

**Highlights of Recent Changes  
to  
State Procurement Statutes, Regulations, & Policy**

R. = Regulation

MPC = ABA 2000 Model Procurement Code

- I. 2007 Regulations – Regulation 19-445.2000 – Eff. May 25, 2007
  - A. General Information
    - 1. Available at:  
<http://www.procurementlaw.sc.gov/MMO/legal/DDP/>
    - 2. Effective May 25, 2007 [or 9/1/07 for certain portions; 19-445.2000(E)]
    - 3. Narrative Section-by-Section plain-English discussion included
  - B. Pre-Award Information [R.19-445.2010]
    - 1. Throughout the competitive sealed proposal process, state and non-state personnel with access to proposal information shall not disclose either the number of offerors or their identity, except as otherwise required by law. [R.19-445.2010(D)]
    - 2. Prior to the issuance of an award or notification of intent to award, whichever is earlier, the procurement officer shall not release a proposal to a person without first obtaining from that person a written agreement, in a form approved by the responsible chief procurement officer, regarding restrictions on the use and disclosure of proposals. Such agreements are binding and enforceable. [R.19-445.2010(E)]
    - 3. 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 State 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 state personnel.[R.19-445.2095(C)(1)]
  - C. Discussions – RFP Only – Post-Opening & Pre-Evaluation [R.19-445.2095(I)]
    - 1. Allows, but does not require, an exchange of information after opening and prior to evaluation or negotiations. Also allows proposal revisions.
    - 2. If discussions are conducted, the procurement officer must:
      - a. Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive.
      - b. Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any.
      - c. Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.
      - d. 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. 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.

D. Cost / Pricing Data [R.19-445.2120]

1. Section 11-35-1830(1)(b) requires contractors to submit cost or pricing data prior to the pricing of any change order exceeding an amount established by regulations.
2. Regulation provides that “Section 11-35-1830(1)(b) applies where the pricing of any change order, contract modification, or termination settlement exceeds five hundred thousand dollars . . . .” Exceptions apply.

E. Pre-Qualification

1. 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 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. [R.19-445.2132(A)]

F. Gifts

1. Gifts to Individuals - State Ethics Act
2. Gifts to Government
  - a. It is the policy of the State that a governmental body should not accept or solicit a gift, directly or indirectly, from a donor if the governmental body has reason to believe the donor has or is seeking to obtain contractual or other business or financial relationships with the governmental body. [R.19-445.2165(A)]
  - b. 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. [R.19-445.2165(B)]
  - c. Donor defined very broadly. [R.19-445.2165( C)]

II. 2008 Procurement Code Revisions – S. 282

A. General Information

1. Adapted largely from ABA’s 2000 Model Procurement Code
  - a. New model revised the ABA’s 1979 Model, upon which state code was based
  - b. Model drafted in conjunction with National Association of State Procurement Officials, the National Institute of Governmental Purchasing, the American Consulting Engineers Council, the Design Professionals Coalition, the Council on the Federal Procurement of A/E Services, the Engineers Joint Contracts Document Committee, and the National Society of Professional Engineers.
2. S. 282 supported by: Carolinas - Associated General Contractors, American Institute of Architects - South Carolina Chapter, American Council of Engineering Companies of South Carolina, Specialty Trade Associations Council (American Subcontractors Association of the Carolinas)
3. Statement of Intent: “it is the intent of the General Assembly to facilitate the use of these alternate forms of project delivery” d/n = “encourage” or “promote”
4. Excellent Model Comments - S. 282, Section 1 “ the relevant official comments to the model code, and the construction given to the model code, should be examined as persuasive authority for interpreting and construing the new code provisions created by this act”

