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December 16, 2019

Report to the Mississippi Legislature

State Government Purchasing: A Review of Recent Statutory Changes



PEER: The Mississippi Legislature's Oversight Agency

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A joint committee, the PEER Committee is composed of seven members of the House of Representatives appointed by the Speaker and seven members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms, with one Senator and one Representative appointed from each of the U.S. Congressional Districts and three at-large members appointed from each house. Committee officers are elected by the membership, with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of four Representatives and four Senators voting in the affirmative.

Mississippi's constitution gives the Legislature broad power to conduct examinations and investigations. PEER is authorized by law to review any public entity, including contractors supported in whole or in part by public funds, and to address any issues that may require legislative action. PEER has statutory access to all state and local records and has subpoena power to compel testimony or the production of documents.

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The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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On December 16, 2019, the PEER Committee authorized release of the report titled *State Government Purchasing: A Review of Recent Statutory Changes*.

A handwritten signature in cursive script that reads "Becky Currie".

Representative Becky Currie, Chair

This report does not recommend increased funding or additional staff.

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State Government Purchasing: A Review of Recent Statutory Changes

CONCLUSION: Effective January 1, 2018, H.B. 1106 and H.B. 1109 altered the operation of public procurement within the state through changes that included the expansion of the Public Procurement Review Board's (PPRB) purview to include local governing authorities, the creation and incorporation of new procurement methods, such as electronic bidding and reverse auctions, as well as administrative changes that required recalculation of time requirements to complete the contracting process. These alterations have resulted in increased work demands of both the PPRB and DFA support staff in reviewing contract packet submissions, lessened the flexibility of PPRB to respond to specific public entity requests for contract review, and created a perception of duplication of oversight responsibilities by local governing authorities.

2017 Amendments to State Procurement Law

Background:

PPRB is the state level oversight and approval body responsible for monitoring purchases made by state agencies and governing authorities as defined in MISS. CODE ANN. § 31-7-1 (1972), and all personal and professional service contracts involving the expenditure of funds in excess of seventy-five thousand dollars (\$75,000).

MISS. CODE ANN. Section 5-3-72 (1972) statutorily requires PEER to evaluate on a biennial basis the procurement process used by all state agencies, including, but not limited to, the contract review, reporting, and record keeping requirements in MISS. CODE ANN Section 25-9-120 (1972) and the bid requirements in Section 31-7-13. Upon completion of its evaluation, the PEER Committee shall submit a report to the Legislature with its recommendations for improving the procurement process.

H.B. 1106:

- amended MISS. CODE ANN. § 31-7-13 (c) (v) (1972) to require agencies and governing authorities to provide, in cases in which a procurement would exceed \$50,000, a potential supplier with the ability to submit a competitive bid electronically; but
- makes exclusions for agencies or governing authorities based on technical capabilities and population size.

H.B. 1109:

- established procurement best practices for Request for Proposals (RFP) and Request for Qualifications (RFQ) use;
- abolished Personal Service Contract Review Board and transferred its authority and responsibilities for personal services to the PPRB; and,
- made reverse auctions the preferred method of procurement (excluding individual state institutions of higher learning) for commodities and certain other items or services designated in Section 31-7-13 (1972) when such procurements exceed \$50,000.

Prior to H.B. 1109, the Personal Service Contract Review Board was responsible for reviewing and approving personal service contracts in excess of \$75,000.

Effects of H.B. 1106 and H.B. 1109 on the State's Public Procurement Process:

- PPRB's purview expanded to include approximately 100 state agencies, 82 counties, 298 incorporated municipalities, and 140 school districts;
- PPRB must now review and approve all commodity and equipment procurements in excess of \$500,000, contracts making use of alternative procurement process other than reverse auctions, and personal service contracts in excess of \$75,000;
- purchasing entities must now adhere to a more formalized PPRB reporting and scheduling timeline; and,
- reverse auctions are the preferred procurement option for all public purchasing entities, but has been criticized as duplicative oversight and questionable benefit in particular applications.

The Attorney General opined on June 9, 2017 that "Purchasing Entity" includes all entities that are subject to Section 31-7-13. Effectively, this opinion places local governing authorities, i.e. board of supervisors, municipal boards, school districts, etc. under PPRB oversight.

Public Purchasing Entities Surveyed:

- In order to assess the impact of H.B. 1106 and H.B. 1109 on the state's procurement processes, PEER surveyed fifty-four purchasing entities across the state:
 - there was a general perception among public purchasing professionals that reverse auctions increased the time necessary to make a procurement, decreased the number of vendors willing to participate in public contract offerings, and did not produce noticeable price savings as compared to the previous competitive bid selection method; and,
 - a general perception that the new RFP and RFQ best practices standards had increased the time necessary to complete a procurement, decreased vendor participation in the RFP and RFQ process, and had no noticeable price savings effect compared to the previous RFP and RFQ guidelines.

Reverse Auction Overview:

In a traditional auction, interested buyers bid against one another to purchase an item, or items, until the one willing to pay the highest remains. However, reverse auctions are the opposite of traditional auctions. As described by the National Association of State Procurement Officials (NASPO) *Reverse Auctions: A Roadmap for Success*, reverse auctions are a procurement tool that allows for multiple vendors to compete in real time, in a fixed duration bidding event. During the reverse auction process, the buyer will receive decreasing offers from prospective sellers for a particular product. The auction ends at a predetermined time, and the at the conclusion of the reverse auction the item is purchased from the seller offering the lowest price.

Factors Needed for a Successful Reverse Auction:

Reverse auctions offer the buyer and seller of goods a chance for better pricing outcomes in a more competitive and transparent environment, while simultaneously lowering procurement costs and increasing procurement personnel efficiency. However, there are also some limitations to using reverse auctions if they are utilized inefficiently, such as increased time and resources to prepare the reverse auction and establish the starting bid or potentially limiting the number of vendors willing to participate in the bidding process. When conducting reverse auctions, public purchasing professionals should consider and incorporate ten factors into their reverse auction process, which include:

- market conditions;
- nature of the goods being sought;
- selecting a reverse auction model;
- preparing a request for qualification;
- developing auction rules;
- pre-qualification and invitations;
- education, communication and training;
- conducting the reverse auction;
- follow-up activities; and,
- maintaining buyer/supplier relationship.

Recommendations for Improving PPRB's Oversight Role:

- The Legislature should amend MISS. CODE ANN. Section 27-104-7 (1972) and relevant sections of MISS. CODE ANN Section 31-7-1 et seq. (1972) to clarify the authority of the Public Procurement Review Board (PPRB) to:
 - allow the Board to delegate to the DFA staff approval or reverse auction exemption requests under certain circumstances; and
 - provide the Board with authority to waive certain best practices found in MISS. CODE ANN. Section 31-7-401 through 31-7-423 (1972) when in the best interest of the state and when the Board has no concerns regarding competition, transparency, or fairness.
- The Legislature should amend relevant sections of MISS. CODE ANN. Section 25-53-1 et seq. (1972) and Section 31-7-1 et seq. (1972) to require the Department of Information Technology Services (DITS) to review reverse auction exemption requests from governing authorities when procurements are information technology-related.
- The Legislature should amend MISS. CODE ANN. Section 31-7-13 (1972) and MISS. CODE ANN. Section 27-104-7 (1972) to clarify that the PPRB has authority to adopt rules and regulations regarding the reverse auction requirement for state agencies and governing authorities.
- The Legislature should amend MISS. CODE ANN. Section 27-104-7 (1972) and MISS. CODE ANN. Section 25-53-5 (1972) to require the PPRB and the DITS to evaluate jointly on a biennial basis the procurement process utilized by all state agencies. In addition, the Legislature should repeal MISS. CODE ANN. 5-3-72 (1972) that currently requires the Joint Legislative PEER Committee to conduct such a biennial review.

DFA staff reviewed this report and elected not to submit a formal agency response.



State Government Purchasing: A Review of Recent Statutory Changes | December 2019
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Representative Becky Currie, Chair | James A. Barber, Executive Director

A copy of the full report is available at: www.peer.ms.gov

State Government Purchasing: A Review of Recent Statutory Changes

Introduction

Authority

MISS. CODE ANN. § 5-3-72 (1972) statutorily requires the Joint Committee on Performance Evaluation and Expenditure Review (PEER) to evaluate on a biennial basis the procurement process used by all state agencies, including, but not limited to, the contract review, reporting, and recordkeeping requirements in MISS. CODE ANN. § 25-9-120 and the bid requirements in Section 31-7-13. Upon completion of its evaluation, the PEER Committee shall submit a report to the Legislature with its recommendations for improving the procurement process.

The Committee acted in accordance with MISS. CODE ANN. § 5-3-57 (1972).

Scope and Purpose

In conducting this review, PEER sought to address the following:

- 2017 amendments to state law and implementation actions;
- effects of the 2017 amendments to procurement laws on the procurement environment; and,
- overview of reverse auctions and their use within Mississippi.

