

SECTION ~~11-35-10~~. Citation. (S.C. Code § 11-35-10)

~~This chapter shall be known and may be cited as the "South Carolina Consolidated Procurement Code".~~ (1) Adoption. This document is adopted pursuant to the mandate of Section 11-35-5340 of the South Carolina Code of Laws, is intended to have the force and effect of law, and shall be known and may be cited as the "[insert district name] Consolidated Procurement Code." Section 11-35-5340 of the South Carolina Code of Laws provides as follows: " Irrespective of the source of funds, any school district whose budget of total expenditures, including debt service, exceeds seventy-five million dollars annually is subject to the provisions of Chapter 35, Title 11, and shall notify the Director of the Division of Procurement Services of the State Fiscal Accountability Authority of its expenditures within ninety days after the close of its fiscal year. However, if a District has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the South Carolina Consolidated Procurement Code, the District is exempt from the provisions of the South Carolina Consolidated Procurement Code except for a procurement audit which must be performed every three years by an audit firm approved by the Division of Procurement Services. Costs associated with the internal review and audits are the responsibility of the school district and will be paid to the entity performing the audit."

(2) Prior District Rules Superseded. This code and the accompanying procurement regulations supersede all other prior codes, regulations, ordinances, policies, procedures, or other rules of this District regarding procurement. To the extent of any conflict, this code and the accompanying procurement regulations take precedence over any other codes, regulations, ordinances, policies, procedures, or other rules of this District.

(3) Approval of Code. By letter dated [enter date], the District received a written opinion from the Division of Procurement Services to the effect that this code and the accompanying procurement regulations are substantially similar to the provisions of the South Carolina Consolidated Procurement Code and the regulations promulgated thereunder, as required by Section 11-35-5340 and Regulation 19-445.3000 of the South Carolina Code of Laws and Regulations.

(4) Updating of Code. The Board intends that this code be updated in conjunction with changes to the South Carolina Consolidated Procurement Code and the regulations promulgated thereunder; accordingly, whenever the South Carolina Consolidated Procurement Code or the regulations promulgated thereunder are updated, the Superintendent shall submit conforming updates for approval to both Division of Procurement Services and the Board of Trustees of the District.

SECTION ~~11-35-20~~. Purpose and policies. (S.C. Code § 11-35-20)

(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-District~~ 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 ~~District 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 ~~DistrictState~~ 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~~the District;

(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 ~~District officials various government procurement officers; and-~~

(i) to promote consistency, certainty, and efficiency, it is the intent of the District to have this code interpreted as consistently as possible with official interpretations of parallel provisions of the South Carolina Consolidated Procurement Code.

SECTION ~~11-35-25~~. Supersession of conflicting laws. (S.C. Code § 11-35-25)

If this code applies to a procurement, the provisions of this code supersede all laws or parts of laws in conflict with it to the extent of the conflict including, but not limited to, the principles of law and equity, the common law, and the Uniform Commercial Code of this State.

SECTION ~~11-35-27~~. No implied repeal.

~~No part of this chapter may be considered to be impliedly repealed by subsequent legislative enactment if such construction of the subsequent legislative enactment can be reasonably avoided.~~

SECTION ~~11-35-30~~. Obligation of good faith. (S.C. Code § 11-35-30)

Every contract or duty within this code imposes an obligation of good faith in its negotiation, performance or enforcement. "Good faith" means honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

SECTION ~~11-35-35~~. Recodified.

SECTION ~~11-35-40~~. Application of ~~Procurement this~~ Code. (S.C. Code § 11-35-40)

(1) General Application. This code applies only to contracts solicited or entered into after the effective date of this code unless the parties agree to its application to a contract entered into prior to its effective date.

(2) Application to ~~District State~~ Procurement. This code applies to every procurement or expenditure of funds by this ~~District State~~ under contract ~~acting through a governmental body as herein defined~~ irrespective of the source of the funds, including federal assistance monies, except as specified in Section ~~11-35-40~~(3) (Compliance with Federal Requirements) and except that this code does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Intergovernmental Relations). Notwithstanding the foregoing, the provisions of Article 23 (Statewide Provisions) apply as provided therein. It also shall apply to the disposal of ~~District state~~ supplies as provided in Article 15 (Supply Management). ~~No state agency or subdivision thereof may sell, lease, or otherwise alienate or obligate telecommunications and information technology infrastructure of the State by temporary proviso and unless provided for in the general laws of the State.~~

(3) Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance, grant, or contract funds, the ~~District governmental body~~ also shall comply with federal laws (including authorized regulations) as are mandatorily applicable and which are not presently reflected in this code; however, failure to comply with the foregoing is not subject to review under Article 17. Notwithstanding, where federal assistance, grant, or contract funds are used in a procurement by the

~~District~~ governmental body as defined in Section 11-35-310(18), this code, including any requirements that are more restrictive than federal requirements, must be followed, except to the extent such action would render the ~~District governmental body~~ ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. In those circumstances, the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this code.

(4) The acquisition of a facility or capital improvement by a foundation or eleemosynary organization on behalf of or for the use of ~~the District any state agency or institution of higher learning~~ which involves the use of public funds in the acquisition, financing, construction, or current or subsequent leasing of the facility or capital improvement is subject to the provisions of this code in the same manner as a ~~governmental body~~ the District. The definition and application of the terms "acquisition", "financing", "construction", and "leasing" are governed by generally accepted accounting principles.

~~(5) The licenses granted by the Federal Communications Commission to Greenville Technical College and Trident Technical College authorizing the use of the band of the Educational Broadband Service spectrum are exempt from the requirements of this code. If Greenville Technical College and Trident Technical College enter into contracts with third parties to lease their spectrum capacity, Greenville Technical College and Trident Technical College must not impose any pricing requirements on those third parties. Any lease agreements with third parties must be designed so that Greenville Technical College and Trident Technical College receive the market rate for the spectrum capacity.~~

SECTION ~~11-35-45~~. Payment for goods and services received by District ~~State~~. (S.C. Code § 11-35-45)

~~(A) All vouchers for payment of purchases of services, supplies, or information technology must be delivered to the Comptroller General's office within thirty work days from acceptance of the goods or services and proper invoice. After the thirtieth work day, following acceptance or the postmark on the invoice, the Comptroller General shall levy an amount not to exceed fifteen percent each year from the funds available to the agency, this amount to be applied to the unpaid balance to be remitted to the vendor unless the vendor waives imposition of the interest penalty.~~

~~(B) All agencies and institutions of the State are required to comply with the provisions of this section. Only the lump sum institutions of higher education are responsible for the payment of all goods or services.~~ (A) The District is responsible for the payment of all supplies, services, or information technology within thirty work days after the acceptance of the goods or services and proper invoice, whichever is received later, and shall pay an amount not to exceed fifteen percent per annum, as established by the South Carolina Comptroller General for state agencies, on any unpaid balance which exceeds the thirty work-day period, if the vendor specifies on the statement or the invoice submitted to ~~the District such institutions~~ that a late penalty is applicable if not paid within thirty work days after the acceptance of goods or services.

~~(C) The Comptroller General shall issue written instructions to the agencies to carry out the intent of this section. All offices, institutions, and agencies of state government shall fully cooperate with the Comptroller General in the implementation of this section.~~

~~(D)~~ (B) The thirty-day period shall not begin until the District agency, whether or not the agency processes vouchers through the Comptroller General, certifies its satisfaction with the received goods or services and proper invoice.

SECTION 11-35-50. Recodified.

SECTION 11-35-55. Recodified.

SUBARTICLE 1.

PURPOSES, CONSTRUCTION, AND APPLICATION

~~SECTION 11-35-60. Dissemination of regulations.~~

~~—The dissemination of regulations relating to the implementation of this code shall be in accordance with Sections 1-23-10, et seq. of the 1976 Code.~~

~~SECTION 11-35-70. Recodified.~~

SUBARTICLE 3.

DETERMINATIONS

~~SECTION 11-35-210. Determinations; exemption. (S.C. Code § 11-35-210)~~

~~(A) Written determinations expressly required by the code or regulations must be retained in an official contract file of the District governmental body administering the contract. These determinations must be documented in sufficient detail to satisfy the requirements of audit as provided in Section 11-35-1230.~~

~~—(B) All findings, determinations, decisions, policies, and procedures allowed by this chapter are exempt from the requirements of Section 1-23-140(b).~~

SUBARTICLE 5.

DEFINITIONS OF TERMS USED IN PROCUREMENT CODE

~~SECTION 11-35-310. Definitions. (S.C. Code § 11-35-310)~~

Unless the context clearly indicates otherwise:

~~(1) "Information Technology (IT)" means information resources, telecommunications, and information services:~~

(a) "Information resources" means any equipment including interconnected systems or subsystems of equipment that is used in the automatic acquisition, creation, conversion, duplication, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the using agency.

(i) "Information resources" includes, but is not limited to, computers, ancillary equipment, including imaging peripherals, input, output, and storage devices and devices necessary for security and surveillance, peripheral equipment designed to be controlled by the central processing unit of a computer, databases, software, firmware, middleware, and application and application development software; whether owned, leased, licensed, or accessed as a service; and routine maintenance and support.

(ii) "Database" means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer.

(iii) "Software" means computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations.

(iv) For purposes of this definition, equipment is used by ~~an agency~~ District if the equipment is used by the ~~District~~agency directly or is used by a contractor under a contract with the ~~District~~agency that requires its use.

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| <p>(b) "Telecommunications" means voice, data, message, and video transmissions, and includes the transmission and switching facilities of public telecommunications systems, as well as operating and network software.</p> |
| <p>(c) "Information Services" means services provided by a contractor associated with any aspect of information resources or telecommunications, except that information services does not include information resources or telecommunications.</p> |
| <p>(2) "Board" means <u>the Board of [Education / Trustees] of [the] School District [No.] of [Name] County. governing body of the State Fiscal Accountability Authority.</u></p> |
| <p>(3) "Business" means any <u>means any</u> corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other legal entity.</p> |
| <p>(4) "Business day" means a day that is neither a Saturday, Sunday, nor a state or federal holiday.</p> |
| <p>(5) "Change order" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual agreement of the parties to the contract.</p> |
| <p>(6) "Chief procurement officer" means (a) the management officer for information technology, (b) the state engineer for areas of construction, architectural and engineering, construction management, and land surveying services, and (c) the materials management officer for all other procurements.</p> |
| <p><u>"Chief Business Official" means a District employee, above the level of procurement officer and reporting directly to the superintendent, designated in writing by the Superintendent as having primary management responsibility for District business operations or finance. Unless otherwise provided by the Superintendent, the "Chief Business Official" shall also serve as the "Chief Procurement Officer." The name and official District title of the person currently serving as the District's chief business official must be published in the internal procurement procedures issued pursuant to Section 540.</u></p> |
| <p><u>"Chief procurement officer" means a District employee, above the level of procurement officer, designated in writing by the Superintendent as having primary management responsibility for supervising procurement or disposal by the District. The Superintendent may provide for the division or sharing of duties and powers assigned by this code to the chief procurement officer to more than one person. Unless otherwise designated in writing by the Superintendent, the chief business official serves as the chief procurement officer. The name and official District title of the person currently serving as the District's chief procurement officer must be published in the internal procurement procedures issued pursuant to Section 540.</u></p> |
| <p>(7) "Construction" means the process of building, altering, repairing, remodeling, improving, or demolishing a public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of an existing public infrastructure facility, including structures, buildings, or real property.</p> |
| <p>(8) "Contract" means all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, information technology, or construction.</p> |
| <p>(9) "Contract modification" means a written order signed by the procurement officer, directing the contractor to make changes which the changes clause of the contract authorizes the procurement officer to order without the consent of the contractor.</p> |
| <p>(10) "Contractor" means any person having a contract with <u>the District.</u>a governmental body.</p> |
| <p>(11) "Cost effectiveness" means the ability of a particular product or service to efficiently provide goods or services to the District<u>State</u>. In determining the cost effectiveness of a particular product or service, the procurement officer shall list the relevant factors in the bid notice or solicitation and use only those listed relevant factors in determining the award.</p> |
| <p>(12) "Data" means recorded information, regardless of form or characteristics.</p> |
| <p>(13) "Days" means calendar days. In computing any period of time prescribed or allowed by this code or the ensuing regulations, or by any order of the Procurement Review Panel, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of</p> |

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| <p>the period computed is to be included, unless it is a Saturday, Sunday, or a <u>legal holiday for the District state</u> or federal holiday, in which event the period runs to the end of the next day which is neither a Saturday, Sunday, nor such holiday.</p> |
| <p>(14) "Debarment" means the disqualification of a person to receive invitations for bids, or requests for proposals, or the award of a contract by the <u>DistrictState</u>, for a specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance.</p> |
| <p>(15) "Designee" means a duly authorized representative of a person with formal responsibilities under the code.</p> |
| <p><u>"District" means [insert full name of school district]</u></p> |
| <p>(16) "Employee" means an individual drawing a salary from a governmental body <u>the District</u>, whether elected or not, and any nonsalaried individual performing personal services for the District <u>any governmental body</u>.</p> |
| <p>(17) (Reserved)</p> |
| <p>(18) "Governmental body" means a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch. Governmental body excludes the General Assembly or its respective branches or its committees, Legislative Council, the Legislative Services Agency, and all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts or any entity created by act of the General Assembly for the purpose of erecting monuments or memorials or commissioning art that is being procured exclusively by private funds.</p> |
| <p>(19) "Grant" means the furnishing by the <u>District</u>, State or the United States government of assistance, whether financial or otherwise, to a person to support a program authorized by law. It does not include an award, the primary purpose of which is to procure specified end products, whether in the form of supplies, services, information technology, or construction. A contract resulting from such an award must not be considered a grant but a procurement contract.</p> |
| <p>(20) "Information Technology Management Officer" means the person holding the position as the head of the State Information Technology Office.</p> |
| <p>(21) "Invitation for bids" means a written or published solicitation issued by an authorized procurement officer for bids to contract for the procurement or disposal of <u>District</u> stated supplies, services, information technology, or construction, which will ordinarily result in the award of the contract to the responsible bidder making the lowest responsive bid.</p> |
| <p>(22) "Materials Management Officer" means the person holding the position as the head of the materials management office of the State.</p> |
| <p>(23) "Person" means any business, individual, union, committee, club, other organization, or group of individuals.</p> |
| <p>(24) "Political subdivision" means all counties, municipalities, school districts, public service or special purpose districts.</p> |
| <p>(25) "Procurement" means buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, information technology, or construction. It also includes all functions that pertain to the obtaining of any supply, service, information technology, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contracts, and all phases of contract administration.</p> |
| <p>(26) "Procurement officer" means any person duly authorized by the <u>District, in accordance with procedures prescribed by regulation, appropriate chief procurement officer or the head of the purchasing agency</u> to enter into and administer contracts and make written determinations and findings with respect thereto. The term also includes an authorized representative of the governmental body within the scope of his authority.</p> |
| <p>(27) "Public funds" means any money or property owned by the State or a political subdivision thereof, regardless of form and whether in specie or otherwise.</p> |

~~(28) "Purchasing agency" means any governmental body other than the chief procurement officers authorized by this code or by way of delegation from the chief procurement officers to enter into contracts.~~

(29) "Real property" means any land, all things growing on or attached thereto, and all improvements made thereto including buildings and structures located thereon.

~~(30)~~ "Request for proposals" (RFP) means a written or published solicitation issued by an authorized procurement officer for proposals to provide supplies, services, information technology, or construction which ordinarily result in the award of the contract to the responsible offeror making the proposal determined to be most advantageous to the DistrictState. The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP.

(31) "Services" means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or information services as defined ~~in Section 11-35-310(1)(c) above.~~

(32) "Subcontractor" means any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with ~~a governmental body~~ the District.

(33) "Supplies" means all personal property including, but not limited to, equipment, materials, printing, and insurance.

(34) "State" means state government.

(35) "State Engineer" means the person holding the position as head of the state engineer's office.

"Superintendent" means the District's chief executive official, usually known as the Superintendent.

(36) "Suspension" means the disqualification of a person to receive invitations for bids, requests for proposals, or the award of a contract by the DistrictState, for a temporary period pending the completion of an investigation and any legal proceedings that may ensue because a person is suspected upon probable cause of engaging in criminal, fraudulent, or seriously improper conduct or failure or inadequacy of performance which may lead to debarment.

~~—(37) "Term contract" means contracts established by the chief procurement officer for specific supplies, services, or information technology for a specified time and for which it is mandatory that all governmental bodies procure their requirements during its term. As provided in the solicitation, if a governmental body is offered the same supplies, services, or information technology at a price that is at least ten percent less than the term contract price, it may purchase from the vendor offering the lower price after first offering the vendor holding the term contract the option to meet the lower price. The solicitation used to establish the term contract must specify contract terms applicable to a purchase from the vendor offering the lower price. If the vendor holding the term contract meets the lower price, then the governmental body shall purchase from the contract vendor. All decisions to purchase from the vendor offering the lower price must be documented by the procurement officer in sufficient detail to satisfy the requirements of an external audit. A term contract may be a multiterm contract as provided in Section 11-35-2030.~~

~~—(38) "Using agency" means any governmental body of the State which utilizes any supplies, services, information technology, or construction purchased under this code.~~

SUBARTICLE 7.

PUBLIC ACCESS TO PROCUREMENT INFORMATION

SECTION 11-35-410. Public access to procurement information. (S.C. Code § 11-35-410)

(A) Procurement information must be a public record to the extent required by Chapter 4, Title 30 (The Freedom of Information Act), except as otherwise provided by this code, and with the exception

that, pursuant to the authority granted by Section 11-35-5340 of the South Carolina Code of Laws, commercial or financial information obtained in response to a request for proposals or any type of bid solicitation that is privileged and confidential need not be disclosed.

(B) Privileged and confidential information is information in specific detail not customarily released to the general public, the release of which might cause harm to the competitive position of the party supplying the information. Examples of this type of information include:

- (1) customer lists;
- (2) design recommendations and identification of prospective problem areas under an RFP;
- (3) design concepts, including methods and procedures;
- (4) biographical data on key employees of the bidder.

(C) ~~The board shall promulgate regulations directing the public availability and disposition of~~For all documents submitted in response or with regard to a solicitation or other request, the documents need not be disclosed if an award is not made, where no award is made.

(D) For all documents submitted in response or with regard to any solicitation or other request, the person submitting the documents shall comply with instructions provided in the solicitation for marking information exempt from public disclosure. Information not marked as required by the applicable instructions may be disclosed to the public.

(E) ~~A governmental body~~The District, with the approval of the ~~appropriate~~ chief procurement officer, may keep portions of a solicitation confidential and release the information to prospective offerors only upon execution of a nondisclosure agreement, provided the information is otherwise exempted from disclosure by law.

(F) If requested in writing before a final award by an actual bidder, offeror, contractor, or subcontractor with regard to a specific intended award or award of a contract, the procurement officer shall, within five days of the receipt of any such request, make documents directly connected to the procurement activity and not otherwise exempt from disclosure available for inspection at an office of the responsible procurement officer. Without otherwise limiting any other exemptions granted by law, and except as provided herein, documents of and documents incidental to proposed contractual arrangements, including those used for contract negotiations, are not exempt from disclosure after the date notice of intent to award is posted, unless the notice is subsequently canceled.

SUBARTICLE 9.

REPORTING OF FURNITURE AND CERTAIN PURCHASES

SECTION ~~11-35-450~~. Reporting purchases. (S.C. Code § 11-35-450)

(A) The purchase of furniture, floor coverings, wall coverings, or other decorative or ornamental items by ~~a governmental body~~the District must be reported to the ~~governing board, commission, or council of the respective governmental body~~Board before the purchase, when the cost of the furniture, covering, or item exceeds one thousand dollars and it is to be used in:

- (1) an office or adjoining reception area utilized by ~~an agency director~~the Superintendent or assistant ~~agency director~~Superintendent; or
- (2) a board room or a conference room used as a board room.

(B) The reports required in subsection (A) must include the item to be purchased and its price. Upon receiving the reports, the ~~governing board, commission, or council of the respective governmental body~~Board formally shall approve or disapprove the purchase.

ARTICLE 3

PROCUREMENT ORGANIZATION

~~SUBARTICLE 1.~~

~~COMMITTEES AND MANAGEMENT~~

SECTION ~~11-35-510.~~ Centralization of materials management authority. (S.C. Code § 11-35-510)

~~Except as otherwise provided herein, a~~All rights, powers, duties, and authority of the District relating to the procurement of supplies, services, ~~and~~ information technology, and construction and to the management, control, warehousing, sale and disposal of supplies, construction, information technology, and services, ~~now vested in or exercised by a state governmental body pursuant to the provisions of law relating thereto, and~~ regardless of source of funding, are hereby ~~vested in~~ vested in ~~delegated to~~ the appropriate chief procurement officer by the Board, ~~or with regard to Article 15, as provided therein. This vesting of authority is subject to Section 11-35-710 (Exemptions), Section 11-35-1250 (Authority to Contract for Auditing Services), Section 11-35-1260 (Authority to Contract for Legal Services), Section 11-35-1550 (Small Purchases), Section 11-35-1560 (Sole Source Procurement), Section 11-35-1570 (Emergency Procurements), Section 11-35-3230 (Exception for Small Architect Engineer, and Land Surveying Services Contracts), and Section 11-35-3620 (Management of Warehouses and Inventory).~~

SECTION ~~11-35-530.~~ ~~Advisory committees.~~

~~The following advisory committees may be established by the board for the purpose of advising the board:~~

~~—(a) The board may appoint a purchasing policies and procedures advisory committee comprised of state and local government, and public members to discuss the performance of public purchasing in the State and to consider specific methods for improvement.~~

~~—(b) The board may appoint an information technology and procedures advisory committee comprised of state and local government and public members to discuss the purchasing performance of information technology for government in the State and to consider specific methods for improvement.~~

~~—(c) The board may appoint a construction, architect engineer, construction management, and land surveying services advisory committee comprised of state and local government and public members to discuss the purchasing performance of these services in the State and to consider specific methods of improvement. The advisory committee shall be comprised of the following: the State Engineer, a state agency representative, a banker, an attorney, a representative of local government, a registered architect, a registered engineer, a licensed building contractor, and a licensed subcontractor.~~

SECTION ~~11-35-540.~~ Authority and duties of the board. (S.C. Code § 11-35-540)

~~(1) Authority to Promulgate Regulations. Except as otherwise provided in this code, the board may promulgate regulations, The District's procurement regulations, consistent which are adopted in conjunction with this code, governing the procurement, management, control, and disposal of all supplies, services, information technology, and construction to be procured by the State. These regulations are binding in all procurements made by ~~the State~~ the District; provided, however, that the code takes precedence over the regulations to the extent of any conflict between them. The procurement regulations shall have the same relationship to this code as regulations promulgated under the administrative procedures act have to statutes enacted by the General Assembly.~~

~~(2) Nondelegation. The board may not delegate its power to promulgate regulations.~~

~~(3)~~(2) Approval of Operational Procurement Procedures. ~~Governmental bodies~~ The District shall develop internal operational procurement procedures consistent with this code and the procurement regulations; except, that the operational procurement procedures must be approved in writing by the

~~Superintendent, appropriate chief procurement officer. The operational procedures must be consistent with this chapter. Operational procedures adopted pursuant to this chapter are exempt from the requirements of Section 1-23-140.~~

~~(4)(3) The board shall consider and decide matters of policy within the provisions of this code including those referred to it by the chief procurement officers. The board has the power to audit and monitor the implementation of its regulations and the requirements of this code.~~

~~SUBARTICLE 3.~~

~~EXEMPTIONS~~

~~SECTION 11-35-710. Exemptions. (S.C. Code § 11-35-710)~~

~~(A) The board, upon the recommendation of the chief procurement officer, may exempt governmental bodies from purchasing certain items through the respective chief procurement officer's area of responsibility. The board-Board may exempt specific supplies, services, information technology, or construction from the purchasing procedures required in this code chapter and for just cause by unanimous written decision limit or may withdraw exemptions provided for in this section. The following exemptions are granted from this chapter: Exemptions granted by the Board shall appear in any internal operating protocols or procedures adopted pursuant to Section 540.~~

~~— (1) the construction, maintenance, and repair of bridges, highways, and roads; vehicle and road equipment maintenance and repair; and other emergency type parts or equipment utilized by the Department of Transportation or the Department of Public Safety;~~

~~— (2) the purchase of raw materials by the South Carolina Department of Corrections, Division of Prison Industries;~~

~~— (3) South Carolina State Ports Authority;~~

~~— (4) Division of Public Railways of the Department of Commerce;~~

~~— (5) South Carolina Public Service Authority;~~

~~— (6) expenditure of funds at state institutions of higher learning derived wholly from athletic or other student contests, from the activities of student organizations, and from the operation of canteens and bookstores, except as the funds are used for the procurement of construction, architect-engineer, construction management, and land surveying services;~~

~~— (7) livestock, feed, and veterinary supplies;~~

~~— (8) articles for commercial sale by all governmental bodies;~~

~~— (9) fresh fruits, vegetables, meats, fish, milk, and eggs;~~

~~— (10) South Carolina Arts Commission and South Carolina Museum Commission for the purchase of one-of-a-kind items such as paintings, antiques, sculpture, and similar objects. Before a governmental body procures the objects, the head of the purchasing agency shall prepare a written determination specifying the need for the objects and the benefits to the State. The South Carolina Arts Commission shall review the determination and forward a recommendation to the board for approval;~~

~~— (11) published books, periodicals, and technical pamphlets;~~

~~— (12) South Carolina Research Authority;~~

~~— (13) the purchase of supplies, services, or information technology by state offices, departments, institutions, agencies, boards, and commissions or the political subdivisions of this State from the South Carolina Department of Corrections, Division of Prison Industries;~~

~~— (14) Medical University Hospital Authority, if the Medical University Hospital Authority has promulgated a procurement process in accordance with its enabling provision;~~

~~— (15) if approved in writing by the State Engineer in advance, and if some aspect of the overall transaction is otherwise approved by the board in advance of the acquisition, an acquisition of construction from an eleemosynary corporation or foundation, or a wholly owned business thereof;~~

~~established solely for the governmental body's benefit, but only if the eleemosynary corporation or foundation acquires the construction on behalf of or for the use of the governmental body and does so pursuant to this code, as required by Section 11-35-40(4).~~

~~—(B) The State Fiscal Accountability Authority shall maintain and post publicly a running list of all currently effective actions taken by the board pursuant to subsection (A).~~

SUBARTICLE 5.

OFFICES CREATED

~~SECTION 11-35-810. Creation of Materials Management Office.~~

~~—There is hereby created, within the Division of Procurement Services, a Materials Management Office to be headed by the Materials Management Officer.~~

~~SECTION 11-35-820. Creation of Information Technology Management Office.~~

~~—There is created within the Division of Procurement Services, the Information Technology Management Office to be headed by the Information Technology Management Officer. The office is responsible for administering all procurement and contracting activities undertaken for governmental bodies involving information technology in accordance with this chapter, and may establish a training and certification program in accordance with Section 11-35-1030. All procurements involving information technology, and any pre-procurement and post-procurement activities in this area, must be conducted in accordance with the regulations promulgated by the board.~~

~~SECTION 11-35-830. Creation of the Office of State Engineer.~~

~~—There is created within the board, the State Engineer's Office to be headed by the State Engineer. All procurements involving construction, architectural and engineering, construction management, and land surveying services, as defined in Section 11-35-2910, and any pre-procurement and post-procurement activities in this area, must be conducted in accordance with the "Manual for Planning and Execution of State Permanent Improvements" and with any regulations promulgated by the board, unless otherwise provided in this code by specific reference to the State Engineer's Office.~~

~~SECTION 11-35-835. Office of State Engineer to review completed documents within specified time.~~

~~The Office of State Engineer must review properly completed schematic design, properly completed design development, and properly completed construction documents within a total of forty five days of submission of documents.~~

~~SECTION 11-35-840. Delegation of authority. (S.C. Code § 11-35-840)~~

~~Subject to this code and the regulations ~~of the board~~, the chief procurement officers may delegate authority to designees, ~~or to any department, agency, or official.~~ A delegation of authority by the chief procurement officers must be in writing and available upon request by the public to the chief procurement officer.~~

~~SECTION 11-35-845. Oversight of permanent improvement projects.~~

~~—Each agency of state government that has total management capability as defined and certified by the State Engineer's Office must be allowed to oversee the administration of construction projects with the State Engineer's Office serving as an audit function. The State Engineer's Office shall assist those small agencies who do not have the necessary expertise in permanent improvements.~~

SUBARTICLE 7

ADVISORY COMMITTEES AND TRAINING

~~SECTION 11-35-1010. Relationship with using agencies.~~

~~—The chief procurement officers shall maintain a close and cooperative relationship with the using agencies. The chief procurement officers shall afford each using agency reasonable opportunity to participate in and make recommendations with respect to procurement matters affecting the using agency.~~

~~SECTION 11-35-1020. Advisory groups.~~

~~—The chief procurement officers may appoint advisory groups such as user committees to assist with respect to specifications and procurement in specific areas and with respect to any other matters within the authority of the chief procurement officers. The chief procurement officers shall develop methods for obtaining necessary and relevant information from the affected agencies, whether through user committees or by surveys and other methods. The chief procurement officers shall make every reasonable effort to ensure that such contracts are developed as will best suit the interest of the State, giving due emphasis to user needs, total costs, and open competitive methods of public purchasing.~~

~~SECTION 11-35-1030. Procurement training and certification. (S.C. Code § 11-35-1030)~~

~~The chief procurement officers develop a system of training for procurement in accordance with regulations ~~by the board~~. The training must encompass the latest techniques and methods of public procurement. If considered appropriate by the chief procurement officers, the training must include a requirement for the certification of the procurement officer of ~~each purchasing agency~~ the District.~~

SUBARTICLE 9.

AUDITING AND FISCAL REPORTING

~~SECTION 11-35-1210. Certification.~~

~~—(1) Authority. In an amount up to fifty thousand dollars in actual or potential value, individual governmental bodies may make direct procurements not under term contracts. Subject to the following and subject to any ensuing regulations:~~

~~— (a) the board may assign differential dollar limits below which individual governmental bodies may make direct procurements not under term contracts. The Division of Procurement Services shall review the respective governmental body's internal procurement operation, shall certify in writing that it is consistent with the provisions of this code and the ensuing regulations, and recommend to the board those dollar limits for the respective governmental body's procurement not under term contract; and~~

~~— (b) the Director of the Division of Procurement Services may authorize an individual governmental body to make direct procurements not under term contracts in an amount up to one hundred fifty thousand~~

dollars. All authority granted pursuant to this item must be in writing, and the director shall advise the board in writing of all such authorizations.

~~—(2) Policy. Authorizations granted by the board or the Director of the Division of Procurement Services to a governmental body are subject to the following:~~

~~— (a) adherence to the provisions of this code and the ensuing regulations, particularly concerning competitive procurement methods;~~

~~— (b) responsiveness to user needs;~~

~~— (c) obtaining the best prices for value received.~~

~~—(3) Adherence to Provisions of the Code. All procurements shall be subject to all the appropriate provisions of this code, especially regarding competitive procurement methods and nonrestrictive specifications.~~

~~—(4) Subject to subsection (1), the State Board for Technical and Comprehensive Education, in coordination with the appropriate chief procurement officer, may approve a cumulative total of up to fifty thousand dollars in additional procurement authority for technical colleges, provided that the Division of Procurement Services makes no material audit findings concerning procurement. As provided by regulation, any authority granted pursuant to this paragraph is effective when certified in writing by the Division of Procurement Services.~~

~~SECTION 11-35-1220. Collection of data concerning public procurement.~~

~~—The chief procurement officers are authorized to prepare statistical data concerning the procurement, use, and disposition of all supplies, services, information technology, and construction. All using agencies shall furnish these reports as the chief procurement officers may require concerning use, needs, and stocks on hand, and the chief procurement officers shall prescribe forms to be used by the using agencies in requisitioning, ordering, and reporting supplies, services, information technology, and construction. The chief procurement officers shall limit requests for information to those items necessary for the effective operation of the purchasing system, but using agencies must be required to provide information as requested.~~

~~SECTION 11-35-1230. Auditing and fiscal reporting.~~

~~—(1) The Division of Procurement Services, through consultation with the chief procurement officers, shall develop written plans for the auditing of state procurements.~~

~~—(2) In procurement audits of governmental bodies thereafter, the auditors from the Division of Procurement Services shall review the adequacy of the governmental body's internal controls in order to ensure compliance with the requirement of this code and the ensuing regulations. A noncompliance discovered through audit must be transmitted in management letters to the audited governmental body and the board. The Division of Procurement Services shall provide in writing proposed corrective action to governmental bodies. Based upon audit recommendations, the board may revoke certification as provided in Section 11-35-1210 and require the governmental body to make all procurements through the appropriate chief procurement officer above a dollar limit set by the board, until such time as the board is assured of compliance with this code and its regulations by that governmental body.~~

~~SECTION 11-35-1240. Administrative penalties.~~

~~—(A) The board shall prescribe administrative penalties for violation of the provisions of this code and of regulations promulgated under it, excluding those matters under the jurisdiction of the Ethics Commission as provided by law.~~

~~—(B) Violation of these provisions is grounds for loss of or reduction in authority delegated by either the board or this code.~~

SECTION ~~11-35-1250~~. Authority to contract for auditing services. (S.C. Code § 11-35-1250)

No contract for auditing or accounting services shall be awarded without the approval of the ~~State Auditor except where specific statutory authority is otherwise provided~~Board.

SECTION ~~11-35-1260~~. Authority to contract for legal services. (S.C. Code § 11-35-1260)

No contract for the services of attorneys shall be awarded without the approval of the ~~State Attorney General except where specific statutory authority is otherwise provided~~Board.

ARTICLE 5

SOURCE SELECTION AND CONTRACT FORMATION

~~SUBARTICLE 1-~~

~~DEFINITIONS~~

SECTION ~~11-35-1410~~. Definitions of terms used in this article. (S.C. Code § 11-35-1410)

Unless the context clearly indicates otherwise:

(1) "Commercial product" means supplies, other than printing, or information resources:

(a) that is of a type customarily used by the general public and that has been sold, leased, or licensed to the general public;

(b) that would satisfy the criteria in subitem (a) were it not for modifications of a type customarily available in the commercial marketplace, or minor modifications made to meet state requirements; or

(c) that is a combination of products meeting the requirements of subitem (a) or (b) that are of a type customarily combined and sold in combination to the general public.

(2) "Commercially available off-the-shelf product" means supplies, other than printing, or information resources: that is a commercial product, as defined herein, that is sold in substantial quantities in the commercial marketplace; and is offered to the State, without modification, in the same form in which it is sold in the commercial marketplace. It does not include agricultural products, petroleum products, and other items customarily sold in bulk.

(3) "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this code, and paid a fee, if any.

(4) "Established catalog price" means the price included in a catalog, price list, schedule, or other form that:

(a) is regularly maintained by a manufacturer or vendor of an item;

(b) is either published or otherwise available for inspection by customers;

(c) states prices at which sales are currently or were last made to a significant number of buyers constituting the general buying public for the supplies, services, or information technology involved.

(5) "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids in accordance with the procedures set forth in Section ~~11-35-1520~~.

(6) "Purchase description" means specifications or other document describing the supplies, services, information technology, or construction to be procured.

(7) "Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

(8) "Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

(9) "Responsive bidder or offeror" means a person who has submitted a bid or proposal which conforms in all material aspects to the invitation for bids or request for proposals.

SUBARTICLE 3.

METHODS OF SOURCE SELECTION

SECTION ~~11-35-1510~~. Methods of source selection. (S.C. Code § 11-35-1510)

Unless otherwise provided by law, all ~~state-District~~ contracts must be awarded by competitive sealed bidding, pursuant to Section ~~11-35-1520~~, except as provided in:

- (1) Section ~~11-35-1250~~ (Authority to Contract for Auditing Services);
- (2) Section ~~11-35-1260~~ (Authority to Contract for Legal Services);
- (3) Section ~~11-35-1525~~ (Fixed Priced Bidding);
- (4) Section ~~11-35-1528~~ (Competitive Best Value Bidding);
- (5) Section ~~11-35-1529~~ (Competitive Online Bidding);
- (6) Section ~~11-35-1530~~ (Competitive Sealed Proposals);
- ~~(7) Section 11-35-1535 (Competitive Negotiations);~~
- ~~(8) Section 11-35-1540 (Negotiations After Unsuccessful Competitive Sealed Bidding);~~
- ~~(9) Section 11-35-1550 (Small Purchases);~~
- ~~(10) Section 11-35-1560 (Sole Source Procurements);~~
- ~~(11) Section 11-35-1570 (Emergency Procurements);~~
- ~~(12) Section 11-35-1575 (Participation in Auction or Bankruptcy Sale);~~
- ~~(13) (Reserved)~~
- ~~(14) Section 11-35-3015 (Source Selection Methods Assigned to Project Delivery Methods);~~
- ~~(15) Section 11-35-3220 (Architect Engineer, Construction Management and Land Surveying Services Procurement Procedures); and~~
- ~~(16) Section 11-35-3230 (Exception for Small Architect-Engineer and Land Surveying Services contractsContracts).~~

SECTION ~~11-35-1520~~. Competitive sealed bidding. (S.C. Code § 11-35-1520)

- (1) Condition for Use. Contracts must be awarded by competitive sealed bidding except as otherwise provided in Section ~~11-35-1510~~.
- (2) Invitation for Bids. An invitation for bids must be issued in an efficient and economical manner and must include specifications and all contractual terms and conditions applicable to the procurement.
- (3) Notice. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. The notice must include publications in "South Carolina Business Opportunities". Governmental bodies may charge vendors the cost incurred for copying and mailing bid or proposal documents requested in response to a procurement.
- (4) Receipt and Safeguarding of Bids. All bids, including modifications, received before the time of opening must be kept secure and unopened, except as provided by regulation ~~of the board~~.
- (5) Bid Opening. Bids must be opened publicly in the presence of one or more witnesses, at the time and place designated in the invitation for bids and in the manner prescribed by regulation ~~of the board~~. The amount of each bid, and other relevant information as may be specified by regulation, together with the name of each bidder, must be tabulated. The tabulation must be open to public inspection at that time.

(6) Bid Acceptance and Bid Evaluation. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The invitation for bids must set forth the evaluation criteria to be used. Criteria must not be used in bid evaluation that are not in the invitation for bids. Bids must be evaluated based on the requirements in the invitation for bids and in accordance with the regulations ~~of the board~~.

(7) Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation and re-award of awards or contracts, after award but before performance, may be permitted in accordance with regulations ~~promulgated by the board~~. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the ~~District~~State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations ~~promulgated pursuant to it~~. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief ~~procurement officers or head of a purchasing agency~~business official.

(8) Reserved.

(9) Tie Bids. If two or more bidders are tied in price while otherwise meeting all of the required conditions, awards are determined in the following order of priority:

(a) If there is a South Carolina firm tied with an out-of-state firm, the award must be made automatically to the South Carolina firm.

(b) Tie bids involving South Carolina produced or manufactured products, when known, and items produced or manufactured out of the State must be resolved in favor of the South Carolina commodity.

(c) Tie bids involving a business certified by the South Carolina Office of Small and Minority Business Assistance as a Minority Business Enterprise must be resolved in favor of the Minority Business Enterprise.

(d) Tie bids involving South Carolina firms must be resolved in favor of the South Carolina firm located in the ~~same taxing jurisdiction as the governmental body's consuming location~~District.

(e) In all other situations in which bids are tied, the award must be made to the tied bidder offering the quickest delivery time, or if the tied bidders have offered the same delivery time, the tie must be resolved by the flip of a coin witnessed by the procurement officer. All responding vendors must be invited to attend.

(10) Award. Unless there is a compelling reason to reject bids as prescribed by regulation ~~of the board~~, notice of an award or an intended award of a contract to the lowest responsive and responsible bidders whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice on the date and at a location specified in the invitation for bids. For contracts with a total or potential value in excess of one hundred thousand dollars, notice of an intended award of a contract must be given by posting the notice for seven business days before entering into a contract and must be sent electronically to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. The posting date shall appear on the face of all these notices. If a change to the posting date is necessary, notice of the revised posting date must be given by posting the notice for three business days at the location identified in the solicitation and must be sent electronically to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. The invitation for bids and a notice of award or notice of intent to award must contain a statement of a bidder's right to protest pursuant to Section ~~11-35~~4210(1). When only one response is received, the notice of intent to award and the delay of award may be waived.

(11) Request for Qualifications.

(a) Before soliciting bids, the procurement officer, may issue a request for qualifications from prospective bidders. The request must contain, at a minimum, a description of the scope of work to be solicited by the invitation for bids, the deadline for submission of information, and how prospective bidders may apply for consideration. The request must require information concerning the prospective

bidders' product specifications, qualifications, experience, and ability to perform the requirements of the contract. Adequate public notice of the request for qualifications must be given in the manner provided in Section ~~11-35-1520~~(3).

(b) After receipt of the responses to the request for qualifications from prospective bidders, the rank of the prospective bidders must be determined in writing from most qualified to least qualified on the basis of the information provided. Bids then must be solicited from at least the top two prospective bidders by means of an invitation for bids. The determination regarding how many bids to solicit is not subject to review under Article 17.

