

State of South Dakota

EIGHTY-FIFTH SESSION
LEGISLATIVE ASSEMBLY, 2010

400R0344

HOUSE GOVERNMENT OPERATIONS AND AUDIT

ENGROSSED NO. **HB 1046** - 2/22/2010

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 That chapters 5-18, 5-19, 5-20, and 5-23 be repealed.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) "Environmentally preferable product," any cleaning or maintenance product having
23 properties that minimize potential impacts to human health and the environment, any
24 product designed to conserve energy and water, any biobased product, and any

- 1 product containing recycled materials or recovered materials;
- 2 (14) "Internet," the international computer network of both federal and nonfederal
3 interoperable packet switched data networks, including the graphical subnetwork
4 called the world wide web;
- 5 (15) "Invitation for bids," any document, whether attached or incorporated by reference,
6 used for soliciting bids;
- 7 (16) "Officer," any elected official or administrative officer appointed to that position by
8 the governing body;
- 9 (17) "Performance criteria," requirements for the public improvement, including as
10 appropriate, capacity, durability, production standards, ingress and egress
11 requirements, building code requirements, or other criteria for the intended use of the
12 public improvement, expressed in performance-oriented specifications or drawings
13 suitable to allow the design-builder to make a proposal;
- 14 (18) "Performance criteria developer," any person and the person's subcontractors retained
15 by the purchasing agency to develop performance criteria;
- 16 (19) "Professional services," services arising out of a vocation, calling, occupation, or
17 employment involving specialized knowledge, labor, or skill, and the labor or skill
18 involved is predominantly mental or intellectual, rather than physical or manual;
- 19 (20) "Proposal," any offer to enter into contract in response to a request for proposals;
- 20 (21) "Purchasing agency," any governmental body or officer authorized by law,
21 administrative rule, or delegated authority, to enter into contracts;
- 22 (22) "Public improvement," the process of building, altering, repairing, improving, or
23 demolishing any public infrastructure facility, including any structure, building, or
24 other improvements of any kind to real property, the cost of which is payable from

1 taxes or other funds under the control of the purchasing agency, and includes any
2 local improvement for which a special assessment is to be levied;

3 (23) "Qualified agency," any public or private nonprofit corporation geographically
4 located in the State of South Dakota that provides services for persons with
5 disabilities and is certified by the Department of Human Services;

6 (24) "Request for proposals," any document, whether attached or incorporated by
7 reference, utilized by a purchasing agency when soliciting proposals for contracts for
8 the procurement of supplies, services, or construction;

9 (25) "Request for qualifications," the document or publication whereby a purchasing
10 agency solicits interested design-builders to pre-qualify for a design-build contract;

11 (26) "Resident," any person, partnership, association, limited liability company, foreign
12 limited liability company, corporation, or foreign corporation licensed to do business
13 within this state that has maintained a substantial and bona fide place of business and
14 has conducted business from within this state for at least one year prior to the date
15 on which a contract was awarded. The members of the partnership or association
16 shall have been bona fide residents of the state for one year or more immediately
17 prior to bidding upon the contract. A foreign corporation licensed pursuant to
18 §§ 47-1A-1501 to 47-1A-1532, inclusive, is not a resident as defined by this section
19 if the state or country in which it is organized enforces or has a preference for
20 resident bidders;

21 (27) "Sealed bid or proposal," a response to an invitation for bids or request for proposals
22 submitted in a manner where the contents of the bid or proposal cannot be opened or
23 viewed before the date and time of the formal opening without leaving evidence that
24 the bid or proposal has been opened or viewed;

1 (28) "Services," furnishing of labor, time, or effort by a contractor not involving the
2 delivery of a specific end product other than reports which are merely incidental to
3 the required performance;

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

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

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

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

- 13 (1) Competitive sealed bids as provided in section 6 of this Act;
- 14 (2) Competitive sealed proposals as provided in sections 7 and 8 of this Act;
- 15 (3) Small purchases as provided in section 12 of this Act;
- 16 (4) Sole source procurement as provided in section 9 of this Act; or
- 17 (5) Emergency procurement as provided in section 10 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 15 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 withdrawal of
3 a bid or change in bid prices or other provisions of bids prejudicial to the interest of
4 the purchasing agency or fair competition is permitted. The purchasing agency may
5 waive technical irregularities in the bid or proposal of the low bidder or offeror which
6 irregularities do not alter the price, quality, or quantity of the services, or items of
7 tangible personal property bid or offered. Any decision to permit the correction or
8 withdrawal of a bid, or to cancel an award or a contract based on a bid mistake, shall
9 be supported by a written determination made by the purchasing agency, and
10 included in the bid file;

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

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

24 (9) If, after advertising for bids, no firm bids are received, the purchasing agency may

1 negotiate a contract for the purchase of the supplies, services, or public improvement
2 projects at the most advantageous price, if the specifications of the original bid are
3 met;

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

- 7 (a) Award the bid by lottery to one of the identical low bidders; or
- 8 (b) Reject all the bids and resolicit bids for the required supplies, services, or
9 public improvement.

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

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

- 15 (1) The proposals shall be solicited through a request for proposals. The request for
16 proposals shall state the relative importance of price and other factors, if any;
- 17 (2) Public notice of the request for proposals shall be given pursuant to section 15 of this
18 Act;
- 19 (3) A proposal may be submitted either manually or electronically in a manner
20 authorized by the purchasing agency;
- 21 (4) Each proposal shall be opened so as to avoid disclosure of contents to competing
22 offerors during the process of negotiation. A register of proposals shall be prepared
23 documenting the name and address of each offeror and identifying each offeror
24 awarded a contract. The register shall be open for public inspection after contract

1 award;

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

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

21 (7) This section does not apply to state professional service contracts issued pursuant to
22 sections 110 to 119, inclusive, of this Act.

23 Section 9. 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 10. A purchasing agency may make or authorize others to make an emergency
9 procurement without advertising the procurement if rentals are not practicable and there exists
10 a threat to public health, welfare, or safety or for other urgent and compelling reasons. Failure
11 to abide by the bid provisions of this Act in a timely manner is not an emergency. An emergency
12 procurement shall be made with such competition as is practicable under the circumstances. A
13 written determination of the basis for the emergency and for the selection of the particular
14 contractor shall be included in the contract file.

15 Section 11. The purchasing agency shall maintain a record listing each contract made under
16 sole source procurement and emergency procurement for a minimum of five years. The record
17 shall contain:

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

22 Section 12. Unless otherwise specified by statute, purchases of supplies and services under
23 twenty-five thousand dollars shall be made as follows:

- 24 (1) State purchases of supplies over one thousand dollars and under twenty-five thousand

1 dollars shall be processed by the Bureau of Administration and shall be made by first
2 obtaining three quotes from different vendors. If three quotes cannot be obtained, a
3 sole source justification shall accompany the purchase request and the Bureau of
4 Administration may approve the purchase if in the best interest of the state, require
5 additional quotes to be obtained, or require the purchase be advertised for bids;

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

8 (3) State purchases of services under twenty-five thousand dollars may be made in
9 accordance with procedures established by the purchasing agency in the best interests
10 of the state; and

11 (4) For all other purchasing agencies, purchases under twenty-five thousand dollars may
12 be made in accordance with procedures established by the purchasing agency.