Method

In conducting this evaluation, PEER

- reviewed the following:
 - the Department of Finance and Administration’s *Mississippi Procurement Manual* as of January 1, 2018;
 - the Public Procurement Review Board: *Office of Personal Service Contract Review Rules and Regulations* (May 6, 2018), and,
 - applicable state laws.
- interviewed staff of appropriate state agencies;
- collected and reviewed information from the Department of Finance and Administration (DFA) and the Public Procurement Review Board (PPRB) pertaining to the implementation of H.B. 1106 and H.B. 1109;

- conducted a mail survey of 54 purchasing authorities across the state pertaining to the effects of H.B. 1106 and H.B. 1109; and,
- reviewed academic and professional publications pertaining to the use, administration, and best practices and procedures for the use of reverse auctions.

Previous PEER Committee Statutory Reviews

Following passage of S.B. 2400 and H.B. 825 in 2015, PEER published *State Government Purchasing: A Review of State Agencies' Implementation of Recent Statutory Changes and Other Selected Issues* (PEER Report #603). The report described the purchasing and procurement regulatory environment as of the beginning of the biennium for which the PEER Committee is required to produce such a study.

In 2017, the PEER Committee published its second biennial review, *State Government Purchasing: A Review of Recent Statutory Changes and a Case Study* (PEER Report #611). The report determined the impact of procurement statutory changes on emergency and sole-source procurements. The report also determined the extent to which purchasing officials had received purchasing training through the Mississippi Purchasing Certification Program. The report also identified changes to the state's procurement laws and included a case study regarding various Mississippi Department of Education procurements for personal services and information technology services.

2017 Amendments to State Law and Implementation Actions

During its 2017 Regular Session, the Legislature enacted H.B. 1106 and H.B. 1109, which were designed primarily to establish best practices for state procurements, streamline oversight of procurements, and potentially generate cost-savings by making reverse auctions the default method for certain procurements (e.g., commodities) and incorporate the responsibilities of the Personal Service Contract Review Board (PSCRB) into a reconstituted Public Procurement Review Board (PPRB).

This chapter addresses the following:

- What changes did H.B. 1106 make to state purchasing laws?
- What changes did H.B. 1109 make to state purchasing laws and regulations?

What Changes Did H.B. 1106 Make to State Purchasing Laws?

H.B. 1106 amended MISS. CODE ANN. § 31-7-13 (1972) by requiring agencies and governing authorities to make electronic bid submissions an option for competitive procurements.

H.B. 1106's primary amendment to state procurement law required agencies and governing authorities to make electronic bid submissions an option for competitive procurements.

Electronic Bid Submission

H.B. 1106 amended MISS. CODE ANN. § 31-7-13 (c) (v) (1972) to require agencies and governing authorities to provide, in cases in which a procurement would exceed \$50,000, a potential supplier with the ability to submit a competitive bid electronically. Specifically, the amended Section states the following:

Agencies and governing authorities shall provide a secure electronic interactive system for the submittal of bids requiring competitive bidding that shall be an additional bidding option for those bidders who choose to submit their bids electronically...The provisions of this subparagraph (v) shall not require any bidder to submit bids electronically.

However, MISS. CODE ANN. § 31-7-13 (c) (v) (1972) lists three instances in which an agency or governing authority may be exempt from providing the electronic bidding option, as follows:

- *Agencies or governing authorities that are currently without available high-speed Internet access shall be exempt from the requirement of this subparagraph (v) until such time that high speed Internet becomes available.*

- *Any county having a population of less than twenty thousand (20,000) shall be exempt from the provisions of this subparagraph (v).*
- *Any municipality having a population of less than ten thousand (10,000), shall be exempt from the provisions of this subparagraph (v).*

Currently, public purchasing entities have the following methods to provide an electronic bidding option for potential suppliers:

- State agencies must use the state’s Enterprise Resource Planning System module of the state’s accounting system— i.e., Mississippi’s Accountability System for Government Information and Collaboration (MAGIC)¹.
- Local governing authorities have the option of utilizing one of four electronic bidding services contractors selected by the Department of Information Technology Services (ITS) through a request for proposals process, but cannot use the MAGIC system. These companies include:
 - Central Auction House, d/b/a/ Central Bidding;
 - EASIBuy, LLC;
 - eSolutionsGroup Limited; and,
 - Quest Construction Data Network, LLC.

Entered into on December 18, 2017, these four contracts are in their initial two-year term, which expires on December 21, 2019. Fees to use these electronic bidding services are paid by vendors/suppliers choosing to use the service. There are no fees charged to the local governmental entity for using these services. The fees charged to vendors for each contracted company’s services vary in price² based on the type of action being billed. For EASIBuy, LLC, eSolutionsGroup Limited, and Quest Construction Data Network, LLC fees are charged on a per electronic bid submission basis, ranging from \$25 to \$50 per transaction. In contrast, Central Bidding charges no fee for submitting electronic bids, but rather charges a fee of \$49.99 for each download of bid documents from its website.

¹ MAGIC (Mississippi’s Accountability System for Government Information and Collaboration) is the state’s licensed version of a product used by business and government entities worldwide. The system is designed and/or customized to act as a purchasing portal and management system, that also serves as the state’s inventory tracking system. After the adoption of H.B. 1109, a reverse auction module was added to the system to allow public entities in the state to host reverse auctions through MAGIC.

² S.B. 2674 (2018 Regular Session) capped fees that can be charged to bidders at a price not to exceed \$50 for submitting an electronic bid.

What Changes Did H.B. 1109 Make to State Purchasing Laws and Regulation?

H.B. 1109 revised state policy on procurement, including abolishing the Personal Service Contract Review Board and transferring its duties, powers, and resources to the Public Procurement Review Board, effective January 1, 2018, and requiring reverse auctions to be the default procurement method for purchases exceeding \$50,000.

During the 2017 Regular Session, the Legislature enacted H.B. 1109 to accomplish the following:

- establish procurement best practices;
- abolish Personal Service Contract Review Board and transfer its authority and responsibilities for personal services to the Public Procurement Review Board;
- make reverse auctions the preferred method of procurement (excluding individual state institutions of higher learning) for commodities and certain other items or services designated in MISS. CODE ANN. § 31-7-13 (1972) when such procurements exceed \$50,000;
- restrict any agency emergency procurement with regard to the purchase of any commodities or repair contracts to a contract period not to exceed one year; and,
- require third-party vendors seeking a protective order for contract information to provide the reasons for the order to any entity or individual requesting these records in accordance with the Mississippi Rules of Civil Procedure. In addition to notice required by the Rules of Civil Procedure, a third party seeking a protective order from the chancery court must also post notice and the reasons for seeking the remedy on the state procurement portal at least seven days before filing a petition in chancery court.

Establish Procurement Best Practices

H.B. 1109 creates standards for procurements by solicitation of requests for proposals or requests for qualifications and provides that the standards shall apply to procurements of commodities, supplies, equipment, construction, technology, personal and professional services, any type of state agency employee benefits, and state agency supplemental insurance and cafeteria plans. Additionally, the bill specifies the following:

- the factors that must be considered when determining to use a request for proposals or requests for qualifications;
- the content to include in a request for proposals or request for qualifications;
- the requirements of pre-proposal conferences;
- the method to properly draft a request for proposals or request for qualifications;
- the evaluation factors to use when reviewing responses to proposals or requests for qualifications;

- the qualifications of the evaluation committee that will evaluate each submitted proposal or qualification;
- the guidelines for discussions once proposals or qualifications have been submitted; and,
- the content to be included in the best and final offer.

Abolish the Personal Service Contract Review Board and Transfer Its Authority and Responsibilities to the Public Procurement Review Board

H.B. 1109 amended MISS. CODE ANN. § 25-9-120 (1972) to abolish the Personal Service Contract Review Board and transfer all its personnel, property, equipment, inventories, and records to the reconstituted Public Procurement Review Board (PPRB), effective January 1, 2018. The transfer of personnel shall be commensurate with the number and classification of staff positions allocated to the Personal Service Contract Review Board as of June 30, 2017.

In addition to the Public Procurement Review Board's current statutory powers and responsibilities outlined under MISS. CODE ANN. § 27-104-7(2) (a-e) (1972), H.B. 1109 amends MISS. CODE ANN. § 27-104-7(2) (1972) to bestow upon it additional powers and responsibilities previously held by the PSCRB (e.g., approval of personal services contracts of more than \$75,000).

The bill also revised the composition of the Public Procurement Review Board from three members—the Executive Director of the Department of Finance and Administration, the head of the Office of Budget and Policy Development, and an employee of the Office of General Services who is familiar with the purchasing laws of this state (currently the Deputy Executive Director over the Bureau of Building)—to a five-member board, composed of three individuals appointed by the Governor and two individuals appointed by the Lieutenant Governor. The Executive Director of the Department of Finance and Administration remains on the Public Procurement Review Board as an ex-officio and nonvoting member.

