

RRC STAFF OPINION

PERIODIC REVIEW AND EXPIRATION OF EXISTING RULES REPORT

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 REPORT AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT REPORT. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Office of Information and Technology Services

REPORT: 09 NCAC 06B .0301

RECOMMENDED ACTION:

- ☒ Approve, but note staff's comment
- ☐ Find the comments for Rules have merit

COMMENT:

In its submission, the agency reported receiving four comments for four rules. In order to assist the Commission in its review, staff compiled the rules, comments, agency response, and the recommendation in the following pages.

Staff recommends approving the report as submitted by the agency.

SECTION .0300 – PROCUREMENT AUTHORIZATION AND PROCEDURES

09 NCAC 06B .0301 PROCUREMENT PROCEDURES

(a) The procurement process of requesting or inviting an offer(s) shall be managed by the purchasing agency, including use of standard solicitation document language and terms and conditions established by the State CIO. If an emergency situation or pressing need exists, the procurement process requesting or inviting an offer(s) shall also be managed by the purchasing agency, including the standard terms and conditions issued by the State CIO, unless circumstances prohibit their use.

(b) All information technology purchases involving the expenditure of state funds by the purchasing agency shall be competitively bid in conformity with the "Best Value" information technology procurement requirements in G.S. 143-135.9 and Rule .0302 of this Section. Exemptions may be granted by the State CIO where limited competition, waiver of competition (See Rule .0901 of this Subchapter), special delegation (see Rules .1303 and .1304 of this Section), exemption, or an emergency purchase is permitted by rule. Purchasing agency procurements not included in a statewide term, convenience, enterprise contract, or master agreement established by the State CIO shall comply with the applicable general delegations and procedures (Rule .1304 of this Section):

(c) Agency Purchases: The agency head, or designee, shall set forth in writing procedures for making purchases. For purchases where the total requirements for goods and services involve an expenditure of state funds that does not exceed the purchasing agency's general or special delegation established by the State CIO, offers in conformity with G.S. 143-135.9 shall be solicited as follows:

- (1) The purchasing agency may advertise solicitations for offers to provide small purchases through the State's designated IT procurement website(s) or by an alternate method of advertising, as may be approved by the State CIO in accordance with Rule .0314 of this Section;
- (2) The purchasing agency shall award contracts for purchases.

(d) For purchases governed by statute, where the total requirements for goods and services involve an expenditure of State funds that exceeds the purchasing agency's general or special delegation established by the State CIO, offers in conformity with G.S. 143-135.9 shall be solicited as follows to encourage competition:

- (1) The purchasing agency shall issue documents soliciting, requesting or inviting offers, as published by ITS;
- (2) The purchasing agency shall include in solicitation documents standard language, including general or standard terms and conditions for technology purchases as published by ITS and in conformance with Rule .0316 of this Section. If additional terms and conditions are used, they shall not conflict with standard terms and conditions published pursuant to 09 NCAC 06A .0101 unless prior written approval is obtained under Rule .0201 of this Subchapter; and
- (3) The purchasing agency may also request from the State CIO, known vendor sources amenable to competing for award of various State procurements.
- (4) For purchases exceeding an agency's general or special delegation, the purchasing agency shall submit drafts of solicitation documents to the State CIO for approval prior to proceeding with the procurement process. The State CIO shall then engage in a review and approval process of such solicitation documents to ensure that proposed and actual IT procurements are advantageous to the State:
 - (A) After completing review and evaluation of offers received, the purchasing agency may prepare and submit to the State CIO for review a draft recommendation for award;
 - (B) After completing review and evaluation of offers received, the purchasing agency shall submit to the State CIO a written, final recommendation for award, including a copy of all offers received and all supporting documentation with its recommendation;
 - (C) The State CIO shall then review and either approve the recommendation or direct modification to the recommended procurement action as deemed in the best interest of the State or as directed by the State CIO, (e.g., award, cancellation, rebid, negotiation with known sources of supply, etc.);
 - (D) The State CIO shall notify the purchasing agency of any decision regarding that recommended procurement action; and
 - (E) Upon receipt of the State CIO notification, the purchasing agency shall proceed with the respective procurement action as directed.

