



# ALABAMA PROCUREMENT LAW

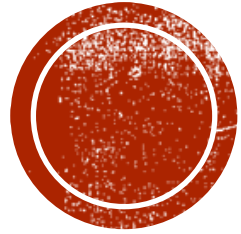
Implementing Act 2021-296



# A WARNING

- This presentation is a *summary* of the law, not the law itself
- Consult your own attorney
- If you or your attorney have additional questions, clarifications, etc., please do feel free to reach out and ask:
  - Taylor Nichols
  - [Taylor.Nichols@finance.alabama.gov](mailto:Taylor.Nichols@finance.alabama.gov)
  - 334-353-9179
- This presentation is terminology-heavy. Note that there are definitions in both the statute and administrative rules, and feel free to ask clarifying questions throughout the presentation.





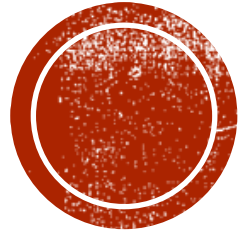
# BACKGROUND: THE OLD PROCUREMENT LAW

# THE OLD PROCUREMENT LAW

- Prior to Oct. 1, 2022
- The old procurement law had not been comprehensively reviewed in 20 years
  - Goal of the new law: To maximize competition, integrity, and transparency
- Goods and non-professional services are procured by competitive bid
  - Request for bid (RFB) process, performed by State Purchasing
- Professional services are not procured by competitive bid
  - Instead, we use the request for proposal (RFP) process
  - Performed by each agency rather than State Purchasing
  - Professional services contracts must be reported to the Contract Review Permanent Legislative Oversight Committee (see Ala. Code § 29-2-40 et seq.)
- Public works are procured under Title 39 of the Code of Alabama







# BACKGROUND: THE MODEL PROCUREMENT CODE

# MODEL PROCUREMENT CODE

- Created by the American Bar Association in 1979
  - Updated in 2000
- Supported by the National Association of State Procurement Officials (NASPO)
- According to NASPO's Survey of State Procurement Practices in 2018, at least 28 states have at least partially adopted MPC
- Alabama Law Institute committee adapted MPC for Alabama beginning 2019
- Enacted in Alabama by Act 2021-296
  - Minor technical adjustments in Act 2022-357
  - Administrative rules published March 2022 (see Division 4 of Title 355 of the Alabama Administrative Code)
  - All of these become effective Oct. 1, 2022



# DEFINING TERMS

- New Terminology:
  - “Chief Procurement Officer” (CPO)
  - “Invitation to Bid” (ITB)
  - “Supplies and services”
- “Competitive Sealed Bid”
  - Procurement process that is initiated by an Invitation to Bid (ITB) or Request for Bid (RFB)
- “Competitive Sealed Proposal”
  - Procurement process that is initiated by a Request for Proposal (RFP)



- “Purchasing Agency”
  - A governmental body, other than [CPO], that is authorized by [MPC], its implementing rules, or by delegation from [CPO] to enter into contracts.
- “Using Agency”
  - A governmental body that utilizes any supplies or services procured under [MPC].
- “Written” or “In writing”
  - Includes electronic writings such as email



# WHAT'S CHANGING

- All procurement of **supplies and services** is centralized at CPO
  - ***But*** CPO may delegate most authority to agencies when appropriate
  - Includes RFPs for professional services (except attorneys)
  - Exceptions apply (more on this later)
- **Does not include public works** (see Title 39 of the Code of Alabama)
- ITBs are the default method for supplies and non-professional services
- RFPs are the default method for professional services
  - Can now be “statewide” i.e. multi-agency
- Bid limits are set in administrative rules, not statute
  - Easier to update in the future
- Contracts not always limited to five years (but that will remain the general rule)
- More flexibility to correct bid errors
- Longer protest period
- Suspension and debarment are authorized
- Emergency procurements require CPO approval





# AUTHORITY & APPLICATION

- “Except as otherwise provided in this article, all rights, powers, duties, and authority relating to the procurement of supplies and services now vested in, or exercised by, any state governmental body under existing law are transferred to the Chief Procurement Officer.” Ala. Code § 41-4-124(a)
- Entities that follow the new law, but are not under CPO authority:
  - Institutions governed by a Board of Trustees
  - Retirement Systems of Alabama
  - Dept. of Mental Health
  - ALDOT for professional services
- Legislature, Judiciary, and State Port Authority are exempt but *may* adopt
  - Procedures “shall be established in accordance with the underlying purposes and policies of promoting responsible and efficient use of public funds...”
- Procurement of certain categories, like public works, attorney services, art, books, products by AIDB & ACI, liquor at ABC, etc. will generally remain the same and outside CPO authority. (See Ala. Code § 41-4-124 through -126)
- The new law does not apply to local governments, including local boards and authorities such as school boards and wastewater authorities (See Ala. Code § 41-16-50 et seq.)



