

State of South Dakota

EIGHTY-FIFTH SESSION
LEGISLATIVE ASSEMBLY, 2010

400R0344

HOUSE STATE AFFAIRS

ENGROSSED NO. **HB 1046** - 2/17/2010

This bill has been extensively amended (hoghoused) and may no longer be consistent with the original intention of the sponsor.

Introduced by: The Committee on State Affairs at the request of the Bureau of Administration

1 FOR AN ACT ENTITLED, An Act to revise certain provisions for the procurement of goods
2 and services for governmental agencies.

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

4 Section 1. That chapters 5-18, 5-19, 5-20, and 5-23 be repealed.

5 Section 2. Terms used in Act mean:

6 (1) "Acceptance," the formal resolution of a purchasing agency authorizing the execution
7 of a design-build contract;

8 (2) "Biobased," any materials composed wholly or in a significant part of biological
9 products including renewable agricultural materials or forestry materials;

10 (3) "Contract," any type of agreement, regardless of what the agreement may be called,
11 for the procurement of supplies, services, or construction;

12 (4) "Construction," and "constructed," in addition to their ordinary meaning, repair,
13 demolition, and alteration;

14 (5) "Construction management," any project delivery system based on an agreement



1 whereby a construction manager provides leadership to the construction process
2 through a series of services to the purchasing agency;

3 (6) "Construction manager," any person or entity that provides construction management
4 services for a purchasing agency, and is either a construction manager-agent or
5 construction manager-at-risk;

6 (7) "Construction manager-agent," any construction manager that provides construction
7 management services to a purchasing agency in a fiduciary capacity;

8 (8) "Construction manager-at-risk," any construction manager that assumes the risk for
9 construction, rehabilitation, alteration, or repair of a public improvement and that
10 provides construction management services to the purchasing agency;

11 (9) "Design-build contract," any contract between a purchasing agency and a
12 design-builder to furnish the architecture, engineering, and related services as
13 required, and the labor, materials, and other construction services for a public
14 improvement. A design-build contract may be conditioned upon future refinements
15 in scope and price, and may permit the purchasing agency to make changes in the
16 scope of the project without invalidating the design-build contract;

17 (10) "Design-build proposal," an offer to enter into a design-build contract;

18 (11) "Design-build request for proposals," any document or publication whereby a
19 purchasing agency solicits proposals for a design-build contract;

20 (12) "Design-builder," any person that proposes to design and construct a public
21 improvement covered by the procedures of this Act;

22 (13) "Internet," the international computer network of both federal and nonfederal
23 interoperable packet switched data networks, including the graphical subnetwork
24 called the world wide web;

- 1 (14) "Invitation for bids," any document, whether attached or incorporated by reference,
2 used for soliciting bids;
- 3 (15) "Officer," any elected official or administrative officer appointed to that position by
4 the governing body;
- 5 (16) "Performance criteria," requirements for the public improvement, including as
6 appropriate, capacity, durability, production standards, ingress and egress
7 requirements, building code requirements, or other criteria for the intended use of the
8 public improvement, expressed in performance-oriented specifications or drawings
9 suitable to allow the design-builder to make a proposal;
- 10 (17) "Performance criteria developer," any person and the person's subcontractors retained
11 by the purchasing agency to develop performance criteria;
- 12 (18) "Professional services," services arising out of a vocation, calling, occupation, or
13 employment involving specialized knowledge, labor, or skill, and the labor or skill
14 involved is predominantly mental or intellectual, rather than physical or manual;
- 15 (19) "Proposal," any offer to enter into contract in response to a request for proposals;
- 16 (20) "Purchasing agency," any governmental body or officer authorized by law,
17 administrative rule, or delegated authority, to enter into contracts;
- 18 (21) "Public improvement," the process of building, altering, repairing, improving, or
19 demolishing any public infrastructure facility, including any structure, building, or
20 other improvements of any kind to real property, the cost of which is payable from
21 taxes or other funds under the control of the purchasing agency, and includes any
22 local improvement for which a special assessment is to be levied;
- 23 (22) "Qualified agency," any public or private nonprofit corporation geographically
24 located in the State of South Dakota that provides services for persons with

- 1 disabilities and is certified by the Department of Human Services;
- 2 (23) "Request for proposals," any document, whether attached or incorporated by
3 reference, utilized by a purchasing agency when soliciting proposals for contracts for
4 the procurement of supplies, services, or construction;
- 5 (24) "Request for qualifications," the document or publication whereby a purchasing
6 agency solicits interested design-builders to pre-qualify for a design-build contract;
- 7 (25) "Resident," any person, partnership, association, limited liability company, foreign
8 limited liability company, corporation, or foreign corporation licensed to do business
9 within this state that has maintained a substantial and bona fide place of business and
10 has conducted business from within this state for at least one year prior to the date
11 on which a contract was awarded. The members of the partnership or association
12 shall have been bona fide residents of the state for one year or more immediately
13 prior to bidding upon the contract. A foreign corporation licensed pursuant to
14 §§ 47-1A-1501 to 47-1A-1532, inclusive, is not a resident as defined by this section
15 if the state or country in which it is organized enforces or has a preference for
16 resident bidders;
- 17 (26) "Reverse auction," a purchasing process in which bidders submit bids in competing
18 to sell supplies, services, or public improvement projects in an open environment via
19 the internet;
- 20 (27) "Sealed bid or proposal," a response to an invitation for bids or request for proposals
21 submitted in a manner where the contents of the bid or proposal cannot be opened or
22 viewed before the date and time of the formal opening without leaving evidence that
23 the bid or proposal has been opened or viewed;
- 24 (28) "Services," furnishing of labor, time, or effort by a contractor not involving the

1 delivery of a specific end product other than reports which are merely incidental to
2 the required performance;

3 (29) "Supplies," any property, including equipment, materials, and printing;

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

8 Section 3. Unless otherwise authorized by law, the provisions of this Act, inclusive, apply
9 to all contracts issued by any purchasing agency.

10 Section 4. Unless otherwise authorized by law, each contract for supplies, services, and
11 construction shall be awarded by one of the following methods:

- 12 (1) Competitive sealed bids as provided in section 6 of this Act;
- 13 (2) Competitive sealed proposals as provided in sections 7 and 8 of this Act;
- 14 (3) Reverse auction as provided in sections 9 and 10 of this Act;
- 15 (4) Small purchases as provided in section 14 of this Act;
- 16 (5) Sole source procurement as provided in section 11 of this Act; or
- 17 (6) Emergency procurement as provided in section 12 of this Act.

18 Section 5. Contracts shall be awarded by the use of competitive sealed bids except as
19 otherwise provided in this Act.

20 Section 6. The following procedures apply to the use of competitive sealed bids:

- 21 (1) Public notice of the invitation for bids shall be given pursuant to section 17 of this
22 Act;
- 23 (2) The invitation for bids shall include a purchase description, and all contractual terms
24 and conditions applicable to the procurement;

- 1 (3) A bid may be submitted either manually or electronically in a manner authorized by
2 the purchasing agency;
- 3 (4) Each bid shall be opened publicly in the presence of one or more witnesses at the
4 time and place designated in the invitation for bids. The amount of each bid, and such
5 other relevant information as may be specified, together with the name of each bidder
6 shall be recorded. Except as otherwise provided by law, the record and each bid shall
7 be open to public inspection;
- 8 (5) Each bid shall be unconditionally accepted without alteration or correction, except
9 as authorized in this section. Each bid shall be evaluated based on the requirements
10 set forth in the invitation for bids, which may include criteria to determine
11 acceptability such as inspection, testing, quality, workmanship, delivery, and
12 suitability for a particular purpose. Those criteria that will affect the bid price and be
13 considered in evaluation for award shall be objectively measurable, such as
14 discounts, transportation costs, and total or life cycle costs. The invitation for bids
15 shall set forth the evaluation criteria to be used. No criteria may be used in bid
16 evaluation that are not set forth in the invitation for bids;
- 17 (6) Any bid may be withdrawn by letter or by electronic communications or in person
18 before the time specified in the advertisement therefor. The purchasing agency may
19 allow modification of bids by mail, facsimile, or electronic notice received at the
20 place designated in the invitation to bid not later than the time set for the opening of
21 bids. A modification may not reveal the bid price but shall provide the addition or
22 subtraction or the modification so that the final prices or terms will not be known to
23 the purchasing agency until the sealed bid is opened. A modification may not be
24 withdrawn after the time set for the opening of bids. Each modification shall be

1 confirmed in writing by the successful bidder before award of the contract. No bid
2 made may be changed or altered by telephone. After bid opening, no change in bid
3 prices or other provisions of bids prejudicial to the interest of the purchasing agency
4 or fair competition is permitted. The purchasing agency may waive technical
5 irregularities in the bid or proposal of the low bidder or offeror which irregularities
6 do not alter the price, quality, or quantity of the services, or items of tangible personal
7 property bid or offered. Any decision to permit the correction or withdrawal of a bid,
8 or to cancel an award or a contract based on a bid mistake, shall be supported by a
9 written determination made by the purchasing agency, and included in the bid file;

