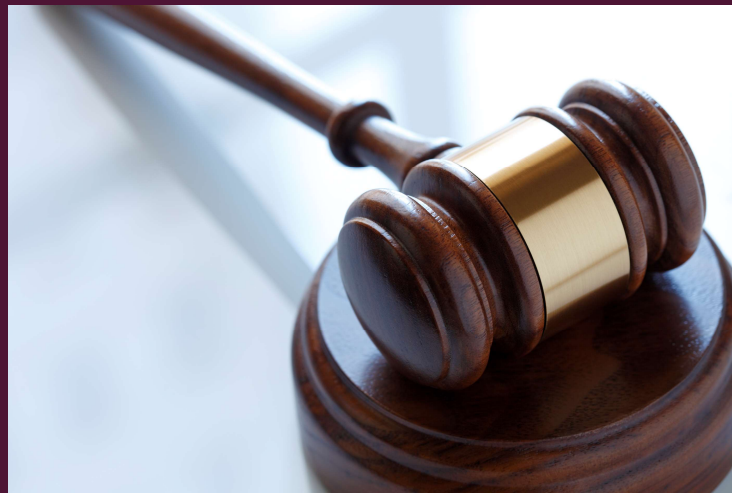


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# ELECTRONIC REVERSE AUCTIONS IN THE STATES

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## ROADMAP

- Brief Overview of Electronic Reverse Auctions (ERAs)
- The Federal Acquisition Regulation on ERAs (FAR 17.8)
- Proposed Amendments to FAR 17.8
- State Regulation of ERAs
- What the Model Procurement Code might take into consideration when crafting a model ERA regulation.

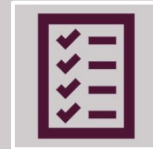
# ELECTRONIC REVERSE AUCTIONS

- An internet-based acquisition tool that allows the government to procure goods and services from suppliers in a competitive environment in which sellers, anonymously, bid prices down until the auction is complete (AFARS).
- Evolution of the Sealed Bidding Process
- What makes ERAs appealing? Cost savings!
  - For FY 2012, DHS, DOI, and VA reported 12% in savings totaling more than \$800M on commercial item procurements.
  - For the same year, DOE saved 14% on core supplies and services contracts.
- Importance of ERA regulations:
  - Increases effectiveness of ERAs by providing guidance to allow the market to work efficiently.

# THE FEDERAL RULES ON REVERSE AUCTIONS



Definitions



Guidelines on Use and  
Applicability



Procedures for Conducting  
a Reverse Auction



Contract Clause Provision

## KEY PROVISIONS OF FAR SUBPART 17.8

Government Access  
to Reverse Auction  
Data (17.802(d))

Disclosure of lowest  
bidder price

Limited guidance on  
when to use Reverse  
Auctions

Exclusion Rights

Reverse auction  
integration with other  
Contracting Methods

Regulations targeting  
ERA service providers  
and bidders (FAR  
17.802(c))

## KEY ISSUES OF THE FEDERAL ERA RULES

Lack of  
encouragement  
to use ERAs

Incomplete  
guidance on  
appropriate use  
and design

No assessment of  
costs and benefits





## PROPOSED FEDERAL RULE: CONSTRUCTION SERVICES

- Definition change
- Prohibiting use of ERAs for construction services over Simplified Acquisition Threshold
  - Site planning and design
  - Architectural and engineering services
  - Interior design
  - Construction

## STATE REGULATION ON ERAS: KEY FINDINGS

Lack of any ERA rule, or inaccessible

Repealed use of ERAs

Poor definitions

Limited and "relaxed" guidance

Some states require pre-qualification or allow the procuring officer to conduct pre-qualifications as they see fit.

Forbidden procurements

Agency rule supplementation



## ALABAMA (ALA. CODE §§ 41-16-50 ET SEQ.)



- Very in-depth procedures for holding reverse auctions
  - Discusses 3 methods for conducting reverse auctions (in house, commercial auction host, cooperative purchasing).
  - Discusses bidding process, purchases eligible with ERAs, communications with contractors, requirements drafting, tie bids, and grounds for bid rejection.
  - <https://alison.legislature.state.al.us/files/pdf/eopa/guides/RAP.pdf>
- Key issues worth mentioning:
  - Definition of ERA lacks any mention of iterative bidding.
  - Does not outright ban ERAs for use on complex procurements. Describes most effective use of ERAs.
  - ERAs only usable when no equivalent item being purchased is available through pre-existing state purchasing program, or if the resulting price of the conducted ERA is equivalent to or lower than existing prices in the state purchasing program.