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

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

18 Section 14. There is hereby created a centralized public bid exchange. The Bureau of
19 Administration shall establish the exchange either within the bureau or within another public
20 or private organization. The purpose of the exchange is to facilitate the publishing of official
21 state and political subdivision bids to provide greater notice to bidders and to the state and its
22 political subdivisions. The exchange shall maintain a list of all state bids and proposals and all
23 bids and proposals provided by political subdivisions which participate in the exchange. The
24 exchange shall set and charge each bidder, offeror, or political subdivision or both a fee for

1 participation in the exchange to defray the cost of administering the exchange.

2 Section 15. If the purchasing agency intends to enter into a contract for any public
3 improvement that involves the expenditure of fifty thousand dollars or more, or a contract for
4 the purchase of supplies or services, other than professional services, that involves the
5 expenditure of twenty-five thousand dollars or more, the purchasing agency shall advertise for
6 bids or proposals. The advertisement shall appear as a legal notice in the appointed legal
7 newspaper. The advertisement shall be printed at least twice, with the first publication at least
8 ten days before opening of bids or the deadline for the submission of proposals. The first
9 publication shall be in each official newspaper of the purchasing agency, and the second
10 publication may be in any legal newspaper of the state chosen by the purchasing agency. If the
11 purchasing agency has no official newspaper, the first publication shall be made in a legal
12 newspaper with general circulation in the jurisdiction of the purchasing agency to be selected
13 by the purchasing agency. The advertisement shall state the time and place where the bids will
14 be opened or the deadline for the submission of proposals. In each notice, the purchasing agency
15 shall reserve the right to reject any or all bids or proposals.

16 Section 16. After receiving notice of a contract award, the successful bidder or offeror shall
17 enter into a contract with the purchasing agency within the time specified in the invitation for
18 bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time
19 specified, the contract may be awarded to the next lowest responsive and responsible bidder or
20 offeror for the same kind of work and material, unless all bids or proposals are rejected. The
21 defaulting bidder or offeror shall be responsible for the difference in price.

22 Section 17. If any successful bidder or offeror fails to fulfill the conditions of an awarded
23 contract, the purchasing agency may proceed to recover from the defaulting party whatever
24 damages may have been sustained as a result of the default. The purchasing agency shall have

1 all remedies provided in the contract and provided by law.

2 Section 18. No officer or employee who approves, awards, or administers a contract
3 involving the expenditure of public funds or the sale or lease of property, may have an interest
4 in a contract that is within the scope of the officer's or employee's official duties. This
5 prohibition includes any officer or employee who, in his or her official capacity, recommends
6 the approval or award of the contract or who supervises a person who approves, awards, or
7 administers the contract. This prohibition does not include any officer who serves without
8 compensation or who may be paid per diem pursuant to § 4-7-10.4. Any contract made in
9 violation of this section is void. Any officer or employee who knowingly violates this section
10 is guilty of a Class 2 misdemeanor.

11 Section 19. Any specification shall seek to promote overall economy for the purposes
12 intended and encourage competition in satisfying the purchasing agency's needs, and may not
13 be unduly restrictive. Brand name or equal specifications may be used if the purchasing agency
14 determines in writing that:

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

22 Section 20. Brand name or equal specifications shall seek to designate three, or as many
23 different brands as are practicable, as "or equal" references and shall further state that
24 substantially equivalent products to those designated will be considered for award. Unless the

1 purchasing agency determines in writing that the essential characteristics of the brand names
2 included in the specifications are commonly known in the industry or trade, brand name or equal
3 specifications shall include a description of the particular design, functional, or performance
4 characteristics which are required. If a brand name or equal specification is used in a
5 solicitation, the solicitation shall contain explanatory language that the use of a brand name is
6 for the purpose of describing the standard of quality, performance, and characteristics desired
7 and is not intended to limit or restrict competition.

8 Section 21. Brand name specification may be used only if the purchasing agency makes a
9 written determination that only the identified brand name item or items will satisfy the agency's
10 needs. The agency shall seek to identify sources from which the designated brand name item or
11 items can be obtained and shall solicit such sources to achieve whatever degree of price
12 competition is practicable. If only one source can supply the requirement, the procurement shall
13 be made under the sole source procurement provisions of section 9 of this Act.

14 Section 22. Each contract shall be in writing and shall be signed on behalf of the purchasing
15 agency by the authorized officials.

16 Section 23. The provisions of this Act do not apply to:

- 17 (1) Any highway construction contract entered into by the Department of Transportation;
- 18 (2) Any contract for the purchase of supplies from the United States or its agencies or
19 any contract issued by the General Services Administration;
- 20 (3) Any purchase of supplies or services, other than professional services, by purchasing
21 agencies from any active contract that has been awarded by any government entity
22 by competitive sealed bids or competitive sealed proposals or from any contract that
23 was competitively solicited and awarded within the previous twelve months;
- 24 (4) Any equipment repair contract;

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

- 1 (14) Any seeds, fertilizers, herbicides, pesticides, feeds, and supplies used in the operation
2 of farms by institutions under the control of the Board of Regents;
- 3 (15) Any purchase of supplies for any utility owned or operated by a municipality if the
4 purchase does not exceed the limits established in section 15 of this Act; or
- 5 (16) For political subdivisions, any contract for asbestos removal in emergency response
6 actions and any contract for services provided by individuals or firms for consultants,
7 audits, legal services, ambulance services, architectural services and engineering,
8 insurance, real estate services, or auction services.

9 Section 24. The state auditor may stop the letting or the execution of any contract with the
10 state, or with any state officer, commission, board, institution, or agency by serving a written
11 notice of the order on the officer, commission, or board involved, the secretary of state, the
12 attorney general, and on the contractor, if any, stating the grounds on which the state auditor has
13 determined that the contract is illegal, unauthorized, or improper.

14 Section 25. From any order or decision of the state auditor stopping execution of any
15 contract obligation of the state, any person aggrieved or interested may appeal to the State Board
16 of Finance at any time within twenty days after the stop order was filed with either the attorney
17 general, the secretary of state, the state treasurer, or the department involved by serving notice
18 of appeal on the state auditor and the Governor. The notice shall state the decision being
19 appealed and shall ask for a hearing on the appeal. Upon receiving the notice, the Governor shall
20 call a meeting of the State Board of Finance. The board shall consider the appeal, make a
21 decision, enter the decision in the journal, and give notice to the appellant and the department
22 involved. Any order of the Board of Finance as expressed in the board's decision is binding upon
23 the state department, institution, agency, or office involved and shall be carried out accordingly.

24 Section 26. Except for canned meat food products that are not available from a domestic

1 source, no purchasing agency may purchase any meat food products that are the products of any
2 foreign country or that are imported from outside the boundaries of the United States.

3 Section 27. Any milk processor licensed pursuant to § 39-6-7, bidding any milk or milk
4 product under a competitive bid contract, shall receive the bid contract if the processor's bid is
5 equal to, or within five percent or less, of any other bidder who is not a licensed processor.