10 (7) The contract shall be awarded within thirty days of the bid opening by written notice
11 to the lowest responsible and responsive bidder whose bid meets the requirements
12 and criteria set forth in the invitation for bids. The purchasing agency may reject any
13 and all bids and readvertise for bids if none of the bids are satisfactory, or if the
14 purchasing agency believes an agreement has been entered into by the bidders to
15 prevent competition. If the low bidder is not responsible or the bid is not made in
16 accordance with the requirements of this Act or the low bid is withdrawn, the bid of
17 the next lowest responsible and responsive bidder may be accepted;

18 (8) If it is considered impractical to initially prepare a purchase description to support an
19 award based on price, an invitation for bids may be issued requesting the submission
20 of unpriced offers to be followed by an invitation for bids limited to those bidders
21 whose offers have been qualified under the criteria set forth in the first solicitation;

22 (9) If, after advertising for bids, no firm bids are received, the purchasing agency may
23 negotiate a contract for the purchase of the supplies, services, or public improvement
24 projects at the most advantageous price, if the specifications of the original bid are

1 met;

2 (10) If two or more competitive sealed bids submitted are identical in price and product
3 quality, the bids are the low bid, and no resident bidder preference is applicable, the
4 purchasing agency may:

5 (a) Award the bid by lottery to one of the identical low bidders; or

6 (b) Reject all the bids and resolicit bids for the required supplies, services, or
7 public improvement.

8 Section 7. A contract may be entered into by competitive sealed proposals if the purchasing
9 agency determines in writing that the use of competitive sealed bids is either not practicable or
10 not advantageous.

11 Section 8. The procedures for issuing a contract through competitive sealed proposals are
12 as follows:

13 (1) The proposals shall be solicited through a request for proposals. The request for
14 proposals shall state the relative importance of price and other factors, if any;

15 (2) Public notice of the request for proposals shall be given pursuant to section 17 of this
16 Act;

17 (3) A proposal may be submitted either manually or electronically in a manner
18 authorized by the purchasing agency;

19 (4) Each proposal shall be opened so as to avoid disclosure of contents to competing
20 offerors during the process of negotiation. A register of proposals shall be prepared
21 documenting the name and address of each offeror and identifying each offeror
22 awarded a contract. The register shall be open for public inspection after contract
23 award;

24 (5) As provided in the request for proposals, a discussion may be conducted with any

1 responsible offeror who submitted a proposal determined to be reasonably
2 susceptible of being selected for award for the purpose of clarification to assure full
3 understanding of, and responsiveness to, the solicitation requirements. Each offeror
4 shall be accorded fair and equal treatment with respect to any opportunity for
5 discussion and revision of a proposal. A revision may be permitted after a submission
6 and prior to an award for the purpose of obtaining the best and final offer. In
7 conducting any discussion, there may be no disclosure of any information derived
8 from any proposal submitted by a competing offeror;

9 (6) An award shall be made to the responsible offeror whose proposal conforms to the
10 solicitation and is determined in writing to be the most advantageous to the
11 purchasing agency taking into consideration price and the evaluation factors set forth
12 in the request for proposals. No other factors or criteria may be used in the
13 evaluation. The contract file shall contain the basis on which the award is made.
14 Written notice of the award of a contract to the successful offeror shall be promptly
15 given to each offeror. The purchasing agency may reject any and all proposals and
16 readvertise for proposals if none of the proposals are satisfactory, or if the purchasing
17 agency believes any agreement has been entered into by the offerors to prevent
18 competition; and

19 (7) This section does not apply to state professional service contracts issued pursuant to
20 sections 112 to 121, inclusive, of this Act.

21 Section 9. A reverse auction may be used by a purchasing agency for the purchase of
22 supplies or services. Prior to conducting a reverse auction, the purchasing agency shall:

23 (1) Pre-qualify bidders to participate in the reverse auction event. Pre-qualification shall
24 be completed by issuing an invitation to qualify to any bidder registered on the state

1 bidder list, and any other vendor that requests a copy of the invitation to qualify. The
2 factors used to determine if a vendor qualifies for the reverse auction shall be clearly
3 stated in the invitation to qualify. No other factors may be used to qualify a vendor
4 for the reverse auction than those stated in the invitation to qualify;

5 (2) The purchasing agency shall advertise the invitation to qualify in the same manner
6 as required for competitive sealed bids or competitive sealed proposals. The
7 invitation to qualify shall be in the form of a competitive sealed bid or competitive
8 sealed proposal. Public notice of the invitation shall be given pursuant to section 17
9 of this Act;

10 (3) The purchasing agency shall notify each responding vendor as to whether the vendor
11 is invited to the reverse auction. The purchasing agency may not disclose to the
12 public or to any other vendor, the name of any vendor that has been invited to the
13 reverse auction until after the reverse auction has occurred;

14 (4) The purchasing agency may limit the number of bidders to be selected to participate
15 in the reverse auction;

16 (5) Each bidder shall directly participate in the reverse auction. The purchasing agency
17 may not accept any bid via phone, fax, or some other alternate method on behalf of
18 a bidder that is unable to enter a bid on the internet for whatever reason;

19 (6) Any clarification, negotiation, and acceptance of any specification, requirement, and
20 term and condition shall occur before the purchasing agency decides whether to
21 invite a vendor to the reverse auction. After the reverse auction, the purchasing
22 agency may permit a change only with the limitation that the change does not alter
23 the scope or content of the original solicitation to a degree that will affect the
24 justification that was used to eliminate any other vendor from being invited to the

1 reverse auction;

2 (7) During any reverse auction, the on-line view of any bid presented to any bidder may
3 not indicate names, aliases, or identifiers of any kind as to who has placed a
4 particular bid. Each bidder shall only be able to see the amount of the bid;

5 (8) If a bidder loses the ability to place a bid during an auction for any reason, the
6 auction shall be suspended as soon as practical and remain suspended until each
7 bidder regains the ability to place bids via the internet auction site. If no resolution
8 to the problem is imminent, the reverse auction may be terminated and rescheduled
9 by the purchasing agency for a later date. In addition, the auction may be suspended
10 or terminated for any reason by the purchasing agency or the reverse auction service
11 provider. Upon resuming an auction after a suspension, the time remaining shall be
12 the time remaining when the auction was suspended or ten minutes, whichever is
13 greater;

14 (9) In conducting a reverse auction, the agency may establish an extension activation
15 period, which is the number of minutes before the end of the auction during which,
16 if a bid is received, the auction will be extended by a pre-defined number of
17 additional minutes. The minimum extension activation period that may be used is ten
18 minutes; and

19 (10) After the reverse auction is completed, any award shall be made in accordance with
20 the requirements for competitive sealed bids or competitive sealed proposals.

21 Section 10. Only the Bureau of Administration may conduct any reverse auction on behalf
22 of a state agency.

23 Section 11. A contract may be awarded for supplies or services without competition if the
24 purchasing agency determines in writing that the supplies or services are of such a unique nature

1 that the contractor selected is clearly and justifiably the only practicable source to provide the
2 supplies or services. The determination that the contractor selected is justifiably the sole source
3 shall be based on either the uniqueness of the supplies or services or the sole availability at the
4 location required. In such cases, the purchasing agency shall conduct negotiations, including
5 price, delivery, and quantity to obtain the most advantageous price and shall include the written
6 verification of the sole source in the contract file. This section does not apply to construction
7 services or construction equipment.

8 Section 12. A purchasing agency may make or authorize others to make an emergency
9 procurement without advertising the procurement if there exists a threat to public health,
10 welfare, or safety and if the emergency procurement is made with such competition as is
11 practicable under the circumstances. A written determination of the basis for the emergency and
12 for the selection of the particular contractor shall be included in the contract file.

13 Section 13. The purchasing agency shall maintain a record listing each contract made under
14 sole source procurement and emergency procurement for a minimum of five years. The record
15 shall contain:

- 16 (1) Each contractor's name;
- 17 (2) The amount and type of each contract; and
- 18 (3) A listing of the supplies, services, and public improvements procured under each
19 contract.

20 Section 14. Unless otherwise specified by statute, purchases of supplies and services under
21 ten thousand dollars shall be made as follows:

- 22 (1) State purchases of supplies over one thousand dollars and under ten thousand dollars
23 shall be processed by the Bureau of Administration and shall be made by first
24 obtaining three quotes from different vendors. If three quotes cannot be obtained, a

1 sole source justification shall accompany the purchase request and the Bureau of
2 Administration may approve the purchase if in the best interest of the state, require
3 additional quotes to be obtained, or require the purchase be advertised for bids;

4 (2) State purchases of supplies under one thousand dollars may be made in accordance
5 with procedures established by the purchasing agency in the best interests of the state;

6 (3) State purchases of services under ten thousand dollars may be made in accordance
7 with procedures established by the purchasing agency in the best interests of the state;
8 and

9 (4) For all other purchasing agencies, purchases under ten thousand dollars may be made
10 in accordance with procedures established by the purchasing agency.