Additionally, H.B. 1109 set the qualifications for members of the Public Procurement Review Board and precluded service by some individuals (e.g., an employee or owner of a company that receives contracts subject to the board's approval). See Exhibit 1, page 7, for a description of the consolidation of the previous Public Procurement Review Board (PPRB) and Personal Service Contract Review Board into the current PPRB.

Exhibit 1: Consolidation of Previous Public Procurement Review Board (PPRB) and Personal Service Contract Review Board (PSCRB) Into the Current PPRB

| Previous PPRB | Current PPRB |
|--|---|
| <ul style="list-style-type: none"> • Three-member Board consisting of Department of Finance and Administration (DFA) staff • Approved regulations governing the purchase or lease of commodities and equipment (except computer equipment) by state agencies • Reviewed and ruled on any state agency purchase that exceeded \$500,000 for commodities, goods, merchandise, furniture, equipment, automotive, or other personal property • Adopted regulations governing the approval of contracts let for the construction and maintenance of state building and other state facilities as well as related contract for architectural and engineering services • Adopted regulations governing any lease or rental agreement by any state agency or department • Adopted regulations, in its discretion, for minority set-asides • Heard protests of solicitations or awards of contracts • Approved agency construction contracts of \$5 million or more | <ul style="list-style-type: none"> • Five-member Board (three members appointed by the Governor and two members appointed by the Lieutenant Governor), with the DFA Executive Director serving as an ex-officio, non-voting member <p style="text-align: center;">General Responsibilities</p> <ul style="list-style-type: none"> • Approve all purchasing regulations governing the purchase or lease by any agency of commodities and equipment, except computer equipment • Adopt regulations governing the approval of contracts let for the construction and maintenance of state buildings and other facilities as well as related contracts for architectural and engineering services • Adopt regulations governing any lease or rental agreement by any state agency or department • Adopt, in its discretion, regulations to set aside at least five percent (5%) of anticipated annual expenditures for the purchase of commodities from minority businesses • Promulgate rules and regulations governing the solicitation and selection of contractual services personnel including personal and professional services contracts for any form of consulting, policy analysis, public relations, marketing, public affairs, legislative advocacy services or any other contract that the board deems appropriate for oversight • Review and rule on any state agency purchase that exceeded \$500,000 for commodities, goods, merchandise, furniture, equipment, automotive, or other personal property • Approve all personal and professional services contracts involving the expenditures of funds in excess of \$75,000 • Provide standards for the issuance of requests for proposals, the evaluation of proposals received, consideration of costs and quality of services proposed, contract negotiations, the administrative monitoring of contract performance by the agency, and successful steps in terminating a contract |
| PSCRB | |
| <ul style="list-style-type: none"> • Five-member Board (two members appointed by the Governor, two members appointed by the Lieutenant Governor, the State Personnel Director, and the DFA Executive Director) • Governed the procurement of personal and professional services contracts • Developed and maintains the <i>Personal Service Contract Review Board Rules and Regulations</i> and its regulations which govern personal and professional contracts in the state • Approved personal and professional contracts in excess of \$75,000 made by state agencies, except those services exempt by statute; and, • Maintained a pre-approved vendor list that includes providers of various personal and professional services for set prices with which state agencies may contract without bidding or prior approval from the board | |

SOURCE: PEER analysis of state law and procurement regulations.

Reverse Auction Mandate

In addition to requiring an electronic bidding option, H.B. 1106 also amended MISS. CODE ANN. § 31-7-13 (c) (2) (1972) to make reverse auctions the default method to be used by all agencies and governing authorities (excluding individual state institutions of higher learning) for procuring commodities and certain other items or services designated in Section 31-7-13 when such procurements exceed \$50,000. The requirement became effective on January 1, 2018. By default, reverse auctions will be the mandatory method for procurement of these products and services unless the Public Procurement Review board approves use of another method.

A reverse auction is a process in which buyers announce their need for a product or service and suppliers bid to fulfill that need. In this type of auction, the role of the buyer and supplier is reversed, with the primary objective to compete purchase prices downward. While buyers compete to obtain a product or service in an ordinary auction (also known as forward auction), sellers compete to obtain business in a reverse auction.

Similar to providing electronic bid submission software to the state's public purchasing professionals, purchasing entities are presented with two possible options for choosing software to host their reverse auctions. The first available reverse auction hosting software is possible through a reverse auction module housed in the state's MAGIC system. The MAGIC reverse auction module is required for state agencies, but is not an available option for local governing units. Alternately, local governing units may elect to utilize a reverse auction system that is "low tech" with no provider (i.e. in person bid submissions similar to a traditional auction process), a system selected through their own procurement process, or a system offered by one of the three third-party service providers awarded state contracts, which include:

- Central Auction House, d/b/a/ Central Bidding;
- EASIBuy, LLC; and,
- Unison Marketplace, Inc. (formerly known as FedBid, Inc.).

Awarded on April 11, 2018, these three contracts are still in their initial 2-year term outlined in the agreement, and are set to expire on April 23, 2020.

Fees to use the reverse auction services³ are paid for by the bidding vendor or supplier choosing to participate in the reverse auction. There are no fees charged to the local governmental entities using the services. Like the electronic bidding contract firms under state contract, reverse auction platform providers are split in how fees are charged to winning vendors. Central Bidding, in lieu of a charged percentage fee to the winning vendor, charges a \$49.99 fee per download of bid documents, with no fee for the final award

³ S.B. 2674 from the 2018 Regular Session allows winning bidders to be charged a fee not to exceed 4% of the winning bid amount.

price. In contrast, EASIBuy, LLC and Unison Marketplace, Inc. charge fees of 3% and 4% (not to exceed \$30,000) to each winning vendor based on total contract value of the awarded contract.

Effects of the 2017 Amendments to Procurement Laws on the Procurement Environment

This chapter addresses the following questions:

- How have H.B. 1106 and H.B. 1109 changed the state's public procurement process?
- What impact have the requirements of H.B. 1106 and H.B. 1109 had on public procurement professionals and public entities in the state?

How Have H.B. 1106 and H.B. 1109 Changed the State's Public Procurement Process?

Enactment of House Bill 1106 and House Bill 1109 resulted in significant changes to the state's public procurement process by broadening the purview of the Public Procurement Review Board and mandating reverse auctions as the required method of procurement.

For public purchasing personnel in the state, the passage of H.B. 1106 and H.B. 1109 required that their offices adopt and adapt to a new procurement format and processes. These changes included the expansion of the PPRB's purview to include local governing authorities, the creation and incorporation of new procurement methods, such as electronic bidding and reverse auctions, as well as administrative changes that required recalculation of time requirements to complete the contracting process.

Changes to the Public Procurement Review Board

H.B. 1106 and H.B. 1109 significantly changed the purview of the Public Procurement Review Board (PPRB).

Prior to the enactment of H.B. 1106 and H.B. 1109, the PPRB, in addition to adopting procurement rules and regulations, had purview over commodity and equipment purchases in excess of \$500,000 made by state agencies. The Personal Service Contract Review Board (PSCRB) had purview over personal service contracts with a value greater than \$75,000 entered into by state agencies. After the enactment of the bills, the PSCRB was abolished and the reconstituted PPRB, due to certain provisions included in the bills—primarily the reverse auction mandate—had purview over approximately 100 state agencies, 82 counties, 298 incorporated municipalities, and 140 school districts.

Regarding PPRB's purview, both H.B. 1106 and H.B. 1109 included the phrase "purchasing entity" with regard to reverse auctions. After passage of the bills, the DeSoto County Board of Supervisors inquired of the Attorney General regarding the effect of the bills on governing authorities. The county's board attorney questioned whether provisions of the bill applied to governing authorities, specifically whether the Legislature's intention was to establish

reverse auctions as the primary method of receiving bids for governing authorities.

On June 9, 2017, the Attorney General opined⁴ the following regarding the county's inquiry:

Historically, purchases made by governing authorities have not been subject to review and/or approval by the Public Procurement Review Board ("PPRB"). The language contained in the amendment to Section 31-7-13 (c)(i)(2) specifically provides that in the event that a "purchasing entity" determines that a reverse auction is not in the best interest of the state, such determination must be approved by the PPRB...Without question, the term "purchasing entity" is much broader than "state agency" or "governing authority." We believe that the use of the term "purchasing entity" applies to any entity that is subject to the provisions of Section 31-7-13 that is making a purchase. In our opinion, had the Legislature intended to limit the requirement of PPRB approval to only determinations made by state agencies, it would have done so by using the term "agency" and not "purchasing entity."...We are of the opinion that the amendment made by House Bills 1106 and 1109 to Section 31-7-13 (c)(i)(2) applies to governing authorities.

