulgated hereunder shall be to promote sound purchasing management.

(d) Notwithstanding the provisions of this section or any rule adopted pursuant to this Article, The University of North Carolina may solicit bids for service contracts with a term of 10 years or less, including extensions and renewals, without the prior approval of the State Purchasing Officer.

(e) Expired. (1931, c. 261, s. 5; 1933, c. 441, s. 1; 1957, c. 269, s. 3; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 602, s. 4; 1983, c. 717, ss. 63-64.1; 1985 (Reg. Sess., 1986), c. 955, ss. 87, 88; 1987, c. 827, s. 216; 1989 (Reg. Sess., 1990), c. 936, s. 3(b); 1995, c. 256, s. 1;

1997-412, s. 3; 1998-217, s. 15; 1999-400, ss. 1, 2; 2002-107, s. 2; 2003-147, s. 9; 2004-203, s. 72(b); 2005-125, s. 1; 2006-203, s. 84; 2009-475, s. 2; 2011-338, s. 4; 2013-289, s. 7.)

§ 143-59.1. Contracts with certain foreign vendors.

(a) **Ineligible Vendors.** – The Secretary of Administration, State Chief Information Officer, and other entities to which this Article applies shall not contract for goods or services with either of the following:

- (1) A vendor if the vendor or an affiliate of the vendor if the Secretary of Revenue has determined that the vendor or affiliate of the vendor meets one or more of the conditions of G.S. 105-164.8(b) but refuses to collect the use tax levied under Article 5 of Chapter 105 of the General Statutes on its sales delivered to North Carolina. The Secretary of Revenue shall provide the Secretary of Administration periodically with a list of vendors to which this section applies.
- (2) A vendor if the vendor or an affiliate of the vendor incorporates or reincorporates in a tax haven country after December 31, 2001, but the United States is the principal market for the public trading of the stock of the corporation incorporated in the tax haven country.

(b) **Vendor Certification.** – The Secretary of Administration shall require each vendor submitting a bid or contract to certify that the vendor is not an ineligible vendor as set forth in subsection (a) of this section. Any person who submits a certification required by this subsection known to be false shall be guilty of a Class I felony.

(c) **Definitions.** – The following definitions apply in this section:

- (1) **Affiliate.** – As defined in G.S. 105-163.010.
- (2) **Tax haven country.** – Means each of the following: Barbados, Bermuda, British Virgin Islands, Cayman Islands, Commonwealth of the Bahamas, Gibraltar, Isle of Man, the Principality of Monaco, and the Republic of the Seychelles. (1999-341, s. 7; 2002-189, s. 6; 2003-413, s. 28; 2012-79, s. 2.14; 2015-241, s. 7A.4(r).)

§ 143-59.2. Certain vendors prohibited from contracting with State.

(a) **Ineligible Vendors.** – A vendor is not entitled to enter into a contract for goods or services with any department, institution, or agency of the State government subject to the provisions of this Article if any officer or director of the vendor, or any owner if the vendor is an unincorporated business entity, within 10 years immediately prior to the date of the bid solicitation, has been convicted of any violation of Chapter 78A of the General Statutes or the Securities Act of 1933 or the Securities Exchange Act of 1934.

(b) **Vendor Certification.** – The Secretary of Administration shall require each vendor submitting a bid or contract to certify that none of its officers, directors, or owners of an unincorporated business entity has been convicted of any violation referenced in subsection (a) of this section within 10 years immediately prior to the date of the bid solicitation. Any person who submits a certification required by this subsection known to be false shall be guilty of a Class I felony.

(c) **Void Contracts.** – A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare, and (ii) the continuation is approved by the Secretary of Administration. Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (2002-189, s. 5.)

§ 143-60. Rules covering certain purposes.