- (5) A contract term shall not be awarded for more than three years including extensions and renewals, without the prior approval of the State CIO, based on a determination that it is advantageous to the State.

*History Note: Authority G.S. 143-135.9; 147-33.76(b1); 147-33.91; 147-33.95;
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

Public Comment:

Publishing results of winning/losing bids on-line would be helpful.

- Nawaf Marjan, Triangle Technology Ventures, LLC.

Agency Response:

Bid announcements, questions, responses, and awards are published on the IPS (State of North Carolina Interactive Purchasing System) website <https://www.ips.state.nc.us/IPS/Default.aspx>.

Staff Recommendation:

The agency designated this Rule as necessary with substantive public interest, and will be readopting this Rule. Therefore, staff does not believe the RRC needs to review the comment to determine whether it has merit.

09 NCAC 06B .0303 ELECTRONIC OFFERS

The purchasing agency may accept offers submitted electronically in response to solicitation documents if such offers comply with these Rules and applicable laws. The purchasing agency's use of digital or electronic signatures must be consistent with applicable statutes and rules. The purchasing agency must authorize but may limit the use of electronic methods of conducting a procurement based on the State's best interests, as determined by the purchasing agency and approved by the State CIO if such methods comply with these Rules and information technology security policies established pursuant to G.S. 147-33.110 et seq.

*History Note: Authority G.S. 66-58.5; 66-325; 147-33.95;
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

Public Comment:

It is challenging for companies to participate in the bidding process when we have to (hand deliver) bids to ITS. Our recommendation is to shift to an electronic system of submission so that vendors can simply submit their bid through an email.

- Nawaf Marjan, Triangle Technology Ventures, LLC.

Agency Response:

While we do not accept electronic bids, we hope to implement the ability in the future.

Staff Recommendation:

Staff notes that the Rule allows the purchasing agency (defined in Rule 09 NCAC 06B .0102(18) "Purchasing agency," or purchaser, is defined as the agency that issues the purchase order and thereby awards a contract) to accept electronic offers. The rule requires an agency to authorize the use of electronic methods for procurement.

Rule 09 NCAC 06B .0102 defines "offer" as:

- (12) "Offer" is defined as a bid or proposal submitted in response to any solicitation document utilizing "Best Value" procurement methodology including Invitation for Bids (IFB), Request for Proposals (RFP), Request for Quotations (RFQ), negotiation, or other acquisition processes, as well as responses to solution-based solicitations and government-vendor partnerships.

That same Rule defines "procurement" as:

- (16) "Procurement" is defined as the process of acquiring goods or services.

Staff notes that the subject of the comment is the use of electronic bidding, not procurement. In a review of the statutes, it does not appear to staff that the agency is required to use electronic bidding, unlike the Department of Administration, as set forth in G.S. 147-33.95. Therefore, staff believes that the comment does not have merit, as it does not address the standards that the RRC uses in reviewing rules.

Statutes in the History Note for Rule 09 NCAC 06B .0303

§ 66-58.5. Validity of electronic signatures

(a) An electronic signature contained in a transaction undertaken pursuant to this Article between a person and a public agency, or between public agencies, shall have the same force and effect as a manual signature provided all of the following requirements are met:

- (1) The public agency involved in the transaction requests or requires the use of electronic signatures.
- (2) The electronic signature contained in the transaction embodies all of the following attributes:
 - a. It is unique to the person using it;
 - b. It is capable of certification;
 - c. It is under sole control of the person using it;
 - d. It is linked to data in such a manner that if the data are changed, the electronic signature is invalidated; and
 - e. It conforms to rules adopted by the Secretary pursuant to this Article.

(b) A transaction undertaken pursuant to this Article between a person and a public agency, or between public agencies, is not unenforceable, nor is it inadmissible into evidence, on the sole ground that the transaction is evidenced by an electronic record or that it has been signed with an electronic signature.