6 Section 28. In awarding a contract, if all things are equal, including the price and quality of
7 the supplies or services, a purchasing agency shall give preference:

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

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

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

14 (4) To a resident business whose principal place of business is located in the State of
15 South Dakota, if the other equal low bid or proposal was submitted by a resident
16 business whose principal place of business is not located in the State of South
17 Dakota; or

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

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

22 Section 29. A resident bidder shall be allowed a preference on a contract against the bid of
23 any bidder from any other state or foreign province that enforces or has a preference for resident
24 bidders. The amount of the preference given to the resident bidder shall be equal to the

1 preference in the other state or foreign province.

2 Section 30. The Bureau of Administration shall maintain a current list of all states that have
3 a resident bidder preference law and the amount or percent of preference taken by each state.
4 The bureau shall make the list available upon request to any purchasing agency.

5 Section 31. A qualified agency may submit a list of supplies, custodial services, and
6 maintenance services, provided by the agency, to the Bureau of Administration. The bureau
7 shall make the information available to purchasing agencies of the State of South Dakota on a
8 website maintained by the bureau.

9 Section 32. No provision of this Act may be so construed as to prohibit any person with a
10 disability from negotiating a contract for service or supplies or in any other manner doing
11 business with any purchasing agency.

12 Section 33. A purchasing agency may give preference to the purchase of supplies
13 manufactured from recycled or biobased materials if the bids are within five percent of the
14 lowest bid offering nonrecycled or nonbiobased materials.

15 Section 34. Prior to the award of a contract, the purchasing agency may require of each
16 bidder or offeror such information as shall allow the agency to determine whether a bidder or
17 offeror is entitled to a preference or subject to having a preference enforced against it under this
18 Act.

19 Section 35. In addition to the provisions of this Act, any procurement utilizing federal funds
20 is subject to any federal statutes and regulations governing the use and payment of such funds.

21 Section 36. Any bidder or offeror who fails to comply with the provisions of this Act, or
22 who provides any false information in the submission of any bid or offer is subject to having the
23 bid or offer disallowed by the purchasing agency soliciting the bid or offer. Any contract entered
24 into in violation of this Act is null and void.

1 Section 37. The Bureau of Administration shall serve as the central procurement agency of
2 the State of South Dakota. Except for the legislative and judicial branches and as otherwise
3 specifically provided in this Act, the Bureau of Administration shall procure, or authorize the
4 procurement of all supplies and public improvements for state government. No claim for any
5 such procurement may be paid unless authorization has been issued by the bureau. All state
6 agencies and institutions are responsible for the procurement of services for their respective
7 governmental unit. The governing body of all other purchasing agencies, including the
8 legislative and judicial branches of state government, is responsible for procuring or authorizing
9 the procurement of supplies, services, and public improvements for their respective
10 governmental unit.

11 Section 38. In the procurement of supplies or services, a purchasing agency may require a
12 bond or an approved security to be submitted with any bid or proposal as a guarantee that the
13 bidder will enter into a contract with the purchasing agency. No offeror or bidder may be
14 required to leave the bond or security posted for a longer period than thirty days if the bid or
15 proposal is not accepted. The bond or approved security of the successful offeror or bidder shall
16 be returned upon the signing of the contract.

17 Section 39. For any public improvement contract, a performance and payment bond is
18 required pursuant to chapter 5-21. For any other contract, a purchasing agency may require a
19 bond or an approved security to be provided by the successful offeror or bidder as a guarantee
20 of faithful performance of the contract. In any case, the bond or approved security of the
21 successful offeror or bidder shall be returned upon satisfactory completion of the contract.

22 Section 40. If a contract is for the construction of a public improvement, the required
23 advertisement shall state where the plans and specifications may be examined. The plans and
24 specifications for the construction of any public improvement shall be and remain on file in the

1 office of the purchasing agency at all times from the beginning of the publication of the
2 advertisement for bids until the completion of the public improvement. The purchasing agency
3 shall, upon request, furnish at least one copy of the plans and specifications, without charge, to
4 each contractor resident in South Dakota who intends, in good faith, to bid upon the public
5 improvement. The copy shall be available at the date of the first publication of the advertisement
6 for bids. The purchasing agency may require the return of the copy at the time of the opening
7 of the bids.

8 Section 41. If the invitation for bids is for the construction of a public improvement, each
9 bid shall contain a certified check or a cashier's check, for five percent of the amount of the bid.
10 Such check shall be certified or issued by either a state or a national bank and payable to the
11 purchasing agency or to an officer of the purchasing agency letting the contract and inviting
12 bids. In lieu of a check, a bid may contain a bid bond for ten percent of the amount of the bid.
13 Such bond to be issued by a surety authorized to do business in this state payable to the
14 purchasing agency, as a guaranty that the bidder will enter into a contract with the purchasing
15 agency, its board or officers thereof, in accordance with the terms of the letting and bid in case
16 the bidder be awarded the contract.

17 Section 42. Notwithstanding the provisions of section 41 of this Act, the requirement of a
18 bid bond, certified or cashier's check, cash, or other security may be waived by the purchasing
19 agency if the bid submitted does not exceed fifty thousand dollars.

20 Section 43. No purchasing agency may, directly or indirectly, require or direct a bidder on
21 any public improvement contract that is about to be or has been competitively bid to obtain from
22 a particular insurer or insurance producer any surety bond or contract of insurance required in
23 the bid or contract or required by any law, ordinance, or rule. However, the surety insurer shall
24 be an authorized insurer under Title 58. Nothing in this section prevents any purchasing agency

1 from exercising the right to approve or reject a surety bond or contract of insurance as to its
2 form or sufficiency.

3 Section 44. If the lowest responsive and responsible bid for a public improvement project
4 exceeds the final estimated project cost, the Bureau of Administration, acting on behalf of the
5 state, or any other purchasing agency may negotiate with that low bidder for the construction
6 of a public improvement at the most advantageous price.

7 Section 45. Prior to execution of a public improvement contract, a successful bidder shall
8 certify:

- 9 (1) That no more than twenty percent of the cost of labor included in the contract is
10 being provided by nonresident subcontractors; or
- 11 (2) That more then twenty percent of the cost of labor included in the contract is being
12 provided by nonresident subcontractors because resident contractors are not available
13 and at competitive prices.

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

16 Section 46. If a purchasing agency is to supply tangible personal property to be used in
17 performance of the contract and the personal property is taxable to the contractor under
18 § 10-46-5, the specifications or notice to bidders shall state the purchase price or fair market
19 value of the tangible personal property, whichever is the greater. The stated amount shall be the
20 basis for determining the contractor's liability for tax.

21 Section 47. Any funds forfeited by a bidder or surety shall accrue to the funds provided for
22 construction of the public improvement.

23 Section 48. No bidder on a public improvement contract may be required, either in the
24 invitation for bids or otherwise, to leave a certified check or cashier's check, or bid bond, posted

1 for a longer period than thirty days if the bid is not accepted. The check or bid bond of the
2 successful bidder shall be returned upon the execution of the contract and surety hereafter
3 provided for. The checks or bid bonds of all unsuccessful bidders shall be, by the purchasing
4 agency, immediately returned to the respective makers thereof and not more than thirty days
5 shall elapse between the opening of the bids and either the acceptance of the bid of the lowest
6 responsible bidder or the rejection of all of the bids presented.