(12) (Reserved)

(13) Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the ~~District~~State. Such communication or determination shall be in writing. Examples of minor informalities or irregularities include, but are not limited to:

(a) failure of a bidder to return the number of copies of signed bids required by the solicitation;

(b) failure of a bidder to furnish the required information concerning the number of the bidder's employees or failure to make a representation concerning its size;

(c) failure of a bidder to sign its bid, but only if the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and submits evidence of that authorization, and the bid carries that signature or the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned document, such as the submission of a bid guarantee with the bid or a letter signed by the bidder with the bid referring to and identifying the bid itself;

(d) failure of a bidder to acknowledge receipt of an amendment to a solicitation, but only if:

(i) the bid received indicates in some way that the bidder received the amendment, such as where the amendment added another item to the solicitation and the bidder submitted a bid, on it, if the bidder states under oath that it received the amendment before bidding and that the bidder will stand by its bid price; or

(ii) the amendment has no effect on price or quantity or merely a trivial or negligible effect on quality or delivery, and is not prejudicial to bidders, such as an amendment correcting a typographical mistake in the name of the ~~District~~governmental body;

(e) failure of a bidder to furnish an affidavit concerning affiliates;

(f) failure of a bidder to execute the certifications with respect to equal opportunity and affirmative action programs;

(g) failure of a bidder to furnish cut sheets or product literature;

(h) failure of a bidder to furnish certificates of insurance;

(i) failure of a bidder to furnish financial statements;

(j) failure of a bidder to furnish references;

(k) failure of a bidder to furnish its bidder number; and

(l) notwithstanding Title 40 ~~of the South Carolina Code of Laws~~, the failure of a bidder to indicate his contractor's license number or other evidence of licensure, except that a contract must not be awarded to the bidder unless and until the bidder is properly licensed under the laws of South Carolina.

SECTION ~~11-35-1524~~. Resident vendor preference. (~~S.C. Code § 11-35-1524~~)

(A) For purposes of this section:

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| <p>(1) "End product" means the tangible product described in the solicitation including all component parts and in final form and ready for the state's<u>District's</u> intended use.</p> |
| <p>(2) "Grown" means to produce, cultivate, raise, or harvest timber, agricultural produce, or livestock on the land, or to cultivate, raise, catch, or harvest products or food from the water which results in an end product that is locally derived from the product cultivated, raised, caught, or harvested.</p> |
| <p>(3) "Labor cost" means salary and fringe benefits.</p> |
| <p>(4) "Made" means to assemble, fabricate, or process component parts into an end product, the value of which, assembly, fabrication, or processing is a substantial portion of the price of the end product.</p> |
| <p>(5) "Manufactured" means to make or process raw materials into an end product.</p> |
| <p>(6) "Office" means a nonmobile place for the regular transaction of business or performance of a particular service which has been operated as such by the bidder for at least one year before the bid opening and during that year the place has been staffed for at least fifty weeks by at least two employees for at least thirty-five hours a week each.</p> |
| <p>(7) "Services" means services as defined by Section 11-35-310(29) and also includes services as defined in Section 11-35-310(1)(d)<u>the definition of Information Technology</u>.</p> |
| <p>(8) "South Carolina end product" means an end product made, manufactured, or grown in South Carolina.</p> |
| <p>(9) "United States end product" means an end product made, manufactured, or grown in the United States of America.</p> |
| <p>(B)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by seven percent the price of any offer for a South Carolina end product.</p> |
| <p>(2) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease by two percent the price of any offer for a United States end product. This preference does not apply to an item to which the South Carolina end product preference has been applied.</p> |
| <p>(3) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product. A preference must not be applied to an item for which a bidder does not qualify.</p> |
| <p>(4) If a contract is awarded to a bidder that received the award as a result of the South Carolina end product or United States end product preference, the contractor may not substitute a nonqualifying end product for a qualified end product. A substitution in violation of this item is grounds for debarment pursuant to Section 11-35-4220. If a contractor violates this provision, the District<u>State</u> may terminate the contract for cause and, in addition, the contractor shall pay to the District<u>State</u> an amount equal to twice the difference between the price paid by the District<u>State</u> and the bidder's evaluated price for a substituted item.</p> |
| <p>(5) If a bidder is requesting this preference, the bidder, upon request of the procurement officer, must provide documentation that establishes the bidder's qualifications for the preference. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement pursuant to subsection (E)(6).</p> |
| <p>(C)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by seven percent if the bidder maintains an office in this State and either (i) maintains at a location in South Carolina at the time of the bid an inventory of expendable items which are representative of the general type of commodities on which the award will be made and which have a minimum total value, based on the bid price, equal to the lesser of fifty thousand dollars or the annual amount of the contract; (ii) is a manufacturer headquartered and having an annual payroll of at least one million dollars in South Carolina and the end product is made or processed from raw materials into a finished end product by that manufacturer or its affiliate (as defined in Section 1563 of the Internal Revenue Code); or (iii) at the time of bidding, directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to bidder for those individuals to provide those services exceeds fifty percent of the bidder's total bid price.</p> |

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| <p>(2) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of end product or work, as applicable. A preference must not be applied to an item for which a bidder does not qualify.</p> |
| <p>(3) If a bidder is requesting this preference, the bidder, upon request by the procurement officer, must provide documentation that establishes the bidder's qualifications for the preference and, for the preference claimed pursuant to subsection (C)(1)(iii), must identify the persons domiciled in South Carolina that will perform the services involved in the procurement upon which bidder relies in qualifying for the preference, the services those individuals are to perform, and documentation of the bidder's labor cost for each person identified. Bidder's failure to provide this information promptly is grounds to deny the preference and for enforcement under subsection (E)(6) below.</p> |
| <p>(D)(1) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by two percent if:</p> |
| <p>(a) the bidder has a documented commitment from a single proposed first-tier subcontractor to perform some portion of the services expressly required by the solicitation; and</p> |
| <p>(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds twenty percent of bidder's total bid price.</p> |
| <p>(2) When evaluating pricing for purposes of making an award determination, the procurement officer shall decrease a bidder's price by four percent if:</p> |
| <p>(a) the bidder has a documented commitment from a single proposed first-tier subcontractor to perform some portion of the services expressly required by the solicitation; and</p> |
| <p>(b) at the time of the bidding, the subcontractor directly employs or has a documented commitment with individuals domiciled in South Carolina that will perform services expressly required by the solicitation and the total direct labor cost to the subcontractor for those individuals to provide those services exceeds forty percent of bidder's total bid price.</p> |
| <p>(3) Whether award is to be made by item or lot, the preferences must be applied to the price of each line item of work. A preference must not be applied to an item for which a bidder does not qualify.</p> |
| <p>(4) Subject to other limits in this section, an offeror may benefit from applying for more than one of, or from multiple applications of, the preferences allowed by items (1) and (2).</p> |
| <p>(5)(a) In its bid, a bidder requesting any of the preferences allowed by items (1) and (2) must identify the subcontractor to perform the work, the work the subcontractor is to perform, and the bidder's factual basis for concluding that the subcontractor's work constitutes the required percentage of the work to be performed in the procurement.</p> |
| <p>(b) If a bidder is requesting a preference allowed by items (1) or (2), upon request by the procurement officer, the bidder shall identify the persons domiciled in South Carolina that are to perform the services involved in the procurement upon which the bidder relies in qualifying for the preference, the services those individuals are to perform, the employer of those persons, the bidder's relationship with the employer, and documentation of the subcontractor's labor cost for each person identified. Bidder's failure to provide this information promptly will be grounds to deny the preference and for enforcement pursuant to subsection (E)(6) below.</p> |
| <p>(c) If a contract is awarded to a bidder that received the award as a result of a preference allowed by items (1) or (2), the contractor may not substitute any business for the subcontractor on which the bidder relied to qualify for the preference, unless first approved in writing by the procurement officer. A substitution in violation of this subitem is grounds for debarment pursuant to Section 11-35-4220. If a contractor violates this provision, the procurement officer may terminate the contract for cause. If the contract is not terminated, the procurement officer may require the contractor to pay the State an amount equal to twice the difference between the price paid by the State and the price offered by the next lowest bidder, unless the substituted subcontractor qualifies for the preference.</p> |

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| <p>(E)(1) A business is not entitled to any preferences unless the business, to the extent required by law, has:</p> |
| <p>(a) paid all taxes assessed by the State; and</p> |
| <p>(b) registered with the South Carolina Secretary of State and the South Carolina Department of Revenue.</p> |
| <p>(2) The preferences provided in subsections (B) and (C)(1)(i) and (ii) do not apply to a single unit of an item with a price in excess of fifty thousand dollars or a single award with a total potential value in excess of five hundred thousand dollars.</p> |
| <p>(3) The preferences provided in subsections (C)(1)(iii) and (D) do not apply to a bid for an item of work by the bidder if the annual price of the bidder's work exceeds fifty thousand dollars or the total potential price of the bidder's work exceeds five hundred thousand dollars.</p> |
| <p>(4) A solicitation must provide potential bidders an opportunity to request the preferences that apply to a procurement. By submitting a bid and requesting that a preference be applied to that bid, a business certifies that its bid qualifies for the preference for that procurement. For purposes of applying this section, a bidder is not qualified for a preference unless the bidder makes a request for the preference as required in the solicitation. If a solicitation specifies which preferences, if any, apply to a procurement, the applicability of preferences to that procurement is conclusively determined by the solicitation unless the solicitation document is timely protested as provided in Section 11-35-4210. If two or more bidders are tied after the application of the preferences allowed by this section, the tie must be resolved as provided in Section 11-35-1520(9). Price adjustments required by this section for purposes of evaluation and application of the preferences do not change the actual price offered by the bidder.</p> |
| <p>(5) This section does not apply to an acquisition of motor vehicles as defined in Section 56-15-10 of the South Carolina Code of Laws or an acquisition of supplies or services relating to construction. This section does not apply to a procurement conducted pursuant to Section 11-35-1550(2)(a) or (b), Section 11-35-1530, or Article 9 of this code., Chapter 35.</p> |
| <p>(6) Pursuant to Section 11-35-4220, a business may be debarred if (i) the business certified that it qualified for a preference, (ii) the business is not qualified for the preference claimed, and (iii) the certification was made in bad faith or under false pretenses. If a contractor has invalidly certified that a preference is applicable, the chief procurement officerbusiness official may terminate the contract for cause, and the chief procurement officerbusiness official may require the contractor to pay the DistrictState an amount equal to twice the difference between the price paid by the DistrictState and the price offered by the next lowest bidder.</p> |
| <p>(7) The sum of all preferences allowed by items (D)(1) and (D)(2), when applied to the price of a line item of work, may not exceed six percent unless the bidder maintains an office in this State. Under no circumstances may the cumulative preferences applied to the price of a line item exceed ten percent.</p> |
| <p>(8) As used in items (C)(1)(iii), (D)(1)(b), and (D)(2)(b), the term "documented commitment" means a written commitment by the bidder to employ directly an individual, and by the individual to be employed by the bidder, both contingent on the bidder receiving the award.</p> |
| <p>(9) The remedies available in this section are cumulative of and in addition to all other remedies available at law and equity.</p> |
| <p>SECTION 11-35-1525. Competitive fixed price bidding. (S.C. Code § 11-35-1525)</p> |
| <p>(1) Conditions for Use. When the Districtprocurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the DistrictState, a contract may be entered into by competitive fixed price bidding subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided for in this section.</p> |
| <p>(2) Fixed Price Bidding. The purpose of fixed price bidding is to provide multiple sources of supply for specific services, supplies, or information technology based on a preset maximum price which the DistrictState will pay for such services, supplies, or information technology.</p> |

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

(4) Pricing. The ~~District~~State shall establish, before issuance of the fixed price bid, a maximum amount the ~~District~~State will pay for the services, supplies, or information technology desired.

(5) Evaluation. Vendors' responses to the fixed price bid will be reviewed to determine if they are responsive and responsible.

(6) Reserved.

(7) Award. Award must be made to all responsive and responsible bidders to the ~~District~~'sstate's request for competitive fixed price bidding. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit.

(8) Bids Received After Award. As provided in the solicitation, bidders not responding to the initial fixed price bid may be added to the awarded vendors' list provided the bidder furnishes evidence of responsibility and responsiveness to the ~~state's-District's~~ original fixed price bid as required by the solicitation.

SECTION ~~11-35-1528~~. Competitive best value bidding. (S.C. Code § 11-35-1528)

(1) Conditions for Use. When the ~~District~~procurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the ~~District~~State, a contract may be entered into by competitive best value bidding subject to the provisions of Section ~~11-35-1520~~ and the ~~ensuing~~ regulations, unless otherwise provided for in this section.

(2) Best Value Bidding. The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific supplies, services, or information technology based on pre-determined criteria identified by the ~~District~~State.

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

(4) Bid Opening. At bid opening, the only information that will be released is the names of the participating bidders. Price information will be provided after the ranking of bidders and the issuance of award.

(5) Evaluation Factors. The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor. Price must be a factor in determination of award and cannot be weighted at less than sixty percent. Best value bid evaluation factors may include, but are not limited to, any of the following:

(a) operational costs the ~~District~~State would incur if the bid is accepted;

(b) quality of the product or service or its technical competency;

(c) reliability of delivery and implementation schedules;

(d) maximum facilitation of data exchange and systems integration;

(e) warranties, guarantees, and return policy;

(f) vendor financial stability;

(g) consistency of the proposed solution with the ~~state's-District's~~ planning documents and announced strategic program direction;

(h) quality and effectiveness of business solution and approach;

(i) industry and program experience;

(j) prior record of vendor performance;

(k) vendor expertise with engagement of similar scope and complexity;

(l) extent and quality of the proposed participation and acceptance by all user groups;

(m) proven development methodologies and tools; and

(n) innovative use of current technologies and quality results.

(6) Clarification of Responsive Bid. The procurement officer may ask a responsive bidder to clarify an ambiguity in its bid; however, no material modification of the bid is allowed.

(7) Selection and Ranking. Bids shall be evaluated by using only the criteria and weightings stated in the invitation for best value bids. All evaluation factors, other than price, will be considered independent of and prior to determining the effect of price on the score for each participating bidder. Once the evaluation is complete, all responsive bidders must be ranked from most advantageous to least advantageous to the ~~State~~District, considering only the evaluation factors stated in the invitation for best value bids.

(8) Award. Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the ~~State~~District, taking into consideration all evaluation factors set forth in the best value bid. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit.

SECTION ~~11-35-1529~~. Competitive online bidding. (S.C. Code § 11-35-1529)

(1) Conditions for Use. When the ~~District~~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 ~~District~~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 ~~District~~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 ~~District~~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 ~~District~~State by a bidder must be safeguarded as required by Section ~~11-35-1520~~(4).

(5) Provisions Not to Apply. Section ~~11-35-1524~~ (~~Resident Vendor Preference~~) and paragraph (5) (Bid Opening) of Section ~~11-35-1520~~ (~~Competitive Sealed Bidding~~) do not apply to solicitations issued pursuant to this section.

SECTION ~~11-35-1530~~. Competitive sealed proposals. (S.C. Code § 11-35-1530)

(1) Conditions for Use.

(a) If ~~the-a~~ ~~District~~procurement officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the ~~District~~State, a contract may be entered into by competitive sealed proposals subject to the provisions of Section ~~11-35-1520~~ and the ~~ensuing~~ regulations, unless otherwise provided in this section.

(b) The ~~board regulations~~ may provide ~~by regulation~~ that it is either not practicable or not advantageous to the ~~District~~State to procure specified types of supplies, services, information technology, or construction by competitive sealed bidding.

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

(3) Receipt of Proposals. Proposals must be opened publicly in accordance with regulations ~~of the board~~. A tabulation of proposals must be prepared in accordance with regulations promulgated by the board and must be open for public inspection after contract award.

(4) Request for Qualifications.

(a) Before soliciting proposals, the procurement officer may issue a request for qualifications from prospective offerors. The request must contain at a minimum a description of the scope of the work to be solicited by the request for proposals and must state the deadline for submission of information and how prospective offerors may apply for consideration. The request must require information only on their qualifications, experience, and ability to perform the requirements of the contract.

(b) After receipt of the responses to the request for qualifications from prospective offerors, rank of the prospective offerors must be determined in writing from most qualified to least qualified on the basis of the information provided. Proposals then must be solicited from at least the top two prospective offerors by means of a request for proposals. The determination regarding how many proposals to solicit is not subject to review pursuant to Article 17.

(5) Evaluation Factors. The request for proposals must state the relative importance of the factors to be considered in evaluating proposals but may not require a numerical weighting for each factor. Price may, but need not, be an evaluation factor.

(6) Discussion with Offerors. As provided in the request for proposals, and under regulations, discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors must be accorded fair and equal treatment with respect to any opportunity for discussions. In conducting discussions, there must be no disclosure of confidential information derived from proposals submitted by competing offerors. The board shall promulgate regulations governing discussions.

(7) Selection and Ranking. Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously. Once evaluation is complete, all responsive offerors must be ranked from most advantageous to least advantageous to the ~~District~~State, considering only the evaluation factors stated in the request for proposals.

(8) Negotiations. After proposals have been ranked pursuant to Section ~~11-35-1530~~(7), the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners indicated below, except that in no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed:

(a) negotiate with the highest ranking offeror on price, on matters affecting the scope of the contract, so long as the changes are within the general scope of the request for proposals, or on both. If a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted, in the sole discretion of the procurement officer, with the second, and then the third, and so on, ranked offerors to the level of ranking determined by the procurement officer in his sole discretion;

(b) during the negotiation process as outlined in item (a) above, if the procurement officer is unsuccessful in his first round of negotiations, he may reopen negotiations with any offeror with whom he previously negotiated; or

(c) before or after negotiations pursuant to Section ~~11-35-1530~~(8), the procurement officer may make changes to the request for proposals within the general scope of the request for proposals and may provide all responsive offerors an opportunity to submit their best and final offers, which must be reevaluated and ranked pursuant to Section ~~11-35-1530~~(7).

(9) Award. Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the ~~District~~State, taking into consideration the evaluation factors set forth in the request for proposals, unless the procurement officer determines to utilize one of the options provided in Section ~~11-35-1530~~(8). The award of the contract must be made on the basis of evaluation factors that must be stated in the RFP. The contract file must contain the basis on which the award is made and must be sufficient to satisfy external audit. Procedures and requirements for the notification of intent to award the contract must be the same as those provided in Section ~~11-35-1520~~(10).

~~SECTION 11-35-1535. Competitive negotiations.~~

~~—(A) Conditions for Use.~~

~~— (1) Competitive negotiations are most appropriate for complex, major acquisitions.~~

~~— (2) If the procurement officer determines in writing that the use of competitive negotiations is appropriate and in the using agency's interest, a contract may be entered into by competitive negotiations subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided in this section. This section may not be used to acquire only commercially available off-the-shelf products.~~

~~— (3) Competitive negotiated acquisitions may be conducted only by the office of the appropriate chief procurement officer.~~

~~—(B) Definitions. As used in this section:~~

~~— (1) "Clarification" means any communication in which the procurement officer requests or accepts information that clarifies any information in a proposal. Clarification does not include the request or acceptance of any change to the terms of a contractual offer.~~

~~— (2) "Competitive range" means the offeror or group of offerors selected for negotiation.~~

~~— (3) "Negotiations" means any communication that invites or permits an offeror to change the terms of its contractual offer in any way.~~

~~—(C) Request for qualifications. Offerors may be prequalified as provided in Section 11-35-1530(4).~~

~~—(D) Requests for proposals.~~

~~— (1)(a) Solicitations for competitive negotiations must be requests for proposals and must, at a minimum, describe:~~

~~— (i) the state's requirements;~~

~~— (ii) anticipated terms and conditions that will apply to the contract. The solicitation may authorize offerors to propose alternative terms and conditions, including alternative contract line items;~~

~~— (iii) information required to be in the offerors proposal; and~~

~~— (iv) evaluation factors.~~

~~— (b) The request for proposals must state the relative importance of all factors to be considered in evaluating proposals but need not state a numerical weighting for each factor. Except as provided by regulation, past performance and price must be evaluated. If price is an evaluation factor, the solicitation must state whether all evaluation factors other than price, when combined, are significantly more important than, approximately equal to, or significantly less important than price.~~

~~— (2) Amendments. Amendments issued after the established time and date for receipt of proposals may not exceed the general scope of the request for proposals and must be issued to those offerors that have not been eliminated from the competition.~~

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

~~—(F) Receipt of Proposals. Proposals must be opened in accordance with regulations of the board. A tabulation of proposals must be prepared in accordance with regulations promulgated by the board and must be open for public inspection after contract award.~~

~~—(G) Evaluation. Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. All proposals must be evaluated and, after evaluation,~~

~~their relative qualities must be assessed solely on the factors and subfactors specified in the solicitation. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract file.~~

~~—(H) Competitive Range. After complying with subsection (G), the procurement officer shall establish a competitive range comprised of the offerors that submitted the most promising offers. Ordinarily, the competitive range should not include more than three offerors. The procurement officer may select only one offeror and may select more than three. The procurement officer shall document the rationale for the selections.~~

~~—(I) Exchanges with Offerors.~~

~~—(1) Fairness and impartiality. The procurement officer shall treat all offerors fairly and impartially when deciding whether and when to seek clarification or to negotiate. Similarly situated offerors must be given similar opportunities to clarify and, if in the competitive range, to negotiate.~~

~~—(2) Clarifications. The procurement officer may conduct clarifications at any time before the award decision.~~

~~—(3) Negotiations.~~

~~—(a) The procurement officer shall negotiate with each offeror in the competitive range. The primary objective is to maximize the state's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation. Subject to item (1), the scope and extent of negotiations are a matter of the procurement officer's judgement.~~

~~—(b)(i) At a minimum, the procurement officer shall identify and seek the elimination of any term of a contractual offer that does not conform to a material requirement of a solicitation and any other undesirable terms in a contractual offer.~~

~~—(ii) The procurement officer may negotiate with offerors to seek changes in their contractual offers that the State desires and to allow them to make other improvements.~~

~~—(iii) Negotiations may include pricing.~~

~~—(iv) The procurement officer may not relax or change any material term of the solicitation during negotiation except by amendment.~~

~~—(v) In conducting negotiations, the procurement officer may not disclose confidential information derived from proposals submitted by competing offerors.~~

~~—(c) The procurement officer shall document the using agency's prenegotiation objectives with regard to each offeror in the competitive range and shall prepare a record of each negotiation session.~~

~~—(d) The procurement officer may eliminate an offeror from the competitive range after negotiation if the offeror is no longer considered to be among the most promising.~~

~~—(4) The board must promulgate regulations governing exchanges with offerors.~~

~~—(J) Proposal Revisions. The procurement officer may request or allow proposal revisions to clarify and document understandings reached during negotiations. If an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to that offeror's proposal may be accepted or considered. Upon the completion of negotiations, the contracting officer shall request that offerors still in the competitive range submit final proposals no later than a specified common cutoff date and time.~~

~~—(K) Award.~~

~~—(1) Award must be based on a comparative assessment of final proposals from offerors within the competitive range against all source selection criteria in the solicitation. Award must be made to the responsible offeror whose final proposal meets the announced requirements in all material respects and is determined in writing to provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals and, if price is an evaluation factor, any tradeoffs among price and non price factors. As provided by regulation, the contract file must document the basis on which the award is made, and the documentation must explain and justify the rationale for any business judgments and tradeoffs made or relied on in the award determination, including benefits associated with additional costs. Section 11-35-1524 does not apply.~~

~~— (2) Procedures and requirements for the notification of intent to award the contract must be the same as those provided in Section 11-35-1520(1).~~

SECTION ~~11-35-1540~~. Negotiations after unsuccessful competitive sealed bidding. (S.C. Code § 11-35-1540)

When bids received pursuant to an invitation for bids under Section ~~11-35-1520~~ are considered unreasonable by the ~~District procurement officer~~, or are not independently reached in open competition, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and it is determined in writing by the chief ~~procurement officer, the head of a purchasing agency, or the designee of either officer above the level of procurement officer~~ business official, that time or other circumstances will not permit the delay required to resolicit competitive sealed bids, a contract may be negotiated pursuant to this section, provided that:

(1) each responsible bidder who submitted a bid under the original solicitation is notified of the determination and is given reasonable opportunity to negotiate;

(2) the negotiated price is lower than the lowest rejected bid by any responsible and responsive bidder under the original solicitation;

(3) the negotiated price is the lowest negotiated price offered by any responsible and responsive offeror.

SECTION ~~11-35-1550~~. Small purchase procedures; when competitive bidding required. (S.C. Code § 11-35-1550)

(1) Authority. The following small purchase procedures may be utilized only in conducting procurements ~~for governmental bodies~~ that are up to the amounts specified herein, ~~but not in excess of the authority granted pursuant to Section 11-35-1210~~. Procurement requirements must not be artificially divided by governmental bodies so as to constitute a small purchase pursuant to this section.

(2) Competition and Price Reasonableness.

(a) No Competition. Small purchases not exceeding ten thousand dollars may be accomplished without securing competitive quotations if the prices are considered reasonable. The purchasing office must annotate the purchase requisition: "Price is fair and reasonable" and sign. The purchases must be distributed equitably among qualified suppliers. When practical, a quotation must be solicited from other than the previous supplier before placing a repeat order. The administrative cost of verifying the reasonableness of the price of purchase "not in excess of" may more than offset potential savings in detecting instances of overpricing. Action to verify the reasonableness of the price need be taken only when the procurement officer of the governmental body suspects that the price may not be reasonable, comparison to previous price paid, or personal knowledge of the item involved.

(b) Three Written Quotes. Written request for written quotes from a minimum of three qualified sources of supply may be made and, unless adequate public notice is provided in the South Carolina Business Opportunities, documentation of at least three bona fide, responsive, and responsible quotes must be attached to the purchase requisition for a small purchase not in excess of twenty-five thousand dollars, or for a small purchase of commercially available off-the-shelf products not in excess of one hundred thousand dollars, or for a small purchase of construction not in excess of one hundred thousand dollars. The award must be made to the lowest responsive and responsible sources. The request for quotes must include a purchase description. Requests must be distributed equitably among qualified supplies unless advertised as provided above.

(c) Advertised Small Purchase. Written solicitation of written quotes, bids, or proposals may be made for a small purchase, other than a small purchase of construction, not in excess of one hundred thousand dollars. The procurement must be advertised at least once in the South Carolina Business Opportunities publication. A copy of the written solicitation and written quotes must be attached to the

purchase requisition. The award must be made to the lowest responsive and responsible source or, when a request for proposal process is used, the highest ranking offeror.

(3) Advertising Threshold. Except for procurements of either commercially available off-the-shelf products or construction, if conducted pursuant to item (2)(b), all competitive procurements above twenty-five thousand dollars must be advertised at least once in the South Carolina Business Opportunities publication. ~~The District Governmental bodies~~ may charge vendors the cost incurred for copying and mailing bid or proposal documents requested in response to a procurement.

~~(4) The Division of Aeronautics of the Department of Commerce may act as its own purchasing agency for all procurements of maintenance services for aircraft and these procurements may be conducted pursuant to subsection (2)(b).~~

SECTION ~~11-35-1560~~. Sole source procurement; public notice. ~~(S.C. Code § 11-35-1560)~~

(A) A contract may be awarded for a supply, service, information technology, or construction item without competition if, under regulations, ~~promulgated by the board, the chief procurement officer, the head of a purchasing agency~~ the Superintendent, or a designee ~~of either officer~~, above the level of the procurement officer, determines in writing that there is only one source for the required supply, service, information technology, or construction item. Except for contracts with a total potential value of fifty thousand dollars or less, adequate public notice of the intent to award without competition must be posted in South Carolina Business Opportunities, except that public notice is not required if the ~~appropriate chief procurement officer~~ Superintendent, after consultation with the ~~head of the purchasing agency~~ Board, determines in writing that award without such notice is in the interest of the ~~District~~ State. Notice must contain a statement of the right to protest under Section ~~11-35-4210(1)~~ and must be posted at least five business days before entering a contract. For contracts with a total potential value greater than two hundred fifty thousand dollars, such notice must be posted at least ten business days before entering a contract.

(B) Written documentation must include the determination and basis for the proposed sole source procurement. A delegation of authority by ~~either the Superintendent chief procurement officer or the head of a governmental body~~ with respect to sole source determinations must be submitted in writing to the ~~Materials Management Officer~~ chief procurement officer. In cases of reasonable doubt, competition must be solicited. Any decision by a ~~District governmental body~~ that a procurement be restricted to one potential vendor must be accompanied by a thorough, detailed explanation as to why no other will be suitable or acceptable to meet the need.

~~(C) A violation of these regulations by a purchasing agency, upon recommendation of the Division of Procurement Services with approval of the majority of the board, must result in the temporary suspension, not to exceed one year, of the violating governmental body's ability to procure supplies, services, information technology, or construction items pursuant to this section.~~

SECTION ~~11-35-1570~~. Emergency procurements; public notice. ~~(S.C. Code § 11-35-1570)~~

(A) Notwithstanding any other provision of this code, the ~~chief procurement officer, the head of a purchasing agency,~~ Superintendent or a designee ~~of either officer~~ may award or authorize others to award emergency contracts only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations ~~promulgated by the board~~; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

(B) When a contract entered pursuant to subsection (A) has a total or potential value in excess of fifty thousand dollars, notice of the award must be posted in South Carolina Business Opportunities (SCBO)

as soon as practicable thereafter. The posted notice must contain a statement of the right to protest under Section ~~11-35-4210~~(1).

SECTION ~~11-35-1575~~. Participation in auction or sale of supplies from bankruptcy. (S.C. Code § 11-35-1575)

A ~~governmental body~~District having knowledge of either an auction or a sale of supplies from a bankruptcy may elect to participate. The ~~District~~governmental body shall (a) survey the needed items being offered to ascertain their condition and usefulness, (b) determine a fair market value for new like items through informal quotes, (c) determine the fair market value from similar items considering age and useful life, and (d) estimated repair cost and delivery cost, if any, of the desired items. Using this information, the ~~District~~governmental body shall determine the maximum price that it can pay for each item desired. At the auction or sale, the ~~District~~governmental body shall not exceed the maximum price so determined.

~~SECTION 11-35-1580. Repealed.~~

~~SUBARTICLE 5.~~

~~CANCELLATION OF SOLICITATIONS~~

SECTION ~~11-35-1710~~. Cancellation of invitation for bids or request for proposals. (S.C. Code § 11-35-1710)

Any solicitation under this code may be cancelled, or any or all bids or proposals may be rejected in whole or part as may be specified in the solicitation, when it is in the best interest of the ~~District~~State. The reasons for rejection, supported with documentation sufficient to satisfy external audit, shall be made a part of the contract file.

~~SUBARTICLE 7.~~

~~RESPONSIBILITY OF BIDDERS AND OFFERORS~~

SECTION ~~11-35-1810~~. Responsibility of bidders and offerors. (S.C. Code § 11-35-1810)

(1) Determination of Responsibility. Responsibility of the bidder or offeror shall be ascertained for each contract let by the ~~District~~State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The ~~board shall by~~ regulations establish standards of responsibility that shall be enforced in all ~~District~~state contracts.

(2) Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations ~~promulgated by the board~~. The unreasonable failure of a bidder or offeror to supply information promptly in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.

(3) Right of Nondisclosure. Except as otherwise provided by law, information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the offices of ~~the board, the Office of the Attorney General, the using agency, or the purchasing agency~~District without prior written consent by the bidder or offeror.

(4) Public procurement units, as defined in Section 11-35-4610 of the South Carolina Code of Laws, may provide information to one another relating to the responsibility or prior performance of a bidder or offeror, or provide any other information about a bidder or offeror that is otherwise related to procurement. Any person affiliated with a public procurement unit in an official capacity, who provides such information in good faith, is immune from civil and criminal liability which might otherwise result by reason of his actions. In all such civil or criminal proceedings, good faith is a rebuttable presumption.

SECTION ~~11-35-1820~~. Prequalification of supplies and suppliers. (S.C. Code § 11-35-1820)

The ~~board shall be authorized to~~ regulations may provide ~~by regulation~~ for prequalification of suppliers or supplies.

SECTION ~~11-35-1830~~. Cost or pricing data. (S.C. Code § 11-35-1830)

(1) Contractor Certification. A contractor shall, except as provided in subsection (3) of this section, submit cost or pricing data and shall certify that, to the best of his knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of mutually determined specified date prior to the date of:

(a) the pricing of any contract awarded by competitive sealed proposals pursuant to Section ~~11-35-1530~~, ~~by competitive negotiations pursuant to Section 11-35-1535~~, or pursuant to the sole source procurement authority as provided in Section ~~11-35-1560~~ where the total contract price exceeds an amount established by ~~the board in~~ regulations; or

(b) the pricing of any change order or contract modification which exceeds an amount established by ~~the board in~~ regulations.

(2) Price Adjustment. Any contract, change order, or contract modification under which a certificate is required shall contain a provision that the price to the DistrictState, including profit or fee, shall be adjusted to exclude any significant sums by which the DistrictState finds that such price was increased because the contractor furnished cost or pricing data was inaccurate, incomplete, or not current as of the date agreed upon between parties.

(3) Cost or Pricing Data Not Required. The requirements of this section shall not apply to contracts:

(a) where the contract price is based on adequate price competition;

(b) where the contract price is based on established catalog prices or market prices;

(c) where contract prices are set by law or regulations; or

(d) where it is determined in writing in accordance with regulations ~~promulgated by the board~~ that the requirements of this section may be waived and the reasons for such waiver are stated in writing.

~~SECTION 11-35-1840.~~ ~~Promulgation of regulations.~~

~~—The board may promulgate regulations to prescribe responsibilities, general rules, and procedures for identifying, evaluating, and resolving organizational conflicts of interest. The aims of such regulations are preventing the existence of conflicting roles that might bias a contractor's judgement, and preventing unfair competitive advantage.~~

SUBARTICLE 9.

TYPES AND FORMS OF CONTRACTS

SECTION ~~11-35-2010~~. Types of contracts, ~~contracting documents and usage instructions.~~ (S.C. Code § 11-35-2010)

~~(1) Types of Contracts.~~ Subject to the limitations of this section, any type of contract that will promote the best interests of the ~~District~~State may be used, except that the use of a cost-plus-a-percentage-of- cost contract must be approved by the ~~appropriate chief procurement officer~~Superintendent. A cost-reimbursement contract, including a cost-plus-a-percentage-of-cost contract, may be used only when a determination sufficient for external audit is prepared showing that the contract is likely to be less costly to the ~~District~~State than any other type or that it is impracticable to obtain the supplies, services, information technology, or construction required except under that contract.

~~—(2)(a) As used in this section:~~

~~—— (i) "Contracting document" means a standardized or model instrument, or a component part of it, for use as a contract, invitation for bids, request for proposals, request for qualifications, or instruction to bidders including, but not limited to, a contract clause or solicitation provision.~~

~~—— (ii) "Usage instructions" means directions regarding conditions for use of a contracting document, completion of a contracting document, and the process for obtaining permission, if possible, to omit or depart from the contracting document's established content for a particular solicitation or contract.~~

~~—— (b) The chief procurement officers may develop contracting documents for their respective areas of responsibility. Contracting documents may be published as internal operating procedures. Contracting documents may be accompanied by usage instructions.~~

~~—— (c) The board may adopt formally a contracting document, as developed by the appropriate chief procurement officer, for mandatory use by all governmental bodies only after notice of the proposed adoption has been published in the State Register and the board has provided the public at least sixty days to make written comments. If a contracting document is adopted by the board, the contracting document must be published in the State Register, accompanied by usage instructions, and used by all governmental bodies in accordance with its usage instructions. The chief procurement officers are not required to submit for board approval contracting documents used in connection with either solicitations issued or contracts awarded by the board or its offices.~~

~~—— (d) Notwithstanding item (c) above, the board may promulgate contracting documents as regulations.~~

SECTION ~~11-35-2015~~. Effect of contract or amendment. (S.C. Code § 11-35-2015)

A contract or amendment thereto, including, but not limited to, a change order or contract modification, is not effective against ~~a the District~~governmental body unless the contract or amendment is in writing and signed by an officer having actual authority to bind the ~~District~~governmental body.

SECTION ~~11-35-2020~~. Approval of accounting system. (S.C. Code § 11-35-2020)

The chief procurement officer, ~~the head of a purchasing agency, or a designee of either officer~~ may require that:

(1) the proposed contractor's accounting system shall permit timely development of all necessary cost data in the form required by the specific contract type contemplated;

(2) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

SECTION ~~11-35-2030~~. Multiterm contracts. (S.C. Code § 11-35-2030)

(1) Specified Period. Unless otherwise provided by law, a contract for supplies, services, or information technology must not be entered into for any a period of more than one year unless approved in a manner prescribed by regulation ~~of the board~~. The term of the contract and conditions of renewal or extension must be included in the solicitation and funds must be available for the first fiscal period at the

time of contracting. Payment and performance obligations for succeeding fiscal periods must be subject to the availability and appropriation of funds for them.

(2) Determination Prior to Use. Before the utilization of a multiterm contract, it must be determined in writing by the ~~District~~~~appropriate governmental body~~ that:

(a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) such a contract serves the interest of the ~~District~~~~State~~ by encouraging effective competition or otherwise promoting economies in ~~District~~~~state~~ procurement.

(3) Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled.

(4) Maximum Duration. The maximum potential duration for a contract is five years. A maximum potential duration of up to seven years may be approved by the ~~appropriate chief procurement officer~~~~Superintendent~~.

(5) ~~Authority~~ Approval. Every type of contract with a maximum potential duration exceeding seven years must be approved by the board. For competitive procurements, approval of the maximum potential duration must be granted before solicitation.

SECTION ~~11-35-2040~~. Inapplicable laws. ~~(S.C. Code § 11-35-2040)~~

The following laws are inapplicable to contracts solely for the procurement of commercially available off-the-shelf products pursuant to Section ~~11-35-1550~~:

(1) Chapter 14, Title 8, Unauthorized Aliens and Public Employment;

(2) Section 11-9-105, Contracts for Legal or Consultant Services;

(3) Section 11-35-5300, Prohibition of Contracting with Discriminatory Business;

(4) Chapter 57, Title 11, Iran Divestment Act;

(5) Chapter 107, Title 44, Drug-Free Workplace Act; and

(6) any other provision of law identified by ~~regulation of the board, that the board determines~~~~regulations that~~ sets forth policies, procedures, or requirements that impact the procurement of commercially available off-the-shelf products by the ~~District~~~~State~~, except for a provision of law that: (i) provides for criminal or civil penalties; (ii) appears in Article 17 of this ~~chapter~~~~code~~; or (iii) specifically refers to this section and provides that, notwithstanding this section, it is applicable to contracts for the procurement of commercially available off-the-shelf products.

SECTION ~~11-35-2050~~. Void contract terms or conditions. ~~(S.C. Code § 11-35-2050)~~

Any term or condition in any contract entered into by the ~~District~~~~State~~ that requires the ~~District~~~~State~~ to defend, indemnify, or hold harmless another person, must be void ab initio, unless such term is expressly authorized by law. All contracts must be governed by South Carolina law. Without limiting the applicability of Section ~~11-35-4230~~, the exclusive venue for any dispute arising out of or related to any contract is in South Carolina. Any contract containing any terms or conditions inconsistent with any of the foregoing are otherwise enforceable as if it did not contain such term or condition.

SECTION ~~11-35-2060~~. Material changes prohibited. ~~(S.C. Code § 11-35-2060)~~

A change order or a contract modification may not alter a contract in a manner or degree inconsistent with the underlying purposes and policies of this code or the regulations ~~of the board~~.

SUBARTICLE 11.

~~INSPECTION OF PLANT AND AUDIT OF RECORDS~~

SECTION ~~11-35-2210~~. Right to inspect plant. ~~(S.C. Code § 11-35-2210)~~

The ~~appropriate~~ chief procurement officer or his designee is authorized, at reasonable times, to inspect the part of the plant or place of business of a contractor or subcontractor which is related to the performance of a contract awarded or to be awarded by the ~~District~~State.

SECTION ~~11-35-2220~~. Right to audit records. ~~(S.C. Code § 11-35-2220)~~

(1) Audit of Cost or Pricing Data. All ~~District~~state contracts shall contain a clause setting forth the ~~District's~~state's right at reasonable times and places to audit the books and records of any contractor or subcontractor who has submitted cost or pricing data pursuant to Section ~~11-35-1830~~ to the extent that such books and records relate to such cost or pricing data. The contract shall further set forth that the contractor or subcontractor who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing by the chief procurement officer; provided, however, that such records shall be retained for additional periods of time beyond this three-year period upon request of the chief procurement officer.

(2) Contract Audit. The ~~District~~State shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three years from the date of final payment under the prime contract and by the subcontractor for a period of three years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing by the chief procurement officer.