The Secretary of Administration may adopt, modify, or abrogate rules covering the following purposes, in addition to those authorized elsewhere in this Article:

- (1) Requiring reports by State departments, institutions, or agencies of stocks of supplies and materials and equipment on hand and prescribing the form of such reports.
- (2) Prescribing the manner in which supplies, materials and equipment shall be delivered, stored and distributed.
- (3) Prescribing the manner of inspecting deliveries of supplies, materials and equipment and making chemical and/or physical tests of samples submitted with bids and samples of deliveries to determine whether deliveries have been made in compliance with specifications. However, the provisions of this subdivision shall not apply to the constituent institutions of The University of North Carolina. The President of The University of North Carolina shall issue regulations or guidelines for the conducting of quality inspections by constituent institutions to ensure that deliveries have been made in compliance with specifications.
- (4) Prescribing the manner in which purchases shall be made in emergencies.
- (5) Providing for such other matters as may be necessary to give effect to foregoing rules and provisions of this Article.
- (6) Prescribing the manner in which passenger vehicles shall be purchased.

Further, the Secretary of Administration may prescribe appropriate procedures necessary to enable the State, its institutions and agencies, to obtain materials surplus or otherwise available from federal, State or local governments or their disposal agencies. (1931, c. 261, s. 11; 1945, c. 145; 1957, c. 269, s. 3; 1961, c. 772; 1971, c. 587, s. 1; 1975, c. 879, s. 46; 1981, c. 268, s. 2; 1983, c. 717, ss. 67, 68; 1985 (Reg. Sess., 1986), c. 955, ss. 89, 90; 1987, c. 282, s. 27; c. 827, s. 217; 2006-203, s. 85; 2011-145, s. 9.6G(a).)

§ 143-746. Internal auditing required.

- (a) Requirements. – A State agency shall establish a program of internal auditing that:
- (1) Promotes an effective system of internal controls that safeguards public funds and assets and minimizes incidences of fraud, waste, and abuse.
 - (2) Determines if programs and business operations are administered in compliance with federal and state laws, regulations, and other requirements.
 - (3) Reviews the effectiveness and efficiency of agency and program operations and service delivery.
 - (4) Periodically audits the agency's major systems and controls, including:
 - a. Accounting systems and controls.
 - b. Administrative systems and controls.
 - c. Information technology systems and controls.
- (b) Internal Audit Standards. – Internal audits shall comply with current Standards for the Professional Practice of Internal Auditing issued by the Institute for Internal Auditors or, if appropriate, Government Auditing Standards issued by the Comptroller General of the United States.
- (c) Appointment and Qualifications of Internal Auditors. – Any State employee who performs the internal audit function shall meet the minimum qualifications for internal auditors established by the Office of State Human Resources, in consultation with the Council of Internal Auditing.
- (d) Director of Internal Auditing. – The agency head shall appoint a Director of Internal Auditing who shall report to, as designated by the agency head, (i) the agency head, (ii) the chief deputy or chief administrative assistant, or (iii) the agency governing board, or subcommittee thereof, if such a governing board exists. The Director of Internal Auditing shall be organizationally situated to avoid impairments to independence as defined in the auditing standards referenced in subsection (b) of this section.
- (e) Insufficient Personnel. – If a State agency has insufficient personnel to comply with this section, the Office of State Budget and Management shall provide technical assistance.
- (f) Reporting Fraudulent Activity. – If an internal audit conducted pursuant to this section results in a finding that a private person or entity has received public funds as a result of fraud, misrepresentation, or other deceptive acts or practices while doing business with the State agency, the internal auditor shall submit a detailed written report of the finding, and any additional necessary supporting documentation, to the State Purchasing Officer. A report submitted under this subsection may include a recommendation that the private person or entity be debarred from doing business with the State or a political subdivision thereof. (2007-424, s. 1; 2013-382, s. 9.1(c); 2013-406, s. 1; 2015-241, s. 25.1(a); 2015-268, s. 7.4.)

§ 147-64.6. Duties and responsibilities.

(a) It is the policy of the General Assembly to provide for the auditing of State agencies by the impartial, independent State Auditor.