As a result of H.B. 1106 and H.B. 1109 local governing authorities now fall under PPRB's purview and must submit reverse auction exemption requests to PPRB for approval. Prior to the enactment of the bills, governing authorities—i.e., boards of supervisors, municipal boards, school districts—only had to receive the approval of their specific oversight body to make procurements in the manner in which they determined the most advantageous for their entity.

H.B. 1106 and H.B. 1109 increased the workload of Department of Finance and Administration (DFA) staff who support the work of the Public Procurement Review Board (PPRB).

As stated on page 10, the previous PPRB only had authority over commodity and equipment purchases made by the approximate 100 state agencies. Staff assigned to the DFA Office of Purchasing, Travel and Fleet Management evaluated procurement requests submitted by state agencies to determine their compliance with relevant rules and regulations and to determine whether the PPRB members needed to approve the procurement. Subsequent to the enactment of the bills, DFA staff had to process procurement requests on behalf of the 620 "purchasing entities" now under PPRB's purview. For the period April 2018 through July 2019, the PPRB considered 608 procurement requests for action (i.e. contract approvals, reverse auction exemptions, etc.), which required DFA

⁴ MS AG Op., Nowak (June 9, 2017).

staff to evaluate such requests and make recommendations to the PPRB for final action. With regard to the 82 Petitions for Relief from reverse auction requests considered by PPRB during this period, non-state agency purchasing entities—i.e., 31 governing authorities— submitted 60 requests, while eight state agencies only submitted 22 requests.

During the implementation phase for H.B. 1106 and H.B. 1109, DFA staff planned to recommend to the PPRB that the board delegate to DFA staff approval authority for reverse auction exemption requests and approval authority to the applicable board of the governing authority for any subsequent contract award. After consulting with the Attorney General's office, DFA staff concluded that the provisions of H.B. 1106 and H.B. 1109 would not allow delegation authority to DFA staff. The PPRB rules and regulations adopted by PPRB regarding exemption requests and contract approvals required that all such requests be submitted to and approved by the PPRB members, rather than DFA staff. Prior to the enactment of the bills, DFA staff handled state agency procurement requests administratively and submitted them to the PPRB only if they exceeded the \$500,000 threshold. The PPRB must now consider all commodity and equipment procurements in excess of \$500,000, any contracts utilizing alternative procurement processes other than reverse auctions, and personal service contracts in excess of \$75,000.

In addition to workload issues, the PPRB members and DFA staff have had to evaluate purchases for which they do not have the requisite expertise. For example, during its June 5, 2019, meeting, the PPRB considered a request from Mississippi State University (MSU) for the purchase of "Babel Street computer software including the 'Babel Box' blended network exploitation software." MSU planned to fund the purchase with 100% federal funds from the Department of Defense. Typically, information technology-related procurement requests are evaluated and approved by the Mississippi Department of Information Technology Services (ITS). However, MISS. CODE ANN. § 25-53-25 (1972) states that "acquisitions of computer equipment and services by institutions of higher learning or junior colleges wholly with federal funds and not with state general funds shall be exempt" from the purview of ITS, but not from the state's public purchases law, which makes such acquisitions subject to the PPRB. DFA staff stated to PEER that they frequently have to consult with ITS staff regarding certain information technology-related procurement requests, due to ITS staff having expertise in that arena. Such consultation requires additional staff time to evaluate the procurement and develop a recommendation for consideration by the PPRB.

The PPRB's monthly meeting schedule requires purchasing entities to adhere to strict deadlines when submitting procurement requests to the board.

While H.B. 1109, which re-constituted the PPRB, does not specify the frequency by which the board shall meet, the PPRB meets on a monthly basis. MISS. CODE ANN. § 27-104-7 (1) (1972), which established the previous PPRB, required the board to meet on a

monthly basis and at any other time when notified by the chairman—i.e., the DFA Executive Director.) Currently, purchasing entities that need procurement requests approved by the PPRB must submit their requests to DFA staff one month prior to a meeting date to have their request placed on the board's meeting agenda. The requirement is new to governing authorities that previously obtained the approval of their local governing boards without submitting such procurements to a state-level entity. The approval of the PPRB and adherence to the board's meeting schedule has increased the time necessary to procure commodities, equipment, and personal services by local purchasing entities, specifically when an alternative to reverse auction is required or utilized.

Reverse Auction Mandate

There is a perception of duplication and applicability regarding the reverse auction mandate for all procurements.

The PPRB's purview now encompasses "purchasing entities," which include counties, municipalities, and other types of local governing authorities, in addition to state agencies. Since the effective date of the reverse auction mandate, local officials have questioned whether PPRB's approval of procurements by a local unit of government is a duplication of the local official's procurement responsibilities and whether the reverse auction requirement should apply to procurements made with federal funds.

Prior to the enactment of H.B. 1106 and H.B. 1109, counties, municipalities, and other types of local governing authorities were not required to submit their procurements to any state-level body for approval. The local entities were only required to adhere to state procurement laws and rules and regulations when making such procurements. Adherence to such requirements were assessed during each entity's annual financial audit. With PPRB's new oversight regarding procurements by local entities, local officials question the need for state-level approval of local procurements. Local officials contend that the entities are using local funds, for local procurements that have been submitted to and approved by their local governing boards (i.e. county board of supervisors, board of aldermen, school board, and commission/authority boards) and question the duplication of requiring the PPRB to approve such procurements.

Local officials, primarily school district officials, also question the applicability of the reverse auction mandate for all procurements, specifically those procured with federal funds. An example of federal funds being used for procurements is the E-rate program used by school districts and others. The E-rate program is an effort to make telecommunication and information services more affordable for schools and libraries by providing discounts for telecommunication, Internet access, and internal connections to

eligible schools⁵ and libraries⁶ with funding derived from the Universal Service Fund⁷. The Federal Communication Commission (FCC) rules and regulations require that schools or libraries that wish to make use of the E-rate program discounts must use an open competitive process for the procurement of telecommunication equipment or services—i.e., the reverse auction method is not an approved procurement method when E-rate funds will be used.

Prior to the enactment of H.B. 1106 and H. B. 1109, school districts and libraries used a competitive sealed bid process to procure telecommunication equipment services with E-rate funds. Due to the reverse auction mandate being required for all procurements, school districts and libraries must now request from PPRB an exemption from the reverse auction mandate, which affects the workload of DFA staff as well as staff of the school districts and libraries. With the exception of institutions of higher learning being exempted from the reverse auction mandate, all other “purchasing entities” must comply with the mandate for all procurements.

What Impact Have the Requirements of H.B. 1106 and H.B. 1109 had on Public Procurement Professionals and Public Entities in the State?

Since enactment of H.B. 1106 and H.B. 1109, there is a general perception among officials of public purchasing entities surveyed by PEER that processing time associated with procurements and prices paid have increased, while vendor participation has tended to decrease.

In order to assess the impact of H.B. 1106 and H.B. 1109 on the state’s procurement processes, PEER surveyed fifty-four purchasing entities. All of the entities had submitted purchase requests to the PPRB at least once since PPRB became effective on January 1, 2018. This survey was not a review of the particular entities’ procurement processes, but rather an assessment of the entities’ procurement experiences since enactment of the bills.

Public purchasing entities responded that there was a general perception that the reverse auction process (and the competitive

⁵ Must meet the statutory definition of elementary and secondary schools found in the No Child Left Behind Act of 2001 (20 U.S.C. Section 7801(18) and (38) (a non-profit institutional day or residential school, including public charter schools, that provides elementary or secondary education, as determined by state law). Schools operating as for-profit businesses or that have endowments exceeding \$50 million are not eligible.

⁶ Must meet the statutory definition of library or library consortium found in the Library Services and Technology Act of 1996 (20 U.S.C. Section 9122) and must be eligible for assistance from a state library administrative agency under this Act. This includes a public library, public elementary or secondary school library (if funded separately from any school budget), a research library (if it provides public services and not an integral part of an institution of higher learning), and private libraries (if the state in which the private library is located determines it should be considered a library for purposes of this definition).

⁷ With its genesis in the Communications Act of 1934 and expanded in the Telecommunication Act of 1996, the Universal Service Fund sought to first deliver telephone service to remote rural areas and later to increase access to telecommunications and advanced services, such as high-speed Internet, to all consumers at just, reasonable, and affordable rates. This fund is paid for by contributions from providers of telecommunications based on an assessment of their interstate and inter-nation end-user revenues.

bidding process) increased the time necessary to make a procurement and decreased the number of vendors willing to provide items through a reverse auction process (33% of responding public entities reported decreases in vendor participation rates). The respondents believed that they did not see noticeable differences in prices resulting from a reverse auction versus a competitive bid method (70% of responding public entities reported seeing no price savings or an increase in prices).

