

## ARTICLE 2. PROCUREMENT

### Rule 1. Procurement Procedures; General

#### 65 IAC 2-1-1 Procurement authority

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 1. (a) The director shall have the full and complete authority to enter into all contracts on behalf of the commission for the procurement of goods and services.

(b) The director shall appoint one (1) person employed by the commission to supervise and manage the procurement of goods and services. This person shall have such authority as may be set forth in this article or as may be delegated by the director in writing.

(c) The director may designate one (1) or more persons to act as purchasing agents for the commission, and who shall act with such authority as the director shall delegate in writing with respect to each purchasing agent. (*State Lottery Commission; 65 IAC 2-1-1; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2292; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 90; emergency rule filed Dec 9, 1996, 4:00 p.m.: 20 IR 962; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

#### 65 IAC 2-1-2 Procurement policy

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 2. (a) In all procurement decisions, the director shall take into account the particularly sensitive nature of the lottery and shall consider the competence, quality of product, experience, and timely performance of the vendors in order to promote and ensure security, honesty, fairness, and integrity in the operation and administration of the lottery and the objective of raising net revenues for the benefit of the public purposes described in IC 4-30. The director shall also take into account the desirability of an efficient and effective procurement process and the legislative finding that the operation of a lottery is a unique activity for state government and that policies and procedures appropriate for the performance of other governmental functions are not necessarily appropriate for the operation of a lottery.

(b) All decisions made under this article are actions concerning the acquisition, leasing, or disposition of property or procurement of goods or services by contract. All such decisions by the director shall be final except as otherwise specifically set forth in this article. (*State Lottery Commission; 65 IAC 2-1-2; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2292; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 90; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

#### 65 IAC 2-1-3 Applicability

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 3. (a) This article applies to every expenditure of commission funds under any contract for the procurement of goods or services except for the following:

(1) Any contract with a state agency, state official, or any other body corporate and politic of this state.

(2) Employment contracts with individuals.

(3) Contracts for investment or related financial services.

(4) Contracts relating to the retail sales of lottery tickets.

(5) Contracts for goods or services provided as part of, or related to, a lease of real property.

(6) Amendments, modifications, or extensions of existing contracts, unless the predominate purpose of an amendment or modification is to avoid the applicability of this article.

(7) Contracts for personal or professional services.

(8) Contracts for employee benefits and related services.

(b) In determining the applicability of this article to a specific contract, the substantial purpose of the contract shall be controlling. This article shall not apply to the acquisition of goods or services under a contract to which this article would not otherwise apply if the acquisition of such goods or services is not the substantial purpose of the contract. (*State Lottery Commission; 65 IAC 2-1-3; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2293; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 91; emergency rule filed Dec 9, 1996, 4:00 p.m.: 20 IR 962; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

**65 IAC 2-1-4 Procurement methods**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 4. The director or the director's designee shall procure goods or services through use of one (1) of the following procurement methods or any combination thereof:

- (1) Sealed bid (either one- or two-step process).
- (2) Request for proposals.
- (3) Special procurement.
- (4) Small purchase.
- (5) State procurement.
- (6) Sole source procurement.
- (7) Any other method or process which is approved by the director pursuant to 65 IAC 2-4-1.
- (8) Any other method or process which is approved by the commission for a specific contract, or series of contracts, for goods or services.

*(State Lottery Commission; 65 IAC 2-1-4; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2293; emergency rule filed Dec 9, 1996, 4:00 p.m.: 20 IR 962; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-5 Sealed bids**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 5. (a) The procedure in this section shall be followed in awarding contracts by sealed bids as follows:

- (1) An invitation for bids shall be issued and must include the following:
  - (A) Purchase description.
  - (B) All contractual terms and conditions applicable to the procurement.
  - (C) Statement of the evaluation criteria to be used, including criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose.
  - (D) Time and place for opening of bids.
  - (E) Statement concerning whether bid must be accompanied by certified check or other evidence of financial responsibility, which may be imposed in accordance with this title.
- (2) Public notice shall be given in the manner required by section 12 of this rule.
- (3) Bids shall be opened publicly at the time and place designated in the invitation for bids or such other time and place as may be announced no later than the originally designated time.
- (4) Bids shall be:
  - (A) unconditionally accepted without alteration or correction, except as provided in subsections (e) through (g); and
  - (B) evaluated based on requirements set forth in the invitation for bids.
- (5) A contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids and offers the best value to the commission based upon the stated evaluation criteria as determined by the purchasing agent.
- (b) The following information must be subject to public inspection after contract award:
  - (1) Name of the bidder.
  - (2) Amount of each bid.
  - (3) Other information required by this title.
- (c) Those criteria that will affect the bid price and be considered in the evaluation for an award must be objectively measurable, such as discounts, transportation costs, and total or life cycle costs except that ten percent (10%) of the stated evaluation criteria may be subjective considerations of the type described in section 2 of this rule.
- (d) The only criteria that may be used in bid evaluation are those specified in the invitation for bids.
- (e) Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such mistakes, shall be permitted at the discretion of the director. After bid opening, changes in bid prices or other provisions of

