

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of NEW)	NOTICE OF PUBLIC HEARING ON
RULE I pertaining to intent to award;)	PROPOSED ADOPTION,
the amendment of ARM 2.5.503,)	AMENDMENT, AND REPEAL
2.5.601, 2.5.602, 2.5.604, 2.5.605, and)	
2.5.609 pertaining to public notice,)	
competitive sealed bids, competitive)	
sealed proposals, sole source)	
procurement, exigency procurements,)	
and alternative procurement methods;)	
and the repeal of ARM 2.5.302,)	
2.5.303, 2.5.304, 2.5.305, and 2.5.502)	
pertaining to requisitions from the)	
agencies to the division, enforcing the)	
contract, contract renewal, completion)	
notification for contracts with)	
performance security, and bid,)	
proposal, and contract performance)	
security)	

TO: All Concerned Persons

1. On May 21, 2024, at 3:00 p.m., the Department of Administration will hold a public hearing in Room 161 of the Mitchell Building, at 125 North Roberts Street, Helena, Montana, to consider the proposed adoption, amendment, and repeal of the above-stated rules. Alternatively, interested parties may attend the public hearing via the Zoom meeting platform or by telephone using the following information:

Join Zoom Meeting:

mt-gov.zoom.us/j/86551741479?pwd=N3lBR2ZDLzFlaGx3MXpEdU9lWlEwZz09

Meeting ID: 865 5174 1479

Password: 907763

-OR-

Dial by Telephone

1-646-558-8656

Meeting ID: 865 5174 1479

Password: 907763

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on May 14, 2024, to advise us of the nature of the accommodation that you need.

Please contact Heather Hardman, Department of Administration, P.O. Box 200546, Helena, Montana 59620-0546; telephone (406) 841-2922; Montana Relay Service 711; facsimile (406) 841-2930; or email to hhardman@mt.gov.

3. The rule proposed to be adopted is as follows:

NEW RULE I INTENT TO AWARD (1) For all invitations to bid and requests for proposals, the division or state agency shall electronically post an intent to award prior to awarding a contract.

(2) The intent to award shall be posted publicly for no less than seven days to allow for public review and comment. If no public comment is received, the division or state agency may award a contract to the successful bidder or offeror.

(3) If public comment is received, the division or state agency shall review the comments received and determine the impact, if any, on the decision to award a contract.

AUTH: 18-4-221, MCA

IMP: 18-4-303, 18-4-304, 18-4-307, MCA

GENERAL STATEMENT OF REASONABLE NECESSITY: The department has identified changes to rules that will streamline regulation, cut red tape, and simplify rule text as part of Governor Gianforte's Red Tape Relief Initiative. Statements concerning only the internal management of the agency or state government are being removed or repealed and transferred to policies maintained in the state's internal policy manual, the Montana Operations Manual (MOM).

Further, as part of its biennial review of rules required under 2-4-314, MCA, the department identified additional changes included in these proposed amendments. Some of the proposed amendments are technical in nature, such as amending punctuation, replacing passive voice with active voice, eliminating outdated references, or updating authority and implementation citations to accurately reflect all statutes implemented through the rules and to provide the complete sources of the department's rulemaking authority. Other changes are intended to simplify language and reduce wordiness.

Finally, the department proposes to adopt NEW RULE I and to amend ARM 2.5.601 and 2.6.602 to implement Senate Bill 51, enacted by the 2023 Montana Legislature (Chapter 489, Laws of 2023). Senate Bill 51 added a notice of intent to award procedure to provide additional transparency and opportunity for public input in the procurement process and adjusted the timing and manner of other disclosures during procurement.

STATEMENT OF REASONABLE NECESSITY: NEW RULE I provides clarity to agencies and potential vendors regarding how agencies will provide notice of intent to award as required by Senate Bill 51. The new rule also identifies procedures for handling comments, or the absence of comments, received in response to a notice of intent to award.

4. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

2.5.503 PUBLIC NOTICE (1) through (4) remain the same.

~~(5) Notice of public meetings conducted to evaluate requests for proposals must be posted to the division's web site no less than 72 hours in advance of the meeting.~~

AUTH: 18-4-221, MCA

IMP: 18-4-303, 18-4-304, MCA

STATEMENT OF REASONABLE NECESSITY: The department is proposing to amend ARM 2.5.503 to remove (5), because ARM 2.2.102 already addresses public meeting requirements for the department and procuring agencies should follow their own public meeting requirements when conducting a solicitation under delegated authority.

