

Chapter

# V

SD ASSOCIATION OF COUNTY HIGHWAY SUPERINTENDENTS

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Certification Manual



# Acquisitions, Disposals and Exchanges

**PLEASE NOTE THAT THE BID BOOKLET WILL BE REVISED IN THE COMING MONTHS DUE TO CHANGES MADE DURING THE 2023 LEGISLATIVE SESSION UNDER HOUSE BILL 1060 – THE ONLINE VERSION OF THIS MANUAL’S CHAPTER WILL BE UPDATED ACCORDINGLY BUT PLEASE CHECK BACK TO THE MAIN LINK BELOW**

**South Dakota Local Government Guide for Acquisitions, Disposals And Exchanges – (Bid Booklet)**

<http://legislativeaudit.sd.gov/resources/resources.aspx>

From the Home Page, select ‘Bid Booklet’, and then ‘SD Local Government Guide For Acquisitions, Disposals And Exchanges – (Bid Booklet)’.

**Index of the following pages**

- 2023 SD Legislature House Bill 1060 – An Act to modify provisions related to procurement for the state and other purchasing agencies.
- Bid Booklet July 2020 Version (update incorporating HB 1060 coming soon!)



2023 South Dakota Legislature  
**House Bill 1060**  
**ENROLLED**

AN ACT

**ENTITLED An Act to modify provisions related to procurement for the state and other purchasing agencies.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

**Section 1. That § 5-18A-1 be AMENDED:**

**5-18A-1.** Terms used in this chapter and chapters 5-18B, 5-18C, and 5-18D mean:

- (1) "Acceptance," the formal resolution of a purchasing agency authorizing the execution of a design-build contract;
- (2) "Biobased," any materials composed wholly or in a significant part of biological products including renewable agricultural materials or forestry materials;
- (3) "Contract," any type of agreement, regardless of what the agreement may be called, for the procurement of supplies, services, or construction;
- (4) "Construction," and "constructed," in addition to their ordinary meaning, repair, demolition, and alteration;
- (5) "Construction management," any project delivery system based on an agreement whereby a construction manager provides leadership to the construction process through a series of services to the purchasing agency;
- (6) "Construction manager," any person or entity that provides construction management services for a purchasing agency, and is either a construction manager-agent or construction manager-at-risk;
- (7) "Construction manager-agent," any construction manager that provides construction management services to a purchasing agency in a fiduciary capacity;
- (8) "Construction manager-at-risk," any construction manager that assumes the risk for construction, rehabilitation, alteration, or repair of a public improvement and that provides construction management services to the purchasing agency;
- (9) "Design-build contract," any contract between a purchasing agency and a design-builder to furnish the architecture, engineering, and related services as required,

and the labor, materials, and other construction services for a public improvement. A design-build contract may be conditioned upon future refinements in scope and price, and may permit the purchasing agency to make changes in the scope of the project without invalidating the design-build contract;

- (10) "Design-build proposal," an offer to enter into a design-build contract;
- (11) "Design-build request for proposals," any document or publication whereby a purchasing agency solicits proposals for a design-build contract;
- (12) "Design-builder," any person that proposes to design and construct a public improvement covered by the procedures of this chapter and chapters 5-18B, 5-18C, and 5-18D;
- (13) "Environmentally preferable product," any cleaning or maintenance product having properties that minimize potential impacts to human health and the environment, any product designed to conserve energy and water, any biobased product, and any product containing recycled materials or recovered materials;
- (14) "Internet," the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork called the world wide web;
- (15) "Invitation for bids," any document, whether attached or incorporated by reference, used for soliciting bids;
- (16) "Officer," any elected official or administrative officer appointed to that position by the governing body;
- (17) "Performance criteria," requirements for the public improvement, including as appropriate, capacity, durability, production standards, ingress and egress requirements, building code requirements, or other criteria for the intended use of the public improvement, expressed in performance-oriented specifications or drawings suitable to allow the design-builder to make a proposal;
- (18) "Performance criteria developer," any person and the person's subcontractors retained by the purchasing agency to develop performance criteria;
- (19) "Professional services," services arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual;
- (20) "Proposal," any offer to enter into contract in response to a request for proposals;
- (21) "Purchasing agency," any governmental body or officer authorized by law, administrative rule, or delegated authority, to enter into contracts;

- (22) "Public improvement," the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any utility infrastructure, structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency, and includes any local improvement for which a special assessment is to be levied;
- (23) "Qualified agency," any public or private nonprofit corporation geographically located in the State of South Dakota that provides services for persons with disabilities and is certified by the Department of Human Services;
- (24) "Request for proposals," any document, whether attached or incorporated by reference, utilized by a purchasing agency when soliciting proposals for contracts for the procurement of supplies, services, or construction;
- (25) "Request for qualifications," the document or publication whereby a purchasing agency solicits interested design-builders to pre-qualify for a design-build contract;
- (26) "Resident," any person, partnership, association, limited liability company, foreign limited liability company, corporation, or foreign corporation licensed to do business within this state that has maintained a substantial and bona fide place of business within this state that has conducted business from within this state for at least one year prior to the date on which a contract was awarded. The members of the partnership or association shall have been bona fide residents of the state for one year or more immediately prior to bidding upon the contract. A foreign corporation licensed pursuant to §§ 47-1A-1501 to 47-1A-1532, inclusive, is not a resident as defined by this section if the state or country in which it is organized enforces or has a preference for resident bidders;
- (26A) "Reverse auction," a purchasing process in which bidders submit bids in competing to sell supplies or nonprofessional services in an open environment via the internet;
- (27) "Sealed bid or proposal," a response to an invitation for bids or request for proposals submitted in a manner where the contents of the bid or proposal cannot be opened or viewed before the date and time of the formal opening without leaving evidence that the bid or proposal has been opened or viewed;
- (28) "Services," furnishing of labor, time, or effort by a contractor not involving the delivery of a specific end product other than reports which are merely incidental to the required performance;
- (29) "Supplies," any property, including equipment, materials, and printing;

- (30) "Surety," a bond or undertaking executed by a surety company authorized to do business in the State of South Dakota and countersigned by an agent of the company resident in the State of South Dakota. However, nothing in this subdivision requires countersignature of a bid bond.

**Section 2. That § 5-18A-11 be AMENDED:**

**5-18A-11.** Unless otherwise specified by statute, purchases of supplies and services under fifty thousand dollars must be made as follows:

- (1) Notwithstanding other provisions of chapter 5-18A or 5-18D, the Bureau of Administration may authorize state agencies and institutions to make purchases of supplies over four thousand dollars and under fifty thousand dollars by obtaining three quotes from different vendors. If three quotes cannot be obtained, the Bureau of Administration may approve the purchase if in the best interest of the state, require additional quotes to be obtained, or require the purchase be advertised for bids;
- (2) State purchases of supplies under four thousand dollars may be made in accordance with procedures established by the purchasing agency in the best interests of the state;
- (3) State purchases of services under fifty thousand dollars may be made in accordance with procedures established by the purchasing agency in the best interests of the state; and
- (4) For all other purchasing agencies, purchases under fifty thousand dollars may be made in accordance with procedures established by the purchasing agency.

No purchases may be artificially divided to constitute a small purchase under this section.

**Section 3. That § 5-18A-14 be AMENDED:**

**5-18A-14.** If the purchasing agency intends to enter into a contract for any public improvement that involves the expenditure of one hundred thousand dollars or more, or a contract for the purchase of supplies or services, other than professional services, that involves the expenditure of fifty thousand dollars or more, the purchasing agency shall advertise for bids or proposals. The advertisement shall appear as a legal notice in the appointed legal newspaper. The advertisement shall be printed at least twice, with the first publication at least ten days before opening of bids or the deadline for the submission of proposals. The first publication shall be in each official newspaper of the purchasing

agency, and the second publication may be in any legal newspaper of the state chosen by the purchasing agency. If the purchasing agency has no official newspaper, the first publication shall be made in a legal newspaper with general circulation in the jurisdiction of the purchasing agency to be selected by the purchasing agency. The advertisement shall state the time and place where the bids will be opened or the deadline for the submission of proposals. In each notice, the purchasing agency shall reserve the right to reject any or all bids or proposals.