bids prejudicial to the interest of the commission or fair competition shall not be permitted.

(f) If a bidder inserts contract terms or bids on items not specified in the invitation for bids, the director shall treat the additional material as a proposal for addition to the contract and may:

- (1) find the bidder to be nonresponsive;
- (2) permit the bidder to withdraw the proposed additions to the contract in order to meet the requirements and criteria set forth in the invitation for bids; or
- (3) accept any of the proposed additions to the contract subject to subsection (g).

(g) The director may not accept proposed additions to the contract that are clearly prejudicial to fair competition. (*State Lottery Commission; 65 IAC 2-1-5; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2293; emergency rule filed Nov 20, 1989, 10:05 a.m.: 13 IR 679; emergency rule filed Dec 9, 1996, 4:00 p.m.: 20 IR 962; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

**65 IAC 2-1-6      Sealed bids (two-step)**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 6. The director may utilize a two-step sealed bid process by requiring that bidders initially submit unpriced sealed offers in response to an invitation to bid. Submission of priced sealed bids may then be restricted to only those offerors whose offer qualified under the criteria set forth in the original invitation. (*State Lottery Commission; 65 IAC 2-1-6; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2294; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

**65 IAC 2-1-7      Request for proposals**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 7. (a) The director may award a contract using the procedure in this section.

(b) Proposals shall be solicited through a request for proposals, which must include the following:

- (1) Factors or criteria that will be used in evaluating the proposals.
- (2) General statement concerning the relative importance of price and the other evaluation factors.
- (3) Statement concerning whether the proposal must be accompanied by certified check or other evidence of financial responsibility.
- (4) Statement concerning whether discussions may be conducted with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award, for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.
- (c) Public notice shall be given in the manner required by section 12 of this rule.
- (d) Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation.

(e) A register of proposals shall be prepared and must be open for public inspection after contract award. The register of proposals must contain the following:

- (1) Copy of the request for proposals.
- (2) Listing of all proposals received, which may include the following:
  - (A) Names and addresses of all offerors.
  - (B) Dollar amount of each offer.
  - (C) Name of successful offeror and dollar amount of offer.
- (3) General basis on which award was made.

(4) Entire contents of the contract file except for proprietary information, which may have been included with an offer, such as trade secrets, manufacturing processes, and financial information which was not required to be made available for public inspection by terms of the request for proposal itself.

(f) If provided in the request for proposals or determined by the director to be desirable, discussions may be conducted with responsible offerors, who submit proposals determined to be reasonably susceptible of being selected for award, for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements or correcting errors or omissions in the proposal.

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the

state, taking into consideration price and other evaluation factors set forth in the request for proposals.

(h) Offerors determined to be reasonably susceptible of being selected for award must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. In conducting discussions, there must be no disclosure of any information derived from proposals submitted by competing offerors.

(i) The only factors or criteria that may be used in the evaluation of proposals are those specified in the request for proposals. (*State Lottery Commission; 65 IAC 2-1-7; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2294; emergency rule filed Dec 9, 1996, 4:00 p.m.: 20 IR 963; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

#### **65 IAC 2-1-8 Special procurement**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 8. (a) Notwithstanding [*sic.*] any other provision of this article, the director may make, or authorize others to make, special procurements:

- (1) when there exists a threat to public health, welfare, or safety, or the integrity or operation of the lottery;
- (2) when there exists a unique opportunity to obtain supplies or services at a substantial savings, including an opportunity to obtain supplies or services at reduced cost or no cost;
- (3) when the market structure requires the commission to inspect and bid on the supplies to be procured;
- (4) for the procurement of data processing contracts or license agreements for:
  - (A) software programs;
  - (B) hardware; or
  - (C) software and hardware maintenance contracts;
- (5) for any services, provided that a broad announcement of the availability of the contracting opportunity is made in such a manner as is determined by the director to be reasonably calculated to be received by a substantial number of potential vendors;
- (6) when the compatibility of equipment, accessories, or replacement parts is a substantial consideration in the procurement and only a limited number of sources meet the commission's reasonable requirements;
- (7) when procurement of the required supplies or services under another section of this rule would seriously impair the functioning of the lottery;
- (8) when a contract has been solicited for a procurement under another section of this rule and the commission has not received a reasonable, responsive offer;
- (9) when the time periods for performance as determined by the director would be seriously impaired by competitive bidding, so long as at least two (2) price quotes are obtained; or
- (10) for sponsorships, promotions, and advertising placement.

(b) A special procurement must be made with such competition as is practicable under the circumstances as determined by the director.

(c) A written determination of the basis for the special procurement must be included in the contract file. (*State Lottery Commission; 65 IAC 2-1-8; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2295; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 91; emergency rule filed Oct 24, 1989, 2:15 p.m.: 13 IR 408; emergency rule filed Nov 20, 1989, 10:05 a.m.: 13 IR 680; emergency rule filed Dec 9, 1996, 4:00 p.m.: 20 IR 964; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

#### **65 IAC 2-1-9 Small purchases**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 9. A contract in an amount which does not exceed fifty thousand dollars (\$50,000) may be made under any practice or procedure as may be considered desirable by the director; provided that, when practicable, more than one (1) price quote is obtained for any procurement valued in excess of five thousand dollars (\$5,000). If a series of contracts awarded under this section for a single classification of goods or services are awarded to one (1) vendor and such contracts are all awarded within a period of six (6) months or less and the total contract price on such series of contracts exceeds seventy-five thousand dollars (\$75,000), then any of the contracts in such series which would cause the total contract price to be in excess of seventy-five thousand dollars (\$75,000), shall not be deemed to be a small purchase qualifying under this section. (*State Lottery Commission; 65 IAC 2-1-9; emergency rule filed*

*Jul 20, 1989, 4:10 p.m.: 12 IR 2295; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 92; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-10 State procurement**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 10. The director may procure any supplies or services from any vendor based on prices set by a contract between the state of Indiana and that vendor. *(State Lottery Commission; 65 IAC 2-1-10; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2295; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-10.1 Sole source procurement**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 10.1. A contract may be awarded for a supply or service without competition when the director, or the director's designee, states in writing the determination that there is only one (1) known or available source for the required supply or service. A copy of such determination shall be made a part of the contract file. *(State Lottery Commission; 65 IAC 2-1-10.1; emergency rule filed Dec 9, 1996, 4:00 p.m.: 20 IR 964; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-11 Cancellation; rejection; amendment of solicitations**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 11. (a) When the director determines that it is in the best interests of the commission, any solicitation, including an invitation for a bid or proposal, may be canceled or rejected in whole or in part at any time prior to the effective date of the resulting contract.

(b) The reasons for a cancellation or rejection of a solicitation must be made a part of the contract file.

(c) The director may amend any solicitation in any manner provided that notice is given in a manner reasonably calculated by the director to provide fair and equitable notice to the potential vendors. *(State Lottery Commission; 65 IAC 2-1-11; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2295; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-12 Manner of giving notice**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 12. (a) Whenever public notice is required by this rule, the notice shall be given in the manner prescribed by this section.

(b) If the ultimate expenditure involved in a procurement is estimated by the director to exceed one hundred thousand dollars (\$100,000), a notice shall be published at least once.

(c) The director may provide for publication of additional notices, even if no publication is required by this subsection. Whenever publication of notice is required by this section, the notice shall be published at least in one (1) newspaper of general circulation in Marion County, Indiana. If any of the services or supplies being procured are for a specific use located outside Marion County, Indiana, the notice may also be published in one (1) or more newspapers of general circulation in the area in which the services or supplies are to be used. The director may designate additional newspapers for the publication of notice according to the nature of the procurement.

(d) In addition to the publication requirements of this section, the director shall give notice in the following manner whenever the ultimate expenditure involved in a procurement is estimated by the director to exceed twenty-five thousand dollars (\$25,000):

(1) The director may send notices, invitations to bid, requests to bid, requests for offers, or requests for proposals by mail to prospective bidders or offerors known to the director to be reasonably susceptible to award of the contract. However, failure to give notice to a particular bidder or offeror does not invalidate a procurement under this rule.