In regard to new best practice alterations made to the RFP/RFQ process public purchasing entities responded that the new RFP/RFQ process largely mirrored their experience with the new reverse auction requirement, that there was a perception the new RFP/RFQ best practices increased the time necessary to make a procurement (63% of responding public entities reported time increases in the RFP/RFQ process) and decreased the number of vendors willing to participate in the RFP/RFQ process (33% of responding public entities reported decreases in vendor participation rates). The respondents believed that they did not see noticeable differences in prices resulting from the use of the new best practices for RFP's and RFQ's (90% of responding public entities reported seeing no price savings).

Overview of Reverse Auctions and Their Use Within Mississippi

This chapter addresses the following questions:

- What is a reverse auction and how does it work?
- What factors are necessary for a successful reverse auction?
- How does the state of Mississippi utilize reverse auctions?

What is a Reverse Auction and How Does it Work?

Reverse auctions are transactions in which a single buyer receives decreasing offers or bids from potential sellers for a single item or lot of items. These auctions have the potential to provide cost savings to public purchasing entities by having vendors compete against each other, in real time, for the final contract award.

In a traditional auction, interested buyers bid against one another to purchase an item, or items, until the one willing to pay the highest remains. However, reverse auctions are the opposite of traditional auctions. As described by the National Association of State Procurement Officials (NASPO) *Reverse Auctions: A Roadmap for Success*, reverse auctions are a procurement tool that allows for multiple vendors to compete in real time, in a fixed duration bidding event. During the reverse auction process, the buyer will receive decreasing offers from prospective sellers for a particular product. The auction ends at a predetermined time, and the at the conclusion of the reverse auction the item is purchased from the seller offering the lowest price.

Historical Use

Reverse auctions have been an available procurement tool since the late 1980's. Due to technology limitations and costly fees paid to third parties for administering the reverse auction process, this was not an efficient procurement option for governmental entities. However, technology advancements and transparency in the reverse auction procurement processes have made this a viable option for governmental entities to use in recent years.

As chronicled in the Journal of International Technology and Information Management's 2004 publication, *Online Reverse Auctions: An Overview*, reverse auctions were first developed and conducted in the late 1980's. Reverse auctions offered governments and businesses an opportunity to acquire goods at lower prices, with more competition, and in a more transparent fashion. These first reverse auctions, conducted by third party application service providers⁸, proved effective, but too costly for most governments or businesses to efficiently utilize. These costs resulted mainly from service fees charged by the application service providers as well as the cost of follow-on business⁹.

⁸ Third party application service providers are commercial service firms that deliver, manage, and remotely host software applications through centrally located servers in a rental or lease arrangement.

⁹ A business practice wherein a company will sell a product to a customer at a reduced rate, with little or no profit for the company, in order for that company to get their "foot in the door" and develop a business

Additionally, application service providers took the purchasing tool out of the buyer's control, and would dictate the terms of the auction and who could participate.

As technology advanced, especially with the prevalence of personal computers and software of the late 1990's, reverse auctions became a viable avenue for smaller businesses and governments to purchase items. This returned the purchasing tool back into the buyer's hands, by allowing the buyer to customize the reverse auction attributes of:

- transparency of information - availability of bidding information to the bidders during the course of the auction;
- termination criteria - when the auction is considered to be closed; and,
- decision criteria - to whom the contract should be awarded at the end of the process.

What Factors are Necessary for a Successful Reverse Auction?

While reverse auctions can offer a win-win scenario to both buyer and seller, such as better pricing outcomes in a more competitive and transparent environment, the process itself is still subject to several potential limitations if used inefficiently (e.g., increased time to plan and develop the procurement or decreased vendor participation). To ensure that the benefits of reverse auctions are maximized, procurement professionals have noted ten key factors that need to be considered by any organization to ensure a successful reverse auction.

As with any negotiation between two or more parties, certain advantages and disadvantages exist for each party during part or all of the negotiation process. Reverse auctions offer the buyer and seller of goods a chance for better pricing outcomes in a more competitive and transparent environment, while simultaneously lowering procurement costs and increasing procurement personnel efficiency. However, there are also some limitations to using reverse auctions if they are utilized inefficiently, such as increased time and resources to prepare the reverse auction and establish the starting bid or potentially limiting the number of vendors willing to participate in the bidding process. For a breakout of several advantages and disadvantages of utilizing the reverse auction process for buyers and sellers (see Appendix A, page 23.)

While outcomes will vary, commonalities exist within the process that allow for purchasing professionals and organizations to prepare and conduct a successful reverse auction. According to procurement professionals, there are ten key factors any organization or purchasing professional should consider to design and implement a successful reverse auction system. These ten key

relationship with a new customer. The rationale being that this new business relationship will allow the company to sell additional products to the customer at increased prices in the future.

factors are published in *Reverse Auctions: A Roadmap for Success*¹⁰ and *Online Reverse Auctions: An Overview*¹¹ and include:

- **Market conditions** – reverse auctions are more likely to succeed when supply exceeds demand, industry capacity is underutilized, and many suppliers are openly competing. Reverse auctions will work better when there are five or more qualified suppliers with similar supply capabilities;
- **Nature of goods** – reverse auctions are more suited for use with high-volume bulk items where small differences in price lead to savings on large quantity orders. Generic, catalog, non-critical, non-strategic, and commodity type items requiring short lead times and minimal support for follow-up services are those best suited for reverse auctions. Purchasing made-to-order or custom assemblies, strategic components, parts requiring special tooling, and materials where specifications are incomplete prove poor candidates for reverse auctions. The limitations of reverse auctions persist in professional service contracts that are open-ended or poorly defined and in instances where quoting a net price is difficult, such as with health care related professional services contracts;
- **Selecting a reverse auction model** – purchasing professionals and organizations must evaluate and determine if reverse auctions are a process that would best meet their needs as supplied from an outside provider or administered in-house. Factors such as familiarity with reverse auctions, qualified bidder lists, reverse auction parameters, and bid preparations services should be considered when determining which reverse auction model should be adopted;
- **Preparation of Request for Qualification** – public purchasing professionals must develop item specifications that have measurable features so that solid, precise descriptions are possible to make the requirements of sellers clear. Buyers should define all purchasing requirements, to include: design specifications, quantity, quality standards, delivery schedule, payment terms, location of use, lot size, and so forth;
- **Development of auction rules** – public purchasing professionals and organizations must develop and convey rules of order and conduct to be used during the reverse auction process. Components such as price setting and adjustment, auction period, overtime period,

¹⁰ National Association of State Procurement Officials, “Reverse Auctions: A Roadmap for Success,” news release August 14, 2019.

¹¹ Ching-Chung Kuo, Pamela Rogers, Richard e. White, “Online Reverse Auctions: An Overview” *Journal of International Information Management*, 13, no. 4 (2004).

anti-sniping¹² protections, clear supplier evaluation criteria, and the inclusion of business intangibles such as reliability, past performance, and familiarity into the evaluation criteria;

- ***Pre-qualification and invitations*** - only sources determined to be in the competitive range for both the type of purchase and the purchase price should be invited to participate in the reverse auction;
- ***Education, communication, and training*** - public purchasing professionals and organizations need to be educated in the reverse auction tool to enhance its resource saving potential and to increase buy-in by staff of the new procurement method. Bidders should be furnished with details about the reverse auction process, the software system that the organizations utilize, and the rules and procedures for how such an auction will be held. Practice runs involving all actors of the reverse auction are options for organizations who are new to the reverse auction format;
- ***Running the reverse auction*** - Prior to and during the auction, operators of the auction must monitor the process to ensure equitable and fair operations. Requiring pre-auction login and verification of vendors, providing alternative electronic access points for vendors in the event of technical failure during the auction, bidder identity protection, and monitoring inactivity by sellers or suspicious bidding activity by participants are issues that potential reverse auction users must plan to encounter;
- ***Follow-up activities*** - at the conclusion of a reverse auction, buyers must close all bidding interface software immediately. After identifying a contract award winner, vendors not selected should be provided the opportunity for a debriefing. At the conclusion of negotiations with the winning seller, public purchasing professionals within the organization should hold meetings to review the reverse auction process with the goal of refining the process and incorporating any lessons learned from the experience; and,
- ***Maintaining buyer/supplier relationship*** - while organizations that utilize reverse auctions can save time and money in the process, the process can also alienate suppliers by reducing the evaluation process to a simple comparison of price, excluding all non-business (non-price) factors. Sellers should provide adequate education, communication, and proper implementation of reverse auctions to alleviate these concerns of sellers.

¹² Sniping refers to the practice of a business flooding the reverse auction process with successive minimum decrement bids near the end of an auction window.

How Does the State of Mississippi Utilize Reverse Auctions?

Since January 1, 2018, reverse auctions have been the mandated primary method to receive competitive bids within the State of Mississippi. The reverse auction process is to be utilized for all public purchases that require competitive bids except for contracts for the design or construction of public facilities, including buildings, roads, and bridges, purchases made by individual institutions of higher learning, and for products under the purview of ITS.