~~SUBARTICLE 13.~~

~~DETERMINATIONS AND REPORTS~~

SECTION ~~11-35-2410~~. Finality of determinations. ~~(S.C. Code § 11-35-2410)~~

(A) The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law: Section ~~11-35-1520(7)~~ (Competitive Sealed Bidding: Correction or Withdrawal of Bids; Cancellation of Awards), Section ~~11-35-1520(11)~~ (Competitive Sealed Bidding: Request for Qualifications), Section ~~11-35-1525(1)~~ (Competitive Fixed Price Bidding: Conditions for Use), Section ~~11-35-1528(1)~~ (Competitive Best Value Bidding: Conditions for Use), Section ~~11-35-1528(8)~~ (Competitive Best Value Bidding: Award), Section ~~11-35-1529(1)~~ (Competitive Online Bidding: Conditions for Use), Section ~~11-35-1530(1)~~ (Competitive Sealed Proposals, Conditions for Use), Section ~~11-35-1530(4)~~ (Competitive Sealed Proposals: Request for Qualifications), Section ~~11-35-1530(7)~~ (Competitive Sealed Proposals, Selection and Ranking of Prospective Offerors), Section ~~11-35-1530(9)~~ (Competitive Sealed Proposals Award), ~~Section 11-35-1535(A) (Competitive Negotiations: Conditions for Use), Section 11-35-1535(C) (Competitive Negotiations: Request for Qualifications), Section 11-35-1535(G) (Competitive Negotiations: Evaluation), Section 11-35-1535(H) (Competitive Negotiations: Competitive Range), Section 11-35-1535(J) (Competitive Negotiations: Proposal Revisions, elimination or removal from the competitive range), Section 11-35-1535(K) (Competitive Negotiations: Award), Section 11-35-1540 (Negotiations After Unsuccessful Competitive Sealed Bidding), Section 11-35-1560 (Sole Source~~

Procurement), Section ~~11-35-1570~~ (Emergency Procurement), Section ~~11-35-1710~~ (Cancellation of Invitation for Bids or Requests for Proposals), Section ~~11-35-1810~~ (Responsibility of Bidders and Offerors), Section ~~11-35-1830(3)~~ (Cost or Pricing Data, Cost or Pricing Data Not Required), Section ~~11-35-2010~~ (Types and Forms of Contracts), Section ~~11-35-2020~~ (Approval of Accounting System), Section ~~11-35-2030(2)~~ (Multiterm Contracts, Determination Prior to Use), Section ~~11-35-3010(1)~~ (Choice of Project Delivery Method), Section ~~11-35-3020(d)~~ (Construction Procurement Procedures: Negotiations After Unsuccessful Competitive Sealed Bidding), Section ~~11-35-3023~~ (Prequalification on ~~DistrictState~~ Construction), Section ~~11-35-3220(5)~~ (Procurement Procedure, Selection and Ranking of the Three Most Qualified), Section ~~11-35-4210(7)~~ (Stay of Procurement During Protests, Decision to Proceed), and Section ~~11-35-4810~~ (Cooperative Use of Supplies, Services, or Information Technology).

(B) The chief ~~procurement officers or their designees~~business official shall review samples of the determinations periodically, and issue reports and recommendations on the appropriateness of the determinations made.

SECTION ~~11-35-2420~~. Reporting of anticompetitive practices; privileged communications. (S.C. Code § 11-35-2420)

(A) When any information or allegations concerning anticompetitive practices among any bidders or offerors, come to the attention of any employee of the ~~DistrictState~~, immediate notice of the relevant facts shall be transmitted to the Office of the Attorney General.

(B) Communications to the Office of the Attorney General and any testimony relating to the matters described in Section ~~11-35-2420(A)~~ are privileged and may not be disclosed without prior approval of the Office of the Attorney General. A person required or permitted to report pursuant to Section ~~11-35-2420(A)~~ or who participates in an investigation or judicial proceedings resulting from the report, acting in good faith, is immune from civil and criminal liability which might otherwise result by reason of these actions. In all such civil or criminal proceedings, good faith is a rebuttable presumption.

SECTION ~~11-35-2430~~. Retention of procurement records. (S.C. Code § 11-35-2430)

All procurement records ~~of governmental bodies~~ shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Department of Archives and History after consultation with the Attorney General. All retained documents shall be made available to the Attorney General or a designee upon request and proper receipt therefor.

SECTION ~~11-35-2440~~. Records of procurement actions. (S.C. Code § 11-35-2440)

(1)(a) Contents of Records. ~~A governmental body as defined in Section 11-35-310(18)~~The chief procurement officer shall submit ~~quarterly~~semi-annually a record listing all contracts made pursuant to Section ~~11-35-1560~~ (Sole Source Procurement) or Section ~~11-35-1570~~ (Emergency Procurements) to the ~~chief procurement officers~~Superintendent. The record must contain:

(i) each contractor's name;

(ii) the amount and type of each contract;

(iii) a listing of supplies, services, information technology, or construction procured under each contract.

(b) The chief procurement officers shall maintain these records for five years.

(2) Publication of Records. A copy of the record must be submitted to the board on an annual basis and must be available for public inspection.

ARTICLE 7

SPECIFICATIONS

~~SUBARTICLE 1.~~

~~DEFINITIONS~~

SECTION ~~11-35-2610~~. Definitions of terms used in this article. (S.C. Code § 11-35-2610)

As used in this article, the term "specifications" means any technical or purchase description or other description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may also include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.

~~SUBARTICLE 3.~~

~~SPECIFICATIONS~~

SECTION ~~11-35-2710~~. Issuance of specifications; duties of the board. (S.C. Code § 11-35-2710)

The ~~board shall promulgate~~ regulations governing may govern the preparation, maintenance, and content of specifications for supplies, services, information technology, and construction required by the ~~District~~State.

~~SECTION 11-35-2720. Duties of the chief procurement officers and the using agencies.~~

~~— The chief procurement officers may prepare or review, issue, revise, and maintain the specifications for supplies, services, information technology, and construction required by the State, except for supplies, services, information technology, and construction items procured by the governmental bodies pursuant to Sections 11-35-1550, 11-35-1570, and 11-35-3230, the specification for which must be prepared and maintained by the using agencies in accordance with the provisions of this article and regulations promulgated under it and monitored periodically by the chief procurement officers.~~

SECTION ~~11-35-2730~~. Assuring competition. (S.C. Code § 11-35-2730)

All specifications shall be drafted so as to assure cost effective procurement of the ~~state's~~District's actual needs and shall not be unduly restrictive.

SECTION ~~11-35-2740~~. Relationship with using agencies. (S.C. Code § 11-35-2740)

~~The chief procurement officers shall obtain advice and assistance from the personnel of the using agencies in the development of specifications, whether through user committees or through the advisory committees, and may delegate in writing to a using agency the authority to prepare and utilize its own specifications.~~ Specifications shall be drawn in such a manner as to ensure maximally cost effective procurement, consistent with regulations ~~promulgated by the board~~.

SECTION ~~11-35-2750~~. Specifications prepared by architects and engineers. (S.C. Code § 11-35-2750)

The requirements of this article regarding the nonrestrictiveness of specifications apply to each solicitation and include, among other things, all specifications prepared by architects, engineers, designers, draftsmen, and land surveyors for ~~District~~state contracts.

ARTICLE 9

CONSTRUCTION, ARCHITECT-ENGINEER, CONSTRUCTION MANAGEMENT, AND LAND SURVEYING SERVICES

~~SUBARTICLE 1.~~

~~DEFINITIONS~~

SECTION ~~11-35-2910.~~ Definitions of terms used in this article. (S.C. Code § 11-35-2910)

(1) "Architect-engineer and land surveying services" are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture, and interior design pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.

(2) "Construction manager agent" means a business that has been awarded a separate contract with the ~~District~~governmental body to provide construction management services but not construction.

(3) "Construction manager at-risk" means a business that has been awarded a separate contract with the ~~District~~governmental body to provide both construction management services and construction using the construction management at-risk project delivery method. A contract with a construction manager at-risk may be executed before completion of design.

(4) "Construction management services" are those professional services associated with contract administration, project management, and other specified services provided in connection with the administration of a project delivery method defined in Section ~~11-35-3005~~ (Project Delivery Methods Authorized).

(5) "Construction management at-risk" means a project delivery method in which the ~~District~~governmental body awards separate contracts, one for architectural and engineering services to design an infrastructure facility and the second to a construction manager at-risk for both construction of the infrastructure facility according to the design and construction management services.

(6) "Design-bid-build" means a project delivery method in which the ~~District~~governmental body sequentially awards separate contracts, the first for architectural and engineering services to design an infrastructure facility and the second for construction of the infrastructure facility according to the design.

(7) "Design-build" means a project delivery method in which the ~~District~~governmental body enters into a single contract for design and construction of an infrastructure facility.

(8) "Design-build-finance-operate-maintain" means a project delivery method in which the ~~District~~governmental body enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. Money appropriated by the ~~District~~State is not used to pay for a part of the services provided by the contractor during the contract period.

(9) "Design-build-operate-maintain" means a project delivery method in which the ~~District~~governmental body enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period. All or a portion of the money required to pay for the services provided by the contractor during the contract period are either

appropriated by the DistrictState before the award of the contract or secured by the DistrictState through fare, toll, or user charges.

(10) "Design requirements" means the written description of the infrastructure facility to be procured pursuant to this article, including:

(a) required features, functions, characteristics, qualities, and properties that are required by the DistrictState;

(b) the anticipated schedule, including start, duration, and completion; and

(c) estimated budgets as applicable to the specific procurement, for design, construction, operation, and maintenance. The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.

(11) "Independent peer reviewer services" are additional architectural and engineering services that a Districtgovernmental body shall acquire, ~~as designated in the Manual for Planning and Execution of State Permanent —Improvement,~~ in design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care. If a Districtgovernmental body elects not to contract with the independent peer reviewer proposed by the successful offeror, the independent peer reviewer must be selected through competitive sealed proposals.

(12) "Infrastructure facility" means a building; structure; or networks of buildings, structures, pipes, controls, and equipment, or portion thereof, that provide transportation, utilities, public education, or public safety services. Included are government office buildings; public schools; courthouses; jails; prisons; water treatment plants, distribution systems, and pumping stations; wastewater treatment plants, collection systems, and pumping stations; solid waste disposal plants, incinerators, landfills, and related facilities; public roads and streets; highways; public parking facilities; public transportation systems, terminals, and rolling stock; rail, air, and water port structures, terminals, and equipment.

(13) "Operations and maintenance" means a project delivery method in which the Districtgovernmental body enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

(14) "Proposal development documents" means drawings and other design-related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method.

SUBARTICLE 3.

CONSTRUCTION SERVICES

SECTION ~~11-35-3005~~. Project delivery methods authorized. (S.C. Code § 11-35-3005)

(1) The following project delivery methods are authorized for procurements relating to infrastructure facilities:

(a) design-bid-build;

(b) construction management at-risk;

(c) operations and maintenance;

(d) design-build;

(e) design-build-operate-maintain; and

(f) design-build-finance-operate-maintain.

(2) In addition to those methods identified in item (1), the ~~board, by regulation, and the State Engineer,~~ in accordance with Section 11-35-3010, regulations may:

(a) approve as an alternate project delivery method any combination of design, construction, finance, and services for operations and maintenance of an infrastructure facility; and

(b) allow or require the ~~District~~governmental body to follow any of the additional procedures established by Section 11-35-3024.

(3) Participation in a report or study that is later used in the preparation of design requirements for a project does not disqualify a firm from participating as a member of a proposing team in a construction management at-risk, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless the participation provides the business with a substantial competitive advantage. ~~In the Manual for Planning and Execution of State Permanent Improvements, the State Engineer may establish guidance for the application of this item by governmental bodies.~~

SECTION ~~11-35-3010~~. Choice of project delivery method. ~~(S.C. Code § 11-35-3010)~~

~~(1) Selection of Method.~~ The project delivery method used for a ~~District~~state construction project must be that method which is most advantageous to the ~~District~~State and results in the most timely, economical, and successful completion of the construction project. The ~~District~~governmental body shall select, in accordance with regulations ~~of the board~~, the appropriate project delivery method for a particular project and shall state in writing the facts and considerations leading to the selection of that particular method.

~~—(2) State Engineer's Office Review.~~ The governmental body shall submit its written report stating the facts and considerations leading to the selection of the particular project delivery method to the State Engineer's Office for its review.

~~—(3) Approval or Disagreement by State Engineer's Office.~~ The State Engineer's Office has ten days to review the data submitted by the governmental body to determine its position with respect to the particular project delivery method recommended for approval by the governmental body, and to notify the governmental body of its decision in writing. If the State Engineer's Office disagrees with the project delivery method selected, it may contest it by submitting the matter to the board for decision. Written notification by the State Engineer's Office to the governmental body of its intention to contest the project delivery method selected must include its reasons. The board shall hear the contest at its next regularly scheduled meeting after notification of the governmental body. If the board rules in support of the State Engineer's Office position, the governmental body shall receive written notification of the decision. If the board rules in support of the governmental body, the governmental body must be notified in writing and by that writing be authorized to use that project delivery method as previously recommended by the governmental body on the particular construction project.

~~—(4) In addition to the requirement of subsection (1), use of the project delivery methods authorized by Section 11-35-3005(1)(e), (1)(f), and (2) must be approved by the board if the total potential value of the overall transaction exceeds twenty five million dollars.~~

SECTION ~~11-35-3015~~. Source selection methods assigned to project delivery methods. ~~(S.C. Code § 11-35-3015)~~

(1) Scope. This section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section ~~11-35-3005~~ (Project delivery methods authorized), except as provided in Sections ~~11-35-1550~~ (Small Purchases), ~~11-35-1560~~ (Sole Source Procurement), ~~11-35-1570~~ (Emergency Procurements), ~~11-35-3230~~ (Exception for small architect-engineer, and land surveying services contract), ~~11-35-3310~~ (Indefinite quantity contracts for architectural-engineering, and land surveying services), and ~~11-35-3320~~ (Indefinite quantity contracts for construction).

(2) Design-bid-build:

(a) Design. Architect-engineer, construction management, and land surveying services. The qualifications based selection process in Section ~~11-35-3220~~ (Qualifications Based Selection Procedures) must be used to procure architect-engineer, construction management, and land surveying services, unless those services are acquired in conjunction with construction using one of the project delivery methods provided in Section ~~11-35-3015~~ (3), (5), (6), (7), and (8).

(b) Construction. Competitive sealed bidding, as provided in Section ~~11-35-1520~~ (Competitive Sealed Bidding), must be used to procure construction in design-bid-build procurements.

(3) Construction Management at-risk. Contracts for construction management at-risk must be procured as provided in either Section ~~11-35-1520~~ (Competitive Sealed Bidding) or Section ~~11-35-1530~~ (Competitive Sealed Proposals).

(4) Operations and Maintenance. Contracts for operations and maintenance must be procured as set forth in Section ~~11-35-1510~~ (Methods of Source Selection).

(5) Design-build. Contracts for design-build must be procured by competitive sealed proposals, as provided in Section ~~11-35-1530~~ (Competitive Sealed Proposals) ~~or competitive negotiation, as provided in Section 11-35-1535 (Competitive Negotiations)~~, except that the regulations may describe the circumstances under which a particular design-build procurement does not require the submission of proposal development documents as required in Section 3024(2)(b).

(6) Design-build-operate-maintain. Contracts for design-build-operate-maintain must be procured by competitive sealed proposals, as provided in Section ~~11-35-1530~~ (Competitive Sealed Proposals) ~~or competitive negotiation, as provided in Section 11-35-1535 (Competitive Negotiations)~~.

(7) Design-build-finance-operate-maintain. Contracts for design-build-finance-operate-maintain must be procured by competitive sealed proposals, as provided in Section ~~11-35-1530~~ (Competitive Sealed Proposals) ~~or Section 11-35-1535 (Competitive Negotiations)~~.

(8) Other. Contracts for an alternate project delivery method approved pursuant to Section ~~11-35-3005~~(2) must be procured by a source selection method provided in Section ~~11-35-1510~~, as specified by the authority approving the alternative project delivery method.

SECTION ~~11-35-3020~~. Additional bidding procedures for construction procurement. (S.C. Code § 11-35-3020)

Exceptions in Competitive Sealed Bidding Procedures. The process of competitive sealed bidding as required by Section ~~11-35-3015~~(2)(b) must be performed in accordance with the procedures outlined in Article 5 of this code subject to the following exceptions:

(a) Invitation for Bids. ~~Each governmental body~~The District is responsible for developing a formal invitation for bids for each ~~state~~ construction project. The invitation must include, but not be limited to, all contractual terms and conditions applicable to the procurement. A copy of each invitation for bids must be ~~filed with the State Engineer's Office and must be~~ advertised formally in South Carolina Business Opportunities, an official state government publication. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. The manner in which this official state government publication must be published, the content of the publication itself, the frequency of the publication, the method of subscription to the publication, and the manner by which the publication is distributed must be established by regulation of the board.

(b) Bid Acceptance. Instead of Section ~~11-35-1520~~(6), the following provision applies. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The ~~District's governmental body's~~ invitation for bids must set forth all requirements of the bid including, but not limited to:

(i) The ~~District governmental body~~, in consultation with the architect-engineer assigned to the project, shall identify by license classification or subclassification in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's

total base bid. In addition, the Districtgovernmental body, in consultation with the architect-engineer assigned to the project, may identify by license classification or subclassification in the invitation for bids a subcontractor who is expected to perform work which is vital to the project. The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section ~~11-35-4210~~ or another provision of this code. A bidder in response to an invitation for bids shall clearly identify in his bid only those subcontractors to perform the work as identified in the invitation for bids. If the bidder determines to use his own employees to perform a portion of the work for which he would otherwise be required to list a subcontractor and if the bidder is qualified to perform that work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid and not subcontract that work except with the approval of the Districtgovernmental body for good cause shown.

(ii) Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive.

(iii) The Districtgovernmental body shall send all responsive bidders a copy of the bid tabulation within ten working days following the bid opening.

(c) Instead of Section ~~11-35-1520~~(10), the following provisions apply:

(i) Unless there is a compelling reason to reject bids as prescribed by regulation ~~of the board~~, notice of an intended award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids must be given by posting the notice at a location that is specified in the invitation for bids. The invitation for bids and the posted notice must contain a statement of the bidder's right to protest pursuant to Section ~~11-35-4210~~(1) and the date and location of posting must be announced at bid opening. In addition to posting notice, the Districtgovernmental body promptly shall send all responsive bidders a copy of the notice of intended award and of the bid tabulation. The mailed notice must indicate the posting date and must contain a statement of the bidder's right to protest pursuant to Section ~~11-35-4210~~(1).

(ii) After five business days' notice is given, the Districtgovernmental body may enter into a contract with the bidder named in the notice in accordance with the provisions of this code and of the bid solicited. The procurement officer must comply with Section ~~11-35-1810~~.

(iii) If, at bid opening, only one bid is received and determined to be responsive and responsible and within the ~~governmental body's~~District's construction budget, award may be made without the five-day waiting period.

(d) Negotiations after Unsuccessful Competitive Sealed Bidding. Instead of Section ~~11-35-1540~~, the following provisions apply:

(i) If bids received pursuant to an invitation for bids exceed available funds, and it is determined in writing by the Districtgovernmental body that circumstances do not permit the delay required to resolicit competitive sealed bids, and the base bid, less deductive alternates, does not exceed available funds by an amount greater than ten percent of the construction budget established for that portion of the work, a contract may be negotiated pursuant to this section with the lowest responsible and responsive bidder. The Districtgovernmental body may change the scope of the work to reduce the price to be within the established construction budget but may not reduce the price below the established construction budget more than ten percent without a written request by the ~~agency and the written approval of the chief procurement officer~~chief business official based on the interest of the DistrictState.

~~(ii) If the lowest base bid received pursuant to an invitation for bids exceeds approved available funds and the governmental body is able to identify additional funds for the project, as certified by the appropriate fiscal officers, in the amount of the difference between the lowest base bid and the approved available funds for the project, the governmental body shall submit a request to use those additional funds in accordance with Chapter 47, Title 2.~~

SECTION ~~11-35-3021~~. Subcontractor substitution. (S.C. Code § 11-35-3021)

(1) After notice of an award or intended award has been given, whichever is earlier, the prospective contractor identified in the notice may not substitute a business as subcontractor in place of a subcontractor listed in the prospective contractor's bid or proposal, except for one or more of the following reasons:

(a) upon a showing satisfactory to the ~~District~~governmental body by the prospective contractor that:

(i) the listed subcontractor is not financially responsible;

(ii) the listed subcontractor's scope of work did not include a portion of the work required in the plans and specifications, and the exclusion is not clearly set forth in the subcontractor's original bid;

(iii) the listed subcontractor was listed as a result of an inadvertent clerical error, but only if that request is made within four working days of opening;

(iv) the listed subcontractor failed or refused to submit a performance and payment bond when requested by the prospective contractor after the subcontractor had represented to the prospective contractor that the subcontractor could obtain a performance and payment bond; and

(v) the listed subcontractor must be licensed and did not have the license at the time required by law;

(b) if the listed subcontractor fails or refuses to perform his subcontract;

(c) if the work of the listed subcontractor is found by the ~~District~~governmental body to be substantially unsatisfactory;

(d) upon mutual agreement of the contractor and subcontractor; and

(e) with the consent of the ~~District~~governmental body for good cause shown.

(2) The request for substitution must be made to the ~~District~~governmental body in writing. This written request does not give rise to a private right of action against the prospective contractor in the absence of actual malice.

(3) If substitution is allowed, the prospective contractor, before obtaining prices from another subcontractor, must attempt in good faith to negotiate a subcontract with at least one subcontractor whose bid was received before the submission of the prospective contractor's offer. This section does not affect a contractor's ability to request withdrawal of a bid in accordance with the provisions of this code and the regulations ~~promulgated pursuant to it.~~

(4) This section applies to a procurement conducted using the source selection methods authorized by Section ~~11-35-3015~~(2)(b), (3), (5), (6), (7), and (8).

SECTION ~~11-35-3023~~. Prequalification on ~~state~~District construction. (~~S.C. Code § 11-35-3023~~)

In accordance with this section, the applicable section of Article 5, and procedures published by the State Engineer, a ~~District~~governmental body may limit participation in a solicitation for construction to only those businesses, including potential subcontractors, that are prequalified. The prequalification process may be used only with the approval ~~and supervision~~ of the ~~State Engineer's Office~~Superintendent.

If businesses are prequalified, the District must issue a request for qualifications. Adequate public notice of the request for qualifications must be given in the manner provided in Section 1520(3). The request must contain, at a minimum, a description of the general scope of work to be acquired, the deadline for submission of information, and how businesses may apply for consideration. The evaluation criteria must include, but not be limited to, prior performance, recent past references on all aspects of performance, financial stability, and experience on similar construction projects. Using only the criteria stated in the request for qualifications, businesses must be ranked from most qualified to least qualified. The basis for the ranking must be determined in writing. If fewer than two businesses are prequalified, the prequalification process must be canceled.

SECTION ~~11-35-3024~~. Additional procedures applicable to procurement of certain project delivery methods. (S.C. Code § 11-35-3024)

(1) Applicability. In addition to the requirements of Section ~~11-35-1530~~ (Competitive Sealed Proposals) ~~or Section 11-35-1535 (Competitive Negotiations)~~, the procedures in this section apply as provided in items (2), (3), and (4) below.

(2) Content of Request for Proposals. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:

(a) must include design requirements;

(b) must solicit proposal development documents; and

(c) may, if the ~~governmental body~~District determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:

(i) prequalify offerors in accordance with Section ~~11-35-3023~~ by issuing a request for qualifications in advance of the request for proposals;

(ii) select, pursuant to procedures designated in the State of South Carolina's Manual for Planning and Execution of State Permanent Improvements, a short list of responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award before discussions and evaluations pursuant to Section ~~11-35-1530~~, if the number of proposals to be short-listed is stated in the Request for Proposals and prompt public notice is given to all offerors as to which proposals have been short-listed; or

(iii) pay stipends to unsuccessful offerors, if the amount of the stipends and the terms under which stipends are paid are stated in the Request for Proposals.

~~Subsection (2)(c)(ii) is inapplicable if competitive negotiations are conducted pursuant to Section 11-35-1535.~~

(3) Evaluation Factors. A Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain must:

(a) state the relative importance of (i) demonstrated compliance with the design requirements, (ii) offeror qualifications, (iii) financial capacity, (iv) project schedule, (v) price, or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements, and (vi) other factors, if any; and

(b) ~~in circumstances designated in the Manual for Planning and Execution of State Permanent Improvements~~, require each offeror to identify an Independent Peer Reviewer whose competence and qualifications to provide that service must be an additional evaluation factor in the award of the contract.

~~(4) Unless excused by the State Engineer, the State Engineer's Office shall oversee the evaluation process for a procurement of construction if factors other than price are considered in the evaluation of a proposal.~~

SECTION ~~11-35-3030~~. Bond and security. (S.C. Code § 11-35-3030)

(1) Bid Security.

(a) Requirement for Bid Security. Bid security is required for all competitive sealed bidding for construction contracts in a design-bid-build procurement in excess of one hundred thousand dollars and other contracts as may be prescribed by the ~~State Engineer's Office~~District's internal procurement procedures (Section 540). Bid security is a bond provided by a surety company meeting the criteria established by the regulations ~~of the board~~ or otherwise supplied in a form that may be established by regulation ~~of the board~~.

(b) Amount of Bid Security. Bid security must be in an amount equal to at least five percent of the amount of the bid at a minimum.

(c) Rejection of Bids for Noncompliance with Bid Security Requirements. When the invitation for bids requires security, noncompliance requires that the bid be rejected except that a bidder who fails to

provide bid security in the proper amount or a bid bond with the proper rating must be given one working day from bid opening to cure the deficiencies. If the bidder is unable to cure these deficiencies within one working day of bid opening, his bid must be rejected.

(d) Withdrawal of Bids. After the bids are opened, they must be irrevocable for the period specified in the invitation for bids. If a bidder is permitted to withdraw its bid in accordance with regulations ~~promulgated by the board~~, action must not be had against the bidder or the bid security.

(2) Contract Performance Payment Bonds.

(a) When Required-Amounts. Contracts for construction must require the following bonds or security:

(i) a performance bond satisfactory to the DistrictState, executed by a surety company meeting the criteria established by the ~~board in~~ regulations, or otherwise secured in a manner satisfactory to the DistrictState, in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;

(ii) a payment bond satisfactory to the DistrictState, executed by a surety company meeting the criteria established by the ~~board in~~ regulations, or otherwise secured in a manner satisfactory to the DistrictState, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the construction work provided for in the contract. The bond must be in an amount equal to one hundred percent of the portion of the contract price that does not include the cost of operation, maintenance, and finance;

(iii) in the case of a construction contract valued at fifty thousand dollars or less, the ~~Districtgovernmental body~~ may waive the requirements of subitems (i) and (ii) above, if the ~~Districtgovernmental body~~ has protected ~~the Stateitself~~;

(iv) in the case of a construction manager at-risk contract, the solicitation may provide that bonds or security are not required during the project's preconstruction or design phase, if construction does not commence until the requirements of subitems (i) and (ii) above have been satisfied. Additionally, the solicitation may provide that bonds or security as described in subitems (i) and (ii) above may be furnished for one or more designated portions of the project, in an amount equal to one hundred percent of the value of the construction of each designated portion, and also may prescribe the time of delivery of the bonds or security. In no event may construction of any portion of the work commence until the appropriate bonds or security have been delivered to the Districtgovernmental body;

(v) in the case of a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain contract, the solicitation may provide that bonds or security as described in subitems (i) and (ii) above may be furnished for one or more designated portions of the project, in an amount equal to one hundred percent of the value of the design and construction of each designated portion, and also may prescribe the time of delivery of the bonds or security. In no event may design or construction of any portion of the work commence until the appropriate bonds or security have been delivered to the Districtgovernmental body.

(b) Authority to Require Additional Bonds. Item (2) does not limit the authority of the ~~Districtboard~~ to require a performance bond or other security in addition to these bonds, or in circumstances other than specified in subitem (a) of that item in accordance with regulations ~~promulgated by the board~~.

(c) Suits on Payment Bonds-Right to Institute. Where and When Brought. Section 11-35-3030(2)(c)-(d) of the South Carolina Code of Laws, as amended, provides for legal actions on payment bonds. A person who has furnished labor, material, or rental equipment to a bonded contractor or his subcontractors for the work specified in the contract, and who has not been paid in full for it before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by the person or material or rental equipment was furnished or supplied by the person for which the claim is made, has the right to sue on the payment bond for the amount, or the balance of it, unpaid at the time of institution of the suit and to prosecute the action for the sum or sums justly due the person. A remote claimant has a right of action on the payment bond only upon giving written notice to the contractor within ninety days from the date on which the person did or performed the last of the labor or furnished

~~or supplied the last of the material or rental equipment upon which the claim is made, stating with substantial accuracy the amount claimed as unpaid and the name of the party to whom the material or rental equipment was furnished or supplied or for whom the labor was done or performed. The written notice to the bonded contractor must be served personally or served by mailing the notice by registered or certified mail, postage prepaid, in an envelope addressed to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation. The aggregate amount of a claim against the payment bond by a remote claimant may not exceed the amount due by the bonded contractor to the person to whom the remote claimant has supplied labor, materials, rental equipment, or services, unless the remote claimant has provided notice of furnishing labor, materials, or rental equipment to the bonded contractor. The written notice to the bonded contractor must generally conform to the requirements of Section 29-5-20(B) and sent by certified or registered mail to the bonded contractor at any place the bonded contractor maintains a permanent office for the conduct of its business, or at the current address as shown on the records of the Department of Labor, Licensing and Regulation. After receiving the notice of furnishing labor, materials, or rental equipment, payment by the bonded contractor may not lessen the amount recoverable by the remote claimant. The aggregate amount of claims on the payment bond may not exceed the penal sum of the bond. A suit under this section must not be commenced after the expiration of one year after the last date of furnishing or providing labor, services, materials, or rental equipment.~~

~~— For purposes of this section, "bonded contractor" means the contractor or subcontractor furnishing the payment bond, and "remote claimant" means a person having a direct contractual relationship with a subcontractor or supplier of a bonded contractor, but no expressed or implied contractual relationship with the bonded contractor. Any payment bond surety for the bonded contractor must have the same rights and defenses of the bonded contractor as provided in this section.~~

~~— (d) Suits on Payment Bonds Where and When Brought. Every suit instituted upon a payment bond must be brought in a court of competent jurisdiction for the county or circuit in which the construction contract was to be performed; except that a suit must not be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by the person bringing suit. The obligee named in the bond need not be joined as a party in the suit.~~

(3) Bonds Forms and Copies.

(a) Bonds Forms. The ~~board shall promulgate by regulation~~ regulations specify the form of the bonds required by this section.

(b) Certified Copies of Bonds. A person may request and obtain from the Districtgovernmental body a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond is prima facie evidence of the contents, execution, and delivery of the original.

(4) Retention.

(a) Maximum amount to be withheld. In a contract or subcontract for construction which provides for progress payments in installments based upon an estimated percentage of completion, with a percentage of the contract's proceeds to be retained by the DistrictState or general contractor pending completion of the contract or subcontract, the retained amount of each progress payment or installment must be no more than three and one-half percent.

(b) Release of Retained Funds. When the work to be performed on a Districtstate construction project or pursuant to a Districtstate construction contract is to be performed by multiple prime contractors or by a prime contractor and multiple subcontractors, the work contracted to be done by each individual contractor or subcontractor is considered a separate division of the contract for the purpose of retention. As each division of the contract is certified as having been completed, that portion of the retained funds which is allocable to the completed division of the contract must be released forthwith to the prime contractor, who, within ten days of its receipt, shall release to the subcontractor responsible for the completed work the full amount of retention previously withheld from him by the prime contractor.

(5) Bonds for Bid Security and Contract Performance. The requirement of a bond for bid security on a construction contract, pursuant to subsection (1), and a construction contract performance bond, pursuant to subsection (2), may not include a requirement that the surety bond be furnished by a particular surety company or through a particular agent or broker.

SECTION 11-35-3035. Errors and omissions insurance. (S.C. Code § 11-35-3035)

Regulations shall ~~be promulgated that~~ specify when a ~~District governmental body~~ shall require offerors to provide appropriate errors and omissions insurance to cover architectural and engineering services under the project delivery methods set forth in Section 11-35-3005(1)(a), (d), (e), and (f).

SECTION 11-35-3037. Other forms of security. (S.C. Code § 11-35-3037)

The ~~District governmental body~~ may require one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately or as one element of another project delivery method:

(a) operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations;

(b) letters of credit in an amount appropriate to cover the cost to the ~~District governmental body~~ of preventing infrastructure service interruptions for a period up to twelve months; and

(c) appropriate written guarantees from the contractor, or depending upon the circumstances, from a parent corporation, to secure the recovery of procurement costs to the ~~District governmental body~~ if the contractor defaults in performance.

SECTION 11-35-3040. Contract clauses and their administration. (S.C. Code § 11-35-3040)

(1) Contract Clauses. ~~District State~~ construction contracts and subcontracts may include clauses providing for adjustments in prices, time of performance, and other appropriate contract provisions including, but not limited to:

(a) the unilateral right of a ~~District governmental body~~ to order in writing:

(i) all changes in the work within the general scope of the contract; and

(ii) all changes in the time of performance of the contract which do not alter the general scope of the contract work;

(b) variations occurring between estimated quantities of work in the contract and actual quantities;

(c) suspension of work ordered by the ~~District governmental body~~;

(d) site conditions differing from those indicated in the contract or ordinarily encountered.

(2) Price Adjustments.

(a) Adjustments in price pursuant to clauses ~~adopted or promulgated pursuant to Section 11-35-2010~~ by regulation must be computed and documented with a written determination. The price adjustment agreed upon must approximate the actual cost to the contractor and all costs incurred by the contractor must be justifiably compared with prevailing industry standards, including reasonable profit. Costs must be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon after that as practicable, and must be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor:

(i) by unit prices specified in the contract or subsequently agreed upon;

(ii) by the costs attributable to the events or situations under those clauses with adjustment of profits or fee, all as specified in the contract or subsequently agreed upon;

(iii) by agreement on a fixed price adjustment;

(iv) in another manner as the contracting parties may mutually agree; or

(v) in the absence of agreement by the parties, through unilateral determination by the ~~District governmental body~~ of the costs attributable to the events or situations under those clauses, with adjustment of profit or fee, all as computed by the ~~District governmental body~~ in accordance with applicable sections of the regulations ~~issued pursuant to this chapter~~ and subject to the provisions of Article 17 of this ~~chapter code~~.

(b) A contractor is required to submit cost or pricing data if an adjustment in contract price is subject to the provisions of Section ~~11-35-1830~~.

(3) Additional Contract Clauses. The construction contracts and subcontracts may include clauses providing for appropriate remedies that cover as a minimum:

(a) specified excuses for delay or nonperformance;

(b) termination of the contract for default;

(c) termination of the contract in whole or in part for the convenience of the ~~District governmental body~~.

(4) Modification of Required Clauses. The chief procurement officer may vary the clauses promulgated by ~~the board pursuant to subsection (1) and subsection (3) of this section regulation~~ for inclusion in a particular construction contract if the variations are supported by a written determination that states the circumstances justifying the variations, if notice of a material variation is stated in the invitation for bids.

SECTION ~~11-35-3050~~. Cost principles regulations for construction contractors. (~~S.C. Code § 11-35-3050~~)

The ~~board may promulgate~~ regulations ~~setting may set~~ forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under provisions in construction contracts which provide for the reimbursement of costs.

~~SECTION 11-35-3060. Fiscal responsibility.~~

~~—Every contract modification, change order, or contract price adjustment under a construction contract with the State is subject to Sections 2-47-40 and 2-47-50.~~

SECTION ~~11-35-3070~~. Approval of architectural, engineering, or construction changes which do not alter general scope or intent or exceed approved budget. (~~S.C. Code § 11-35-3070~~)

~~Consistent with any applicable regulation of the board, a governmental body~~ A District may approve and pay for amendments to architectural/engineering contracts and change orders to construction contracts, ~~within the governmental body's authority~~, which do not alter the general scope or intent of the project and which do not exceed the previously approved project budget.

SUBARTICLE 5.

ARCHITECT ENGINEER, CONSTRUCTION MANAGEMENT, AND LAND SURVEYING SERVICES

SECTION ~~11-35-3210~~. Policy. (~~S.C. Code § 11-35-3210~~)

Policy. It is the policy of this ~~District~~ State to announce publicly all requirements for architect-engineer, construction management, and land surveying services and to negotiate contracts for such services on the basis of demonstrated competence and qualification for the particular type of services required and at fair and reasonable prices.

SECTION ~~11-35-3215~~. Preference for resident design service; definitions; exceptions. (S.C. Code § 11-35-3215)

(A) As used in this section:

(1) "Design services" means architect-engineer, construction management, or land surveying services as defined in Section ~~11-35-2910~~ and awarded pursuant to Section ~~11-35-3220~~.

(2) "Resident" means a business that employs, either directly or through consultants, an adequate number of persons domiciled in South Carolina to perform a majority of the design services involved in the procurement.

(B) A business responding to an invitation involving design services shall submit a certification with its response stating whether the business is a resident for purposes of the procurement. Submission of a certification under false pretenses is grounds for suspension or debarment.

(C) An award to a nonresident of a contract involving design services must be supported by a written determination explaining why the award was made to the selected firm.

(D) In an evaluation conducted pursuant to Section ~~11-35-3220~~, a resident firm must be ranked higher than a nonresident firm if the ~~District's~~ agency selection committee finds the two firms otherwise equally qualified.

(E) This section does not apply to a procurement if either the procurement does not involve construction or the design services are a minor accompaniment to a contract for nondesign services.

SECTION ~~11-35-3220~~. Qualifications based selection procedures. (S.C. Code § 11-35-3220)

(1) ~~District~~ Agency Selection Committee. A ~~District~~ governmental body shall establish its own architect-engineer, construction management, and land surveying services selection committee, referred to as the ~~District~~ agency selection committee, which must be composed of those individuals the ~~agency head~~ Superintendent determines to be qualified to make an informed decision as to the most competent and qualified firm for the proposed project. The ~~head of the governmental body~~ Superintendent or his qualified responsible designee shall sit as a permanent member of the ~~District~~ agency selection committee for the purpose of coordinating and accounting for the committee's work. ~~To assist an agency selection committee in the selection of firms to be employed for significant or highly technical projects and to facilitate prompt selections, the agency selection committee may invite the State Engineer or his designee to sit as a nonvoting member of the committee.~~

(2)(a) Advertisement of Project Description. The ~~District~~ agency selection committee is responsible for:

(i) developing a description of the proposed project;

(ii) enumerating all required professional services for that project; and

(iii) preparing a formal invitation to firms for submission of information.

(b) The invitation must include, but not be limited to, the project title, the general scope of work, a description of all professional services required for that project, the submission deadline, and how interested firms may apply for consideration. The invitation must be advertised formally in South Carolina Business Opportunities. The agency selection committee shall file a copy of the project description and the invitation with the State Engineer's Office. Adequate notice of the invitation must be given at a reasonable time before the date set forth in it for receipt of responses. The invitation must be advertised formally in an official state government publication. The manner in which this official state government publication must be published, the content of the publication itself, the frequency of the publication, the method for subscription to the publication, and the manner by which the publication is distributed must be established by regulation of the board.

(3) Response to Invitation. The date for submission of information from interested persons or firms in response to an invitation must not be less than fifteen days after publication of the invitation. Interested

architect-engineer, construction management, and land surveying persons or firms shall respond to the invitation with the submission of a current and accurate Federal Standard Form 330, Architect-Engineer and Related Services Questionnaire, and Federal Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project, or their successor forms or similar information as ~~the State Engineer may specify in the Manual for Planning and Execution of State Permanent Improvement Projects, Part II~~ may be prescribed by regulation, and other information that the particular invitation may require.

(4) Interviews with Interested Firms. Following receipt of information from all interested persons and firms, the Districtagency selection committee shall hold interviews with at least three persons or firms who respond to the committee's advertisement and who are considered most qualified on the basis of information available before the interviews. A list of firms selected for interview must be sent to all firms that submitted information in response to the advertisement, before the date selected for the interviews. If less than three persons or firms respond to the advertisement, the committee shall hold interviews with those that did respond. The Districtagency selection committee's determination as to which are to be interviewed must be in writing and based upon its review and evaluation of all submitted materials. The written report of the committee must list specifically the names of all persons and firms that responded to the advertisement and enumerate the reasons of the committee for selecting those to be interviewed. The purpose of the interviews is to provide the further information that may be required by the Districtagency selection committee to fully acquaint itself with the relative qualifications of the several interested firms.

(5) Selection and Ranking of the Three Most Qualified.

(a) The Districtagency selection committee shall evaluate each of the persons or firms interviewed in view of their:

(i) past performance;

(ii) the ability of professional personnel;

(iii) demonstrated ability to meet time and budget requirements;

(iv) location and knowledge of the locality of the project if the application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project;

(v) recent, current, and projected workloads of the firms;

(vi) creativity and insight related to the project;

(vii) related experience on similar projects;

(viii) volume of work awarded by the ~~Districtusing agency~~ to the person or firm during the previous five years, with the objective of effectuating an equitable distribution of contracts by the DistrictState among qualified firms including Minority Business Enterprises certified by the South Carolina Office of Small and Minority Business Assistance and firms that have not had previous Districtstate work; and

(ix) any other special qualification required pursuant to the solicitation of the Districtusing agency.

(b) Based upon these evaluations, the Districtagency selection committee shall select the three persons or firms that, in its judgment, are the best qualified, ranking the three in priority order. The Districtagency selection committee's report ranking the three chosen persons or firms must be in writing and include data substantiating its determinations.

(6) Notice of Selection and Ranking. When it is determined by the Districtagency that the ranking report is final, written notification of the highest ranked person or firm must be sent immediately to all firms interviewed.

(7) Negotiation of Contract. The ~~governing body~~Board of the ~~Districtgovernmental body~~ or its designee shall negotiate a contract for services with the most qualified person or firm at a compensation that is fair and reasonable to the DistrictState. If the ~~governing body~~Board of the ~~Districtgovernmental body~~ or its designee is unable to negotiate a satisfactory contract with this person or firm, negotiations must be terminated formally. Negotiations must commence in the same manner with the second and then

the third most qualified until a satisfactory contract is negotiated. If an agreement is not reached with one of the three, additional persons or firms in order of their competence and qualifications must be selected after consultation with the Districtagency selection committee, and negotiations must be continued in the same manner until agreement is reached.