**Section 4. That § 5-18A-22 be AMENDED:**

**5-18A-22.** The provisions of this chapter and chapters 5-18B, 5-18C, and 5-18D do not apply to:

- (1) Any highway construction contract entered into by the Department of Transportation;
- (2) Any contract for the purchase of supplies from the United States or its agencies or any contract issued by the General Services Administration;
- (3) Any purchase of supplies or services, other than professional services, by purchasing agencies from any active contract that has been awarded by any government entity by competitive sealed bids or competitive sealed proposals or from any contract that was competitively solicited and awarded within the previous twelve months;
- (4) Any equipment repair contract;
- (5) Any procurement of electric power, water, or natural gas; chemical and biological products; laboratory apparatus and appliances; published books, maps, periodicals and technical pamphlets; works of art for museum and public display; medical supplies; communications technologies, computer hardware and software, peripheral equipment, and related connectivity; tableware or perishable foods;
- (6) Any supplies, services, and professional services required for externally funded research projects at institutions under the control of the Board of Regents;
- (7) Any property or liability insurance or performance bonds, except that the actual procurement of any insurance or performance bonds by any department of the state government, state institution, and state agency shall be made under the supervision of the Bureau of Administration;
- (8) Any supplies needed by the Department of Human Services or the Department of Social Services or prison industries for the manufacturing of products;

- (9) Any printing involving student activities, conducted by student organizations and paid for out of student fees, at institutions under the control of the Board of Regents. However, nothing in this subdivision exempts, from the requirements of this chapter and chapters 5-18B, 5-18C, and 5-18D, purchases that involve printing for other activities at institutions under the control of the Board of Regents;
- (10) Any purchase of surplus property from another purchasing agency;
- (11) Any animals purchased;
- (12) Any purchase by a school district of perishable food, raw materials used in construction or manufacture of products for resale, or for transportation of students;
- (13) Any authority authorized by chapters 1-16A, 1-16B, 1-16G, 1-16H, 1-16J, 5-12, or 11-11;
- (14) Any seeds, fertilizers, herbicides, pesticides, feeds, and supplies used in the operation of farms by institutions under the control of the Board of Regents;
- (15) Any purchase of supplies for any utility owned or operated by a municipality if the purchase does not exceed the limits established in § 5-18A-14;
- (16) For political subdivisions, any contract for asbestos removal in emergency response actions and any contract for services provided by individuals or firms for consultants, audits, legal services, ambulance services, architectural services and engineering, insurance, real estate services, or auction services;
- (17) Any purchase of supplies or services from a contract established through a Midwestern Higher Education Compact group purchasing program by a competitive sealed bid or a competitive sealed proposal; or
- (18) Any contract concerning the custody, management, purchase, sale, and exchange of fund investments and research by the State Investment Council or Division of Investment.



An Act to modify provisions related to procurement for the state and other purchasing agencies.

\_\_\_\_\_  
I certify that the attached Act originated in  
the:  
House as Bill No. 1060

\_\_\_\_\_  
Received at this Executive Office  
this \_\_\_\_ day of \_\_\_\_\_,  
2023 at \_\_\_\_\_ M.

\_\_\_\_\_  
Chief Clerk

By \_\_\_\_\_  
for the Governor

\_\_\_\_\_  
Speaker of the House

The attached Act is hereby  
approved this \_\_\_\_ day of  
\_\_\_\_\_, A.D., 2023

Attest:

\_\_\_\_\_  
Chief Clerk

\_\_\_\_\_  
Governor

**STATE OF SOUTH DAKOTA,**

ss.

Office of the Secretary of State

\_\_\_\_\_  
President of the Senate

Attest:

Filed \_\_\_\_\_, 2023  
at \_\_\_\_\_ o'clock \_\_ M.

\_\_\_\_\_  
Secretary of the Senate

\_\_\_\_\_  
Secretary of State

House Bill No. 1060  
File No. \_\_\_\_\_  
Chapter No. \_\_\_\_\_

By \_\_\_\_\_  
Asst. Secretary of State

**SOUTH DAKOTA  
LOCAL GOVERNMENT GUIDE**

**FOR**

**ACQUISITIONS, DISPOSALS AND EXCHANGES**

**(Bid Booklet)**



Prepared by  
Department of Legislative Audit  
July 2020

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## Introduction

This guide has been prepared for the use of local government officials. Its use is primarily for a ready reference and guideline for bid procedures and requirements. It is not intended to be, nor should it be considered legal advice. Specific questions or unusual matters should be directed to the appropriate legal officials for resolution.

Users of this guide should be cognizant of bid law updates and recent interpretations. Even though this guide will be periodically updated, changes are ongoing and need to be addressed in relation to each transaction conducted.

## Definitions

**Professional Services** - services arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual;

**Purchasing Agency** - any governmental body or officer authorized by law, administrative rule, or delegated authority, to enter into contracts;

**Public Improvement** - the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency, and includes any local improvement for which a special assessment is to be levied; (as per the \$100,000 bid limit)

**Qualified Agency** - any public or private nonprofit corporation geographically located in the State of South Dakota that provides services for persons with disabilities and is certified by the Department of Human Services;

**Sealed Bid or Proposal** - a response to an invitation for bids or request for proposals submitted in a manner where the contents of the bid or proposal cannot be opened or viewed before the date and time of the formal opening without leaving evidence that the bid or proposal has been opened or viewed;

**Services** - furnishing of labor, time, or effort by a contractor not involving the delivery of a specific end product other than reports which are merely incidental to the required performance;

**Supplies** - any property, including equipment, materials, and printing;

**Surety** - a bond or undertaking executed by a surety company authorized to do business in the State of South Dakota and countersigned by an agent of the company resident in the State of South Dakota. However, nothing in this subdivision requires countersignature of a bid bond. (SDCL 5-18A-1)

## Interest of Local Officials in Contracts

Elected or appointed officers of local governments are generally barred from being interested in any contract with their respective entities. There are certain conditions which allow public officers to be interested in contracts with their own respective entities without fraud or deceit. In view of the numerous prohibitions, conditions and requirements, **local officials should solicit advice of their respective legal officials** before any such contracts are contemplated. Listed below are a few of the statutes that apply to related parties or conflict of interest. The list is not intended, nor should it be considered a list ALL applicable statutes and is provided for general reference purposes only.

- Chapter 3-23 Conflicts of Interest
- Chapter 3-16 Malfeasance, Misfeasance and Nonfeasance in Office
- Chapter 6-1 Acts and Records of Local Officers
- Chapter 8-9 Township Contracts and Purchases
- Chapter 9-14 Municipal Officers and Employees
- Chapter 13-20 School District Purchases and Contracts
- South Dakota Constitution, Article VIII, Section 17 (*School Districts*)

## When Bidding is Required

There are currently two bid limits to consider when purchasing agencies enter into purchase contracts. If the purchasing agency intends to enter into a contract for any public improvement that involves the expenditure of one hundred thousand dollars or more, or a contract for the purchase of supplies or services, other than professional services, that involves the expenditure of twenty-five thousand dollars or more, the purchasing agency shall advertise for bids or proposals. (SDCL 5-18A-14)

Bidding is also required when the local entity anticipates expenditures in the following conditions, purposes or circumstances:

- a. Although no single expenditure for an item will exceed the amount requiring bidding, if the total amount purchased during a year (generally a fiscal year) will exceed the bid limit, then advertisement for competitive bids is required. (*Fonder v. City of South Sioux Falls* (1955) 76 SD 31, 71 NW 2d 618, 53 ALR 2d 493) (*State ex rel. Small v. Hughes County Comm.* (1965) 81 SD 238, 133 NW 2d 228) (AGR 1963-64, p. 333)
- b. Contracts for the collection and hauling of garbage and waste in excess of the bid limit are subject to the competitive bidding requirements. (*Northern Hills Sanitation, Inc. v. Board of Comm., City of Lead* (1978) 272 NW 2d 835) Garbage hauling and supply contracts may include a procedure for adjusting prices to meet changing market conditions not within the control of the vendor. (SDCL 5-18C-7)
- c. Even though only one bid is expected, advertisement for bids is still required. There is always a possibility an unknown bidder may be interested in the contract. (AGR 1967-68, p. 303)

- d. When the total acquisition price of an item will exceed the bid limit, and installment payments are made over a period of years, then advertisement for competitive bids is required. (AGR 1953-54, p. 271)
- e. The purchase of items that represent a homogeneous group means that items are "similar" or "of the same." For example, when the annual purchase of assorted tires can be estimated to exceed the bid limit, then competitive bidding is required.