# RECAP: CODE VS RULE

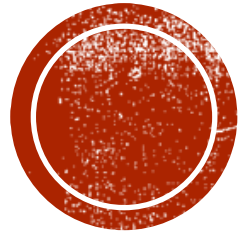
- Code of Alabama 1975
  - A.K.A. “code” or “statute”
  - Changes require an act of the Legislature
- Alabama Administrative Code
  - A.K.A. “rules” or “regulations”
  - Used to further interpret and add detail to the statutes (the Code of Alabama)
  - Cannot exceed the authority created in the statutes
  - Changes are initiated by the agency itself, and follow the process established in the Administrative Procedure Act (Ala. Code § 41-22-1 et seq.)
    - Requires certain public notice and comment periods
    - Legislative Council (one of the many committees) has authority to veto rule changes or require amendments, but rarely does this
- In the case of any conflict: Statute > Rule



# NEW BID LIMITS

- New bid threshold: \$25,000 and above
- Must meet public notice requirements (similar to existing requirements)
- Under the threshold, Small Purchase procedures may be used (more on this later)
- See Code of Ala. § 41-4-134, Rule 355-4-3-.04 (Small Purchases), Rule 355-4-3-.02(4) (Public Notice)





# TYPES OF PROCUREMENT





Competitive  
Sealed Bid  
(by ITB)

Competitive  
Sealed Proposal  
(by RFP)

Small Purchase

Sole Source

Emergency  
Procurement

Special  
Procurement

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# METHODS OF PROCUREMENT



# INVITATION TO BID

- Ala. Code § 41-4-132 and Rule 355-4-3-.02 (Competitive Sealed Bidding)
- Authority: CPO or head of a Purchasing Agency
- Formerly known as Request for Bid (RFB)
  - May still use the term “RFB” in some instances, and the Rules state that they are equivalent
- This is the default method for procurements above the bid threshold of \$25,000
  - Exception: professional services are by default procured by RFP
- Just like RFB, ITB will contain all contract terms and conditions
- Awarded to the “lowest responsive and responsible bidder whose bid meets the requirements”
- Multiple awards permitted



# ITB – MISTAKES

- Ala. Code § 41-4-132(f)(1): “When a bid is submitted that contains an error, [CPO] or head of a purchasing agency may authorize the correction or withdrawal of the bid or may cancel the award of the contract...”
- Mistake discovered before bid opening date: Vendor may correct
- Mistake discovered after opening but before award:
  - **Minor informalities** can be corrected if the effect on price, quantity, quality, delivery, or contractual conditions is negligible (Example: failure to sign but the intent to do so is clear)
  - **Mistakes where intent is evident** may be corrected (Example: typos, obvious math errors) and cannot be withdrawn
  - **Mistakes where intent is not evident** may be withdrawn if CPO/Purchasing Agency agrees
- Mistake discovered after award: Cannot be corrected unless by CPO/Purchasing Agency written determination
- CPO/Purchasing Agency has no duty to inspect bids for mistakes
- See Rule 355-4-3-.02(11) and (19)



# REQUEST FOR PROPOSALS

- Ala. Code § 41-4-133 and Rule 355-4-3-.03 (Competitive Sealed Proposals)
- Authority: CPO or the head of a Purchasing Agency
- May be used when ITB “is either not practicable or not advantageous to the state.”
  - Professional services must be procured by RFP “unless determined otherwise” by CPO
  - Supplies and non-prof. services *may* be procured by RFP
  - If there is a question of whether something is a “professional service,” CPO will determine
- More flexible process:
  - After proposals opened, CPO/Purchasing Agency may have discussions with responsible offerors, but may not reveal offerors’ proposals to each other
  - Revisions after opening are permitted
  - After discussions (if any), CPO/Purchasing Agency establishes a deadline for “Best and Final Offer” (BAFO), after which the proposal is locked in
  - Awarded to offeror “whose proposal conforms to the solicitation” and is “the **most advantageous to the state**, taking into consideration price and the evaluation factors”
- Note: Many vendors will need to be educated on RFP, since they are accustomed to ITB/RFB