7 Section 49. If a contract is based upon plans and specifications prepared by an architect or
8 engineer, the contract's terms and conditions shall comply with the provisions provided in the
9 "General Conditions of the Contract for Construction," Fourteenth Edition, by the American
10 Institute of Architects in effect on January 1, 2010, the "ConsensusDOCS 200 Standard
11 Agreement and General Conditions Between Owner and Contractor," by ConsensusDOCS LLC
12 in effect January 1, 2010, or the "Standard General Conditions of the Construction Contract,"
13 1990 Edition, by the Engineer's Joint Contract Documents Committee, in effect January 1, 2010,
14 except when in conflict with the laws of this state. However, the purchasing agency may modify
15 or delete, on a contract by contract basis, any portion of the "General Conditions of the Contract
16 for Construction," "ConsensusDOCS 200 Standard Agreement and General Conditions Between
17 Owner and Contractor," or the "Standard General Conditions of the Construction Contract."

18 Section 50. The contract may permit progress payments, but an amount necessary to
19 complete the improvement shall be retained from the final payment until the contract is executed
20 in full and the public improvement completed to the satisfaction and acceptance of the
21 purchasing agency. However, if the contractor has furnished the purchasing agency all required
22 records and reports and a final inspection has been made, the purchasing agency shall pay to the
23 contractor interest as set by the governing body at a rate of not less than the category E rate of
24 interest as established by § 54-3-16 on the amounts retained and on the final payment due the

1 contractor beginning thirty days after the work under the contract has been completed, as
2 evidenced either by the completion date established by the architect's or engineer's letter of
3 acceptance or by the use and occupancy of the public improvement. The interest shall continue
4 until the date when payment is tendered to the contractor unless delay in payment has been the
5 result of federal participation in the contract in which event interest may not begin until thirty
6 days after payment by the federal authority involved. If a portion of a progress payment is
7 retained, other than the final payment, the purchasing agency shall pay to the contractor interest
8 as set by the purchasing agency at a rate of not less than the category E rate of interest as
9 established by § 54-3-16 on the amount retained beginning thirty days after the contractor has
10 furnished the purchasing agency with all required records and reports and a progress inspection.

11 Section 51. The purchasing agency may include in any contract for a public improvement
12 provisions for a bond or the deposit of securities in lieu of sums retained from payments due a
13 contractor for work performed pursuant to the terms of the contract. The contract document
14 shall state the types of bond or securities to be accepted and the procedural requirements for the
15 deposits.

16 Section 52. If a purchasing agency elects to use and occupy the public improvement before
17 acceptance, the purchasing agency shall pay all amounts due under the contract except double
18 the amount that the architect or engineer estimates to be necessary to complete the improvement
19 in accordance with the plans and specifications or one percent of the contract price, or in any
20 event not less than three hundred dollars. No interest may commence until thirty days after the
21 work has been fully completed.

22 Section 53. The purchasing agency may appoint a competent superintendent who may be
23 the architect or engineer furnishing the plans and specifications for the public improvement. The
24 superintendent shall report to the purchasing agency or board every thirty days as to the progress

1 and character of the work done by the contractor. Upon the reports of the superintendent, the
2 purchasing agency shall make payments promptly to the contractor during the process of
3 construction to the extent provided by the contract based on the value of the work done and
4 materials furnished. The payments shall be divided into such installments as the board and the
5 contractor may agree upon at the time of entering into the contract, and which shall be included
6 in and be a part of the terms of the contract. No payment, however, constitutes an acceptance,
7 in whole or in part, by the purchasing agency prior to making of the final payment and
8 acceptance in full completion of the contract. Final payment of any sums due to the contractor
9 shall be made within thirty days after the completion and acceptance of the public improvement
10 by the purchasing agency.

11 Section 54. No person, firm, or corporation may act as architect or engineer and also
12 contractor on any public improvement project if the amount to be expended exceeds one
13 hundred thousand dollars. Any public improvement of an emergency nature which affects the
14 public health and safety of the state and are funded through the use of an emergency
15 appropriation or special appropriation, and any full-service firm which specialize in the design,
16 fabrication, and installation of cultural and educational exhibits are exempt from this section.

17 Section 55. Each purchasing agency, on entering into a contract for a public improvement,
18 shall provide in the contract that the contractor is required to pay the Department of Labor of
19 South Dakota all contributions and interest due under the provisions of chapter 61-5, on wages
20 paid to individuals employed in performance of the contract.

21 Section 56. No purchasing agency may award any contract for the construction of any public
22 improvement unless the purchasing agency has verified with the Department of Revenue and
23 Regulation that the contractor has a contractor's excise tax license pursuant to chapter 10-46A
24 or 10-46B.

1 Section 57. Before final payment may be made on any contract for public improvement, the
2 purchasing agency awarding the contract shall require the contractor to furnish a certificate from
3 the Department of Labor that all contributions and interest due to the Department of Labor in
4 the performance of the contract have been paid.

5 Section 58. Any amendment or change order to an existing contract for construction,
6 reconstruction, or remodeling of a public improvement does not need to be bid if:

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

22 Section 59. A purchasing agency may enter into design-build contracts for public
23 improvements, if the following conditions are met:

- 24 (1) The purchasing agency shall, prior to issuing any design-build request for proposals,

1 establish and publish procedures for the solicitation and award of design-build
2 contracts. The Bureau of Administration shall establish the procedures for the state.

3 The procedures shall include the following:

4 (a) The procedure to select or designate a performance criteria developer utilizing
5 a qualification based process and the procedure to prepare performance
6 criteria;

7 (b) The procedures for the preparation and contents of a design-build request for
8 proposals;

9 (c) The procedure and standards to be used to qualify or pre-qualify
10 design-builders;

11 (d) The procedures for preparing and submitting proposals;

12 (e) The procedures for evaluating proposals;

13 (f) The procedures for negotiations between the purchasing agency and those
14 submitting proposals prior to the acceptance of a proposal. The procedures
15 shall contain safeguards to preserve confidential information and proprietary
16 information supplied by those submitting proposals, consistent with section
17 73 of this Act;

18 (g) The procedures for awarding and executing design-build contracts;

19 (h) The procedures for awarding design-build contracts in the event of public
20 emergencies as defined in section 10 of this Act; and

21 (i) The procedures for acting on formal protests relating to the solicitation or
22 award of design-build contracts;

23 (2) The purchasing agency shall, for each public improvement under this section, make
24 a determination that it is in the best interest of the public to enter into a design-build

1 contract to complete the public improvement. The determination to utilize
2 design-build and the basis for the determination shall be recorded in the project file
3 or the minutes of the meeting of the governing board of the purchasing agency. In
4 making this determination, design-build projects shall meet one or more of the
5 following criteria:

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

16 Section 60. No design-builder may do business in this state unless authorized as either an
17 architect, engineer, or general contractor.

18 Section 61. A design-builder may sublet responsibility for professional design services to
19 any person licensed and registered to provide professional design services in this state. Nothing
20 in this section limits or eliminates the responsibility or liability of any person registered pursuant
21 to chapter 36-18A, on a design-build project to the purchasing agency or other third parties
22 under existing law.