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

12 Section 15. An invitation for bids, a request for proposals, or other solicitation may be
13 canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified
14 in the solicitation, if the purchasing agency determines it is in the best interests of the agency.
15 The reasons for the cancellation or rejection shall be made part of the contract file.

16 Section 16. There is hereby created a centralized public bid exchange. The Bureau of
17 Administration shall establish the exchange either within the bureau or within another public
18 or private organization. The purpose of the exchange is to facilitate the publishing of official
19 state and political subdivision bids to provide greater notice to bidders and to the state and its
20 political subdivisions. The exchange shall maintain a list of all state bids and proposals and all
21 bids and proposals provided by political subdivisions which participate in the exchange. The
22 exchange shall set and charge each bidder, offeror, or political subdivision or both a fee for
23 participation in the exchange to defray the cost of administering the exchange.

24 Section 17. If the purchasing agency intends to enter into a contract for the construction of

1 a new building or for the remodeling or addition to an existing building that involves the
2 expenditure of fifty thousand dollars or more, a contract for any other public improvement that
3 involves the expenditure of twenty-five thousand dollars or more, or a contract for the purchase
4 of supplies or services, other than professional services, that involves the expenditure of ten
5 thousand dollars or more, the purchasing agency shall advertise for bids or proposals. The
6 advertisement shall appear as a legal notice in the appointed legal newspaper. The advertisement
7 shall be printed at least twice, with the first publication at least ten days before opening of bids
8 or the deadline for the submission of proposals. The first publication shall be in each official
9 newspaper of the purchasing agency, and the second publication may be in any legal newspaper
10 of the state chosen by the purchasing agency. If the purchasing agency has no official
11 newspaper, the first publication shall be made in a legal newspaper with general circulation in
12 the jurisdiction of the purchasing agency to be selected by the purchasing agency. The
13 advertisement shall state the time and place where the bids will be opened or the deadline for
14 the submission of proposals. In each notice, the purchasing agency shall reserve the right to
15 reject any or all bids or proposals. If a purchasing agency lists an invitation for bids or request
16 for proposals on the centralized bid exchange pursuant to section 16 of this Act, the purchasing
17 agency need not make the publication required by this section.

18 Section 18. After receiving notice of a contract award, the successful bidder or offeror shall
19 enter into a contract with the purchasing agency within the time specified in the invitation for
20 bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time
21 specified, the contract may be awarded to the next lowest responsive and responsible bidder or
22 offeror for the same kind of work and material, unless all bids or proposals are rejected. The
23 defaulting bidder or offeror shall be responsible for the difference in price.

24 Section 19. If any successful bidder or offeror fails to fulfill the conditions of an awarded

1 contract, the purchasing agency may proceed to recover from the defaulting party whatever
2 damages may have been sustained as a result of the default. The purchasing agency shall have
3 all remedies provided in the contract and provided by law.

4 Section 20. No officer or employee who approves, awards, or administers a contract
5 involving the expenditure of public funds or the sale or lease of property, may have an interest
6 in a contract that is within the scope of the officer's or employee's official duties. This
7 prohibition includes any officer or employee who, in his or her official capacity, recommends
8 the approval or award of the contract or who supervises a person who approves, awards, or
9 administers the contract. This prohibition does not include any officer who serves without
10 compensation or who may be paid per diem pursuant to § 4-7-10.4. Any contract made in
11 violation of this section is void. Any officer or employee who knowingly violates this section
12 is guilty of a Class 2 misdemeanor.

13 Section 21. Any specification shall seek to promote overall economy for the purposes
14 intended and encourage competition in satisfying the purchasing agency's needs, and may not
15 be unduly restrictive. Brand name or equal specifications may be used if the purchasing agency
16 determines in writing that:

- 17 (1) No other design or performance specification or qualified products list is available;
- 18 (2) Time does not permit the preparation of another form of purchase description, not
19 including a brand name specification;
- 20 (3) The nature of the product or the nature of the purchasing agency's requirements
21 makes use of a brand name or equal specification suitable for the procurement; or
- 22 (4) Use of a brand name or equal specification is in the purchasing agency's best
23 interests.

24 Section 22. Brand name or equal specifications shall seek to designate three, or as many

1 different brands as are practicable, as "or equal" references and shall further state that
2 substantially equivalent products to those designated will be considered for award. Unless the
3 purchasing agency determines in writing that the essential characteristics of the brand names
4 included in the specifications are commonly known in the industry or trade, brand name or equal
5 specifications shall include a description of the particular design, functional, or performance
6 characteristics which are required. If a brand name or equal specification is used in a
7 solicitation, the solicitation shall contain explanatory language that the use of a brand name is
8 for the purpose of describing the standard of quality, performance, and characteristics desired
9 and is not intended to limit or restrict competition.

10 Section 23. Brand name specification may be used only if the purchasing agency makes a
11 written determination that only the identified brand name item or items will satisfy the agency's
12 needs. The agency shall seek to identify sources from which the designated brand name item or
13 items can be obtained and shall solicit such sources to achieve whatever degree of price
14 competition is practicable. If only one source can supply the requirement, the procurement shall
15 be made under the sole source procurement provisions of section 11 of this Act.

16 Section 24. Each contract shall be in writing and shall be signed on behalf of the purchasing
17 agency by the authorized officials.

18 Section 25. The provisions of this Act do not apply to:

- 19 (1) Any highway construction contract entered into by the Department of Transportation;
- 20 (2) Any contract for the purchase of supplies from the United States or its agencies or
21 any contract issued by the General Services Administration;
- 22 (3) Any purchase of supplies or services, other than professional services, by purchasing
23 agencies from contracts that have been awarded by any government entity by
24 competitive sealed bids or competitive sealed proposals;

- 1 (4) Any equipment repair contract;
- 2 (5) Any procurement of electric power, water, or natural gas; chemical and biological
3 products; laboratory apparatus and appliances; published books, maps, periodicals
4 and technical pamphlets; works of art for museum and public display; medical
5 supplies; communications technologies, computer hardware and software, peripheral
6 equipment, and related connectivity; tableware or perishable foods;
- 7 (6) Any supplies and services required for externally funded research projects at
8 institutions under the control of the Board of Regents;
- 9 (7) Any property or liability insurance or performance bonds, except that the actual
10 procurement of any insurance or performance bonds by any department of the state
11 government, state institution, and state agency shall be made under the supervision
12 of the Bureau of Administration;
- 13 (8) Any supplies needed by the Department of Human Services or prison industries for
14 the manufacturing of products;
- 15 (9) Any printing involving student activities, conducted by student organizations and
16 paid for out of student fees, at institutions under the control of the Board of Regents.
17 However, nothing in this subdivision exempts, from the requirements of this Act,
18 purchases that involve printing for other activities at institutions under the control of
19 the Board of Regents;
- 20 (10) Any purchase of surplus property from another purchasing agency;
- 21 (11) Any animals purchased;
- 22 (12) Any purchase by a school district of perishable food, raw materials used in
23 construction or manufacture of products for resale, any contract for asbestos removal
24 in emergency response actions, and any contract for services provided by individuals

1 or firms for consultants, audits, legal services, architectural services and engineering,
2 insurance, real estate services, auction services, or transportation of students; or
3 (13) Any authority authorized by chapters 1-16A, 1-16B, 1-16E, 1-16G, 1-16H, 5-12, or
4 11-11.

5 Section 26. The state auditor may stop the letting or the execution of any contract with the
6 state, or with any state officer, commission, board, institution, or agency by serving a written
7 notice of the order on the officer, commission, or board involved, the secretary of state, the
8 attorney general, and on the contractor, if any, stating the grounds on which the state auditor has
9 determined that the contract is illegal, unauthorized, or improper.

10 Section 27. From any order or decision of the state auditor stopping execution of any
11 contract obligation of the state, any person aggrieved or interested may appeal to the State Board
12 of Finance at any time within twenty days after the stop order was filed with either the attorney
13 general, the secretary of state, the state treasurer, or the department involved by serving notice
14 of appeal on the state auditor and the Governor. The notice shall state the decision being
15 appealed and shall ask for a hearing on the appeal. Upon receiving the notice, the Governor shall
16 call a meeting of the State Board of Finance. The board shall consider the appeal, make a
17 decision, enter the decision in the journal, and give notice to the appellant and the department
18 involved. Any order of the Board of Finance as expressed in the board's decision is binding upon
19 the state department, institution, agency, or office involved and shall be carried out accordingly.

20 Section 28. Except for canned meat food products that are not available from a domestic
21 source, no purchasing agency may purchase any meat food products that are the products of any
22 foreign country or that are imported from outside the boundaries of the United States.

23 Section 29. Any milk processor licensed pursuant to § 39-6-7, bidding any milk or milk
24 product under a competitive bid contract, shall receive the bid contract if the processor's bid is

1 equal to, or within five percent or less, of any other bidder who is not a licensed processor.