# ARIZONA (A.R.S. §41-2672)



## 41-2672. On-line bidding

- A. If a procurement officer determines that electronic, on-line bidding is more advantageous than other procurement methods provided in this chapter, a procurement officer may use on-line bidding to obtain bids electronically for the purchase of goods, services, construction and information services.
- B. An on-line bidding solicitation must designate an opening date and time.
- C. The closing date and time for an on-line solicitation may be fixed or remain open depending on the structure of the item being bid on line. Information regarding the closing date and time must be included in the solicitation. At the opening date and time, the purchasing agency must begin accepting on-line bids and must continue accepting bids until the bid is officially closed.
- D. All on-line bids must be posted electronically and updated on a real-time basis.
- E. Purchasing agencies may:
1. Require bidders to register before the opening date and time and, as part of that registration, require bidders to agree to any terms, conditions or other requirements of the solicitation.
  2. Prequalify bidders and allow only those bidders who are prequalified to submit bids on line.
- F. Purchasing agencies retain their existing authority to determine the criteria that will be used as a basis for making awards.
- G. Sections 41-2533 and 41-2534 do not apply to solicitations issued pursuant to this section, except that:
1. All bids submitted electronically through an on-line bidding process are public information and are subject to the same public disclosure laws that govern bids received through the sealed bid process.
  2. All remedies available to purchasing agencies and to bidders through the sealed bid process under this chapter are also available to purchasing agencies and bidders in an on-line bidding process.

# ARIZONA (A.R.S. §41- 2672) CONT.



- Key Issues:
  - No definition provided
  - Essentially allows use of ERAs for all types of procurements
  - Does not provide guidance on proper use or detail how to maximize the benefits of ERAs
  - Discusses timing but does not discuss what ERA services are available to them

# ARIZONA AGENCY SUPPLEMENT

- Arizona supplements its online bidding statute with standard procedures drafted by the Arizona Department of Administration:
  - Breaks down ERAs into five phases: determine need, develop solicitation, notify vendors of ERA, issue and conduct reverse auction, award contract.
  - Procedure is well thought out but lacks specificity for each step. E.g., when discussing determining the need the supplement makes no mention of what factors to take into consideration, nor what procurements best fit an ERA.
  - Supplement was drafted in 2013 and refers to statutes for procedures that have since been repealed (updated supplement not readily available).
  - Provides an example solicitation and notice email. (The sample was for the purchase of 11 vans – should ERAs be used for vehicles?)
  - Can be found at:  
[https://spo.az.gov/sites/default/files/documents/files/SP\\_025\\_Reverse\\_Auctions\\_\(rev0913\).pdf](https://spo.az.gov/sites/default/files/documents/files/SP_025_Reverse_Auctions_(rev0913).pdf)



# CALIFORNIA (PCC § 10290.3)

## California Code, Public Contract Code - PCC § 10290.3

Current as of January 01, 2023 | Updated by [FindLaw Staff](#)



(a) Notwithstanding the bidding provisions of this chapter, reverse auctions may be utilized for the acquisition of goods and services. The reverse auction process shall include a specification of an opening date and time when real-time electronic bids may be accepted, and provide that the procedure shall remain open until the designated closing date and time.

(b) All bids on reverse auctions shall be posted electronically on the Internet, updated on a real-time basis, and shall allow registered bidders to lower the price of their bid below the lowest bid posted on the Internet.

(c) The Department of General Services shall require vendors to register before the reverse auction opening date and time, and as part of the registration, agree to any terms and conditions and other requirements of the solicitation. The Department of General Services may require vendors to be prequalified prior to placing bids in a reverse auction.

➡ (d) For purposes of this section, "reverse auction" means a competitive online solicitation process for fungible goods or services in which vendors compete against each other online in real time in an open and interactive environment.

➡ (e) The reverse auction process may not be used for bidding on any construction contract that is subject to Chapter 1 (commencing with [Section 10100](#)).



## CALIFORNIA (PCC § 10290.3) CONT.

- Key issues
  - Definition could be improved by mentioning the requirement of iterative bidding.
  - No guidance on applicability, procedures, and proper use.
  - Specifically bans construction contracts but should be expanded to exclude other forms of complex goods and services.





# COLORADO (R-24-103-208-01)

## R-24-103-208-01 - Competitive Reverse Auctions

[State Regulations](#) [Compare](#)

Contracts for goods and services may be awarded by competitive reverse auctions if the procurement official determines that adequate competition, as defined in rule R- 24-103-403 -01, can be achieved and that the process is likely to result in better pricing. Unless otherwise specified, the general rules under rule R- 24-103-201 shall apply to competitive reverse auctions. Competitive reverse auction means a bidding process through which a pre-established group of vendors may post bids for a defined period of time and change their bids as desired during the bidding period.