B. Authorizes Project Delivery Methods

1. Expressly authorizes
  - a. design-bid-build (A/E using QBS / Construction w/ IFB)
  - b. construction management at risk (IFB or RFP)
  - c. operations and maintenance (any allowed w/ justification)
  - d. design-build (RFP only)
  - e. design-build-operate-maintain (RFP only)
    - (1) Involves public financing - “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 State before the award of the contract or secured by the State through fare, toll, or user charges.” [11-35-2910(9)]
    - (2) Could involve partial contractor financing?
  - f. design-build-finance-operate-maintain (RFP only)
    - (1) Contractor at risk
    - (2) No Appropriated Money - “Money appropriated by the State is not used to pay for a part of the services provided by the contractor during the contract period.” [11-35-2910(8)]
  - g. Alternate method approved by State Engineer (any allowed w/ justification)
2. Design-Bid-Build Still Default [11-35-3010; PR 19-445.2145(B)(3)]
3. Project Delivery Method Defined = a “method of configuring and administering construction projects” [R. 19-445.2145(B)(1)]
4. Not authority for alternative forms of financing public works; still need

- authority to sell or encumber property or to take on debt.
5. QBS (qualifications based selection) still default for A/E unless CM at-risk, DB, DBOM, DBFOM [11-35-3015(2)(a)]
- C. Subcontractor Rules
1. Mandatory Subcontractor Listing - still applies only to design-bid-build [11-35-3020(b)(i)]
  2. Restrictions on Subcontractor Substitution - applies to all construction procurements. To the extent the government requires that subcontractors be identified, those identified must be used absent statutorily allowed excuse. [11-35-3021(4)]
- D. Pre-Qualification - New Rules [11-35-3023]
1. OSE approval & supervision required
  2. Invitation must state evaluation criteria, which must be used
  3. All must be ranked; basis for ranking in writing
  4. In DBB
    - a. Only available “ if the construction involved is unique in nature, over ten million dollars in value, or involves special circumstances, as determined by the State Engineer”
    - b. Used only to identify qualified / not to limit number
      - (1) minimum requirements must be published
      - (2) Offers must be sought from all businesses that meet the published minimum requirements
      - (3) OSE procedures established - see OSE Manual - Very Objective
  5. In DB / DBOM / DBFOM - may be used to limit competition due to high costs of participation [11-35-3024(2)(c)(i)]
- E. DB / DBOM / DBFOM – **Special Rules**
1. **“Design Requirements”**
    - a. Requirement – must be included in RFP [11-35-3024(2)(a)]
    - b. Defined – written description of the infrastructure facility, including:
      - (1) required features, functions, characteristics, qualities, and properties
      - (2) anticipated schedule, including start, duration, and completion
      - (3) estimated budgets for design, construction, operation, and maintenance
      - (4) may, but need not, include drawings and other documents *illustrating the scale and relationship* of the features, functions, and characteristics of the project - *not details*
    - c. Purpose - “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 State with the benefit of having responses from competitors that meet the same RFP requirements.” [R. 19-445.2145(K)(2)]
    - d. Concept

- (1) “The starting gate for these competitions is the statement of “design requirements” in the RFP, which establishes a *common minimum threshold of owner requirements* in these competitions. The finish gate is the submission of “proposal development documents” by offerors in response to the RFP.” MPC, opening commentary.
- (2) “Government prepares a functional description that sets forth only the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance. . . . If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, “design-build” competitions in which major design decisions are already set forth in the design requirements – known in the industry as “detail-build” – are not likely to produce innovation in the integration of design and construction. “Detail-build” procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity.“ MPC §5-101, cmt.2.(emphasis added)

2. **“Proposal Development Documents”**

- a. Requirement – solicitation must require [11-35-3024(2)(b)]
  - (1) Regulations may describe exceptions for design-build, but do not. [11-35-3015(5)] [See also MPC §5-202(4), cmt. 2. & MP Regs. R5-202.02]
- b. Defined - “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.” [11-35-2910(14)]
- c. Purpose - The purpose and intent . . . 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 . . .* [R. 19-445.2145(K)(3).]