2.5.601 COMPETITIVE SEALED BIDS AND GENERAL PROVISIONS
PERTAINING TO BOTH COMPETITIVE SEALED BIDS AND PROPOSALS

(1) remains the same.

(2) The invitation for bid solicitation shall include the following:

(a) instructions and information to bidders or offerors concerning the bid or proposal submission requirements, including the time and date established for bid opening submission, the ~~address of the office to~~ method by which bids or offers are to be delivered, and any other special information;

(b) and (c) remain the same.

(3) The invitation for bid or request for proposals may incorporate documents by reference if ~~the invitation for bid~~ it specifies where such documents can be obtained.

(4) Where a brand name specification is used in a solicitation, the solicitation shall ~~contain explanatory language~~ explain that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired, and is not intended to limit or restrict competition. When bidding or proposing an "or equal" product, the burden of persuasion is on the bidder or offeror to convince the procurement officer that their product is, in fact, equal to the one specified. The procurement officer is given the responsibility and judgment for making a final determination of whether a proposed substitution is equal to the brand name specified.

(5) ~~Addenda, if any,~~ If the division or agency decides to amend an invitation for bids or request for proposals, the amendments will be provided to all vendors who received an invitation for bid the solicitation, or notice of the ~~addenda~~ solicitation amendment will be placed provided in the ~~electronic~~ format designated in the solicitation for giving public notice.

(6) ~~Upon receipt of a bid or a facsimile transmission of a bid, an employee of the agency other than the procurement officer will cause it to be time-stamped and stored in a secure place until the time and date set for bid opening. In order to be considered timely, a complete printed bid response must be delivered to the~~

~~specified destination by the specified time. For all invitations for bid and requests for proposals, the division or state agency shall post an intent to award as described in [NEW RULE I].~~

~~(7) Bids or proposals shall be opened publicly at submitted on or before the time, date, and place and in the manner designated in the invitation for bid solicitation.~~

~~(8) The division may request ask state agencies to perform tests or to provide technical expertise to determine product or service acceptability on bids received.~~

~~(9) through (15) remain the same.~~

~~(16) The state may create a roster of contractors to provide supplies or services on an "as needed, if needed" basis. In this situation, contractors have no guarantee that any supplies or services will be purchased by the state. The solicitation document will establish the method to be used to select contractors for the roster.~~

AUTH: 18-4-221, MCA

IMP: 18-4-303, 18-4-304, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend ARM 2.5.601 to clarify which provisions that apply to both competitive sealed bids and competitive sealed proposals. Previously, ARM 2.5.602 referred to ARM 2.5.601, but it was difficult to understand which sections applied only to competitive sealed bids and which applied to both bids and proposals. The word "solicitation" is used to clarify that a requirement or process may apply to either invitations to bid or requests for proposals. The catchphrase is also being updated to clarify the portions of ARM 2.5.601 apply to both competitive sealed bids and proposals. The implementation citation is being updated to add 18-4-304, MCA, because the rule also implements that section.

The department proposes to amend (6) to remove an outdated description of division internal processes and allow that procedure to be defined in MOM policy. The new language in (6) is necessary to inform the reader to consult NEW RULE I for information about the intent to award process for competitive sealed bids and proposals.

The department is proposing to add (16) to clarify that the division or an agency may create a roster of contractors on an as needed, if needed basis by either an invitation for bids or request for proposals. Previously, similar language was found only in ARM 2.5.602(16), which gave the impression that a roster of contractors could only be created using a request for proposals.

2.5.602 COMPETITIVE SEALED PROPOSALS (1) "Competitive sealed proposal" is a procurement option allowing the award to be based upon an evaluation process using stated criteria to arrive at a contract that will be the most advantageous to the state. Competitive sealed proposals shall be solicited through a request for proposals.

(2) Competitive sealed proposals, ~~solicited through a request for proposals,~~ may be practical when one or more of the following conditions exist:

(a) through (e) remain the same.