# RFP — MISTAKES

- Mistakes discovered before proposal due date may be corrected
- Mistakes discovered after receipt but before award:
  - During discussions, if there are any, offerors may freely correct mistakes
  - Minor informalities can be corrected if the effect on price, quantity, quality, delivery, or contractual conditions is negligible (same as ITB)
  - After BAFO, corrections may be made only by CPO/Purchasing Agency determination
- Mistakes discovered after award may not be corrected unless the CPO/Purchasing Agency finds it would be “unconscionable” not to allow
- CPO/Purchasing Agency has no duty to inspect proposals for mistakes
- See Rule 355-4-3-.03(15)



# CONTRACT REVIEW COMMITTEE

- Contract Review Committee requirements remain unchanged
  - See Ala. Code § 29-2-40 et seq., not amended as part of the Model Procurement Code
  - Must submit for review “contracts for personal or professional services”
  - “Contracts let by competitive bid” are excluded, so no ITB contracts
  - Current Committee policy requires that professional services contracts be let for a period no longer than two years, not including options; this remains unchanged
- What about statewide/multi-agency contracts for professional services?
  - If only one agency will use the contract, that agency will present the contract to the committee, unless otherwise determined by CPO.
  - If multiple agencies will use the contract, CPO may designate a using agency to present the contract to the committee.
  - Rule 355-4-3-.03(16)



# SMALL PURCHASE

- Ala. Code § 41-4-134 and Rule 355-4-3-.04
- Authority: Any agency procurement under the bid threshold (\$25,000)
- “Any procurement not exceeding the small purchase amount established by rule may be made in accordance with small purchase procedures.”
- If a State contract for the supplies/services already exists, must use the contract
- Cannot artificially divide purchases to stay under the threshold
- For purchases between \$5,000 and \$24,999, three quotes must be solicited, and “lowest acceptable quotation” must be awarded
- For purchases below \$5,000, CPO/Purchasing Agency should establish its own procedure



# SOLE SOURCE

- Ala. Code § 41-4-135 and Rule 355-4-3-.05
- Authority: CPO determination only
  - CPO makes the determination and conducts the negotiations
  - Authority may be delegated by CPO
- “A contract may be awarded for a supply or service without competition when [CPO] determines in writing that there is only one source for the required supply or service.”
  - Note that this does not include a situation in which there is only one proprietary supply/service, but there are multiple potential bidders (such as resellers)
- Sole source is acceptable “where the compatibility of equipment, accessories, or replacement parts is the paramount consideration” under Rule 355-4-3-.05(1)(a).
- May not exceed one year, unless CPO determines that there is still only one source





# EMERGENCY PROCUREMENT

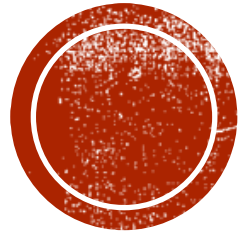
- Ala. Code § 41-4-136 and Rule 355-4-3-.06 (Emergency Procurements)
- Authority: CPO or the head of a Purchasing Agency
  - Authority may not be delegated
- “[W]hen there is a threat to public health, welfare, or safety under emergency conditions”
  - No more “convenience”
  - Further definition in the Rule: These methods may be used when the emergency creates “an immediate and serious need... that cannot be met through normal procurement methods” and it threatens
    - “the functioning of State government”
    - “the preservation or protection of property” or
    - “the health or safety of any person.”
- Must be done with “as much competition as is practicable under the circumstances”
- Written determination is required for basis of emergency and selection of vendor, and this will be available for public inspection



# SPECIAL PROCUREMENT

- Ala. Code § 41-4-137 and Rule 355-4-3-.07
- Authority: CPO or the head of a Purchasing Agency
- Requirements:
  - Prior public notice
  - “[A]n unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest.”
  - Special procurement “shall be made with as much competition as is practicable under the circumstances.”
  - Written determination of the basis for Special Procurement and the selection of a particular contractor/vendor
- CPO must publish an annual report describing all Special Procurements





# PROTESTS & DISPUTES



# PROTESTS

- Ala. Code § 41-4-161 and Rule 355-4-6-.01
- *Prospective* bidder/offeror may protest to CPO within 14 days of issuance of the solicitation or amendment
  - “A matter that could have been raised... as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.” Ala. Code §41-4-161(a)(2)(b)
- *Actual* bidder/offeror may protest to CPO within 14 days of award or notification of intent to award, whichever is earlier
- Protests may be filed regarding any phase of the process, including phases before the bid was publicly noticed
- CPO or CPO’s designee may settle and resolve the protest
- If the protest is not resolved by mutual agreement within 10 days, CPO must commence “administrative review” and issue a formal decision within 14 days after the administrative review is commenced