(c) This Article does not affect the validity of, presumptions relating to, or burdens of proof regarding an electronic signature that is accepted pursuant to Article 40 of this Chapter or other law.

§ 66-325. Time and place of sending and receipt

(a) Unless otherwise agreed between a sender and a recipient, which in a consumer transaction must be reasonable under the circumstances, an electronic record is sent when it:

- (1) Is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;
- (2) Is in a form capable of being processed by that system; and
- (3) Enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and a recipient, which in a consumer transaction must be reasonable under the circumstances, an electronic record is received when:

- (1) It enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and
- (2) It is in a form capable of being processed by that system.

(c) Subsection (b) of this section applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d) of this section.

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:

- (1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.
- (2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subsection (b) of this section even if no individual is aware of its receipt; provided, however, in a consumer transaction, a record has not been received unless it is

received by the intended recipient in a manner in which the sender has a reasonable basis to believe that the record can be opened and read by the recipient.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) of this section establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a) of this section, or purportedly received under subsection (b) of this section, was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

§ 147-33.95. Procurement of information technology

(a) Notwithstanding any other provision of law, the Office of Information Technology Services shall procure all information technology for State agencies. The Office shall integrate technological review, cost analysis, and procurement for all information technology needs of those State agencies in order to make procurement and implementation of technology more responsive, efficient, and cost-effective. All contract information shall be made a matter of public record after the award of contract. Trade secrets, test data, similar proprietary information, and security information protected under [G.S. 132-6.1\(c\)](#) may remain confidential.

(b) The Office shall have the authority and responsibility, subject to the provisions of this Part, to:

(1) Purchase or contract for all information technology in the State government, or any of its departments, institutions, or agencies covered by this Part. The Office may authorize any State agency covered by this Part to purchase or contract for information technology. **The Office or a State agency may use any authorized means, including negotiations, reverse auctions, and the solicitation, offer, and acceptance of electronic bids.** [G.S. 143-135.9](#) shall apply to these procedures.

(2) Establish processes, specifications, and standards that shall apply to all information technology to be purchased, licensed, or leased in the State government or any of its departments, institutions, or agencies covered by this Part.

(2a) Establish procedures to permit State agencies and local government agencies to use the General Services Administration (GSA) Cooperative Purchasing Program to purchase information technology (i) awarded under General Services Administration Supply Schedule 70 Information Technology and (ii) from contracts under the GSA's Consolidated Schedule containing information technology special item numbers.

(3) Comply with the State government-wide technical architecture, as required by the State CIO.

(4) If a State agency wishes to enter into a cooperative purchasing agreement, the agency must first obtain approval by the State CIO. Upon receiving a request to use a cooperative purchasing agreement, the State CIO must evaluate the need for goods or services available through the agreement, review the specifications, terms, and conditions of the agreement, and obtain legal advice on the use of the agreement. Prior to granting approval, the State CIO must find that the agreement was awarded pursuant to a competitive bidding process and that the agency will obtain the best value pursuant to [G.S. 143-135.9](#) by using the agreement. Upon approval by the State CIO, a State agency may use the agreement without further approval. Agencies must report periodically to the CIO regarding the use of these agreements.

(5) The State CIO shall establish procedures for the utilization of cooperative purchasing agreements.

(c) For purposes of this section, "reverse auction" means a real-time purchasing process in which vendors compete to provide goods or services at the lowest selling price in an open and interactive electronic environment. The vendor's price may be revealed during the reverse auction. The Office may contract with a third-party vendor to conduct the reverse auction.

- (d) For purposes of this section, “electronic bidding” means the electronic solicitation and receipt of offers to contract. Offers may be accepted and contracts may be entered by use of electronic bidding.
- (e) The Office may use the electronic procurement system established by [G.S. 143-48.3](#) to conduct reverse auctions and electronic bidding. All requirements relating to formal and competitive bids, including advertisement, seal, and signature, are satisfied when a procurement is conducted or a contract is entered in compliance with the reverse auction or electronic bidding requirements established by the Office.
- (f) The Office shall adopt rules consistent with this section.
- (g) No contract subject to the provisions of this Part may be entered into unless the contractor and the contractor's subcontractors comply with the requirements of Article 2 of Chapter 64 of the General Statutes.