On the other hand, if an entity purchased \$20,000 worth of tires and \$20,000 worth of oil from the same vendor during a fiscal year, and these were the only purchases of these types of items by the entity for the year, then these items would not need to be bid because they are not homogeneous. (AGR 83-18)

- f. When purchasing equipment, consideration should be given to the total value of the contract and not the net cash outlay after trade-in. For example, let's assume a political subdivision wishes to purchase a new vehicle. The actual cost of the new vehicle is \$55,000. However, the political subdivision receives a trade-in allowance of \$10,000 resulting in a cash expenditure of \$45,000. This would still require advertisement for bids as the total "contract cost" of \$55,000 exceeds the amount requiring bids. (SDCL 5-18A-14)
- g. Portions of a single construction project may be awarded to several different bidders, however, the value of the total project must be considered when comparing to the bid limit to determine if it must be bid.

Further, when comparing to the bid limit to determine if a project is biddable, the total project value may be reduced for any portion of the project that is exempt from bidding, such as items acquired from federal surplus property or for costs incurred by an entity's own employees and equipment. But the total project value may not be reduced by any portion of the project that was previously bid by yourself or other entities.

### **Quote vs. Bid**

The bid process is a formalized open and competitive procedure utilizing two notices in the legal newspaper to secure proposals. Quotes, on the other hand, are an informal process utilizing phone contact, faxes or other methods to secure proposals. Quotes are used in special purchasing situations such as emergencies or the purchase of fuel and for purchases that are under the bid limit.

### **Competitive Sealed Proposals**

A contract may be entered into by competitive sealed proposals if the purchasing agency determines in writing that the use of competitive sealed bids is either not practicable or not advantageous. (SDCL 5-18-6)

Per SDCL 5-18A-7 the procedures for issuing a contract through competitive sealed proposals are as follows:

- (1) The proposals shall be solicited through a request for proposals. The request for proposals shall state the relative importance of price and other factors, if any;
- (2) Public notice of the request for proposals shall be given pursuant to § 5-18A-14;
- (3) A proposal may be submitted either manually or electronically in a manner authorized by the purchasing agency;
- (4) Each proposal shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A register of proposals shall be prepared documenting the name and address of each offeror and identifying each offeror awarded a contract. The register shall be open for public inspection after contract award;
- (5) As provided in the request for proposals, a discussion may be conducted with any responsible offeror who submitted a proposal 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. Each offeror shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of a proposal. A revision may be permitted after a submission and prior to an award for the purpose of obtaining the best and final offer. In conducting any discussion, there may be no disclosure of any information derived from any proposal submitted by a competing offeror;
- (6) An award shall be made to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the purchasing agency taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The contract file shall contain the basis on which the award is made. Written notice of the award of a contract to the successful offeror shall be promptly given to each offeror. The purchasing agency may reject any and all proposals and readvertise for proposals if none of the proposals are satisfactory, or if the purchasing agency believes any agreement has been entered into by the offerors to prevent competition; and
- (7) This section does not apply to state professional service contracts issued pursuant to § 5-18A-37 and §§ 5-18D-17 to 5-18D-24, inclusive.

### **Sole Source Procurement**

A contract may be awarded for supplies or services without competition if the purchasing agency determines in writing that the supplies or services are of such a unique nature that the contractor selected is clearly and justifiably the only practicable source to provide the supplies or services. The determination that the contractor selected is justifiably the sole source shall be based on either the uniqueness of the supplies or services or the sole availability at the location required. In such cases, the purchasing agency shall conduct negotiations, including price, delivery, and quantity to obtain the most advantageous price and shall include the written verification of the sole source in the contract file. This section does not apply to construction services or construction equipment. (SDCL 5-18A-8)



## Emergency Purchases

A purchasing agency may make or authorize others to make an emergency procurement without advertising the procurement if rentals are not practicable and there exists a threat to public health, welfare, or safety or for other urgent and compelling reasons. Failure to abide by the bid provisions of this chapter and chapters 5-18B, 5-18C, and 5-18D in a timely manner is not an emergency. An emergency procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. (SDCL 5-18A-9)

## Exemptions from Bidding

The following type contracts are exempt from bidding:

- a. For political subdivisions, any purchase of equipment involving the expenditure of less than fifty thousand dollars. (SDCL 5-18A-22(19))
- b. Purchase of utility services such as electric power, lights, water or gas. (SDCL 5-18A-22 (5))
- c. Any contract for the purchase of supplies from the United States or its agencies or any contract issued by the General Services Administration. (SDCL 5-18A-22 (2))
- d. Equipment repair contracts. (SDCL 5-18A-22 (4))
- e. Purchases of surplus property from another South Dakota purchasing agency. (SDCL 5-18A-22 (10))
- f. Purchases by a local government from the lowest bidder of an item contained on the state price list. The state bid price list may be obtained on the internet at [www.state.sd.us/boa/](http://www.state.sd.us/boa/). Double click on "Procurement Management" and then click on "Contracts" to secure of list of state contracts. (SDCL 5-18C-8)

The local government may also purchase items from any vendor, if less than or equal to the state price list, but must be the exact same item. Specs used to establish the price of the item(s) to be purchased should be obtained from the State Bureau of Administration to ensure the item being purchased conforms with the item wanted. The specs should also be used to verify the appropriate item(s) has been received. Documentation of purchases utilizing state contracts is to be made in the entity's minutes and retained on file. (SDCL 5-18C-8)

- g. Any purchase of supplies or services, other than professional services, by purchasing agencies from any active contract that has been awarded by any government entity by competitive sealed bids or competitive sealed proposals or from any contract that was competitively solicited and awarded within the previous twelve months. (SDCL 5-18A-22 (3))

A purchase utilizing another entity's bid has to mirror a purchase from a contract that

was “awarded” by the original bidding entity. It is not enough that such contract was “bid” by the original entity, it must also have been “awarded”.

Contracts may be utilized from any government entity, including those that are out-of-state, however, care must be taken to ensure that payment is made to the original vendor and that the contract was awarded by competitive sealed bids or competitive sealed proposals as defined in SDCL 5-18A-1 (27), 5-18A-5 and 5-18A-7.

When entering into a purchase utilizing another entity’s competitive sealed bid contract, strong internal controls would suggest that documents such as the following should be obtained directly from the original bidding entity prior to the purchase:

- i. A copy of the specs;
- ii. A copy of the affidavit of publication;
- iii. A copy of the minutes containing the bid award;
- iv. A copy of the bid invitations.

With the preceding documents, a purchasing agency will be able to determine the actual specifications for the contracted item and that the contract was competitively bid and awarded to the lowest responsible bidder that meeting specifications.

A governing entity may not utilize the bid of another entity if the original bid specifications included a trade-in allowance because no two trade-ins are alike. (AGR 94-08)

If one entity accepts a bid net of trade-in allowances, another entity may not contract with the successful bidder by utilizing the "original bid amount" for a cash outright purchase. The trade-in portion of the original contract is a material specification. (AGR 94-08)

When purchasing off of the bid of another entity, the variance between items purchased by way of an original and then a subsequent bid may not be "material" and that the new item must be in "substantial compliance" with the specifications set out in the original bid letting. (AGR 94-08)

- h. Any purchase by a school district of perishable food, raw materials used in construction or manufacture of products for resale, or for transportation of students. (SDCL 5-18A-22 (12))

No contract for the transportation of students may exceed five years. (SDCL 5-18C-1)

Although state law exempts school districts from having to bid perishable foods, federal law (7CFR 3016.36 (d)), which must also be complied with when utilizing funds that come from the National School Lunch Program’s school food service account, does not contain such an exemption. Federal regulations establish a tiered process whereby purchases of \$150,000 or less require that quotations be obtained from an adequate number of qualified sources. (a.k.a. simplified acquisition threshold). Contracts of greater than \$150,000 would entail a process that is publicly advertised, and bids shall be solicited from an adequate number of known suppliers. This may be accomplished by utilizing either competitive sealed bids or competitive sealed proposals. Evidence outlining the steps performed and bids/quotes received should be gathered and retained.