2 Section 30. In awarding a contract, if all things are equal, including the price and quality of
3 the supplies or services, a purchasing agency shall give preference:

4 (1) To a qualified agency if the other equal low bid or proposal was submitted by a
5 business that was not a qualified agency;

6 (2) To a resident business if the other equal low bid or proposal was submitted by a
7 nonresident business;

8 (3) To a resident manufacturer if the other equal low bid or proposal was submitted by
9 a resident business that is not a manufacturer;

10 (4) To a resident business whose principal place of business is located in the State of
11 South Dakota, if the other equal low bid or proposal was submitted by a resident
12 business whose principal place of business is not located in the State of South
13 Dakota; or

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

17 In computing price, the cost of transportation, if any, including delivery, shall be considered.

18 Section 31. A resident bidder shall be allowed a preference on a contract against the bid of
19 any bidder from any other state or foreign province that enforces or has a preference for resident
20 bidders. The amount of the preference given to the resident bidder shall be equal to the
21 preference in the other state or foreign province.

22 Section 32. The Bureau of Administration shall maintain a current list of all states that have
23 a resident bidder preference law and the amount or percent of preference taken by each state.
24 The bureau shall make the list available upon request to any purchasing agency.

1 Section 33. A qualified agency may submit a list of supplies, custodial services, and
2 maintenance services, provided by the agency, to the Bureau of Administration. The bureau
3 shall make the information available to purchasing agencies of the State of South Dakota on a
4 website maintained by the bureau.

5 Section 34. No provision of this Act may be so construed as to prohibit any person with a
6 disability from negotiating a contract for service or supplies or in any other manner doing
7 business with any purchasing agency.

8 Section 35. purchasing agency may give preference to the purchase of supplies manufactured
9 from recycled or biobased materials if the bids are within five percent of the lowest bid offering
10 nonrecycled or nonbiobased materials.

11 Section 36. Prior to the award of a contract, the purchasing agency may require of each
12 bidder or offeror such information as shall allow the agency to determine whether a bidder or
13 offeror is entitled to a preference or subject to having a preference enforced against it under this
14 Act.

15 Section 37. In addition to the provisions of this Act, any procurement utilizing federal funds
16 is subject to any federal statutes and regulations governing the use and payment of such funds.

17 Section 38. Any bidder or offeror who fails to comply with the provisions of this Act, or
18 who provides any false information in the submission of any bid or offer is subject to having the
19 bid or offer disallowed by the purchasing agency soliciting the bid or offer. Any contract entered
20 into in violation of this Act is null and void.

21 Section 39. The Bureau of Administration shall serve as the central procurement agency of
22 the State of South Dakota. Except for the legislative and judicial branches and as otherwise
23 specifically provided in this Act, the Bureau of Administration shall procure, or authorize the
24 procurement of all supplies and public improvements for state government. No claim for any

1 such procurement may be paid unless authorization has been issued by the bureau. All state
2 agencies and institutions are responsible for the procurement of services for their respective
3 governmental unit. The governing body of all other purchasing agencies, including the
4 legislative and judicial branches of state government, is responsible for procuring or authorizing
5 the procurement of supplies, services, and public improvements for their respective
6 governmental unit.

7 Section 40. In the procurement of supplies or services, a purchasing agency may require a
8 bond or an approved security to be submitted with any bid or proposal as a guarantee that the
9 bidder will enter into a contract with the purchasing agency. No offeror or bidder may be
10 required to leave the bond or security posted for a longer period than thirty days if the bid or
11 proposal is not accepted. The bond or approved security of the successful offeror or bidder shall
12 be returned upon the signing of the contract.

13 Section 41. For any public improvement contract, a performance and payment bond is
14 required pursuant to chapter 5-21. For any other contract, a purchasing agency may require a
15 bond or an approved security to be provided by the successful offeror or bidder as a guarantee
16 of faithful performance of the contract. In any case, the bond or approved security of the
17 successful offeror or bidder shall be returned upon satisfactory completion of the contract.

18 Section 42. If a contract is for the construction of a public improvement, the required
19 advertisement shall state where the plans and specifications may be examined. The plans and
20 specifications for the construction of any public improvement shall be and remain on file in the
21 office of the purchasing agency at all times from the beginning of the publication of the
22 advertisement for bids until the completion of the public improvement. The purchasing agency
23 shall, upon request, furnish at least one copy of the plans and specifications, without charge, to
24 each contractor resident in South Dakota who intends, in good faith, to bid upon the public

1 improvement. The copy shall be available at the date of the first publication of the advertisement
2 for bids. The purchasing agency may require the return of the copy at the time of the opening
3 of the bids.

4 Section 43. If the invitation for bids is for the construction of a public improvement, each
5 bid shall contain a certified check or a cashier's check, for five percent of the amount of the bid.
6 Such check shall be certified or issued by either a state or a national bank and payable to the
7 purchasing agency or to an officer of the purchasing agency letting the contract and inviting
8 bids. In lieu of a check, a bid may contain a bid bond for ten percent of the amount of the bid.
9 Such bond to be issued by a surety authorized to do business in this state payable to the
10 purchasing agency, as a guaranty that the bidder will enter into a contract with the purchasing
11 agency, its board or officers thereof, in accordance with the terms of the letting and bid in case
12 the bidder be awarded the contract.

13 Section 44. Notwithstanding the provisions of section 43 of this Act, the requirement of a
14 bid bond, certified or cashier's check, cash, or other security may be waived by the purchasing
15 agency if the bid submitted does not exceed fifty thousand dollars.

16 Section 45. No public servant may, directly or indirectly, require or direct a bidder on any
17 public improvement contract that is about to be or has been competitively bid to obtain from a
18 particular insurer or insurance producer any surety bond or contract of insurance required in the
19 bid or contract or required by any law, ordinance, or rule. However, the surety insurer shall be
20 an authorized insurer under Title 58. Nothing in this section prevents any such public servant
21 acting on behalf of the government from exercising the right to approve or reject a surety bond
22 or contract of insurance as to its form or sufficiency.

23 Section 46. If the lowest responsive and responsible bid for a public improvement project
24 exceeds the final estimated project cost, the Bureau of Administration, acting on behalf of the

1 state, or any other purchasing agency may negotiate with that low bidder for the construction
2 of a public improvement at the most advantageous price.

3 Section 47. Prior to execution of a public improvement contract, a successful bidder shall
4 certify:

5 (1) That no more than twenty percent of the cost of labor included in the contract is
6 being provided by nonresident subcontractors; or

7 (2) That more than twenty percent of the cost of labor included in the contract is being
8 provided by nonresident subcontractors because resident contractors are not available
9 and at competitive prices.

10 The bidder shall also provide any information requested by the purchasing agency to verify the
11 certification.

12 Section 48. If a purchasing agency is to supply tangible personal property to be used in
13 performance of the contract and the personal property is taxable to the contractor under
14 § 10-46-5, the specifications or notice to bidders shall state the purchase price or fair market
15 value of the tangible personal property, whichever is the greater. The stated amount shall be the
16 basis for determining the contractor's liability for tax.

17 Section 49. Any funds forfeited by a bidder or surety shall accrue to the funds provided for
18 construction of the public improvement.

19 Section 50. No bidder on a public improvement contract may be required, either in the
20 invitation for bids or otherwise, to leave a certified check or cashier's check, or bid bond, posted
21 for a longer period than thirty days if the bid is not accepted. The check or bid bond of the
22 successful bidder shall be returned upon the execution of the contract and surety hereafter
23 provided for. The checks or bid bonds of all unsuccessful bidders shall be, by the purchasing
24 agency, immediately returned to the respective makers thereof and not more than thirty days

1 shall elapse between the opening of the bids and either the acceptance of the bid of the lowest
2 responsible bidder or the rejection of all of the bids presented.

3 Section 51. If a contract is based upon plans and specifications prepared by an architect or
4 engineer, the contract's terms and conditions shall comply with the provisions provided in the
5 "General Conditions of the Contract for Construction," Fourteenth Edition, by the American
6 Institute of Architects in effect on January 1, 2010, the "ConsensusDOCS 200 Standard
7 Agreement and General Conditions Between Owner and Contractor," by ConsensusDOCS LLC
8 in effect January 1, 2010, or the "Standard General Conditions of the Construction Contract,"
9 1990 Edition, by the Engineer's Joint Contract Documents Committee, in effect January 1, 2010,
10 except when in conflict with the laws of this state. However, the purchasing agency may modify
11 or delete, on a contract by contract basis, any portion of the "General Conditions of the Contract
12 for Construction," "ConsensusDOCS 200 Standard Agreement and General Conditions Between
13 Owner and Contractor," or the "Standard General Conditions of the Construction Contract."