Adopted with the passage of H.B. 1109 in the 2017 Regular Session, reverse auctions are now the primary method for receiving bids in the competitive sealed bidding process of the state. As noted earlier in this report on page 16, MISS. CODE ANN. § 31-7-13 (c) (1972), a reverse auction is an electronic auction where suppliers bid online against each other for contracts against a published specification, and are the primary method for procuring any good or service by a public entity within the state when the contract price is in excess of \$50,000.

Identified in MISS. CODE ANN. § 31-7-13 (1972), exemptions from the use of reverse auctions are limited to only contracts for the design or construction of public facilities, including buildings, roads, and bridges, as well as procurements made by individual institutions of higher learning, and procurements made for products under the purview of ITS. However, not every commodity is a good potential candidate for reverse auctions, and as such factors to determine their use are to be evaluated on a case by case basis. Located in Section 3.106.22 of the *Mississippi Procurement Manual*, factors to include in evaluating the ability of a commodity to be a good candidate for reverse auction include:

- commodities that are clearly defined by industry standards (e.g. off the shelf items);
- with many suppliers;
- where the supplier relationship is transactional; and,
- costs to switch among suppliers are negligible.

Reverse auctions are initiated in the state in much the same fashion as other competitive bid contracts. Following regulation in Section 3.106 of the *Mississippi Procurement Manual*, public entities first issue Invitations for Bids and Public Notice as required by law, modifying the Advertisement and Invitation for Bids to reflect that a reverse auction will be the determining selection process. As part of the Invitation for Bids, a packet of information must be included in this offer, detailing:

- the timing of the auction;
- the prequalification process;
- quotes;
- instructions on accessing the auction; and
- the award processes.

If a purchasing entity determines that a reverse auction is not in the best interest of the state, then that entity must petition the PPRB for a determination of the issue. In seeking a Petition for Relief from Reverse Auction, that purchasing entity must present to PPRB a detailed explanation of why a reverse auction would not be in the best interest of the state and present an alternative

process to award the contract. Should PPRB approve of the alternative procurement method, the purchasing entity is authorized to solicit bids with the allowed alternative method. At the conclusion of the alternative process, PPRB must approve the final form of the contract entered into in the alternative process.

Appendix B, page 25, outlines Mississippi's reverse auction and alternative procurement processes.

Recommendations

1. The Legislature should amend MISS. CODE ANN. § 27-104-7 (1972) and relevant sections of MISS. CODE ANN. § 31-7-1 et seq. (1972) to clarify the authority of the Public Procurement Review Board (PPRB) to:
 - a. allow the board to delegate to Department of Finance and Administration staff approval of reverse auction exemption requests under certain circumstances; and
 - b. provide the board with authority to waive certain best practices found in MISS. CODE ANN. § 31-7-401 through 31-7-423 when in the best interest of the state and when the board has no concerns regarding competition, transparency, or fairness.
2. The Legislature should amend relevant sections of MISS. CODE ANN. § 25-53-1 et seq. (1972) and Section 31-7-1 et seq. (1972) to require the Department of Information Technology Services (ITS) to review reverse auction exemption requests from governing authorities when procurements are information technology-related.
3. The Legislature should amend MISS. CODE ANN. § 31-7-13 (1972) and MISS. CODE ANN. Section 27-104-7 (1972) to clarify that the PPRB has authority to adopt rules and regulations regarding the reverse auction requirement for state agencies and governing authorities.
4. The Legislature should amend MISS. CODE ANN. § 27-104-7 (1972) and MISS. CODE ANN. § 25-53-5 (1972) to require the PPRB and the ITS to evaluate jointly on a biennial basis the procurement process utilized by all state agencies. In addition, the Legislature should repeal MISS. CODE ANN. 5-3-72 (1972) that currently requires the Joint Legislative PEER Committee to conduct such a biennial review.

Appendix A: Advantages and Disadvantages of Reverse Auctions

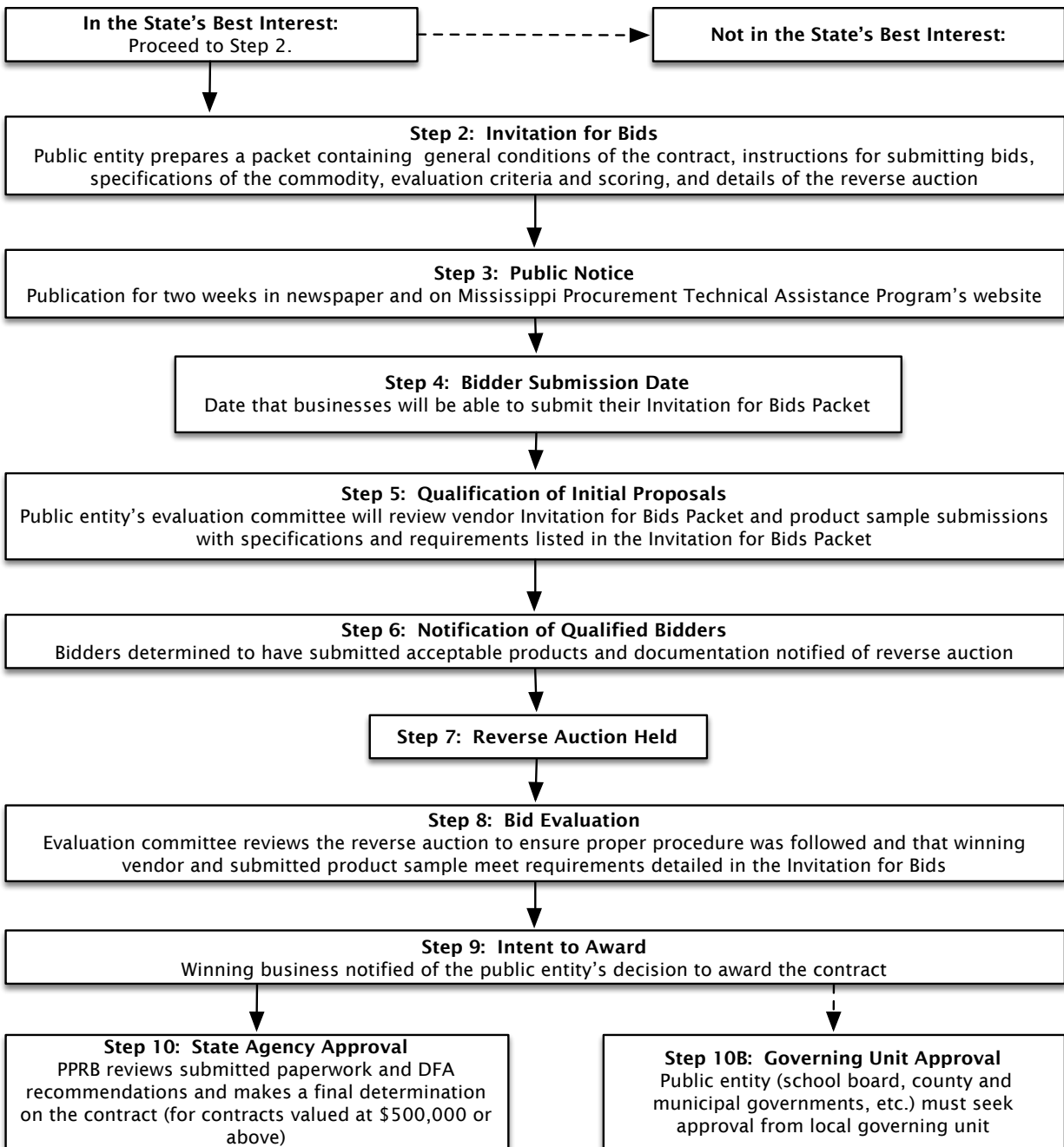
| | Advantages | Disadvantages |
|-----------------------|---|---|
| Buyer (Public Entity) | <ul style="list-style-type: none"> • Opportunity for better prices – bids reflect going market rate, the nature of online purchasing quickly drives prices downward, and because of the certainty of sale and contract acceptance means that normal mark-up included in the selling price for covering risks can be eliminated; • Expanded supply base – electronic posting of procurement requests can reach a wider audience and help explore potential new suppliers, and certain software and procurement firms offer databases of evaluative information about various companies for similar purchases in the future and can provide quick identification of alternative and backup sources of supply; • Shortened purchase cycle – the need for phone calls, faxes, and face-to-face meetings is minimized or eliminated which can provide faster reaction times to changing market conditions and product development, and increased flexibility in real-time spot buying; • Procurement cost reduction – less travel, lower resource requirement, smaller staff, and more streamlined process for collecting bids, decreases need to re-enter data, and allows for a more centralized single-system repository for data; and • Procurement personnel efficiency – automated transaction tracking as well as storage and exchange of standard electronic documents allows reallocation of resources to other procurement areas, allows staff to focus on value-added core activities such as post-bid analysis, price negotiation, and review of supplier performance, and reduction in exposure to unwanted sales pitches or cold calls. | <ul style="list-style-type: none"> • Cost of conducting reverse auction – reverse auction house may require subscription fee and/or a percentage charge on total purchases, or if developing an in-house system, the cost of building and administering a buyer’s own system; • Preparation – reverse auctions take only a small time to run but require much planning and training for the system to be successful; and • Loss of value-added benefits – benefits such as price discounts for multiple contracts and referrals may not be available through reverse auctions, and minimization of non-price factors such as business values, quality, expectation, or customer service standards. |

