



FOIA Meeting Guide

How to Comply with FOIA in Conducting Meetings of Advisory, Evaluation, and Selection Committees

Version 3.0

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Division of Procurement Services

This document does not create a binding procedure or create rights or obligations for or against the State. Rather, this document provides recommendations to procurement officers in the State's Division of Procurement Services to assist them in fulfilling their responsibilities under FOIA.

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Table of Contents

I.	Introduction: How to use this Guide.....	1
II.	Guidelines for RFP Evaluation Panels	3
A.	Meeting - Is a Meeting Required?.....	3
B.	Posting Advance Notice: Notice of a meeting must be posted.....	4
1.	When Required:.....	4
2.	When Posted:	4
3.	Where Posted:	4
4.	What Gets Posted:.....	4
5.	Direct Notice:.....	5
C.	Meeting Minutes	5
1.	Basic Rule:.....	5
2.	Contents:.....	5
3.	Releasing Meeting Minutes:	6
III.	The Meeting - Public Access.....	7
A.	Step #1 – Meeting to Charge the Panel.....	7
B.	Step #2 – Meeting to Discuss & Score.....	8
C.	Notes	10
IV.	Forms and Examples	11
A.	Form #1 – Charging Meeting Notice	12
B.	Form #2 – Scoring Meeting Notice.....	13
C.	Form #3 – Charging Meeting Minutes	14
D.	Form #4 – Scoring Meeting Minutes.....	16
E.	Form #5 – Non-Disclosure Agreement.....	17
F.	Form #6 – Procurement Integrity Representations and Restrictions	19
G.	Model Motion and Announcement for Executive Session	21

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I. INTRODUCTION: HOW TO USE THIS GUIDE

This Freedom of Information Act (FOIA) Meeting Guide (Guide) includes instructions and forms, which should be used together.

This Guide recommends a model approach. Notwithstanding the use of words like “shall,” “must,” or “should,” this Guide is not a binding policy or procedure. The Guide is general in nature and is not intended to address every possible situation you may encounter during the acquisition process. Whenever you deviate from the recommended approach, consult with your supervisor or legal counsel. This model approach applies only to those solicitations, including requests for qualifications (RFQs), which were issued after the revision date on the Guide’s cover. This Guide requires periodic updating because statutes can be rewritten or subject to a new interpretation and policies can be amended. This Guide is current as of the revision date listed on the cover.

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II. GUIDELINES FOR RFP EVALUATION PANELS

The processes addressed in these guidelines require that we navigate a number of competing policy goals imposed by both South Carolina’s Freedom of Information Act¹ and its Consolidated Procurement Code², including the accompanying regulations³:

- performing public business in an open and public manner;
- enabling citizens to learn and fully report on the activities of their public officials;
- maximizing to the fullest extent practicable the purchasing values of funds;
- ensuring that procurements are the most advantageous to the State; and,
- maintaining a procurement system of quality and integrity.

These guidelines are designed to insure we fully comply with every requirement of both statutory schemes.

A. Meeting - Is a Meeting Required?

FOIA’s meeting rules apply to any meeting of a public body. FOIA’s definition of the phrase “public body” includes “advisory committees.” S.C. Code Ann. § 30-4-20(a). The South Carolina Supreme Court has characterized RFP evaluation committees as advisory bodies subject to FOIA’s meeting rules. *Quality Towing, Inc. v. City of Myrtle Beach*, 547 S.E.2d 862 (S.C. 2001). The concept applies equally to any procurement related advisory group. Examples could include committees formed to prepare specifications, evaluate bid samples, evaluate best value bids, or evaluate submittals in a request for qualifications.

Neither the Freedom of Information Act nor the Procurement Code require multiple evaluators. Likewise, these laws do not require that the evaluators function collectively, as a panel or advisory body. Rather, the responsible procurement officer may seek advice from numerous individuals without conducting a meeting.⁴ However, if the evaluators meet to discuss the proposals as part of the evaluation, the Procurement Officer should ordinarily treat the evaluators as an “advisory body” subject to FOIA’s meeting rules and hold meetings as reflected in this document.

¹ S.C. Code Ann. § 30-4-15 (Findings and purpose).

² E.g., S.C. Code Ann. § 11-35-20, -25, -410, -1510(4) & (5), -1530(3) & (8), and -1810(3).

