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**TITLE 105 INDIANA DEPARTMENT OF
TRANSPORTATION**

Proposed Rule
LSA Document #03-58

DIGEST

Amends 105 IAC 12 concerning the procurement of supplies and services. The rule will add sections concerning the following: the definitions of “offer” and “offeror”; public inspection of the contract files and what is excluded from public inspection; sanctions for providing false information to the department; United States manufactured product definition, policy, certification, and enforcement; and the requirements concerning the use of steel products. The rule will also modify sections, including, but not limited to, the following: withdrawal of bids or proposals; the cancellation of any bids or proposals; communications with the offeror who submit proposals for a contract; and added language to several sections concerning what is subject to public inspection. The rule will also make changes to clarify sections and make technical changes. Effective 30 days after filing with the secretary of state.

105 IAC 12-1-2	105 IAC 12-2-16
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SECTION 1. 105 IAC 12-1-2 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-1-2 “Award” defined

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 2. “Award” means the decision of the commissioner **or the commissioner’s designee** to accept a bid **or proposal**, subject to the execution and approval of a satisfactory contract and all other conditions required by the invitation ~~to~~ **for** bid or by law. (*Indiana Department of Transportation; 105 IAC 12-1-2; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1502; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 2. 105 IAC 12-1-5 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-1-5 “Bidder” defined

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 5. “Bidder” means a person who submits a bid ~~or proposal~~ for a contract with the department. (*Indiana Department of*

Transportation; 105 IAC 12-1-5; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1502; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)

SECTION 3. 105 IAC 12-1-14.5 IS ADDED TO READ AS FOLLOWS:

105 IAC 12-1-14.5 “Offer” defined

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 14.5. (a) “Offer” means a response to a solicitation.

(b) The term includes a bid or proposal. *(Indiana Department of Transportation; 105 IAC 12-1-14.5)*

SECTION 4. 105 IAC 12-1-14.6 IS ADDED TO READ AS FOLLOWS:

105 IAC 12-1-14.6 “Offeror” defined

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 14.6. “Offeror” means a person that submits an offer to a governmental body. *(Indiana Department of Transportation; 105 IAC 12-1-14.6)*

SECTION 5. 105 IAC 12-1-18 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-1-18 “Proposal” defined

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 18. “Proposal” means an offer submitted on the prescribed proposal form to furnish the supplies or services at the prices quoted by the ~~bidder~~ offeror on the proposal form. *(Indiana Department of Transportation; 105 IAC 12-1-18; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1503; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)*

SECTION 6. 105 IAC 12-1-22 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-1-22 “Responsible bidder or offeror” defined

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 22. “Responsible bidder or offeror” means a person who has:

- (1) the capability to fully perform the contract requirements; and
- (2) the integrity and reliability that will ensure good faith performance.

(Indiana Department of Transportation; 105 IAC 12-1-22; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1504; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)

SECTION 7. 105 IAC 12-1-23 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-1-23 “Responsive bidder or offeror” defined

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 23. “Responsive bidder or offeror” means a person who has submitted a bid or proposal that conforms in all material respects to the invitation for bid or request for proposal. *(Indiana Department of Transportation; 105 IAC 12-1-23; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1504; filed Oct 3, 2001, 9:35 a.m.: 25 IR 367; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)*

SECTION 8. 105 IAC 12-2-4 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-4 Minority participation

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 4. The department will make good faith efforts to solicit participation of minorities on every invitation for bid **or request for proposal**. (*Indiana Department of Transportation; 105 IAC 12-2-4; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1504; filed Oct 3, 2001, 9:35 a.m.: 25 IR 368; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 9. 105 IAC 12-2-6 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-6 Bid or proposal bonds

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 6. At the discretion of the department, a bidder **or offeror** may be required to submit, with ~~its~~ **their bid or proposal**, a bid ~~guarantee or proposal~~ bond in the form of a certified check, a cashier's check, or a bid **or proposal** bond acquired from a surety company authorized to do business in Indiana. If **such is** required, the amount **of the bid or proposal bond** shall be specified in the invitation for bid ~~The bid guarantee of an unsuccessful bidder will be returned upon award of the contract. The bid guarantee of the successful bidder will be returned after the bidder enters into a contract with the department.~~ **or request for proposal. The bid or proposal bond will be returned to bidders or offerors, upon request, after an award has been made or the solicitation has been canceled.** (*Indiana Department of Transportation; 105 IAC 12-2-6; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1505; filed Oct 3, 2001, 9:35 a.m.: 25 IR 368; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 10. 105 IAC 12-2-7 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-7 Performance bonds