| | | |
|--|--|---|
| <p>Seller (vendor willing to participate)</p> | <ul style="list-style-type: none"> • Expanded marketing channels – provides a leveled playing field and equal opportunity for participants making it possible for businesses of all sizes to participate; • Allows seller to adjust their bid or bow out of the process at any time; and • Relatively inexpensive approach to identifying new customers and expanding business. | <ul style="list-style-type: none"> • Perceived threat to bottom line – viewed by business as ploy by buyers to squeeze costs and limit business profitability in favor of cost savings; • Unethical business practices – some businesses may participate in reverse auctions with no intention of actually winning the contract, but instead bid down prices to force competitors into non-advantageous contracts; • Pressure on industry supply base – reverse auctions can negatively affect business relationships between a buyer and seller by disrupting developed relationships and limiting future contract guarantees, and; • Loss of brand image – since the identity of the supplier is not revealed throughout the reverse auction, the effect of brand image is eliminated and their brand is reduced to the lowest common denominator, i.e., price. |
|--|--|---|

SOURCE: National Association of State Procurement Officials (NASPO), *Reverse Auctions: A Roadmap for Success*, 2018, and Kuo, Ching-Chung, Rogers, Pamela, and White, Richard E. (2004). *Online Reverse Auctions: An Overview*. *Journal of International Technology and Information Management*, Volume 13, Issue 4, Article 5.

Appendix B: Reverse Auction and Alternative Procurement Processes

Reverse Auction Procurement Process



SOURCE: Department of Finance and Administration's *Mississippi Procurement Manual* as of January 1, 2018.

The adoption of reverse auctions as the preferred method for competitively awarding public contracts and the expansion of PPRB oversight purview has necessitated an alteration to the public procurement process for all public purchasing professionals in the state. To address this, PPRB in conjunction with DFA staff have outlined the two possible purchasing procedure paths that a public purchasing professional may follow when procuring commodities. For reverse auctions this process proceeds by:

Step 1: Determination of “Best Interest”

The first decision that any public entity and their staff must make when wanting to make a purchase is to determine if a reverse auction is the best procurement selection option for the given commodity, and ultimately in the “best interest” of the state. As explained more fully on page 20, reverse auctions work best for commodities that are in wide circulation with multiple suppliers, while specialty commodities with limited supplier networks tend to underperform with reverse auctions.

Public purchasing professionals must evaluate the needs of their organization and the possible solutions that the business community has to offer to determine if a reverse auction would be the best procurement option to maximize value for the state. Time needed to accomplish this step depends on the commodity being sought, and variables such as the market environment, availability of the commodity, and complexity of the commodity will impact the amount of time it takes a public entity to determine if a reverse auction is the best possible procurement means for the purchase.

Step 2: Invitation for Bids

Should a public entity determine that performing a reverse auction would be in the best interest of the state, that entity will then begin to develop an Invitation for Bids Packet. This package will include a purchase description and all contractual terms and conditions applicable to the procurement. Items that must be included within the packet consist of:

- general conditions – sometimes referred to as the “boilerplate,” this section includes instructions and information which should be considered by bidders. This information is standard for all bids and may include how to complete and submit bid forms, how errors will be handled, how to obtain clarification on the specifications, etc.;
- instructions and special conditions – this section includes instructions and information which is pertinent and unique to the particular Invitation for Bids. This may include special delivery requirements, bonding, installation, etc. This section should include information concerning the method used to evaluate and award contracts (i.e. all or none, line item, life-cycle-cost, etc.);
- specifications – this section should clearly describe the minimum requirements and any testing requirements;
- bid form – a bid form should be provided so that all bidders are submitting pricing in a similar format. Instructions on the proper completion of the bid form should be included if needed;
- execution page – the packet should include a page for bidders to complete showing bidder information such as name, contract administrator, address, phone, e-mail, fax, etc. This should include a space for the bidder to provide a signature indicating the bidder’s acceptance of the terms and commitment to honoring the prices bid;
- timing of the auction – this section details the advertising requirements found in MISS. CODE ANN. § 31-7-13 (c) (1972) and Section 3.106.05.4 of the *Mississippi Procurement Manual* and states that the deadline to receive initial responses by suppliers shall not be less than seven working days after the last notice appears in the newspaper. After such deadline has passed, the submissions shall be taken under advisement for prequalification. The reverse auction should occur only after the purchasing agent has

had sufficient time to prequalify the suppliers. Such anticipated time shall be included in the Invitation for Bids Packet; however, the purchasing agent should reserve the right to extend the auction date, if necessary, to complete prequalification;

- prequalification process – the initial response to the Invitation for Bids shall include a proposed product, including specifications and/or samples, for the purchasing entity to evaluate and determine responsiveness to requirements. Once a supplier’s product is determined to be responsive, the supplier may participate in the reverse auction;
- quotes – responding suppliers must provide a quote with the initial response. Quotes are utilized by the purchasing agent to determine market pricing and set the auction parameters (e.g. Start Price);
- instructions on accessing the auction – suppliers should be given detailed instructions on how to access the reverse auction event, including how to gain access to the system utilized and what technical requirements may be involved. However, no supplier may be prohibited from participating in person by paper through surrogate bidding; and
- suppliers should be advised that no award will automatically result from a reverse auction, and that the purchasing entity will review the results of the auction and make a determination in a timely manner.

As with Step 1, the time it requires to compile commodity specifications and prepare the Invitation for Bids Packet depends largely on the type of commodity being sought by the public entity. The more complex and unique the item or good, the longer the Invitation for Bids will take to complete.

Step 3: Public Notice

Every procurement in excess of \$50,000 must be publicly advertised in accordance with MISS. CODE ANN. § 31-7-13 (1972), which requires that such procurements be advertised for “*two (2) consecutive weeks in a regular newspaper published in the county or municipality in which such agency or governing authority is located,*” and submitting notice to be published to the Mississippi Procurement Technical Assistance Program on the same day that the notice is submitted to the newspaper. The date set for bid opening for commodities, equipment, and printing must not be less than seven working days after the last notice appears in the newspaper.

Step 4: Bidder Submission Date

Included in the public notice relating to the procurement at issue, the packet will identify a date that vendors may submit their responses to the Invitation for Bids. The date set for bid opening for commodities, equipment, and printing must not be less than seven working days after the last notice appears in the newspaper.

Step 5: Qualification of Proposals

At the close of the bidder submission window, an evaluation committee (composed of persons appointed by the purchasing entity based on relevant experience necessary to evaluate the proposal or qualification) will evaluate the proposals or qualifications only in accordance with the methodology and weighing criteria described in the Invitation for Bid Packet. Proposals or qualifications will be initially classified as: acceptable, potentially acceptable (reasonably susceptible of being acceptable), or unacceptable. Vendors who submitted unacceptable packets for proposals or qualifications will be notified promptly.

The time it takes to complete this step in the procurement process is dependent on the complexity of the commodity being sought and the number of businesses submitting packets. Public purchasing personnel should anticipate allocating at least one to two weeks to complete this review.

Step 6: Notification of Qualified Bidders

At the conclusion of the packet review step, the evaluation committee will email each business that submitted a qualifying bid packet and notify that business of the start date and time of the reverse auction. The purchasing entity should provide at least seven days to the qualified bidders to ensure that each business has the technical capabilities to administer the reverse auction on their computer systems or to arrange for alternative auction hosting options (DFA can provide computer terminals for businesses that request one and businesses may elect to perform an in person reverse auction at a location identified in the Invitation for Bids Packet).

Step 7: Reverse Auction Held

The reverse auction will be held on the day and in the manner as described in the Invitation for Bids.

In most instances, the auction itself will take less than a day to complete. However, if a large number of vendors choose to participate, if the commodity is unique, or if the purchasing entity desires a longer auction window, the reverse auction itself can last multiple days.

Step 8: Bid Evaluations

At the conclusion of the reverse auction, the evaluation committee will reconvene to examine the results of the reverse auction. The evaluation committee will then review and evaluate the submitted bids and products in accordance with the specifications and evaluation criteria laid out in the Invitation for Bids to ensure that the submitted offers align with the parameters of the bid.

Similar to the Step 5: Qualification, evaluating the bids submitted during the auction are dependent on the commodity being purchased and the complexity of the Invitation for Bids. This step should take between one to two weeks to accomplish.