(2) The director may post notices on a public bulletin board in the in the *[sic.]* director's office.

*(State Lottery Commission; 65 IAC 2-1-12; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2295; emergency rule filed Dec 9, 1996, 4:00 p.m.: 20 IR 965; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-13 Disclosure requirements for major procurements**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30

Sec. 13. (a) All offerors for a major procurement as defined in IC 4-30 shall submit the information required by IC 4-30 at the time of submission of its bid, proposal, or offer. Immediately prior to execution of a contract by a vendor, the vendor shall update the disclosures. The vendor shall be under continuous duty to correct any such information as may be later found to have been incorrect or incomplete when submitted. The vendor shall be under a duty to update and revise such disclosure only in accordance with the provisions of the vendor's contract.

(b) The director may require such additional disclosures as may be desired for the purpose of enforcing, auditing, investigating, or confirming the accuracy of the disclosures or for any proper purpose. *(State Lottery Commission; 65 IAC 2-1-13; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2296; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-14 Contract types**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 14. (a) The director may enter contracts of the following type or combination thereof:

- (1) Firm fixed price.
- (2) Cost reimbursement.
- (3) Fixed price, level of effort.
- (4) Indefinite quantity, fixed unit price.
- (5) Basic ordering agreement for items individually priced at less than five thousand dollars (\$5,000).

(b) A fixed price, level of effort contract may be used only if the priced level of effort is objectively measurable in units, such as hourly rate, daily rate, weekly rate, rate per meeting, rate per page, etc.

(c) Except as provided in subsection (d), a cost reimbursement contract may be used only if the director concludes that:

- (1) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated;
- (2) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles; and
- (3) the contractor agrees to disclose its allocation system and maintain that system throughout the term of the contract unless otherwise approved by the director.

(d) A contract may provide for the reimbursement of direct, out-of-pocket costs for travel and subsistence expenses, postage, photocopy and printing charges, temporary clerical or office services, or similar costs without requiring compliance with subsection (c). *(State Lottery Commission; 65 IAC 2-1-14; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2296; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-15 Contract terms**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8

Sec. 15. No contract shall obligate the commission for a period in excess of four (4) years without the prior approval of the commission. Any contract may contain one (1) or more option periods or provisions for extensions of the contract term, provided that:

- (1) any individual option period or extension does not exceed two (2) years in duration; and
- (2) any individual option period or extension may become effective only upon the specific, affirmative exercise of the option, or the specific, affirmative agreement to the extension, by the director.

*(State Lottery Commission; 65 IAC 2-1-15; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2296; emergency rule filed Sep 5,*

1989, 3:20 p.m.: 13 IR 92; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)

**65 IAC 2-1-16 Contract clauses**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30

Sec. 16. Any contract with the commission may contain any terms and conditions and any contract clauses which are not prohibited by the Indiana state lottery statute IC 4-30, or federal law. *(State Lottery Commission; 65 IAC 2-1-16; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2297; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-17 Public records**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8; IC 5-14-3-4

Sec. 17. (a) Except as provided in subsection (b), all procurement records shall be available for public inspection following award of the contract or cancellation of the procurement, except to the extent the disclosure is prohibited by law.

(b) The director may except from public disclosure, at any time, procurement records which are exempt from mandatory disclosure under IC 5-14-3-4(b). *(State Lottery Commission; 65 IAC 2-1-17; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2297; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-1-18 Meaning of “vendor under contract with the commission” (Repealed)**

Sec. 18. *(Repealed by State Lottery Commission; emergency rule filed May 4, 1990, 4:35 p.m.: 13 IR 1733)*

**Rule 2. Leases of Real Property**

**65 IAC 2-2-1 Authority to lease real property**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30

Sec. 1. (a) The director of the state lottery commission shall have the authority to lease all real property necessary for the efficient operation of the lottery and for the conducting of the business of the commission and the director, including, but not limited to, office space, warehouse facilities, parking facilities, and fixtures and improvements related thereto and services related to the use and occupancy of the property.

(b) The term of such a lease may not exceed four (4) years without the prior approval of the commission.

(c) The lease may contain option periods or extensions of the lease term provided that:

(1) no individual option period or extension period may be more than two (2) years in duration; and

(2) the option period or extension period becomes effective only upon the specific, affirmative exercise of the option period, or the specific, affirmative agreement to the extension, by the director.