3. **Independent Peer Reviewer** [11-35-3024(3)(b)]

- a. Requirement - Must be acquired in DB, DBOM, and DBFOM

- procurements, as required by OSE Manual [11-35- 2910(11)]
- b. Process - State hires IPR proposed by successful contractor. [11-35-2910(11)] “If a governmental 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” [11-35- 2910(11) & PR 19-445.2145(A)(7).]
- c. Defined - “[A] person who has been awarded a contract with the State for an independent, contemporaneous, peer review of the design services provided to the State by a DBO or DBFO Producer.” [PR 19-445.2145(A)(7).] A person providing “additional architectural and engineering services . . . in design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurements.” [11-35- 2910(11)]
- d. Purpose -
- (1) “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.*” [11-35-2910(11)]
  - (2) “The Independent Peer Reviewer provides an *independent professional peer review of key elements of the design of major public facilities.* The Independent Peer Reviewer’s function is not to conduct a second design alongside the designers of record. The Independent Peer Reviewer’s purpose is *to provide the government with independent professional advice and assurance that key design elements of the project are consistent with the functional description in the Request for Proposals and with the common law standard of professional care.* The Independent Peer Reviewer’s contractual relationship and professional obligation is to the [State]. By requiring that the offeror recommend an appropriate Independent Peer Reviewer (upon which the offeror is evaluated), the professional quality of the Independent Peer Reviewer is assured to be high.” MPC § 5-204(3), cmt.
  - (3) The independent peer reviewer function is applied to these types of procurements because these project delivery methods typically include contract periods for operations and maintenance of between 15 and 25 years. In design-build-operate-maintain and design-build-finance-operate-maintain procurements, a high portion of the contract price is devoted to operation, maintenance, and (in the case of design-build-finance-operate-maintain) to financing concerns. The government has heightened, but practical, interests: (a) to ensure that initial design is consistent with the applicable

standard of care; (b) to preserve the government's investment in the project during the contract period; and (c) to provide increased flexibility in the event a termination for convenience or for default is in the government's interest. An independent, contemporaneous, peer review by a highly-qualified professional designer will help to ensure that the contractor's design comports with good engineering and architectural practice at the time the services are rendered." MPC § 5-101(7), cmt. 2.

4. **Evaluation Factors** - mandatory minimum factors [11-35-3024(3)(a)]
    - a. demonstrated compliance with the "Design Requirements"
    - b. offeror qualifications
    - c. financial capacity
    - d. project schedule
    - e. **PRICE** (life-cycle price may be used for design-build-operate-maintain and design-build-finance-operate-maintain) procurements
    - f. other factors allowed
    - g. Independent Peer Reviewer, if used
  5. **Short List** prior to Discussions & Evaluations [11-35-3024(2)(c)(ii)]
    - a. Includes "responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award"
    - b. Number to be short listed must be stated in RFP
  6. **Stipends** - may be paid to unsuccessful offerors [11-35-3024(2)(c)(iii)]
    - a. Encourages competition when cost to participate is high (e.g., energy performance contracts)
    - b. Terms and amount must be stated in RFP
  7. **OSE Oversight** of Evaluation Process [11-35-3024(4)]
  8. **Operations & Maintenance Security** (not required)
    - a. operations period surety bonds
    - b. letters of credit
    - c. guarantees security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services
  9. **Payment & Performance Bonds**
    - a. Does not have to include that "portion of the contract price specified in the contract that does not include the cost of operation, maintenance, and finance" 11-35-3030(2)(a)
- F. CM at-Risk / CM-GC – Special Rules
1. Expressly allows "contract with a construction manager at risk may be executed before completion of design" [11-35-2910(3)]
  2. Payment & Performance bonds are not required during the project's preconstruction or design phase, if construction does not commence until they have been provided. [11-35-3030(2)(a)(iv)]
- III. 2008 Regulations - Eff. May 2008
- A. Pre-Bid Conferences - Limits on making them mandatory:
1. "Pre-bid conferences may not be made mandatory absent a written determination by the 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.” [R. 19-445.2042]

2. “Since 1970, the United State's Comptroller General has ruled that the failure to attend a mandatory pre-bid conference is not grounds for rejecting a bid. In doing so, the CG presented a strong case that mandatory pre-bid conferences are anti-competitive.” [From explanation for R. 19-445.2042]

B.