~~—(8) State Engineer's Office Review. The head of the governmental body shall submit the following documents to the State Engineer's Office for its review:~~

~~—(a) the written report of the agency selection committee, listing the persons or firms that responded to the invitation to submit information and enumerating the reasons of the committee for selecting the particular ones to be interviewed;~~

~~—(b) the written ranking report of the agency selection committee and all data substantiating the determinations made in that report; and~~

~~—(c) the tentative contract between the governmental body and the selected person or firm.~~

~~—(9) Approval or Disagreement by State Engineer's Office. The State Engineer's Office has ten days to review the data submitted by the agency selection committee, and to determine its position with respect to the particular person or firm recommended for approval by the agency. If the State Engineer's Office disagrees with the proposal, it may contest the proposal by submitting the matter to the board for decision. In the event of approval, the State Engineer's Office shall notify immediately in writing the governmental body and the person or firm selected of the award and authorize the governmental body to execute a contract with the selected person or firm. In the event of disagreement, the State Engineer's Office immediately shall notify the governmental body in writing of its intention to contest the ranking and the reasons for it. All contract negotiations by the governing body must be suspended pending a decision by the board concerning a contested ranking. The board shall hear contests at its next regularly scheduled meeting after notification of the governmental body. If the board rules in support of the State Engineer's Office position, the governmental body shall submit the name of another person or firm to the State Engineer's Office for consideration, selected in accordance with the procedures prescribed in this section. If the board rules in support of the governmental body, the governmental body must be notified in writing and authorized to execute a contract with the selected person or firm.~~

SECTION 11-35-3230. Exception for small architect-engineer, construction management and land surveying services contract. (S.C. Code § 11-35-3230)

(1) Procurement Procedures for Certain Contracts. A Districtgovernmental body securing architect-engineer, construction management, or land surveying services which are estimated not to exceed fifty thousand dollars may award contracts by direct negotiation and selection, taking into account:

(a) the nature of the project;

(b) the proximity of the architect-engineer or land surveying services to the project;

(c) the capability of the architect, engineer, or land surveyor to produce the required service within a reasonable time;

(d) past performance; and

(e) ability to meet project budget requirements.

(2) Maximum Value of Small Contracts with One Person or Firm. The total value of contracts awarded to a single architectural engineering, construction management, or land surveying firm by a single Districtgovernmental body pursuant to subsection (1) may not exceed one hundred fifty thousand dollars in a twenty-four-month period. Persons or firms seeking to render professional services pursuant to this section shall furnish the Districtgovernmental body with whom the firm is negotiating a list of professional services, including fees paid for them, performed for the Districtgovernmental body during the fiscal year immediately preceding the fiscal year in which the negotiations are occurring and during the fiscal year in which the negotiations are occurring.

~~(3) Submission of Contracts to State Engineer's Office. Copies of contracts, including the negotiated scope of services and fees, awarded pursuant to this section must be submitted to the State Engineer's Office for information. Reserved~~

(4) Splitting of Larger Projects Prohibited. A ~~District governmental body~~ may not break a project into small projects for the purpose of circumventing the provisions of Section ~~11-35-3220~~ and this section.

(5) When negotiating a contract pursuant to this section, a ~~District governmental body~~ may not negotiate with a firm unless any unsuccessful negotiations with a different firm have been concluded in writing. Once negotiations with a firm have been concluded, negotiations may not be reopened.

~~SECTION 11-35-3240. Manual for planning and execution of state permanent improvements.~~

~~—As relates to this code and the ensuing regulations, a "Manual for Planning and Execution of State Permanent Improvements" may be published by the board or its designee for use by governmental bodies and included, by reference, in the regulations of the board. The manual may be revised as the board considers necessary, except that proposed changes are not effective until the board has provided the public at least sixty days to make written comments after notice of the proposed changes is published in South Carolina Business Opportunities.~~

~~SECTION 11-35-3245. Architect, engineer, or construction manager; performance of other work. (S.C. Code § 11-35-3245)~~

(a) An architect or engineer performing design work, or a construction manager performing construction management services, both as described in Section ~~11-35-2910~~(1) and (3), under a contract awarded pursuant to the provisions of Section ~~11-35-3220~~ or Section ~~11-35-3230~~, may not perform other work, by later amendment or separate contract award, on that project as a contractor or subcontractor either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest.

(b) For purposes of this section, safety compliance and other incidental construction support activities performed by the construction manager are not considered work performed as a contractor or subcontractor. If the construction manager performs or is responsible for safety compliance and other incidental construction support activities, and these support activities are in noncompliance with the provisions of Section 41-15-210, then the construction management firm is subject to all applicable fines and penalties.

(c) This section applies only to procurements for construction using the design-bid-build project delivery method.

ARTICLE 10

~~INDEFINITE QUANTITY DELIVERY CONTRACTS~~

~~SECTION 11-35-3305. Establishment of indefinite quantity contracts. (S.C. Code § 11-35-3305)~~

With the approval of the ~~appropriate~~ chief procurement officer, and in accordance with any applicable regulations, a procurement officer may establish contracts providing for an indefinite quantity, within state maximum or minimum limits, of specified supplies, service, or information technology, to be furnished during a fixed period, and that provide for the issuance of orders for delivery or performance of individual requirements during the period of the contract. The ~~appropriate~~ chief procurement officer may establish the contracts on behalf of ~~any governmental body~~ or for use by any ~~District public procurement unit~~.

SECTION ~~11-35-3310~~. Indefinite quantity contracts. (S.C. Code § 11-35-3310)

(1) General Applicability. Indefinite quantity contracts may be awarded on an as-needed basis for architectural-engineering and land-surveying services pursuant to Section ~~11-35-3220~~.

(2) Architectural-Engineering and Land-Surveying Services. When architectural-engineering and land-surveying services contracts are awarded, each contract must be limited to a total expenditure of three hundred thousand dollars for a two-year period with individual project expenditures not to exceed one hundred thousand dollars; ~~however, for public institutions of higher learning, and for technical college service contracts authorized by the State Board for Technical and Comprehensive Education, these limits shall be five hundred thousand dollars for total expenditures and two hundred thousand dollars for individual expenditures within the time periods specified.~~

(3) Small Indefinite Quantity Contracts. Small indefinite quantity contracts for architectural-engineering and land-surveying services may be procured as provided in Section ~~11-35-3230~~. A contract established under this section must be subject to Section ~~11-35-3230~~, and any applicable regulations.

SECTION ~~11-35-3320~~. Task order contracts. (S.C. Code § 11-35-3320)

(A) The term "task order contract" means a contract that does not procure or specify a firm quantity of services, other than a minimum or maximum quantity, and that provides for the issuance of task orders for the performance of tasks during the period of the contract. Subject to the requirements of this section and other applicable law, a ~~District~~governmental body may enter into task order contracts to acquire construction services when the exact time or exact quantities of future tasks are not known at the time of contract award. ~~In accordance with Section 11-35-4810, the State Engineer may award task order contracts on behalf of any governmental body and for use by any state public procurement unit authorized by the State Engineer.~~

(B) At any given time, a ~~District~~governmental body may enter into task order contracts with four businesses for each geographic area for each licensing classification and subclassification for construction. Licensing classification and subclassification has the meaning provided by Chapter 11, Title 40. Except as otherwise provided in this section, a task order contract for construction must be procured as provided in Section ~~11-35-1530~~, not including paragraph (4) (Request for Qualifications) or paragraph (8) (Negotiations). All evaluations must be conducted by a panel composed of at least three members. ~~A governmental body shall invite the State Engineer or his designee to serve as one of the panel members.~~ Except as provided by regulation, award must be made to the four responsible offerors whose proposals are determined in writing to be the most advantageous to the ~~District~~State, taking into consideration the evaluation factors set forth in the request for proposals. The contract file must contain the basis on which the awards will be made and must be sufficient to satisfy external audit. Procedures and requirements for the notification of intent to award the contracts must be the same as those provided in Section ~~11-35-1520(1)~~ (Award). Section ~~11-35-3023~~ does not apply to contracts awarded pursuant to this section.

(C) Limitations on task order contracts.

(1) A task order contract awarded for geographic area may not be used to perform services at a different geographic area.

(2) A task order contract may not exceed five years, including extensions.

(3) Total expenditures pursuant to all task order contracts for construction resulting from a single solicitation may not exceed four million dollars.

(4) The total construction cost of a single project performed using multiple task orders or task orders in combination with other types of contracts may not exceed five hundred thousand dollars. Projects may not be divided artificially to avoid this limitation.

(5) A single project must not be performed using task order contracts for construction in combination with contracts awarded pursuant to Section ~~11-35~~-1550. Standards for determining whether work constitutes a single project must be established in the State Engineer's Manual for Planning and Execution of State Permanent Improvements.

(D) Limitations on task orders.

(1) A task order must clearly specify all tasks to be performed or property to be delivered under the order so the full price for the performance of the work can be established when the order is placed. All task orders must be issued on a fixed-price basis.

(2) A quote request for construction must be provided to all task order contractors. A task order for construction may not be issued unless the ~~District~~governmental body receives at least two responsive, bona fide, fixed-price quotes. Any award must be issued to the contractor submitting the lowest responsive quote.

(3) All task orders must be issued within the period of the contract and must be within the scope and maximum value of the contract.

(4) A task order for construction may not be less than ninety thousand dollars and may not exceed three hundred fifty thousand dollars. Work may not be aggregated or divided artificially in order to avoid these limits.

(E) Any solicitation for a task order contract must include the following:

(1) the period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any;

(2) the maximum dollar value of the services to be procured under the contract;

(3) the minimum and maximum dollar value of the services to be procured under a single task order;

(4) a description that reasonably describes the licensing classification and the general scope, nature, complexity, and purposes of the services to be procured under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(5) the procedures that the governmental body will use for requesting fixed price quotes and for issuing orders, a restriction on communications between contractors regarding pending quote requests, and a requirement that all contractors must respond to all quote requests;

(6) the geographic area to which the task order contract applies. Ordinarily, a geographically contiguous area should not be subdivided; and

(7) the number of task order contracts to be awarded.

(F) Every award of a task order contract ~~must be approved by the Office of the State Engineer and is subject to procedures or guidelines established in the Manual for Planning and Execution of State Permanent Improvements. A governmental body shall submit to the Office of the State Engineer any reports required by the Manual for Planning and Execution of State Permanent Improvements.~~

(G) Administrative review under Article 17 is not available for the award of an individual task order, except for a protest of the award of a task order on the ground that the order increases the scope, period, or maximum value of the task order contract under which the order is issued.

ARTICLE 11

MODIFICATIONS AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES

SECTION ~~11-35~~-3410. Contract clauses and their administration. (S.C. Code § 11-35-3410)

(1) Contract Clauses. The ~~board may promulgate~~ regulations ~~requiring~~ may require the inclusion in ~~state~~ supplies, services, and information technology contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate, and covering the following subjects:

| |
|---|
| (a) the unilateral right of a Districtgovernmental body to order in writing changes in the work within the general scope of the contract and temporary stopping of the work or delaying performance; and |
| (b) variations occurring between estimated quantities of work in a contract and actual quantities. |
| (2)(a) Price Adjustments. Adjustments in price pursuant to clauses promulgated under subsection (1) of this section shall be computed and documented with a written determination. The price adjustment agreed upon shall approximate the actual cost to the contractor, and all costs incurred by the contractor shall be justifiable compared with prevailing industry standards, including a reasonable profit. Costs shall be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon thereafter as practicable, and shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor: |
| (i) by unit prices specified in the contract or subsequently agreed upon; |
| (ii) by the costs attributable to the events or situations under such clauses with adjustment for profit or fee, all specified in the contract or subsequently agreed upon; |
| (iii) by agreement on a fixed price adjustment; |
| (iv) by rates determined by the Public Service Commission and set forth in the applicable tariffs; |
| (v) in such other manner as the contracting parties may mutually agree; or |
| (vi) in the absence of agreement by the parties, through unilateral determination by the Districtgovernmental body of the costs attributable to the events or situations under such clauses, with adjustment of profit or fee, all as computed by the Districtgovernmental body in accordance with applicable sections of the regulations issued under Article 13 of this chaptercode, if any , and subject to the provisions of Article 17 of this chaptercode . |
| (b) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is subject to the provisions of Section 11-35-1830 . |
| (3) Additional Contract Clauses. The board shall be authorized to promulgate regulations requiring may require the inclusion in Districtstate supplies, services, and information technology contracts of clauses providing for appropriate remedies and covering the following subjects: |
| (a) specified excuses for delay or nonperformance; |
| (b) termination of the contract for default; and |
| (c) termination of the contract in whole or in part for the convenience of the Districtgovernmental body . |
| (4) Modification of Clauses. The chief procurement officer may vary the clauses promulgated by the board under subsection (1) and subsection (3) of this section regulation for inclusion in any particular Districtstate contract; provided, that any variations are supported by a written determination that states the circumstances justifying such variations; and provided, further, that notice of any such material variations shall be stated in the invitation for bids or request for proposals. |
| ARTICLE 13 |
| COST PRINCIPLES |
| SECTION 11-35-3510 . Cost principles required for supplies and services contracts. <u>(S.C. Code § 11-35-3510)</u> |
| The board may promulgate regulations setting may set forth cost principles that must be used to determine the allowability of incurred costs for the purpose of reimbursing costs under provisions in supplies, services, and information technology contracts that provide for the reimbursement of costs. |
| ARTICLE 15 |

SUPPLY MANAGEMENT

~~SUBARTICLE 1.~~

~~WAREHOUSES AND INVENTORY~~

~~SECTION 11-35-3620. Management of warehouses and inventory.~~

~~—Until such time as the General Assembly may act upon the warehousing and inventory management plan, all powers and responsibilities for management of warehouses and inventory shall be vested in the agency owning, renting, or leasing the warehouses or inventory.~~

~~SUBARTICLE 3.~~

~~REGULATIONS FOR SALE, LEASE, TRANSFER, AND DISPOSAL~~

~~SECTION 11-35-3810. Regulations for sale, lease, transfer and disposal. (S.C. Code § 11-35-3810)~~

~~Subject to existing provisions of law, the board shall promulgate regulations governing shall govern:~~
(1) the sale, lease, or disposal of surplus supplies by public auction, competitive sealed bidding, or other appropriate methods designated by such regulations;
(2) the transfer of excess supplies between ~~agencies schools~~ and departments.

~~SECTION 11-35-3820. Allocation of proceeds for sale or disposal of surplus supplies. (S.C. Code § 11-35-3820)~~

~~Except as provided in Section 11-35-3830 and the regulations pursuant thereto, the sale of all Districtstate-owned supplies, or personal property not in actual public use must be conducted and directed by the Department of Administration chief procurement officer. The sales must be held at such places and in a manner as in the judgment of the department chief procurement officer is most advantageous to the DistrictState. Unless otherwise determined, sales must be by either public auction or competitive sealed bid to the highest bidder. Each governmental body shall inventory and report to the division all surplus personal property not in actual public use held by that governmental body for sale. The department shall deposit the proceeds from the sales, less expense of the sales, in the state general fund or as otherwise directed by regulation. This policy and procedure applies to all governmental bodies unless exempt by law.~~

~~SECTION 11-35-3830. Trade-in sales. (S.C. Code § 11-35-3830)~~

(1) Trade-in Value. Unless otherwise provided by law, ~~governmental bodies~~the District may trade-in personal property, the trade-in value of which may be applied to the procurement or lease of like items. The trade-in value of such personal property shall not exceed an amount as specified in regulations ~~promulgated by the board.~~

(2) Approval of Trade-In Sales. When the trade-in value of personal property of a ~~District~~governmental body exceeds the specified amount, the ~~Department of Administration~~chief business official shall have the authority to determine whether:

(a) the subject personal property shall be traded in and the value applied to the purchase of new like items; or

(b) the property shall be classified as surplus and sold in accordance with the provisions of Section ~~11-35-3820~~. The ~~department's chief business official's~~ determination shall be in writing and be subject to the provisions of this ~~chapter~~code.

~~(3) Record of Trade In Sales. Governmental bodies shall submit quarterly to the Division of Procurement Services a record listing all trade in sales made under subsections (1) and (2) of this section, including any applicable written determinations.~~

~~SECTION 11-35-3840. Licensing for public sale of certain publications and materials.~~

~~— The Division of Procurement Services may license for public sale publications, including South Carolina Business Opportunities, materials pertaining to training programs, and information technology products that are developed during the normal course of its activities. The items must be licensed at reasonable costs established in accordance with the cost of the items. All proceeds from the sale of the publications and materials must be deposited in the State Treasury in a special account and expended only for the costs of providing the goods and services, and such funds may be retained and expended for the same purposes.~~

~~SECTION 11-35-3850. Sale of unserviceable supplies. (S.C. Code § 11-35-3850)~~

~~Governmental bodies approved by the Department of Administration~~The District may sell any supplies owned by it after the supplies have become entirely unserviceable and can properly be classified as "junk", in accordance with procedures established by the ~~District~~department. All sales of unserviceable supplies by the ~~District~~governmental body must be made in public to the highest bidder, after advertising for fifteen days, ~~and the funds from the sales must be credited to the account of the governmental body owning and disposing of the unserviceable supplies.~~

ARTICLE 17

LEGAL AND CONTRACTUAL REMEDIES

~~SUBARTICLE 1.~~

~~ADMINISTRATIVE RESOLUTION OF CONTROVERSIES~~

~~SECTION 11-35-4210. Right to protest; procedure; duty and authority to attempt to settle; administrative review; stay of procurement. (S.C. Code § 11-35-4210)~~

(1) Right to Protest.

(a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with a solicitation shall protest to the ~~appropriate chief procurement officer~~business official in the manner stated in subsection (2) within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Requests for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.

(b) Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall notify the ~~appropriate chief procurement officer~~business official in writing of its intent to protest within seven business days of the date that award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code. Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or

award of a contract and has timely notified the ~~appropriate chief procurement officer~~ business official of its intent to protest, may protest to the ~~appropriate chief procurement officer~~ business official in the manner stated in subsection (2) within fifteen days of the date award or notification of intent to award, whichever is earlier, is posted and sent in accordance with this code; except that a matter that could have been raised pursuant to subitem (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(c) Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract pursuant to Section ~~11-35-1560~~ or Section ~~11-35-1570~~ shall notify the ~~appropriate chief procurement officer~~ business official in writing of its intent to protest within five business days of the date that award or notification of intent to award, whichever is earlier, is posted in accordance with this code. Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of such a contract and has timely notified the ~~appropriate chief procurement officer~~ business official of its intent to protest, may protest to the ~~appropriate chief procurement officer~~ business official in the manner stated in subsection (2) within fifteen days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code; except that a matter that could have been raised pursuant to subitem (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

(d) The rights and remedies granted by subsection (1) and Section ~~11-35-4410(1)(b)~~ are not available for contracts with an actual or potential value of up to fifty thousand dollars.

(2) Protest Procedure. A protest pursuant to subsection (1) must be in writing, filed with the ~~appropriate chief procurement officer~~ business official, and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The protest must be received by the ~~appropriate chief procurement officer~~ business official within the time provided in subsection (1).

(3) Duty and Authority to Attempt to Settle Protests. Before commencement of an administrative review as provided in subsection (4), the ~~appropriate chief procurement officer, the head of the purchasing agency, or their designees~~ chief business official or his designee may attempt to settle by mutual agreement a protest of an aggrieved bidder, offeror, contractor, or subcontractor, actual or prospective, concerning the solicitation or award of the contract. The ~~appropriate chief procurement officer~~ business official has the authority to approve any settlement reached by mutual agreement.

(4) Administrative Review and Decision. If in the opinion of the ~~appropriate chief procurement officer~~ business official, after reasonable attempt, a protest cannot be settled by mutual agreement, the ~~appropriate chief procurement officer~~ business official shall conduct promptly an administrative review. The ~~appropriate chief procurement officer or his designee~~ shall commence the administrative review no later than fifteen business days after the deadline for receipt of a protest has expired and shall issue a decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

(5) Notice of Decision. A copy of the decision under subsection (4) along with a statement of appeal rights pursuant to Section ~~11-35-4210(6)~~ must be mailed or otherwise furnished immediately to the protestant and other party intervening. The ~~appropriate chief procurement officer, or his designee~~, also shall post a copy of the decision at a date and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section ~~11-35-4210(6)~~.

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section ~~11-35-4410(1)~~ within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the ~~appropriate chief procurement officer~~ business official, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the ~~appropriate chief procurement officer~~ business official. The person also may request a hearing before the

Procurement Review Panel. ~~The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.~~

(7) Automatic Stay of Procurement During Protests. In the event of a timely protest pursuant to subsection (1), the ~~District~~State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the ~~appropriate chief procurement officer~~business official, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not stayed if the ~~appropriate chief procurement officer~~business official, after ~~consultation with the head~~written approval of the ~~using agency~~Superintendent, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the interest of the ~~District~~State.

(8) Notice of Chief ~~Procurement Officer~~Business Official Address. Notice of the address of the ~~appropriate chief procurement officer~~business official must be included in every notice of an intended award and in every invitation for bids, request for proposals, or other type solicitation.

SECTION ~~11-35-4215~~. Posting of bond or irrevocable letter of credit. (S.C. Code § 11-35-4215)

The ~~agency~~Board may request that the ~~appropriate chief procurement officer~~business official require any bidder or offeror who files an action protesting the intended award or award of a contract solicited under Article 5 of this code and valued at one million dollars or more to post with the ~~appropriate chief procurement officer~~business official a bond or irrevocable letter of credit payable to the ~~State of South Carolina~~District in an amount equal to one percent of the total potential value of the contract as determined by the ~~appropriate chief procurement officer~~business official. The chief ~~procurement officer's~~business official's decision to require a bond or irrevocable letter of credit is not appealable under Article 17. The bond or irrevocable letter of credit shall be conditioned upon the payment of all reasonable reimbursement costs which may be adjudged against the bidder or offeror filing the protest in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. For protests of ~~intended award or award of a contract of the District's request for~~ sole source or emergency procurements, the bond or irrevocable letter of credit shall be in an amount equal to one percent of the ~~requesting agency's~~District's estimate of the contract amount for the sole source or emergency procurement requested. In lieu of a bond or irrevocable letter of credit, the ~~appropriate chief procurement officer~~business official may accept a cashier's check or money order in the amount of the bond or irrevocable letter of credit. If, after completion of the administrative hearing process and any appellate court proceedings, the ~~District~~agency prevails, it may request that the Procurement Review Panel allow it to recover all reasonable reimbursement costs and charges associated with the protest which shall be included in the final order or judgment, excluding attorney's fees. Upon payment of such costs and charges by the bidder or offeror protesting the intended award or award of a contract, the bond, irrevocable letter of credit, cashier's check, or money order shall be returned to the bidder or offeror. Failure to pay such costs and charges by the bidder or offeror protesting the intended award or award of a contract shall result in the forfeiture of the bond, irrevocable letter of credit, cashier's check, or money order to the extent necessary to cover the payment of all reasonable reimbursement costs adjudged against the protesting bidder or offeror. If the bidder or offeror prevails in the protest, the cost of providing the bond, irrevocable letter of credit or cashier's check may be sought from the ~~District~~agency requesting the bond or irrevocable letter of credit; provided that in no event may the amount recovered exceed fifteen thousand dollars.

SECTION ~~11-35-4220~~. Authority to debar or suspend. (S.C. Code § 11-35-4220)

(1) Authority. After reasonable notice to the person or firm involved, and a reasonable opportunity for that person or firm to be heard, the ~~appropriate chief procurement officer~~business official has the authority to debar a person for cause from consideration for award of contracts or subcontracts. The

~~appropriate~~ chief ~~procurement officer~~ business official has authority to suspend a person or firm from consideration for award of contracts or subcontracts during an investigation if there is probable cause for debarment. The period of debarment or suspension is as prescribed by the ~~appropriate~~ chief ~~procurement officer~~ business official.

(2) Causes for Debarment or Suspension. The causes for debarment shall include, but not be limited to:

(a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;

(b) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or another offense indicating a lack of business integrity or professional honesty which currently, seriously, and directly affects responsibility as a District ~~state~~ contractor;

(c) conviction under state or federal antitrust laws arising out of the submission of bids or proposals;

(d) violation of contract provisions, as set forth below, of a character regarded by the ~~appropriate~~ chief ~~procurement officer~~ business official to be so serious as to justify debarment action:

(i) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(ii) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; except, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor must not be considered a basis for debarment;

(e) violation of an order of a chief ~~procurement officer~~ business official or the Procurement Review Panel;

(f) violation of the Ethics, Government Accountability, and Campaign Reform Act of 1991, as amended, as determined by the State Ethics Commission, as an incident to obtaining or attempting to obtain a public contract or subcontract, or in the performance of the contract, or subcontract; and

(g) any other cause the ~~appropriate~~ chief ~~procurement officer~~ business official determines to be so serious and compelling as to affect responsibility as a District ~~state~~ contractor or subcontractor, including debarment by another governmental entity for any cause listed in this subsection.

(3) Decision. The ~~appropriate~~ chief ~~procurement officer~~ business official shall issue a written decision to debar or suspend within ten days of the completion of his administrative review of the matter. The decision must state the action taken, the specific reasons for it, and the period of debarment or suspension, if any.

(4) Notice of Decision. A copy of the decision pursuant to subsection (3) and a statement of appeal rights pursuant to Section ~~11-35-4220~~(5) must be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening. The ~~appropriate~~ chief ~~procurement officer~~ business official also shall post a copy of the decision at a time and place communicated to all parties participating in the administrative review and the posted decision must indicate the date of posting on its face and shall be accompanied by a statement of the right to appeal provided in Section ~~11-35-4220~~(5).

(5) Finality of Decision. A decision pursuant to subsection (3) is final and conclusive, unless fraudulent or unless the debarred or suspended person requests further administrative review by the Procurement Review Panel pursuant to Section ~~11-35-4410~~(1), within ten days of the posting of the decision in accordance with Section ~~11-35-4220~~(4). The request for review must be directed to the ~~appropriate~~ chief ~~procurement officer~~ business official, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing, setting forth the reasons why the person disagrees with the decision of the ~~appropriate~~ chief ~~procurement officer~~ business official. The person also may request a hearing before the Procurement Review Panel. ~~The appropriate chief procurement officer and any affected governmental body must have the opportunity to participate fully in any review or appeal, administrative or legal.~~

(6) Debarment constitutes debarment of all divisions or other organizational elements of the contractor, unless the debarment decision is limited by its terms to specific divisions, organization elements, or commodities. The debarring official may extend the debarment decision to include any principals and affiliates of the contractor if they are specifically named and given written notice of the proposed debarment and an opportunity to respond. For purposes of this section, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indications of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment. For purposes of this section, the term "principals" means officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including, but not limited to, a general manager, plant manager, head of a subsidiary, division, or business segment, and similar positions.

(7)(a) The fraudulent, criminal, or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(b) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.

(c) The fraudulent, criminal, or other seriously improper conduct of one contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct is evidence of such knowledge, approval, or acquiescence.

(8) The chief ~~procurement officers~~business official shall maintain and update a list of debarred and suspended persons, and shall make the list publicly available.

SECTION ~~11-35-4230~~. Authority to resolve contract and breach of contract controversies. (S.C. Code § 11-35-4230)

(1) Applicability. This section applies to controversies between a ~~District~~governmental body and a contractor or subcontractor, when the subcontractor is the real party in interest, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. The procedure set forth in this section constitutes the exclusive means of resolving a controversy between a ~~governmental body~~District and a contractor or subcontractor, when the subcontractor is the real party in interest, concerning a contract ~~governed by the provisions of the South Carolina Consolidated Procurement Code. On behalf of any governmental body or South Carolina public procurement unit that participates in a multiagency, term, or cooperative contract awarded by or under the authority of a chief procurement officer, the Division of Procurement Services may initiate and pursue resolution of any contract controversy which arises under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission~~solicited and awarded pursuant to the provisions of this code.

(2) Request for Resolution; Time for Filing. Either the ~~District~~contracting state agency or the contractor or subcontractor, when the subcontractor is the real party in interest, may initiate resolution

proceedings before the ~~appropriate chief procurement officer~~business official by submitting a request for resolution to the ~~appropriate chief procurement officer~~business official in writing setting forth the specific nature of the controversy and the specific relief requested with enough particularity to give notice of every issue to be decided. A request for resolution of contract controversy must be filed within one year after the date the contractor last performs work under the contract or within one year after the claim accrues, whichever is later; except that in the case of latent defects a request for resolution of a contract controversy must be filed within three years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.

(3) Duty and Authority to Attempt to Settle Contract Controversies. Before commencement of an administrative review as provided in subsection (4), the ~~appropriate chief procurement officer~~business official or his designee shall attempt to settle by mutual agreement a contract controversy brought pursuant to this section. The ~~appropriate chief procurement officer~~business official has the authority to approve any settlement reached by mutual agreement.

(4) Administrative Review and Decision. If, in the opinion of the ~~appropriate chief procurement officer~~business official, after reasonable attempt, a contract controversy cannot be settled by mutual agreement, the ~~appropriate chief procurement officer~~business official ~~or his designee~~ promptly shall conduct an administrative review and issue a decision in writing within ten days of completion of the review. The decision must state the reasons for the action taken.

(5) Notice of Decision. A copy of the decision pursuant to subsection (4) and a statement of appeal rights under Section ~~11-35-4230~~(6) must be mailed or otherwise furnished immediately to all parties participating in the administrative review proceedings. The ~~appropriate chief procurement officer~~business official also shall post a copy of the decision at a time and place communicated to all parties participating in the administrative review, and the posted decision must indicate the date of posting on its face and must be accompanied by a statement of the right to appeal provided in Section ~~11-35-4230~~(6).

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section ~~11-35-4410~~(1) within ten days of the posting of the decision in accordance with Section ~~11-35-4230~~(5). The request for review must be directed to the ~~appropriate chief procurement officer~~business official, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the ~~appropriate chief procurement officer~~business official. The person also may request a hearing before the Procurement Review Panel. ~~The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.~~

SUBARTICLE 2.

REMEDIES

SECTION ~~11-35-4310~~. Solicitations or awards in violation of the law. (S.C. Code § 11-35-4310)

(1) Applicability. The provisions of this section apply where it is determined by either the ~~appropriate chief procurement officer~~business official or the Procurement Review Panel, upon administrative review, that a solicitation or award of a contract is in violation of the law. The remedies set forth herein may be granted by either the ~~appropriate chief procurement officer~~business official, ~~only~~ after review under Section ~~11-35-4210~~; or by the Procurement Review Panel, ~~only~~ after review under Section ~~11-35-4410~~(1).

(2) Remedies Prior to Award. If, prior to award of a contract, it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award may be:

| |
|--|
| (a) canceled; |
| (b) revised to comply with the law and rebid; or |
| (c) awarded in a manner that complies with the provisions of this code. |
| (3) Remedies After Award. If, after an award of a contract, it is determined that the solicitation or award is in violation of law: |
| (a) the contract may be ratified and affirmed, provided it is in the interest <u>best interests</u> of the District <u>State</u> ; or |
| (b) the contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded. |
| (4) Entitlement to Costs. In addition to or in lieu of any other relief, when a protest submitted under Section 11-35-4210 is sustained, and it is determined that the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror may request and be awarded a reasonable reimbursement amount, including reimbursement of its reasonable bid preparation costs. |
| SECTION 11-35-4315. Unauthorized award or modification of a contract. (<u>S.C. Code § 11-35-4315</u>) |
| The board regulations may provide by regulation for appropriate action where it is discovered either: |
| (a) that a person lacking actual authority has made an unauthorized award or modification of a contract, or (b) that a contract award or modification is otherwise in violation of the <u>Consolidated Procurement Codecode</u> or these regulations. |
| SECTION 11-35-4320. Contract controversies. (<u>S.C. Code § 11-35-4320</u>) |
| Remedies available in a contract controversy brought under the provisions of Section 11-35-4230 . The appropriate chief procurement officer <u>business official</u> or the Procurement Review Panel, in the case of review under Section 11-35-4410(1) , may award such relief as is necessary to resolve the controversy as allowed by the terms of the contract or by applicable law. |
| SECTION 11-35-4330. Frivolous protests. (<u>S.C. Code § 11-35-4330</u>) |
| (1) Signature on Protest Constitutes Certificate. The signature of an attorney or party on a request for review, protest, motion, or other document constitutes a certificate by the signer that the signer has read the document, to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and it is not interposed for an improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation. |
| (2) Sanctions for Violations. If a request for review, protest, pleading, motion, or other document that is filed with the chief procurement officer <u>business official</u> or the Procurement Review Panel is signed in violation of this subsection, the Procurement Review Panel, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction that may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the protest, pleading, motion, or other paper, including a reasonable attorney's fee. |
| (3) Filing. A motion regarding a matter that is not otherwise before the panel may not be filed until after a final decision has been issued by the appropriate chief procurement officer <u>business official</u> . A motion for sanctions pursuant to this section must be filed with the panel no later than fifteen days after the later of either the filing of a request for review, protest, motion, or other document signed in violation |

of this section, or the issuance of an order that addresses the request for review, protest, motion, or other document that is the subject of the motion for sanctions.

SECTION ~~11-35-4340~~. Rights and remedies. (S.C. Code § 11-35-4340)

There is no remedy against the ~~District~~State other than those provided in this chapter in any case involving a procurement subject to this code. The rights and remedies granted in this article are to the exclusion of all other rights and remedies against the ~~District~~State for matters arising out of or related to this code.

SUBARTICLE 3.

REVIEW PANEL

SECTION ~~11-35-4410~~. Procurement Review Panel. (S.C. Code § 11-35-4410)

(1) Creation. There is created the ~~South Carolina~~District's Procurement Review Panel which is charged with the responsibility to review and determine de novo:

(a) requests for review of written determinations of the chief ~~procurement officers~~business officials pursuant to Sections ~~11-35-4210~~(6), ~~11-35-4220~~(5), and ~~11-35-4230~~(6); and

(b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ~~ensuing~~regulations; except that a matter which could have been brought before the chief ~~procurement officers~~business officials in a timely and appropriate manner pursuant to Sections ~~11-35-4210~~, ~~11-35-4220~~, or ~~11-35-4230~~, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the ~~chief business official~~ Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

(2) Membership. ~~The panel must be composed of:~~

~~— (a) [Reserved]~~

~~— (b) [Reserved]~~

~~— (c) [Reserved]~~

~~— (d) [Reserved]~~

~~(ea) The Panel must be composed of five members~~a member of the Board appointed by the Governor from the State at large who must be representativeBoard, who will chair the Panel. In addition, four persons shall be appointed, one each, by the Chair of the Board, the Vice-Chair of the Board, the Superintendent, and the chief business official. These four persons should be members of the community who are well-respected representatives of several of the professions ~~governed and businesses affected~~ by this ~~title code~~ including, but not limited to: (1) goods and services, (2) information technology, (3) procurements (4) construction; (5) architecture, engineering, construction management, and land surveying. Each of these persons shall serve a one-year term running from July 1 through June 30 annually. These persons shall recuse themselves in any matter in which they have an actual or apparent conflict of interest.

~~— (i) goods and services;~~

~~— (ii) information technology procurements;~~

~~— (iii) construction;~~

~~— (iv) architects and engineers;~~

~~— (v) construction management; and~~

~~— (vi) land surveying services;~~

~~(f) two state employees appointed by the Governor.~~

~~(b) When a vacancy is created, the official responsible for originally appointing the member vacating his or her seat shall appoint the successor to complete the term of service.~~

~~(c) Members may be reappointed to succeed themselves.~~

~~(3) Chairperson and Meetings. The panel shall elect a chairman from the members at large and shall meet as often as necessary to afford a swift resolution of the controversies submitted to it. Four members present and voting shall constitute a quorum. In the case of a tie vote, the decision of the chief procurement officer/business official is final. At large members of the panel must be paid per diem, mileage, and subsistence as provided by law for members of boards, commissions, and committees. State employee members must be reimbursed for meals, lodging, and travel in accordance with current state allowances.~~

~~(4) Jurisdiction. (a) Notwithstanding the provisions of Chapter 23, Title 1 or another provision of law, the Administrative Procedures Act does not apply to administrative reviews conducted by either a chief procurement officer or the Procurement Review Panel. The Procurement Review Panel is vested with the authority to:~~

~~(i) establish its own rules and procedures for the conduct of its business and the holding of its hearings;~~

~~(ii) issue subpoenas;~~

~~(iii) interview any person it considers necessary; and~~

~~(iv) record all determinations.~~

~~(b) A party aggrieved by a subpoena issued pursuant to this provision shall apply to the panel for relief.~~

~~(5) Procedure. Within fifteen days of receiving a grievance filed pursuant to Section 11-35-4210(6), 11-35-4220(5), 11-35-4230(6), or 11-35-4410(1)(b), the chairman shall either convene the review panel to conduct an administrative review or schedule a hearing to facilitate its administrative review. Except for grievances filed pursuant to Section 11-35-4230(6), the review panel shall record its determination within ten working days and communicate its decision to those involved in the determination. In matters designated by the review panel as complex, the review panel shall record its determination within thirty days.~~

~~(6) Finality. Notwithstanding another provision of law, including the Administrative Procedures Act, the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the court of appeals pursuant to Section 1-23-380, and the filing of an appeal does not stay a decision of the panel.~~

~~**SECTION 11-35-4420. Participation in review.**~~

~~The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully as a party in a matter pending before the Procurement Review Panel and in an appeal of a decision of the Procurement Review Panel, whether administrative or judicial.~~

~~**SECTION 11-35-4425. Final order not appealed. (S.C. Code § 11-35-4425)**~~

~~If a final order of a the chief procurement officer/business official or the Procurement Review Panel is not appealed in accordance with the provisions of this code, upon request of by a party to the proceedings, the chief procurement officer/business official or Procurement Review Panel may file a certified copy of the final ruling with a clerk of the circuit court, or a court of competent jurisdiction, as requested. After filing, the certified ruling has the same effect as a judgment of the court where filed and may be recorded, enforced, or satisfied in the same manner as a judgment of that court.~~

~~**SECTION 11-35-4430. Communication of panel members. (S.C. Code § 11-35-4430)**~~

Unless required for the disposition of ex parte matters authorized by law, members or employees of the panel assigned to render a decision or to make findings of fact and conclusions of law in a matter pending before the panel shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. A panel member: (a) may communicate with other members of the panel, and (b) may have the aid and advice of one or more personal assistants. ~~Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not more than two hundred fifty dollars or imprisoned for not more than six months.~~

ARTICLE 19

INTERGOVERNMENTAL RELATIONS

~~The District shall comply with Article 19 of Title 11, Chapter 35 of the South Carolina Code of Laws.~~

SUBARTICLE 1.

DEFINITIONS

~~SECTION 11-35-4610. Definitions of terms used in this article.~~

~~—As used in this article, unless the context clearly indicates otherwise:~~

~~—(1) "Cooperative purchasing" means procurement conducted by, or on behalf of, more than one public procurement unit, or by a public procurement unit with an external procurement activity.~~

~~—(2) "External procurement activity" means:~~

~~—(a) any buying organization not located in this State which, if located in this State, would qualify as a public procurement unit;~~

~~—(b) buying by the United States government.~~

~~—(3) "Local public procurement unit" means any political subdivision or unit thereof of this State which expends public funds for the procurement of supplies, services, information technology, or construction.~~

~~—(4) "Mandatory opting" is the requirement for a local procurement unit to choose whether to utilize a state contract before it is established as prescribed in regulation by the board.~~

~~—(5) "Public procurement unit" means any of the following:~~

~~—(a) a local public procurement unit;~~

~~—(b) a state public procurement unit;~~

~~—(c) an external procurement activity; or~~

~~—(d) any not for profit entity comprised only of more than one activity or unit listed in subitems (a), (b), or (c), if and as approved in writing by the Materials Management Officer.~~

~~—(6) "State public procurement unit" means the offices of the chief procurement officers, any purchasing agency of this State, and any other unit of South Carolina state government.~~

SUBARTICLE 3.

COOPERATIVE PURCHASING

~~SECTION 11-35-4810. Cooperative purchasing authorized.~~

~~—(1) Any public procurement unit may participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any supplies, services, technology information, or construction with one or more public procurement units in accordance with an agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multi party contracts between public procurement units and open ended state public procurement unit contracts which shall be made available to local public procurement units, except as provided in Section 11-35-4820 or except as may otherwise be limited by the appropriate chief procurement officer.~~

~~—(2) Without limiting other requirements of this code, all cooperative purchasing with other states conducted under this article must be through contracts awarded through full and open competition, including use of source selection methods substantially equivalent to those specified in Article 5 and, as applicable, Article 9 of this code, and consistent with the requirements of Section 11-35-2730 (Assuring Competition).~~

~~—(3) The offices of the chief procurement officers, and any other purchasing agency of this State, may participate in cooperative purchasing as provided in Section 11-35-4810(1) only if the appropriate chief procurement officer determines in writing: (i) that participation is in the interest of the State, (ii) that the procurement will conform to subsection (2), if applicable, and (iii) that any entities responsible for the management and administration of the procurement, other than another state's central procurement office, have in place appropriate and adequate internal controls 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. In making his determination, the chief procurement officer shall evaluate and consider the impact on South Carolina businesses.~~

~~—(4) Thirty days' prior notice of a proposed multistate solicitation must be provided in accordance with Section 11-35-1520(3). Supplies acquired pursuant to such contracts may be distributed only through vendors with an in-state office, as defined in Section 11-35-1524(A)(6), when available; provided, however, that the provisions of this paragraph do not apply to public institutions of higher learning if the institution demonstrates a cost savings to the appropriate chief procurement officer in regard to the multistate solicitation and procurement.~~

SECTION 11-35-4820. Selective mandatory opting.

~~—As prescribed in regulation by the board, any local public procurement unit may purchase from or through the State at any time; provided, however, that the board may impose a requirement upon the localities for mandatory opting in or out of any particular contract before it is established. Mandatory opting shall be imposed only where it is necessary to obtain more cost effective contracts for the State.~~

SECTION 11-35-4830. Sale, acquisition, or use of supplies by a public procurement unit.