(3) The request for proposals must be prepared and conducted in accordance with ARM 2.5.601, except for provisions of ARM 2.5.601 that expressly apply only to invitations for bid. A request for proposals ~~and~~ must include:

(a) through (4) remain the same.

~~(5) Facsimile transmission of a proposal is only acceptable on an exception basis with prior approval from the procurement officer.~~

~~(6) Proposals shall be time-stamped upon receipt and held in a secure place by an employee of the agency until the due date specified in the request for proposals.~~

~~(7)~~(5) After the time established for receipt of proposals, a procurement officer shall open and inspect the proposals for material not available for public inspection pursuant to 18-4-304 and 18-4-308, MCA. The procurement officer shall remove this material and release the remainder of the proposal for public inspection. Offerors submitting a proposal containing a claim of confidentiality pursuant to 18-4-304, MCA, shall include a statement that attests to the offeror's acceptance of the legal and financial responsibility for defending the claim. A claim to shield trade secret material must be made by an offeror's legal counsel using the affidavit form prescribed by the division. The division or purchasing agency is not required to accept an offeror's trade secret claims. An offeror who claims material in its proposal is a trade secret shall provide two versions of all documents containing claimed trade secrets. In one version, all material shall be readable and unredacted. In the other version, all claimed trade secrets must be redacted by the offeror. After complying with 18-4-304(4) and (8), MCA, the division or purchasing agency may publish or provide to the public redacted documents and any proposal documents that do not contain claimed trade secrets.

~~(8)~~(6) For the purpose of conducting discussions, proposals must be initially classified as responsive or nonresponsive.

(a) Proposals may be found nonresponsive at any time during the procurement process if:

(i) any of the required information is not provided;

(ii) the submitted price is found to be excessive or inadequate as measured by criteria stated in the request for proposals; ~~or~~

(iii) the proposal does not conform to the specifications described and required in the request for proposal;

(iv) the offeror claims all or significant portions of the offeror's proposal are trade secrets without a proper basis under law or the offeror and the division or purchasing agency are unable to resolve disagreements regarding the offeror's trade secrecy claims before the division or purchasing agency posts an intent to award;

(v) the offeror or proposal fails to comply with procurement laws or policies;

(vi) the offeror or proposal fails to comply with the request for proposal requirements;

(vii) the offeror does not agree to the state's contract requirements after negotiations;

(viii) the offeror fails to provide required financial, insurance, reference, or security information; or

(ix) the offeror fails to demonstrate financial responsibility or an ability to

comply with contract requirements.

(b) remains the same.

(9) through (15) remain the same but are renumbered (7) through (13).

~~(16) The state may create a roster of contractors to provide supplies and/or services on an "as needed, if needed" basis. In this situation, contractors have no guarantee that any supplies or services will be purchased by the state. The solicitation document will establish the method to be used to select contractors for the roster.~~

AUTH: 18-4-221, MCA

IMP: 18-4-304, MCA

STATEMENT OF REASONABLE NECESSITY: See above the statement of reasonable necessity for ARM 2.5.601 and the general statement of reasonable necessity. The department intends to eliminate former (5) and (6) because they describe requirements and processes that are no longer in use or are more properly defined in the state's internal policy manual, the MOM.

In addition, the department proposes to amend new (5) to update the requirements regarding offerors' trade secrecy claims to reflect current division and agency practices. In addition, Senate Bill 232, enacted by the 2023 Montana Legislature (Chapter 439, Laws of 2023), implemented statutory deadlines for responding to requests for public information. To help the division and agencies meet deadlines for reviewing claims of confidentiality and responding to such requests, it is necessary for offerors to specifically mark and identify claimed trade secrets.

The department proposes to amend new (6) to clarify the process for handling instances where an offeror claims more information is protected than what is recognized under Montana law. Recently, some offerors have erroneously indicated all or a majority of their proposal is considered a trade secret to avoid the effort involved in specifically identifying material that is actually confidential. This can delay the process of reviewing trade secrecy claims and affect the schedule for the solicitation. The other proposed amendments to this section describe additional issues that have previously resulted in proposals being deemed nonresponsive. By listing them here, instead of simply relying on the definition of "nonresponsive," the department intends to make it easier for offerors to identify problems that could result in a proposal being rejected.