(A275, R303, S950)

**AN ACT TO AMEND SECTION 59-53-630, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO THE POWERS OF THE DENMARK TECHNICAL COLLEGE AREA COMMISSION, SO AS TO ALLOW THE COMMISSION TO ENTER INTO GROUND LEASE AGREEMENTS WITH PRIVATE ENTITIES UPON APPROVAL BY THE STATE BUDGET AND CONTROL BOARD; TO AMEND SECTIONS 59-53-740, 59-117-65, 59-125-130, 59-127-85, 59-130-60, AND 59-133-60, ALL RELATING TO THE AUTHORITY TO ENTER INTO GROUND LEASE AGREEMENTS, SO AS TO PROVIDE THAT TRANSACTIONS ENTERED INTO PURSUANT TO THE RESPECTIVE SECTIONS ARE NOT EXEMPT FROM COMPLIANCE WITH CHAPTER 35 OF TITLE 11; AND BY ADDING SECTION 59-53-290 SO AS TO ALLOW THE AREA COMMISSION OF TRI-COUNTY COLLEGE TO ENTER INTO GROUND LEASE AGREEMENTS WITH PRIVATE ENTITIES UPON APPROVAL BY THE STATE BUDGET AND CONTROL BOARD.**

Be it enacted by the General Assembly of the State of South Carolina:

**Denmark Technical College Area Commission ground lease agreements**

SECTION 1. Section 59-53-630 of the 1976 Code is amended to read:

“Section 59-53-630. (A) The commission has the same powers as provided by Article 1, Chapter 53, Title 59 of the 1976 Code, and in addition must prepare and submit its annual budget for approval to the State Board of Technical and Comprehensive Education.

(B) Denmark Technical College shall be funded in accordance with the provisions of Section 6 of Act 654 of 1976.

(C) The Denmark Technical College Area Commission, with the approval of the State Budget and Control Board, may enter into one or more ground lease agreements with a private entity in which the private entity provides all services necessary for the creation and operation of an on-campus student housing facility including, but not limited to, financing, designing, constructing, managing, operating, maintaining, and related services. Upon expiration of the ground lease agreement term, the private entity shall surrender to the Denmark Technical College Area Commission such premises with the existing buildings,

other structures, and improvements constructed and located on the premises, in the same condition as when the construction of the buildings, other structures, and improvements were completed, with only natural and normal wear and tear excepted. The State Budget and Control Board must first approve all ground lease agreement terms and conditions including the consideration involved. The full faith and credit of the State toward the lease obligations must not be pledged, and a statement to the contrary is deemed null and void as a matter of public policy. The private entity may be a nonprofit organization. The State Budget and Control Board approval required shall be in lieu of or a substitute for other approval required by another provision of law or regulation in connection with the undertaking of the private entity and Denmark Technical College. However, the private entity and the Denmark Technical College Area Commission shall adhere to fire, life, and safety codes as required by the Office of the State Engineer.

(D) Neither this section, nor the approval required by this section, exempts any transaction or entity from complying with Chapter 35 of Title 11.”

#### **Florence-Darlington Technical College ground lease agreements**

SECTION 2. Section 59-53-740 of the 1976 Code, as added by Act 201 of 2004, is amended by adding at the end to read:

“(E) Neither this section, nor the approval required by this section, exempts any transaction or entity from complying with Chapter 35 of Title 11.”