~~—Any public procurement unit may sell to, acquire from, or use any supplies belonging to another public procurement unit independent of the requirements of Articles 5 and 15 of this chapter; provided, that such procurement shall take place only when the procuring entities have good reason to expect the intergovernmental procurement to be more cost effective than doing their own procurement.~~

SECTION 11-35-4840. Cooperative use of supplies or services.

~~—Any public procurement unit may enter into an agreement independent of the requirements of Articles 5 and 15 of this chapter with any other public procurement unit for the cooperative use of supplies, services, or information technology under the terms agreed upon between the parties; provided, that such cooperative use of supplies, services, or information technology shall take place only when the public procurement units have good reason to expect the cooperative use to be more cost effective than utilizing their own supplies and services.~~

SECTION 11-35-4850. Joint use of facilities.

~~—Any public procurement unit may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another public procurement unit or an external procurement activity under the terms agreed upon between the parties.~~

SECTION 11-35-4860. Supply of personnel, information, and technical services.

~~—(1) Supply of Personnel. Any public procurement unit is authorized, in its discretion, upon written request from another public procurement unit or external procurement activity, to provide personnel services to the requesting public procurement unit or external procurement activity with or without pay by the recipient governmental unit as may be agreed upon by the parties involved.~~

~~—(2) Supply of Services. The informational, technical, and other services of any public procurement unit may be made available to any other public procurement unit or external procurement activity provided, that the requirements of the public procurement unit tendering the services shall have precedence over the requesting public procurement unit or external procurement activity. The payment shall be in accordance with an agreement between the parties.~~

~~—(3) State Information Services. Upon request, the chief procurement officers may make available to public procurement units or external procurement activities the following services among others:~~

~~— (a) standard forms;~~

~~— (b) printed manuals;~~

~~— (c) product specifications and standards;~~

~~— (d) quality assurance testing services and methods;~~

~~— (e) qualified product lists;~~

~~— (f) source information;~~

~~— (g) common use commodities listings;~~

~~— (h) supplier prequalification information;~~

~~— (i) supplier performance ratings;~~

~~— (j) debarred and suspended bidders lists;~~

~~— (k) forms for invitations for bids, requests for proposals, instruction to bidders, general contract provisions and other contract forms;~~

~~— (l) contracts; or~~

~~— (m) published summaries of contracts, including price and time of delivery information.~~

~~—(4) State Technical Services. The State, through the chief procurement officers, may provide the following technical services among others:~~

~~— (a) development of products specifications;~~

~~— (b) development of quality assurance test methods, including receiving, inspection, and acceptance procedures;~~

~~— (c) use of product testing and inspection facilities;~~

~~— (d) use of personnel training programs.~~

~~—(5) Fees. The chief procurement officers may enter into contractual arrangements and publish a schedule of fees for the services provided under subsections (3) and (4) of this section. All proceeds from the sale of such services must be deposited in the State Treasury in a special account and expended only for the costs of providing the goods and services, and such funds may be retained and expended for the same purposes.~~

SECTION 11-35-4870. Use of payments received by a supplying public procurement unit.

~~— All payments from any public procurement unit or external procurement activity received by the Division of Procurement Services in connection with sponsoring or administering a cooperative purchase, must be deposited in the State Treasury in a special account and expended only for the costs of providing the goods and services, and such funds may be retained and expended for the same purposes.~~

~~**SECTION 11-35-4880.** Public procurement units in compliance with code requirements.~~

~~— Where the public procurement unit administering a cooperative purchase complies with the requirements of this code, any public procurement unit participating in such a purchase shall be deemed to have complied with this code. Public procurement units shall not enter into a cooperative purchasing agreement for the purpose of circumventing this code.~~

~~**SECTION 11-35-4890.** Review of procurement requirement.~~

~~— To the extent possible, the chief procurement officers may collect information concerning the type, cost, quality, and quantity of commonly used supplies, services, or construction being procured or used by local public procurement units, which shall be required to respond appropriately as a precondition for participation in state contracts as governed by regulations promulgated by the board. The chief procurement officers shall make available all such information to any public procurement unit upon request.~~

~~**SECTION 11-35-4900.** Intergovernmental acquisitions.~~

~~— (1) Any procurement by a governmental body from any other public procurement unit must be approved in advance of contracting by the applicable chief procurement officer unless either the supply, service, or information technology is expressly authorized by the enabling legislation of the governmental body supplying the item, or the board has exempted the type of procurement from such approval. Upon recommendation of the division, the board may establish criteria for approval. Absent approval, any procurement by a governmental body from any other public procurement unit must be in accordance with the other articles of this code.~~

~~— (2) Any procurement by a governmental body from any other public procurement unit must be reported to the Division of Procurement Services quarterly. The division shall determine the means and content of the information to be reported. The division shall report to the board annually on such procurements.~~

ARTICLE 21

ASSISTANCE TO MINORITY BUSINESSES

SUBARTICLE 1.

DEFINITIONS AND CERTIFICATION

SECTION 11-35-5010. Definitions of terms used in this article. (S.C. Code § 11-35-5010)

The definitions appearing in Section 11-35-5010 and Regulation 19-445.2160(A) of the South Carolina Code of Laws, as amended, shall apply to Article 21 of this code. On the date of this code's adoption, Section 11-35-5010 provided as follows:

The board may promulgate regulations establishing detailed definitions of the following terms using, in addition to the criteria set forth in this section, such other criteria as it may deem desirable.

| |
|---|
| <p>(1) "Minority person" for the purpose of this article, means a United States citizen who is economically and socially disadvantaged.</p> |
| <p>(a) "Socially disadvantaged individuals" means those individuals who have been subject to racial or ethnic prejudice or cultural bias because of their identification as members of a certain group, without regard to their individual qualities. Such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts and Native Hawaiians), Asian Pacific Americans, and other minorities to be designated by the board or designated agency.</p> |
| <p>(b) "Economically disadvantaged individuals" means those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.</p> |
| <p>(2) A "socially and economically disadvantaged small business" means any small business concern which:</p> |
| <p>(a) is at least fifty-one percent owned by one or more citizens of the United States who are determined to be socially and economically disadvantaged.</p> |
| <p>(b) in the case of a concern which is a corporation, fifty-one percent of all classes of voting stock of such corporation must be owned by an individual determined to be socially and economically disadvantaged.</p> |
| <p>(c) in the case of a concern which is a partnership, fifty-one percent of the partnership interest must be owned by an individual or individuals determined to be socially and economically disadvantaged and whose management and daily business operations are controlled by individuals determined to be socially and economically disadvantaged. Such individuals must be involved in the daily management and operations of the business concerned.</p> |
| <p>SUBARTICLE 3.</p> |
| <p>ASSISTANCE TO MINORITY BUSINESSES</p> |
| <p>SECTION 11-35-5210. Statement of policy and its implementation. <u>(S.C. Code § 11-35-5210)</u></p> |
| <p>(1) Statement of Policy. The <u>As provided in Section 11-35-5210 of the South Carolina Code of Laws,</u> the South Carolina General Assembly declares has declared that business firms owned and operated by minority persons have been historically restricted from full participation in our free enterprise system to a degree disproportionate to other businesses. The General Assembly believes that it is in the state's best interest to assist minority-owned businesses to develop fully as a part of the state's policies and programs which are designed to promote balanced economic and community growth throughout the State. The General Assembly, therefore, wishes to ensure that those businesses owned and operated by minorities are afforded the opportunity to fully participate in the overall procurement process of the State. The General Assembly, therefore, takes this leadership role in setting procedures that will result in awarding contracts and subcontracts to minority business firms in order to enhance minority capital ownership, overall state economic development and reduce dependency on the part of minorities.</p> |
| <p>(2) Implementation. Chief procurement officers shall implement the policy set forth in subsection (1) of this section in accordance with the provisions of Section 11-35-5220.</p> |
| <p>SECTION 11-35-5220. Duties of the chief procurement officers. <u>(S.C. Code § 11-35-5220)</u></p> |
| <p>(1) Assistance from the Chief Procurement Officers. The chief procurement officers shall provide appropriate staffs to assist minority businesses with the procurement procedures developed pursuant to this code.</p> |

(2) Special Publications. The chief procurement officers in cooperation with other appropriate private and ~~state-District~~ agencies may issue supplementary instructions designed to assist minority businesses with the ~~Districtstate~~ procurement procedures.

(3) Source Lists. Chief procurement officers shall maintain special source lists of minority business firms detailing the products and services which they provide. These lists shall be made available to ~~Districtagency~~ purchasing personnel.

(4) Solicitation Mailing Lists. The chief procurement officers shall include and identify minority business on the ~~state's-District's~~ bidders' list and shall ensure that these firms are solicited on an equal basis within nonminority firms.

(5) Training Programs. The chief procurement officers shall work with appropriate ~~Districtstate~~ offices and minority groups in conducting seminars to assist minority business owners in learning how to do business with the ~~DistrictState~~.

(6) Fee Waivers. Upon request by an MBE certified by the Small and Minority Business Assistance Office, user or subscription fees for services provided by the chief procurement officers may be waived for an MBE.

SECTION ~~11-35-5230~~. Regulations for negotiation with ~~state-District~~ minority firms. (S.C. Code § 11-35-5230)

(A) The ~~board shall promulgate~~ regulations that may designate such procurement contracts as ~~it may deem be~~ appropriate for negotiation with certified, South Carolina-based minority firms, as defined by this subarticle. Among the criteria that shall be used to determine such designations are:

(1) The total dollar value of procurement in South Carolina.

(2) The availability of South Carolina-based minority firms.

(3) The potential for breaking the contracts into smaller units, where necessary, to accommodate such firms.

(4) ~~Insuring-Ensuring~~ that the ~~DistrictState~~ shall not be required to sacrifice quality of goods or services.

(5) Ensuring that the price has been determined to be fair and reasonable, and competitive both to the ~~DistrictState~~ and to the contractor.

(B)(1) ~~[deleted] Firms with state contracts that subcontract with minority firms shall be eligible for an income tax credit equal to four percent of the payments to minority subcontractors for work pursuant to a state contract. Such subcontractors must be certified as to the criteria of a minority firm as defined in Section 11-35-5010 of this code and any regulations which may be promulgated thereunder.~~

(2) ~~The tax credit is limited to a maximum of fifty thousand dollars annually. A firm is eligible to claim a tax credit for a period of ten years from the date the first income tax credit is claimed. [reserved]~~

(3) Any firm desiring to be certified as a minority firm shall make application to the Small and Minority Business Assistance Office (SMBAO) as defined by Section 11-35-5270 of the South Carolina Code of Laws, on such forms as may be prescribed by that office.

(4) ~~[reserved] Firms claiming the income tax credit shall maintain evidence of work performed for a state contract by minority subcontractors and shall present such evidence on a form and in a manner prescribed by the Department of Revenue at the time of filing its state income tax return and claim such credit at the time of filing. All records shall be available for audit by the Department of Revenue in accordance with prevailing tax statutes.~~

SECTION ~~11-35-5240~~. Minority business enterprise (MBE) ~~Utilization-utilization Planplan~~. (S.C. Code § 11-35-5240)

| |
|---|
| <p>(1) To emphasize the use of minority small businesses, each agency director <u>the District</u> shall develop a Minority Business Enterprise (MBE) Utilization Plan. The MBE Utilization Plan must include, but not be limited to:</p> |
| <p>(a) the name of the District governmental body;</p> |
| <p>(b) a policy statement expressing a commitment by the District governmental body to use MBEs in all aspects of procurement;</p> |
| <p>(c) the name of the coordinator responsible for monitoring the MBE Utilization Plan;</p> |
| <p>(d) goals that include expending with Minority Business Enterprises certified by the Office of Small and Minority Business Assistance an amount equal to ten percent of each governmental body's <u>the District's</u> total dollar amount of funds expended;</p> |
| <p>(e) solicitation of certified minority vendors, a current list of which must be supplied by the Office of Small and Minority Business Assistance, in each commodity category for which the minority vendor is qualified. The current listing of qualified minority vendors must be made available by the Office of Small and Minority Business Assistance on a timely basis;</p> |
| <p>(f) procedures to be used when it is necessary to divide total project requirements into smaller tasks which will permit increased MBE participation;</p> |
| <p>(g) procedures to be used when the District governmental body subcontracts the scope of service to another District governmental body; the responsible District governmental body may set goals for the subcontractor in accordance with the MBE goal and the responsible District governmental body may allow the subcontractor to present a MBE Utilization Plan detailing its procedure to obtain minority business enterprise participation.</p> |
| <p>(2) MBE utilization plans must be submitted to the SMBAO Board for approval no later than <u>the first Board meeting on or after</u> July thirtieth, annually. Upon petition by the District governmental body, SMBAO the Board may authorize an MBE utilization plan that establishes a goal of less than ten percent of the governmental body's <u>District's</u> total dollar amount of funds expended. Progress reports must be submitted to the SMBAO Board no later than thirty days after the end of each <u>six-month</u> fiscal <u>quarter period</u> and contain the following information:</p> |
| <p>(a) number of minority firms solicited;</p> |
| <p>(b) number of minority bids received;</p> |
| <p>(c) total dollar amount of funds expended on contracts awarded to minority firms certified pursuant to Section 11-35-5230 <u>of the South Carolina Code of Laws</u>; and</p> |
| <p>(d) total dollar amount of funds expended.</p> |
| <p>(3) For purposes of this section, and notwithstanding the Administrative Procedures Act, the Board executive director of the board shall establish a definition for the phrase "total dollar amount of funds expended".</p> |
| <p>SECTION 11-35-5250. Progress payments and letters of credit. <u>(S.C. Code § 11-35-5250)</u></p> |
| <p>(1) Progress Payments. The chief procurement officers may make special provisions for progress payments and letters of credit, as deemed reasonable to assist minority businesses to carry out the terms of a District state contract pursuant to regulations which may be promulgated by the board.</p> |
| <p>(2) Letter of Contract Award. When a minority business firm certified by the Department of Revenue receives a contract with the District State, the appropriate chief procurement officer shall furnish a letter, upon request, stating the dollar value and duration of, and other information about the contract, which may be used by the minority firm in negotiating lines of credit with lending institutions.</p> |
| <p>SECTION 11-35-5260. Reports of number and dollar value of contracts awarded to minority firms.</p> |
| <p>—The Small and Minority Business Assistance Office shall report annually in writing to the Governor concerning the number and dollar value of contracts awarded for each governmental body to a firm</p> |

~~certified as a minority firm pursuant to Section 11-35-5230 during the preceding fiscal year. These records must be maintained to evaluate the progress of this program.~~

~~**SECTION 11-35-5270. Division of Small and Minority Business Contracting and Certification.**~~

~~—The Division of Small and Minority Business Contracting and Certification must be established within the Department of Administration to assist the Department of Administration and the Department of Revenue in carrying out the intent of this article. The responsibilities of the division include, but are not limited to, the following:~~

~~—(1) assisting the chief procurement officers and governmental bodies in developing policies and procedures which will facilitate awarding contracts to small and minority firms;~~

~~—(2) assisting the chief procurement officers in aiding small and minority owned firms and community based business in developing organizations to provide technical assistance to minority firms;~~

~~—(3) assisting with the procurement and management training for small and minority firm owners;~~

~~—(4) assisting in the identification of responsive small and minority firms;~~

~~—(5) receiving and processing applications to be registered as a minority firm in accordance with Section 11-35-5230(B);~~

~~—(6) revoking the certification of any firm that has been found to have engaged in any of the following:~~

~~—(a) fraud or deceit in obtaining the certification;~~

~~—(b) furnishing of substantially inaccurate or incomplete information concerning ownership or financial status;~~

~~—(c) failure to report changes which affect the requirements for certification;~~

~~—(d) gross negligence, incompetence, financial irresponsibility, or misconduct in the practice of his business; or~~

~~—(e) wilful violation of any provision of this article.~~

~~—(7) After a period of one year, the division may reissue a certificate of eligibility provided acceptable evidence has been presented to the commission that the conditions which caused the revocation have been corrected.~~

ARTICLE 23

STATEWIDE PROVISIONS

The District shall comply with Article 23 of Title 11, Chapter 35 of the South Carolina Code of Laws, as applicable.

~~**SECTION 11-35-5300. Prohibition of contracting with discriminatory business.**~~

~~—(A) A public entity may not enter into a contract with a business to acquire or dispose of supplies, services, information technology, or construction unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not engage in, the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in this article.~~

~~—(B) For purposes of this section:~~

~~—(1) "Boycott" means to blacklist, divest from, or otherwise refuse to deal with a person or firm when the action is based on race, color, religion, gender, or national origin of the targeted person or entity. "Boycott" does not include:~~

~~—(a) a decision based on business or economic reasons, or the specific conduct of a targeted person or firm;~~

~~— (b) a boycott against a public entity of a foreign state when the boycott is applied in a nondiscriminatory manner; and~~

~~— (c) conduct necessary to comply with applicable law in the business's home jurisdiction.~~

~~— (2) "Public entity" means the State, or any political subdivision of the State, including a school district or agency, department, institution, or other public entity of them.~~

~~— (3) A "jurisdiction with whom South Carolina can enjoy open trade" includes World Trade Organization members and those with which the United States has free trade or other agreements aimed at ensuring open and nondiscriminatory trade relations.~~

~~— (C) This section does not apply if a business fails to meet the requirements of subsection (A) but offers to provide the goods or services for at least twenty percent less than the lowest certifying business. Also, this section does not apply to contracts with a total potential value of less than ten thousand dollars.~~

~~— (D) Failure to comply with a provision of this section is not grounds for a protest filed pursuant to Section 11-35-4210 or any other preaward protest process appearing in a procurement ordinance adopted by a political subdivision pursuant to Section 11-35-5320 or Section 11-35-5340, or similar law.~~

~~SECTION 11-35-5310. Surety bonds; public entity may not designate surety company.~~

~~— If the State, or county, city, public service district, or other political subdivision of the State, or agency, department, institution, or other public entity of the State, enters into a procurement contract and requires the bidder to provide a surety bond to secure the bid or the performance or payment of the contract, the state political subdivision of the State, or public entity of the State may not exact that the surety bond be furnished by a particular surety company or through a particular agent or broker.~~

~~SECTION 11-35-5320. Political subdivisions required to develop and adopt procurement laws.~~

~~— All political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983. The State Fiscal Accountability Authority, in cooperation with the Procurement Policy Committee and subdivisions concerned, shall create a task force to draft model ordinances, regulations, and manuals for consideration by the political subdivisions. The expenses of the task force shall be funded by the General Assembly. The task force shall complete its work no later than January 1, 1982. A political subdivision's failure to adopt appropriate ordinances, procedures, or policies of procurement is not subject to the legal remedies provided in this code.~~

~~SECTION 11-35-5330. Purchase of goods or services from entity employing prison inmates of another state paid less than federal minimum wage prohibited.~~

~~— A governmental body procuring goods or services under the Consolidated Procurement Code, and any agency or department of a political subdivision of this State procuring goods or services under the Consolidated Procurement Code or its own procurement code, may not accept any proposals from or procure any goods or services from an entity which employs or uses inmates of a correctional system of another state who are not paid at least the required federal minimum wage for work performed in the manufacturing, processing, or supplying of those goods or services.~~

~~SECTION 11-35-5340. School district subject to consolidated procurement code; exemptions.~~

~~— Irrespective of the source of funds, any school district whose budget of total expenditures, including debt service, exceeds seventy five million dollars annually is subject to the provisions of Chapter 35, Title 11, and shall notify the Director of the Division of Procurement Services of the State Fiscal Accountability Authority of its expenditures within ninety days after the close of its fiscal year. However,~~

~~if a district has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the South Carolina Consolidated Procurement Code, the district is exempt from the provisions of the South Carolina Consolidated Procurement Code except for a procurement audit which must be performed every three years by an audit firm approved by the Division of Procurement Services. Costs associated with the internal review and audits are the responsibility of the school district and will be paid to the entity performing the audit.~~

~~19-445.2000. State-District Procurement Regulations.~~

~~A. General.~~

~~These Regulations issued by the South Carolina State Fiscal Accountability Authority, hereafter referred to as the board, establish policies, procedures, and guidelines relating to the procurement, management, control, and disposal of supplies, services, information technology, and construction, as applicable, under the authority of the South Carolina Consolidated Procurement Code, as amended. These Regulations are designed to achieve maximum practicable uniformity in purchasing throughout state governmentthe District. Hence, implementation of the Procurement Code by and within governmental bodies, as defined in Section 11-35-310(18) of the Procurement Code, shall be consistent with these Regulations. Nothing contained in these Rules and Regulations shall be construed to waive any rights, remedies or defenses the District might have under any laws of the State of South Carolina. The "[insert district name] Consolidated Procurement Code takes precedence over these regulations to the extent of any conflict between them. The procurement regulations shall have the same relationship to the District's Code as regulations promulgated under the administrative procedures act have to statutes enacted by the General Assembly. State might have under any laws of the State of South Carolina.~~

~~B. Organizational Authority.~~

~~(1) The Chief Procurement Officers acting on behalf of the board Board shall have the responsibility to audit and monitor the implementation of these Regulations and requirements of the South Carolina Consolidated Procurement Code. In accordance with Section 11-35-510 of the Codecode, all rights, powers, duties and authority relating to the procurement of supplies, services, and information technology and to the management, control, and warehousing, sale and disposal of supplies, construction, information technology, and services now vested in or exercised by any governmental bodythe District under the provisions of law relating thereto, and regardless of source funding, are hereby vested in the appropriate chief procurement officers. In exercising this authority, delegated to the chief procurement officers shall afford each using agency reasonable opportunity to participate in and make recommendations with respect to procurement matters affecting the using agencyby the Board. The chief procurement officersbusiness official shall be responsible for developing such organizational structure as necessary to implement the provisions of the Procurement-District's Code and these Regulations.~~

~~(2) Materials Management Office: The Materials Management Officer is specifically responsible for:~~

~~(a) developing a system of training and certification for procurement officers of governmental bodies in accordance with Section 11-35-1030;~~

~~(b) recommending differential dollar limits for direct procurements on the basis of but not limited to the following:~~

~~(1) procurement expertise;~~

~~(2) commodity;~~

~~(3) service;~~

| |
|---|
| (4) dollar; |
| (e) performing procurement audits of governmental bodies in accordance with Sections 11-35-1230 and 11-35-5340 of the Procurement Code. |
| (d) overseeing acquisitions for the State by the State Procurement Office. |
| (e) coordinating with the Information Technology Management Office in accordance with Section 11-35-820; |
| (f) overseeing the acquisition of procurements by the State Engineer in accordance with Section 11-35-830. |
| (3) Office of Information Technology Management: The Office of Information Technology Management shall be responsible for all procurements involving information technology pursuant to Section 11-35-820 of the Procurement Code. |
| (4) Office of State Engineer: The Office of State Engineer under the direction and oversight of the Materials Management Officer shall be responsible for all procurements involving construction, architectural and engineering, construction management, and land surveying services pursuant to Section 11-35-830 of the Procurement Code. |
| C. Definitions |
| (1) "Head of purchasing agency" means the agency head, that is, the individual charged with ultimate responsibility for the administration and operations of the governmental body. Whenever the South Carolina Consolidated Procurement Code or these Regulations authorize either the chief procurement officer or the head of the purchasing agency to act, the head of the purchasing agency is authorized to act only within the limits of the governmental body's authority under Section 11-35-1210, except with regard to acts taken pursuant to Section 11-35-1560 and 11-35-1570. |
| (2) "Procuring Agency" means "purchasing agency" as defined in Section 11-35-310. |
| (3) "Certification" means the authority delegated by the board or the Director of Procurement Services to a governmental body to make direct procurements not under term contracts. Certification is granted pursuant to Section 11-35-1210 and R.19-445.2020. |
| (4) "Responsible procurement officer" means the individual employed by either the purchasing agency or the chief procurement officers, as applicable, assigned to serve as the procurement officer, as defined in Section 11-35-310, and responsible for administering the procurement process. Typically, the responsible procurement officer will be identified by name in the solicitation, as amended, and any subsequent contracts, as amended. |
| DC. Duty to Report Violations |
| All governmental bodies <u>The District</u> shall comply in good faith with all applicable requirements of the consolidated procurement code and these procurement regulations. When any information or allegations concerning improper or illegal conduct regarding a procurement governed by <u>this the consolidated procurement</u> code comes to the attention of any employee of the <u>State District</u> , immediate notice of the relevant facts shall be transmitted to the <u>appropriate chief procurement officer business official</u> . |
| ED. Application of the <u>District's</u> Procurement Code. |
| (1) Other Required Approvals. Approval pursuant to the Code or regulations does not substitute for any other approval required by law. For example, if the Procurement Code applies to an acquisition and the overall arrangement involves either construction or the granting or acquiring any interest in real property, other independent processes or approval may be required by law, e.g., Sections 1-11-55, 1-11-56, 1-11-58, 1-11-65, or Chapter 47 of Title 2. <u>[Reserved]</u> |
| (2) Multiple Instruments Not Determinative. The application of the Code <u>this code</u> does not depend on whether the parties memorialize the overall transaction into one or more contractual instruments. As a remedial statute, the Consolidated Procurement Code <u>This code</u> should be construed liberally to carry out its purposes. (Section 11-35-20) Accordingly, when multiple written agreements are part of an overall transaction to accomplish an overall purpose, the documents will be considered together for |

purposes of determining whether ~~the Consolidated Procurement Code~~ this code applies, even if the instruments have not been executed simultaneously or the parties are not the same.

(3) Revenue generating contracts. ~~The Consolidated Procurement Code~~ This code “applies to every procurement . . . by this ~~District~~ State under contract ~~acting through a governmental body~~ . . .” (Section ~~11-35-40(2)~~) “The term ‘contract’ means “all types of ~~state~~ agreements, regardless of what they may be called, for the procurement . . . of . . . supplies, services, information technology, or construction.” (Section ~~11-35-310(8)~~) In pertinent part, the term “procurement” is defined as “buying, purchasing, renting, leasing, or otherwise acquiring any . . . construction.” (Section ~~11-35-310(25)~~ ~~(emphasis added)~~.) Accordingly, ~~the Procurement Code~~ this code applies even though the ~~governmental body~~ District does not make a payment of money. Without limitation, examples of such contracts include revenue-generating contracts, concession agreements, and contracts structured as a design-build-finance-operate-maintain project. (Section ~~11-35-2910(8)~~)

(4) Financed Construction. ~~The Consolidated Procurement Code~~ This code “applies to every procurement . . . by this ~~District~~ State under contract ~~acting through a governmental body~~ . . .” (Section ~~11-35-40(2)~~) The term “contract” means “all types of ~~state~~ agreements, regardless of what they may be called, for the procurement . . . of . . . construction.” (Section ~~11-35-310(18)~~) In pertinent part, the term “procurement” is defined as “buying, purchasing, renting, leasing, or otherwise acquiring any . . . construction.” (Section ~~11-35-310(25)~~ ~~(emphasis added)~~) The term “construction” is defined as “the process of building . . . any . . . public improvements of any kind to real property.” (Section ~~11-35-310(7)~~) Read together, and absent an applicable exclusion (e.g., gifts) or exemption (e.g., Section ~~11-35-710~~), ~~the Procurement Code~~ this code applies to every acquisition of the process of improving real property by ~~a the District~~ governmental body, whether or not the acquisition involves an expenditure of money. Such acquisitions may be memorialized in a number of related agreements and, without limitation, may be structured as an in-kind exchange, lease-purchase, lease with purchase option, lease-lease-back, sale-lease-back, installment-purchase, or so-called public-private-partnership.

(5) Acquisition involving an interest in real property. Generally, ~~the Procurement Code~~ this code does not apply to an acquisition solely of an interest in real property. For example, ~~the Procurement Code~~ this code does not apply to an acquisition of land, even though it includes pre-existing improvements and fixtures (i.e., not built-to-suit), nor does it apply to an acquisition of a leasehold estate, even though it includes complementary subordinate supplies, services, information technology, or construction (e.g., landlord-performed tenant improvements for a lease not-to-own, building security, janitorial services). In contrast, ~~the Procurement Code~~ this code does apply to an acquisition of an interest in real property if the transaction also involves a substantial acquisition of supplies, services, information technology, or construction. For example, and without limitation, ~~the Procurement Code~~ this code would apply to an acquisition of food services, even though it involved the agency leasing its land to the contractor. As another example, as discussed in ~~R.19-445-Regulation2000E2000D(4)~~, a lease-purchase of custom-built, new construction must be acquired pursuant to ~~the Procurement Code~~ this code. While not necessarily conclusive, the primary objective of the transaction may be determinative.

FE. Notice.

(1) When adequate public notice is required by Article 5, the notice must contain sufficient information to allow a prospective offeror to make an informed business judgment as to whether she should compete (or would have competed) for the contract. At minimum the notice must contain the following information, as applicable:

(a) a description of the item(s) to be acquired;

(b) how to obtain a copy of the solicitation document or the anticipated contract;

(c) when and where responses are due; and

(d) the place of performance or delivery.

(2) In addition to the information above, the notices required by Section ~~11-35-1560~~ and Section ~~11-35-1570~~ must include the contract dollar amount of the proposed contract.

~~19-445~~.2005. Internal Procurement Procedures; Procurement Records.

A. Procedures Manual.

~~All governmental bodies~~The District shall develop and maintain an internal procurement procedures manual ~~and forward a copy, and any revisions, of such to the Materials Management Officer. Upon receipt of the respective governmental body's internal procurement procedures manual, the Materials Management Office.~~ The Superintendent shall be responsible for the following ~~review~~:

(1) Determine that written internal ~~operations-procurement~~ procedures as submitted (a) are consistent with the ~~South Carolina Consolidated Procurement Code and Regulations~~District's code and regulations, (b) are consistent with any policies or procedures ~~published-established~~ by the ~~chief procurement officers for their respective areas of responsibility~~Board, and (c) establish a clear means by which vendors can identify the ~~governmental body's~~District's procurement officers and the limits of their authority.

(2) ~~Notify the governmental body of its findings in writing.~~

B. Procurement Records.

Each ~~governmental body~~District must maintain procurement files sufficient to satisfy the requirements of external audit.

~~19-445~~.2010. Disclosure of Procurement Information.

A. Reserved.

B. Prior to the issuance of an award or notification of intent to award, whichever is earlier, ~~District~~state personnel involved in an acquisition shall forward or refer all requests for information regarding the procurement to the responsible procurement officer. The procurement officer will respond to the request.

C. Prior to the issuance of an award or notification of intent to award, whichever is earlier, ~~state~~District personnel involved in an acquisition shall not engage in conduct that knowingly furnishes source selection information to anyone other than the responsible procurement officer, unless otherwise authorized in writing by the responsible procurement officer. "Source selection information" means any of the following information that is related to or involved in the evaluation of an offer (e.g., bid or proposal) to enter into a procurement contract, if that information has not been previously made available to the public or disclosed publicly: (1) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices, (2) source selection plans, (3) technical evaluation plans, (4) technical evaluations of proposals, (5) cost or price evaluations of proposals, (6) information regarding which proposals are determined to be reasonably susceptible of being selected for award, (7) rankings of responses, proposals, or competitors, (8) reports, evaluations of source selection committees or evaluations panels, (9) other information based on a case-by-case determination by the procurement officer that its disclosure would jeopardize the integrity or successful completion of the procurement to which the information relates.

D. In procurements conducted pursuant to Section ~~11-35-1530-or Section 11-35-1535~~, ~~state~~ personnel with access to proposal information shall not disclose either the number of offerors or their identity prior to the issuance of an award or notification of intent to award, whichever is earlier, except as otherwise required by law.

E. Prior to the issuance of an award or notification of intent to award, whichever is earlier, the procurement officer shall not release to any individual information obtained in response to an RFP, without first obtaining from that individual a written agreement, in a form approved by the ~~responsible~~ chief procurement officer, regarding restrictions on the use and disclosure of such information. Such agreements are binding and enforceable. Before allowing any individual to perform any role in discussions, negotiations, evaluation, or the source selection decision in a procurement conducted pursuant to Section ~~11-35-1530-or Section 11-35-1535~~, the responsible procurement officer must

obtain from that individual, in a form approved by the ~~appropriate~~ chief ~~procurement officer~~ business official, a written acknowledgement of compliance and an agreement to comply with rules designed to protect the integrity of the procurement process.

F. The release of a proposal to non-~~District~~state personnel for evaluation does not constitute public disclosure or a release of information for purposes of the Freedom of Information Act.

G. Except as prohibited by law, and subject to ~~Regulation section~~ 2200, ~~District~~state contracts may include clauses restricting the ~~state's-District's~~ release of documents and information received from a contractor if those documents are exempt from disclosure under applicable law.

~~H. Subject to item (E), any person may furnish source selection information to the Office of the State Engineer. The procurement officer shall provide to the Office of the State Engineer any information it requests regarding a procurement.~~

~~H~~ H. Non-Public Solicitations. In accordance with Section ~~11-35-410~~(~~EF~~), information that forms a part of a specific solicitation need not be publicly available if (a) the information is otherwise exempt from disclosure by law (e.g., Chapter 4, Title 30 (The Freedom of Information Act)), (b) the information is available to any prospective offeror that has executed a nondisclosure agreement (NDA), and (c) the ~~appropriate~~ chief business official~~procurement officer~~ has approved the use and terms of an NDA for the solicitation at issue. Prior to use in a specific solicitation, the terms of a proposed NDA must be published in the solicitation unless otherwise approved by the CPOCBO. When requesting approval from the ~~appropriate~~ chief procurement officer, the ~~District~~governmental body must identify the information to be released pursuant to the NDA, explain the reason for the request, cite the legal basis for not making the information publicly available, and provide any other information requested by the CPOCBO. If the ~~District~~governmental body declines a person's request to enter an NDA and acquire the information thereto, it must immediately notify the CPOCBO. Consistent with ~~R-19-445-Regulation~~ 2030, the applicable solicitation should instruct bidders how to comply with the NDA when submitting their offer. Information to be released pursuant to the NDA may also be released in accordance with ~~R-19-445-Regulation~~ 2200 (Administrative Review Protective Orders).

~~19-445-2015. Unauthorized or Illegal Procurements.~~

A. Decision to Ratify or Declare Void

(1) Upon discovering after award either (a) that a ~~person-District employee~~ lacking actual authority has made an unauthorized award or modification of a contract or (b) that a contract award or modification is otherwise in violation of ~~this code~~the Consolidated Procurement Code or these regulations, the appropriate official, as defined in section G below, must decide to either ratify the contract in accordance with this regulation or acknowledge and declare the contract null and void. If ratified, the contract may be continued or terminated. The contract may be ratified only if ratification is in the interest of the DistrictState.

(2) The factors pertinent in determining the ~~District's~~State's interest include, but are not limited to: (a) the seriousness of the procurement deficiency; (b) the degree of prejudice to the integrity of the competitive procurement system;

(c) the good faith of the ~~District~~public officials and contractors involved; (d) the extent of performance; (e) the costs to the DistrictState in either terminating the contract or declaring it null and void, if any; (f) the urgency of the acquisition; and (g) the impact on the ~~using-District's~~agency's mission.

B. Decision to Continue or Terminate Contract. If a contract is ratified, the appropriate official must decide to either (1) continue the contract, or (2) terminate the contract and proceed as provided in section C below. A contract award or modification that is in violation of ~~this code~~the Consolidated Procurement Code or these regulations may be continued only if the appropriate official determines an urgent and compelling need exists that cannot otherwise be met without undue burden on the DistrictState. If no such urgent and compelling need exists, the ratified contract must be terminated and the DistrictState shall proceed as provided in section C below. A contract that was ratified solely

because a ~~District employee~~ ~~person~~ lacking actual authority made an unauthorized award or modification, as described in item A(1)(a) above, does not require an urgent and compelling need to support its continuation.

C. Settlement of Terminated Contracts. If a contract is terminated as allowed by this regulation, the ~~State-District~~ shall, as appropriate and by agreement with the supplier, return any supplies delivered for a refund at no cost to the ~~State-District~~ or at a minimal restocking charge. If a contract is terminated and a termination claim is made, settlement shall be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance were completed. Anticipated profits are not allowed.

D. Settlement of Void Contracts. If a contract is acknowledged as null and void pursuant to section A above, the ~~State-District~~ shall endeavor to return those supplies delivered under the contract that have not been used or distributed, and no further payments shall be made under the contract. In addition, the ~~State-District~~ is entitled to recover the greater of (1) the difference between payments made under the contract and the contractor's actual costs up until the contract was declared null and void, or (2) the difference between payments under the contract and the value to the ~~State-District~~ of the supplies, services, information technology, or construction it obtained under the contract.

E. Bad Faith. Notwithstanding section D above, the ~~State-District~~ is entitled to recover all amounts paid if the appropriate official determines that the recipient of the contract acted in bad faith. Bad faith shall not be assumed. Without limitation, specific findings showing deception, dishonesty, reckless disregard of clearly applicable laws or regulations, or deliberate breach of contract scope limits, support a finding of bad faith.

F. ~~District's~~ ~~State's~~ Remedies Not Limited. Regardless of its ratification of a contract, the ~~District~~ ~~State~~ shall be entitled to any damages it can prove under any theory including but not limited to contract and tort.

G. Appropriate Official. The appropriate official to make the decisions authorized by sections A, B, and E above, or the determination addressed in item H(2) below, is ~~the chief procurement officer, the head of a purchasing agency, or, for a contract with a total potential value no greater than \$100,000, a designee of either officer, the Superintendent, or a designee~~ above the level of the person responsible for the person committing or authorizing the act. If a contract award or modification is made in violation of ~~the Consolidated Procurement Code~~ ~~this code~~ or these regulations, and the value of the contract exceeds ~~the certification of the purchasing agency or~~ one hundred thousand dollars, the ~~Board~~ ~~chief procurement officer~~ must concur in the written determination before any further action is taken, unless the contract is declared null and void. In all circumstances, the ~~Board~~ ~~chief procurement officer~~ must concur in any determination finding bad faith.

H. Determinations.

(1) All decisions authorized by sections A, B, and E above shall be supported by a written determination of appropriateness conforming to the requirements of Section ~~11-35~~-210.

(2) The written determination must include the facts and circumstances surrounding the improper act, what corrective action is being taken to prevent recurrence, and the action taken against the individual committing the act.

(3) In most circumstances, the decisions authorized by sections A, B, and E above are unnecessary for a contract that has been completely performed. Accordingly, the determination in those instances maybe limited to the information required by subsection H(2).

~~I. Reporting. Every quarter, each governmental body shall submit to the Materials Management Officer a record listing all contract awards or modifications discovered as described in item A(1) above, along with copies of the applicable written determinations. The Materials Management Officer shall submit a~~

~~copy of the record to the board on an annual basis and such record shall be available for public inspection.~~

J. Miscellaneous.

(1) In the context of an administrative review conducted under Article 17, sections G, H, and I above are inapplicable, and the appropriate official to make the decision authorized by sections A, B, and E is the chief ~~procurement officer~~business official or the Procurement Review Panel, as applicable.

(2) This Regulation does not apply to a determination pursuant to ~~R.19-445.Regulation~~ 2085C.

~~19-445-2017.~~ Pre-solicitation Procedures.

A. General.

(1) This regulation prescribes best practices for pre-solicitation activities in acquisitions of supplies, services, or information technology, including acquisition planning, market research, and exchanges with industry. Nothing in section A, B, or C of this regulation shall provide an independent basis for administrative review pursuant to Article 17.

(2) ~~Using agencies~~The District shall perform acquisition planning and conduct market research for all acquisitions of supplies, services, or information technology. The extent of planning and research will vary, depending on such factors as estimated dollar value, complexity, and past experience, as well as the nature of the supplies, services or information technology to be acquired.

(3) Except for procurements conducted pursuant to Section ~~11-35-1550~~, no solicitation for offers shall proceed until the ~~District~~using agency has certified in writing that it has complied with this regulation. ~~If the using agency lacks authority to conduct the procurement, the using agency shall provide the responsible procurement officer the opportunity to fully participate in all aspects of any pre-solicitation activities conducted by the using agency.~~

(4) The ~~District~~using agency must document its acquisition planning and market research in sufficient detail to satisfy the requirements of an audit. This documentation shall be made a part of the procurement file.

(5) ~~The appropriate chief procurement officer or his designee may require the using agency to conduct additional market research or provide additional documentation of the using agency's planning and research activities.~~[Reserved]

(6) The ~~District~~chief procurement officers shall provide guidance which shall be followed by ~~all agencies~~the District in conducting acquisition planning and market research, including considerations pertinent to determining the adequacy of planning and research activities.

B. Acquisition Planning.

(1) The purpose of acquisition planning is to ensure that the using agency meets its needs in the most effective, economical, and timely manner. The planning should promote and provide for:

(a) Clearly defining the agency's needs;

(b) Acquisition of commercially available items to the maximum extent practicable;

(c) Full and open competition to the maximum extent practicable, with due regard to the nature of the supplies, services, or information technology to be acquired;

(d) Selection of appropriate source selection method and contract type; and

(e) Appropriate consideration of the use of term contracts to fulfill the requirement, before awarding new contracts.

(2) Acquisition planning should begin as soon as the agency need is identified, preferably well in advance of when contract award or order placement is necessary. Agency staff should avoid issuing requirements on an urgent basis or with unrealistic delivery or performance schedules, since it generally impedes advantageous outcomes, restricts competition, and increases prices.

(3) Acquisition planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition. If and as commensurate with the value and complexity of the acquisition, the agency shall form a team consisting of all those who will be responsible for significant aspects of the

acquisition, such as procurement, fiscal, legal, and technical personnel. If contract performance is to be in a designated operational area, the agency should also consider including operations staff or “end users,” as appropriate.