The department is proposing to remove (16) and transfer it to ARM 2.5.601, because it applies to both invitations for bids and requests for proposals.

2.5.604 SOLE SOURCE PROCUREMENT (1) through (3) remain the same.

~~(4) The procurement officer may conduct negotiations, as appropriate, as to price, delivery, and terms. For any requested sole source procurement with a total contract value exceeding \$100,000, the division or procuring agency must provide public notice of intent to sole source as provided in ARM 2.5.503. An intent to sole source shall be posted on the division or agency website for 10 business days to allow for public review and comment before the division may approve sole source procurement.~~

(5) remains the same.

(6) The following items do not require sole source justification and shall be purchased directly by the agency regardless of delegated authority:

(a) through (c) remain the same;

(d) purchase or renewal of maintenance agreements for software or hardware. The purchase or renewal of a software subscription agreement or the addition of new major functional capabilities or services is not considered purchase or renewal of a maintenance agreement for software or hardware and such items cannot be purchased directly by an agency without sole source approval or another approved procurement method; and

(e) remains the same.

(7) ~~If an extension or renewal of a~~ Any modification, extension, or renewal to an existing sole source contract is required, requires the agency shall to provide the division with a new justification form as provided in (5).

AUTH: 18-4-221, MCA

IMP: 18-4-306, MCA

STATEMENT OF REASONABLE NECESSITY: During compliance reviews with agencies and in the regular course of working with agencies, the division has identified sole source procurements as an area where more transparency is needed. The department is proposing to amend ARM 2.5.604 to include a requirement to conduct an intent to sole source process to provide such transparency. The intent to sole source allows the public an opportunity to inform the division or agency about opportunities in the marketplace for conducting a competitive procurement that the division or agency might not have been aware of. It is also possible that public comment may reinforce the need for a sole source procurement, and that information could be used to complete the sole source justification. Further, by requiring that an intent to sole source be posted for 10 business days, the proposed rule will ensure that the division and agency have taken appropriate time to consider whether a sole source procurement is truly the only procurement mechanism appropriate for obtaining the necessary supplies or services.

The department proposes to amend (6) to clarify that software maintenance, which may be purchased directly, does not include renewal of a software subscription agreement. Software maintenance, as defined in ARM 2.5.201, includes "patches, support, or upgrades and minor enhancements allowing the software to continue to perform its functional purposes as originally specified." The term does not apply to renewal of expired or expiring license or subscription agreements. There has been some confusion regarding this issue among purchasing agencies; therefore, the department has determined it is necessary to amend this rule now to eliminate the confusion.

Likewise, there has been some confusion among purchasing agencies regarding when a sole source justification is necessary. Some agencies incorrectly believed they could reuse the sole source approval they obtained when they initially purchased a service or supply when it was time to renew the contract. The department is proposing to amend (7) to clarify that a new sole source justification must be completed and a new sole source approval must be obtained prior to

renewing a contract procured under sole source authority. In many cases, one vendor's success with a novel product or service inspires competitors to provide similar products and services. Thus, while a sole source procurement may have been justified when the initial purchase was made, the justification may not continue to exist when it is time for the initial contract to be renewed.

2.5.605 EXIGENCY PROCUREMENTS (1) An exigency procurement of \$10,000 or more shall be limited to those supplies or services necessary to meet the exigency, as defined in ARM 2.5.201. An exigency does not exist when:

(a) an agency failed to procure supplies or services before the time they were needed;

(b) an agency failed to timely renew an expiring contract; or

(c) other inaction by the agency created the exigency. [does not follow lead-in language]

~~(2) The determination as to whether a procurement shall be made as an exigency procurement shall be made by the agency.~~ An agency shall decide whether public exigencies require an exigency procurement. The determination must be in writing and must state the basis for an exigency procurement and for the selection of a particular vendor.

(3) The procedure used shall ~~be selected to assure that~~ ensure the required supplies or services are procured in time to meet the exigency. However, such competition as is practicable shall be obtained.

(4) A record of each exigency procurement shall be made as soon as practicable and shall ~~set forth~~ include:

(a) through (d) remain the same.