- ➔ (a) An electronic procurement system notice shall include all terms, conditions, and specifications and provide instruction for participating in the process. If the procurement official believes that an electronic procurement system is not likely to yield adequate competition, the purchasing agency may notify potential vendors through additional methods.
- (b) All responsible vendors willing to accept the terms and conditions of the procurement and to meet the specifications of the bid shall be eligible to participate. The purchasing agency may conduct a preliminary evaluation to determine vendor responsibility and to ensure the vendor's responsiveness to terms and specifications.
- ➔ (c) During the bidding process, the participating vendors shall be identified only by a letter, number, or other symbol to protect their identities. Each bid price and the letter, number, or symbol designation of the vendor shall be made available to all bidding vendors immediately upon receipt by the purchasing agency.
- (d) The contract shall be awarded to the lowest responsible bidder whose bid meets the requirements and specifications.

## COLORADO (R-24-103-208-01)



- Unique Features
  - Allows procurement officials to conduct responsibility determinations before the ERA
  - Explicitly mentions bid anonymity
- Key issues:
  - Missing definition
  - “May use”
  - Does not discuss ideal procurements for ERAs
  - Limited guidance on conducting reverse auctions
  - No mention of iterative bidding



# ILLINOIS (50 ICLS 530/10)

50 ILCS 530/10

## 530/10. Reverse auction

Currentness

§ 10. Reverse auction. Notwithstanding any other provision of law and in accordance with rules adopted by the unit, a unit of local government, whether or not it is a home rule unit as defined in [Section 6 of Article VII of the Illinois Constitution](#), may procure supplies or services through a competitive electronic auction bidding process after the unit's purchasing officer explains in writing to the unit's governing body his or her determination that the use of such a process will be in the best interest of the unit.

The purchasing officer shall publish that determination in the same manner required by law for the unit's invitations for bids.

An invitation for bids shall be issued and shall include (i) a procurement description, (ii) all contractual terms, whenever practical, and (iii) conditions applicable to the procurement, including a notice that bids will be received in an electronic auction manner.

Public notice of the invitation for bids shall be given in the same manner as required by law for the unit's other invitations for bids.

Bids shall be accepted electronically at the time and in the manner designated in the invitation for bids. During the auction, a bidder's price shall be disclosed to other bidders. Bidders shall have the opportunity to reduce their bid prices during the auction. At the conclusion of the auction, the record of the bid prices received and the name of each bidder shall be open to public inspection.

After the auction period has terminated, withdrawal of bids shall be permitted as otherwise provided by law.

The contract shall be awarded within 60 days after the auction by written notice to the lowest responsible bidder, or all bids shall be rejected except as otherwise provided by law.

Extensions of the date for the award may be made by mutual written consent of the purchasing officer and the lowest responsible bidder.

## ILLINOIS (50 ILCS 530/10)



- Unique features:
  - Allows for withdrawal of bids after the reverse auction has been conducted.
  - Sets mandatory award timeline and allows for time extensions w/ written consent.
  - Forces procuring official to use established invitation for bid procedures (sealed bidding).
  - Bid records become public information upon conclusion of competition.
- Key issues:
  - No definition
  - Very limited in procedural and applicability guidance.

# NEBRASKA (81-158)



## 81-158.

State purchasing bureau; use reverse auction; powers and duties.

(1) Notwithstanding any other provision of law, the state purchasing bureau created by section 81-152 may use a reverse auction for the acquisition of goods if the bureau determines that the use of a reverse auction would be advantageous to the state.

(2) If the bureau conducts a reverse auction, the bureau shall provide notification of the intent to use the reverse auction process in the bid solicitation documents and, unless the solicitation is canceled, an award shall be made to the bidder determined by the bureau to be the lowest responsible bidder at the close of the bidding process. The bureau may require bidders to register before the opening date and time of the reverse auction.

(3) The bureau may contract with a third-party vendor to conduct a reverse auction pursuant to this section.

➡ (4) The bureau may adopt and promulgate rules and regulations to implement this section.

➡ (5) For purposes of this section, reverse auction means a process in which (a) bidders compete to provide goods in an open and interactive environment, which may include the use of electronic media, (b) bids are opened and made public immediately, and (c) bidders are given opportunity to submit revised bids until the bidding process is complete.