C. Market Research.

(1) Acquisitions begin with a description of the ~~District's~~ agency's needs stated in terms sufficient to allow conduct of market research. ~~Districts~~ Using agencies shall conduct market research appropriate to the circumstances to arrive at the most suitable approach to acquiring supplies, services, and information technology. ~~Agencies~~ Districts should conduct market research when planning a new acquisition, or for a new type of supplies, services, or information technology; before requisitioning an acquisition, ~~or requesting delegated authority to conduct an acquisition in excess of the agency's certification~~; and on an ongoing basis (to the maximum extent practicable), to effectively identify the capabilities of small businesses, new entrants into government contracting, and new commercially available items, for meeting the ~~District's~~ agency's requirements.

(2) ~~Agencies~~ Districts should use the results of market research to determine if sources capable of satisfying the ~~agency's~~ District's requirements exist; determine if commercially available items exist that meet the ~~agency's~~ District's requirements; and determine the practices of firms engaged in producing, distributing, and supporting the supplies, services or information technology to be acquired, such as type of contract, type and relationship of businesses involved in such contracts (e.g., subcontractors, suppliers, distributors, integrators) and, common industry contract terms or specifications, including without limitation, terms for contract duration, payment, warranties, maintenance and packaging, marking, and any other contract terms relevant to the proposed acquisition..

D. Exchanges with industry before receipt of proposals.

(1) Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with Regulation ~~19-445~~.2010, Disclosure of Procurement Information. Interested parties include potential offerors, end users, ~~District~~ agency acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition. The purpose of exchanging information is to improve the understanding of ~~District~~ agency requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the ~~District's~~ State's requirements, and enhancing the ~~State's~~ District's ability to obtain quality supplies, services, information technology, and construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(2) ~~Agencies~~ Districts are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the ~~program manager~~, responsible procurement officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria; the availability of reference documents; and any other industry concerns or questions.

(3) Techniques to promote early exchanges of information include industry conferences; public hearings; market research, as described in section C above; presolicitation notices; draft RFPs; requests for information (RFIs); presolicitation conferences; and site visits. They may also include one-on-one meetings with potential offerors. In conducting exchanges, ~~agencies~~ the District should take measures to comply with Chapter 13, Title 8 of the South Carolina Code (Ethics, Government Accountability and Campaign Reform Act); ~~R.19-445~~.Regulation 2010 (Disclosure of Procurement Information); ~~R.19-445~~.Regulation 2127 (Organizational Conflicts of Interest); and ~~R.19-445~~.Regulation 2165 (Gifts). However, any such meetings that are substantially involved with potential specifications or contract terms and conditions must comply with the restrictions on disclosure of information in subsection D(6) below.

(4) To encourage industry response, ~~a using agency~~ the District may publish notice of its plans to conduct pre-solicitation exchanges in South Carolina Business Opportunities and other publications likely to reach potential offerors.

(5) RFIs may be used when the ~~District~~ agency does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted by the ~~District~~ agency to form a binding contract. There is no required format for RFIs.

(6) General information about agency mission needs and future requirements may be disclosed at any time. In addition to the controls in ~~R.19-445.Regulation~~ 2010, the responsible procurement officer must control any exchange with potential offerors after release of the solicitation. When specific information about a proposed acquisition that would be necessary or advantageous for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. When conducting a presolicitation conference, materials distributed at the conference should be made available to all potential offerors, upon request.

~~19-445.2020. Certification.~~

~~A. Review Procedures:~~

~~(1) Unless otherwise authorized by statute, any governmental body that desires to make direct agency procurements in excess of \$50,000.00, shall contact the Materials Management Officer in writing to request certification in any area of procurement, including the following areas:~~

~~(a) Supplies and services;~~

~~(b) Reserved;~~

~~(c) Construction, including, subject to Section 11-35-3220(9), construction-related professional services;~~

~~(d) Information technology;~~

~~(2) The Materials Management Officer shall review and report on the particular governmental body's entire internal procurement operation to include, but not be limited to the following:~~

~~(a) Adherence to provisions of the South Carolina Consolidated Procurement Code and these Regulations;~~

~~(b) Procurement staff and training;~~

~~(c) Adequate audit trails and purchase order register;~~

~~(d) Evidences of competition;~~

~~(e) Small purchase provisions and purchase order confirmation;~~

~~(f) Emergency and sole source procurements;~~

~~(g) Source selections;~~

~~(h) File documentation of procurements;~~

~~(i) Decisions and determinations made pursuant to section 2015;~~

~~(j) Adherence to any mandatory policies, procedures, or guidelines established by the appropriate chief procurement officers;~~

~~(k) Adequacy of written determinations required by the South Carolina Consolidated Procurement Code and these Regulations;~~

~~(l) Contract administration;~~

~~(m) Adequacy of the governmental body's system of internal controls in order to ensure compliance with applicable requirements.~~

~~(3) The report required by item A(2) shall be submitted to the board.~~ B. Approval

~~(1)(a) Upon recommendation by the Materials Management Officer, the Director of the Division of Procurement Services may authorize the particular governmental body to make direct agency procurements in the areas described in item A(1)(a) and A(1)(d), not under term contracts, in an~~

~~amount up to one hundred fifty thousand dollars, provided a report required by item A(2) has been prepared within two years preceding the request.~~

~~(b) Upon recommendation by the State Engineer based on her knowledge of and experience with the particular governmental body, the Director of the Division of Procurement Services may authorize the particular governmental body to make direct agency procurements in the areas described in item A(1)(c), not under term contracts, in an amount up to one hundred fifty thousand dollars.~~

~~(c) The director shall advise the board in writing of all authorizations granted pursuant to this section B.~~

~~(2) If a governmental body requests certification above one hundred fifty thousand dollars, the request, along with the recommendation of the Materials Management Officer and the report required by item A(2), shall be submitted to the board. Upon recommendation by the Materials Management Officer and approval by the board, the particular governmental body may be certified and assigned a dollar limit below which the certified governmental body may make direct agency procurements not under term contracts.~~

~~(3) Certification under item B(1) or B(2) shall be in writing and specify:~~

~~(a) The name of the governmental body;~~

~~(b) Any conditions, limits or restrictions on the exercise of the certification;~~

~~(c) The duration of the certification; and~~

~~(d) The procurement areas in which the governmental body is certified.~~

~~C. Using the criteria listed in item A(2) above, the office of each chief procurement officer shall be reviewed at least every five years by the audit team of the Materials Management Office. The results of the audit shall be provided to the appropriate chief procurement officer and the Executive Director of the Authority.~~

~~D. Limitations:~~

~~(1) Such certification as prescribed in section B shall be subject to any term contracts established by the chief procurement officers which require mandatory procurement by all governmental bodies.~~

~~(2) Such certification as prescribed in section B shall be subject to maintaining an adequate staff of qualified or certified procurement officers.~~

~~19-445.2022. Temporary Suspension of Authority; Audit.~~

~~A. Suspension of Authority:~~

~~Within his area of authority, the appropriate chief procurement officer may temporarily suspend a governmental body's power to conduct all, any type of, or any value of procurements if the chief procurement officer concludes that the governmental body either (1) lacks adequate internal controls to ensure compliance with the procurement laws, (2) lacks qualified or adequate staff, or (3) has otherwise acted in a manner that, in the opinion of the chief procurement officer, warrants a temporary loss of authority. The chief procurement officer may make continued suspension contingent upon corrective action, e.g., retain additional staff, training, revised internal controls. The suspension is effective upon delivery of written notice to the head of the purchasing agency. The written notice shall state the duration of the temporary suspension, which may not extend beyond the next regularly scheduled audit to be conducted pursuant to Section 11-35-1320. A chief procurement officer may not limit direct agency procurements below \$25,000.00. Before issuing a suspension pursuant to this paragraph, a chief procurement officer shall consult with the other chief procurement officers.~~

~~B. Audit:~~

~~In order to monitor the implementation of the procurement process, the appropriate chief procurement officer has the authority to audit any governmental body regarding one or more procurement activities.~~

~~19-445.2025. Authority to Contract for Certain Services; Definitions.~~

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| A. Consultant Services. |
| (1) For the purposes of these Regulations, consultant services shall be defined as follows: An individual, partnership, corporation or any other legally established organization performing consulting services for or providing consulting advice to the State of South Carolina, or any governmental body thereof, District over whom the State or governmental body District has the right of control as to the result to be accomplished but not as to the details and means by which that result is to be accomplished. |
| (2) Services which fall within this definition shall be procured in accordance with the Code code and these Regulations. |
| B. Employee Services. |
| (1) For the purposes of these Regulations, employee services shall be defined as follows: An individual performing services directly for the DistrictState of South Carolina, or any governmental body thereof, over whom the DistrictState or governmental body has the right of control not only as to the result to be accomplished by the work but also as to the details and means by which that work is to be accomplished. |
| (2) Services which fall within this definition shall be procured in accordance with State District personnel policies and procedures. |
| C. Employment Services. |
| (1) For the purposes of these Regulations, employment services shall be defined as follows: An individual performing services indirectly for the DistrictState of South Carolina, or any governmental body thereof, whose services are obtained through a private employment agency. The employee employer relationship exists between the private employment agency and its employee. The DistrictState, or any governmental body, will contract with the private employment agency for the services of its employees. |
| (2) Services which fall within this definition shall be procured in accordance with the Code code and these Regulations. |
| D. Legal Services. |
| Prior to the award of any Districtstate contract for the services of attorneys, approval for such services shall be obtained by the governmental body from the State Attorney General <u>specify Board or appropriate official</u> . |
| E. Auditing Services. |
| Prior to the award of any Districtstate contract for auditing or accounting services, approval for such services shall be obtained by the governmental body from the State Auditor <u>specify Board or appropriate official</u> . |
| 19-445-2027. Electronic Commerce. |
| A. "Electronic commerce" means electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfer, and electronic data interchange. |
| B. General. |
| (1) The DistrictState may use electronic commerce whenever practicable or cost-effective. The use of terms commonly associated with paper transactions (e.g., "copy," "document," "page," "printed," "sealed envelope," and "stamped") shall not be interpreted to restrict the use of electronic commerce. The responsible procurement officer may supplement electronic transactions by using other media to meet the requirements of any contract action governed by the Consolidated-District's Procurement Code (e.g., transmit hard copy of drawings). |
| (2) Agencies-Districts may exercise broad discretion in selecting the information technology that will be used in conducting electronic commerce. However, the head of each agency Superintendent shall ensure that systems, technologies, procedures, and processes used by the Districtagency to conduct electronic commerce— |
| (a) Are implemented uniformly throughout the Districtagency , to the maximum extent practicable; |
| (b) Are implemented only after considering the full or partial use of existing infrastructures; |

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| (c) Facilitate access to <u>DistrictState</u> acquisition opportunities by as many persons as practicable, including small businesses, minority business enterprises, and socially and economically disadvantaged small businesses; |
| (d) Include a means of providing widespread public notice of acquisition opportunities and a means of responding to notices or solicitations electronically; |
| (e) Comply with applicable standards that broaden interoperability and ease the electronic interchange of information; and |
| (f) Are capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information. |
| (3) Agencies using the procurement functionality of the South Carolina Enterprise Information System are deemed to have complied with subsection (B)(2) of this regulation.[Deleted] |
| (4) Consistent with provisions of the Uniform Electronic Transactions Act, Sections 26-6-10, et seq., agencies-Districts may accept electronic signatures and records in connection with <u>DistrictState</u> contracts. |
| C. Submission of Offers by Electronic Commerce. Subject to all other applicable regulations (e.g., <u>R.19-445.Regulations</u> 2045 and -2050), the responsible procurement officer may authorize use of electronic commerce for submission of bids and proposals. If electronic submissions are authorized, the solicitation shall specify the electronic commerce method(s) that offerors may use. Offers submitted by electronic commerce shall be considered only if the electronic commerce method was specifically stipulated or permitted by the solicitation. |
| 19-445.2030. Competitive Sealed Bidding—The Invitation for Bids. |
| A. The invitation for bids shall be used to initiate a competitive sealed bid procurement and shall include the following, as applicable: |
| (1) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the individual to whom the bid is to be submitted, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the <u>DistrictState</u> , and any other special information; |
| (2) the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description; |
| (3) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable; and |
| (4) Instructions to bidders on how to visibly mark information which they consider to be exempt from public disclosure. |
| B. Adequate notice of the invitation for bids must be given at a reasonable time before the date set forth in it for the opening of bids. Accordingly, bidding time will be set to provide bidders a reasonable time to prepare their bids. Without limiting the foregoing requirements, the date of opening may not be less than seven (7) days after notice of the solicitation is provided as required by Section 11-35-1520 (3), unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Chief Procurement Officer or the head of the purchasing agency <u>chief business official</u> or his designee. |
| 19-445.2040. The Official State Government Publication. <u>Publication of District Business Opportunities</u> |
| <u>As used in this code and these regulations “South Carolina Business Opportunities” means the periodical published by the Materials Management Office pursuant to Regulation 19-445.2040 of the South Carolina Code of Laws.</u> The name of the official state government publication shall be known as the “South Carolina Business Opportunities.” It shall be published by the Materials Management Office at least weekly. The purpose is to provide a listing of proposed procurements of construction, information technology, supplies, |

~~services and other procurement information of interest to the business community. Except as otherwise provided by law, the publication will be available to all interested parties by posting on a public-facing Internet site. Contents shall be limited to inclusion of proposed procurements required by regulations and such other business information as approved by the Materials Management Officer. Publication of proposed procurements of a classified nature or emergencies may be excluded from publication.~~

~~19-445.2042. Pre-Bid Conferences.~~

A. Pre-bid conferences may be conducted. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Notice of the conference must be included in the notice of the solicitation required by Articles 5 or 9 of this code.

B. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment. A potential bidder's failure to attend an advertised pre-bid conference will not excuse its responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the ~~State~~District.

C. Pre-bid conferences may not be made mandatory absent a written determination by the ~~Superintendent head of the governmental body~~ or his designee that the unique nature of the procurement justifies a mandatory pre-bid conference and that a mandatory pre-bid conference will not unduly restrict competition.

D. To minimize the time and expense imposed on industry by pre-bid conferences, the procurement officer should arrange for attendance by electronic means to the maximum extent practicable.

~~19-445.2045. Receipt, Safeguarding, and Disposition of Bids.~~

A. Procedures Prior to Bid Opening.

All bids (including modifications) received prior to the time of opening shall be kept secure and, except as provided in subsection B below, unopened. Necessary precautions shall be taken to ~~insure~~ensure the security of the bid. Prior to bid opening, information concerning the identity and number of bids received shall be made available only to the ~~District~~state employees, and then only on a "need to know" basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening.

B. Unidentified Bids.

Unidentified bids may be opened solely for the purpose of identification, and then only by an official specifically designated for this purpose by the Chief Procurement Officer, the procurement officer of the ~~District~~governmental body, or a designee of either officer. If a sealed bid is opened by mistake, the person who opens the bid will immediately write his signature and position on the envelope and deliver it to the aforesaid official. This official shall immediately write on the envelope an explanation of the opening, the date and time opened, the invitation for bids' number, and his signature, and then shall immediately reseal the envelope.

C. When bids or proposals are rejected, or a solicitation cancelled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file or, if unopened, otherwise disposed of. Unopened bids or proposals are not considered to be public information under Chapter 4 of Title 30 (Freedom of Information Act).

~~19-445.2050. Bid Opening.~~

A. Procedures.

The procurement officer of the Districtgovernmental body or his designee shall decide when the time set for bid opening has arrived, and shall so declare to those present. In the presence of one or more Districtstate witnesses, he shall then personally and publicly open all bids received prior to that time, and read aloud so much thereof as is practicable, including prices, to those persons present and have the bids recorded. The amount of each bid and such other relevant information, together with the name of each bidder, shall be tabulated and certified in writing as true and accurate by both the person opening the bids and the witness. The tabulation shall be open to public inspection.

B. If it becomes necessary to postpone a bid opening, the procurement officer shall issue the appropriate amendments to the solicitation postponing or rescheduling the bid opening. When the Districtpurchasing agency is closed due to force majeure, bid opening will be postponed to the same time on the next official business day.

C. Disclosure of Bid Information.

Only the information disclosed by the procurement officer of the Districtgovernmental body or his designee at bid opening is considered to be public information under the Freedom of Information Act, Chapter 4 of Title 30, until after the issuance of an award or notification of intent to award, whichever is earlier.

~~19-445-2055~~. Bid Acceptance and Bid Evaluation.

When necessary for the best interest of the DistrictState, bid criteria to determine acceptability may include inspection, testing, quality, workmanship, delivery and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be measurable costs to include, but not be limited to, discounts, transportation costs, total or life cycle costs.

~~19-445-2060~~. Repealed.

~~19-445-2065~~. Rejection of Bids.

A. Unless there is a compelling reason to reject one or more bids, award will be made to the lowest responsible and responsive bidder. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule after opening, an invitation for bids should not be canceled and readvertised due solely to increased quantities of the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.

B. Cancellation of Bids Prior to Award.

(1) When it is determined prior to the issuance of an award or notification of intent to award, whichever is earlier, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the invitation for bids shall be cancelled. Invitations for bids may be cancelled after opening, but prior to award, when such action is consistent with subsection A above and the procurement officer determines in writing that:

(a) inadequate or ambiguous specifications were cited in the invitation;

(b) specifications have been revised;

(c) the supplies, services, information technology, or construction being procured are no longer required;

(d) the invitation did not provide for consideration of all factors of cost to the DistrictState, such as cost of transporting Districtstate furnished property to bidders' plants;

(e) bids received indicate that the needs of the DistrictState can be satisfied by a less expensive article differing from that on which the bids were invited;

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| (f) all otherwise acceptable bids received are at unreasonable prices; |
| (g) the bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or |
| (h) for other reasons, cancellation is clearly in the best interest of the <u>DistrictState</u> . |
| (2) Determinations to cancel invitations for bids shall state the reasons therefor. |
| C. Extension of Bid Acceptance Period. |
| Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement. |
| 19-445.2070 . Rejection of Individual Bids. |
| A. General Application. |
| Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected. |
| B. Alternate Bids. |
| Any bid which does not conform to the specifications contained or referenced in the invitation for bids may be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation. |
| C. Any bid which fails to conform to the delivery schedule, to permissible alternates thereto stated in the invitation for bids, or to other material requirements of the solicitation may be rejected as nonresponsive. |
| D. Modification of Requirements by Bidder. |
| (1) Ordinarily a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the <u>DistrictState</u> , since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids should be rejected in which the bidder: |
| (a) attempts to protect himself against future changes in conditions, such as increased costs, if total possible cost to the <u>DistrictState</u> cannot be determined; |
| (b) fails to state a price and in lieu thereof states that price shall be "price in effect at time of delivery;" |
| (c) states a price but qualified such price as being subject to "price in effect at time of delivery;" |
| (d) when not authorized by the invitation, conditions or qualifies his bid by stipulating that his bid is to be considered only if, prior to date of award, bidder receives (or does not receive) award under a separate procurement; |
| (e) requires the <u>DistrictState</u> to determine that the bidder's product meets <u>Districtstate</u> specifications; or |
| (f) limits the rights of the <u>DistrictState</u> under any contract clause. |
| (2) Bidders may be requested to delete objectionable conditions from their bid provided that these conditions do not go to the substance, as distinguished from the form, of the bid or work an injustice on other bidders. Bidder should be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness. |
| E. Price Unreasonableness. |
| Any bid may be rejected if the responsible procurement officer determines in writing that it is unreasonable as to price. |
| F. Bid Security Requirement. |
| When a bid security is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected. |
| G. Exceptions to Rejection Procedures. |
| Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the |

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| location specified in the solicitation or the governmental bodies' mail room which services that location prior to the bid opening. |
| 19-445.2075. All or None Qualifications. |
| Unless the invitation for bids so provides, a bid is not rendered nonresponsive by the fact that the bidder specifies that award will be accepted only on all, or a specified group, of the items included in the invitation for bids. However, bidders shall not be permitted to withdraw or modify "all or none" qualifications after bid opening since such qualification is substantive and affects the rights of the other bidders. |
| 19-445.2077. Bid Samples and Descriptive Literature. |
| A. "Descriptive literature" means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the District State to consider whether the item meets its needs. |
| B. "Bid sample" means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid. |
| C. Bid samples or descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid. |
| D. The Invitation for Bids shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the Invitation for Bids. |
| 19-445.2080. Bid Reductions. |
| The responsible procurement officer may accept a voluntary reduction in price from a low bidder after bid opening but prior to award; provided that such reduction is not conditioned on, nor results in, the modification or deletion of any conditions contained in the invitation for bids. |
| 19-445.2085. Correction or Withdrawal of Bids; Cancellation of Awards. |
| A. General Procedure. |
| (1) A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's or offeror's mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either business official. |
| (2) Confirmation of Bid. When the responsible procurement officer knows or has reason to conclude that a mistake may have been made, she the procurement officer should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. Consistent with R.19-445.Regulations 2010, -2050C, and -2095C, the responsible procurement officer should only disclose information that is publicly available when confirming a bid. If the bidder asserts a mistake, the bid may be corrected or withdrawn only if allowed by regulation (e.g., R.19-445.Regulation 2085A and B and R.19-445.Regulation 2095I(2)(d)). |
| B. Correction Creates Low Bid. |
| To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the |

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| mistake is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition. |
| C. Cancellation Of Award Prior To Performance. |
| After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled, if the Chief Procurement Officer <u>chief business official</u> determines in writing that: |
| (1) Inadequate or ambiguous specifications were cited in the invitation; |
| (2) Specifications have been revised; |
| (3) The supplies, services, information technology, or construction being procured are no longer required; |
| (4) The invitation did not provide for consideration of all factors of cost to the <u>DistrictState</u> , such as cost of transporting <u>Districtstate</u> furnished property to bidders' plants; |
| (5) Bids received indicate that the needs of the <u>DistrictState</u> can be satisfied by a less expensive article differing from that on which the bids were invited; |
| (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith; |
| (7) Administrative error of the <u>Districtpurchasing agency</u> discovered prior to performance, or |
| (8) For other reasons, cancellation is clearly in the best interest of the <u>DistrictState</u> . |
| 19-445-2090 . Award. |
| A. Application. |
| The contract shall be awarded to the lowest responsible and responsive bidder(s) whose bid meets the requirements and criteria set forth in the invitation for bids. |
| B. The procurement officer shall issue the notice of intent to award or award on the date specified in the solicitation, unless the procurement officer determines, and gives notice, that a longer review time is necessary. The procurement officer shall give notice of the revised posting date in accordance with Section 11-35-1520 (10). |
| 19-445-2095 . Competitive Sealed Proposals. |
| A. Request for Proposals. |
| The provisions of Regulations 19-445-2030B and 19-445-2040 shall apply to implement the requirements of Section 11-35-1530 (2), Public Notice. |
| B. Receipt, Safeguarding, and Disposition of Proposals. |
| The provisions of Regulation 19-445-2045 shall apply to competitive sealed proposals. |
| C. Receipt of Proposals. |
| The provisions of Regulation 19-445-2050 (B) shall apply to competitive sealed proposals. For the purposes of implementing Section 11-35-1530 (3), Receipt of Proposals, the following requirements shall be followed: |
| (1) Proposals shall be opened publicly by the procurement officer or his designee in the presence of one or more witnesses at the time and place designated in the request for proposals. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the item offered. The Register of Proposals shall be certified in writing as true and accurate by both the person opening the proposals and the witness. The Register of Proposals shall be open to public inspection only after the issuance of an award or notification of intent to award, whichever is earlier. Proposals and modifications shall be shown only to <u>DistrictState</u> |

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| personnel having a legitimate interest in them and then only on a “need to know” basis. Contents and the identity of competing offers shall not be disclosed during the process of opening by <u>Districtstate</u> personnel. |
| (2) As provided by the solicitation, offerors must visibly mark all information in their proposals that they consider to be exempt from public disclosure. |
| D. [Repealed] |
| E. Clarifications and Minor Informalities in Proposals. |
| The provisions of Section 11-35-1520 (13) shall apply to competitive sealed proposals. |
| F. Specified Types of Construction. |
| Consistent with Section 48-52-670, which allows the use of competitive sealed proposals, it is generally not practicable or advantageous to the <u>DistrictState</u> to procure guaranteed energy, water, or wastewater savings contracts by competitive sealed bidding. |
| G. Procedures for Competitive Sealed Proposals. |
| The appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies using the competitive sealed proposal method of acquisition. Unless excused by the State Engineer, the Office of State Engineer shall oversee (1) the evaluation process for any procurement of construction if factors other than price are considered in the evaluation of a proposal, and (2) any discussions with offerors conducted pursuant to Section 11-35-1530(6) or subsection I below. |
| H. Other Applicable Provisions. |
| The provisions of the following Regulations shall apply to competitive sealed proposals: |
| (1) Regulation 19-445-2042 , Pre-Bid Conferences, |
| (2) Regulation 19-445-2060 , Telegraphic and Electronic Bids, |
| (3) Regulation 19-445-2075 , All or None Qualifications, |
| (4) Regulation 19-445-2085 , Correction or Withdrawal of Bids; Cancellation of Awards, and Cancellation of Awards Prior to Performance. |
| (5) Regulation 19-445-2137, Food Service Contracts. |
| I. Discussions with Offerors |
| (1) Classifying Proposals. |
| For the purpose of conducting discussions under Section 11-35-1530 (6) and item (2) below, proposals shall be initially classified in writing as: |
| (a) acceptable (i.e., reasonably susceptible of being selected for award); |
| (b) potentially acceptable (i.e., reasonably susceptible of being made acceptable through discussions); or |
| (c) unacceptable. |
| (2) Conduct of Discussions. |
| If discussions are conducted, the procurement officer shall exchange information with all offerors who submit proposals classified as acceptable or potentially acceptable. The content and extent of each exchange is a matter of the procurement officer’s judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall: |
| (a) Control all exchanges; |
| (b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive; |
| (c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any; |
| (d) Resolve in writing suspected mistakes, if any, by calling them to the offeror’s attention. |
| (e) Provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal, but only to the extent such revisions are necessary to resolve any matter raised by the procurement officer during discussions under items (2)(b) through (2)(d) above. |

(3) Limitations. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. Ordinarily, discussions are conducted prior to final ranking. Discussions may not be conducted unless the solicitation alerts offerors to the possibility of such an exchange, including the possibility of limited proposal revisions for those proposals reasonably susceptible of being selected for award.

~~(4) Communications authorized by Section 11-35-1530(6) and items (1) through (3) above may be conducted only by procurement officers authorized by the appropriate chief procurement officer.~~

J. Rejection of Individual Proposals.

(1) Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the ~~State's~~ District's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

(a) the business that submitted the proposal is nonresponsible as determined under Section ~~11-35-~~1810;

(b) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the ~~District~~State in some material respect; or

(c) the proposed price is clearly unreasonable.

(2) The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

K. Negotiations.

(1) Prior to initiating negotiations under Section ~~11-35-~~1530(8), the ~~District~~using agency must document its negotiation objectives.

(2) The responsible procurement officer must participate in, control, and document all negotiations.

L. Delay in Posting Notice of Intent to Award or Award.

Regulation ~~19-445-~~2090B shall apply to competitive sealed proposals.

~~19-445-~~2097. Rejection of Proposals.

A. Unless there is a compelling reason to reject one or more proposals, award will be made to the highest ranked responsible offeror or otherwise as allowed by Section ~~11-35-~~1530. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective offerors of any resulting modification or cancellation.

B. Cancellation of Solicitation Prior to Award.

(1) When it is determined prior to the issuance of an award or notification of intent to award, whichever is earlier, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the request for proposals shall be cancelled. A request for proposals may be cancelled after opening, but prior the issuance of an award or notification of intent to award, whichever is earlier, when such action is consistent with subsection A above and the procurement officer determines in writing that:

(a) inadequate or ambiguous specifications were cited in the solicitation;

(b) specifications have been revised;

(c) the supplies, services, information technology, or construction being procured are no longer required;

(d) the solicitation did not provide for consideration of all factors of cost to the ~~state-~~District, such as cost of transporting ~~state-~~District furnished property to bidders' plants;

(e) proposals received indicate that the needs of the ~~state-~~District can be satisfied by a less expensive article differing from that on which the proposals were requested;

(f) all otherwise acceptable proposals received are at unreasonable prices;

(g) the proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or

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| (h) for other reasons, cancellation is clearly in the best interest of the <u>District/State</u> . |
| (2) Determinations to cancel a request for proposals shall state the reasons therefor. |
| C. Extension of Bid Acceptance Period. |
| Should administrative difficulties be encountered after opening which may delay award beyond offeror's acceptance periods, the relevant offerors should be requested, before expiration of their offers, to extend the acceptance period (with consent of sureties, if any). |
| 19-445.2098. Rejection of Individual Proposals. |
| A. Proposals need not be unconditionally accepted without alteration or correction, and to the extent otherwise allowed by law, the State's-District's stated requirements may be clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. |
| B. Reasons for rejecting proposals include but are not limited to: |
| (1) the business that submitted the proposal is nonresponsible as determined under Section 11-35-1810 ; |
| (2) the proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the <u>District/State</u> in some material respect; or |
| (3) the proposed price is unreasonable. |
| C. The reasons for rejection shall be made a part of the procurement file and shall be available for public inspection. |
| D. Exceptions to Rejection Procedures. |
| Any proposal received after the procurement officer of the <u>District/governmental body</u> or his designee has declared that the time set for opening has arrived, shall be rejected unless the proposal had been delivered to the location specified in the solicitation or the <u>governmental body's/District's</u> mail room which services that location prior to the bid opening. |
| 19-445.2099. Competitive Negotiations. |
| A. General |
| (1) Competitive negotiations are governed by R.19-445.2030B, 2040, 2042, 2045, 2050B, 2085C, 2090B, 2095C, 2095J, and 2098. Regulation 19-445-2097 (Rejection of Proposals) applies to competitive negotiations except that R.19-445.2099(K)(1) is substituted for R.19-445.2097A. |
| (2) Documentation required by this Regulation 19-445.2099 must be prepared at the time the process to be documented is conducted. |
| (3) For each competitive negotiation the head of the using agency or his designee must appoint in writing an individual to serve as the selection executive (SE). The SE must be an individual who has sufficient rank and professional experience to effectively carry out the functions of an SE. Subject to the authority and approval of the responsible procurement officer, the SE shall— |
| (a) Recommend an acquisition team, tailored for the particular acquisition, that includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a well-developed solicitation, a comprehensive evaluation of offers, and effective negotiations; |
| (b) Approve the acquisition plan and the solicitation before solicitation release; |
| (c) Ensure consistency among and sufficiency of the solicitation requirements, evaluation factors and subfactors, solicitation provisions or contract clauses, and data requirements; |
| (d) Ensure that proposals are evaluated based solely on the factors and subfactors contained in the solicitation; |
| (e) Consider the recommendations of subject matter experts, advisory boards or panels (if any); and |
| (f) Select the source or sources whose proposal is the best value to the State, as provided in R.19-445.2099K. |

(4) Consistent with Section 11-35-1535(A)(3), competitive negotiated acquisitions may be conducted only by the office of the appropriate chief procurement officer; accordingly, a chief procurement officer may not delegate to a using agency the authority to conduct a competitive negotiation.

B. Procedures for Competitive Negotiations.

The Division of Procurement Services may develop and issue procedures which shall be followed when using the competitive negotiations method of acquisition.

C. Definitions

Clarification means any communication in which the responsible procurement officer requests or accepts information that clarifies any information in a proposal. Clarification does not include the request or acceptance of any change to the terms of an offer.

Competitive range means the offeror or group of offerors selected for negotiation.

Deficiency means any term of an offer that does not conform to a material requirement of a solicitation. A material requirement is one that affects the price, quantity, quality, delivery, or other performance obligations of the contract.

Negotiation means any communication, oral or written, that invites or permits an offeror to change any texts or graphics in the terms of its offer in any way. Negotiation does not include communications involving (i) information that is necessary to understand an offer, but that does not change any text or graphics in the offer, (ii) information about the offeror, or (iii) any other information that will not bind the parties upon acceptance of an offer.

Offer means those portions of a proposal that constitute a written promise or set of promises to act or refrain from acting in a specified way, so made as to manifest a commitment to be bound by those promises upon acceptance by the State. Offer does not include mere descriptions of approaches, plans, intentions, opinions, predictions, or estimates; statements that describe the offeror's organization or capability; or any other statements that do not make a definite and firm commitment to act or refrain from acting in a specified way.

Proposal means the information submitted to the State in response to a request for proposals. The information in a proposal includes (i) the offer, (ii) information explaining the offer, (iii) information about the offeror, and (iv) any other information that is relevant to source selection decision making.

Weakness means a flaw in the proposal that increases the risk of unsuccessful contract performance. A "significant weakness" in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

D. Amending the solicitation

(1) When, either before or after receipt of proposals, the State changes its requirements or terms and conditions, the responsible procurement officer shall amend the solicitation.

(2) When, after the receipt of proposals, the State discovers that material inadequacies of the solicitation have contributed to technical or pricing deficiencies, the responsible procurement officer shall amend the solicitation to resolve the inadequacies, preferably prior to proceeding further with the procurement process.

(3) If a proposal of interest to the State involves a desirable departure from the stated requirements, the responsible procurement officer shall amend the solicitation, preferably prior to completion of proposal evaluation pursuant to F(1), provided this can be done without revealing to the other offerors the alternate solution proposed or any other information that is entitled to protection (see Regulation 19-445.2099I).

(4) Amendments issued after the established time and date for receipt of proposals may not exceed the general scope of the request for proposals and must be issued to those offerors that have not been eliminated from the competition.

(5) If, based on market research or otherwise, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the

amendment been known to them, the responsible procurement officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

E. Evaluation Factors

(1) The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition.

(2) Evaluation factors and significant subfactors must —

(a) Represent the key areas of importance and emphasis to be considered in the source selection decision; and

(b) Support meaningful comparison and discrimination between and among competing proposals.

(3) The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of the responsible procurement officer, subject to the following requirements:

(a) Price or cost to the State shall be evaluated unless the responsible procurement officer documents the reasons price or cost is not an appropriate evaluation factor for the acquisition and that decision is approved by the head of the using agency.

(b) The quality of the item to be acquired shall be addressed in every source selection through consideration of one or more non cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience.

(c) Past performance shall be evaluated unless the responsible procurement officer documents the reasons past performance is not an appropriate evaluation factor for the acquisition.

(4) All factors and significant subfactors that will affect contract award and their relative importance shall be stated clearly in the solicitation. The rating method need not be disclosed in the solicitation.

(5) The request for proposals must state the relative importance of all factors to be considered in evaluating proposals but need not state a numerical weighting for each factor.

(6) If price is an evaluation factor, the solicitation must state whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price.

F. Evaluation Process

(1) General. Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. All proposals shall be evaluated and, after evaluation, their relative qualities must be assessed solely on the factors and subfactors specified in the solicitation. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.

(2) Evaluation methods. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings.

(3) Cost or price evaluation. The responsible procurement officer shall document the cost or price evaluation. Price reasonableness shall be determined independently of cost or price evaluation.

(4) Past performance evaluation.

(a) Past performance information is one indicator of an offeror's ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This comparative assessment of past performance information is separate from the responsibility determination.

(b) The solicitation shall provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the stated requirement. The solicitation shall also authorize offerors to provide information on problems encountered on the identified contracts and the offeror's corrective actions. When evaluating an offeror's past performance, this information, as well as information obtained from any other sources, must be considered; however, the relevance of similar past performance information is a matter of business judgment.

(e) The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

(5) Technical evaluation. The source selection records shall include —

(a) An assessment of each offeror's ability to accomplish the technical requirements; and

(b) A summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors.

G. Exchanges with offerors.

(1) Control. The responsible procurement officer shall control all exchanges after opening and prior to award.

(2) Fairness and Impartiality. The responsible procurement officer shall treat all offerors fairly and impartially when deciding whether and when to seek clarification or to negotiate. Similarly situated offerors shall be given similar opportunities to clarify and, if in the competitive range, to negotiate.

(3) Clarifications. The responsible procurement officer may conduct clarifications at any time prior to the award decision.

(4) Competitive Range.

(a) After complying with Section 11-35-1535(G) (Evaluation), and before negotiating with anyone, the responsible procurement officer shall establish a competitive range comprised of the offerors that submitted the most promising offers.

(b) Ordinarily, the competitive range should not include more than three offerors. The responsible procurement officer may select only one offeror and may select more than three. The rationale for establishment of, and every modification to, the competitive range shall be determined in writing.

(c) Prior to conducting the minimum negotiations required by Section 11-35-1535(I)(3)(b)(i) and R.19-445.2099H(2), otherwise promising offerors should not be excluded from the competitive range due solely to deficiencies that are reasonably susceptible of correction.

(d) After conducting the minimum negotiations required by 11-35-1535(I)(3)(b)(i) and R.19-445.2099H(2), the responsible procurement officer may eliminate an offeror from the competitive range if the offeror is no longer considered to be among the most promising.

(e) Offerors excluded or otherwise eliminated from the competitive range may request a debriefing.

H. Negotiations with offerors

(1) Negotiations — General.

(a) The responsible procurement officer shall participate in and control all negotiations.

(b) The primary objective of negotiation is to maximize the State's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation.

(c) The State may use any method of communication.

(d) Prior to any negotiation session, the using agency must document its prenegotiation objectives with regard to each offeror in the competitive range.

(e) The responsible procurement officer shall prepare a record of each negotiation session.

(f) Negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give and take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

(g) The responsible procurement officer may not relax or change any material requirement of the solicitation during negotiation except by amendment in accordance with R.19-445.2099D.

(h) Negotiations may include pricing. The responsible procurement officer may state a price that the State is willing to pay for what has been offered and may tell an offeror its price standing.

(i) Subject to the following requirements, the scope and extent of negotiations are a matter of the responsible procurement officer's judgment:

(i) Section 11-35-30 (Obligation of Good Faith);

(ii) R.19-445.2099G(2) (Fairness and Impartiality); and

(iii) R.19-445.2099H(2) (Minimum Negotiations).

(j) The State may engage in more than one session with an offeror if necessary. Subject to R.19-445.2099G(2), the conduct of multiple sessions with a particular offeror does not require the conduct of multiple sessions with other offerors.

(k) Throughout the competitive negotiation process, state personnel shall not disclose the content of any offeror's proposal to any other offeror.

(l) State personnel shall not promise that the State will select an offeror for award if it makes a particular change or set of changes to its offer.

(2) Negotiations—Minimum—Problem Identification

The State shall negotiate with each offeror in the competitive range. At a minimum, the State shall identify and seek the correction of any deficiency and the elimination of any other undesirable term in an offer.

(3) Negotiations—Enhancement.

(a) The responsible procurement officer may negotiate with offerors in the competitive range to seek changes in their offers that the State desires and to allow them to make other improvements.

(b) The responsible procurement officer may state specific terms that the State desires and seek improvements in already acceptable terms.

(4) Proposal Revisions.

(a) The responsible procurement officer may request or allow proposal revisions either (i) to clarify and document understandings reached during negotiations, or (ii) to provide offerors an opportunity to respond to an amendment.

(b) If an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to that offeror's proposal shall be accepted or considered.

(c) Upon the completion of all negotiations, the responsible procurement officer shall request that offerors still in the competitive range submit final offers not later than a specified common cutoff date and time that allows a reasonable opportunity for submission. When submitting final offers, an offeror may revise any aspect of its offer. The responsible procurement officer shall notify offerors that failure to submit a final offer by the common cutoff date and time will result in the consideration of their last prior offer. Requests for final offers shall advise offerors that final offers shall be in writing and that the government intends to make award without obtaining further revisions.

I. Limitations on exchanges. State personnel involved in the acquisition shall not engage in conduct that—

(1) Favors one offeror over another;

(2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;

(3) Reveals the names of individuals providing reference information about an offeror's past performance; or

(4) Knowingly furnishes source selection information in violation of Regulation 19-445.2010.

J. Tradeoff Process

(1) A tradeoff process is appropriate when it may be in the interest of the State to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

(2) This process permits tradeoffs among cost or price and non-cost factors and allows the State to accept other than the lowest priced proposal. The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file.

K. Award

(1) Unless there is a compelling reason to reject proposals, award must be made to the responsible offeror whose final proposal meets, in all material respects, the requirements announced in the solicitation, as amended, and is determined in writing to provide the best value to the State, taking into consideration the evaluation factors set forth in the request for proposals and, if price is an evaluation factor, any tradeoffs among price and non-price factors. Award must be based on a comparative

~~assessment of final proposals from offerors within the competitive range against all source selection criteria in the solicitation.~~

~~(2) The contract file must document the basis on which the award is made, and the documentation must explain and justify the rationale for any business judgments and tradeoffs made or relied on in the award determination, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.~~

~~(3) The contract file must document who performed the functions required by sections F, J, and K of R.19-445.2099 and which functions they performed.~~

~~19-445.2100. Small Purchases and Other Simplified Purchasing Procedures.~~

A. Authority.

(1) ~~An agency~~ A District may make small purchases not exceeding the limits prescribed in Section ~~11-35-1550~~ in accordance with the procedures in that section and herein.

~~(2) Any purchase of supplies, services, or information technology made pursuant to Section 11-35-1550 must be within the agency's certification.~~

~~(3)~~ These simplified acquisition procedures shall not be used for items available under mandatory state term contracts (see R.19-445-2020B(1) of the South Carolina Code of Laws).

~~(3) [Reserved] (4) Contracts solely for the procurement of commercially available off the shelf products pursuant to Section 11-35-1550 are not subject to laws identified in Section 11-35-2040.~~

~~(5)~~ When required, adequate public notice must comply with R.19-445.Regulation 2000F.