- i. Any contract for asbestos removal in emergency response actions and any contract for services provided by individuals or firms for consultants, audits, legal services, ambulance services, architectural services and engineering, insurance, real estate services, or auction services. (SDCL 5-18A-22 (16))
- j. Chemical and biological products; laboratory apparatus and appliances; published books, maps, periodicals and technical pamphlets; works of art for museum and public display; medical supplies. (SDCL 5-18A-22 (5))
- k. Contracts for ambulance service. (AGR 84-42)
- l. Any amendment or change order to an existing contract for construction, reconstruction, or remodeling of a public improvement does not need to be bid if:
  - 1. The contract contains unit prices for the same type or class of work;
  - 2. The change or extra work is necessitated by circumstances related to soils, utilities, or unknown conditions directly affecting the performance of the work that were not reasonably foreseeable at the time the underlying contract was let and the change or extra work is necessary to the completion of the public improvement; or
  - 3. The sum of the proposed amendment or change order plus the sum of all other prior unbid amendments or change orders, exclusive of change orders issued under subdivisions (1) and (2) of this section, does not exceed the following:
    - a. For contracts not more than \$500,000, the greater of \$25,000 or 15% of the base contract;
    - b. For contracts exceeding \$500,000 but not more than \$2,500,000, the greater of \$75,000 or 10% of the base contract; and
    - c. For contracts exceeding \$2,500,000, the greater of \$250,000 or 5% of the base contract. (SDCL 5-18B-19)
- m. Purchases of material, supplies or equipment made at public sale or auction if the following conditions are met:
  - 1. If purchases are made at substantial savings.
  - 2. Competitive quotations are obtained from at least three suppliers of identical or similar material, supplies.
  - 3. Purchases are made at less than 80% of the average of the quotations received.
  - 4. A record of the names of the suppliers, quotations received and the procurement procedures used in purchasing shall be documented, indicated in the minutes and retained on file. (SDCL 5-18C-3)

- n. Purchases of real property having a particular use or benefit. Even though an entity may not have to legally bid a particular real estate transaction, it generally is prudent and advisable to obtain an appraisal and other supporting documentation to provide the necessary analysis of the purchase at hand. (AGR 1959-60, p. 142; AGR 1963-64, p. 146)
- o. Purchases of less than \$25,000. (SDCL 5-18A-14))
- p. If, after advertising for bids, no firm bids are received, the purchasing agency may negotiate a contract for the purchase of the supplies, services, or public improvement projects at the most advantageous price, if the specifications of the original bid are met. (SDCL 5-18A-5 (9))
- q. Any animals purchased. (SDCL 5-18A-22 (11))
- r. Guaranteed energy savings contracts. (SDCL 1-33B-9)
- s. Urban renewal projects as authorized by SDCL 11-8-36.
- t. Communications technologies, computer hardware and software, peripheral equipment, and related connectivity. (SDCL 5-18A-22 (5))
- u. Tableware and perishable foods are exempt from bidding. The purchase of prepared meals on the other hand would be a biddable contract. (SDCL 5-18A-22 (5)) (AGR 73-43)
- v. If a municipality requires a developer to install water, sanitary sewer, and storm sewer trunk lines or mains; sewer collection systems; or streets at the expense of the developer and the municipality requires the size of the trunk line or main, sewer collection systems, or streets to be larger than the developer's requirements, the price difference paid by the municipality and as determined by a licensed engineer's estimate is exempt from bidding.  
  
If a developer installs a regional storm sewer detention pond ahead of a municipality's schedule at the expense of the developer, the price of the pond construction paid by the municipality and based on certified quantities provided by a licensed engineer is exempt from bidding. (SDCL 5-18C-4)
- w. Any purchasing agency may enter into agreements with purchasing agents in this or any other state or the United States government under which any of the parties may agree to participate in, administer, sponsor, or conduct purchasing transactions under a joint agreement or contract for the purchase of supplies or contractual services. A purchasing agency may cooperate with purchasing agencies and other interested parties in any other state or the United States government to develop uniform purchasing specifications on a regional or national level to facilitate cooperative interstate purchasing transactions. (SDCL 5-18A-37)
- x. (Water User Districts) If all or a portion of the cost of the proposed works is to be met by grant of labor or a grant-in-aid from a federal or state agency, does not require the use of any state or federal funds in the proposed works, or under other contract with a federal or

state agency, and the rules of such agency provide that work may not be done by contract, the board of directors may proceed with the necessary construction or other work without first complying with any of the provisions of §§ 46A-9-52 to 46A-9-54, inclusive.

While the above types of contracts and/or purchases are exempt from the bidding process, it may be in the best interests of the entity to solicit bids or quotes before purchasing. This will ensure the entity the best possible price has been obtained.

### **Bid Specifications**

#### **Brand Names:**

Brand name or equal specifications shall seek to designate three, or as many different brands as are practicable, as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award. Unless the purchasing agency determines in writing that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required. If a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language 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. (SDCL 5-18A-19)

#### **Preferences:**

Except for canned meat food products that are not available from a domestic source, no purchasing agency may purchase any meat food products that are the products of any foreign country or that are imported from outside the boundaries of the United States. (SDCL 5-18A-23)

Any milk processor licensed pursuant to § 39-6-7, bidding any milk or milk product under a competitive bid contract, shall receive the bid contract if the processor's bid is equal to, or within five percent or less, of any other bidder who is not a licensed processor. (SDCL 5-18A-24)

In awarding a contract, if all things are equal, including the price and quality of the supplies or services, a purchasing agency shall give preference:

- (1) To a qualified agency if the other equal low bid or proposal was submitted by a business that was not a qualified agency;
- (2) To a resident business if the other equal low bid or proposal was submitted by a nonresident business;
- (3) To a resident manufacturer if the other equal low bid or proposal was submitted by a resident business that is not a manufacturer;
- (4) To a resident business whose principal place of business is located in the State of South Dakota, if the other equal low bid or proposal was submitted by a resident business whose principal place of business is not located in the State of South Dakota; or

- (5) To a nonresident business providing or utilizing supplies or services found in South Dakota, if the other equal low bid or proposal was submitted by a nonresident business not providing or utilizing supplies or services found in South Dakota.

In computing price, the cost of transportation, if any, including delivery, shall be considered. (SDCL 5-18A-25)

A resident bidder shall be allowed a preference on a contract against the bid of any bidder from any other state or foreign province that enforces or has a preference for resident bidders. The amount of the preference given to the resident bidder shall be equal to the preference in the other state or foreign province. (SDCL 5-18A-26)

The Bureau of Administration shall maintain a current list of all states that have a resident bidder preference law and the amount or percent of preference taken by each state. The bureau shall make the list available upon request to any purchasing agency. (SDCL 5-18A-27)

A purchasing agency may give preference to the purchase of supplies manufactured from recycled or biobased materials if the bids are within five percent of the lowest bid offering nonrecycled or nonbiobased materials. (SDCL 5-18A-30)

Except as stipulated in the preceding paragraphs, there is currently no provision to award a bid preference to a vendor just because the vendor is located within the city, county, school district or immediate trade area.