14 Section 52. The contract may permit progress payments, but an amount necessary to
15 complete the improvement shall be retained from the final payment until the contract is executed
16 in full and the public improvement completed to the satisfaction and acceptance of the
17 purchasing agency. However, if the contractor has furnished the purchasing agency all required
18 records and reports and a final inspection has been made, the purchasing agency shall pay to the
19 contractor interest as set by the governing body at a rate of not less than the category E rate of
20 interest as established by § 54-3-16 on the amounts retained and on the final payment due the
21 contractor beginning thirty days after the work under the contract has been completed, as
22 evidenced either by the completion date established by the architect's or engineer's letter of
23 acceptance or by the use and occupancy of the public improvement. The interest shall continue
24 until the date when payment is tendered to the contractor unless delay in payment has been the

1 result of federal participation in the contract in which event interest may not begin until thirty
2 days after payment by the federal authority involved. If a portion of a progress payment is
3 retained, other than the final payment, the purchasing agency shall pay to the contractor interest
4 as set by the purchasing agency at a rate of not less than the category E rate of interest as
5 established by § 54-3-16 on the amount retained beginning thirty days after the contractor has
6 furnished the purchasing agency with all required records and reports and a progress inspection.

7 Section 53. The purchasing agency may include in any contract for a public improvement
8 provisions for the deposit of securities in lieu of sums retained from payments due a contractor
9 for work performed pursuant to the terms of the contract. The contract document shall state the
10 types of securities to be accepted and the procedural requirements for the deposits.

11 Section 54. If a purchasing agency elects to use and occupy the public improvement before
12 acceptance, the purchasing agency shall pay all amounts due under the contract except double
13 the amount that the architect or engineer estimates to be necessary to complete the improvement
14 in accordance with the plans and specifications or one percent of the contract price, or in any
15 event not less than three hundred dollars. No interest may commence until thirty days after the
16 work has been fully completed.

17 Section 55. The purchasing agency may appoint a competent superintendent who may be
18 the architect or engineer furnishing the plans and specifications for the public improvement. The
19 superintendent shall report to the purchasing agency or board every thirty days as to the progress
20 and character of the work done by the contractor. Upon the reports of the superintendent, the
21 purchasing agency shall make payments promptly to the contractor during the process of
22 construction to the extent provided by the contract based on the value of the work done and
23 materials furnished. The payments shall be divided into such installments as the board and the
24 contractor may agree upon at the time of entering into the contract, and which shall be included

1 in and be a part of the terms of the contract. No payment, however, constitutes an acceptance,
2 in whole or in part, by the purchasing agency prior to making of the final payment and
3 acceptance in full completion of the contract. Final payment of any sums due to the contractor
4 shall be made within thirty days after the completion and acceptance of the public improvement
5 by the purchasing agency.

6 Section 56. No person, firm, or corporation may act as architect or engineer and also
7 contractor on any public improvement project if the amount to be expended exceeds one
8 hundred thousand dollars. Any public improvement of an emergency nature which affects the
9 public health and safety of the state and are funded through the use of an emergency
10 appropriation or special appropriation, and any full-service firm which specialize in the design,
11 fabrication, and installation of cultural and educational exhibits are exempt from this section.

12 Section 57. Each purchasing agency, on entering into a contract for a public improvement,
13 shall provide in the contract that the contractor is required to pay the Department of Labor of
14 South Dakota all contributions and interest due under the provisions of chapter 61-5, on wages
15 paid to individuals employed in performance of the contract.

16 Section 58. No purchasing agency may award any contract for the construction of any public
17 improvement unless the purchasing agency has verified with the Department of Revenue and
18 Regulation that the contractor has a contractor's excise tax license pursuant to chapter 10-46A
19 or 10-46B.

20 Section 59. Before final payment may be made on any contract for public improvement, the
21 purchasing agency awarding the contract shall require the contractor to furnish a certificate from
22 the Department of Labor that all contributions and interest due to the Department of Labor in
23 the performance of the contract have been paid.

24 Section 60. Any amendment or change order to an existing contract for construction,

1 reconstruction, or remodeling of a public improvement does not need to be bid if:

- 2 (1) The contract contains unit prices for the same type or class of work;
- 3 (2) The change or extra work is necessitated by circumstances related to soils, utilities,
4 or unknown conditions directly affecting the performance of the work that were not
5 reasonably foreseeable at the time the underlying contract was let and the change or
6 extra work is necessary to the completion of the public improvement; or
- 7 (3) The sum of the proposed amendment or change order plus the sum of all other prior
8 unbid amendments or change orders, exclusive of change orders issued under
9 subdivisions (1) and (2) of this section, does not exceed the following:
 - 10 (a) For contracts not more than five hundred thousand dollars, the greater of
11 twenty-five thousand dollars or fifteen percent of the base contract;
 - 12 (b) For contracts exceeding five hundred thousand dollars but not more than two
13 million five hundred thousand dollars, the greater of seventy-five thousand
14 dollars or ten percent of the base contract; and
 - 15 (c) For contracts exceeding two million five hundred thousand dollars, the greater
16 of two hundred fifty thousand dollars or five percent of the base contract.

17 Section 61. A purchasing agency may enter into design-build contracts for public
18 improvements, if the following conditions are met:

- 19 (1) The purchasing agency shall, prior to issuing any design-build request for proposals,
20 establish and publish procedures for the solicitation and award of design-build
21 contracts. The Bureau of Administration shall establish the procedures for the state.
22 The procedures shall include the following:
 - 23 (a) The procedure to select or designate a performance criteria developer utilizing
24 a qualification based process and the procedure to prepare performance

- 1 criteria;
- 2 (b) The procedures for the preparation and contents of a design-build request for
3 proposals;
- 4 (c) The procedure and standards to be used to qualify or pre-qualify
5 design-builders;
- 6 (d) The procedures for preparing and submitting proposals;
- 7 (e) The procedures for evaluating proposals;
- 8 (f) The procedures for negotiations between the purchasing agency and those
9 submitting proposals prior to the acceptance of a proposal. The procedures
10 shall contain safeguards to preserve confidential information and proprietary
11 information supplied by those submitting proposals, consistent with section
12 75 of this Act;
- 13 (g) The procedures for awarding and executing design-build contracts;
- 14 (h) The procedures for awarding design-build contracts in the event of public
15 emergencies as defined in section 12 of this Act; and
- 16 (i) The procedures for acting on formal protests relating to the solicitation or
17 award of design-build contracts;
- 18 (2) The purchasing agency shall, for each public improvement under this section, make
19 a determination that it is in the best interest of the public to enter into a design-build
20 contract to complete the public improvement. The determination to utilize
21 design-build and the basis for the determination shall be recorded in the project file
22 or the minutes of the meeting of the governing board of the purchasing agency. In
23 making this determination, design-build projects shall meet one or more of the
24 following criteria:

- 1 (a) The purchasing agency requires a project design and construction time line
- 2 that is faster than the traditional design/bid/build process would allow;
- 3 (b) The complexity of the project requires close coordination of design and
- 4 construction expertise or an extreme amount of coordination;
- 5 (c) The purchasing agency requires early cost commitments; or
- 6 (d) The project can be defined at an early stage and the purchasing agency is able
- 7 to specify all requirements; and
- 8 (3) The purchasing agency shall follow the procedures of other laws governing public
- 9 improvement construction contracts to the extent such laws are compatible with the
- 10 use of design-build contracts.

11 Section 62. No design-builder may do business in this state unless authorized as either an

12 architect, engineer, or general contractor.

13 Section 63. A design-builder may sublet responsibility for professional design services to

14 any person licensed and registered to provide professional design services in this state. Nothing

15 in this section limits or eliminates the responsibility or liability of any person registered pursuant

16 to chapter 36-18A, on a design-build project to the purchasing agency or other third parties

17 under existing law.

18 Section 64. A design-builder may sublet responsibility for construction or other services to

19 persons registered, licensed, or otherwise qualified to provide those services in this state.

20 Section 65. A design-builder may contract with the purchasing agency to provide

21 professional services or construction services for which the design-builder is not licensed,

22 registered, or qualified to perform, as long as the design-builder sublets all such services

23 required under the design-build contract to a licensed, registered, or otherwise qualified person.

24 Section 66. Any request for proposals shall contain performance criteria developed by a

1 performance criteria developer and approved by the purchasing agency. For projects not
2 exempted under chapter 36-18A from using a registered design professional, the performance
3 criteria developer shall be a design professional registered under chapter 36-18A. For projects
4 exempt under chapter 36-18A from using a registered design professional, the performance
5 criteria developer shall be hired on the basis of qualifications related to projects of similar scope.

6 Section 67. The performance criteria developer may not submit a proposal to enter into the
7 design-build contract and the design-builder may not delegate or contract services under the
8 design-build contract to the performance criteria developer.

9 Section 68. The performance criteria developer shall be either an employee of the purchasing
10 agency or shall be engaged in accordance with statutory procedures for contracting with
11 professional services. With the approval of the purchasing agency, the developer may delegate
12 or contract for the development of specific aspects of the design criteria to other consultants.
13 The performance criteria developer may be retained at the purchasing agency's option through
14 to the completion of the design-build contract.

15 Section 69. The purchasing agency, in consultation with the performance criteria developer,
16 shall determine the scope and level of detail required for the performance criteria. The
17 performance criteria shall be detailed enough to permit a person to submit a proposal in
18 accordance with the design-build request for proposals, given the nature of the public project
19 and the level of design to be provided in the proposal.