~~(6)~~ Section ~~11-35-4210(1)(d)~~ makes the protest process inapplicable to contracts with an actual or potential value of up to \$50,000. Because the protest process applies to all small purchases in excess of \$50,000, notice of an award must be communicated to all bidders on the same date award is made and must be documented in the procurement file. Any method of communication may be used.

B. Purchases pursuant to Section ~~11-35-1550(2)(b)~~ (Three Written Quotes).

(1) If ~~an agency~~ a District does not receive responsive quotes from at least three responsible bidders, adequate public notice must be given and documented with the purchase requisition. So-called "no bids" are not bona fide and do not count as one of the three.

(2) Requests for quotes must be distributed equitably among qualified suppliers, unless adequate public notice is given in South Carolina Business Opportunities.

C. Purchases pursuant to Section ~~11-35-1550(2)(c)~~ (Advertised Small Purchase) may be made by giving adequate public notice in South Carolina Business Opportunities and:

(1) issuing a written solicitation for written quotes, as described in Section ~~11-35-1550(2)(c)~~;

(2) soliciting bids in accordance with Section ~~11-35-1520~~, Competitive Sealed Bidding, Section ~~11-35-1525~~, Competitive Fixed Price Bidding, or Section ~~11-35-1528~~, Competitive Best Value Bidding; or

(3) soliciting proposals in accordance with Section ~~11-35-1530~~, Competitive Sealed Proposals.

D. When conducting a small purchase over twenty-five thousand dollars for which adequate public notice is required, potential offerors must be provided reasonable time to prepare their bids, no less than seven (7) days after such notice is provided, unless a shorter time is deemed necessary for a particular procurement as determined in writing by the ~~head of the purchasing agency, the appropriate chief procurement officer, or the designee of either chief business official.~~

E. Establishment of Blanket Purchase Agreements.

(1) General. A blanket purchase agreement is a simplified method of filling repetitive needs for small quantities of miscellaneous supplies, services, or information technology by establishing "charge accounts" with qualified sources of supply. Blanket purchase agreements are designed to reduce administrative costs in accomplishing small purchases by eliminating the need for issuing individual purchase documents.

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| (2) Alternate Sources. To the extent practicable, blanket purchase agreements for items of the same type should be placed concurrently with more than one supplier. All competitive sources shall be given an equal opportunity to furnish supplies, services, or information technology under such agreements. |
| (3) Terms and Conditions. Blanket purchase agreements shall contain the following provisions: |
| (a) Description of agreement. A statement that the supplier shall furnish supplies, services, or information technology, described therein in general terms, if and when requested by the Procurement Officer, or his authorized representative, during a specified period and within a stipulated aggregate amount, if any. Blanket purchase agreements may encompass all items that the supplier is in a position to furnish. |
| (b) Extent of obligation. A statement that the <u>DistrictState</u> is obligated only to the extent of authorized calls actually placed against the blanket purchase agreement. |
| (c) Notice of individuals authorized to place calls and dollar limitations. A provision that a list of names of individuals authorized to place calls under the agreement, identified by organizational component, and the dollar limitation per call for each individual shall be furnished to the supplier by the Procurement Officer. |
| (d) Delivery tickets. A requirement that all shipments under the agreement, except subscriptions and other charges for newspapers, magazines, or other periodicals, shall be accompanied by delivery tickets or sales slips which shall contain the following minimum information: |
| (1) name of supplier; |
| (2) blanket purchase agreement number; |
| (3) date of call; |
| (4) call number; |
| (5) itemized list of supplies, services, or information technology furnished; |
| (6) quantity, unit price, and extension of each item less applicable discounts (unit price and extensions need not be shown when incompatible with the use of automated systems, provided that the invoice is itemized to show this information); and |
| (7) date of delivery or shipment. |
| (e) Invoices one of the following statements: |
| (1) A summary invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a billing period, identifying the delivery tickets covered therein, stating their total dollar value, and supported by receipted copies of the delivery tickets; or |
| (2) An itemized invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a billing period and for which payment has not been received. Such invoices need not be supported by copies of delivery tickets; |
| (3) When billing procedures provide for an individual invoice for each delivery, these invoices shall be accumulated provided that a consolidated payment will be made for each specified period; and the period of any discounts will commence on final date of billing period or on the date of receipt of invoices for all deliveries accepted during the billing period, whichever is later. This procedure should not be used if the accumulation of the individual invoices materially increases the administrative costs of this purchase method. |
| F. Competition Under Blanket Purchase Agreement. |
| Calls against blanket purchase agreements shall be placed after prices are obtained. When concurrent agreements for similar items are in effect, calls shall be equitably distributed. In those instances where there is an insufficient number of BPAs for any given class of supplies, services, or information technology to assure adequate competition, the individual placing the order shall solicit quotations from other sources. |
| G. Calls Against Blanket Purchase Agreement. |
| Calls against blanket purchase agreements generally will be made orally, except that informal correspondence may be used when ordering against agreements outside the local trade area. Written |

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| calls may be executed. Documentation of calls shall be limited to essential information. Forms may be developed for this purpose locally and be compatible with the Comptroller General's Office STARS system. |
| H. Receipt and Acceptance of Supplies or Services. |
| Acceptance of supplies, services, or information technology shall be indicated by signature and date on the appropriate form by the authorized District State representative after verification and notation of any exceptions. |
| I. Review Procedures. |
| The District governmental body shall review blanket purchase agreement files at least semiannually to assure that authorized procedures are being followed. Blanket purchase agreements shall be issued for a period of no longer than 12 months. |
| 19-445.2105. Sole Source Procurements. |
| A. Application. |
| The provisions of this Regulation shall apply to all sole source procurements unless emergency conditions exist as defined in Regulation 19-445.2110. |
| B. Exceptions. |
| Sole source procurement is not permissible unless there is only a single supplier. The following are examples of circumstances which could necessitate sole source procurement: |
| (1) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration; |
| (2) where a sole supplier's item is needed for trial use or testing; |
| (3) [Repealed] |
| (4) [Repealed] |
| (5) where the item is one of a kind; and |
| (6) [Repealed] |
| C. Written Determination. |
| (1) The written determination to conduct a procurement as a sole source shall be made by either the Chief Procurement Officer, the head of a purchasing agency, the Superintendent or designee of either above the level of the procurement officer. Any delegation of authority by either the Chief Procurement Officer or the head of a purchasing agency, the Superintendent with respect to sole source determinations shall be submitted in writing to the Materials Management Officer chief procurement officer. (2) The written determination must include a purchase description that states the using agency's District's actual needs, which shall not be unduly restrictive. In cases of reasonable doubt, competition should be solicited. The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision and must be accompanied by market research that supports the decision. The determination must be authorized prior to contract execution. |
| D. Notice. |
| (1) Compliance with the notice requirements in Section 11-35-1560(A) must be documented in the procurement file. |
| (2) The public notice required by Section 11-35-1560(A) must include the written determination required by Section C(2) above or instructions how to obtain the written determination immediately upon request. |
| E. Other Applicable Provisions. |
| Sole source procurements must comply with all applicable statutes and regulations, including without limitation, Sections 11-35-30 (Obligation of good faith), -210 (Determinations), -410 (Public access to procurement information), -1810 (Responsibility of bidders and offerors), -1830 (Cost or pricing data), -2010 (Types of contracts), -2030 (Multiterm contracts), -1610 (Change order or contract |

modification), -2440 (Records of procurement actions), -2730 (Assuring competition), and -4230 (Authority to resolve contract and breach of contract controversies).

~~19-445.2110.~~ Emergency Procurements.

A. Application.

The provisions of this Regulation apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.

B. Definition.

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by ~~either the Chief Procurement Officer or the head of a purchasing agency~~ Superintendent or a designee ~~of either office~~. The existence of such conditions must create an immediate and serious need for supplies, services, information technology, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:

(1) the functioning of ~~District~~ State government;

(2) the preservation or protection of property; or

(3) the health or safety of any person.

C. Limitations.

Emergency procurement shall be limited to those supplies, services, information technology, or construction items necessary to meet the emergency.

D. Conditions.

~~Any governmental body~~ The District may make emergency procurements when an emergency condition arises and the need cannot be met through normal procurement methods, provided that whenever practical, approval by ~~either the head of a purchasing agency~~ Superintendent or his designee ~~or the Chief Procurement Officer~~ shall be obtained prior to the procurement.

E. Selection of Method of Procurement.

The procedure used shall be selected to assure that the required supplies, services, information technology, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.

F. Notice.

Compliance with the notice requirements in Section ~~11-35-~~1570(B) must be documented in the procurement file.

G. Written Determination.

The ~~Chief Procurement Officer or the head of the purchasing agency~~ Superintendent or a designee ~~of either office~~ shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision.

~~19-445.2115.~~ Information Technology Procurements.

The District, whether using District appropriations or other funds, shall rent, purchase, or lease any information technology, or software, or contract for consulting or other services in the field of information technology only in accordance with these Regulations.

~~A. Reserved.~~

~~B. Reserved.~~

C. Software Licensing

Pursuant to Section 11-35-510, the Information Technology Management Officer may execute an agreement with a business on behalf of, and which binds all, governmental bodies in order to establish the terms and conditions upon which computer software may be licensed, directly or indirectly, from

~~that business by a governmental body. Such an agreement may provide for the voluntary participation of any other South Carolina public procurement unit. Such agreements do not excuse any governmental body from complying with any applicable requirements of the Procurement Code and these Regulations, including the requirements of Section 11-35-1510.~~

~~19-445.2120. Cost or Pricing Data.~~

A. Definitions

(1) Adequate Price Competition. Price competition exists if competitive sealed proposals are solicited, at least two responsive and responsible offerors independently compete for a contract, and price is a substantial factor in the evaluation. If the foregoing conditions are met, price competition shall be presumed to be “adequate” unless the procurement officer determines in writing that such competition is not adequate.

(2) Commercial product has the meaning stated in Section ~~11-35-1410~~(1).

(3) Established catalog price has the meaning stated in Section ~~11-35-1410~~.

(4) Established Market Price means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

(5) Prices Set by Law or Regulation. The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the ~~State-District~~ and other customers.

B. Thresholds

(1) Section ~~11-35-1830~~(1)(a) applies where the total contract price exceeds five hundred thousand dollars.

(2) Section ~~11-35-1830~~(1)(b) applies where the pricing of any change order, contract modification, or termination settlement exceeds five hundred thousand dollars, unless the procurement officer determines in writing that such information is necessary to determine that the pricing is reasonable. Price adjustment amounts shall consider both increases and decreases (e.g., a \$150,000 modification resulting from a reduction of \$350,000 and an increase of \$200,000 is a pricing adjustment exceeding \$500,000.). This requirement does not apply when unrelated and separately priced changes for which cost or pricing data would not otherwise be required are included for administrative convenience in the same modification.

(3) Ordinarily, cost and pricing data should not be required for the acquisition of any item that meets the definition of commercial product, including any modification that does not change the item from a commercial product to a non-commercial product. The contractor may be required to submit cost or pricing data for commercial products or COTS only if the purchase or modification exceeds the thresholds established in this section and the procurement officer determines in writing that no other basis exists to establish price reasonableness.

C. Conditions of Waiver

The requirements of Section ~~11-35-1830~~ may be waived if the ~~head of the using agency~~Superintendent determines in writing that the price can be determined to be fair and reasonable without submission of cost or pricing data.

D. Refusal to Submit Data

A refusal by the offeror to supply the requested information may be grounds to disqualify the offeror or to defer award pending further review and analysis.

~~19-445.2122. Price Reasonableness.~~

A. General. The objective of offer analysis is to ensure that the final contract price is fair and reasonable. The procurement officer is responsible for evaluating the reasonableness of the offered

prices. Normally, competition establishes price reasonableness. Therefore, when contracting on a firm-fixed-price basis, comparison of the proposed prices will usually satisfy the requirement to perform a price analysis, and a cost analysis need not be performed. In limited situations, a cost analysis (see subsection B(2)) may be appropriate to establish reasonableness of the otherwise successful offeror's price. The analytical techniques and procedures described in this regulation may be used, singly or in combination with others, to ensure that the final price is fair and reasonable. In addition, they should be used to analyze cost or pricing data required by Section ~~11-35~~1830. The complexity and circumstances of each acquisition should determine the appropriate level of detail for the analysis. The ~~appropriate Chief Procurement Officer~~Board or designee may develop and issue procedures which shall be followed by all ~~agencies~~schools in the District conducting offer analysis. The responsible procurement officer may request the advice and assistance of other experts to ensure that an appropriate analysis is performed.

B. Analytical techniques include, but are not limited to, the following:

(1) Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. Examples of price analysis criteria include but are not limited to: (a) price submissions of prospective bidders or offerors in the current procurement; (b) prior price quotations and contract prices charged by the bidder, offeror, or contractor; (c) prices published in catalogues or price lists; (d) prices available on the open market; and (e) in-house estimates of cost. The responsible procurement officer may use various price analysis techniques and procedures to ensure a fair and reasonable price.

(2) Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price, and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency. Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate: (a) specific elements of costs; (b) the necessity for certain costs; (c) the reasonableness of amounts estimated for the necessary costs; (d) the reasonableness of allowances for contingencies; (e) the basis used for allocation of indirect costs; (f) the appropriateness of allocations of particular indirect costs to the proposed contract; and (g) the reasonableness of the total cost or price. The responsible procurement officer may use various cost analysis techniques and procedures to ensure a fair and reasonable price, given the circumstances of the acquisition.

C. Unbalanced pricing. All offers with separately priced line items or subline items shall be analyzed to determine if the prices are unbalanced. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly over or understated as indicated by the application of cost or price analysis techniques. If the responsible procurement officer determines that unbalanced pricing may increase performance risk (e.g., it is so unbalanced as to be tantamount to allowing an advance payment) or could result in payment of unreasonably high prices, she may conclude that the offer is unreasonable as to price.

~~19-445.2125.~~ Responsibility of Bidders and Offerors.

A. ~~District~~State Standards of Responsibility.

Factors to be considered in determining whether the ~~District~~state standards of responsibility have been met include whether a prospective contractor has:

(1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;

(2) a satisfactory record of performance;

(3) a satisfactory record of integrity;

(4) qualified legally to contract with the ~~District~~State; and

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| (5) supplied all necessary information in connection with the inquiry concerning responsibility. |
| B. Obtaining Information; Duty of Contractor to Supply Information. |
| At any time prior to award, the prospective contractor shall supply information requested by the procurement officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the procurement officer shall base the determination of responsibility upon any available information or may find the prospective contractor non responsible if such failure is unreasonable. In determining responsibility, the procurement officer may obtain and rely on any sources of information, including but not limited to the prospective contractor; knowledge of personnel within the District using or purchasing agency ; commercial sources of supplier information; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; government agencies; and business and trade associations. |
| C. Demonstration of Responsibility. |
| The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request: |
| (1) evidence that such contractor possesses such necessary items; |
| (2) acceptable plans to subcontract for such necessary items; or |
| (3) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items. |
| D. Duty Concerning Responsibility. |
| (1) Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening. |
| (2) Consistent with Section 41-35 -1529(3), the procurement officer must determine responsibility of bidders in competitive on-line bidding before bidding begins. |
| E. Written Determination of Nonresponsibility. |
| If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the procurement officer. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the procurement file. |
| F. Special Standards of Responsibility |
| When it is necessary for a particular acquisition or class of acquisitions, the procurement officer may develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors. A valid special standard of responsibility must be specific, objective and mandatory. |
| G. Subcontractor responsibility. |
| (1) Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors. Determinations of prospective subcontractor responsibility may affect the procurement officer's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility. |
| (2) When it is in the state's District's interest to do so, the procurement officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the procurement officer to determine subcontractor responsibility. |
| 49-445 .2127. Organizational Conflicts of Interest. |
| A. General. |

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| (1) “Organizational conflict of interest” occurs when, because of other activities or relationships with the <u>DistrictState</u> or with other businesses: |
| (a) a business is unable or potentially unable to render impartial assistance or advice to the <u>DistrictState</u> , or |
| (b) the business’ objectivity in performing the contract work is or might be otherwise impaired, or |
| (c) a business has an unfair competitive advantage. |
| (2) This regulation applies to acquisitions of supplies, services and information technology, except for acquisitions made pursuant to Section 11-35 -1550. Unless the procurement uses a project delivery method identified in Section 11-35 -3005(1)(e), 1(f), or (2)(a), this regulation does not apply to acquisitions under Article 9 (Construction, Architect-Engineer, Construction Management, and Land Surveying Services). |
| (3) The general rules in sections B (Providing systems engineering and technical direction), C (Preparing specifications or work statements), and D (Providing evaluation of offers) below prescribe limitations on contracting as the means of avoiding organizational conflicts of interest that might otherwise exist in the stated situations. Conflicts may arise in situations not expressly covered in sections B, C, and D. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it. The two underlying principles are |
| (a) Preventing the existence of conflicting roles that might bias a contractor’s judgment; and |
| (b) Preventing unfair competitive advantage. Without limitation, an unfair competitive advantage exists where a business competing for award of a <u>DistrictState</u> contract possesses (i) proprietary information that was obtained from the <u>DistrictState</u> without authorization; or (ii) source selection information (<u>R-19-445-Regulation</u> 2010C) that is relevant to the contract but is not available to all competitors, and such information would assist that business in obtaining the contract. |
| (4) The terms “contractor” and “subcontractor” are defined by Section 11-35 -310. |
| B. Providing systems engineering and technical direction. (1) A business shall not be awarded a contract to supply a system or any of its major components, or be a subcontractor or consultant, if that business, as a contractor, provided or provides a combination of substantially all of the following activities: |
| (a) determining specifications or developing work statements, |
| (b) determining parameters, |
| (c) identifying and resolving interface problems, |
| (d) developing test requirements, |
| (e) evaluating test data, |
| (f) supervising design, |
| (g) directing other contractors’ operations, and |
| (h) resolving technical controversies. |
| (2) This section B does not prohibit a contractor providing systems engineering and technical direction, from developing or producing a system if the entire effort is conducted under a single contract. |
| C. Preparing specifications or work statements. |
| (1) If a contractor prepares and furnishes specifications for a specific acquisition of tangible supplies or information resources, or their components, that contractor shall not be allowed to furnish these items, either as a contractor or as a subcontractor at any tier, for a reasonable period of time including, at least, the duration of the initial contract for purchase of the items. |
| (2) If a contractor prepares, or assists in preparing, a work statement to be used in a specific acquisition of a system or services—or provides material leading directly, predictably, and without delay to such a work statement—that contractor may not supply the system, major components of the system, or the services, either as a contractor or as a subcontractor at any tier, unless (a) the acquisition is a sole |

source under ~~R.19-445.Regulation~~ 2105; (b) it has participated in the development and design work; or (c) more than one contractor has been involved in preparing the work statement.

D. Providing evaluation of offers. If a contractor evaluates or supports the evaluation of a bid or proposal for a contract with ~~a governmental body~~ the District, that contractor and its affiliates are barred from performing under that contract as either a contractor or as a subcontractor at any tier.

E. Procurement Officer Responsibilities.

(1) The responsible procurement officer shall (a) analyze planned acquisitions in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and (b) review plans to avoid, neutralize, or mitigate significant potential conflicts before contract award.

(2) The responsible procurement officer shall determine whether the apparent successful offeror has an organizational conflict of interest. The responsible procurement officer shall award the contract to the apparent successful offeror unless (i) a conflict of interest is determined to exist that cannot be avoided or mitigated, or (ii) the conflict is not waived as provided in section F. Before determining to withhold award based on conflict of interest considerations, the procurement officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond.

F. Waiver. With respect to the award of an individual contract, the ~~District~~ using agency may waive an organizational conflict of interest by determining that the application of these rules in a particular situation would not be in the ~~State's~~ District's interest. A determination to waive a conflict of interest must be in writing, shall set forth the extent of the conflict, and requires approval by the ~~agency head~~ Superintendent or ~~her~~ designee above the level of the ~~agency's~~ District's senior procurement official. If a waiver involves an acquisition with a value that exceeds ~~either the limits of the governmental body's authority under Section 11-35-1210(1) or~~ one million dollars, the ~~appropriate Chief Procurement Officer~~ Board must concur in the waiver and the written determination must be published with the notice of intent to award. Any report required by ~~R.19-445.Regulation~~ 2020A(2) must include every waiver addressing a procurement during the audit period.

~~G. The appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies to identify organizational conflicts of interest and techniques to avoid or mitigate them.~~

~~19-445.2130.~~ Prequalification of Supplies and Suppliers.

A. Qualified Products Lists.

A qualified products list may be developed with the approval of the Chief Procurement Officer or the procurement officer of the ~~District~~ governmental body authorized to develop qualified products lists, when testing or examination of the supplies or construction items prior to issuance of the solicitation is desirable or necessary in order to best satisfy ~~District~~ state requirements. The procedures for the inclusion of a product on the qualified products list ("QPL") must be available to prospective vendors for consideration of their product to the list.

B. Prospective suppliers may be prequalified, and distribution of the solicitation may be limited to prequalified suppliers. Suppliers who meet the prequalification standards at any time shall be added to the prequalified list for subsequent solicitations. The fact that a prospective supplier has been prequalified does not necessarily represent a finding of responsibility.

~~19-445.2132.~~ Prequalification for a Single Solicitation.

A. Application.

The pre-qualification process shall not be used to unduly limit competition. Any mandatory minimum requirements shall comply with Section ~~11-35-2730~~. In a competitive bid, the pre-qualification process is not intended to eliminate bidders capable of completing the work being procured. Before a request for qualifications may be issued pursuant to Section ~~11-35-1520(11)~~ or ~~11-35-1530(4)~~, the chief

~~procurement officer~~business official or ~~the head of a purchasing agency or either officer's~~ designee shall prepare a written justification stating the necessity for pre-qualifying offerors. Prior to issuance of the solicitation, each potential offeror seeking qualification must be promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

B. Receipt and Safeguarding of Responses.

Prior to opening submittals received in response to a request for prequalification, the provisions of Regulation ~~19-445~~.2045 shall apply to the receipt and safeguarding of all such submittals received.

~~19-445~~.2135. Conditions for Use of Multi-term Contracts.

A. General.

A multi-term contract is a contract for the acquisition of supplies, services, or information technology for more than one year. A contract is not a multi-term contract if no single term exceeds one year and each term beyond the first requires the ~~District~~governmental body to exercise an option to extend or renew. A multi-term contract is appropriate when it is in the best interest of the ~~District~~State to obtain uninterrupted services for a period in excess of one year, where the performance of such services involves high start up costs, or when a changeover of service contracts involves high phase in/phase out costs during a transition period. The multi-term method of contracting is also appropriate when special production of definite quantities of supplies for more than one year is necessary to best meet ~~District~~state needs but funds are available only for the initial fiscal period. Special production refers to production for contract performance when it requires alteration in the contractor's facilities or operations involving high start up costs.

B. Objective.

The objective of the multi-term contract is to promote economy and efficiency in procurement by obtaining the benefits of sustained volume production and consequent low prices, and by increasing competitive participation in procurements which involve special production with consequent high start-up costs and in the procurement of services which involve high start-up costs or high phase-in/phase-out costs during changeover of service contracts.

C. Exceptions.

This Regulation ~~19-445~~.2135 applies only to contracts for supplies, services, or information technology and does not apply to contracts for construction.

D. Conditions for Use.

(1) A multi-term contract may be used if, prior to issuance of the solicitation, the Procurement Officer determines in writing that:

(a) Special production of definite quantities or the furnishing of long term services are required to meet ~~District~~state needs; or

(b) a multi-term contract will serve the best interests of the ~~District~~state by encouraging effective competition or otherwise promoting economies in ~~District~~state procurement.

(2) The following factors are among those relevant to such a determination:

(a) firms which are not willing or able to compete because of high start up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping such costs during the period of contract performance;

(b) lower production cost because of larger quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;

(c) stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality;

(d) the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

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| (3) The determination must contain sufficient factual grounds and reasoning to provide an informed, objective explanation for the decision. |
| E. Solicitation. |
| The solicitation shall state: |
| (1) the estimated amount of supplies or services required for the proposed contract period; |
| (2) that a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract); |
| (3) that the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the District's state's rights or the contractor's rights under any termination clause in the contract; |
| (4) that the procurement officer of the governmental body must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period; |
| (5) whether bidders or offerors may submit prices for: |
| (a) the first fiscal period only; |
| (b) the entire time of performance only; or |
| (c) both the first fiscal period and the entire time of performance; |
| (6) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and, |
| (7) that, in the event of cancellation as provided in (E) (3) of this subsection, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs. |
| F. Award. |
| Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offerer to "buy in", that is give such bidder or offeror an undue competitive advantage in subsequent procurements. |
| G. Maximum Contract Periods |
| Every contract with a total potential duration in excess of five years must be approved as required by Section 11-35-2030 (4) or Section 11-35-2030 (5). No solicitation shall be issued for a contract with a total potential duration in excess of five years, nor shall any contract with a total potential duration in excess of five years be awarded pursuant to Section 11-35-1560 , until such approval is granted. |
| 19-445.2137. Food Service Contracts. |
| Any food service contracts entered into by any governmental body shall be solicited by the Materials Management Office under Code Section 11-35-1530, Competitive Sealed Proposals, and Regulation 19-445.2095. A review panel composed of one representative each from the governmental body, the Materials Management Office, and the Commission on Higher Education shall review such proposals and approve it prior to the issuance of an award or notification of intent to award, whichever is earlier. |
| 19-445.2140. Specifications. |
| A. Definitions. |
| (1) "Brand Name Specification" means a specification limited to one or more items by manufacturers' names or catalogue number. |

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| (2) “Brand Name or Equal Specification” means a specification which uses one or more manufacturer’s names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet <u>DistrictState</u> requirements, and which provides for the submission of equivalent products. |
| (3) “Qualified Products List” means an approved list of supplies, services, information technology, or construction items described by model or catalogue number, which, prior to competitive solicitation, the <u>DistrictState</u> has determined will meet the applicable specification requirements. |
| (4) “Specification” means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, information technology, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service or construction item for delivery. Unless the context requires otherwise, the terms “specification” and “purchase description” are used interchangeably throughout the Regulations. |
| (5) “Specification for a Common or General Use Item” means a specification which has been developed and approved for repeated use in procurements. |
| B. Issuance of Specifications. |
| The purpose of a specification is to serve as a basis for obtaining a supply, service, information technology, or construction item adequate and suitable for the <u>State’s-District’s</u> needs in a cost effective manner, taking into account, to the extent practicable, the cost of ownership and operation as well as initial acquisition costs. It is the policy of the <u>DistrictState</u> that specifications permit maximum practicable competition consistent with this purpose. Specification shall be drafted with the objective of clearly describing the <u>State’s-District’s</u> requirements. All specifications shall be written in a non restrictive manner as to describe the requirements to be met. |
| C. Use of Functional or Performance Descriptions. |
| (1) Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the <u>DistrictState</u> . To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies, services, and information technology. Such preference is often not practicable in construction, apart from the procurement of supply type items for a construction project. |
| (2) Brand Name or Equal Specifications. |
| (a) Brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required. |
| (b) Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition. |
| D. Preference for Commercially Available Products. |
| It is the general policy of this <u>DistrictState</u> to procure standard commercial products whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable. |
| 19-445 .2141. Commercial Products. |
| A. Definitions. |
| (1) Commercial product has the meaning stated in Section 11-35 -1410, and does not include printing or insurance. |
| (2) Commercially available off-the-shelf product (“COTS”) has the meaning stated in Section 11-35 -1410, and does not include printing or insurance. |
| B. General. |

~~(1) Agencies~~The District shall conduct market research to determine whether commercial products or COTS are available that could meet ~~agency~~the District's requirements, and should endeavor to acquire commercial products or COTS when they are available to meet ~~District~~agency needs (see ~~R.19-445-Regulation~~ 2140D (Preference for commercially available products)).

~~(2) Consistent with Section 11-35-1535(A)(2), the competitive negotiations source selection method may not be used to acquire only commercially available off-the-shelf products.~~

C. Price reasonableness.

(1) An advantage of COTS is that a competitive market, evidenced by substantial commercial sales, helps to determine price reasonableness. Substantial sales of a COTS product may establish catalog prices (see Section ~~11-35-1410~~) and market prices. Market prices are current prices that are established in the usual and ordinary course of trade between buyers and sellers (see ~~R.19-445-Regulation~~ 2120A(3)). A characteristic of both catalog prices and market prices is that they can be substantiated from sources independent of the offeror—for example, through market research.

(2) "Items customarily sold in bulk" means products that are loaded and carried in bulk without mark or count. COTS does not include bulk materials, like fuel and grain, because the prices for those items fluctuate, making it difficult or impossible to rely on short-term pricing to establish price reasonableness for purchase contracts that may be for a longer term.

D. Purchase description or specification.

The ~~agency's~~District's purchase description must contain sufficient detail for potential offerors of commercial products or COTS to know which products may be suitable. Generally, ~~an~~ ~~agency's~~District's specification for COTS should describe the type of product to be acquired and explain how the ~~District~~agency intends to use the product in terms of function to be performed, performance requirement or physical characteristics. Describing the ~~District's~~agency's needs in these terms allows offerors to propose products that will best meet the ~~District's~~State's needs.

E. Simplified purchasing procedures for COTS.

(1) Section ~~11-35-1550~~(2)(b) authorizes the use of simplified procedures for the acquisition of supplies and information resources in amounts up to \$100,000, if the responsible procurement officer reasonably expects, based on the nature of the supplies or information resources sought, and on market research, that offers will include only COTS. The purpose of these simplified procedures is to vest procurement officers with additional procedural discretion and flexibility, so that COTS acquisitions in this dollar range may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the ~~District~~State and industry (see ~~R.19-445-Regulation~~ 2100).

(2) The procurement officer should be aware of customary commercial terms and conditions when pricing COTS. COTS prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The procurement officer should review the ~~using agency's~~District's standard contract terms and conditions, along with commercial terms appropriate for the acquisition of the particular item. The procurement officer should consider avoiding terms inconsistent with commercial practice, unless those terms are required by law (see ~~R.19-445-Regulation~~ 2143) or are essential to the ~~using agency's~~District's requirements.

(3) Section ~~11-35-2040~~ provides that COTS purchases made using any of the simplified procedures of Section ~~11-35-1550~~ are exempt from a number of statutory provisions that vendors have complained are overly burdensome. The procurement officer should consider Section ~~11-35-2040~~ and ~~R.19-445-Regulation~~ 2143 when preparing the solicitation or written request for quotes.

(4) Regulation ~~19-445-2120B~~(3) prohibits requiring cost or pricing data when acquiring a commercial product, including COTS, unless the purchase or modification exceeds the thresholds established in that section and the procurement officer determines in writing that no other basis exists to establish price reasonableness.

~~F. The appropriate Chief Procurement Officer may develop and issue guidance, including solicitation forms, which may be used by agencies acquiring COTS using small purchase procedures.~~

~~19-445.2143. Contract clauses and administration.~~

A. Contracts formed pursuant to the ~~Consolidated Procurement Code~~District's code are deemed to incorporate all applicable provisions thereof and the ensuing regulations.

B. Prohibited Terms. Unless otherwise specifically provided by or authorized by law, if a contract contains any of the following terms, the term shall be void, and the contract is otherwise enforceable as if it did not contain such term or condition:

(1) Terms (a) subjecting the ~~State of South Carolina or its agencies~~District to the jurisdiction of the courts of other states; or (b) requiring the ~~State of South Carolina or its agencies~~District to bring or defend a legal claim in a venue outside this State. (Sections ~~11-35-2050~~ and ~~4230~~)

(2) Terms limiting the time in which the ~~State of South Carolina or its agencies~~District may bring a legal claim under the contract to a period shorter than that provided in South Carolina law. (Sections ~~11-35-4230(2)~~ and ~~15-3-140~~)

(3) Terms imposing a payment obligation, including a rate of interest for late payments, inconsistent with the terms of Section ~~11-35-45~~.

(4) Terms that require the ~~District~~State to defend, indemnify, or hold harmless another person. (Section ~~11-35-2050~~)

(5) Terms requiring that the contract be governed or interpreted by other than South Carolina law. (Section ~~11-35-2050~~)

C. A material change is a change order or contract modification that is beyond the general scope of the original contract, such that the subject of the modification should be competitively procured absent a valid sole-source justification. Material changes are inconsistent with the underlying purposes and policies of this code. ~~The appropriate Chief Procurement Officer may develop and issue guidance and procedures for evaluating whether a change order or modification is material.~~

~~19-445.2145. Construction, Architect Engineer, Construction Management, and Land Surveying Services.~~

A. Definitions

(1) Designer, as used in these regulations, means a person who has been awarded, through the qualifications-based process set forth in Section ~~11-35-3220~~, a contract with the ~~District~~State for the design of any infrastructure facility using the design-bid-build project delivery method defined in Section ~~11-35-2910(6)~~.

(2) Builder, as used in these regulations, means a person who has been awarded, through competitive sealed bidding, a separate contract with the ~~District~~State to construct (alter, repair, improve, or demolish) any infrastructure facility using the design-bid-build project delivery method defined in Section ~~11-35-2910(6)~~.

(3) Design-Builder, as used in these regulations, means a person who has been awarded a contract with the ~~District~~State for the design and construction of any infrastructure facility using the design-build project delivery method defined in Section ~~11-35-2910(7)~~.

(4) DBO Producer, as used in these regulations, means a person who has been awarded a contract with the ~~District~~State for the design, construction, operation, and maintenance of any infrastructure facility using the design-build-operate-maintain project delivery method defined in Section ~~11-35-2910(9)~~.

(5) DBFO Producer, as used in these regulations, means a person who has been awarded a contract with the ~~District~~State for the design, construction, finance, operation, and maintenance of any infrastructure facility using the design-build-finance-operate-maintain project delivery method defined in Section ~~11-35-2910(8)~~.

(6) Guaranteed Maximum Price (GMP) means a price for all costs for the construction and completion of the project, or designated portion thereof, including all construction management services and all mobilization, general conditions, profit and overhead costs of any nature, and where the total contract amount, including the contractor's fee and general conditions, will not exceed a guaranteed maximum amount.

(7) Independent Peer Reviewer means a person who has been awarded a contract with the ~~State-District~~ for an independent, contemporaneous, peer review of the design services provided to the ~~DistrictState~~ by a DBO or DBFO Producer. In the event the ~~DistrictState~~ does not elect to contract with the Independent Peer Reviewer proposed by the successful DBO or DBFO Producer, the Independent Peer Reviewer shall be selected as provided in Section ~~11-35-2910~~(11).

(8) Operator, as used in these regulations, means a person who has been awarded, through competitive sealed bidding, a separate contract with the ~~DistrictState~~ for the routine operation, routine repair, and routine maintenance (Operation and Maintenance) of any infrastructure facility, as defined in Section ~~11-35-2910~~(13).

B. Choice of Project Delivery Method.

(1) This Subsection contains provisions applicable to the selection of the appropriate project delivery method for constructing infrastructure facilities, that is, the method of configuring and administering construction projects which is most advantageous to the ~~DistrictState~~ and will result in the most timely, economical, and otherwise successful completion of the infrastructure facility. The ~~Districtgovernmental body~~ shall have sufficient flexibility in formulating the project delivery approach on a particular project to fulfill the ~~District'sState's~~ needs. Before choosing the project delivery method, a careful assessment must be made of requirements the project must satisfy and those other characteristics that would be in the best interest of the ~~DistrictState~~.

(2) Selecting An Appropriate Project Delivery Method.

In selecting an appropriate project delivery method for each of the ~~District'sState's~~ Infrastructure Facilities, the ~~Districtgovernmental body~~ should consider the results achieved on similar projects in the past and the methods used. Consideration should be given to all authorized project delivery methods, the comparative advantages and disadvantages of each, and how these methods may be appropriately configured and applied to fulfill ~~DistrictState~~ requirements. Additional factors to consider include:

(a) the extent to which the ~~District'sgovernmental body's~~ design requirements for the Infrastructure Facility are known, stable, and established in writing;

(b) the extent to which qualified and experienced ~~DistrictState~~ personnel are available to the ~~Districtgovernmental body~~ to provide the decision-making and administrative services required by the project delivery method selected;

(c) the extent to which decision-making and administrative services may be appropriately assigned to designers, builders, construction-managers at-risk, design-builders, DBO producers, DBFO producers, peer reviewers, or operators, as appropriate to the project delivery method;

(d) the extent to which outside consultants, including construction manager agent, may be able to assist the ~~Districtgovernmental body~~ with decision-making and administrative contributions required by the project delivery method;

(e) the ~~governmental body's~~~~District's~~ projected cash flow for the Infrastructure Facility to be acquired (both sources and uses of the funds necessary to support design, construction, operations, maintenance, repairs, and demolition over the facility life cycle);

(f) the type of infrastructure facility or service to be acquired - for example, public buildings, schools, water distribution, wastewater collection, highway, bridge, or specialty structure, together with possible sources of funding for the infrastructure facility - for example, state or federal grants, ~~state or~~ federal loans, local tax appropriations, special purpose bonds, general obligation bonds, user fees, or tolls;

(g) the required delivery date of the infrastructure facility to be constructed;

(h) the location of the infrastructure facility to be constructed;

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|---|
| (i) the size, scope, complexity, and technological difficulty of the infrastructure facility to be constructed; |
| (j) the State's District's current and projected sources and uses of public funds that are currently generally available (and will be available in the future) to support operation, maintenance, repair, rehabilitation, replacement, and demolition of existing and planned infrastructure facilities; |
| (k) and, any other factors or considerations specified in the Manual for Planning of Execution of State Permanent Improvements, Part 11, or as otherwise requested by the State Engineer. |
| (3) Except for guaranteed energy, water, or wastewater savings contracts (Section 48-52-670), design-bid-build (acquired using competitive sealed bidding) is hereby designated as an appropriate project delivery method for any infrastructure facility and may be used by any District governmental body without further project specific justification. |
| (4) District Governmental Body Determination. |
| The head of the governmental body Superintendent shall make a written determination that must be reviewed by the State Engineer . The determination shall describe the project delivery method (Section 11-35-3005), source selection method (Section 11-35-3015 and 11-35-1510), any additional procurement procedures (11-35-3023 and 11-35-3024(2)(c)), and types of performance security (Sections 11-35-3030 and 11-35-3037) selected and set forth the facts and considerations leading to those selections. This determination shall demonstrate either reliance on paragraph (3) above, or that the considerations identified in paragraphs (1) and (2) above, as well as the requirements and financing of the project, were all considered in making the selection. Any determination to use a project delivery method other than design-bid-build must explain why the use of design-bid-build is not practical or advantageous to the District State. Any determination to use any of the additional procedures allowed by Section 11-35-3024(2)(c) must explain why the use of such procedures are in the best interests of the District State. Any request to use the prequalification process in a design-bid-build procurement must be in writing and must set forth facts sufficient to support a finding that pre-qualification is appropriate and that the construction involved is unique in nature, over ten million dollars in value, or involves special circumstances. |
| C. Bonds and Security. |
| (1) Bid Security. Bid Security required by Section 11-35-3030 shall be a certified cashier's check or a bond, in a form to be specified in the Manual for Planning and Execution of State Permanent Improvements—Part II District's internal procurement procedures (Section 540), provided by a surety company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. <u>In the case of a construction contract under \$100,000, the District may, upon written justification, allow the use of a "B+" rated bond when bid security is required.</u> Each bond shall be accompanied by a "Power of Attorney" authorizing the attorney in fact to bind the surety. |
| (2) Contract Performance and Payment Bonds. Unless waived pursuant to Section 11-35-3030(2)(iii) , the contractor shall provide a certified cashier's check in the full amount of the Performance and Payment Bonds or may provide, and pay for the cost of, Performance and Payment Bonds in a form to be specified in the District's internal procurement procedures (Section 540). Manual for Planning and Execution of State Permanent Improvements Part II. <u>Each bond for construction exceeding \$50,000</u> Each bond shall be issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times that portion of the contract price that does not include operations, maintenance, and finance. Where the agency District requires a payment bond for construction of \$50,000 or less, the bond must be issued by a surety meeting the requirements of Section 29-6-270. Each bond shall be accompanied by a "Power of Attorney" authorizing the attorney in fact to bind the surety. |

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| D. Architect Engineer, Construction Management and Land Surveying Services Procurement. |
| (1) The Advertisement of Project Description |
| The provisions of Regulation 19-445 .2040 shall apply to implement the requirements of Code Section 11-35-3220 (2), Advertisement of Project Description. |
| (2) State Engineer's Office Review. |
| The Office of State Engineer will provide forms in the Manual for Planning and Execution of State Permanent Improvements Projects Part II for use by governmental bodies in submitting a contract for approval pursuant to Section 11-35-3220(8) of the Code. |
| E. Contract Forms. |
| (1) Pursuant to Section 11-35 -2010(2), the following contract forms shall be used as applicable, as amended by the District State Engineer , and as provided in the Manual for Planning and Execution of State Permanent Improvements Part II District's internal procurement procedures (Section 540) . |
| Subject to the foregoing: |
| (a) If an agency the District conducts a competitive sealed bid to acquire construction independent of architect-engineer or construction management services, the governmental body District may use a document in the form of AIA Document A701. |
| (b) If an agency the District acquires architect-engineer services independent of construction, the District governmental body may use a document in the form of AIA Document B151. |
| (c) If an agency the District acquires construction independent of architect-engineer or construction management services, the District governmental body may use documents in the form of ALA AIA Document A101 and A201. Other contract forms may be used as are approved by the State Engineer chief business official . |
| (d) If an agency the District acquires architect-engineer services, construction management services, and construction on the same project, each under separate contract, the District governmental body may use documents in the form of AIA Documents A101/CMa, A201/CMa, B141/CMa, and B801/CMa. This paragraph does not apply if an agency the District acquires both construction and construction management services from the same business under the same contract. |
| (2) With prior approval of the State Engineer, a The District governmental body may supplement the contract forms identified in paragraph (1), as they have been amended by the State Engineer. |
| (3) Paragraph (1) does not apply to a contract entered into pursuant to Sections 11-35-1530, 11-35-1550, 11-35-3230, or 11-35-3310. |
| (4) For any contract forms specified herein, the Manual for Planning and Execution of State Permanent Improvements Part II shall District's internal procurement procedures (Section 540) may specify the appropriate edition or, if applicable, replacement form. |
| (5) For any contract forms not specified herein or otherwise required by law, the Manual for Planning and Execution of State Permanent Improvements Part II District's internal procurement procedures (Section 540) may, without limitation, require the use of any appropriate contract document, standard industry contract form, standard amendments to such documents or forms, or publish state specific contract forms. Absent contrary instructions in , the District Manual , the governmental body may use a contract written for an individual project. |
| (6) Construction under Procurement Code Section 11-35-1550 and 11-35-1530 may be in a format and description of services approved by the State Engineer chief business official . |
| F. Manual for Planning and Execution of State Permanent Improvements Projects Reserved. |
| For the purpose of these Regulations and Code Section 11-35-3240, a manual of procedures to be followed by governmental bodies for planning and execution of state permanent improvement projects is prepared and furnished by the designated board office, and included in this regulation. Part II of this manual, covering the procurement of construction for the projects, will be the responsibility of the Office of the State Engineer. |
| G. Prequalifying Construction Bidders. |

~~In accordance with Section 11-35-3023, the~~The State Engineer's Office ~~shall develop~~has developed procedures for a prequalification process and ~~shall include it in the Manual for Planning and Execution of State Permanent Improvements Part II~~these procedures are included in the District's internal procurement procedures (Section 540). The provisions of Regulation ~~19-445-2132~~ shall apply to implement Section ~~11-35-3023~~.