Step 9: Intent to Award

When the final meeting of the evaluation committee is concluded, and the committee has determined a winning bid and business, the purchasing entity will then notify the winning business that their offer will be chosen as the winning bid.

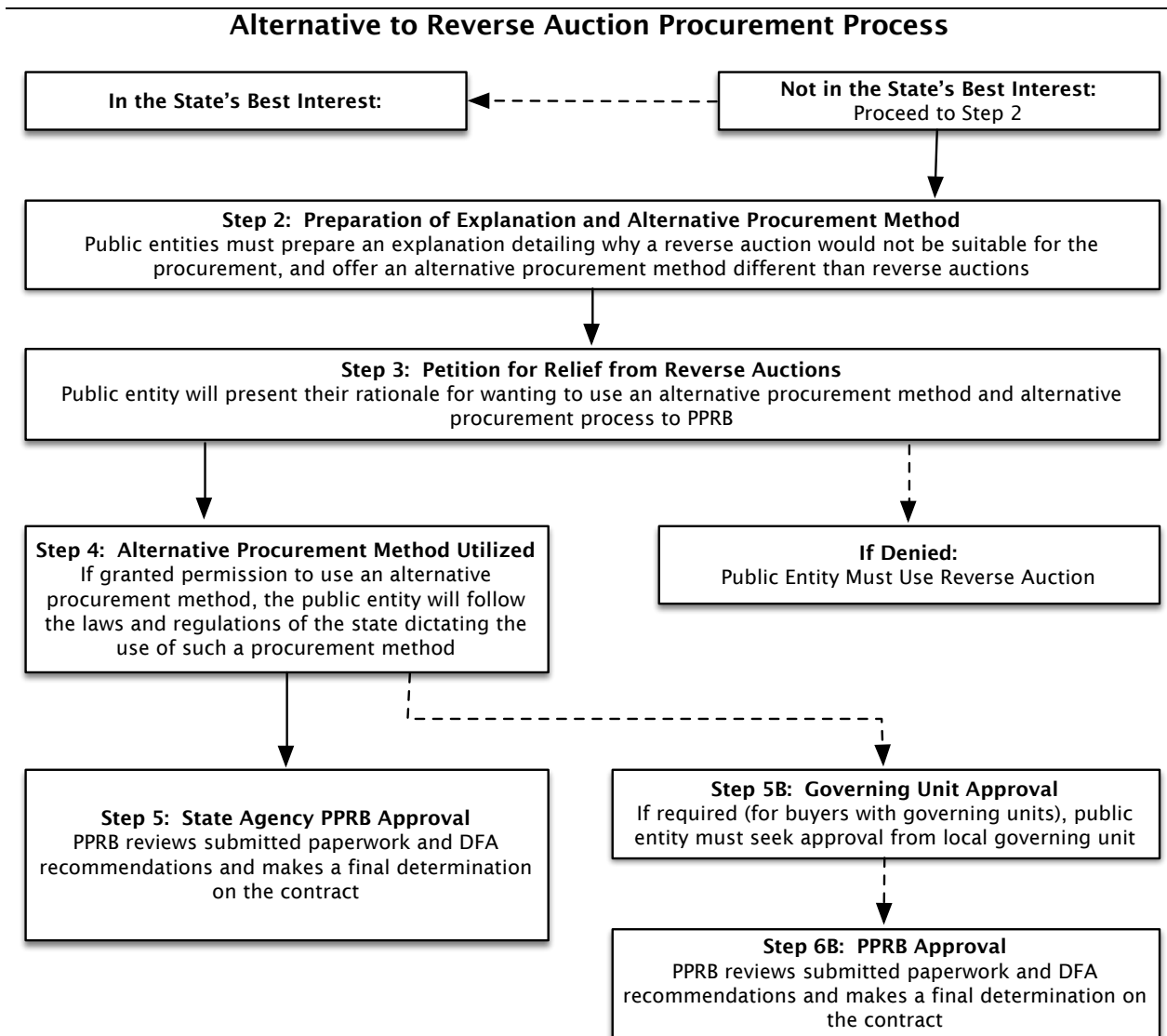
Step 10: PPRB Approval

The final step before a state agency may purchase the commodity bid in excess of \$500,000 during the reverse auction is presentation of the intent to award decision and the accompanying documentation contained in the Invitation for Bids Packet before the PPRB. Here, DFA staff, after reviewing the submitted documentation, will confirm or deny that the state agency followed the laws and regulations of the state relating to public purchasing and state their recommendation of acceptance or denial of the contract award to the PPRB. PPRB will then deliberate on the suggestions of DFA before rendering a final approval or denial of the contract award. Only after PPRB has returned an approval to proceed with the contract will the state agency be able to begin negotiations to purchase and take possession of the commodity being sought.

To be placed on the agenda for PPRB, public entities will need to submit all documentation requested by DFA to PPRB by the first Wednesday of the month preceding the month they wish to appear for. If all documentation is in order, the public entity will be placed on the agenda for the next scheduled PPRB meeting (the first Wednesday of the month). If any issues arise concerning the accuracy or details of the reverse auction process or submitted documentation, placement on the PPRB agenda can be delayed until such issues are resolved. In general, public entities should anticipate at least one month to elapse between when they submit their contract for review and when they will appear before PPRB. If any issues relating to the process are discovered by PPRB or DFA, this step can last multiple months.

Step 10B: Governing Unit Approval

If the reverse auction process is performed by a public entity that is controlled by a governing body (county governments, municipal governments, boards, commissions, etc.) that entity must get approval of that governing body prior to finalizing the contract award. Similar to Step 10 above, local governing units will present intent to award and the accompanying Invitation for Bids Packet before the local governing body. Only after obtaining approval from this governing body will the local entity be able to begin negotiations to purchase and take possession of the commodity being sought.



SOURCE: Department of Finance and Administration's *Mississippi Procurement Manual* as of January 1, 2018.

As detailed on page 20, reverse auctions are very capable procurement tools that offer many advantages to public purchasing professionals. However, reverse auctions are not a panacea to all the public purchasing issues and limitations. For some commodities and in certain conditions,

reverse auctions will not be in the public entity's or the state best interest. As such, PPRB has developed an alternative procurement path for public entities (state agencies and local governing units) to utilize when reverse auctions would be an unfavorable selection model.

Step 1: Determination of "Best Interest"

See page 26.

Step 2: Preparation of Explanation and Alternative Procurement Method

Should a public entity determine that performing a reverse auction would not be in the best interest of the state, then that determination must be approved by the PPRB. The public entity will be required to submit an explanation to PPRB for their review and consideration detailing why a reverse auction would not be in the best interest of the state and presenting an alternative procurement process (RFP, RFQ, multi-vendor/multi-year, competitive sealed bid, etc.), that could be utilized. PPRB may, at its discretion, allow for alternatives to reverse auctions to be utilized by public entities, but final contract approval by PPRB is still required for the alternative procurement process award.

Step 3: Petition for Relief from Reverse Auctions

A public entity that wants to make use of an alternative procurement process will have to petition PPRB for permission to pursue such a procurement process. That public entity will submit its explanation and alternative packet to PPRB, and request that it be granted a Petition for Relief from Reverse Auctions. If awarded, this petition will grant that public entity permission to utilize a competitive procurement process other than reverse auctions.

Similar to Step 10: PPRB Approval as explained on page 28, the public entity will have to submit its explanation and alternative process to PPRB a month prior to the month they wish to have their appeal heard. Depending on the complexity of the procurement and the schedule of the PPRB, this initial step can take one to two months.

Step 4: Alternative Procurement Method Used

If granted a Petition for Relief from Reverse Auctions, the public entity will be allowed to begin the alternative procurement process approved by PPRB. The type of procurement process selected, RFP, RFQ, multi-vendor/multi-year, or competitive sealed bid, will dictate how that public entity will go about procuring the desired commodity. Public entities will be required to follow the laws and regulations of the state concerning public purchases for whichever process they have been given permission to utilize. Regardless of which procurement process the entity has been given permission to use, aspects such as Invitation for Bids Packet, public notice, bidder submission date and time, qualifications of proposals, and notification of winners will be required as with reverse auctions.

Depending on the commodity being sought and the particular procurement process being used a general time frame for this step cannot accurately be estimated.

Steps 5, 5B, and 6B: PPRB Approval

Similar to Step 10: PPRB approval found on page 28, after the state agency has issued an intent to award based on the alternative procurement process and the local governing unit has received approval of the alternative procurement process award from its governing body, the public entity is required to present the results and documentation relating to the alternative procurement process to the PPRB and DFA staff for final approval from PPRB.

As with reverse auctions, public entities utilizing alternative procurement processes should allocate at least one month to the procurement timeline to satisfy this step. Should any issues related to the contract arise or if the PPRB's agenda is at capacity, public entities could see multi-month wait times.

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