AUTH: 18-4-221, MCA

IMP: 18-4-133, MCA

STATEMENT OF REASONABLE NECESSITY: It is necessary to amend ARM 2.5.605 to identify situations that are not public exigencies. Under 18-4-133(1), MCA, supplies and services may be procured "in the manner in which the articles are usually bought and sold" when "immediate delivery of articles or performance of service is required by the public exigencies." An exigency purchase, as defined in ARM 2.5.201, is "a purchase made without following normal purchasing procedures due to a sudden and unexpected happening or unforeseen occurrence or condition which requires immediate action." During compliance reviews with agencies and in the regular course of working with agencies, the division has discovered that some agencies believe an exigency purchase is justified in instances where they have not planned to allow an appropriate amount of time to complete a competitive procurement. It is necessary to amend ARM 2.5.605 to reinforce the idea, included in the definition of exigency, that purchases made without following normal purchasing procedures should be limited to situations where a sudden event or unforeseeable circumstance requires immediate action.

2.5.609 ALTERNATIVE PROCUREMENT METHODS (1) An agency may request authorization from the division to pursue an alternative procurement method

~~for obtaining a supply or service.~~

(2) If an alternative procurement method is approved, the division shall:

(a) conduct the procurement on behalf of the agency or delegate one-time authority to conduct the procurement on its own;

(b) and (c) remain the same.

AUTH: 18-4-221, 18-4-302, MCA

IMP: 18-4-302, MCA

STATEMENT OF REASONABLE NECESSITY: The department finds it necessary to amend ARM 2.5.609 to allow the division to decide to delegate authority to agencies to procure through an alternative procurement method where appropriate. While in many cases, the division may be in a position to successfully implement an alternative procurement method, it is necessary to amend the rule to give the division the option of delegating authority to an agency to conduct an alternative procurement in situations where the division's workload does not permit the division to conduct the procurement on behalf of the agency or where the agency is in a better position to manage an alternative procurement process due to the agency's expertise.

5. The department proposes to repeal the following rules:

2.5.302 REQUISITIONS FROM THE AGENCIES TO THE DIVISION

AUTH: 18-4-221, MCA

IMP: 18-4-221, MCA

STATEMENT OF REASONABLE NECESSITY: Under 2-4-102(11), MCA, administrative rules are statements of general applicability that implement, interpret, or prescribe law or policy. The administrative rules the department proposes to repeal are statements concerning only the internal management of government and are being transferred to MOM policy to decrease unnecessary text in the department's administrative rules.

2.5.303 ENFORCING THE CONTRACT

AUTH: 18-4-221, MCA

IMP: 18-4-221, MCA

2.5.304 CONTRACT RENEWAL

AUTH: 18-4-221, MCA

IMP: 18-4-313, MCA

2.5.305 COMPLETION NOTIFICATION FOR CONTRACTS WITH PERFORMANCE SECURITY

AUTH: 18-4-221, 18-4-312, MCA
IMP: 18-4-312, MCA

2.5.502 BID, PROPOSAL, AND CONTRACT PERFORMANCE SECURITY

AUTH: 18-4-221, 18-4-312, MCA
IMP: 18-1-201, 18-4-312, MCA

6. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the person listed in paragraph two above. Comments must be received no later than 5:00 p.m., May 24, 2024.

7. Katy Brandis, Department of Administration, has been designated to preside over and conduct this hearing.

8. An electronic copy of this proposal notice is available through the department's website at doa.mt.gov/administrativerules. The department strives to make its online version of the notice conform to the official published version, but advises all concerned persons that if a discrepancy exists between the official version and the department's online version, only the official text will be considered. In addition, although the department works to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

9. The division maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this division. Persons who wish to have their name added to the mailing list shall make a written request that includes the name, mailing address, and e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding division rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written requests may be mailed or delivered to the person listed in paragraph two above; or may be made by completing a request form at any rules hearing held by the department.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by mail on January 25, 2024.

11. The department has determined that under 2-4-111, MCA, the proposed adoption, amendment, and repeal of the above-stated rules will not significantly and directly impact small businesses.

By: /s/ Misty Ann Giles
Misty Ann Giles, Director
Department of Administration

By: /s/ Don Harris
Don Harris, Rule Reviewer
Department of Administration

Certified to the Secretary of State April 16, 2024.