*(State Lottery Commission; 65 IAC 2-2-1; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2297; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 92; errata, 13 IR 402; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**Rule 3. Contracts with State Agencies**

**65 IAC 2-3-1 Authority to contract with state agencies**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-3-16; IC 4-30-8-9

Sec. 1. The director may contract with any state agency or official for any purpose provided that the term of such a contract does not exceed four (4) years. If the director concludes that the state agency, whether for reasons of economy, convenience, or otherwise, should supply goods or services to the commission which the agency procures for a third party other than a state employee,

then such a contract must require that the agency's procurement of those goods or services be accomplished in accordance with any applicable safeguards and procedures of IC 4-13.4 and not pursuant to the agency's use of the exception set forth in IC 4-30-8-9. (*State Lottery Commission; 65 IAC 2-3-1; emergency rule filed Jul 20, 1989, 4:10 p.m.: 12 IR 2297; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

#### **Rule 4. Other Contracts**

##### **65 IAC 2-4-1 Consideration by director**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30

Sec. 1. The director may procure all goods and services not otherwise covered by this article in any manner in which the director deems desirable. In making such procurements, the director shall consider the following:

(1) The efficient and effective operations of the lottery.

(2) The sensitive nature of the lottery.

(3) The competence, quality of product, experience, and timely performance of the persons or entities providing such goods and services.

(*State Lottery Commission; 65 IAC 2-4-1; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 92; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

#### **Rule 5. Procurement Claims and Appeals**

##### **65 IAC 2-5-1 Application**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-21.5; IC 4-30

Sec. 1. Pursuant to IC 4-21.5-2-5(11), procurement decisions by the commission or the director are not subject to IC 4-21.5. In lieu thereof, vendors or prospective vendors, shall follow the procedures of and have the remedies available under this rule in the event of a protest of any procurement decision of the commission or the director or a claim under a contract with the commission. (*State Lottery Commission; 65 IAC 2-5-1; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 92; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

##### **65 IAC 2-5-2 Appeal of eligibility or disqualification**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8

Sec. 2. If a prospective vendor is determined to be ineligible or is disqualified, the prospective vendor may appeal that determination by filing a written appeal complying with section 7 of this rule within seventy-two (72) hours after receipt of notice of the determination or public announcement of the determination, whichever occurs first. If the decision is reversed, the sole relief for the prospective vendor will be consideration of the prospective vendor for the particular contract. (*State Lottery Commission; 65 IAC 2-5-2; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 93; emergency rule filed Oct 29, 1992, 5:00 p.m.: 16 IR 899; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

##### **65 IAC 2-5-3 Appeal of denial of permission to withdraw bid**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8

Sec. 3. If a prospective vendor is denied permission to withdraw its bid, the prospective vendor may appeal the decision by filing a written appeal complying with section 7 of this rule within seventy-two (72) hours after receipt of notice of the decision. If no bond has been posted by the prospective vendor, then before appealing the decision the prospective vendor shall deposit with the commission a certified or cashier's check payable to the commission or a cash bond naming the commission as obligee for the amount

of the difference between the bid sought to be withdrawn and the next lowest bid. The check or cash bond posted by the prospective vendor shall be released if the prospective vendor is allowed to withdraw the bid, or if the prospective vendor withdraws the appeal and agrees to honor the bid, or if the decision denying permission to withdraw the bid is reversed. The check or cash bond posted by the prospective vendor shall be paid to the commission if the decision is not reversed and the prospective vendor fails to accept the contract. If the decision is reversed, the sole relief available to the prospective vendor will be to grant the prospective vendor permission to withdraw its bid. *(State Lottery Commission; 65 IAC 2-5-3; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 93; emergency rule filed Nov 20, 1989, 10:05 a.m.: 13 IR 680; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-5-4 Appeal of decision that prospective vendor is not responsible**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8

Sec. 4. If a prospective vendor, despite being the low bidder, is determined not to be a responsible bidder with respect to a contract, the prospective vendor may appeal the decision by filing a written appeal complying with section 7 of this rule within seventy-two (72) hours after receipt of notice of the decision. If the decision is reversed, the sole relief for the prospective vendor will be consideration of the prospective vendor as a responsible bidder with respect to the particular contract. A prospective vendor appealing a decision that it is not responsible shall appeal under this section and shall not appeal the award or proposed award under section 5 of this rule. Nothing in this section shall require the commission to furnish a statement of the reasons that a particular proposal was not deemed acceptable. *(State Lottery Commission; 65 IAC 2-5-4; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 93; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-5-5 Appeal of award or decision to award a contract**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8