#### **Bid Bonds:**

If the invitation for bids is for the construction of a public improvement, each bid shall contain a certified check or a cashier's check, for five percent of the amount of the bid. Such check shall be certified or issued by either a state or a national bank and payable to the purchasing agency or to an officer of the purchasing agency letting the contract and inviting bids. In lieu of a check, a bid may contain a bid bond for ten percent of the amount of the bid. Such bond to be issued by a surety authorized to do business in this state payable to the purchasing agency, as a guaranty that the bidder will enter into a contract with the purchasing agency. (SDCL 5-18B-2, 13-20-7.1)

Although not specifically required, entities have implied authority to require bid (surety) bonds for purchases of supplies or services. (AGR 79-2, SDCL 13-20-7, 5-18A-35)

No offeror or bidder may be required to leave the bond or security posted for a longer period than that allowed by SDCL 5-18A-5 if the bid or proposal is not accepted. The bond or approved security of the successful offeror or bidder shall be returned upon the signing of the contract. (SDCL 5-18A-35)

Notwithstanding the provisions of § 5-18B-2, the requirement of a bid bond, certified or cashier's check, cash, or other security may be waived by the purchasing agency if the bid submitted does not exceed fifty thousand dollars. (SDCL 5-18B-3)

#### **Performance Bonds:**

Except for highway contracts as stipulated in SDCL 31-12-15, when any contract is entered into for the construction of a public improvement or the furnishing of any material or labor for the

improvement, the contractor must furnish a performance bond in an amount equal to the contract price. This bond guarantees the faithful performance and the payment for labor and materials by the contractor. (SDCL 5-21-1, 13-20-7.1, 5-18A-36)

If the contract includes total cost bidding, the attorney general has stated it would be prudent for an entity to require a performance bond for the cost of repairs and guaranteed repurchase cost. (AGR 86-01)

The requirement of a performance security may be waived by a public corporation if the bid submitted does not exceed the limit established pursuant to SDCL 5-18A-14 for a public improvement. (\$100,000) (SDCL 5-21-1.1)

The requirement of a performance security may be waived by a public corporation if the procurement meets the requirements established pursuant to § 5-18A-9 (emergency procurement). (SDCL 5-21-1.3)

**Architects:**

Based upon the square footage and type of building project undertaken, SDCL 36-18A-9 promulgates when the services of an architect are required.

No person, firm or corporation may act as architect or engineer and also as contractor or construction manager on any public improvement project when the amount expended will exceed \$100,000. (SDCL 5-18B-15) (See also design-build) (AGR 11-01)

**Design Build:**

A purchasing agency may enter into design-build contracts for public improvements if the conditions found in SDCL 5-18B-20 are met. (SDCL 5-18B-20 through 38)

**Construction Manager:**

Any purchasing agency may engage a construction manager-agent for a project. No construction manager-agent may contract directly with any contractor or supplier for the project. (SDCL 5-18B-39, 40, 41)

A purchasing agency may engage a construction manager-at-risk if it determines that it is in the public interest to utilize their services. The construction manager-at-risk shall directly contract with subcontractors and suppliers for the project. (SDCL 5-18B-39, 40, 42, 43, 44)(AGR 11-01)

**Advertisement for Competitive Sealed Bids**

Advertisement for competitive sealed bids must be published in the newspaper at least twice prior to opening of bids. The first publication shall appear as a legal notice in the entity's appointed legal newspaper; however the second publication can be in any other legal newspaper in the state. (SDCL 5-18A-14) (AGR 85-24)

The first publication must be made at least 10 days prior to the date for the opening of bids or the deadline for submission of proposals. (SDCL 5-18A-14)

The invitation for bids shall include a purchase description, all contractual terms and conditions applicable to the procurement. The invitation for bids for supplies shall include the length of

time, not to exceed forty-five days, between the bid opening and the award of the bid. (SDCL 5-18A-5)

The advertisement shall state the time and place where bids will be opened or the deadline for the submission of proposals. In each notice, the purchasing agency shall reserve the right to reject any and all bids or proposals. (SDCL 5-18A-14)

If the entity has no official newspaper, the legal notice for bids is to be published in a legal newspaper with a general circulation in the purchasing agency's area. (SDCL 5-18A-14)

Purchasing agencies may also participate in a centralized bid exchange established by the Bureau of Administration. Bid specifications are provided to the exchange by purchasing agencies. The bid exchange then makes these bid requirements available to the vendors participating in the exchange. (SDCL 5-18A-13)

### **Opening of Bids**

Each bid shall be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The amount of each bid, and such other relevant information as may be specified, together with the name of each bidder shall be recorded. Except as otherwise provided by law, the record and each bid shall be open to public inspection. (SDCL 5-18A-5 (4))

While most bids are opened at regular or special board meetings, they may be opened at a different time and place as specified in the bid advertisement. The entity, by authorization in the bid specs, may set an alternate date and time for the opening of bids. However, no authority exists to postpone the date on which bids must be received. Only those bids received by the original date are permitted to be opened. (AGR 85-24) (AGR 72-77)

Since statute only allows for "sealed" bids to be submitted, a vendor may not FAX a bid directly to the entity.

At a minimum, the winning bidder should be spread in the minutes by vendor, description and amount.

### **Tabling of Bids**

The contract for services or public improvement shall be awarded within thirty days and the contract for supplies shall be awarded within forty-five days of the bid opening by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. The purchasing agency may reject any and all bids and readvertise for bids if none of the bids are satisfactory, or if the purchasing agency believes an agreement has been entered into by the bidders to prevent competition. (SDCL 5-18A-5 (7), 7-25-9) (AGR 1959-60, p. 380; AGR 72-77)

If an invitation for a bid for airport improvements states that the requirement the bid be awarded within thirty days has been waived, the provisions of SDCL 5-18A-5(7) and SDCL 5-18B-9 do not apply. If the bid award time exceeds thirty days, any bid may be withdrawn by the bidder



without jeopardizing the bid bond. This section only applies to any improvement project that relies on federal funding from the federal aviation administration. (SDCL 5-18B-46)

### **Withdrawal and Modification of Bids**

Any bid may be withdrawn by letter, in person or by electronic communications. Any bid may be modified by mail, FAX or electronic notice provided such notice is received no later than the time set for the opening of bids. The electronic notice or FAX cannot reveal the bid price but only the addition or subtraction to the bid price. An electronic notice or FAX may not be withdrawn after the opening of the bid and all FAX and electronic notices must be confirmed in writing before the awarding of the contract. (SDCL 5-18A-5 (6))

The purchasing agency may waive technical irregularities in the bid or proposal of the low bidder or offeror which irregularities do not alter the price, quality, or quantity of the services, or items of tangible personal property bid or offered. Any decision to permit the correction or withdrawal of a bid, or to cancel an award or a contract based on a bid mistake, shall be supported by a written determination made by the purchasing agency, and included in the bid file. (SDCL 5-18A-5 (6))

No bid can be changed or altered verbally by telephone. (SDCL 5-18A-5 (6))

### **Lowest Responsible Bid**

If the low bidder is not responsible or the bid is not made in accordance with the requirements of this chapter and chapters 5-18B, 5-18C, and 5-18D or the low bid is withdrawn as authorized by this section, the bid of the next lowest responsible and responsive bidder may be accepted. (SDCL 5-18A-5 (7))

In the event total cost bidding is a part of the bidding procedure, the attorney general has stated that the time use of money has to be considered as a part of the bid. To consider the time use of money, an interest rate must be specified in the bid notice. This interest rate is then used to put each of the conditions of the contract (guaranteed repairs, maintenance and repurchase price) into a present value so that each of the bids may then be made comparable. (AGR 86-01)

If two or more competitive sealed bids submitted are identical in price and product quality, the bids are the low bid, and no resident bidder preference is applicable (see preferences section of this booklet), the purchasing agency may:

- (a) Award the bid by lottery to one of the identical low bidders; or
- (b) Reject all the bids and resolicit bids for the required supplies, services, or public improvement. (SDCL 5-18A-5 (10))

### **Rejection of Bids**

The purchasing agency has the right to reject any and all bids if they feel the bids are not satisfactory or if they believe an agreement has been entered into to prevent competition. (SDCL 5-18A-5 (7))

## **Awarding of Bids**

If the lowest responsive and responsible bid for a public improvement project exceeds the final estimated project cost a purchasing agency may negotiate with that low bidder for the construction of a public improvement at the most advantageous price. (SDCL 5-18B-5)

If other than the lowest bid is accepted, the board minutes should clearly document the reasons why the lowest bid was not accepted. (1955-56, p. 286)

A public body cannot reject the low bidder and accept another if the low bid is in conformance with the specifications, is in compliance with the statutory bid laws and the low bidder is responsible. (AGR 91-10)

When purchasing off of the bid of another entity, the second government entity may purchase an alternative model item from the low bidder as long as the item purchased from the lowest responsible bidder contains no material variance from the original specifications. (AGR 94-08)

A local government may not award a public highway or street contract to a contractor unless that contractor has been issued a highway contractor fuel tax license. (SDCL 10-47B-69)

Unconditional rebates may be considered when performing the calculations to determine the lowest responsible bidder.