Cross Referenced Statutes in the Rule and Law

§ 143-48.3. Electronic procurement

- (a) The Department of Administration shall develop and maintain electronic or digital standards for procurement. The Department of Administration shall consult with the Office of the State Controller, the Office of Information Technology Services (ITS), the Department of State Auditor, the Department of State Treasurer, The University of North Carolina General Administration, the Community Colleges System Office, and the Department of Public Instruction.
- (a1) The Department of Administration shall comply with the State government-wide technical architecture for information technology, as required by the State Chief Information Officer.
- (b) The Department of Administration, in conjunction with the Office of the State Controller and the Office of Information Technology Services may, upon request, provide to all State agencies, universities, and community colleges, training in the use of the electronic procurement system.
- (c) The Department of Administration shall utilize the Office of Information Technology Services as an Application Service Provider for an electronic procurement system. The Office of Information Technology Services shall operate this electronic procurement system, through State ownership or commercial leasing, in accordance with the requirements and operating standards developed by the Department of Administration and the financial reporting and accounting procedures of the Office of the State Controller.
- (d) This section does not otherwise modify existing law relating to procurement between The University of North Carolina, UNC Health Care, community colleges, and the Department of Administration.
- (e) The Board of Governors of The University of North Carolina shall exempt North Carolina State University and The University of North Carolina at Chapel Hill from the electronic procurement system authorized by this Article until May 1, 2003. Each exemption shall be subject to the Board of Governors' annual review and reconsideration. Exempted constituent institutions shall continue working with the North Carolina E-Procurement Service as that system evolves and shall ensure that their proposed procurement systems are compatible with the North Carolina E-Procurement Service so that they may take advantage of this service to the greatest degree possible. Before an exempted institution expands any electronic procurement system, that institution shall consult with the Joint Legislative Commission on Governmental Operations and the Joint Legislative Oversight Committee on Information Technology. By May 1, 2003, the General Assembly shall evaluate the efficacy of the State's electronic procurement system and the inclusion and participation of entities in the system.
- (f) Any State entity or community college operating a functional electronic procurement system established prior to September 1, 2001, may until May 1, 2003, continue to operate that system independently or may opt into the North Carolina E-Procurement Service. Each entity subject to this section shall notify the Office of Information Technology Services by January 1 of each year of its intent to participate in the North Carolina E-Procurement Service.

§ 147-33.110. Statewide security standards

The State Chief Information Officer shall establish a statewide set of standards for information technology security to maximize the functionality, security, and interoperability of the State's distributed information technology assets, including communications and encryption technologies. The State CIO shall review and revise the security standards annually. As part of this function, the State Chief Information Officer shall review periodically existing security standards and practices in place among the various State agencies to determine whether those standards and practices meet statewide security and encryption requirements. The State Chief Information Officer may assume the direct responsibility of providing for the information technology security of any State agency that fails to adhere to security standards adopted under this Article.

09 NCAC 06B .0309 EVALUATION

- (a) In determining the award of contracts, the purchasing agency shall consider and evaluate responsive and responsible offers as provided by statute and applicable rules.
- (b) Only persons in the purchasing agency who are assigned to evaluate the offers and accompanying information, or who are otherwise assigned to participate in the procurement process, or others whose participation may be determined necessary on the basis of subject matter expertise by the purchasing agency or State CIO in the procurement process shall possess offers, including any information submitted with the offers or any information related to evaluation of offers, for the purpose of concluding the award process.
- (c) Clarification of offers or negotiation(s) with offerors, if desired, shall be requested by the purchasing agency in writing. An offeror's further participation in the evaluation process is not permitted except as approved by the State CIO for the purpose of concluding the evaluation or the award process.
- (d) After award of the contract or when the need for the good or service is canceled, the complete procurement file (see Rule .1402 of this Subchapter) shall be available for public inspection except as set forth in Rule .1001 of this Subchapter and except as provided by law; provided however, that when a solicitation document is canceled and the purchasing agency intends to reissue the solicitation, information that is confidential under Rule .0103 of this Subchapter and offers received prior to cancellation shall be withheld from public inspection until the re-issued solicitation results in a contract or termination of the procurement.