(b) The duties of the Auditor are independently to examine into and make findings of fact on whether State agencies:

- (1) Have established adequate operating and administrative procedures and practices; systems of accounting, reporting and auditing; and other necessary elements of legislative or management control.
- (2) Are providing financial and other reports which disclose fairly, consistently, fully, and promptly all information needed to show the nature and scope of programs and activities and have established bases for evaluating the results of such programs and operations.
- (3) Are promptly collecting, depositing, and properly accounting for all revenues and receipts arising from their activities.
- (4) Are conducting programs and activities and expending funds made available in a faithful, efficient, and economical manner in compliance with and in furtherance of applicable laws and regulations of the State, and, if applicable, federal law and regulation.
- (5) Are determining that the authorized activities or programs effectively serve the intent and purpose of the General Assembly and, if applicable, federal law and regulation.

(c) The Auditor shall be responsible for the following acts and activities:

- (1) Audits made or caused to be made by the Auditor shall be conducted in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants, the United States General Accounting Office, or other professionally recognized accounting standards-setting bodies.
- (2) Financial and compliance audits may be made at the discretion of the Auditor without advance notice to the organization being audited. Audits of economy and efficiency and program results shall be discussed in advance with the prospective auditee unless an unannounced visit is essential to the audit.
- (3) The Auditor, on the Auditor's own initiative and as often as the Auditor deems necessary, or as requested by the Governor or the General Assembly, shall, to the extent deemed practicable and consistent with the Auditor's overall responsibility as contained in this act, make or cause to be made audits of all or any part of the activities of the State agencies. Each agency or department receiving a financial statement audit by the Auditor under this subdivision shall prepare a financial statement and supplementary information in the format required by the Auditor. Financial statements and supplementary information prepared as required by this subdivision shall be completed and submitted to the Auditor not later than 60 days after the deadline for the agency's or department's Comprehensive Annual Financial Report submission as established by the State Controller.
- (4) The Auditor, at the Auditor's own discretion, may, in selecting audit areas and in evaluating current audit activity, consider and utilize, in whole or in part, the relevant audit coverage and applicable reports of the audit staffs of the various State agencies, independent contractors, and federal agencies. The Auditor shall coordinate, to the extent deemed practicable, the auditing conducted within the State to meet the needs of all governmental bodies.

- (5) The Auditor is authorized to contract with federal audit agencies, or any governmental agency, on a cost reimbursable basis, for the Auditor to perform audits of federal grants and programs administered by the State Departments and institutions in accordance with agreements negotiated between the Auditor and the contracting federal audit agencies or any governmental agency. In instances where the grantee State agency shall subgrant these federal funds to local governments, regional councils of government and other local groups or private or semiprivate institutions or agencies, the Auditor shall have the authority to examine the books and records of these subgrantees to the extent necessary to determine eligibility and proper use in accordance with State and federal laws and regulations.
- The Auditor shall charge and collect from the contracting federal audit agencies, or any governmental agencies, the actual cost of all the audits of the grants and programs contracted by him to do. Amounts collected under these arrangements shall be deposited in the State Treasury and be budgeted in the Department of State Auditor and shall be available to hire sufficient personnel to perform these contracted audits and to pay for related travel, supplies and other necessary expenses.
- (6) The Auditor is authorized and directed in the Auditor's reports of audits or reports of special investigations to make any comments, suggestions, or recommendations the Auditor deems appropriate concerning any aspect of such agency's activities and operations.
- (7) The Auditor may charge and collect from each examining and licensing board the actual cost of each audit of such board. Costs collected under this subdivision shall be based on the actual expense incurred by the Auditor's office in making such audit and the affected agency shall be entitled to an itemized statement of such costs. Amounts collected under this subdivision shall be deposited into the general fund as nontax revenue.
- (8) The Auditor shall examine as often as may be deemed necessary the accounts kept by the Treasurer, and if the Auditor discovers any irregularity or deficiency therein, unless the same be rectified or explained to his satisfaction, report the same forthwith in writing to the General Assembly, with copy of such report to the Governor and Attorney General. In addition to regular audits, the Auditor shall check the treasury records at the time a Treasurer assumes office (not to succeed himself or herself), and therein charge the Treasurer with the balance in the treasury, and shall check the Treasurer's records at the time the Treasurer leaves office to determine that the accounts are in order.
- (9) The Auditor may examine the accounts and records of any bank or financial institution relating to transactions with the State Treasurer, or with any State agency, or the Auditor may require banks doing business with the State to furnish the Auditor information relating to transactions with the State or State agencies.
- (10) The Auditor may, as often as the Auditor deems advisable, conduct a detailed review of the bookkeeping and accounting systems in use in the various State agencies which are supported partially or entirely from State funds. Such examinations will be for the purpose of evaluating the adequacy of systems in use by these agencies and institutions. In instances where the Auditor determines that existing systems are outmoded, inefficient, or otherwise inadequate, the Auditor shall recommend changes to the State Controller. The