H. With regard to Section ~~11-35-3310~~, the ~~District~~State Engineer's Office will establish working procedures for indefinite quantity contracts for professional services, and shall include them in the ~~Manual for Planning and Execution of State Permanent Improvements Part II~~. With regard to Section ~~11-35-3320~~, the State Engineer's Office will establish working procedures for task order contracts for construction services and shall include them in the Manual for Planning and Execution of State Permanent Improvements Part IIDistrict's internal procurement procedures (Section 540).

I. Construction Procurement-The Invitation for Bids.

The provisions of Regulation ~~19-445-2040~~ shall apply to implement the requirements of Section ~~11-35-3020~~(a), Invitation for Bids. The provisions of Regulation ~~19-445-2090~~(B) shall not apply to implement the requirements of ~~Code code~~ Section ~~11-35-3020~~.

J. Participation in Prior Reports or Studies.

(1) Before awarding a contract for a report or study that could subsequently be used in the creation of design requirements for an infrastructure facility or service, the procurement officer should address, to the extent practical, the contractor's ability to compete for follow-on work.

(2) Before issuing a request for proposals for an infrastructure facility or service, the procurement officer should take reasonable steps to determine if prior participation in a report or study could provide a firm with a substantial competitive advantage, and, if so, the procurement officer should take appropriate steps to eliminate or mitigate that advantage.

(3) In complying with items (1) and (2) above, the procurement officer shall consider the requirements of Section ~~11-35-3245~~ and the Manual for Planning and Execution of State Permanent Improvements, Part II.

K. Additional Procedures for Design-Build; Design-Build-Operate-Maintain; and Design-Build-Finance

-Operate-Maintain.

(1) Content of Request for Proposals. Each request for proposals (RFP) issued by the ~~District~~State for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services shall contain a cover sheet that: (a) confirms that design requirements are included in the RFP, (b) confirms that proposal development documents are solicited in each offeror's response to the RFP, and (c) states the ~~governmental body's~~District's determination for that procurement (i) whether offerors must have been prequalified through a previous request for qualifications; (ii) whether the ~~District~~governmental body will select a short list of responsible offerors prior to discussions and evaluations (along with the number of proposals that will be short-listed); and (iii) whether the ~~District~~governmental body will pay stipends to unsuccessful offerors (along with the amount of such stipends and the terms under which stipends will be paid).

(2) Purpose of Design Requirements. The purpose and intent of including design requirements in the RFP is to provide prospective and actual offerors a common, and transparent, written description of the starting point for the competition and to provide the ~~District~~State with the benefit of having responses from competitors that meet the same RFP requirements. In order to be effective, the ~~District~~governmental body must first come to understand and then to communicate its basic requirements for the infrastructure facility to those who are considering whether they will participate in the procurement competition.

(3) Purpose of Requirement for Proposal Development Documents. The purpose and intent of including the requirement for submittal of proposal development documents in each RFP for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain is to provide actual offerors with a common, and transparent, written description of the finish point for the

competition. To be responsive, each offeror must submit drawings and other design related documents that are sufficient to fix and describe the size and character of the infrastructure facility to be acquired, including price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements).

(4) Content of Request for Proposals: Evaluation Factors. Each request for proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain shall state the relative importance of (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements), and (6) other factors, if any by listing the required factors in descending order of importance (without numerical weighting), or by listing each factor along with a numerical weight to be associated with that factor in the ~~governmental body's~~District's evaluation. Subfactors, if any, must be stated in the RFP and listed, pursuant to the requirements of this Regulation, either in descending order, or with numerical weighting assigned to each subfactor. The purpose and intent of disclosing the relative importance of factors (and subfactors) is to provide transparency to prospective and actual competitors from the date the RFP is first published.

(5) ~~The Manual for Planning and Execution of State Permanent Improvement Projects—Part II~~The District's internal procurement procedures (Section 540) must include guidelines for the proper drafting of design requirements, proposal development documents, and requests for proposals.

L. Errors and Omissions Insurance.

(1) For design services in design-bid-build procurements. A ~~District~~governmental body shall include in the solicitation such requirements as the procurement officer deems appropriate for errors and omissions insurance (commonly called “professional liability insurance” in trade usage) coverage of architectural and engineering services in the solicitation for design services in design-bid-build procurements.

(2) For design services to be provided as part of design-build procurements. A ~~District~~governmental body shall include in the solicitation for design-build such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements. Prior to award, the ~~head of a governmental body~~Superintendent, or his delegee, shall review and approve the errors and omissions insurance coverage for all design-build contracts in excess of \$25,000,000.

(3) For design services to be provided as part of design-build-operate-maintain and design-build-finance-operate-maintain procurements. A ~~District~~governmental body shall include in the solicitation for design-build-operate-maintain and design-build-finance-operate-maintain such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage of architectural and engineering services to be provided as part of such procurements. Prior to award, the ~~head of a governmental body~~Superintendent, or his delegee, shall review and approve the errors and omissions insurance coverage for all design-build-operate-maintain and design-build-finance-operate-maintain contracts in excess of \$25,000,000.

(4) For Construction Management (Agency) services. A ~~District~~governmental body shall include in the solicitation for construction management agency services such requirements as the procurement officer deems appropriate for errors and omissions insurance coverage.

(5) Errors and omissions (or professional liability) insurance coverage for construction management services is typically not required when the ~~District~~governmental body is conducting a construction management at-risk procurement.

M. Other Security; Operations Period Performance Bonds.

(1) Purpose.

To assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately, or as one element of design-build-operate-maintain or design-build-finance-operate-maintain services, the ~~District~~governmental body shall identify, in the

solicitation, one or more of the other forms of security identified in Section ~~11-35~~-3037 that shall be furnished to the District governmental body by the offerors (or bidders) in order to be considered to be responsive.

(2) Operations Period Performance Bonds.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, each offeror shall demonstrate in its offer that it is prepared to provide, and upon award of the contract, to maintain in effect an operations period performance bond that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in the amount of 100% of that portion of the contract price that includes the cost of such operation and maintenance services during the period covered by the bond. In those procurements in which the contract period for operation and maintenance is longer than 5 years, the procurement officer may accept an operations period performance bond of five years' duration, provided that such bond is renewable by the contractor every five (5) years during the contract, and provided further, that the contractor has made a firm contractual commitment to maintain such bond in full force and effect throughout the contract term.

(b) The operations period performance bond shall be delivered by the contractor to the District governmental body at the same time the contract is executed. If a contractor fails to deliver the required bond, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, award of the contract shall be made to the next ranked bidder (or offeror), or the contractor shall be declared to be in default, as otherwise provided by these regulations.

(c) Operations period performance bond shall be in a form to be specified in the Manual for Planning and Execution of State Permanent Improvement, Part H District's internal procurement procedures (Section 540). Each bond shall be issued by a Surety Company licensed in South Carolina with an "A" minimum rating of performance as stated in the most current publication of "Best Key Rating Guide, Property Liability", which company shows a financial strength rating of at least five (5) times the bond amount.

(3) Letters of Credit to Cover Interruptions in Operation.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, each offeror shall demonstrate in its offer that it is prepared to post, and upon award of the contract shall post, and in each succeeding year adjust and maintain in place, an irrevocable letter of credit with a banking institution in this State that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the next 12 months.

(b) The letter of credit required under this Section shall be posted by the contractor at the same time the contract is executed, and thereafter, shall be annually adjusted in amount and maintained by the contractor. If an offeror or bidder fails to demonstrate in its offer that it is prepared to post the required letter of credit, the bid (or offer) shall be rejected, the bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror), as otherwise provided by these regulations. If the contractor fails to place and maintain the required letter of credit, the contractor shall be declared to be in default, as otherwise provided by these regulations.

(c) If required by the solicitation, letters of credit shall be in a form to be specified in the Manual for Planning and Execution of State Permanent Improvement, Part H District's internal procurement procedures (Section 540).

(4) Guarantees.

(a) If required in a solicitation for operation and maintenance, design-build-operate-maintain, or design-build-finance-operate-maintain, the contractor and affiliated organizations (including parent corporations) shall provide a written guarantee that secures the timely, faithful, and uninterrupted performance of operations and maintenance services required under the contract, in an amount

established under the contract that is sufficient to cover 100% of the cost of performing such operation and maintenance services during the contract period.

(b) The written guarantee required under this Section shall be submitted by each offeror at the time the proposal is submitted. If the contractor fails to submit the required guarantee, the contractor's bid (or offer) shall be rejected, its bid security shall be enforced, and award of the contract shall be made to the next ranked bidder (or offeror) as otherwise provided by these regulations.

(c) If required by the solicitation, guarantees shall be in a form to be specified in the [Manual for Planning and Execution of State Permanent Improvement, Part II District's internal procurement procedures \(Section 540\)](#).

N. Construction Management At-Risk.

(1) Absent the approval required by Section ~~11-35-2010~~, a contract with a construction manager at-risk may not involve cost reimbursement.

(2) Prior to contracting for a GMP, all construction management services provided by a construction manager at-risk must be paid as a fee based on either a fixed rate, fixed amount, or fixed formula.

(3) As required by Section ~~11-35-3030(2)(a)(iv)~~, construction may not commence until the bonding requirements of Section ~~11-35-3030(2)(a)~~ have been satisfied. Subject to the foregoing, bonding may be provided and construction may commence for a designated portion of the construction.

(4) In a construction management at-risk project, construction may not commence for any portion of the construction until after the ~~Districtgovernmental body~~ and the construction manager at risk contract for a fixed price or a GMP regarding that portion of the construction. Prior to executing a contract for a fixed price or a GMP, a ~~Districtgovernmental body~~ shall comply with Section ~~11-35-1830~~ and Regulation ~~19-445.2120~~, if applicable. For purposes of Section ~~11-35-1830(3)(a)~~, adequate price competition exists for all components of the construction work awarded by a construction manager at-risk on the basis of competitive bids.

(5) When seeking competitive sealed proposals in a construction management at-risk procurement, the solicitation shall include a preliminary budget, and if applicable, completed programming and the conceptual design. The solicitation shall request information concerning the prospective offeror's qualifications, experience, and ability to perform the requirements of the contract, including but not limited to, experience on projects of similar size and complexity, and history of on-time, on-budget, on-schedule construction. The offeror's proposed fee may be a factor in determining the award.

(6) After all preconstruction services and final construction drawings have been completed, or prior thereto upon written determination by the procurement officer, a ~~Districtgovernmental body~~ must negotiate with and contract for a GMP with a construction manager at-risk. If negotiations are unsuccessful, the ~~Districtgovernmental body~~ may issue an invitation for bids, as allowed by this code, for the remaining construction.

(7) A ~~Districtgovernmental body~~ shall have the right at any time, and for three years following final payment, to audit the construction manager at-risk to disallow and to recover costs not properly charged to the project. Any costs incurred above the GMP shall be paid for by the construction manager at-risk.

(8) A construction manager at-risk may not self-perform any construction work for which subcontractor bids are invited, unless no acceptable bids are received or a subcontractor fails to perform. Ordinarily, the contract with a construction manager at-risk should require the construction manager at-risk to invite bids for all major components of the construction work. Section ~~11-35-4210~~ does not apply to any subcontractor bid process conducted by a construction manager at-risk.

~~19-445.2150~~. Surplus Property Management.

~~(Statutory Authority: 1976 Code Section 11-35-3810)~~

A. Definition, Authority and Mission.

(1) Definition.

Surplus property is all ~~State~~District-owned supplies and equipment, not in actual public use, with remaining useful life and available for disposal. This definition and the ~~ensuing~~ regulations exclude the disposal of solid and hazardous wastes as defined by any federal, state or local statutes and regulations. ~~Property so defined as solid or hazardous waste shall not be relocated, nor title assumed under the authority of these regulations.~~

~~(2) Authority.~~

~~The disposition of all surplus property shall be conducted by the General Service Division's Surplus Property Management Office (SPMO) at such places and in such manner determined most advantageous to the State, except as defined in Section 11-35-1580 of the Procurement Code. All government bodies must identify surplus items and declare them as such, and report them in writing to the SPMO within one hundred and eighty (180) days from the date they become surplus. The SPMO shall deposit the proceeds from such disposition, less expense of the disposition, in the State's General Fund unless a government body makes a written request to retain such proceeds, less cost of disposition, for the purchase of like kind property and the SPMO, or his designee, approves such request.~~

~~(3) Mission.~~

~~The primary mission of the Surplus Property Management Office shall be to receive, warehouse and dispose of the State's surplus property in the best interest of the State. The central warehousing of State surplus property will allow all State governmental bodies and other political subdivisions one location to acquire needed property.~~

~~The purpose of this program is to provide the following:~~

~~1. elimination of costs related to the warehousing, insurance and accounting systems necessary to fulfill an agency's surplus property responsibility;~~

~~2. maximization of proceeds by disposing of property as soon as possible after it becomes excess to an agency's needs;~~

~~3. establishment of priorities in the disposal process that encourage keeping assets in public use as long as possible;~~

~~4. conversion of unneeded fixed assets into available funds on a timely basis.~~

~~B. Reporting and Relocation of Surplus Property.~~

~~(1) Reporting.~~

~~Within one hundred eighty (180) days from the date property becomes surplus, it must be reported to the SPMO on a turn-in document (TID) designed by the SPMO. The description, model or serial number, acquisition cost, date of purchase and agency ID number shall be listed for each item.~~

~~Upon receipt of the TID, the SPMO will screen the property to determine whether it is surplus or junk as defined in these regulations.~~

~~(2) Property Relocation.~~

~~Surplus property reported shall be scheduled for relocation to the SPMO, Boston Avenue, West Columbia; or, upon consultation and agreement with the generating governmental body, remain at the governmental body's site if deemed by the SPMO to be a more cost effective method for disposal.~~

~~At such time as property is officially received by the SPMO, title will pass to the General Services' Division and shall be accounted for as described herein. Governmental bodies shall delete insurance coverage on such property. The SPMO shall carry sufficient insurance to ensure these assets are safeguarded against loss. Governmental bodies shall delete such property from their fixed asset records at this point of transfer.~~

~~Upon disposal of the property, the proceeds, less cost of disposition, will be returned to the authorized revenue center if so requested and authorized in accordance with these regulations.~~

~~If determined to be junk, disposal will be the responsibility of the generating governmental body in accordance with Section 11-35-4020 of the Procurement Code.~~

~~B. [Reserved]~~

C. Transfer of Surplus Property to Governmental Bodies, Political Subdivisions, and Eligible Nonprofit Health or Education Institutions.

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|---|
| (1) Eligibility. |
| The SPMO's primary role shall be to District may relocate surplus property to eligible Donees which includes governmental bodies, political subdivisions and nonprofit health and educational institutions. |
| The term governmental bodies means any State government department, commission, council, board, bureau, committee, institution, college, university, technical school, legislative body, agency government corporation, or other establishment or official of the executive, judicial, or legislative branches of the State. The term political subdivisions includes counties, municipalities, school districts or public service or special purpose districts. The term eligible nonprofit health or educational institutions means tax-exempt entities, duly incorporated as such by the State. SPMO The chief procurement officer shall be responsible for determining an applicant's eligibility prior to any transfer of property. |
| The SPMO chief procurement officer will maintain sufficient records to support the eligibility status of these entities. |
| (2) Determination of Sale Price. |
| The sale price for all items will be established by the Manager of Surplus Property chief procurement officer or the Manager's chief procurement officer's designee. The Manager chief procurement officer or the Manager's chief procurement officer's designee shall have the final authority to accept or reject bids received via public sale. The following categories and methods will be used: |
| (a) Vehicles: NADA loan value shall be used for the sale price. In certain instances, the most recent public sale figures and consultation with the generating governmental body shall be the basis for a sale price. |
| (b) Boats, motors, heavy equipment, farm equipment, airplanes and other items with an acquisition cost in excess of \$5,000: The sale price shall be set from the most recent public sale figures and/or any other method necessary to establish a reasonable value including consultation with the generating governmental body . |
| (c) Miscellaneous items with an acquisition cost of \$5,000 or less such as office furniture and machines, shop equipment, cafeteria equipment, etc.: A sale price will be assessed based on current market conditions. |
| (3) Terms and Conditions on Property Transferred from Warehouse. |
| For any purchases made under this subsection, the purchasing entity will certify that all items acquired will be for the sole benefit of the buying institution and that no personal use will be involved. This certification will be formalized by the agreement signed at the time eligibility is established. The following terms and conditions will be set forth therein: |
| (1) Property must be placed into public use within one (1) year of acquisition and remain in use one (1) year from the date placed into actual use. |
| (2) Property which becomes unusable may be disposed of prior to the one-year limitation with the approval of the SPMO chief procurement officer. |
| A utilization visit may be made by authorized personnel of the SPMO chief procurement officer. All vehicles and property with an acquisition cost in excess of \$5,000 require a utilization review during the twelve-month period from date of transfer to ensure the property is in public use. |
| (A) Any misuse of property will be reported in writing to the SPMO's Manager chief procurement officer by the utilization staff of the SPMO chief procurement officer. The SPMO Manager chief procurement officer shall have the authority to suspend all further purchases until a determination can be made under Subsection B. If warranted, the matter shall be referred to the proper law enforcement authority for full investigation. |
| (B) Upon determination that misuse of property has occurred, purchasing privileges will be terminated and not restored until the buying governmental body, political subdivision, or nonprofit health or educational institution pays to the District SPMO the fair market value of the item(s) misused or returns the misused property to the District SPMO. |
| (4) Disposition Cycles for Surplus Property. |

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| An appropriate cycle methodology as determined in the SPMO's chief procurement officer's sole discretion shall be used for the disposal process of surplus property. Governmental bodies, political subdivisions and nonprofit health and educational institutions, and any other qualifying donees will be given priority over the general public to acquire the property. |
| Special items and heavy equipment, will generally follow the same disposal procedures as other property. When vehicles are the items in question, they will be held for two weeks to allow State agencies purchasing priority. However, the SPMO shall have the authority to deviate from these procedures in circumstances where cost avoidance, space requirements, market conditions, accessibility and manpower are considerations. The SPMO must document that such procedure is advantageous to the State. |
| D. Public Sale of Surplus Property. |
| (1) Public Sale Cycle. |
| Upon completion of the Donee sales cycle, the remaining items shall be made available to the public. Donees and the general public may purchase in this period, but without priority. This period has no minimum or maximum length and is determined by warehouse space and scheduled incoming property. There will also be times when property will not be made available for a Public Cycle Sale. |
| (2) Final Disposition by Competitive Public Sale. |
| When surplus property is sold via the competitive sealed bid process, notification of such sale shall be given through a Notice of Sale to be posted at the SPMO-District office at least fifteen (15) days prior to the bid opening date. The sale shall also be announced through advertisement in newspapers of general circulation, the South Carolina Business Opportunities publication and such electronic or other media as deemed appropriate by the SPMO chief procurement officer . The Notice of Sale shall list the supplies or property offered for sale; designate the location and how property may be inspected; and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for bid opening. Bids shall be opened publicly. |
| Award shall be made in accordance with the provisions set forth in the Notice of Sale and to the highest responsive and responsible bidder provided that the price offered by such bidder is deemed reasonable by the SPMO chief procurement officer or his designee. Where such price is not deemed reasonable, the bids may be rejected in whole, or in part, and the sale negotiated beginning with the highest bidder provided the negotiated sale price is higher than the highest responsive and responsible bid. In the event of a tie bid the award will be made in accordance with the tie bid procedure set forth in Section 11-35-1520(9) of the Consolidated Procurement Code . |
| Property may also be sold at a public auction by an experienced auctioneer. The Notice of Sale shall include, at a minimum, all terms and conditions of the sale and a statement clarifying the authority of the SPMO chief procurement officer , or his designee, to reject any and all bids. These auctions will be advertised in a newspaper of general circulation or on the radio, or both. |
| (3) Other Means of Disposal. |
| Some types and classes of items can be sold or disposed of more economically by some other means of disposal including barter, appraisal, electric commerce and web based sales. In such cases, and also where the nature of the supply or unusual circumstances necessitate its sale to be restricted or controlled, the SPMO-Superintendent may employ such other means provided the SPMO-Superintendent makes a written determination that such procedure is advantageous to the District State. |
| (4) Designation of Surplus Property. |
| Upon written determination by the SPMO-Superintendent that surplus property items are needed to comply with programs authorized by the legislature or by executive order of the governor exercising his statutory authority, the SPMO-Superintendent may designate surplus property items for disposal in order to comply with the program requirements. The SPMO-Superintendent will develop and implement internal guidelines and procedures for the disposal of surplus property items designated as necessary to comply with the program requirements established by the legislature or the governor. |
| E. Fee Schedule: |

~~The State Surplus Property Management Program will operate solely from service charges retained from the sale of surplus property. The Board shall establish a fee schedule sufficient to fund all program costs and it shall be reviewed by the Board as required to ensure the adequacy and equity of the Program.~~

~~F. Inventory and Accounting Systems.~~

~~(1) Forms.~~

~~Turn-in documents designed by the SPMO shall be used by all governmental bodies for reporting surplus property to the SPMO. It shall be the responsibility of the generating governmental body to obtain these forms and to furnish all information required on the form. Items received by the SPMO shall be physically checked by the SPMO against the turn-in document and a signed receipt issued to the governmental body.~~

~~(2) Tagging.~~

~~Items received by the SPMO shall be assigned an inventory number and data including generating governmental body, description of property, quantity, original acquisition cost, and other relevant information entered into an automated inventory system. Inventory tags listing all necessary information shall be attached to each item.~~

~~(3) Display.~~

~~Items shall be displayed in locations with other like commodities to allow for easy viewing.~~

~~(4) Issuing property.~~

All items sold by the ~~District~~SPMO to governmental bodies, political subdivisions and nonprofit health or educational institutions shall be recorded on a Bill of Sale and all required information shall be listed on the document. The Bill of Sale must be signed by the signatory authority of the governmental body, political subdivision or nonprofit health or educational institution as defined in Subsection C, Item 1 of these regulations. At the time of sale, the eligible entity shall receive a copy of the Bill of Sale.

~~(5) Invoicing.~~

Invoices shall be generated and mailed to the acquiring agency. All cash and accounts receivable transaction records shall be properly maintained. All transfers of funds to various accounts will be performed in accordance with these regulations.

~~(6) Deletions.~~

~~Items shall be deleted from the SPMO's inventory simultaneously with the invoicing process or by written justification from the Surplus Property Management Officer or his designee.~~

~~(7) Property sold to the public shall be paid for in full at the time of purchase.~~

Transactions shall be documented by a Bill of Sale enumerating all conditions of the sale i.e., "as is, where is," etc. and must be signed by the purchaser. Personal checks with proper identification, certified checks, or money orders made payable to the State of South Carolina or cash or credit cards shall be accepted as a form of payment. A copy of the Bill of Sale shall be presented to the purchaser as a receipt.

G. Trade In Sales.

~~Governmental bodies~~The District may trade in personal property, whose original unit purchase price did not exceed \$5,000, the trade in value of which must be applied to the purchase of new items. When the original unit purchase price exceeds \$5,000, the governmental body shall refer the matter to the ~~SPMO~~chief business official, or his designee, for disposition.

The ~~SPMO~~chief business official, or his designee, shall have the authority to determine whether the property shall be traded in and the value applied to the purchase of new like items or classified as surplus and sold in accordance with the provisions of Section ~~11-35-3820~~ of the Procurement Code. When the original purchase price exceeds \$100,000, the ~~SPMO, or his designee,~~chief business official shall make a written determination as to its reasonableness and document such trade-in transaction.

H. Definition of Junk.

Junk is ~~District~~State-owned supplies and equipment having no remaining useful life in public service and the cost to repair or to refurbish the property exceeds the value of like used equipment, or the cost of transporting the property for sale exceeds the likely recovery from a sale. Property that may be recycled

is not considered junk. The classification of property as junk is at the sole discretion of the SPMO chief business official.

I. Unauthorized Disposal.

(1) The ratification of an act of unauthorized and/or improper disposal of District/State property by any persons without the requisite authority to do so by an appointment or delegation under ~~the this Procurement Code code~~ rests with the Surplus Property Management Officer/Superintendent.

(2) Corrective Action and Liability.

In all cases, the ~~head of the disposing agency-Superintendent~~ shall prepare a written determination describing the facts and circumstances surrounding the act, corrective action being taken to prevent recurrence, and action taken against the individual committing the act and shall report the matter in writing to the SPMO Board within ten (10) days after the determination.

J. Authority to Debar or Suspend.

The procedures and policies set forth in Section ~~11-35-4220~~ of ~~the Procurement Code~~ this code shall apply to the disposal of District/State property. The authority to debar a person from participation in the public sales of District/State-owned property shall rest with the ~~Materials Management Officer~~ chief business official.

~~19-445.2152.~~ Leases, Lease/Payment, Installment Purchase, and Rental of Personal Property.

A. Justification. A District/governmental body proposing to enter into an agreement other than an outright purchase is responsible for the justification of such action. Lease, lease/purchase, installment purchase, or rental agreements are subject to the procedures of ~~the Procurement Code and these Regulations~~ this code and regulations.

B. Procedures. Upon written justification by the procurement officer of the District/governmental body of such alternate method, the following procedures will be followed:

(1) ~~The State of South Carolina~~ Standard Equipment Agreement will be used in all cases unless modifications are approved by the ~~Director of the Division of Procurement Services or his designee~~ chief business official. A District/purchasing agency may enter into an agreement for the rental of equipment without using the Standard Equipment Agreement when the agreement has a total potential value of fifteen thousand dollars or less or the agreement does not exceed ninety days in duration.

(2) Installment purchases will require ~~the governmental body to submit both a justification and purchase requisition to the appropriate chief procurement officer or his designee for processing a written determination of appropriateness.~~

(3) All lease/purchase and installment sales contracts must contain an explicitly stated rate of interest to be incurred by the District/State under the contract.

~~19-445.2155.~~ Intergovernmental Relations.

~~A. Selective Mandatory Opting.~~

~~As provided in the solicitation, local political subdivisions such as counties, municipalities, school districts, public service or special purpose districts and the Federal Government may purchase from or through the State at any time. When the appropriate chief procurement officer determines prior to establishment of a contract that localities must mandatorily opt in or out of the contract, the following procedures shall be followed:~~

~~(1) Sixty (60) days prior to establishment of a particular contract, the appropriate chief procurement officer shall publicly notify local political subdivision of the mandatory opting requirement; and~~

~~(2) Require local political subdivisions to advise the appropriate chief procurement officer within 30 days of its desire to participate in the contract.~~

~~19-445.2160~~. Assistance to Minority Businesses.

Regulation 19-445.2160 of the South Carolina Code of Laws, as amended, shall apply to Article 21 of this Code. On the date of this code's adoption, Regulation 19-445.2160 provided as follows:

A. Definitions

(1) "Minority Person" means a United States citizen who is economically and socially disadvantaged.

(2) "Socially disadvantaged individuals" means those individuals who have been subject to racial or ethnic prejudice or cultural bias because of their identification as members of a certain group without regard to their individual qualities. Such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans (including American Indians, Eskimos, Aleuts and Native Hawaiians), Asian Pacific Americans, Women and other minorities to be designated by the South Carolina Budget and Control Board or designated agency.

(3) "Economically disadvantaged individuals" means those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

(4) "A socially and economically, disadvantaged small business" means any small independent business concern which:

(a) At a minimum is fifty one (51) percent owned by one or more citizens of the United States who are determined to be socially and economically disadvantaged and who also exercise control over the business per 49 CFR Part 26, Subpart D (2006), as amended.

(b) In the case of a corporation, at a minimum, fifty-one (51) percent of all classes of voting stock of such corporation must be owned by an individual or individuals determined to be socially and economically disadvantaged who also exercise control over the business.

(c) In the case of a partnership, at a minimum, fifty-one (51) percent of the partnership interest must be owned by an individual or individuals determined to be socially and economically disadvantaged who also exercise control over the business.

(5) "Small Business" means a for-profit concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts, and qualified as a small business under the criteria and size standards in 13 C.F.R. Section 121 (1996), as amended. Such a concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

(6) "Minority Business Enterprise" is a business which has been certified as a socially and economically disadvantaged small business.

(7) "OSMBA" means the Office of Small and Minority Business Assistance.

B. Certification as a Minority Business Enterprise (MBE)

(1) A South Carolina business seeking certification as a Minority Business Enterprise must submit to OSMBA an application and any supporting documentation as may be required.

(2) Certification Process. The Certification Board within OSMBA will determine if the business is controlled and operated by socially and economically disadvantaged individuals. Upon recommendation of the Certification Board, OSMBA will certify the business as a socially and economically disadvantaged small business and issue a Certification as authorized by Section 11-35-5270 of the Procurement Code. Firms may re-apply to OSMBA one year after denied certification. Certifications are valid for five years. Firms may apply for re-certification by submitting an application and required supporting documents of eligibility.

C. Certification Board/Procedures

(1) The certification board, as defined below, is responsible for reviewing files and applications in order to determine whether a business should be recommended for approval or disapproval by the Director of the OSMBA (hereinafter referred to as the Director) as a certified business in compliance with Article 21.

(2) The certification board shall include three (3) members of the Office in which the OSMBA is located and is chaired by a member selected by the Director. The board will meet at the request of the Director.

(3) Applications for certification must be addressed to the Director. Upon receipt, OSMBA shall conduct an investigation of the applicant and provide the results to the Certification Board. Failure to furnish requested information will be grounds for denial or revocation of certification.

D. Eligibility

In order for a firm to be certified, the business must have an office in South Carolina, duly registered and licensed as a South Carolina business, it must be found to be a small independent business owned and controlled by a person or persons who are socially and economically disadvantaged. The following factors will be considered in determining whether the applicant is eligible for certification:

(1) Small Business

The business must meet the definition of small business contained in Subsection A hereof.

(2) Independent Business

a. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for certification under Article 21. In determining whether an applicant for certification is an independent business, OSMBA shall consider all relevant factors, including the date the business was established, the adequacy of its resources, and relationships with other businesses.

b. A joint venture is eligible if one of the certified business partners of the joint venture meets the standards of a socially and economically disadvantaged small business and this partner's share in the ownership, control and management responsibilities, risks and profits of the joint venture is at least 51 percent, and this partner is also responsible for a clearly defined portion of the work to be performed.

(3) Ownership and Control

a. The business must be 51 percent owned by socially and economically disadvantaged persons. The OSMBA will examine closely any recent transfers of ownership interests to insure that such transfers are not to be made for the sole purpose of obtaining certification.

b. Ownership shall be real, substantial and continuing and shall go beyond the pro forma structure of the firm as reflected in its ownership documents. The minority owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of ownership arrangements.

c. The contribution of capital or expertise by the minority or women owners to acquire their interest in the business shall be real and substantial. Examples of insufficient contributions include gifts, inheritance, a promise to contribute capital, a note payable to the business or its owners who are not socially disadvantaged and economically disadvantaged, or the participation as an employee, rather than as a manager.

d. The minority owners must have management responsibilities and capabilities including the ability to hire and fire personnel at the highest level and to exercise financial control. A previous and/or continuing employer-employee relationship between or among present owners is carefully reviewed.

e. Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purpose of this part, be considered as controlling the business.

f. Any relationship between a business that is applying for certification under Article 21 and a business which is not certified will be carefully reviewed to determine if there are conflicts with the ownership and control requirement of this section.

g. All securities which constitute ownership and/or control of a business for purposes of establishing it as a Minority shall be held directly by minorities. No securities held in trust, or by any guardian for a minor, shall be considered in determining ownership or control.

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| (4) Socially Disadvantaged |
| The only factor to be considered in determining whether a firm is socially disadvantaged is membership in a minority group which is listed in Subsection A hereof. Membership shall be established on the basis of the individual's claim that he or she is a member of one of the minority groups included in the definition of socially disadvantaged in Subsection A above and is so regarded by that particular group. |
| (5) Economically Disadvantaged |
| a. OSMBA will make a determination of whether a firm is socially disadvantaged before proceeding to make a determination of economic disadvantage. If OSMBA determines that the business owner is not socially disadvantaged, it is not necessary to make the economically disadvantaged determination. |
| b. OSMBA may consider as evidence of the business owner's economic disadvantage the following: unequal access to credit or capital; acquisition of credit under unfavorable circumstances; difficulty in meeting requirements to receive government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have restricted the owner's business development. |
| c. In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the business with which he or she is affiliated. |
| d. In considering the economic disadvantages of businesses and owners, OSMBA will make a comparative judgement about relative disadvantage. The test is not absolute deprivation, but rather whether the individuals and businesses owned by such individuals are disadvantaged in this respect. |
| e. It is the responsibility of an applicant business and its owner(s) to provide information to OSMBA about its economic situation when it seeks certification. OSMBA will be making a judgement about whether the applicant business and its socially disadvantaged owner(s) are in a more difficult economic situation than most businesses (including established businesses) and owners who are not socially disadvantaged. OSMBA is not required to make a detailed, point-to-point, accountant like comparison of the businesses involved. |
| E. Decertification |
| OSMBA reserves the right to cancel a certification at any time if a business becomes ineligible after certification. OSMBA will take action to ensure that only firms meeting the eligibility requirements stated herein qualify for certification. OSMBA will also review the eligibility of businesses with existing certifications to ensure that they remain eligible. A business organization's, ownership or control can change over time resulting in a once eligible business becoming ineligible. Certified businesses must notify OSMBA, in writing within 30 days, of changes in organization, ownership or control. When OSMBA determines that an existing business may no longer be eligible, it will file a Complaint with the Certification Board, and send a copy of the Complaint by certified mail to the business. Upon receipt of such a complaint, the Certification Board shall conduct a hearing in accordance with the procedures set forth in the Administrative Procedures Act (Section 1-23-310, et seq., Code of Laws of South Carolina, 1976, as amended). |
| 19-445 .2165. Gifts |
| A. Policy |
| It is the policy of the District State that a Districtgovernmental body should not accept or solicit a gift, directly or indirectly, from a donor if the Districtgovernmental body has reason to believe the donor has or is seeking to obtain contractual or other business or financial relationships with the Districtgovernmental body . |
| B. Future Contracts with Donors |
| Prior to accepting a gift, care should be taken to determine whether acceptance of the gift will provide the donor, directly or indirectly, an undue competitive advantage in subsequent procurements. |
| C. Definition |

For purposes of this Regulation ~~19-445.2165~~, the term “donor” means the business donating the gift and all divisions or other organizational elements of the business and any principals and affiliates of the business. For purposes of this Regulation, business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indications of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized subsequent to the gift which has the same or similar management, ownership, or principal employees as the business that made the gift. For purposes of this section, the term ‘principals’ means officers, directors, owners, partners, and persons having primary management or supervisory responsibilities within a business entity including, but not limited to, a general manager, plant manager, head of a subsidiary, division, or business segment, and similar positions.

~~19-445.2180~~. Assignment, Novation, and Change of Name.

A. “Novation agreement” is a contractual amendment by which the DistrictState recognizes a successor in interest to a DistrictState contract as provided in this regulation. The successor in interest assumes all the obligations under the contract and the transferor, when still in existence, typically guarantees the performance of the contract by the transferee.

B. No Assignment.

No DistrictState contract is transferable, or otherwise assignable, without the written consent of the ~~Chief Procurement Officer, the head of a purchasing agency, or the designee of either chief business official~~; provided, however, that a contractor may assign monies receivable under a contract after due notice from the contractor to the DistrictState.

C. Recognition of a Successor in Interest; Novation.

When in the best interest of the DistrictState, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:

(1) the transferee assumes all of the transferor’s obligations;

(2) the transferor waives all rights under the contract as against the DistrictState; and

(3) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

D. Change of Name.

When a contractor requests to change the name in which it holds a contract with the DistrictState, the procurement officer responsible for the contract may, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

~~19-445.2200~~. Administrative Review Protective Orders.

A. At the request of any party or on its own initiative, the ~~appropriate chief procurement officer~~business official or the Procurement Review Panel may issue a protective order controlling the treatment of protected information for purposes of a protest or other proceeding currently pending before it. Such information may include any information exempt from public disclosure by law, such as information exempt from disclosure under Sections ~~11-35~~ 410 and 30-4-40. The protective order shall establish procedures for application for access to protected information and for identification and safeguarding of that information. Because a protective order serves to facilitate the pursuit of a protest or other administrative proceeding by a protester through counsel, it is the responsibility of protester’s counsel to request that a protective order be issued and to submit timely applications for admission under that order.

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| Protected information received by a person pursuant to a protective order issued under this regulation shall be released only pursuant to and in compliance with the protective order. |
| B. A protective order may not prohibit a public body from releasing information which the public body must release under applicable law. A protective order may not require the release of any public record that a public body is prohibited from releasing by law. Issuance of a protective order does not preclude a party from asserting any legally cognizable privilege to withhold any document or information. |
| C. Before being permitted to view any protected information, counsel and any consultants retained by counsel who will review or utilize any protected information must file an application for access in accordance with the conditions of the protective order. To be entitled to access, an applicant must establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that there will be no significant risk of inadvertent disclosure of protected information. A consultant will not be permitted access to protected information if he or she is employed by a party to the action or is working under a contract to a party. Objections to granting an applicant access to protected information must be in writing and filed within two business days after the person receives a copy of the application for access. |
| D. Any violation of the terms of a protective order may result in the imposition of such sanctions as the <u>CPO-chief business official</u> or Procurement Review Panel, as applicable, deems appropriate, including referral to appropriate bar associations or other disciplinary bodies and restricting the individual's practice before the <u>CPO-chief business official</u> or Panel. A business aggrieved by violation of a protective order may seek enforcement of such order in any available judicial or administrative forum. |
| 19-445.3000. School District Procurement Codes; Model. |
| A. Application. |
| Under Section 11-35-5340, a school district is exempt from the South Carolina Consolidated Procurement Code (except for a procurement audit) if the district has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the Consolidated Procurement Code and regulations in effect at the time the opinion is issued. |
| B. Delegation. |
| The authority and responsibilities under Section 11-35-5340 are hereby delegated to the Materials Management Officer. |
| C. Substantially Similar. |
| To qualify for approval, a district code should largely mirror, but need not be identical to, the Consolidated Procurement Code. Because a district code needs only to be substantially similar to the consolidated procurement code and regulations, a district code may accommodate the differing context of school districts (e.g., differences between state government and local school district operations, including size, purchasing staff resources, volume and type of procurements, and structure of its governing body and executive hierarchy) as long as it preserves the sound procurement policies and practices underlying the rules found in the consolidated procurement code and regulations. |
| D. Definitions. |
| Covered District means a school district subject to the requirements of Section 11-35-5340. Model code means a model school district procurement code and any subsequent modifications to the model code, including instructions regarding how each district may customize the model code to an individual district's organizational structure. |
| E. Guidelines; Model Code. |
| By requiring a written opinion, Section 11-35-5340 provides for an exercise of judgment. The best interest of the state is served by exercising this judgment in a consistent manner. Accordingly, the Materials Management Office may publish guidance regarding its exercise of this judgment, including publication of a model code. In developing a model code, the Materials Management Officer should |

~~consult with all covered districts and the State Department of Education. Any model should be designed to serve and comply with the purposes and policies enumerated in Section 11-35-20 in the specific context of local school district operations, with due regard for minimizing administrative costs of compliance with the model code. Prior to publishing a model code, the Materials Management Officer must determine in writing that the model code is substantially similar to the provisions of the South Carolina Consolidated Procurement Code and these procurement regulations. Any school district may adopt the model code.~~

~~F. Duration of Written Opinion:~~

~~A written opinion issued pursuant to Section 11-35-5340 remains valid for a covered district's procurement code until the covered district seeks and receives a written opinion for modifications to its procurement code.~~

~~G. Effect of Adoption:~~

~~A procurement code adopted by a school district in accordance with all applicable law shall have the full force and effect of law.~~

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