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 7. At the discretion of the department, a successful bidder **or offeror** may be required to submit, **after the award has been made**, a performance bond in the form of a certified check, a cashier's check, or a performance bond acquired from a surety company authorized to do business in Indiana. If **such is** required, the amount of the performance bond and the time that it must be submitted will be specified in the invitation for bid **or request for proposal**. Performance bonds will be returned, upon request, at the successful completion of the contract. (*Indiana Department of Transportation; 105 IAC 12-2-7; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1505; filed Oct 3, 2001, 9:35 a.m.: 25 IR 368; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 11. 105 IAC 12-2-10 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-10 Notice to bidders or offerors

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 10. (a) The department shall send invitations ~~to~~ **for bid or request for proposals** by mail or as otherwise provided in this article to prospective bidders **or offerors**. Failure to give personal notice to a particular bidder **or offeror** will not invalidate a procurement under this article.

(b) The department shall schedule all notices given under this section so as to provide a reasonable amount of time for preparation and submission of responses after notification. (*Indiana Department of Transportation; 105 IAC 12-2-10; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1505; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 12. 105 IAC 12-2-11 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-11 Qualifications and duties of bidder or offeror

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 11. (a) The department may request a bidder **or offeror** to submit information to show it is a responsible bidder **or offeror**. Failure of a bidder **or offeror** to submit information requested by the department shall be cause for the department to determine the bidder **or offeror** is not responsible.

(b) If the department determines that a bidder **or offeror** is not responsible, that determination shall be made in writing. (*Indiana Department of Transportation; 105 IAC 12-2-11; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1505; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 13. 105 IAC 12-2-13 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-13 Anticompetitive practices

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 13. If the commissioner determines that a bidder **or offeror** has participated in collusion or other anticompetitive practices, the bidder **or offeror** may be prohibited from bidding on contracts with the department for a period of time determined by the department. (*Indiana Department of Transportation; 105 IAC 12-2-13; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1506; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 14. 105 IAC 12-2-14 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-14 Withdrawal of bids or proposals

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 14. ~~☆~~ (a) **Withdrawal of a bid or proposal shall be permitted before the exact date and hour for submission of bids or proposals, either by an agent of the bidder or offeror bearing proper authorization and identification may sign for and who shall receive an and sign for the unopened bid or proposal and withdraw the bid or proposal prior to the exact time for submission of bids or proposals. A bidder may modify its bid or proposal by withdrawing its bid or proposal as provided above and resubmitting a modified bid or proposal prior to the exact time for submission of bids or proposals. or by the timely receipt of a certified letter or telegram from the bidder or offeror.**

(b) **A bid or proposal already submitted may be modified by withdrawal of the bid or proposal as provided above and resubmission of the modified bid or proposal before the exact date and hour for submission of bids or proposals. The bid or proposal may also be modified by the timely receipt of a certified letter or telegram from the bidder or offeror.**

(c) Neither the staff nor the facilities of the department ~~will~~ **shall** be available to ~~assist~~ a bidder **or offeror** desiring to make modifications. It is the bidder's **or offeror's** responsibility to make all modifications. (*Indiana Department of Transportation; 105 IAC 12-2-14; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1506; filed Oct 3, 2001, 9:35 a.m.: 25 IR 368; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 15. 105 IAC 12-2-16 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-16 Award; cancellation; rejection

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 16. (a) The department reserves the right to accept or reject any or all bids **or proposals**, or any part thereof, and to award the items separately or all to one (1) bidder **or offeror**. A bidder **or offeror** bidding on an all or none basis must state so in its bid **or offer**.

(b) Prior to the opening, ~~of bids~~, the department may cancel an invitation for bid **or request for proposal** in whole or in part,

when it is in the best interest of the department. Reasons for cancellation include, but are not limited to:

- (1) the department no longer requires the supplies or services;
- (2) the department no longer can reasonably expect to fund the procurement; or
- (3) proposed ~~amendments~~ **revisions in a specification, delivery point, rate of delivery, period of performance, price, quantity, or another provision** to the ~~invitation for bid~~ **solicitation** would be of such magnitude that a new ~~invitation for bid~~ **solicitation** is desirable.

(c) When a solicitation is canceled prior to opening, notice of cancellation shall be sent to all businesses that have received a solicitation. The:

(1) notice of cancellation shall:

(A) identify the solicitation; and

(B) cite the reason for cancellation; and

(2) reason for cancellation shall be made part of the procurement file and shall be available for public inspection.