³ E.g., S.C. Code Regs. Ann. 19-445.2010, .2030(4), .2045A, .2050C, and .2095B & C.

⁴ S.C. Code Ann. § 11-35-1530(5) & (7).

If a meeting is held, FOIA's requirements apply if the meeting involves a quorum or simple majority of the evaluators.⁵ Remember, a "meeting" includes telephone conference calls or any other form of electronic communication.⁶

B. Posting Advance Notice: Notice of a meeting must be posted.

1. When Required:

As a general rule, a notice must be posted for a meeting if a simple majority of the evaluators will attend the meeting. If a meeting concludes, ends, breaks, or adjourns for any reason, a separate notice must be posted for any subsequent meeting. However, a new notice is not required if the meeting is simply a continuation of a meeting that began at the same location on the same day or on the preceding business day. In other words, no new notice is necessary if you take a break for lunch or recess for the evening or weekend. The meeting notice requirements apply regardless whether the entire meeting takes place in executive session or not.

2. When Posted:

As early as is practicable, but no later than twenty-four hours before the meeting, notice of the meeting must be posted.⁷

3. Where Posted:

Notice must be posted either in a publicly accessible location at the office of the procurement officer responsible for the solicitation and on a centralized web page, if any, established for this purpose.⁸

4. What Gets Posted:

The notice must identify the solicitation by name and number, state the date, time, and place of the meeting, and provide an agenda. The agenda need only identify

⁵ "Meeting" means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." S.C. Code Ann. § 30-4-20(d).

⁶ "No chance meeting, social meeting, or electronic communication may be used in circumvention of the spirit of requirements of this chapter to act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." S.C. Code Ann. § 30-4-70(c).

⁷ S.C. Code Ann. § 30-4-80(A).

⁸ *Id.*

the overall topics to be discussed⁹. As a practical matter, the notice should reflect the date it was posted and where it was posted. Examples of notice forms DPS currently uses are included as Section IV.A, Form #1 – Charging Meeting Notice, and Section IV.B, Form #2 – Scoring Meeting Notice.

5. Direct Notice:

If anyone asks to be notified of an upcoming meeting, send them notification (letter, e-mail, or phone call) at the time notice is posted. If meeting notices are posted on a centralized web page, you may explain to them where to access such notice on the internet and ask that they withdraw the request and monitor the website. If they do not withdraw the request, you must provide them the requested notice.¹⁰

C. Meeting Minutes

1. Basic Rule:

FOIA requires that all public bodies keep written minutes of all their *public* meetings.¹¹ ***This means meeting minutes of executive session are not required.***

2. Contents:

Meeting minutes must include (1) the date, time, and place of the meeting; (2) the presence or absence of members of the public body; (3) the “substance of all matters proposed, discussed or decided and, at the request of any member, a record, by an individual member, of any votes taken;” (4) “[a]ny other information that any member of the public body requests be included or reflected in the minutes;” and (5) any efforts to comply with a request for direct notification allowed by Section 30-4-80(E). S.C. Code Ann. §§ 30-4-80(E) & -90(a).

Recommendation: Also include a statement regarding how notice of the meeting was provided to the public, including the physical location and website where notice was posted. Examples of minutes forms DPS currently uses are included as Section IV.C, Form #3 – Charging Meeting Minutes, and IV.D, Form #4 – Scoring Meeting Minutes.

⁹ *Id.*

¹⁰ S.C. Code Ann. § 30-4-80(E).

¹¹ S.C. Code Ann. § 30-4-90(a).

3. Releasing Meeting Minutes:

- a. **Practical Matters:** Meeting minutes need not be approved by the evaluators. As the responsible procurement officer always attends any meeting of the evaluators, the procurement officer should keep the minutes. Examples of meeting minutes are attached.
- b. **What to Release:** If the minutes contain information obtained from an offeror's proposal, redact¹² the minutes prior to release.
- c. **When to Release:** Release meeting minutes to the public only after posting the earlier of the award or notice of intent to award.
- d. **Walk-In Requests:** If a person visits the procurement office of a state entity that issued the solicitation, that person is entitled to review - upon request - the minutes for any meetings held within the last six months. Nevertheless, meeting minutes are not released to the public until after the notice of intent to award is posted. One possible way to comply with this requirement would be for procurement offices to maintain recent meeting minutes either in a loose-leaf binder in its lobby or on a centralized web page.¹³

¹² The term "redact" means to edit out. The term is used as a shorthand for editing out any information that must be removed before a document is released to another. You may redact text by blacking it out.