23 Section 62. A design-builder may sublet responsibility for construction or other services to
24 persons registered, licensed, or otherwise qualified to provide those services in this state.

1 Section 63. A design-builder may contract with the purchasing agency to provide
2 professional services or construction services for which the design-builder is not licensed,
3 registered, or qualified to perform, as long as the design-builder sublets all such services
4 required under the design-build contract to a licensed, registered, or otherwise qualified person.

5 Section 64. Any request for proposals shall contain performance criteria developed by a
6 performance criteria developer and approved by the purchasing agency. For projects not
7 exempted under chapter 36-18A from using a registered design professional, the performance
8 criteria developer shall be a design professional registered under chapter 36-18A. For projects
9 exempt under chapter 36-18A from using a registered design professional, the performance
10 criteria developer shall be hired on the basis of qualifications related to projects of similar scope.

11 Section 65. The performance criteria developer may not submit a proposal to enter into the
12 design-build contract and the design-builder may not delegate or contract services under the
13 design-build contract to the performance criteria developer.

14 Section 66. The performance criteria developer shall be either an employee of the purchasing
15 agency or shall be engaged in accordance with statutory procedures for contracting with
16 professional services. With the approval of the purchasing agency, the developer may delegate
17 or contract for the development of specific aspects of the design criteria to other consultants.
18 The performance criteria developer may be retained at the purchasing agency's option through
19 to the completion of the design-build contract.

20 Section 67. The purchasing agency, in consultation with the performance criteria developer,
21 shall determine the scope and level of detail required for the performance criteria. The
22 performance criteria shall be detailed enough to permit a person to submit a proposal in
23 accordance with the design-build request for proposals, given the nature of the public project
24 and the level of design to be provided in the proposal.

1 Section 68. After a minimum of three design-builders have been pre-qualified in accordance
2 with section 70 of this Act, a design-build request for proposals shall be mailed to each
3 pre-qualified design-builder. The minimum number of pre-qualified design-builders is not
4 required for any improvement project that is complex in nature, requires close coordination of
5 design and construction expertise, and does not require significant structural changes, additions,
6 reconstruction, or new construction. The design-build request for proposals shall be prepared
7 for each design-build contract containing the following elements:

- 8 (1) The identity of the purchasing agency which will award the design-build contract
9 and the identity of the performance criteria developer;
- 10 (2) The procedures to be followed for submitting proposals, the criteria for evaluation
11 of a proposal and its relative weight, and the procedures for making awards;
- 12 (3) The proposed terms and conditions for the design-build contract;
- 13 (4) The performance criteria, which shall include the following:
 - 14 (a) The owners preliminary program of space needs and special requirements;
 - 15 (b) Performance standards for materials and equipment; and
 - 16 (c) Minimum system requirements and efficiencies;
- 17 (5) A description of the drawings, specifications, or other submittals to be submitted
18 with the proposal, with guidance as to the form and level of completeness of the
19 drawings, specifications, or submittals that is acceptable;
- 20 (6) A schedule for planned commencement and completion of the design-build contract;
- 21 (7) Budget limits for the design-build contract;
- 22 (8) Affirmative action, disadvantaged business, or set-aside goals or requirements for the
23 design-build contract, if any;
- 24 (9) Requirements for performance and payment bonds, and insurance. These

1 requirements shall meet the requirements of § 5-21-1;

2 (10) The compensation, if any, to be given to design-builders submitting proposals who
3 are not awarded the project;

4 (11) Whether project financing is in place;

5 (12) A schedule for payments to the design-builder;

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

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

8 (15) Warranty and guarantee requirements.

9 Section 69. No design-build request for proposals may include detailed designs or detailed
10 drawings prepared by the criteria developer. The request may, however, include drawings of
11 existing conditions and any preliminary conceptual sketches necessary to illustrate the
12 information required by subdivision (4) of section 68 of this Act. Each conceptual drawing shall
13 contain the minimum information necessary to convey the requirements. No design-build
14 request for proposals may include detailed construction specifications. Any design and
15 construction standards in the request for proposals shall be performance standards only.

16 Section 70. A purchasing agency shall pre-qualify design-builders for design-build contracts
17 by advertising its request for qualifications in accordance with section 15 of this Act. A request
18 for qualifications shall contain the following elements:

19 (1) The identity of the purchasing agency;

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

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

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

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

24 Section 71. Any proposal, submitted pursuant to this section, shall be accompanied by a

1 deposit or bond meeting the requirements of section 41 of this Act. The deposit or security may
2 be forfeited if the proposal is accepted but the design-builder fails to execute the design-build
3 contract.

4 Section 72. Any proposal shall be sealed and may not be opened until expiration of the time
5 established for making proposals as set forth in the design-build request for proposals. To the
6 extent required by the request for proposals, any proposal shall identify each person to whom
7 the design-builder proposes to sublet obligations under the design-build contract. At a
8 minimum, any proposal shall identify each person to whom the design-builder proposes to
9 sublet any design obligations or general construction obligations. Any person so identified may
10 not be replaced without the approval of the purchasing agency. Any proposal shall establish a
11 cost of the design-build contract that may not be exceeded if the proposal is accepted without
12 change. The maximum cost in the proposal may be converted to fixed prices by negotiated
13 agreement between the purchasing agency and the selected design-builder.

14 Section 73. Until a proposal is accepted, the drawings, specifications, and other information
15 in the proposal remain the property of the person making the proposal. The purchasing agency
16 shall make reasonable efforts to maintain the secrecy and confidentiality of any proposal and
17 all information contained in any proposal and may not disclose any proposal or the information
18 contained in a proposal to the design-builder's competitors. The purchasing agency may not
19 disclose, except as may be permitted pursuant to chapter 1-27, confidential and proprietary
20 information contained in any proposal to the public until such time as the purchasing agency
21 takes final action to accept a proposal.

22 Section 74. Once received, any proposal shall be submitted to the performance criteria
23 developer for review. Clarifications may be required to ensure conformance of any proposal
24 with the performance criteria. In seeking clarifications, the performance criteria developer may

1 not reveal any aspect of any design-builder's proposal to any other design-builder. No proposal
2 may be considered until the performance criteria developer issues a written opinion that the
3 proposal is consistent with the performance criteria. Once the performance criteria developer
4 has issued such an opinion, the proposal shall be submitted to the governing body of the
5 purchasing agency for review and evaluation. No proposal or design-build contract may be
6 accepted unless the purchasing agency determines there was adequate competition for such
7 contract.

8 Section 75. After obtaining and evaluating proposals according to the criteria and procedures
9 set forth in the design-build request for proposals, a purchasing agency may accept the proposal
10 it considers most advantageous to the purchasing agency. Acceptance of a proposal shall be by
11 written notice to the design-builder which submitted the accepted proposal. At the same time
12 notice of acceptance is delivered, the purchasing agency shall also inform, in writing, the other
13 design-builders that their proposals were not accepted. Unless all proposals are rejected, a
14 detailed breakdown of the evaluation criteria scores for each proposal received shall be made
15 available to the public after signature execution of the design-build contract. The contract for
16 development of performance criteria shall terminate if a contract is awarded to the
17 design-builder.