20 Section 70. After a minimum of three design-builders have been pre-qualified in accordance
21 with section 72 of this Act, a design-build request for proposals shall be mailed to each
22 pre-qualified design-builder. The minimum number of pre-qualified design-builders is not
23 required for any improvement project that is complex in nature, requires close coordination of
24 design and construction expertise, and does not require significant structural changes, additions,

1 reconstruction, or new construction. The design-build request for proposals shall be prepared
2 for each design-build contract containing the following elements:

- 3 (1) The identity of the purchasing agency which will award the design-build contract
4 and the identity of the performance criteria developer;
- 5 (2) The procedures to be followed for submitting proposals, the criteria for evaluation
6 of a proposal and its relative weight, and the procedures for making awards;
- 7 (3) The proposed terms and conditions for the design-build contract;
- 8 (4) The performance criteria, which shall include the following:
 - 9 (a) The owners preliminary program of space needs and special requirements;
 - 10 (b) Performance standards for materials and equipment; and
 - 11 (c) Minimum system requirements and efficiencies;
- 12 (5) A description of the drawings, specifications, or other submittals to be submitted
13 with the proposal, with guidance as to the form and level of completeness of the
14 drawings, specifications, or submittals that is acceptable;
- 15 (6) A schedule for planned commencement and completion of the design-build contract;
- 16 (7) Budget limits for the design-build contract;
- 17 (8) Affirmative action, disadvantaged business, or set-aside goals or requirements for the
18 design-build contract, if any;
- 19 (9) Requirements for performance and payment bonds, and insurance. These
20 requirements shall meet the requirements of § 5-21-1;
- 21 (10) The compensation, if any, to be given to design-builders submitting proposals who
22 are not awarded the project;
- 23 (11) Whether project financing is in place;
- 24 (12) A schedule for payments to the design-builder;

1 (13) Site identification and geotechnical information if the site is owner-provided;

2 (14) Location of existing utilities and their capacity if the site is owner-provided; and

3 (15) Warranty and guarantee requirements.

4 Section 71. No design-build request for proposals may include detailed designs or detailed
5 drawings prepared by the criteria developer. The request may, however, include drawings of
6 existing conditions and any preliminary conceptual sketches necessary to illustrate the
7 information required by subdivision (4) of section 70 of this Act. Each conceptual drawing shall
8 contain the minimum information necessary to convey the requirements. No design-build
9 request for proposals may include detailed construction specifications. Any design and
10 construction standards in the request for proposals shall be performance standards only.

11 Section 72. A purchasing agency shall pre-qualify design-builders for design-build contracts
12 by advertising its request for qualifications in accordance with section 17 of this Act. A request
13 for qualifications shall contain the following elements:

14 (1) The identity of the purchasing agency;

15 (2) A description of the proposed public improvement;

16 (3) Budget limits for the proposed public improvement;

17 (4) The requirements the design-builder will be required to have; and

18 (5) The criteria and their relative weight for prequalification.

19 Section 73. Any proposal, submitted pursuant to this section, shall be accompanied by a
20 deposit or bond meeting the requirements of section 43 of this Act. The deposit or security may
21 be forfeited if the proposal is accepted but the design-builder fails to execute the design-build
22 contract.

23 Section 74. Any proposal shall be sealed and may not be opened until expiration of the time
24 established for making proposals as set forth in the design-build request for proposals. To the

1 extent required by the request for proposals, any proposal shall identify each person to whom
2 the design-builder proposes to sublet obligations under the design-build contract. At a
3 minimum, any proposal shall identify each person to whom the design-builder proposes to
4 sublet any design obligations or general construction obligations. Any person so identified may
5 not be replaced without the approval of the purchasing agency. Any proposal shall establish a
6 cost of the design-build contract that may not be exceeded if the proposal is accepted without
7 change. The maximum cost in the proposal may be converted to fixed prices by negotiated
8 agreement between the purchasing agency and the selected design-builder.

9 Section 75. Until a proposal is accepted, the drawings, specifications, and other information
10 in the proposal remain the property of the person making the proposal. The purchasing agency
11 shall make reasonable efforts to maintain the secrecy and confidentiality of any proposal and
12 all information contained in any proposal and may not disclose any proposal or the information
13 contained in a proposal to the design-builder's competitors. The purchasing agency may not
14 disclose, except as may be permitted pursuant to chapter 1-27, confidential and proprietary
15 information contained in any proposal to the public until such time as the purchasing agency
16 takes final action to accept a proposal.

17 Section 76. Once received, any proposal shall be submitted to the performance criteria
18 developer for review. Clarifications may be required to ensure conformance of any proposal
19 with the performance criteria. In seeking clarifications, the performance criteria developer may
20 not reveal any aspect of any design-builder's proposal to any other design-builder. No proposal
21 may be considered until the performance criteria developer issues a written opinion that the
22 proposal is consistent with the performance criteria. Once the performance criteria developer
23 has issued such an opinion, the proposal shall be submitted to the governing body of the
24 purchasing agency for review and evaluation. No proposal or design-build contract may be

1 accepted unless the purchasing agency determines there was adequate competition for such
2 contract.

3 Section 77. After obtaining and evaluating proposals according to the criteria and procedures
4 set forth in the design-build request for proposals, a purchasing agency may accept the proposal
5 it considers most advantageous to the purchasing agency. Acceptance of a proposal shall be by
6 written notice to the design-builder which submitted the accepted proposal. At the same time
7 notice of acceptance is delivered, the purchasing agency shall also inform, in writing, the other
8 design-builders that their proposals were not accepted. Unless all proposals are rejected, a
9 detailed breakdown of the evaluation criteria scores for each proposal received shall be made
10 available to the public after signature execution of the design-build contract. The contract for
11 development of performance criteria shall terminate if a contract is awarded to the
12 design-builder.

13 Section 78. The purchasing agency may reject any and all design-build proposals. The
14 purchasing agency may solicit new proposals using the same or different performance criteria,
15 budget constraints, or qualifications.

16 Section 79. Any design-build proposal may be withdrawn by the proposer for any reason at
17 any time prior to acceptance.

18 Section 80. Any purchasing agency may engage a construction manager if planning,
19 designing, or constructing a public improvement, or if improving, altering, or repairing a public
20 improvement. However, no purchasing agency is required to engage a construction manager.

21 Section 81. Construction management services provided in the planning and design phases
22 of a public improvement project may include:

- 23 (1) Services provided in the planning and design phases of a public improvement project
24 including the following:

- 1 (a) Consulting with, advising, assisting, and making recommendations to the
- 2 public corporation and architect or engineer on all aspects of planning for
- 3 project construction;
- 4 (b) Reviewing all plans and specifications as they are being developed and
- 5 making recommendations with respect to construction feasibility, availability
- 6 of material and labor, time requirements for procurement and construction,
- 7 and projected costs;
- 8 (c) Making, reviewing, and refining budget estimates based on the public
- 9 corporation's program and other available information;
- 10 (d) Making recommendations to the public corporation and the architect or
- 11 engineer regarding the division of work in the plans and specifications to
- 12 facilitate bidding and awarding of contracts;
- 13 (e) Soliciting the interest of capable contractors and assisting the public
- 14 corporation in taking bids on the project;
- 15 (f) Analyzing the bids received and awarding contracts; and
- 16 (g) Preparing and monitoring a progress schedule during the design phase of the
- 17 project and preparation of a proposed construction schedule; and
- 18 (2) Services provided in the construction phase of the public improvement project
- 19 including the following:
- 20 (a) Maintaining competent supervisory staff to coordinate and provide general
- 21 direction of the work and progress of the contractors on the project;
- 22 (b) Observing the work as it is being performed for general conformance with
- 23 working drawings and specifications;
- 24 (c) Establishing procedures for coordinating among the public corporation,

- 1 architect or engineer, contractors, and construction manager with respect to all
- 2 aspects of the project and implementing labor policy in conformance with the
- 3 requirements of the public corporation's policy and making recommendations;
- 4 (d) Reviewing and processing all applications for payment by involved
- 5 contractors and material suppliers in accordance with the terms of the contract;
- 6 (e) Making recommendations for and processing requests for changes in the work
- 7 and maintaining records of change orders;
- 8 (f) Scheduling and conducting job meetings to ensure orderly progress of the
- 9 work;
- 10 (g) Developing and monitoring a project progress schedule, coordinating and
- 11 expediting the work of all contractors, and providing periodic status reports
- 12 to the owner and the architect and engineer; and
- 13 (h) Establishing and maintaining a cost control system and conducting meetings
- 14 to review costs.

15 Section 82. No construction manager-agent may contract directly with any contractor or
16 supplier for the project.

17 Section 83. The construction manager-at-risk shall directly contract with subcontractors and
18 suppliers for the project.