¹³ See S.C. Code Ann. § 30-4-30(e).

III. THE MEETING - PUBLIC ACCESS

The following process is designed around two steps. The first step is a meeting for charging the evaluators and distributing the proposals. The second step is a meeting for the evaluators to discuss the proposals and submit their score sheets. This process also assumes that each evaluator completes some type of score sheet. Nothing in the law mandates this particular process. If you don't use this process or you vary this process, consult with legal counsel regarding how FOIA's meeting rules might apply to the process you follow.

A. Step #1 – Meeting to Charge the Panel

1. Regulation 19-445.2010(D) provides that “state personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law.” Accordingly, if you bring the proposals to the meeting for distribution, take steps to avoid disclosing the number or identity of offerors prior to executive session.
2. Convene the meeting in public. Ordinarily do not identify the evaluators by last name. Do not identify or reveal the number of offerors.¹⁴ In accordance with your normal process, provide the panel with general instruction regarding the evaluation process, including their confidentiality obligations under Regulation 19-445.2010. Hand out confidentiality agreement forms to each evaluator and any other person, like subject matter experts, who will participate in the evaluation. The confidentiality agreement form DPS currently uses is included as Section IV.E, Form #5 – Non-Disclosure Agreement. You may also distribute any general instruction and forms, but not proposals. ***None of these materials should include the number or identity of any of the offerors.*** If you only use blank scoring sheets you may hand them out in public session. If the score sheets identify any offeror, though, you must not distribute them until executive session, and after evaluators have signed their non-disclosure forms. See Section III.A.5, below. Then, make a motion to go into executive session.
3. After the motion is approved by a majority of evaluators,¹⁵ announce (a) that the panel is going into executive session, (b) that the matters to be discussed

¹⁴ “Throughout the competitive sealed proposal process, state and non-state personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law.” S.C. Code Ann. Regs. 19-445.2010D.

¹⁵ “Before going into executive session the public agency shall vote in public on the question” S.C. Code Ann. § 30-4-70(b).

are incident to a proposed contractual arrangement,¹⁶ and (c) that the panel will discuss proposals received in response to the solicitation – which should be identified by name or description and solicitation number. Then, adjourn to review the proposals individually. The Panel may adjourn without leaving executive session.¹⁷

4. Excuse the public, then ask everyone to sign the non-disclosure agreement. **After obtaining a signed written confidentiality agreement from each evaluator,**¹⁸ announce the names of the offerors, hand out the conflict-of-interest forms, explain the rules regarding conflicts of interest, and inquire about any possibility of a conflict of interest between the evaluators and the offerors under review. The conflict of interest form DPS currently uses is included as Section IV.F, Form #6 – Procurement Integrity Representations and Restrictions.
5. Once you have a signed conflict-of-interest form from each evaluator, distribute the proposals. ***Do not provide a proposal to any evaluator that refuses to sign the confidentiality agreement or the conflict-of-interest form.*** After conducting any needed discussion regarding the proposals, adjourn, *i.e.*, dismiss the evaluators.

B. Step #2 – Meeting to Discuss & Score

1. Convene the meeting in public. Do not identify the evaluators by last name. In accordance with your normal process, provide the panel any routine instructions regarding the evaluation process, then make a motion to go into executive session.
2. After the motion is approved by a majority of evaluators, announce (a) that the panel is going into executive session, (b) that the matters to be discussed are incident to a proposed contractual arrangement, (c) that the panel will discuss the proposals received in response to the solicitation– which should be

¹⁶ “[T]he presiding officer shall announce the specific purpose of the executive session . . .” S.C. Code Ann. § 30-4-70(b). *Herald Publishing Co. v. Barnwell*, 351 S.E. 2d 878 (S.C. Ct. App. 1986) (providing analysis of this statutory reason for executive session).

¹⁷ S.C. Code Ann. § 30-4-70(b) (“No action may be taken in executive session except to (a) adjourn or (b) return to public session.”).