## NEBRASKA (81-158)



- Key issues:
  - Definition is provided but has very little to no guidance on using ERAs.
  - Covers this gap by expressly giving the state purchasing bureau the authority to adopt and promulgate rules and regulations for ERAs.



# OREGON (OARD 125-247-330, OARD 125-247-0340, OARD 125-247-0288)

- Oregon has some of the most comprehensive ERA procedural regulations in terms of technical guidance.
- Key Features:
  - Allows for three types of bid information disclosure. (Bids fully transparent, ranking system, or a scoring system which takes into consideration non-price factors.)
  - Reserves right to conduct responsibility determination at end of auction.
  - Allows PO to prequalify vendors before auction if deemed advantageous.
  - Public notice requirements for both solicitation and award. For contracts over \$150,000, 7-day intent to award notice is required.
  - Comprehensive (in comparison to other states) E-procurement regulations. They provide guidance on soliciting, conducting, and awarding contracts via various electronic contracting methods.
- While Oregon excels on the technical guidance for ERAs, the state fails to provide (1) adequate definitions, and (2) any guidance on when to use ERAs, nor what procurement types in terms of good or services are appropriate for reverse auctions.



## VIRGINIA (§ 2.2-4303)



I. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by reverse auctioning.

## VIRGINIA (§ 2.2-4303)



- Key Issues:
  - Missing everything that makes a good ERA rule.
  - Excludes bulk purchases of road related construction and maintenance materials.
- Limits use of ERA to goods and non-professional services. However, professional services are not defined.

#### §5A-3-10d. Reverse auctions.



(a) Notwithstanding any other provision of this code, the director is hereby authorized to initiate reverse auctions to procure commodities. The director may not use reverse auctions for the procurement of services under any circumstances.

➔ (b) Reverse auctions may be utilized if the director determines their use would be fair, economical and in the best interests of the state, and the commodities to be procured:

- (1) Are subject to low price volatility;
- (2) Have specifications that are common and not complex;
- (3) Vary little between suppliers;
- (4) Are sourced primarily based on price, with limited ancillary considerations;
- (5) Require little collaboration from suppliers; and
- (6) Are sold by a large, competitive supply base.

(c) For purposes of this section, "reverse auction" means a process by which bidders compete to provide commodities in an open and interactive market, including but not limited to the Internet. Reverse auction bids are opened and made public upon receipt by the director, and then bidders are given the opportunity to submit revised bids until the bidding process is complete. The contract is awarded to the lowest responsible bidder.

(d) The director may contract with qualified, industry-recognized third-party vendors to conduct reverse auctions on behalf of the director.

➔ (e) The director shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to establish the procedures for conducting reverse auctions. The rules shall include procedures for contracting with qualified, industry-recognized third-party vendors.

## WEST VIRGINIA (§ 5A 3-10D)



## WEST VIRGINIA §148-1-11



- Key Feature:
  - Concrete requirements for ERA use regarding goods/services being procured.
- Director utilized their power to promulgate the following additional ERA rules in §148-1-11:
  - Outlines mandatory pre-qualification requirement for all participating bidders.
  - Procuring office must (1) explain how utilizing an ERA would be in the best interest of the state and (2) provide a written analysis proving that the good being procured fits all the requirements of §5A – 3-10D.
  - Bidding and award procedures
  - Accepted ERA systems for use

# SOUTH CAROLINA § 11-35-1529



## SECTION 11-35-1529. Competitive online bidding.

➡ (1) Conditions for Use. When the procurement officer determines in writing that on-line bidding is more advantageous than competitive sealed bidding, a contract may be entered into by competitive on-line bidding, subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section.

(2) Public Notice. Adequate public notice of the request for the solicitation must be given in the same manner as provided in Section 11-35-1520(3).

➡ (3) Bidding Process. The solicitation must designate both an Opening Date and Time and a Closing Date and Time. The Closing Date and Time need not be a fixed point in time, but may remain dependent on a variable specified in the solicitation. At the Opening Date and Time, the State must begin accepting real-time electronic bids. The solicitation must remain open until the Closing Date and Time. Before the Opening Date and Time, the State shall require bidders to register, shall register only responsible bidders, and, as a part of that registration, require bidders to agree to any terms, conditions, or other requirements of the solicitation. If less than two bidders are registered, the solicitation must be canceled. Following receipt of the first bid after the Opening Date and Time, the lowest bid price must be posted electronically to the Internet and updated on a real-time basis. At any time before the Closing Date and Time, a bidder may lower the price of its bid, except that after Opening Date and Time, a bidder may not lower its price unless that price is below the then lowest bid. Bid prices may not be increased after Opening Date and Time. Except for bid prices, bids may be modified only as otherwise allowed by this code. A bid may be withdrawn only in compliance with Section 11-35-1520. If a bid is withdrawn, a later bid submitted by the same bidder may not be for a higher price. If the lowest responsive bid is withdrawn after the Closing Date and Time, the State may cancel the solicitation in accordance with this code or reopen electronic bidding to all pre-existing bidders by giving adequate notice to all pre-existing bidders of both the new Opening Date and Time and the new Closing Date and Time. Notice that electronic bidding will be reopened must be given as specified in the solicitation.