No public corporation may award any contract for the construction of any public improvement unless the public corporation has verified with the Department of Revenue that the contractor has a contractor's excise tax license pursuant to chapter 10-46A or 10-46B. (SDCL 5-18B-17)

## **Negotiation of Contract When No Bids Are Received**

If, after advertising for bids, no firm bids are received, the purchasing agency may negotiate a contract for the purchase of the supplies, services, or public improvement projects at the most advantageous price, if the specifications of the original bid are met. (SDCL 5-18A-5 (9))

## **Progress Payments - Retainage**

Progress payments to contractors are allowed based upon estimations of work completed but any prepayment for work not yet done would constitute payment for goods or services not yet received and would therefore, be contrary to statute. An amount necessary to complete the improvement shall be retained from the final payment until the contract is executed in full and the public improvement completed to the satisfaction and acceptance of the purchasing agency. (SDCL 5-18B-11)

## **Fuel Purchases**

Fuel purchased by local government units. The bid requirements of this chapter and chapters 5-18A, 5-18B, and 5-18D do not apply to the purchase of fuel by units of local government. The governing board of a unit of local government may, instead of advertising for bids, negotiate a

contract for the purchase of fuel at the most advantageous price. The governing board shall contact and attempt to obtain competitive quotations from at least three suppliers. A record of the names of the suppliers, the quotations received and the procurement procedures used in purchasing shall be documented, noted in the minutes, and retained on file by the governing body. The contract may include a procedure for adjusting prices to meet changing market conditions not within the control of the vendor. (SDCL 5-18C-6)

Fuel is a material used to produce heat and power such as gas, diesel, fuel oil, coal, propane, natural gas, etc.

### **Written Contracts**

Each contract shall be in writing, shall have the printed name of the individual signing the contract, and shall be signed on behalf of the purchasing agency by the authorized officials. Failure to comply with the requirements for a printed name under this section does not void the terms or purpose of the contract. (SDCL 5-18A-21)

If a contract is based upon plans and specifications prepared by an architect or engineer, the contract's terms and conditions shall comply with the provisions provided in the "General Conditions of the Contract for Construction," Fourteenth Edition, by the American Institute of Architects in effect on January 1, 2010, the "ConsensusDOCS 200 Standard Agreement and General Conditions Between Owner and Contractor," by ConsensusDOCS LLC in effect January 1, 2010, or the "Standard General Conditions of the Construction Contract," 1990 Edition, by the Engineer's Joint Contract Documents Committee, in effect January 1, 2010, except when in conflict with the laws of this state. However, the purchasing agency may modify or delete, on a contract by contract basis, any portion of the "General Conditions of the Contract for Construction," "ConsensusDOCS 200 Standard Agreement and General Conditions Between Owner and Contractor," or the "Standard General Conditions of the Construction Contract." (SDCL 5-18B-10)

Counties, municipalities, townships and school districts may enter into multiple year contracts for the lease purchase of real or personal property. (SDCL 7-21-16.1, 9-21-18.1, 8-10-32 and 13-16-6)

A clause that is found in some contracts but has been ruled as being in noncompliance is an "exclusivity" clause. Usually found in multiple year contracts, this clause prevents an entity from leasing or purchasing any other "similar" equipment during the duration of the contract. (AGR 85-12)

### **Reverse Auctions**

Reverse Auction – a purchasing process in which bidders submit bids in competing to sell supplies or nonprofessional services in an open environment via the internet. (SDCL 5-18A-1)

A purchasing agency may conduct an online reverse auction for the procurement of supplies or nonprofessional services, if the purchasing agency determines in writing that a reverse auction is appropriate for the specific procurement. No reverse auction may be used to establish contracts for public improvements, professional services, or indefinite quantity supply purchases. (SDCL 5-18A-39)

Several key requirements of a reverse auction are: (SDCL 5-18A- 40)

- a. Bidders shall be pre-qualified to participate,
- b. Public notice shall be given pursuant SDCL 5-18A-14,
- c. Bidders shall directly enter their bids onto the internet,
- d. Only the bid amounts are listed on the internet, not the bidder's name,
- e. A purchasing agency may establish an extension activation period.
- f. After the reverse auction is completed, the award shall be made in accordance with SDCL 5-18A-5.

### **Additional Requirements of Municipalities**

The contract for doing street improvement construction not subject to special assessments and for furnishing materials for such projects under the direction of the park board must be let to the best and lowest bidder in the same manner as required of the city governing board. (SDCL 9-38-38)

Contracts for doing any construction or improvements incidental to the operation of a system of public recreation, playgrounds and children's parks must be let by the recreation board to the lowest and best bidder in the same manner required of the city governing board. (SDCL 9-38-100)

The provisions of SDCL 5-18A relating to advertisement for bids shall apply to contracts of municipal utility boards. (SDCL 9-39-20)

Contracts for the construction or repair of public buildings or for public works or improvements, and contracts for material used and equipment purchased or rented, and contracts for local improvements for which special assessments are to be levied, must be let to the lowest responsible bidder in accordance with SDCL 5-18A. (SDCL 9-42-5)

When an emergency exists from the complete failure of the water supply, the governing board is authorized to contract for the drilling of a new well or for such repairs, replacements and equipment as may be necessary. This may be done privately without advertising for bids upon adoption and approval of a resolution of necessity by unanimous vote of the governing board. (SDCL 9-47-3)

The governing board of the municipality may enter into agreements with a county or counties, with one or more other municipalities, with a regional recycling and waste management district created pursuant to chapter 34A-16, with Indian tribes, with private persons, corporations, trusts, or with any combination thereof, to provide or operate a solid waste collection or disposal system or disposal site for a solid waste management system for the municipality. Any such contract may not exceed thirty-five years in duration. (SDCL 34A-6-26)

Whenever a municipality is entering into a contract for the purchase of real property to be used as a parking lot, the property shall first be appraised. The purchase price may not be in excess of the appraised value and the contract term may not exceed 15 years. (SDCL 9-51-6,7)

### **Additional Requirements of School Districts**

When an emergency exists due to a casualty loss, natural disaster or sudden deterioration resulting in destruction to a vital piece of equipment which would require closing of school, or which will endanger the usefulness of remaining school property, the school board may take action without advertising for bids. However, the emergency may not be used to avoid bidding the replacement of an entire building. (SDCL 13-20-4)

A school board may purchase facilities, equipment and supplies from another school district without advertising for bids. (SDCL 13-20-5)

The purchase of copyrighted material need not be submitted for bids when only one company publishes the material to be purchased. (SDCL 13-20-6)

The school board has authority to lease equipment, teacherages, buildings or other real estate and personal property for a period not exceeding 30 years. However, the aggregate lease payments are subject to bid requirements. (SDCL 13-24-10)

Cooperative educational service units must comply with several school district legal requirements including bid procedures. (SDCL 13-5-33)

Food service management contracts must be bid but no contract for the services of a food service management company may exceed one year. An original contract for the services of a school food service management company may be renewed annually no more than four times consecutively following the original contract. Both bid and contract shall specify that the contract can be renewed, but the local school is not required to renew the contract. Specific provisions of the original contract may be renegotiated prior to renewal provided that guidelines for making changes are in the original contract. The school board shall record in its minutes any changes made during the term of a food service management contract or renewal. (SDCL 5-18C-2)

### **Additional Requirements of Townships**

Contractual payments from the Snow Removal Fund of a township are authorized without advertising for bids if the total cost in a winter's season will not exceed thirty-five hundred dollars. If the cost will be less than thirty-five hundred dollars, the township supervisors may make contracts with any person, firm, or corporation, including any county, for the removal of snow on its roads, or repair of such roads damaged from or caused by melting snow, either at an hourly or day rate. If it is anticipated that the cost in any one winter would exceed that sum, the snow removal or road repair shall be done by bids as provided by law. (SDCL 31-13-27)

### **Fair and Open Competition in Government Contracts**

SDCL 5-18A-43 to 5-18A-47, inclusive, are intended to provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services by this state and political subdivisions of this state as market participants by providing for fair and open competition in government contracts. (SDCL 5-18A-42). Review these sections for terms and conditions prohibited in construction contracts, conditions related to agreements with

labor organizations, exemptions for special circumstances, and construction with National Labor Relations Act.