- State Controller shall prescribe and supervise the installation of such changes, as provided in G.S. 143B-426.39(2).
- (11) The Auditor shall, through appropriate tests, satisfy himself or herself concerning the propriety of the data presented in the Comprehensive Annual Financial Report and shall express the appropriate auditor's opinion in accordance with generally accepted auditing standards.
 - (12) The Auditor shall provide a report to the Governor and Attorney General, and other appropriate officials, of such facts as are in the Auditor's possession which pertain to the apparent violation of penal statutes or apparent instances of malfeasance, misfeasance, or nonfeasance by an officer or employee.
 - (13) At the conclusion of an audit, the Auditor or the Auditor's designated representative shall discuss the audit with the official whose office is subject to audit and submit necessary underlying facts developed for all findings and recommendations which may be included in the audit report. On audits of economy and efficiency and program results, the auditee's written response shall be included in the final report if received within 30 days from receipt of the draft report.
 - (14) The Auditor shall notify the General Assembly, the Governor, the Chief Executive Officer of each agency audited, and other persons as the Auditor deems appropriate that an audit report has been published, its subject and title, and the locations, including State libraries, at which the report is available. The Auditor shall then distribute copies of the report only to those who request a report. The copies shall be in written or electronic form, as requested. He shall also file a copy of the audit report in the Auditor's office, which will be a permanent public record. In addition, the Auditor may publish on his or her Web site any reports from audits of State agencies not directly conducted by the Auditor. Nothing in this subsection shall be construed as authorizing or permitting the publication of information whose disclosure is otherwise prohibited by law.
 - (15) It is not the intent of the audit function, nor shall it be so construed, to infringe upon or deprive the General Assembly and the executive or judicial branches of State government of any rights, powers, or duties vested in or imposed upon them by statute or the Constitution.
 - (16) The Auditor shall be responsible for receiving reports of allegations of the improper governmental activities as provided in G.S. 147-64.6B. The Auditor shall adopt policies and procedures necessary to provide for the investigation or referral of these allegations.
 - (17) Repealed by Session Laws 2009-136, s. 2, effective June 19, 2009.
 - (18) Repealed by Session Laws 2010-31, s. 6.15(b), effective July 1, 2010.
 - (19) Whenever the Auditor believes that information received or collected by the Auditor may be evidence of a violation of any of the provisions of Subchapter II of Chapter 163A of the General Statutes, or Article 14 of Chapter 120 of the General Statutes, the Auditor shall report that information to the Bipartisan State Board of Elections and Ethics Enforcement and the Secretary of State as appropriate. The Auditor shall be bound by interpretations issued by the Bipartisan State Board of Elections and Ethics Enforcement as to whether or not any information reported by the Auditor under this subdivision involves or may involve a violation of Subchapter II of Chapter 163A of the General Statutes, or Article 14 of Chapter 120 of the General Statutes. Nothing in this

subdivision shall be construed to limit the Auditor's authority under subdivision (1) of this subsection.

- (20) Whenever the Auditor believes that information received or collected by the Auditor may be evidence of criminal misconduct, the Auditor shall report that information to either the State Bureau of Investigation or the District Attorney for the county where the alleged misconduct occurred. Nothing in this subdivision shall be construed to limit the Auditor's authority under subdivision (1) of this subsection.

- (21) If an audit undertaken by the Auditor results in a finding that a private person or entity has received public funds as a result of fraud, misrepresentation, or other deceptive acts or practices while doing business with the State or a political subdivision thereof, the Auditor shall submit a detailed written report of the finding, and any additional necessary supporting documentation, to the State Purchasing Officer or the appropriate political subdivision official, as applicable. A report submitted under this subsection may include a recommendation that the private person or entity be debarred from doing business with the State or a political subdivision thereof.