19 Section 84. Unless the construction manager-agent is an employee of the purchasing agency
20 and provides the construction management services pursuant to such employment, no
21 purchasing agency may engage the services of a construction manager except as follows:

- 22 (1) The purchasing agency shall first make the following determinations:
- 23 (a) That it is in the public interest to utilize the services of a construction
- 24 manager; and

- 1 (b) That the construction management services would not unreasonably duplicate
- 2 and would be in addition to the normal scope of separate architect or engineer
- 3 contracts;
- 4 (2) Notwithstanding any other provisions of this chapter, no construction manager may
- 5 contract to perform actual construction on the project, except as follows:
- 6 (a) The construction manager may perform general conditions of the construction
- 7 contract as required by the owner;
- 8 (b) The construction manager is a construction manager-at-risk and was solicited
- 9 through a qualification-based request for proposals method of procurement as
- 10 provided in section 85 of this Act and the construction manager-at-risk, for
- 11 any actual construction contracted by the construction manager-at-risk to be
- 12 performed on the project, provides payment and performance bonds and
- 13 competitively bids the work as required by any statute governing bidding and
- 14 bonding for public improvement projects;
- 15 (c) Pursuant to a contract awarded on an emergency basis, pursuant to section 12
- 16 of this Act; or
- 17 (d) Pursuant to a contract negotiated pursuant to subdivision (9) of section 6 of
- 18 this Act; and
- 19 (3) No person, firm, or corporation may act as a construction manager-agent and also as
- 20 a contractor on any public improvement, except as follows:
- 21 (a) Pursuant to a contract awarded on an emergency basis, pursuant to section 12
- 22 of this Act; or
- 23 (b) Pursuant to a contract negotiated pursuant to subdivision (9) of section 6 of
- 24 this Act.

1 Section 85. Each qualification based request for proposals required by subsection (b) of
2 subdivision (2) of section 84 of this Act to enter into a construction manager-at-risk services
3 contract where the construction manager-at-risk intends to actually perform construction on the
4 project, shall meet the following criteria:

5 (1) The purchasing agency shall, prior to issuing any request for proposals to enter in a
6 construction management services contract, establish and publish procedures for the
7 solicitation and award of such contracts, which procedures shall include the
8 following:

- 9 (a) The procedures and standards to be used to qualify construction managers;
- 10 (b) The procedures for preparing and submitting proposals;
- 11 (c) The procedures for evaluating proposals;
- 12 (d) The procedures for negotiations between the purchasing agency and those
13 submitting proposals prior to the acceptance of a proposal. The procedures
14 shall contain safeguards to preserve the confidential information and
15 proprietary information supplied by those submitting proposals; and
- 16 (e) The procedures for awarding construction management services contracts;

17 (2) A request for proposals to enter into a construction management services contract
18 shall contain the following elements:

- 19 (a) The identity of the purchasing agency;
- 20 (b) A description of the proposed public improvement;
- 21 (c) A description of the qualifications the construction manager will be required
22 to have;
- 23 (d) The procedures to be followed for submitting proposals, the criteria for
24 evaluation of a proposal and its relative weight, and procedures for making

1 awards;

2 (e) The proposed terms and conditions for the construction management services
3 contract, including a description of the scope of services to be provided;

4 (3) Notice of any request for proposals shall be advertised in accordance with the
5 provisions of section 17 of this Act;

6 (4) After obtaining and evaluating proposals, a purchasing agency may accept the
7 proposal it considers the most advantageous to the purchasing agency. Acceptance
8 of a proposal shall be by written notice to the construction manager submitting the
9 accepted proposal, and by simultaneously notifying in writing the other construction
10 managers that their proposals were not accepted; and

11 (5) The purchasing agency shall reserve the right to reject any or all proposals submitted.

12 Section 86. Each contract for a public improvement shall have a licensed design professional
13 actively involved in the project from the start of design through final completion as required by
14 chapter 36-18A.

15 Section 87. No contract for the transportation of students may exceed five years. Specific
16 provisions of the contract may be renegotiated during the term of the contract if guidelines for
17 making changes are in the contract. Any change made during the term of the contract shall be
18 reported in the school board minutes.

19 Section 88. No contract for the services of a local school food service management company
20 may exceed one year. An original contract for the services of a school food service management
21 company may be renewed annually no more than four times consecutively following the original
22 contract. Both bid and contract shall specify that the contract may be renewed, but the local
23 school is not required to renew the contract. Specific provisions of the original contract may
24 be renegotiated prior to renewal if guidelines for making changes are in the original contract.

1 The school board shall record in its minutes any changes made during the term of a food service
2 management contract or renewal.

3 Section 89. The governing board of a unit of local government shall be exempted from the
4 provisions of this Act if it is able to purchase supplies at a substantial savings at a public sale
5 or auction. Any performance bond required by § 5-21-1 may be waived on items purchased for
6 less than ten thousand dollars at a public sale or auction. The governing board shall contact and
7 attempt to obtain competitive quotations from at least three suppliers of identical or similar
8 supplies. The board may authorize an agent to attend a sale or auction and expend an amount
9 not in excess of eighty percent of the average of the quotations received. A record of the names
10 of the suppliers, the quotations received, and the procurement procedures used in purchasing
11 shall be documented, noted in the minutes, and retained on file by the governing board.

12 Section 90. If a municipality requires a developer to install water and sanitary sewer trunk
13 lines or mains, sewer collection systems, or streets at the expense of the developer and the
14 municipality requires the size of the trunk line or main, sewer collection systems, or streets to
15 be larger than the developer's requirements, the price difference paid by the municipality and
16 as determined by a licensed engineer's estimate is exempt from the provisions of this Act.

17 Section 91. Nothing in this Act or chapter 5-21 may be so construed as to prevent counties
18 or townships from constructing or maintaining the county highway system and any secondary
19 highways by means of drags, road planers, tractors, and other approved mechanical devices
20 owned by said counties or townships. Nothing in this Act and chapter 5-21 may be construed
21 to prevent the construction of dams in connection with water conservation projects if the cost
22 of materials used does not exceed the total cost of twenty-five hundred dollars.

23 Section 92. The bid requirements of this Act do not apply to the purchase of fuel by units
24 of local government. The governing board of a unit of local government may, instead of

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

7 Section 93. For any contracts entered into pursuant to § 9-32-11 or for any supply contract,
8 any local government may include a procedure for adjusting prices to meet changing market
9 conditions not within the control of the vendor. The adjustments may not result in increases in
10 the profit of the vendor, and shall be supported by written justification filed with the purchasing
11 agent of the unit of local government.

12 Section 94. Notwithstanding the provisions of this Act, any purchasing agency of a local
13 governmental unit may purchase, without advertising for bids, from a willing vendor, any
14 supplies contained in the state contract list established pursuant to section 101 of this Act, or
15 from any willing vendor at a price at or below that shown in the state contract. The governing
16 body of the purchasing agency shall note in its minutes what supplies were purchased from the
17 state contract and shall further note the identity and address of the vendor and the price paid. If
18 an item is purchased at a price lower than that found on the state contract, the purchasing agency
19 shall note that fact in its minutes and show the identity and address of the vendor and the price
20 paid.

21 Section 95. The procurement of motor vehicles by the state shall only be from authorized
22 dealers licensed by the State of South Dakota.

23 Section 96. The Bureau of Administration shall classify all supplies purchased for the use
24 of every agency of state government. The bureau shall group items of the same class so that

1 contracts may be grouped for like commodities or classes of commodities.

2 Section 97. State agencies shall submit estimates of projected purchases within established
3 commodity classifications as required by the Bureau of Administration. The bureau may change
4 or modify the agency estimates in any manner determined to be in the best interest of the state.

5 Section 98. The Bureau of Administration may pool the combined estimated needs of
6 several agencies for identical supplies or services under one contract.

7 Section 99. For any state contract, any electronic sealed bid or proposal may only be
8 submitted through an electronic procurement system authorized for use by the Bureau of
9 Administration.

10 Section 100. The Bureau of Administration may obtain expert advice and assistance from
11 any officer or employee of any state agency for recommendations or assistance in the
12 preparation of specifications and in the examination of bids or proposals or testing of samples
13 submitted with bids or proposals.

14 Section 101. The Bureau of Administration shall establish a state contract list that contains
15 a listing of the supplies or services which are in contracts executed by the bureau. The list shall
16 also contain the name and address of the vendor supplying the supplies or services and the price
17 of the item. The bureau shall make the contract list available to other purchasing agencies in a
18 manner determined by the bureau to be the most efficient.

19 Section 102. The Bureau of Administration may establish a state bidders list in order to
20 facilitate the notification of official state invitations for bids or requests for proposals. Bidders
21 may request placement on the state bidders list and notification of any lettings issued under this
22 chapter. The bureau may establish by rules, promulgated pursuant to chapter 1-26, a fee for
23 placement on the list to defray the cost of administration. Any fees charged shall be deposited
24 in the internal service fund created in section 103 of this Act.

1 Section 103. There is hereby created in the state treasury a procurement management
2 internal service fund. The commissioner of administration shall apportion all expenses incurred
3 in the administration of the procurement management system to all state departments, agencies,
4 and institutions utilizing such system. Payments received therefrom shall be deposited into the
5 procurement management internal service fund.