# SUSPENSION & DEBARMENT

- Ala. Code § 41-4-162 and Rule 355-4-6-.02
- CPO may suspend or debar vendors for:
  - Conviction of criminal offense in connection with procurement or performance
  - Conviction of “embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty as a state contractor.”
  - Conviction under state/federal antitrust law
  - “Serious” violation of a contract provision, including deliberate failure to perform or a recent record of unsatisfactory performance
  - Violation of Ethics Law, an order of the CPO, or other “serious and egregious misconduct”
- Debarment may not exceed 3 years; suspension may not exceed 3 months
- Requires reasonable notice to the vendor, opportunity for vendor to be heard, and consultation with the using agency





# APPEALS

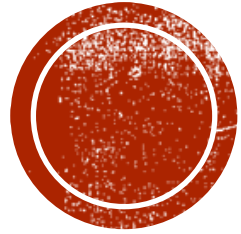
- Ala. Code § 41-4-164 and -168 and Rule 355-4-6-.02
- Applies to protests, suspensions, and debarments
- Within 5 days of an adverse decision from CPO, a party may appeal to the Director of Finance
  - Director must issue his/her decision within 14 days of receipt of the appeal
  - Standard of review: “Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”
- Civil action may be brought in Montgomery County Circuit Court once all administrative appeals are exhausted



# CONTRACT DISPUTES

- Ala. Code § 41-4-163 and Rule 355-4-6-.03
- General policy is familiar: “In the event of any dispute between the State and a contractor, senior officials of both parties shall meet and engage in a good faith attempt to resolve the dispute...” etc.
- CPO or head of Purchasing Agency may issue a final decision which includes the relevant facts and rationale
- Final decision must be issued within 120 days; if not, the contractor may proceed as if they received an adverse decision





# MISCELLANEOUS POINTS

# CONTRACTS

- Any type of contract is permitted (Ala. Code § 41-4-143), except:
  - Cost-plus-a-percentage-of-cost is prohibited
  - Cost-reimbursement is permitted only if:
    - It is “likely to be less costly to the state than any other type of contract” or
    - It is “impracticable to obtain the supplies or services required except under a cost-reimbursement contract”
- Cooperative purchasing and interagency agreements remain widely available (Ala. Code § 41-4-170 to -176)
  - Authority for cooperative purchases has expanded: State can now partner with any other governmental entity, not just cooperative organizations
  - Prior law did not explicitly authorize interagency agreements



# MULTI-YEAR CONTRACTS

- A contract “may be entered into for any period of time that is in the best interests of the state, so long as the terms of the contract and the conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal year at the time of contracting.” Ala. Code § 41-4-144.
- Contracts are not limited in length in the statute, **but** the rule limits them to five years **except** by CPO’s written determination. Rule 355-4-3-.13(1).
  - For cooperative contracts, CPO may determine (in writing) whether the State will limit to five years or not
- Non-appropriation contract provisions still apply





# PREPARING SPECIFICATIONS

- Ala. Code § 41-4-151 and Rule 355-4-4-.02
- CPO continues to be responsible for specifications in ITBs, RFPs, etc.
- CPO “shall obtain expert advice and assistance from personnel of **using agencies** in the development of specifications”
- CPO “may delegate in writing to a **using agency** the authority to prepare and utilize its own specifications”
- “Specifications may be prepared by persons other than state employees when necessary.”
  - Must assure that third parties do not have conflicts of interest



# REQUESTS FOR QUALIFICATIONS (RFQ)

- RFQs may be authorized by CPO
  - For ITB solicitations, see Ala. Code § 41-4-132(i)
  - For RFP solicitations, see Ala. Code § 41-4-135(i)
- Note that there are no administrative rules on RFQ
- Public notice is the same as for ITBs and RFPs



# CONFIDENTIALITY & PUBLIC RECORDS

- Ala. Code § 41-4-115 defines what is exempt from disclosure and provides CPO authority to make rules
  - "...[P]rocurement information is a public record to the extent provided by state law and shall be available to the public."
- "Confidential Information" is defined in Rule 355-4-1-.03(4)
- Procedures are set forth in Rule 355-4-1-.04
  - Bidders/offerors generally should not provide Confidential Information, but if it is necessary, they may submit redacted copies
  - Confidential Information is not subject to Open Records, but CPO/Purchasing Agency determines whether something actually meets the definition of "Confidential Information"
- "Protestors may also protest the disclosure of information marked confidential in the bid or offer if the disclosure provided a party with an unfair competitive advantage." Rule 355-4-6-.01(b).



# EFFECTIVE DATE

- Both the new law and the new rules are effective October 1, 2022
  - New rules govern all contracts **solicited and entered into** after October 1, 2022.
  - Contracts entered into on or before October 1, 2022 will continue to be governed by the old law and administrative rules.





**QUESTIONS**