¹⁸ “Prior to the issuance of an award or notification of intent to award, whichever is earlier, the procurement officer shall not release a proposal to a person without first obtaining from that person a written agreement, in a form approved by the responsible chief procurement officer, regarding restrictions on the use and disclosure of proposals. Such agreements are binding and enforceable.” S.C. Code Ann. Regs. 19-445.2010E.

identified by name or description and solicitation number, and (d) that the panel will, at the conclusion of their discussions, return to public session.

3. After you excuse the public, begin any discussions. Once discussions are complete, have the panel complete their score sheets and resolve any questions they may have. Ask the Panel not to sign their score sheets at that time.¹⁹ Once all score sheets are complete, vote to return to public session and allow public attendance.
4. Once in public session, ask the evaluators to sign their score sheets and submit them to you, then adjourn the meeting.
5. An open roll-call or other oral action by the evaluators is **not** required.²⁰
6. In the public meeting, **do not** announce the evaluators' scores or the ranking of offerors.²¹ At the public meeting, **do not** announce the highest ranking offeror or discuss any information appearing in an offeror's proposal.²² Generally, you should not tally the scores or, if applicable, add in the scores for cost.

¹⁹ “No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.” S.C. Code Ann. § 30-4-70(b) (emphasis added).

²⁰ In *Fowler v. Beasley*, 472 S.E.2d 630 (S.C. 1996), the South Carolina Supreme Court considered the legality of action taken by the Charleston County Legislative Delegation. By statute, the delegation was required to recommend to the governor a person to fill an opening on the county school board. To accomplish this, the Delegation, at a properly noticed meeting, accomplished its statutory duty by “sending around a ‘sign-up’ sheet at a meeting of the Delegation.” *Id.* at 633. Plaintiff citizens objected that the “sign-up” sheet did not comply with FOIA and that the “vote” had to be made by an open roll call. As the following explanation reflects, the Court rejected this argument.

We find the circulation of a letter, at an open, public meeting, at which each individual member signs his recommendation is in compliance with subsection six. So long as the vote is taken at an open public meeting, and the public is able to glean the results and how each member voted, there is no FOIA violation.

Id. at 634.

²¹ S.C. Code Ann. Regs. 19-445.2010C (“[S]tate personnel involved in an acquisition shall not engage in conduct that knowingly furnishes source selection information to anyone other than the responsible procurement officer”).

²² S.C. Code Ann. Regs. 19-445.2010E (“Prior to the issuance of an award or notification of intent to award, whichever is earlier, the procurement officer shall not release a proposal to a person without first obtaining from that person a written agreement, in a form approved by the responsible chief procurement officer, regarding restrictions on the use and disclosure of proposals.”).

C. Notes

1. In any meeting, if the evaluators reconvene after a break, a new, public vote must be taken to enter executive session if a new meeting notice is required. See paragraph II.B above regarding when a new meeting notice is required.
2. Public Participation - Recording: Allow anyone to record by any means any aspect of any public portions of a meeting. Do not allow the process of recording to interfere with the meeting. Neither questions nor public participation should be allowed.

IV. FORMS AND EXAMPLES

The following forms and examples are used by Division of Procurement Services purchasing managers to help them comply with FOIA meeting requirements during the procurement process. ***One size does not fit all.*** The forms should be modified to fit your particular situation.

A. Form #1 – Charging Meeting Notice

NOTICE - Meeting of the Request for Proposal Panel Charging

[Solicitation Description]

Solicitation No. _____

The meeting of the RFP Panel Charging for the above-referenced solicitation will be held:

Tuesday, March 25, 2019 at 11:00 AM

The meeting will be held at:

SFAA, Division of Procurement Services

1201 Main Street, Suite 600

Columbia, SC 29201

AGENDA:

A. REGULAR SESSION

1. Open Meeting
2. Overview of Process

B. EXECUTIVE SESSION

1. Distribute Proposals to Panel
2. Close Meeting

Posted: 3/21/19 at *[physical location and website address]*

B. Form #2 – Scoring Meeting Notice

NOTICE - Meeting of the Request for Proposal Evaluation Panel

[Solicitation Description]

Solicitation No. _____

The meeting of the RFP Evaluation Panel for the above-referenced solicitation will be held:

Friday, February 22, 2019 at 9:00 AM

The meeting will be held at:

SFAA, Division of Procurement Services
1201 Main Street, Suite 600
Columbia, SC 29201

AGENDA:

A. REGULAR SESSION

1. Open Meeting
2. Overview of Process

B. EXECUTIVE SESSION

1. Discussion of Proposals

C. EVALUATION OF PROPOSALS

1. Final scoring by evaluators and signing evaluation forms

Posted 2/20/2019 at *[physical location and website address]*

C. Form #3 – Charging Meeting Minutes

MINUTES OF THE STATE PROCUREMENT OFFICE PANEL CHARGING September 7, 2018 2:30 PM

The Evaluation Panel for the contract for *[Solicitation Description]*, Solicitation No. _____, met at 2:30 P.M. on September 7, 2018, at the Division of Procurement Services, 1401 Main Street, Suite 600, Columbia, South Carolina, with the following panel members in attendance:

Mr. _____

Mr. _____

Ms. _____

The meeting was called to order by *[Procurement Officer]*, Division of Procurement Services, Procurement Officer responsible for this procurement.

Distribution of Evaluation Packages

[Procurement Officer] distributed the evaluation packages to each panel member. Each package contained the following information:

- The Evaluation Panel Briefing Instructions
- The Non-Disclosure Agreement
- Evaluator Reports (Sample Score Sheets)

Evaluation Panel Briefing Instructions

[Procurement Officer] conducted the panel briefing and discussed the Evaluation Briefing Sheet, covering each of the items listed therein. In addition, *[Procurement Officer]* discussed and explained the Non-Disclosure Agreement and the Evaluator Score Sheets.

Distribution of Proposals

A motion was made by *[Procurement Officer]* to enter executive session to issue the proposals and was seconded by Mr. _____. All in favor - none opposed. After all attendees signed a non-disclosure agreement, *[Procurement Officer]* distributed the Procurement Integrity Representations & Restrictions Certification and discussed

and explained the obligations under that certification. After all attendees signed a Procurement Integrity Representations & Restrictions Certification, [Procurement Officer] distributed copies of each of the proposals submitted in response to the Request for Proposal.

A motion was made by [Procurement Officer] to exit executive session and was seconded by _____. All in favor – none opposed.

There being no further business to come before the Evaluation Panel, the meeting was adjourned. The Evaluation Panel will meet on September 26, 2018, at 9:00 am, for the purpose of general discussion concerning the submitted proposals prior to completing their evaluation. The panel members were instructed to contact [Procurement Officer] if they had any questions or concerns. No one from the public attended the meeting.

[signed]

Procurement Officer

Division of Procurement Services

As required by Section 30-4-80, notification for this meeting was posted at the Materials Management Office, office of the procurement officer responsible for this solicitation. The notification included the date, time, place and agenda of the meeting. There were no requests from the media outlets or any other organization to be notified of this meeting.

D. Form #4 – Scoring Meeting Minutes

**MINUTES OF THE STATE PROCUREMENT OFFICE
PANEL SELECTION
September 7, 2018
2:30 PM**

The Evaluation Panel for the contract for *[Solicitation Description]*, Solicitation No. _____, met at 2:30 P.M. on September 7, 2018, at the Division of Procurement Services, 1401 Main Street, Suite 600, Columbia, South Carolina, with the following panel members in attendance:

Mr. _____

Mr. _____

Ms. _____

The meeting was called to order by *[Procurement Officer]*, Division of Procurement Services, Procurement Officer responsible for this procurement.

Overview of Process

[Procurement Officer] opened the meeting and gave a brief overview of the evaluation review process. A motion was made to go into Executive Session by *[Procurement Officer]*, seconded by _____. *[Procurement Officer]* announced that the panel was going into Executive Session and that all matters to be discussed are incident to a proposed contractual arrangement. No one from the public attended the meeting.

Evaluation and scoring was conducted. A motion was made to exit executive session by *[Procurement Officer]*, seconded by _____. All panel members signed their scoring sheets and turned them in to *[Procurement Officer]*.