18 Section 76. The purchasing agency may reject any and all design-build proposals. The
19 purchasing agency may solicit new proposals using the same or different performance criteria,
20 budget constraints, or qualifications.

21 Section 77. Any design-build proposal may be withdrawn by the proposer for any reason at
22 any time prior to acceptance.

23 Section 78. Any purchasing agency may engage a construction manager if planning,
24 designing, or constructing a public improvement, or if improving, altering, or repairing a public

1 improvement. However, no purchasing agency is required to engage a construction manager.

2 Section 79. Construction management services provided in the planning and design phases
3 of a public improvement project may include:

4 (1) Services provided in the planning and design phases of a public improvement project
5 including the following:

6 (a) Consulting with, advising, assisting, and making recommendations to the
7 public corporation and architect or engineer on all aspects of planning for
8 project construction;

9 (b) Reviewing all plans and specifications as they are being developed and
10 making recommendations with respect to construction feasibility, availability
11 of material and labor, time requirements for procurement and construction,
12 and projected costs;

13 (c) Making, reviewing, and refining budget estimates based on the public
14 corporation's program and other available information;

15 (d) Making recommendations to the public corporation and the architect or
16 engineer regarding the division of work in the plans and specifications to
17 facilitate bidding and awarding of contracts;

18 (e) Soliciting the interest of capable contractors and assisting the public
19 corporation in taking bids on the project;

20 (f) Analyzing the bids received and awarding contracts; and

21 (g) Preparing and monitoring a progress schedule during the design phase of the
22 project and preparation of a proposed construction schedule; and

23 (2) Services provided in the construction phase of the public improvement project
24 including the following:

- 1 (a) Maintaining competent supervisory staff to coordinate and provide general
2 direction of the work and progress of the contractors on the project;
- 3 (b) Observing the work as it is being performed for general conformance with
4 working drawings and specifications;
- 5 (c) Establishing procedures for coordinating among the public corporation,
6 architect or engineer, contractors, and construction manager with respect to all
7 aspects of the project and implementing labor policy in conformance with the
8 requirements of the public corporation's policy and making recommendations;
- 9 (d) Reviewing and processing all applications for payment by involved
10 contractors and material suppliers in accordance with the terms of the contract;
- 11 (e) Making recommendations for and processing requests for changes in the work
12 and maintaining records of change orders;
- 13 (f) Scheduling and conducting job meetings to ensure orderly progress of the
14 work;
- 15 (g) Developing and monitoring a project progress schedule, coordinating and
16 expediting the work of all contractors, and providing periodic status reports
17 to the owner and the architect and engineer; and
- 18 (h) Establishing and maintaining a cost control system and conducting meetings
19 to review costs.

20 Section 80. No construction manager-agent may contract directly with any contractor or
21 supplier for the project.

22 Section 81. The construction manager-at-risk shall directly contract with subcontractors and
23 suppliers for the project.

24 Section 82. Unless the construction manager-agent is an employee of the purchasing agency

1 and provides the construction management services pursuant to such employment, no
2 purchasing agency may engage the services of a construction manager except as follows:

3 (1) The purchasing agency shall first make the following determinations:

4 (a) That it is in the public interest to utilize the services of a construction
5 manager; and

6 (b) That the construction management services would not unreasonably duplicate
7 and would be in addition to the normal scope of separate architect or engineer
8 contracts;

9 (2) Notwithstanding any other provisions of this chapter, no construction manager may
10 contract to perform actual construction on the project, except as follows:

11 (a) The construction manager may perform general conditions of the construction
12 contract as required by the owner;

13 (b) The construction manager is a construction manager-at-risk and was solicited
14 through a qualification-based request for proposals method of procurement as
15 provided in section 83 of this Act and the construction manager-at-risk, for
16 any actual construction contracted by the construction manager-at-risk to be
17 performed on the project, provides payment and performance bonds and
18 competitively bids the work as required by any statute governing bidding and
19 bonding for public improvement projects;

20 (c) Pursuant to a contract awarded on an emergency basis, pursuant to section 10
21 of this Act; or

22 (d) Pursuant to a contract negotiated pursuant to subdivision (9) of section 6 of
23 this Act; and

24 (3) No person, firm, or corporation may act as a construction manager-agent and also as

1 a contractor on any public improvement, except as follows:

2 (a) Pursuant to a contract awarded on an emergency basis, pursuant to section 10
3 of this Act; or

4 (b) Pursuant to a contract negotiated pursuant to subdivision (9) of section 6 of
5 this Act.

6 Section 83. Each qualification based request for proposals required by subsection (b) of
7 subdivision (2) of section 82 of this Act to enter into a construction manager-at-risk services
8 contract where the construction manager-at-risk intends to actually perform construction on the
9 project, shall meet the following criteria:

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

14 (a) The procedures and standards to be used to qualify construction managers;

15 (b) The procedures for preparing and submitting proposals;

16 (c) The procedures for evaluating proposals;

17 (d) The procedures for negotiations between the purchasing agency and those
18 submitting proposals prior to the acceptance of a proposal. The procedures
19 shall contain safeguards to preserve the confidential information and
20 proprietary information supplied by those submitting proposals; and

21

22 (e) The procedures for awarding construction management services contracts;

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

- 1 (a) The identity of the purchasing agency;
- 2 (b) A description of the proposed public improvement;
- 3 (c) A description of the qualifications the construction manager will be required
4 to have;
- 5 (d) The procedures to be followed for submitting proposals, the criteria for
6 evaluation of a proposal and its relative weight, and procedures for making
7 awards;
- 8 (e) The proposed terms and conditions for the construction management services
9 contract, including a description of the scope of services to be provided;
- 10 (3) Notice of any request for proposals shall be advertised in accordance with the
11 provisions of section 15 of this Act;
- 12 (4) After obtaining and evaluating proposals, a purchasing agency may accept the
13 proposal it considers the most advantageous to the purchasing agency. Acceptance
14 of a proposal shall be by written notice to the construction manager submitting the
15 accepted proposal, and by simultaneously notifying in writing the other construction
16 managers that their proposals were not accepted; and
- 17 (5) The purchasing agency shall reserve the right to reject any or all proposals submitted.

18 Section 84. Each contract for a public improvement shall have a licensed design professional
19 actively involved in the project from the start of design through final completion as required by
20 chapter 36-18A.

21 Section 85. No contract for the transportation of students may exceed five years. Specific
22 provisions of the contract may be renegotiated during the term of the contract if guidelines for
23 making changes are in the contract. Any change made during the term of the contract shall be
24 reported in the school board minutes.

1 Section 86. No contract for the services of a local school food service management company
2 may exceed one year. An original contract for the services of a school food service management
3 company may be renewed annually no more than four times consecutively following the original
4 contract. Both bid and contract shall specify that the contract may be renewed, but the local
5 school is not required to renew the contract. Specific provisions of the original contract may
6 be renegotiated prior to renewal if guidelines for making changes are in the original contract.
7 The school board shall record in its minutes any changes made during the term of a food service
8 management contract or renewal.