### **Disposition of Surplus Property**

**Motion** - The governing board of a political subdivision may sell, trade, loan, destroy, or otherwise dispose of any land, structures, equipment, or other property which the governing board has, by appropriate motion, determined is no longer necessary, useful, or suitable for the purpose for which it was acquired. No motion is required to sell, trade, loan, destroy, or otherwise dispose of consumable supplies, printed text, zoo animals, or subscriptions. (SDCL 6-13-1)

Whenever the board of county commissioners deems it advisable or whenever a written petition shall be presented to the board of county commissioners by the governing board of any city, town, school district or township requesting the sale of any real property over which such petitioner has taxing power, the board of county commissioners shall direct such real property to be offered for sale in accordance with SDCL 6-13. (SDCL 7-31-16)

Municipalities – It shall require a two-thirds vote of all the aldermen to sell any city property (SDCL 9-8-10). The two-thirds vote of all the commissioners elected is required to sell any city real property (SDCL 9-9-17)

**Appraisal** - After determining surplus property the governing board shall appoint three real property owners of the entity to appraise the value of such property. The appraisal shall be filed with the fiscal officer of the entity. The governing board may employ a person or persons licensed by the state to do fee appraisals in lieu of appointing three real property owners. (SDCL 6-13-2)

Any improvements on land shall be appraised separately from the land. Equipment or supplies which are to be traded for other property, property which is to be destroyed, property which is to be transferred to another political subdivision, property being sold which was created as result of an educational program in a school and property which is to be sold at public auction need not be appraised. (SDCL 6-13-3)

Appraisals or appraisal information and negotiation records concerning the purchase or sale, by a public body, of any interest in real or personal property are records that are not subject to inspection and copying as promulgated in SDCL 1-27-1, 1.1, and 1.3.

No governing board member, any officer of a county, municipality, township or school district, who has been elected or appointed, or real property owner acting as an appraiser may purchase the surplus property except at public auction. (SDCL 6-13-7)

Any surplus property appraised at \$500.00 or less or any animal owned by a municipality for a zoo may be sold by the governing board at a private or public sale without notice. (SDCL 6-13-4)

**Notice** - The governing board shall give notice of the sale of all surplus property, appraised in excess of \$500.00, by publishing a notice of such sale at least 10 days prior to the sale. Advertisement of the sale must be published at least twice prior to opening of sealed bids. The

first publication has to be in the entity's official newspaper; however, the second publication can be in any other newspaper in the state. Such notice shall describe the property to be sold and the time when bids will be opened. Property to be transferred to another political subdivision need not be advertised. (SDCL 6-13-4)

**Sealed Bids** - Sealed bids received on the surplus property shall be filed with the fiscal officer of the political subdivision and shall be opened at a governing board meeting at the time specified in the notice required by § 6-13-4, or the governing board may designate an official of the political subdivision and a witness to open all bids before the meeting of the governing board as specified in the notice required by § 6-13-4. The governing board may reject any and all bids. However, if the governing board accepts a bid, it must be the bid of the highest bidder. If no bids are received, the governing board may have the surplus property reappraised pursuant to 6-13-2, or may, within twelve months thereafter, sell the property at private sale for not less than ninety percent of the appraised value without further publication or appraisal. (SDCL 6-13-5)

If the property to be sold was created as a result of an educational program in a school, the school board may accept the highest bid or it may reject all bids and may sell the property at private sale without further publication. (SDCL 6-13-5)

**Auction** - In lieu of sealed bids the governing board may sell surplus property at auction. Such governing board shall advertise such auction by publication in the official newspaper for at least once each week for two consecutive weeks with the first publication no less than 10 days prior to the sale. The first publication has to be in the entity's official newspaper; however, the second publication can be in any other newspaper in the state. (SDCL 6-13-6, 6-13-4)

If a governing body sells real property by public auction or through a real estate broker, the governing body shall give notice of the sale of the real property and the appraised value of the real property from the appraisal report on file with the fiscal offices of the governing body as required by § 6-13-4. (SDCL 6-13-5.2)

**Proceeds of Sale** - All revenue accruing from the sale of surplus property shall be paid into the treasury of such political subdivision and credited, at the discretion of the governing board, to the general fund, to the fund in which such property was inventoried, or to the Capital Outlay Fund of a School District. (SDCL 6-13-8)

Property conveyed to a political subdivision by a railroad may be sold to the lessee of the property or, if there is no lessee, to the owner of the property abutting the property to be sold for not less than its appraised value. (SDCL 6-13-5.1)

**Real Estate Brokers** - In lieu of receiving sealed bids as required by this chapter, a school district, municipality, or county may sell real property at public auction or by listing the property with one or more licensed real estate brokers. The governing body may accept any offer through a real estate broker for purchase of real property. If a governing body sells real property by public auction or through a real estate broker, the governing body shall give notice of the sale of the real property and the appraised value of the real property from the appraisal report on file with the fiscal offices of the governing body as required by § 6-13-4. (SDCL 6-13-5.2)

**Installment Contract** - The governing board may sell any real property with a purchase price in excess of \$250.00 under an installment contract. The property may not be sold for less than 90% of the appraised value. Before the governing board may sell any real property under an installment contract it shall attempt to sell such property by sealed bids or by auction sale. The governing board shall determine the terms and conditions of the installment contract including the number of installments, date of payment and rate of interest. The purchaser may, at his option, pay the balance or any number of installments on any interest payment date. (SDCL 6-13-9)

Immediately upon the acceptance of the bid on the sale of real property the purchaser shall deposit the amount of the cash payment with the fiscal officer. The fiscal officer shall provide the purchaser with a receipt for such payment and retain a copy in his office. (SDCL 6-13-10)

At the first meeting of the governing board after a sale of surplus real property has been made the fiscal officer shall report the sale to the governing board. The governing board may refuse to approve the sale if the purchase price offered is, in the judgment of the board, less than the true and full value of the real property. If the sale is not approved, the fiscal officer shall return the purchaser's deposit. The purchaser shall surrender the receipt for such deposit. (SDCL 6-13-11)

If the governing board approves a sale of surplus real property and the full amount of the purchase price has been paid in cash, the board shall direct that a deed conveying such property be delivered to the purchaser. The deed shall be executed in the name of the chairman of the governing board and attested by the fiscal officer. The deed shall vest in the grantee or grantees all of the right, title and interest of the political subdivision in and to such real property so sold and every part thereof. (SDCL 6-13-12)

If the governing board approves a sale of surplus real property and less than the full amount of the purchase price is paid in cash and the remainder is to be paid in annual installments, the purchaser or purchasers shall be given a contract for deed covering such real property. The contract for deed shall be executed in the name of the chairman of the governing board and attested by the fiscal officer. The contract for deed shall state the political subdivision agrees to convey all of the right, title and interest of the political subdivision in and to such real property so sold and every part thereof upon the full performance thereof by the purchaser. The contract for deed shall contain a recital of terms of the sale, the amount of cash paid at the sale, the amount of each of the annual installments, the date of payment of such annual installments, and the rate of interest thereon. The contract for deed shall require the purchaser to make the payments of principal and interest in the amounts and at the times provided by SDCL 6-13-9. The contract for deed shall require that all taxes assessed and levied upon the real property shall be paid in full each year during the term of the contract and before the taxes become delinquent. The contract for deed shall provide that in case of default in the payment of any annual installment or interest or taxes assessed and levied, the governing board, at its option, may declare the contract at an end and proceed immediately to foreclose the deed. The contract for deed shall provide that all payments made prior to such default shall be retained by the political subdivision as liquidated damages. (SDCL 6-13-13)

**Bicycles** - If any abandoned, lost, or confiscated bicycle is under the control or care of or has been placed in storage by any local government agency or law enforcement agency and if more than ninety days have passed since the bicycle first came in possession of the local government agency or law enforcement agency, the bicycle may be donated to a charitable organization,



veterans organization, or benevolent organization that is nonprofit and recognized as tax exempt for distribution to the public based on need in a manner to be determined by the charitable, veterans, or benevolent organization, (SDCL 43-41-11)

**Recyclables** - The governing body of any political subdivision, by ordinance or resolution, may establish policies, requirements, and procedures for the purchase, acquisition, sale or transfer of any solid waste, solid waste by-products, recyclable materials and scrap materials by any solid waste or recycling system or facility that is owned or operated by a political subdivision.