Sec. 5. (a) Any prospective vendor may appeal the award or decision to award a contract by filing a written appeal complying with section 7 of this rule within seventy-two (72) hours after the award, after receipt of notice of the award, or after the announcement of the decision to award is posted or published, whichever occurs first. If the appeal depends upon information contained in public records pertaining to the contract, then the time for appeal begins to run when the records are made available to the prospective vendor for inspection, so long as the request of the prospective vendor to inspect the records is made within seventy-two (72) hours after the award or after the announcement of the decision to award is posted or published, whichever occurs first.

(b) The only grounds for filing an appeal under this section are as follows:

(1) A procurement decision was not made in compliance with the procedures required by IC 4-30 or this article.

(2) A procurement decision was made in violation of any emergency rules regarding ethics promulgated by the commission.

(c) No appeal shall be made under this section on the grounds that the prospective vendor was not determined to be a responsible bidder.

(d) If, prior to the award of a contract, it is determined by the director that the decision to award the contract was erroneous, the sole relief will be cancellation or revision of the proposed award.

(e) No appeal shall delay the award of a contract.

(f) Where a contract has been awarded but the work has not begun, the director may issue an order stopping the performance of the contract. Where a contract has been awarded and the work has begun, the director may declare the contract void upon a finding that voiding the contract is in the best interest of the lottery. If a contract is declared void under this subsection, the performing vendor shall be paid for the cost of work up to the time when the contract was voided, but in no event shall the vendor be paid for lost profits.

(g) Where it is not in the best interest of the lottery to declare a contract void, the director may award such other remedy as the director may deem appropriate. *(State Lottery Commission; 65 IAC 2-5-5; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 93; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

**65 IAC 2-5-6 Contract claims**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8

Sec. 6. (a) A vendor may file a written claim with the director for money or other relief in connection with a contract between the vendor and the commission. Any such claim by a vendor shall be filed no later than thirty (30) days after final payment is made on the contract by the commission.

(b) If a claim arises while a contract is still being performed by the vendor, the vendor shall give written notice to the director of the vendor's intention to file a claim at the time the vendor begins the disputed work or within ten (10) days after the claim arises. Failure by the vendor to give such notice shall be grounds for denial of the claim by the director.

(c) Nothing in this section shall prohibit a vendor from submitting an invoice to the commission for final payment after the work on a contract is completed and accepted. The commission shall not delay payment to a vendor of undisputed amounts as a result of the filing of a claim under this section.

(d) The director shall issue a decision on a claim within thirty (30) days after the claim was filed. The director shall state the reasons for denial of any claim filed under this section. A copy of the decision shall be mailed by certified or registered mail, return receipt requested, to the vendor who filed the claim. The director may order that a vendor be given relief from administrative procedures, liquidated damages, or failure to follow contract formalities when the director determines that such relief is in the best interests of the lottery.

(e) A vendor whose claim is denied by the director may appeal the decision by filing a written appeal complying with section 7 of this rule within seventy-two (72) hours after receipt of notice of the decision. (*State Lottery Commission; 65 IAC 2-5-6; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 94; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

#### **65 IAC 2-5-7 Notice of appeal**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8

Sec. 7. (a) A notice of appeal shall be filed by mailing the notice of appeal to the director at the principal office of the director in Indianapolis by registered or certified mail, return receipt requested, or by delivering the notice of appeal to the principal office of the director in Indianapolis. Filing by registered or certified mail shall be effective upon mailing.

(b) A notice of appeal shall be in writing and shall state the following:

(1) The decision which is being appealed.

(2) The grounds for the appeal.

(3) The number of the contract, bid, or request involved in the appeal.

(4) Any other information necessary to identify the contract, bid, or request involved in the appeal.

(5) A brief statement of the reasons for the appeal.

(c) A vendor or prospective vendor who files a notice of appeal may file a supplemental statement of reasons for appeal within ten (10) days after the date the notice of appeal was filed. Such a supplemental statement of reasons shall explain more fully the basis of the appeal but shall not raise any grounds for appeal not included in the notice of appeal. A vendor or prospective vendor who files a notice of appeal which does not contain specific citation to any statutes or regulations which the notice of appeal alleges were violated shall file a supplemental statement setting forth such specific citations. A supplemental statement of reasons for appeal shall be filed in the same manner as a notice of appeal.