9 Section 87. The governing board of a unit of local government shall be exempted from the
10 provisions of this Act if it is able to purchase supplies at a substantial savings at a public sale
11 or auction. Any performance bond required by § 5-21-1 may be waived on items purchased for
12 less than ten thousand dollars at a public sale or auction. The governing board shall contact and
13 attempt to obtain competitive quotations from at least three suppliers of identical or similar
14 supplies. The board may authorize an agent to attend a sale or auction and expend an amount
15 not in excess of eighty percent of the average of the quotations received. A record of the names
16 of the suppliers, the quotations received, and the procurement procedures used in purchasing
17 shall be documented, noted in the minutes, and retained on file by the governing board.

18 Section 88. If a municipality requires a developer to install water and sanitary sewer trunk
19 lines or mains, sewer collection systems, or streets at the expense of the developer and the
20 municipality requires the size of the trunk line or main, sewer collection systems, or streets to
21 be larger than the developer's requirements, the price difference paid by the municipality and
22 as determined by a licensed engineer's estimate is exempt from the provisions of this Act.

23 Section 89. Nothing in this Act or chapter 5-21 may be so construed as to prevent counties
24 or townships from constructing or maintaining the county highway system and any secondary

1 highways by means of drags, road planers, tractors, and other approved mechanical devices
2 owned by said counties or townships. Nothing in this Act and chapter 5-21 may be construed
3 to prevent the construction of dams in connection with water conservation projects if the cost
4 of materials used does not exceed the total cost of twenty-five hundred dollars.

5 Section 90. The bid requirements of this Act do not apply to the purchase of fuel by units
6 of local government. The governing board of a unit of local government may, instead of
7 advertising for bids, negotiate a contract for the purchase of fuel at the most advantageous price.
8 The governing board shall contact and attempt to obtain competitive quotations from at least
9 three suppliers. A record of the names of the suppliers, the quotations received and the
10 procurement procedures used in purchasing shall be documented, noted in the minutes, and
11 retained on file by the governing body. The contract may include a procedure for adjusting
12 prices to meet changing market conditions not within the control of the vendor.

13 Section 91. For any contracts entered into pursuant to § 9-32-11 or for any supply contract,
14 any local government may include a procedure for adjusting prices to meet changing market
15 conditions not within the control of the vendor. The adjustments may not result in increases in
16 the profit of the vendor, and shall be supported by written justification filed with the purchasing
17 agent of the unit of local government.

18 Section 92. Notwithstanding the provisions of this Act, any purchasing agency of a local
19 governmental unit may purchase, without advertising for bids, from a willing vendor, any
20 supplies contained in the state contract list established pursuant to section 99 of this Act, or
21 from any willing vendor at a price at or below that shown in the state contract. The governing
22 body of the purchasing agency shall note in its minutes what supplies were purchased from the
23 state contract and shall further note the identity and address of the vendor and the price paid. If
24 an item is purchased at a price lower than that found on the state contract, the purchasing agency

1 shall note that fact in its minutes and show the identity and address of the vendor and the price
2 paid.

3 Section 93. The procurement of motor vehicles by the state shall only be from authorized
4 dealers licensed by the State of South Dakota.

5 Section 94. The Bureau of Administration shall classify all supplies purchased for the use
6 of every agency of state government. The bureau shall group items of the same class so that
7 contracts may be grouped for like commodities or classes of commodities.

8 Section 95. State agencies shall submit estimates of projected purchases within established
9 commodity classifications as required by the Bureau of Administration. The bureau may change
10 or modify the agency estimates in any manner determined to be in the best interest of the state.

11 Section 96. The Bureau of Administration may pool the combined estimated needs of
12 several agencies for identical supplies or services under one contract.

13 Section 97. For any state contract, any electronic sealed bid or proposal may only be
14 submitted through an electronic procurement system authorized for use by the Bureau of
15 Administration.

16 Section 98. The Bureau of Administration may obtain expert advice and assistance from any
17 officer or employee of any state agency for recommendations or assistance in the preparation
18 of specifications and in the examination of bids or proposals or testing of samples submitted
19 with bids or proposals.

20 Section 99. The Bureau of Administration shall establish a state contract list that contains
21 a listing of the supplies or services which are in contracts executed by the bureau. The list shall
22 also contain the name and address of the vendor supplying the supplies or services and the price
23 of the item. The bureau shall make the contract list available to other purchasing agencies in a
24 manner determined by the bureau to be the most efficient.

1 Section 100. The Bureau of Administration may establish a state bidders list in order to
2 facilitate the notification of official state invitations for bids or requests for proposals. Bidders
3 may request placement on the state bidders list and notification of any lettings issued under this
4 chapter. The bureau may establish by rules, promulgated pursuant to chapter 1-26, a fee for
5 placement on the list to defray the cost of administration. Any fees charged shall be deposited
6 in the internal service fund created in section 101 of this Act.

7 Section 101. There is hereby created in the state treasury a procurement management
8 internal service fund. The commissioner of administration shall apportion all expenses incurred
9 in the administration of the procurement management system to all state departments, agencies,
10 and institutions utilizing such system. Payments received therefrom shall be deposited into the
11 procurement management internal service fund.

12 Section 102. If, after all bids or proposals are examined, the Bureau of Administration is
13 satisfied that it can procure any or all of the supplies or services covered by the bids or proposals
14 more advantageously elsewhere than from those submitting bids or proposals, it may reject any
15 or all bids or proposals and procure any or all of the required supplies or services at the most
16 advantageous price.

17 Section 103. The attorney general shall draw all state contracts for supplies let under the
18 provisions of this Act. Each contract shall be signed by the commissioner of administration or
19 a designee, on the part of the state, and by the party to whom the contract has been awarded.
20 Each contract and any required bond shall be filed in the Bureau of Administration.

21 Section 104. If a contract price for goods entered into by the state becomes unreasonable in
22 view of changing market conditions, the Bureau of Administration may cancel the contract or
23 adjust the contract price to meet the changing market conditions if it is necessary to obtain
24 necessary supplies at the required time. Any contract price adjustment shall be justified in

1 writing by the contractor to the Bureau of Administration and a copy of the adjustment and the
2 written justification for the adjustment by the contractor and the bureau shall be filed with the
3 auditor general. No contract price adjustment may allow for increased management costs or for
4 an increase in the dollar amount of profit for the contractor having the contract. No contract
5 price adjustment resulting in an increase may be made for or during the first ninety days of an
6 annual contract.

7 Section 105. The Bureau of Administration, after notice to the business involved, may
8 suspend or debar a business for cause from consideration of any state contracts. The suspension
9 may not exceed three months and the debarment may not exceed three years. Any action to
10 debar or suspend shall be conducted by the Bureau of Administration pursuant to chapter 1-26.

11 Section 106. Each state contract for printing shall provide for a specific amount of penalty
12 for failure on the part of the contractor to deliver the public printing in accordance with the
13 plans and specifications within the time to be designated in the contract. The penalty shall be
14 a fixed sum for each day so delayed. The penalty shall be applied by the Bureau of
15 Administration according to the contract. The amount of the penalty shall be deducted in the
16 voucher for payment for the work done under the contract. The state auditor may draw no
17 warrant for any amount deducted by the bureau in any voucher certified for payment by the
18 bureau. However, no contractor may be held accountable for any delay occasioned by holding
19 proof sheets.