Such purchases, acquisitions, sales, and transfers, as noted in the preceding paragraph, are exempt from the requirements of chapters 5-18A and 6-13. If the governing body determines that it would be in the best interests of the political subdivision, the governing body may attempt to identify additional prospective buyers or sellers and may negotiate the conditions of such transactions with prospective buyers or sellers, including price, delivery, transport, quantity, and length of contract, to obtain the price or conditions most advantageous to the governing body. The governing body may authorize procedures for adjusting prices to meet changing market conditions not within the control of the purchaser or seller. (SDCL 34A-6-63.1)

**Donated Property** - Disposal of donated property held by a political subdivision that was required to be used for a specific purpose. (SDCL 43-25-18.1)

**Zoo Animals** - Any municipality or other political subdivision of the state that operates a zoo may enter into an agreement for the loaning of zoo animals with another political subdivision, nonprofit corporation, or other entity that operates a zoo accredited by the Association of Zoos and Aquariums or other appropriate institutions dealing with animal care, breeding, welfare, or wildlife education. The zoo that accepts the loaned zoo animals may be located inside or outside the State of South Dakota. The loan agreement shall be under terms and conditions agreed to by the parties to the agreement. Zoo animals loaned pursuant to this section are not deemed to be surplus property, and no motion is required to enter into an agreement for the loaning of zoo animals. (SDCL 6-13-16)

**Public Library Materials** - Any public library may discard over-duplicated, outdated, inappropriate, or worn library materials; provided, that such materials shall be marked clearly with the words: "Discarded, \_\_\_\_\_ Public Library" wherever the property label of such library appears. Such discarded materials may be given to other libraries or to nonprofit agencies, destroyed, offered for public sale, or traded to a vendor for future library material purchasing credits. (SDCL 14-2-49)

### **Exchanges of Property and Work**

All counties, municipalities, sanitary districts, improvement districts, townships and school districts of this state may exchange with each other and to transfer and convey from one to the other any land or property belonging to them and under their respective jurisdictions and to perform and exchange work between themselves. All transfers of property and work as authorized by this section shall be upon such terms and conditions as may be determined and agreed upon by the respective governing bodies thereof. (SDCL 6-5-1)

(Gratuitous transfers of real property) Any political subdivision may convey and transfer any real or personal property which is held or owned by it, the title to which has been obtained and

which is not held for public use or which is about to be abandoned for public purposes, to another political subdivision or nonprofit corporation for public, charitable, or humanitarian purposes and accommodation without offering the property for sale and without requiring the political subdivision or nonprofit corporation to pay for the property. (SDCL 6-5-2)

If the governing body deems it advisable and to the best interest of the public to convey any such property to another political subdivision or nonprofit corporation pursuant to SDCL 6-5-2, it shall by resolution direct that said property be so conveyed and transferred. Thereupon a deed of conveyance shall be made to the political subdivision or nonprofit corporation, which deed vests in the grantee all right, title and interest of the transferor in and to the real property so conveyed. (SDCL 6-5-3)

Notwithstanding any other provision of law to the contrary, but, in compliance with the provisions of the Constitution of the State of South Dakota, every county, municipality, school district, civil township or other entity authorized by law to levy taxes may lease or sell or give and convey any personal property, real property, or money of such entity or perform any work or render any services, to the state or any public corporation thereof, to be used by such grantee for an authorized public purpose. Such lease or sale or gift and conveyance, or the performance of such work to be authorized, shall be made or done on the terms and in the manner provided by resolutions of the governing body. However, no money may be transferred from any sinking or interest fund unless sufficient money is left therein to pay all interest which may accrue on and the principal of all outstanding bonds. (SDCL 6-5-5)

Any county, municipality, sanitary district, township or school district of this state may, by resolution, exchange any land belonging to them with a private owner. Before entering into a contract for the exchange of real property, the governing board shall cause the real property to be appraised by a board of three disinterested appraisers who are freeholders within the county, municipality, sanitary district, township or school district or by one or more persons licensed by the state to do fee appraisals. Any exchange shall be made upon such terms, conditions and in such manner as may be determined and agreed upon by the parties, following public notice and hearing. The notice of the proposed exchange and hearing shall be published once at least ten days before the hearing. The notice shall contain a description of the lands to be exchanged. (SDCL 6-5-4; 9-27-34.1)

Every municipality shall have authority by resolution to give to a nonprofit corporation, real and personal property owned by the municipality and used by it in the operation of a health care facility or medical clinic, provided such transfer of property shall be accepted by a majority vote of the directors of such nonprofit corporation and the property transferred, or the proceeds from the sale thereof, is to be used by the nonprofit corporation in the operation of a health care facility or medical clinic. (SDCL 34-9-11)

Every municipality shall have power to lease or sell on a negotiated basis and to convey any of its real property to a nonprofit local industrial development corporation as defined by § 9-27-37 located in the city to be used by such a corporation for an industrial development purpose as enumerated in § 9-54-1. Such lease or sale shall be authorized on the terms and in the manner provided by resolution of the governing body. (SDCL 9-27-36)

By unanimous vote of its members, a board of county commissioners may give, lease or convey, upon such terms and on such conditions as the board shall set forth, personal and real

property to corporations organized under chapter 47-22, if the property is to be used exclusively by such corporation for one or more of the purposes specified in § 47-22-4. (SDCL 7-29-26)

Every county shall have power to lease or sell on a negotiated basis and to convey any of its real property to a municipality or the state or another county, or to a nonprofit local industrial development corporation as defined by § 7-29-24 and located therein, to be used by such grantee for an authorized public purpose or industrial development purpose as enumerated in § 9-54-1. Such lease or sale shall be authorized on the terms and in the manner provided by resolution of the county commissioners. (SDCL 7-29-23)

By unanimous vote of its members, a board of county commissioners may give, upon such terms and conditions as may be agreed to, any of its lands suitable for parks or recreation areas to the State of South Dakota or to first and second class municipalities in the manner provided by chapter 9-38 or chapter 41-2 for use as state parks, recreation areas, or city parks. (SDCL 7-29-25)

Any political subdivision is authorized and empowered to exchange by and with approval of the federal government, or any agency thereof, any lands or other properties belonging to such political subdivision for any lands belonging to the United States of America, located within the county in which such political subdivision is located. Such exchanges, transfers and conveyances from one to the other shall be made upon such terms, conditions and such manner as may be determined and agreed upon by the parties to such exchanges. (SDCL 9-27-34)

**Assistance:**

DLA – For assistance in answering bid and surplus property questions you may call (605) 367-5810 or contact the Department of Legislative Audit by E-mail. (rod.fortin@state.sd.us)

SDCL – South Dakota Codified Laws which may be viewed on the state website by going to the state agency (Legislative Research Council) and clicking on “Codified Laws”.

AGR – Attorney General Reports which may be viewed on the state website by going to the state agency (Attorney General) and clicking on “Legal Resources” then “Official Opinions”.