(d) Reports and Work Papers. – The Auditor shall maintain for 10 years a complete file of all audit reports and reports of other examinations, investigations, surveys, and reviews issued under the Auditor's authority. Audit work papers and other evidence and related supportive material directly pertaining to the work of the Auditor's office shall be retained according to an agreement between the Auditor and State Archives. To promote intergovernmental cooperation and avoid unnecessary duplication of audit effort, and notwithstanding the provisions of G.S. 126-24, pertinent work papers and other supportive material related to issued audit reports may be, at the discretion of the Auditor and unless otherwise prohibited by law, made available for inspection by duly authorized representatives of the State and federal government who desire access to and inspection of such records in connection with some matter officially before them, including criminal investigations.

Except as provided in this section, or upon an order issued in Wake County Superior Court upon 10 days' notice and hearing finding that access is necessary to a proper administration of justice, audit work papers and related supportive material shall be kept confidential, including any interpretations, advisory opinions, or other information or materials furnished to or by the Bipartisan State Board of Elections and Ethics Enforcement under this section. (1983, c. 913, s. 2; 1985 (Reg. Sess., 1986), c. 1024, ss. 24, 25; 1987, c. 738, s. 62; 1989, c. 236, s. 2; 1999-188, s. 2; 2001-142, s. 2; 2001-424, ss. 9.1(a), 15.2(c); 2002-126, s. 27.2(b); 2002-159, s. 48; 2004-129, s. 46; 2008-215, ss. 1(a), 2, 3; 2009-136, s. 2; 2010-31, s. 6.15(b); 2010-194, s. 27; 2014-100, ss. 25.2, 25.3; 2015-241, s. 25.1(b); 2015-268, s. 7.4; 2017-6, s. 3; 2018-5, s. 27.1.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .1520

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In (a) and (c), how will it be determined how much time the debarment will last? The words "up to" create the potential ambiguity. Is it necessary to have this language in both places? It might make sense to leave it in (c) and address this and my other concern regarding (c) at the same time.

In (b)(1), delete or define "deliberate." Also, what is meant by "good cause"? Please provide some examples if you keep this language.

In (b)(3), change "which" to "that"

In (b)(3), delete or define "currently", "seriously", and "directly"

In (c), by "may remove the Vendor", do you mean "shall"? If you mean "may", what factors will be used in making this determination.

In (d), what are these "appeal rights"? Is there a cross-reference available?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .1520 is readopted as published in 33:23 NCR 2248-2249 as follows:

01 NCAC 05B .1520 ~~DEFAULT PROCEEDINGS; DEBARMENT~~

~~(a) The agency which issued the solicitation document resulting in the contract may find a contractor in default of contract for failing to perform in accordance with the contract requirements, terms and conditions. If a contractor is found in default of contract, the agency which issued the solicitation document resulting in the contract may take action, immediate if necessary, to purchase the needed commodities, printing or services on the open market and charge any additional cost for the commodities, printing or services and expense for doing so to the defaulting contractor. If an agency finds a contractor in default, such action and the circumstances shall be reported by the agency to the Division of Purchase and Contract in writing. This does not limit any other remedies that may be available to the State or agency.~~

(a) In addition to any civil or criminal remedies available to the State, the SPO may debar the Vendor from receiving an award under a State Contract or conducting future business with the State for up to a one year term in accordance with this Rule.

(b) Cause for initial or successive debarment may include:

- (1) deliberate failure without good cause to perform a Contract in accordance with the terms and conditions of the Contract;
- (2) substantiated or uncured complaints;
- (3) the Vendor or any officer, director, owner, project manager, Procurement manager or chief financial officer is convicted under a State or Federal statute of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity which currently, seriously, and directly affects responsibility as a State Vendor;
- (4) the Vendor or any officer, director, or owner is debarred from bidding or contracting with the federal government;
- (5) conviction under State or Federal antitrust statutes arising out of the submission of bids or proposals; and
- (6) violation of the State Government Ethics Act or the Lobbying laws.