*History Note: Authority G.S. 147-33.76(b1); 147-33.95(a);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

Public Comment:

We would also urge ITS to keep the vendor community more connected with their needs by holding quarterly “reach out” sessions which would help us understand what their needs are and how to position ourselves to deliver that.

- Nawaf Marjan, Triangle Technology Ventures, LLC.

Agency Response:

Comment forwarded to Ray Johnson, Strategic Sourcing Director, for his review.

Staff Recommendation:

Staff does not believe this qualifies as a public comment as defined in G.S. 150B-21.3A, as it is not an objection in whole or part to the Rule, but is instead a suggestion for outreach by the agency. Even if it is determined to be a “public comment,” staff does not believe that it has merit, as it does not address the specific substance of the Rule, nor is this suggestion within the four standards of RRC review.

09 NCAC 06B .1304 GENERAL DELEGATIONS

(a) The general purchasing delegation for a purchasing agency shall be twenty-five thousand dollars (\$25,000) unless specific authorization is given by the State CIO.

(b) The State CIO may suspend, rescind, lower or raise this general delegation for a specific agency, up to the benchmark established under Rule 09 NCAC 06A .0103 upon consideration of the agency's overall capabilities, including staff resources, organizational structure, training, purchasing compliance reviews, electronic communication capabilities, and audit reports.

(c) If an agency wishes to obtain an increase in its general delegation, it shall submit a request in writing, outlining its overall capabilities, to the State CIO for the State CIO's consideration.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. March 1, 2001;
Recodified from 09 NCAC 06B .1104 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

Public Comment:

Thank you for the opportunity to provide feedback. The only area that we would ask you to consider is raising the agency spending authority currently at \$25,000. I feel quite certain that our agency, NC Wildlife Resources Commission, could effective work with a \$50,000 benchmark. Best regards,

- Tommy Kirby C.P.M., CPIM Purchasing Officer, NC Wildlife Resources Commission

Agency Response:

Instructions for seeking an increase in agency delegations can be found in 09 NCAC 06B .1304, General Delegations.

Staff Recommendation:

Staff believes that the agency response is intended to ensure the commenter understands that an agency may seek additional funding, using the guidelines in Paragraphs (b) and (c). Staff believes that the comment raises a valid point regarding the general delegation cap, but this does not address the standards within the RRC's purview, as it really addresses efficacy and content, rather than statutory authority or ambiguity.

Statute in the History Note for Rule 09 NCAC 06B .1304

§ 147-33.76. Qualification, appointment, and duties of the State Chief Information Officer

(a) The Office of Information Technology Services shall be managed and administered by the State Chief Information Officer ("State CIO"). The State Chief Information Officer shall be qualified by education and experience for the office and shall be appointed by and serve at the pleasure of the Governor.

(b) Repealed by [S.L. 2004-129, § 3, eff. July 1, 2004](#).

(b1) The State CIO shall be responsible for developing and administering a comprehensive long-range plan to ensure the proper management of the State's information technology resources. The State CIO shall set technical standards for information technology, review and approve major information technology projects, review and approve State agency information technology budget requests, establish information technology security standards, provide for the procurement of information technology resources, and develop a schedule for the replacement or modification of major systems. The State CIO is authorized to adopt rules to implement this Article.

(c) The salary of the State Chief Information Officer shall be set by the Governor. The State Chief Information Officer shall receive longevity pay on the same basis as is provided to employees of the State who are subject to the North Carolina Human Resources Act.