[signed]

Procurement Officer

Division of Procurement Services

As required by Section 30-4-80, notification for this meeting was posted at the Materials Management Office, office of the procurement officer responsible for this solicitation. The notification included the date, time, place and agenda of the meeting. There were no requests from the media outlets or any other organization to be notified of this meeting.

related to this procurement. ▪ I will not divulge, publish, or reveal by word, conduct, or any other means any proposal or source selection information, except as necessary to perform my official duties related to this procurement as assigned by the procurement officer. ▪ Except as authorized by the procurement officer, I will not reveal the names of individuals providing reference information about an offeror's past performance. ▪ I will use source selection information, a proposal, or the contents of either only for my official duties regarding this procurement as assigned by the procurement officer and only in a manner consistent with the rules of conduct stated herein. ▪ I acknowledge that state law may prohibit the public release of some proposal information even after award. ▪ If anyone communicates with me, directly or indirectly, regarding this procurement prior to award, I agree to immediately report the time, place, manner, content, and originator of the communication to the procurement officer. Prior to award, I will forward or refer all requests for information regarding the procurement to the procurement officer. ▪ If any information or allegations concerning improper or illegal conduct regarding a procurement comes to my attention, I will give immediate notice of the relevant facts to the appropriate chief procurement officer.

Continuing Obligation: My obligations under this agreement are of a continuing nature. If I violate any of the above restrictions, I agree to inform the procurement officer immediately and to take no further action concerning the procurement pending receipt of the procurement officer's instructions.

Certification: I certify that I have read and understand the above agreement. I agree to the above terms.

Printed Name

Signature

Date

conflicting roles that might bias its exercise of judgment in performing its contractual obligations. ▪ I have no information that would suggest that an offeror, directly or indirectly, has provided to any other offeror information regarding its pricing, the factors used to calculate its prices, or its intention to submit an offer. ▪ I am not aware of any offeror (including its principals and affiliates) making a donation, directly or indirectly, to the using agency during the eighteen months prior to issuance of the solicitation.

Integrity Obligations / Rules of Conduct: ▪ I acknowledge that my participation in this procurement may be subject to intense scrutiny and that my misrepresentation or failure to abide by the applicable rules of conduct could irreparably damage the integrity of this procurement. By signing this agreement, I agree to abide by the following rules of conduct until an award or notification of intent to award has been issued by the procurement officer: ▪ I agree to conduct myself in such a way as not to adversely affect the confidence of the public or competing offerors in this procurement process. ▪ I agree to avoid any action that could result in the appearance that I lack independence or impartiality. ▪ I agree not to engage in any activity, or enter into any financial transaction, that involves or appears to involve the direct or indirect use of "inside information" to further a private gain for myself or others. ▪ I agree to comply with applicable provisions of Title 8, Chapter 13 of the South Carolina Code of Laws, known as the State Ethics Act. If the State Ethics Act requires me to furnish or file a statement or form that has any bearing on this acquisition process, I agree to immediately provide the procurement officer with a copy. [▪ If you are not a public official, public member, or public employee (as defined by the State Ethics Act) and you are participating in this evaluation pursuant to a contract with the State, (a) you affirm that your employer does not have any direct or indirect financial interest or any other beneficial interest in any offeror, and (b) you agree to file a statement as required by Section 8-13-1150 and to simultaneously provide a copy to the procurement officer.]

Continuing Obligation: My representations and obligations under this agreement are of a continuing nature. If subsequent events cause any change to the representations made above, create an actual or apparent conflict of interest, or create a violation of any rule of conduct contained in this agreement, I agree to inform the procurement officer promptly and to take no further action concerning the procurement pending receipt of the procurement officer's instructions.

Exceptions: Check this box if you take any exceptions to any of the above representations. Please provide a thorough explanation of any exceptions on a separate sheet of paper, sign each page, and provide them to the procurement officer with this form. In the event that you note any exceptions, the procurement officer will advise you whether you may still participate in this procurement process.

Certification: I certify that I have read and understand the above. I further certify that the representations and statements made herein (or attached) are true and correct. I agree to the above terms.

Printed Name

Signature

Date

G. Model Motion and Announcement for Executive Session

Model Motion

Pursuant to Section 30-4-70 of the state Freedom of Information Act, I move that the evaluation panel go into executive session in order to *<select appropriate option: view, review, discuss, and/or evaluate the competing proposals>*.

Model Announcement

In accordance with the evaluation panel's vote, this meeting is now in executive session and I must ask everyone to leave. While in executive session, the panel will *<select appropriate option: **Use same language that was used in motion.**>*. The meeting is being closed pursuant to the exemption for discussions of negotiations incident to proposed contractual relations, as allowed by Section 30-4-70(a)(2) of the Freedom of Information Act.