(d) The director may prescribe a form or forms which shall be used by any vendor or prospective vendor who files a notice of appeal unless good cause is shown that use of the form was impossible or impractical in the situation. (*State Lottery Commission; 65 IAC 2-5-7; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 94; emergency rule filed May 4, 1990, 4:35 p.m.: 13 IR 1725; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

#### **65 IAC 2-5-8 Hearing procedures**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-21.5; IC 4-30

Sec. 8. (a) All hearings shall be conducted by the director or by another person (who may be an employee of the commission) appointed by the director to act as a hearing officer to hear appeals in place of the director and to exercise the powers of the director in conducting the hearing and recommending a decision to the director with respect to the appeal. The person presiding at a hearing shall be known as the hearing judge. Hearing judges shall conduct hearings with due regard for the rights of all parties as well as the facts and the law, and consistent with the orderly and prompt dispatch of proceedings.

(b) The director shall decide to hear the appeal personally or appoint a hearing judge within ten (10) days after notice of appeal is filed. The hearing judge shall conduct a hearing on every appeal within forty-five (45) days after the notice of appeal is filed. All parties to an appeal or claim shall be given at least five (5) days' notice of the time and place of the hearing, unless all parties to the appeal or claim agree to a shorter notice period. All hearings shall be held in Indianapolis, Indiana, unless the hearing judge orders otherwise.

(c) The commission and the appellant shall be the parties to any appeal under this rule. Only the appellant, employees of the commission, and such other persons as the hearing judge orders may participate in the hearing of an appeal.

(d) Hearings of appeals shall be informal and shall not be conducted like trials. The Indiana Rules of Trial Procedure, IC 4-21.5, and the rules of evidence shall not apply to the conduct of hearings. Parties may be, but shall not be required to be, represented by counsel.

(e) The hearing judge may exclude evidence upon a determination that it is repetitive or not relevant to the appeal. The commission shall issue subpoenas authorized by law to private parties upon request, upon a simple statement of the general relevance and reasonable scope of the testimony or other evidence sought. Hearing judges shall have the power to administer oaths and affirmations and to regulate the course of hearings or the conduct of the parties. The hearing judge may limit the number of witnesses or the length of testimony or oral presentations in order to hear the appeal in a reasonable amount of time. The hearing judge may ask questions at any time, but the hearing judge shall not question the appellant in closed session.

(f) All hearings shall be open to the public. The hearing judge may adjourn the public hearing to discuss and reach a decision in private. All hearings shall be electronically recorded, and the recordings shall be kept with the records of the commission for at least sixty (60) days after the date of the hearing. A court reporter may be used at the request of any party to the hearing at the expense of such party. The court reporter's transcript shall be given to the hearing judge at no expense to the commission, unless the court reporter was requested by the commission, its employees, or the hearing judge, and the transcript shall become a part of the records of the commission.

(g) Unless the hearing judge orders otherwise, hearings shall be conducted in the following order:

(1) The appellant will explain the reasons for the appeal and the desired relief.

(2) The appellant will present witnesses and evidence, and the commission staff will be able to ask questions of each witness.

(3) The staff of the commission will present other witnesses and evidence relevant to a determination of the appeal, and the appellant will be able to ask questions of each witness.

(4) After all evidence has been presented, the hearing judge shall adjourn the hearing to reach a decision in private.

*(State Lottery Commission; 65 IAC 2-5-8; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 94; emergency rule filed Apr 14, 1992, 5:00 p.m.: 15 IR 1966; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

#### **65 IAC 2-5-9      Hearing judge's decision**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8

Sec. 9. (a) If the hearing judge is other than the director, the hearing judge shall recommend a decision to the director. The hearing judge shall issue a written decision within thirty (30) days after the hearing date if a court reporter was not used at the hearing, and within thirty (30) days after a transcript of the hearing is received by the hearing judge if a court reporter is used at the hearing and a transcript is prepared. The hearing judge is not required to have a transcript prepared even if a court reporter was used at a hearing.