~~(e)~~ **(d)** After the opening, ~~of bids~~, but prior to award, ~~of a contract~~, the department ~~may reject all bids or proposals may be rejected~~ in whole or in part when it is in the best interest of the department. ~~Reasons for rejection include;~~ **determines, in writing, that such action is in the department's best interest for reasons including,** but are not limited to:

- (1) the department no longer requires the supplies or services;
- (2) ambiguous or otherwise inadequate specifications were part of the ~~invitation for bid~~; **solicitation**;
- (3) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (4) all bids ~~or proposals~~ received ~~contain~~ **are at clearly** unreasonable prices; or
- (5) there is reason to believe that the bids or proposals may not have been independently ~~prepared~~; **arrived at in open competition, may have been collusive, or may have been submitted in bad faith.**

~~(d)~~ **(e)** When the department cancels an invitation for bid ~~or request for proposal~~, the department will send notice **of cancellation** to each ~~person~~ **business** who submitted a bid ~~or offer~~, stating the reason for cancellation. The reason for cancellation shall be made part of the procurement file and shall be available for public inspection.

~~(e)~~ **(f)** When two (2) or more bids are equal, award shall be made by a drawing by lot limited to those bidders. If time permits, the bidders involved shall be given an opportunity to attend the drawing. The drawing shall be witnessed by at least three (3) persons, and the contract file shall contain the names and addresses of the witnesses. *(Indiana Department of Transportation; 105 IAC 12-2-16; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1506; filed Oct 3, 2001, 9:35 a.m.: 25 IR 369; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)*

SECTION 16. 105 IAC 12-2-17 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-2-17 Gifts

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 17. A bidder, **offeror**, or contractor shall not offer or give a gift, including, but not limited to, money, goods, services, meals, and entertainment to any officer, employee, section, division, district, or combination thereof of the department if the gift has a fair market value of ten dollars (\$10) or more. Exceptions to this provision must be approved, in writing, by the department's commissioner. *(Indiana Department of Transportation; 105 IAC 12-2-17; filed Jul 28, 1994, 4:00 p.m.: 17 IR 2802; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)*

SECTION 17. 105 IAC 12-2-18 IS ADDED TO READ AS FOLLOWS:

105 IAC 12-2-18 Public inspection

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 18. (a) The following information shall be subject to public inspection after the contract award:

(1) The invitation for bids or request for proposals.

- (2) A list of all vendors who received the invitation for bids or request for proposals.
- (3) The name and address of each bidder or offeror.
- (4) The amount of each bid or offer.
- (5) A record showing the name of the successful bidder or offeror, the dollar amount of the bid or offer, and the basis on which the award was made.
- (6) The entire contents of the contract file except for proprietary information that may have been included with a bid or offer, such as:
 - (A) trade secrets;
 - (B) manufacturing processes;
 - (C) financial information not otherwise publicly available; or
 - (D) other data that does not bear on the competitive goals of public procurement;that is not required by the terms of the invitation for bids or request for proposals itself to be made available for public inspection. A bidder or offeror shall identify information that he or she proposes to remain confidential and bind it separately from the remainder of his or her bid or offer.

(b) Requests for public disclosure of information, which a bidder or offeror has identified as proprietary, shall be made to the commissioner in writing. The commissioner shall examine the information to determine the validity of the bidder's or offeror's request for confidentiality and shall inform the bidder of his or her decision, which decision shall become a part of the contract file. *(Indiana Department of Transportation; 105 IAC 12-2-18)*

SECTION 18. 105 IAC 12-2-19 IS ADDED TO READ AS FOLLOWS:

105 IAC 12-2-19 Sanctions

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 19. (a) The department may impose any of the following sanctions if the department determines that a bidder, offeror, or contractor has knowingly or intentionally provided false information to the department:

- (1) The bidder or offeror may be declared nonresponsive or nonresponsible.
- (2) The department may:
 - (A) find the contractor in breach of the contract; and
 - (B) recover all amounts paid under the contract.

(b) The department may bar the bidder, offeror, or contractor from doing business with the state for a period not to exceed three (3) years. *(Indiana Department of Transportation; 105 IAC 12-2-19)*

SECTION 19. 105 IAC 12-2-20 IS ADDED TO READ AS FOLLOWS:

105 IAC 12-2-20 United States manufactured product definition, policy, certification, and enforcement

Authority: IC 8-23-2-6

Affected: IC 5-22-15-21

Sec. 20. (a) IC 5-22-15-21 allows a preference to promote the purchase of products manufactured in the United States.