6 Section 104. If, after all bids or proposals are examined, the Bureau of Administration is
7 satisfied that it can procure any or all of the supplies or services covered by the bids or proposals
8 more advantageously elsewhere than from those submitting bids or proposals, it may reject any
9 or all bids or proposals and procure any or all of the required supplies or services at the most
10 advantageous price.

11 Section 105. The attorney general shall draw all state contracts for supplies let under the
12 provisions of this Act. Each contract shall be signed by the commissioner of administration or
13 a designee, on the part of the state, and by the party to whom the contract has been awarded.
14 Each contract and any required bond shall be filed in the Bureau of Administration.

15 Section 106. If a contract price for goods entered into by the state becomes unreasonable in
16 view of changing market conditions, the Bureau of Administration may cancel the contract or
17 adjust the contract price to meet the changing market conditions if it is necessary to obtain
18 necessary supplies at the required time. Any contract price adjustment shall be justified in
19 writing by the contractor to the Bureau of Administration and a copy of the adjustment and the
20 written justification for the adjustment by the contractor and the bureau shall be filed with the
21 auditor general. No contract price adjustment may allow for increased management costs or for
22 an increase in the dollar amount of profit for the contractor having the contract. No contract
23 price adjustment resulting in an increase may be made for or during the first ninety days of an
24 annual contract.

1 Section 107. The Bureau of Administration, after notice to the business involved, may
2 suspend or debar a business for cause from consideration of any state contracts. The suspension
3 may not exceed three months and the debarment may not exceed three years. Any action to
4 debar or suspend shall be conducted by the Bureau of Administration pursuant to chapter 1-26.

5 Section 108. Each state contract for printing shall provide for a specific amount of penalty
6 for failure on the part of the contractor to deliver the public printing in accordance with the
7 plans and specifications within the time to be designated in the contract. The penalty shall be
8 a fixed sum for each day so delayed. The penalty shall be applied by the Bureau of
9 Administration according to the contract. The amount of the penalty shall be deducted in the
10 voucher for payment for the work done under the contract. The state auditor may draw no
11 warrant for any amount deducted by the bureau in any voucher certified for payment by the
12 bureau. However, no contractor may be held accountable for any delay occasioned by holding
13 proof sheets.

14 Section 109. No printing office within state government, whether the office is within the
15 Bureau of Administration or within an institution of higher education, may accept printing
16 contracts or jobs from private individuals or organizations.

17 Section 110. The Bureau of Administration shall establish by rules, promulgated pursuant
18 to chapter 1-26, the criteria by which any publication, brochure, pamphlet, or flyer with a total
19 cost exceeding one hundred dollars, paid for and distributed by a state agency shall bear an
20 inscription listing the publisher, the number of copies published, and the approximate cost of
21 publication per copy.

22 Section 111. The Bureau of Administration shall purchase, if the price is reasonably
23 competitive and the quality is acceptable, soybean-based inks in lieu of conventional inks for
24 use in any state government operations. The bureau may require the use of soybean-based inks

1 by any private vendor under contract to a state agency in carrying out the terms of the contract
2 if the price of the inks is reasonably competitive and the quality is acceptable.

3 Section 112. The Bureau of Administration may enter into agreements with purchasing
4 agents in any other state or the United States government under which any of the parties may
5 agree to participate in, administer, sponsor, or conduct purchasing transactions under a joint
6 agreement or contract for the purchase of supplies or contractual services. The Bureau of
7 Administration may cooperate with purchasing agents and other interested parties in any other
8 state or the United States government to develop uniform purchasing specifications on a
9 regional or national level to facilitate cooperative interstate purchasing transactions.

10 Section 113. No agency of the state may award or renew a contract for professional services
11 exceeding fifty thousand dollars without complying with the procedures set forth in this section
12 to section 118 of this Act, inclusive. Any agency seeking such professional services shall issue
13 a request for proposals. The agency shall publish any request for proposals issued pursuant to
14 this section on the electronic procurement system maintained by the Bureau of Administration.
15 The request for proposals shall include the procedures for the solicitation and award of the
16 contract.

17 Section 114. The request for proposals shall state the relative importance of evaluation
18 criteria to be used in the ranking of prospective contractors. The agency shall include the
19 following evaluation criteria in any request for proposals:

- 20 (1) Specialized expertise, capabilities, and technical competence as demonstrated by the
21 proposed approach and methodology to meet the project requirements;
- 22 (2) Resources available to perform the work, including any specialized services, within
23 the specified time limits for the project;
- 24 (3) Record of past performance, including price and cost data from previous projects,

- 1 quality of work, ability to meet schedules, cost control, and contract administration;
- 2 (4) Availability to the project locale;
- 3 (5) Familiarity with the project locale;
- 4 (6) Proposed project management techniques; and
- 5 (7) Ability and proven history in handling special project constraints.

6 Section 115. The agency and the highest ranked contractor shall mutually discuss and refine
7 the scope of services for the project and shall negotiate terms, including compensation and
8 performance schedule. The compensation level paid shall be reasonable and fair to the agency,
9 as determined by the agency. If the agency and the highest ranked contractor are unable for any
10 reason to negotiate a contract at a compensation level that is reasonable and fair to the agency,
11 the agency shall, by notification either orally or in writing, terminate negotiations with the
12 contractor. The agency may then negotiate with the next highest ranked contractor. The
13 negotiation process may continue through successive contractors, according to agency ranking,
14 until an agreement is reached or the agency terminates the contracting process.

15 Section 116. A register of proposals shall be prepared and maintained by any state agency
16 issuing a request for proposals for a professional service contract. The register shall contain the
17 names of any person whose qualifications were considered and the name of the person that was
18 awarded the contract. Any professional service contract and the documentation that was the
19 basis for the contract is public except for proprietary information which shall remain
20 confidential. The qualifications and any other documentation of any person not issued a contract
21 shall remain confidential.

22 Section 117. The provisions of sections 113 to 116, inclusive, of this Act do not apply to
23 contracts issued for:

- 24 (1) Services of such a unique nature that the contractor selected is clearly and justifiably

1 the only practicable source to provide the service. Determination that the contractor
2 selected is justifiably the sole source is based on either the uniqueness of the service
3 or sole availability at the location required;

4 (2) Emergency services necessary to meet an urgent or unexpected requirement or if
5 health and public safety or the conservation of public resources is at risk;

6 (3) Services subject to federal law, regulation, or policy or state statute, under which a
7 state agency is required to use a different selection process or to contract with an
8 identified contractor or type of contractor;

9 (4) Services for professional legal services and services of expert witnesses, hearing
10 officers, or administrative law judges retained by state agencies for administrative or
11 court proceedings;

12 (5) Services involving state or federal financial assistance passed through by a state
13 agency to a political subdivision;

14 (6) Medical services and home and community-based services;

15 (7) Services to be performed for a state agency by another state or local government
16 agency or contracts made by a state agency with a local government agency for the
17 direct provision of services to the public; or

18 (8) Services to be provided by entertainers for the state fair and other events.

19 Section 118. Notwithstanding any other provisions of law, an agency that is required to issue
20 a decision in a contested case proceeding in one year or less may increase its statutory deadline
21 for issuing the agency decision by sixty days if the agency seeks to enter into a professional
22 services contract covered by sections 113 to 116, inclusive, of this Act.

23 Section 119. The Bureau of Administration shall publish notice of its intent to purchase
24 property or liability insurance or performance bonds. Publication of a notice containing a

1 description of the coverage sought as a display advertisement in at least three newspapers of
2 general circulation in different parts of the state at least sixty days prior to the purchase, along
3 with publication in the South Dakota Register, shall be considered compliance with the notice
4 requirements of this section.

5 The notice provisions of this section do not apply to expenditures of less than five thousand
6 dollars.

7 Section 120. The code counsel shall transfer §§ 5-23-38, 5-23-39, and 5-23-40 to chapter
8 1-40 and shall make the necessary changes to the internal references contained in those sections.

9 Section 121. The Bureau of Administration shall keep suitable records in which shall be
10 recorded all requisitions for public printing, stationery, and supplies, all advertisements, bids,
11 certified checks, bonds, contracts, orders, vouchers, and all acts and proceedings taken under
12 the provisions of this Act. All requisitions, advertisements, bids, certified checks, bonds,
13 specifications, schedules of specifications, contracts, reports, and any other papers or documents
14 executed under the provisions of this Act shall constitute the files in the bureau, except as
15 otherwise provided for in this Act.

16 Section 122. The Bureau of Administration, any other designated state purchasing agent, and
17 any agency making purchases shall, to the extent practicable, make purchasing selections to
18 maximize the purchase of environmentally preferable products, including cleaning products
19 having properties that minimize potential impacts to human health and the environment,
20 products designed to conserve energy and water, biobased products and products containing
21 recycled materials and recovered materials. Each agency shall take steps to reduce consumption
22 of paper and paper products. The Bureau of Administration may promulgate rules, pursuant to
23 chapter 1-26, to establish specifications and requirements for the purchase for use by state
24 government agencies of environmentally preferred products.