(b) The decision shall include as much detail as the hearing judge determines is necessary to explain the reasons for the decision and shall be signed by the hearing judge. If the hearing judge was not the director, the hearing judge's decision shall be delivered to the director, who may issue the decision as written or modify it in any manner (including changing the prevailing party) before issuing the final decision. A copy of the director's decision shall be mailed to the appellant. *(State Lottery Commission; 65 IAC 2-5-9; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 95; emergency rule filed Apr 14, 1992, 5:00 p.m.: 15 IR 1966; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268)*

#### **65 IAC 2-5-10      Rehearing**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30

Sec. 10. Any vendor, or prospective vendor, aggrieved because of the director's decision of an appeal under this rule may be granted a rehearing before the commission for the purpose of presenting evidence, facts, or reasons why the decision on appeal should be modified or reversed. To apply for a rehearing, the party requesting the rehearing shall, within seventy-two (72) hours from receipt of notice of the decision of the appeal, file a written request with the director, who shall forward the request to the chairman. The decision to grant a rehearing is wholly within the discretion of the commission. The commission may in its discretion grant a rehearing notwithstanding the failure to file a written request within seventy-two (72) hours as required by this section if the commission determines there was good cause for the failure to file. A rehearing shall be conducted in a manner similar to a hearing under section 8 of this rule and shall be presided over by the chairman or another member of the commission designated by the commission. (*State Lottery Commission; 65 IAC 2-5-10; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 95; emergency rule filed Apr 14, 1992, 5:00 p.m.: 15 IR 1967; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

**65 IAC 2-5-11 Legal action**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8

Sec. 11. Nothing in this rule shall prevent the director or the commission from taking legal action against a vendor or prospective vendor at any time. (*State Lottery Commission; 65 IAC 2-5-11; emergency rule filed Sep 5, 1989, 3:20 p.m.: 13 IR 95; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

**65 IAC 2-5-12 Computation of time; delivery**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-7-1; IC 4-30-8

Sec. 12. (a) In computing any period of time prescribed or allowed by this rule, by IC 4-30-7-1, or by order of the director or the commission pursuant to this rule, the hour (if the time period is stated in terms of hours) or day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is one (1) of the following:

- (1) A Saturday.
- (2) A Sunday.
- (3) A legal holiday as defined by state statute.
- (4) A day the principal office of the director in Indianapolis is closed during regular business hours.

In any event, the period runs until the corresponding time of the next day that is not a Saturday, a Sunday, a legal holiday, or a day on which the office is closed.

(b) The delivery of any document pursuant to this rule, pursuant to IC 4-30-7-1, or pursuant to any order of the director or the commission under this rule shall be made by one (1) of the following methods:

- (1) Delivering the document personally or by courier.
- (2) Mailing the document by registered or certified mail, return receipt requested.
- (3) Transmitting the document by facsimile followed by delivery or mailing as described in subdivision (1) or (2).

Delivery by registered or certified mail is deemed made at 8:00 a.m., Indianapolis time, on the day after the day of mailing. Delivery by facsimile transmission is deemed made at 8:00 a.m., Indianapolis time, on the day of receipt of the facsimile transmission. Delivery in person or by courier is deemed made at 8:00 a.m., Indianapolis time, on the day of receipt. (*State Lottery Commission; 65 IAC 2-5-12; emergency rule filed May 4, 1990, 4:35 p.m.: 13 IR 1725; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

**65 IAC 2-5-13 Request for ruling (Repealed)**

Sec. 13. (*Repealed by State Lottery Commission; filed Dec 7, 1992, 5:00 p.m.: 16 IR 1196*)

**65 IAC 2-5-13.1 Request for ruling**

Authority: IC 4-30-3-7; IC 4-30-3-9

Affected: IC 4-30-8-4

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## PROCUREMENT

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Sec. 13.1. A prospective vendor may request a determination regarding such prospective vendor's qualification to enter into a contract for a major procurement under IC 4-30-8-4 by filing a request for ruling with the commission on such forms as the director may determine. Upon the filing of a request for ruling, a hearing shall be scheduled before the director, with the prospective vendor having the same rights as an appellant under section 8 of this rule. A decision on the request for ruling shall be issued in the manner provided for appeals under section 9 of this rule. Any ruling by the director must be approved or denied by the commission or the commission may permit, within its discretion, a rehearing in the manner provided in section 10 of this rule. Any ruling by the director is binding on the commission only to the extent of the facts presented at the hearing and appearing in the record of the hearing or in the decision. (*State Lottery Commission; 65 IAC 2-5-13.1; emergency rule filed Dec 7, 1992, 5:00 p.m.: 16 IR 1195; errata filed Feb 8, 1993, 1:00 p.m.: 16 IR 1514; readopted filed Nov 30, 2001, 11:02 a.m.: 25 IR 1268*)

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