(b) As used in this rule, "components" means those articles, materials, and supplies incorporated directly into the products.

(c) As used in this rule, "United States" means the United States, its possessions, Puerto Rico, and any other place subject to its jurisdiction, but does not include trust territories.

(d) As used in this rule, "United States manufactured product" means either of the following:

- (1) An unmanufactured product mined or produced in the United States.
- (2) A product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds fifty percent (50%) of the cost of all its components. (In determining if a product is manufactured

in the United States, only the product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of a foreign origin of the same class or kind for which determinations have been made in accordance with subsection (e)(3) or (e)(4) are treated as United States manufactured. Scrap generated, collected, and prepared for processing in the United States is considered United States manufactured.

(e) The statute requires that only United States manufactured products be acquired for public use, except articles, materials, and supplies as determined by the commissioner of the department or designee:

- (1) for use outside the United States;
- (2) for which the cost would be unreasonable;
- (3) for which the preference would be inconsistent with the public interest; or
- (4) that are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(f) For purposes of determining unavailability, the items listed in Federal Acquisition Regulation 25.108 (48 CFR 25.108) are presumed to be not reasonably available. However, the commissioner of the department or designee reserves the right to determine an item to be available for a particular bid, request for proposal, or other acquisition procedure.

(g) Any business that makes an offer, a proposal, or a bid for the purpose of seeking the preference in IC 5-22-15-21 shall certify under the penalties of perjury that it is offering United States manufactured products within the meaning of subsection (d). The certification will be made on forms provided by the department.

(h) The commissioner of the department or designee may presume the representations contained in the certification are true, thereby qualifying the business for the United States manufactured products preference. However, this presumption may be rebutted under subsection (k), (l), (m), or (n) or if the commissioner of the department or the commissioner's designee has reason to question the representations contained in the certification.

(i) Whether the United States manufactured product preference is offered shall be stated in each invitation for bid, request for proposal, or other acquisition procedure.

(j) The decision to grant the United States manufactured product preference shall be at the sole discretion of the commissioner of the department or the commissioner's designee.

(k) If, prior to award, the commissioner of the department or the commissioner's designee determines the business does not qualify for the United States manufactured product preference, the commissioner of the department or the commissioner's designee may do any of the following in any combination deemed appropriate:

- (1) Declare the business nonresponsible and bar it from doing business with the state for a specified period, not exceeding two (2) years.
- (2) Require the business to reimburse the state for the costs incurred due to rebidding of the contract.

(l) If, after the award, the commissioner of the department or the commissioner's designee determines the business does not qualify for the United States manufactured product preference, the commissioner of the department or the commissioner's designee may do any of the following in any combination deemed appropriate:

- (1) Cancel the contract.
- (2) Declare the business nonresponsible and bar it from doing business with the state for a specified period, not exceeding two (2) years.
- (3) Require the business to reimburse the state for the amount incurred due to rebidding of the contract.

(m) The sanctions in subsections (k) and (l) in no way limit what actions could be taken through appropriate civil or criminal statutes.

(n) Any applicant for the United States manufactured product preference who is dissatisfied with the decision rendered concerning sanctions may, within fifteen (15) days after receiving such notification, request in writing a reconsideration of that decision and submit additional written evidence bearing on the sanction. The commissioner of the department or the

commissioner's designee will consider any such request within forty-five (45) days of receipt thereof. A written decision will be issued. (*Indiana Department of Transportation; 105 IAC 12-2-20*)

SECTION 20. 105 IAC 12-2-21 IS ADDED TO READ AS FOLLOWS:

105 IAC 12-2-21 Steel products

Authority: IC 8-23-2-6

Affected: IC 5-22-15-25

Sec. 21. (a) Any business that makes an offer, a proposal, or a bid shall certify under the penalties of perjury that it is offering steel products manufactured in the United States as defined in IC 5-22-15-25 unless the commissioner of the department or the commissioner's designee makes a determination under IC 5-22-15-25(d). The certification will be made on forms provided by the department.

(b) The commissioner of the department or the commissioner's designee may presume the representations contained in the certification are true. However, this presumption may be rebutted if the commissioner of the department or the commissioner's designee has reason to question the representations contained in the certification.