20 Section 107. No printing office within state government, whether the office is within the
21 Bureau of Administration or within an institution of higher education, may accept printing
22 contracts or jobs from private individuals or organizations.

23 Section 108. The Bureau of Administration shall establish by rules, promulgated pursuant
24 to chapter 1-26, the criteria by which any publication, brochure, pamphlet, or flyer with a total

1 cost exceeding one hundred dollars, paid for and distributed by a state agency shall bear an
2 inscription listing the publisher, the number of copies published, and the approximate cost of
3 publication per copy.

4 Section 109. The Bureau of Administration shall purchase, if the price is reasonably
5 competitive and the quality is acceptable, soybean-based inks in lieu of conventional inks for
6 use in any state government operations. The bureau may require the use of soybean-based inks
7 by any private vendor under contract to a state agency in carrying out the terms of the contract
8 if the price of the inks is reasonably competitive and the quality is acceptable.

9 Section 110. Any purchasing agency may enter into agreements with purchasing agents in
10 this or any other state or the United States government under which any of the parties may agree
11 to participate in, administer, sponsor, or conduct purchasing transactions under a joint
12 agreement or contract for the purchase of supplies or contractual services. A purchasing agency
13 may cooperate with purchasing agencies and other interested parties in any other state or the
14 United States government to develop uniform purchasing specifications on a regional or national
15 level to facilitate cooperative interstate purchasing transactions.

16 Section 111. No agency of the state may award or renew a contract for professional services
17 exceeding fifty thousand dollars without complying with the procedures set forth in this section
18 to section 116 of this Act, inclusive. Any agency seeking such professional services shall issue
19 a request for proposals. The agency shall publish any request for proposals issued pursuant to
20 this section on the electronic procurement system maintained by the Bureau of Administration.
21 The request for proposals shall include the procedures for the solicitation and award of the
22 contract.

23 Section 112. The request for proposals shall state the relative importance of evaluation
24 criteria to be used in the ranking of prospective contractors. The agency shall include the

1 following evaluation criteria in any request for proposals:

- 2 (1) Specialized expertise, capabilities, and technical competence as demonstrated by the
3 proposed approach and methodology to meet the project requirements;
- 4 (2) Resources available to perform the work, including any specialized services, within
5 the specified time limits for the project;
- 6 (3) Record of past performance, including price and cost data from previous projects,
7 quality of work, ability to meet schedules, cost control, and contract administration;
- 8 (4) Availability to the project locale;
- 9 (5) Familiarity with the project locale;
- 10 (6) Proposed project management techniques; and
- 11 (7) Ability and proven history in handling special project constraints.

12 Section 113. The agency and the highest ranked contractor shall mutually discuss and refine
13 the scope of services for the project and shall negotiate terms, including compensation and
14 performance schedule. The compensation level paid shall be reasonable and fair to the agency,
15 as determined by the agency. If the agency and the highest ranked contractor are unable for any
16 reason to negotiate a contract at a compensation level that is reasonable and fair to the agency,
17 the agency shall, by notification either orally or in writing, terminate negotiations with the
18 contractor. The agency may then negotiate with the next highest ranked contractor. The
19 negotiation process may continue through successive contractors, according to agency ranking,
20 until an agreement is reached or the agency terminates the contracting process.

21 Section 114. A register of proposals shall be prepared and maintained by any state agency
22 issuing a request for proposals for a professional service contract. The register shall contain the
23 names of any person whose qualifications were considered and the name of the person that was
24 awarded the contract. Any professional service contract and the documentation that was the

1 basis for the contract is public except for proprietary information which shall remain
2 confidential. The qualifications and any other documentation of any person not issued a contract
3 shall remain confidential.

4 Section 115. The provisions of sections 111 to 114, inclusive, of this Act do not apply to
5 contracts issued for:

- 6 (1) Services of such a unique nature that the contractor selected is clearly and justifiably
7 the only practicable source to provide the service. Determination that the contractor
8 selected is justifiably the sole source is based on either the uniqueness of the service
9 or sole availability at the location required;
- 10 (2) Emergency services necessary to meet an urgent or unexpected requirement or if
11 health and public safety or the conservation of public resources is at risk;
- 12 (3) Services subject to federal law, regulation, or policy or state statute, under which a
13 state agency is required to use a different selection process or to contract with an
14 identified contractor or type of contractor;
- 15 (4) Services for professional legal services;
- 16 (5) Services of expert witnesses, hearing officers, or administrative law judges retained
17 by state agencies for administrative or court proceedings;
- 18 (6) Services involving state or federal financial assistance passed through by a state
19 agency to a political subdivision;
- 20 (7) Medical services and home and community-based services;
- 21 (8) Services to be performed for a state agency by another state or local government
22 agency or contracts made by a state agency with a local government agency for the
23 direct provision of services to the public; or
- 24 (9) Services to be provided by entertainers for the state fair and other events.

1 Section 116. Notwithstanding any other provisions of law, an agency that is required to issue
2 a decision in a contested case proceeding in one year or less may increase its statutory deadline
3 for issuing the agency decision by sixty days if the agency seeks to enter into a professional
4 services contract covered by sections 111 to 114, inclusive, of this Act.

5 Section 117. The Bureau of Administration shall publish notice of its intent to purchase
6 property or liability insurance or performance bonds. Publication of a notice containing a
7 description of the coverage sought as a display advertisement in at least three newspapers of
8 general circulation in different parts of the state at least sixty days prior to the purchase, along
9 with publication in the South Dakota Register, shall be considered compliance with the notice
10 requirements of this section.

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

13 Section 118. The code counsel shall transfer §§ 5-23-38, 5-23-39, and 5-23-40 to chapter
14 1-40 and shall make the necessary changes to the internal references contained in those sections.

15 Section 119. The Bureau of Administration shall keep suitable records in which shall be
16 recorded all requisitions for public printing, stationery, and supplies, all advertisements, bids,
17 certified checks, bonds, contracts, orders, vouchers, and all acts and proceedings taken under
18 the provisions of this Act. All requisitions, advertisements, bids, certified checks, bonds,
19 specifications, schedules of specifications, contracts, reports, and any other papers or documents
20 executed under the provisions of this Act shall constitute the files in the bureau, except as
21 otherwise provided for in this Act.

22 Section 120. The Bureau of Administration, any other designated state purchasing agent, and
23 any agency making purchases shall, to the extent practicable, make purchasing selections to
24 maximize the purchase of environmentally preferable products. The Bureau of Administration

1 shall promulgate rules, pursuant to chapter 1-26, to establish specifications, requirements, and
2 certification standards for the purchase for use by state government agencies of environmentally
3 preferable products. The certification standards established by the bureau shall be based on
4 standards established by the United States Environmental Protection Agency's Design for the
5 Environment program, the TerraChoice EcoLogo program, the United States Department of
6 Agriculture's Biopreferred program, the Green Seal program, or any other certification program
7 or comparable data, including life cycle assessment data, approved by the bureau. No rule may
8 prohibit the use of disinfectants, disinfecting cleaners, sanitizers, or any other antimicrobial
9 product regulated by the federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. Sec. 136
10 et seq.), as amended to January 1, 2010, if the use is necessary to protect public health and if the
11 use is in accordance with responsible cleaning procedure requirements.