

Procurement Presentation
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1. Know Your Code / Ordinance

- a. **Counties are not covered strictly by the terms of the SC Consolidated Procurement Code – per S.C. Code Ann. §11-35-1520 they have the ability to author their own Ordinances which must “embody[ing] sound principles of appropriately competitive procurement.”**

See e.g. Glasscock Co. v. Sumter County 361 SC. 483 (Ct. App. 2004)

While its mandate that all government bodies adopt some form of competitive procurement procedures is unambiguous, the statute’s broad directive that the processes chosen embody sound principles of appropriately competitive procurement clearly was intended to afford local governments needed flexibility to determine what is “appropriately competitive” in light of the public business they must transact.

As *Glasscock* and others illustrate – waste disposal is fertile ground for contract and procurement disputed.

- b. **the Consolidated Procurement Code is thorough and can be guidance for issues often not addressed specifically in a County Ordinance.**
- c. **Virtually every ordinance has similar goals to the Consolidated Procurement Code (S.C. Code Ann. §11-35-20).**

SECTION 11-35-20. Purpose and policies.

- (1) This code must be construed and applied to promote underlying purposes and policies.
- (2) The underlying purposes and policies of this code are:
 - (a) to provide increased economy in state procurement activities and to maximize to the fullest extent practicable the purchasing values of funds while ensuring that procurements are the most advantageous to the State and in compliance with the provisions of the Ethics Government Accountability and Campaign Reform Act;
 - (b) to foster effective broad-based competition for public procurement within the free enterprise system;
 - (c) to develop procurement capability responsive to appropriate user needs;
 - (d) to consolidate, clarify, and modernize the law governing procurement in this State and permit the continued development of explicit and thoroughly considered procurement policies and practices;

(e) to require the adoption of competitive procurement laws and practices by units of state and local governments;

(f) to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement;

(g) to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process; and

(h) to develop an efficient and effective means of delegating roles and responsibilities to the various government procurement officers.

d. There are other resources available to review when drafting, modifying or administering your County Procurement Ordinance.

i. The South Carolina Materials Management Office website contains South Carolina Procurement Law and Regulations.

<https://procurement.sc.gov>

ii. The National Association of State Procurement Officials has Courses and Model Codes and Ordinances on its website.

<https://www.naspo.org>

e. Most problems arise when the ordinance is not followed or administered properly.

f. Work with your procurement officer – they are trained in procurement – but will often need legal advice. (sometimes more often than they realize)

2. Bad Solicitations = Poor Procurement

a. First determine exactly what the County seeks to purchase or acquire

b. A Proper Source Selection Method is the first step in every good procurement. There are several different types of source selection

Invitation for Bids

Fixed Price Bidding

Best Value Bidding

Competitive Online Bidding

Requests for Proposals

Competitive Sealed Proposals

**Requests for Qualifications
Competitive Negotiations**

Negotiations after Unsuccessful Competitive Sealed Bidding

Small Purchases

Sole Source Procurement

Emergency Procurement

Architectural and Engineering Procurement

**Construction Services acquisitions – Design Bid Build
 Design Build
 CM at Risk**

- c. The Determinations that lead to the procurement method / source selection should be in writing and retained in the contract file.**

In *Sloan v. Greenville County*, 356 S.C. 531 (Ct. App. 2003), the Court set aside a contract where it held that the determination for source selection was improper. Most codes include specific requirements for particular methods of source selection and this can be a common procurement error.

In light of the Code's express mandate and guiding policy, it is apparent the written determination required under section 7-242.5 must serve a dual function: The determination must first effectively inform county council of the reasons why design-build source selection works to the County's best advantage for the project at issue. Equally important, the determination must provide the citizens of Greenville County a window into the County's decision-making process--safeguarding the quality and integrity of the contract awards through public accountability. If the written determination provides sufficient factual grounds and reasoning for the County Council and the public to make an informed, objective review of these decisions, then it has accomplished its purpose. Sloan, supra at 356 S.C. 558

In the Sloan / Greenville County case the Court noted that a reasoned basis for a procurement decision is based on facts – not mere conclusory statements.

This is dicta as the Supreme Court reversed this case in *Sloan v. Greenville County*, 361 S.C. 568(2004) on mootness grounds – citing guidance provided in to prior unpublished Court of

Appeals decisions.

A second *Sloan v. Greenville County*, 380 S.C. 528 (Ct. App. 2009) (rehearing denied at 2009 S.C. App. LEXIS 489) where the circuit court found that the Greenville County Procurement Code did not embody sound principles of appropriately competitive procurement by not requiring a determination in writing before the use of competitive sealed proposals rather than competitive sealed bidding, the Court of Appeals determined that the case was moot since Greenville had changed the ordinance to include that requirement.

d. Solicitation / Bid Documents properly prepared and followed

i. Ensure that “fairness” is inherent in purchasing.

For example – when setting a standard for goods – if it is too restrictive, it could result in a sole source procurement.

“all specifications should be drafted to assure cost-effective procurement of the County’s actual needs.”

“specifications should be written to allow as many vendors as possible to participate in a solicitation.”

Likewise, a specification that is too ambiguous may require a rebid of a contract. See, e.g., In Re Protest of Warehouse Distributing Company, 1988-2

“When a specification is ambiguous, it is proper to rebid the contract.”

ii. MMO Compendium has language that you can use and modify. The language is approved.

iii. <https://www.procurement.sc.gov/legal/procurement-law>

iv. Respond accurately and fully to vendor questions.

e. Resident Vendor Preferences

3. The Evaluation Process

a. Follow the Solicitation to the letter.

Deviations from your specifications or requirements will result in protests. If something needs to be changed, generate an amendment.

Best practice, even though most County Procurement Codes do not require it, is to keep price information out of the hands of the evaluation committee for a proposal.

That ensures that price does not influence ratings related to other evaluation factors.

i. Selection of Evaluation Panel for Proposals / Requests for Qualifications

Ensure that qualified people who are not tied in any way to a potential proposer are selected.

Require and review conflict of interest disclosures.

When reviewing conflict of interest disclosures – analyze whether a conflict exists – don't rubber stamp it either way.

ii. The Panel Briefing

b. Cost consideration in RFP evaluations.

c. RFQ's for Design Build Construction Services

d. Safeguarding information and confidentiality during evaluation process.

4. Protests and Contract Controversies

a. Protest of Solicitation

b. Protest of Award

c. Procurement Official Review

i. Be sure that procurement decisions contain facts and law findings.

All to many times a local government procurement decision reads like the following excerpts:

1. "Upon review, the denies this allegation"

2. "Upon review, the finds the committee evaluated the proposals appropriately, and denies this allegation."

d. Document and prepare for any appeals of Procurement Officer decisions.