(c) The steel products requirement shall be stated in each invitation for bid, request for proposal, or other acquisition procedure. (*Indiana Department of Transportation; 105 IAC 12-2-21*)

SECTION 21. 105 IAC 12-3-1 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-3-1 Purchases less than \$2,500

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 1. (a) A procurement with an estimated cost not exceeding two thousand five hundred dollars (\$2,500) may be made under the procedure outlined in this section.

(b) Bids shall be invited from at least one (1) person known to deal in the supplies or services to be procured.

(c) The purchase description and date bids are due shall be communicated to the person invited to bid. Means of communication may include mail, telephone, electronic mail, or facsimile machine.

(d) The department may consider an advertised price in a catalog, newspaper advertisement, radio commercial, television commercial, or other media communication to be a bid received by the department. The department must know of the advertised price at the time bids are due.

(e) If a satisfactory bid is received, a contract shall be awarded to the lowest responsive and responsible bidder.

(f) If no responsive bid is received from a responsible bidder, the department reserves the right to repeat the process described in this section.

(g) After opening, but prior to the contract award, no information is available for public inspection until a contract award has been made. (*Indiana Department of Transportation; 105 IAC 12-3-1; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1507; filed Jul 28, 1994, 4:00 p.m.: 17 IR 2802; errata filed Sep 14, 1994, 2:50 p.m.: 18 IR 268; filed Oct 3, 2001, 9:35 a.m.: 25 IR 369; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 22. 105 IAC 12-3-2 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-3-2 Purchases less than \$75,000

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 2. (a) A procurement with an estimated cost not exceeding seventy-five thousand dollars (\$75,000) may be made under the procedure outlined in this section.

(b) Bids shall be invited from at least three (3) persons known to deal in the supplies or services to be procured.

(c) The purchase description and the date bids are due shall be communicated to the persons invited to bid. Means of communication may include mail, telephone, electronic mail, or facsimile machine.

(d) The department may consider an advertised price in a catalog, newspaper, advertisement, radio commercial, television commercial, or other media communication to be a bid received by the department. The department must know of the advertised price at the time bids are due.

(e) If satisfactory bids are received, a contract shall be awarded to the lowest responsive and responsible bidder.

(f) If no responsive bid is received from a responsible bidder, the department reserves the right to repeat the process described in this section.

(g) After opening, but prior to the contract award, no information is available for public inspection until a contract award has been made. (*Indiana Department of Transportation; 105 IAC 12-3-2; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1507; filed Jul 28, 1994, 4:00 p.m.: 17 IR 2803; filed Oct 3, 2001, 9:35 a.m.: 25 IR 369; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899*)

SECTION 23. 105 IAC 12-3-4 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-3-4 Competitive sealed bids

Authority: IC 8-23-2-6

Affected: IC 5-22-18-2

Sec. 4. (a) A contract for supplies or services may be awarded under the procedure outlined in this section regardless of the estimated dollar value.

(b) An invitation for bid under this section shall be issued to potential bidders and must include the following:

(1) A purchase description.

(2) All contractual terms and conditions that apply to the purchase.

(3) A statement of the evaluation criteria that will be used, including any of the following:

(A) Inspection.

(B) Testing.

(C) Quality.

(D) Workmanship.

(E) Delivery.

(F) Suitability for a particular purpose.

(4) The time, date, and place for opening of bids.

(5) A statement concerning whether the bid must be accompanied by a certified check or other evidence of financial responsibility that may be imposed in accordance with rules or policies of the governmental body.

(6) A statement concerning the conditions under which a bid may be canceled or rejected in whole or in part as specified under IC 5-22-18-2.

(c) Bids shall be publicly opened at the time and place designated in the invitation for bid in the presence of one (1) or more witnesses.

(d) A contract shall be awarded with reasonable promptness to the lowest responsive and responsible bidder.

(e) After opening, but prior to the contract award, the following information shall be subject to public inspection:

(1) A list of all bidders who received the invitation for bid.

(2) The total amount of each bid.

(Indiana Department of Transportation; 105 IAC 12-3-4; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1507; filed Oct 3, 2001, 9:35 a.m.: 25 IR 370; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)

SECTION 24. 105 IAC 12-3-5 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-3-5 Competitive sealed proposal or request for proposal

Authority: IC 5-22-4-2; IC 8-23-2-6

Affected: IC 5-3-1; IC 5-22

Sec. 5. (a) When a purchasing agent makes a written determination that the use of competitive sealed bidding is either not practicable or not advantageous to the governmental body, the purchasing agent may award a contract using the procedure provided by this section instead of competitive sealed bidding.