~~(c)(b) Upon finding cause to debar a Vendor, the SPO The Division may remove the contractor Vendor from any mailing distribution lists which may be utilized for up to a one year term, and debar the contractor from doing business with the agency, or any agency, for a period of time at the discretion of the Division.~~

(d) The SPO shall notify a Vendor of any debarment and appeal rights, in writing, which may include an Electronic form.

*History Note: Authority G.S. 143-49; 143-52; 143-53; 143-60; 143-64.b(c)(21); 143-746;
Eff. February 1, 1996;
Amended Eff. April 1, 1999.*

1 *Eff. October 1, 2019*
2

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .1521

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

In Item (5), please change "which" to "that" in "which assures"

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .1521 is readopted as published in 33:23 NCR 2249 as follows:

01 NCAC 05B .1521 FAITHFUL PERFORMANCE

~~(a) A bond, or other suitable means of insuring faithful performance, may be required of the contractor at the contractor's expense.~~

~~(b) Liquidated damages, in the form of a monetary penalty for late delivery, may be provided for in the contract, as a means of ensuring faithful performance from the contractor.~~

A Solicitation and Contract may include terms ensuring a Vendor's performance such as:

- (1) a bond, or similar assurance;
- (2) liquidated damages;
- (3) a percentage of the Contract value held as a retainage;
- (4) withholding final payment contingent on acceptance of the final deliverable; and
- (5) any other provision which assures performance of the Vendor.

*History Note: Authority G.S. 143-52; 143-53;
Eff. February 1, 1996;
Amended Eff. April 1, 1999.
Eff. October 1, 2019*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Department of Administration

RULE CITATION: 01 NCAC 05B .1522

DEADLINE FOR RECEIPT: Wednesday, September 11, 2019

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

This Rule seems to be missing something. What is a reciprocal preference? When would this Rule be applicable? Please note that because titles of Rules can be changed without going through the rulemaking process, we read rules without the titles. Please make it clear within the body of the Rule when this is applicable.

In (b), please change "according to the Agency's interpretation of..." to "as defined by"

In (c), please change "procurement are" to "procurements are" or "procurement is"

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 27, 2019

01 NCAC 05B .1522 is readopted as published in 33:23 NCR 2249 as follows:

01 NCAC 05B .1522 RECIPROCAL PREFERENCE

(a) Each Solicitation ~~document~~ used to obtain contracts for ~~equipment, materials, supplies, Goods and services~~ Services that exceed ~~twenty five thousand dollars (\$25,000) in value~~ thresholds mandated in G.S. 143-59(b) shall include space for a bidder to give their principal place of business address if it is different than the address given in the execution section of the ~~solicitation document~~. Solicitation. This shall not prevent the ~~agency~~ Purchasing Agency that issued the ~~solicitation document~~ Solicitation from investigating this information and concluding that the principal place of business is different, according to ~~their~~ the Agency's interpretation of G.S. 143-59(c).

(b) A reciprocal preference shall not be used when ~~procurements are being made~~ Procurement are exempted under ~~G.S. 143-53(a)(5) and G.S. 143-57.~~ G.S. 143-59(d).

~~(c) For the purpose of this Section, a bidder and offeror, as well as bid and proposal, are interchangeable.~~

History Note: Authority G.S. 143-59;

Temporary Adoption Eff. January 14, 2002;

Eff. April 1, 2003.

Eff. October 1, 2019

01 NCAC 05D .0209 is repealed through readoption as published in 33:23 NCR 2249 as follows:

SUBCHAPTER 05D - CONSULTANT CONTRACTS

SECTION .0200 - CONTRACTING PROCEDURE FOR CONSULTANTS

01 NCAC 05D .0209 RELATIONSHIP OF CONSULTANT TO STATE

*History Note: Authority G.S. 143-64.21;
 Eff. February 1, 1976;
 Readopted Eff. February 27, 1979;
 Amended Eff. February 1, 1996.
 Eff. October 1, 2019*