(4) Receipt and Safeguarding of Bids. Other than price, any information provided to the State by a bidder must be safeguarded as required by Section 11-35-1520(4).

(5) Provisions Not to Apply. Section 11-35-1524 and paragraph (5) (Bid Opening) of Section 11-35-1520 do not apply to solicitations issued pursuant to this section.



## SOUTH CAROLINA § 11-35-1529



- Distinct features:
  - SC's instructions on the bidding process is much more in-depth when compared to other states.
  - Relies on sealed bidding process procedures outlined in § 11-35-1520 (notice, bid evaluation and acceptance, award, cancellations, tie bids).
- Key issues:
  - Provides guidance on when to use ERAs (must be more advantageous than sealed bidding).
    - Does not define what would make use of an ERA more advantageous than sealed bidding.
  - Does not define ERAs
  - Uses the term “competitive online bidding” – lack of uniformity

## ELECTRONIC REVERSE AUCTIONS IN THE ABA MODEL PROCUREMENT CODE (MPC)

The FAR sets out important provisions for any ERA regulation.

The MPC could include and expand upon the following sections:

- Definitions
- Guidelines on proper use and applicability
- Procedures for conducting an ERA
- Contract clause provision



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## WHAT DOES A GOOD DEFINITION SECTION LOOK LIKE?

- Concrete and in-depth definition of a reverse auction.
- ERA regulations that hyperlink back to a definitions section of a statute should ensure that the existing ERA regulation is updated.
- Some important elements of a good ERA definition are:
  - ERAs are held online
  - Iterative bidding
  - Over an established period of time
  - Award to lowest responsible bidder

## CONCRETE GUIDELINES ON ERA USE AND APPLICABILITY

01

Use of ERAs should be promoted over the use of competitive sealed bids for some procurements.

02

Provide scenarios where pre-qualification may be appropriate (WV, OR)

03

Provide examples of what types of goods and services should or should not be procured with ERAs.

04

Potentially limit contract values for ERAs.

## CONCRETE EXAMPLES FOR PROPER ERA USE

### Goods (WV)

- Low price volatility
- Specifications that are common and not complex
- Vary little between suppliers
- Sourced primarily on price, with limited ancillary considerations
- Require little collaboration with supplies
- Sold by large competitive supply bases

### Services

- Non-professional/specialized services
- Janitorial, administrative assistance, and low-level tech support vs. architectural, medical, and engineering services

## PROCEDURES FOR CONDUCTING AN ERA

- Include procedures for agency award refusal (unfair prices, competition was not realized, irresponsible offerors etc.)
- The MPC could consider aspects of Arizona's internal ERA guidance:
  - Identify and determine the need
  - Develop solicitation
  - Notify vendors of reverse auction
  - Issue reverse auction
  - Award contract
- The MPC could consider introducing something like South Carolina's technical bidding process procedures found on slide 26.
- Oregon laid out three different bid disclosure methods (Bids fully transparent, ranking system, or a scoring system which takes into consideration non-price factors). Bidder identity is hidden in all three methods.
- Alabama has issued comprehensive procedures for conducting ERAs. Covers topics such as tie bids, rejecting bids, bidder communication restraints, recording requirements (makes publicly available a recording of the auction), and the option to pre-screen vendors for responsibility.
- <https://alison.legislature.state.al.us/files/pdf/eopa/guides/RAP.pdf>.



# SOLICITATION AND CONTRACT CLAUSE PROVISION

- It is important to insert ERA provisions into solicitations and contracts.
  - If the ERA provisions are properly drafted, they provide the following useful information to vendors:
    - Definitions
    - How an ERA works
    - What the government hopes to gain by using an ERA as its contracting method
    - Procedures on how to compete effectively in an ERA
    - Any pre-qualification requirements
    - Terms of agreement
    - Assurance of bid confidentiality among competing parties
    - Government Data provisions

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# QUESTIONS & CONCLUSION