(b) The purchasing agent shall solicit proposals through a request for proposals, which must include the following:

- (1) A statement concerning the relative importance of price and the other evaluation factors.
- (2) A statement concerning whether the proposal must be accompanied by a certified check or other evidence of financial responsibility.

(c) Public notice shall be given in the manner required by IC 5-3-1.

(d) Proposals shall be opened at the date and time specified in the request for proposals.

(e) ~~The department may conduct discussions with persons submitting proposals for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Persons submitting proposals must be accorded fair and equal treatment with respect to the opportunity for discussion and revision of proposals. In conducting discussions, the department shall not disclose information derived from proposals submitted by competing persons. As provided for in the request for proposals, 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. No discussions shall be held with an offeror whose proposal fails to meet a mandatory requirement of the RFP. Discussions shall be held to:~~

(1) promote understanding of the department's requirements and the offerors' proposals; and

(2) facilitate arriving at a contract that will be most advantageous to the department, taking into consideration price and other evaluation factors set forth in the RFP.

In conducting discussions, there must be no disclosure of any information derived from proposals submitted by competing offerors. The only factors or criteria that may be used in the evaluation of proposals are those specified in the request for proposals. The requirements of the RFP shall not be altered.

(f) After identification of the responsible offer or whose proposal appears to be the most advantageous to the department, the department will enter into contract preparation activities with the ~~bidder, offeror~~. If at any time the contract preparation activities are judged to be ineffective, the department may cease all activities with that ~~bidder, offeror~~ and begin contract preparation activities with the next highest ranked ~~bidder, offeror~~, and the process may continue until a contract is executed. The department reserves the right to cease all contract preparation activities at any time and to reject all proposals, if such action is determined to be in the best interest of the department.

(g) After opening, but prior to the contract award, a list of all offerors who received the request for proposal shall be subject to public inspection. *(Indiana Department of Transportation; 105 IAC 12-3-5; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1508; filed Oct 3, 2001, 9:35 a.m.: 25 IR 370; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)*

SECTION 25. 105 IAC 12-4-3 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-4-3 Equipment rental or lease with option to purchase

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 3. A contract for rental or lease may contain an option to purchase under the following circumstances:

(1) Exercise of the option shall be at the sole discretion of the commissioner **or the commissioner's designee.**

(2) The option must be part of the invitation for bid.

(Indiana Department of Transportation; 105 IAC 12-4-3; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1509; filed Oct 3, 2001, 9:35 a.m.: 25 IR 371; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)

SECTION 26. 105 IAC 12-4-4 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-4-4 Additions

Authority: IC 8-23-2-6

Affected: IC 5-22

Sec. 4. (a) If a bidder **or offeror** inserts contract terms or bids on items not listed in the invitation for bid **or request for proposal**, the department will treat the additional material as a proposal for addition to the contract and may:

(1) find the bidder **or offeror** to be nonresponsive;

(2) permit the bidder **or offeror** to withdraw the proposed additions to the contract; or

(3) accept any of the proposed additions to the contract.

(b) The department will not accept proposed additions to the contract that are prejudicial to the interest of the department or fair competition. The department's decision to permit a change will be made in writing. *(Indiana Department of Transportation; 105 IAC 12-4-4; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1509; filed Oct 3, 2001, 9:35 a.m.: 25 IR 371; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)*

SECTION 27. 105 IAC 12-4-5 IS AMENDED TO READ AS FOLLOWS:

105 IAC 12-4-5 Contract modifications and change orders

Authority: IC 8-23-2-6

Affected: IC 8-23-2

Sec. 5. The department may execute contract modifications and issue change orders on a contract. ~~A contract modification or change order may not materially change the terms of the contract.~~ *(Indiana Department of Transportation; 105 IAC 12-4-5; filed Jan 15, 1993, 1:00 p.m.: 16 IR 1509; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899)*

Notice of Public Hearing

Under IC 4-22-2-24, notice is hereby given that on July 1, 2003 at 9:00 a.m., at the Indiana Government Center-North, 100 North Senate Avenue, Room 730, Indianapolis, Indiana the Indiana Department of Transportation will hold a public hearing on proposed amendments concerning the procurement of supplies and services. Copies of these rules are now on file at the Indiana Government Center-North, 100 North Senate Avenue, Room 730 and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.

J. Bryan Nicol
Commissioner
Indiana Department of Transportation