#### **University of South Carolina ground lease agreements**

SECTION 3. Section 59-117-65 of the 1976 Code is amended by adding at the end to read:

“Neither this section, nor the approval required by this section, exempts any transaction or entity from complying with Chapter 35 of Title 11.”

#### **Winthrop University ground lease agreements**

SECTION 4. Section 59-125-130 of the 1976 Code is amended by adding at the end to read:

“Neither this section, nor the approval required by this section, exempts any transaction or entity from complying with Chapter 35 of Title 11.”

**South Carolina State University ground lease agreements**

SECTION 5. Section 59-127-85 of the 1976 Code is amended by adding at the end to read:

“Neither this section, nor the approval required by this section, exempts any transaction or entity from complying with Chapter 35 of Title 11.”

**College of Charleston ground lease agreements**

SECTION 6. Section 59-130-60 of the 1976 Code is amended by adding at the end to read:

“Neither this section, nor the approval required by this section, exempts any transaction or entity from complying with Chapter 35 of Title 11.”

**Francis Marion University ground lease agreements**

SECTION 7. Section 59-133-60 of the 1976 Code is amended by adding at the end to read:

“Neither this section, nor the approval required by this section, exempts any transaction or entity from complying with Chapter 35 of Title 11.”

**Tri-County Technical College Area Commission ground lease agreements**

SECTION 8. Article 3, Chapter 53, Title 59 of the 1976 Code is amended by adding:

“Section 59-53-290. (A) The Area Commission of Tri-County Technical College, with the approval of the State Budget and Control Board, may enter into one or more ground lease agreements with a private entity in which the private entity provides all services necessary for the creation and operation of an on-campus facility, the purpose of which must be determined by the commission including, but not

limited to, financing, designing, constructing, managing, operating, maintaining, and related services. Upon expiration of the ground lease agreement term, the private entity shall surrender to the college the premises with the existing buildings, other structures, and improvements constructed and located on the premises, in the same condition as when the construction of the buildings, other structures, and improvements were completed, with only natural and normal wear and tear excepted. The State Budget and Control Board shall first approve all ground lease agreement terms and conditions including the consideration involved. The full faith and credit of the State toward the lease obligations may not be pledged, and a statement to the contrary is deemed null and void as a matter of public policy. The approval required is in lieu of or a substitute for other approval required by another provision of law or regulation in connection with the undertaking of the private entity and the college; however, the private entity and the college shall adhere to fire, life, and safety codes as required by the Office of the State Engineer.

(B) The Area Commission of Tri-County Technical College, upon the approval of the State Budget and Control Board, may enter into a lease or lease purchase agreement with a private entity for the entity to occupy a college facility or a facility to be built by the college on college property for the purpose of conducting an entrepreneurial or commercial activity.

(C) The Area Commission of Tri-County Technical College, upon approval of the State Budget and Control Board, may enter into a ground lease with a private entity for the private entity to build a facility on property of the college in which the private entity will conduct an entrepreneurial or commercial activity consistent with the scope and mission of the college.

(D) In implementing the provisions of subsections (B) and (C), full compliance with the provisions of Article X, Section 11 of the Constitution of this State is required.

(E) Neither this section, nor the approval required by this section, exempts any transaction or entity from complying with Chapter 35 of Title 11.”

**Time effective**

SECTION 9. This act takes effect upon approval by the Governor.

Ratified the 29<sup>th</sup> day of May, 2008.

Vetoed by the Governor -- 6/4/08.

Veto overridden by Senate -- 6/5/08.

Veto overridden by House -- 6/5/08.

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# ARTICLE 5 – PROCUREMENT OF INFRASTRUCTURE FACILITIES AND SERVICES

## Part A – Definitions

### §5-101 Definitions.

- (1) *Architectural and Engineering Services* means:
- (a) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this Subsection;
  - (b) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
  - (c) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including: studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

#### COMMENTARY:

(1) The revision to the definition of architectural and engineering services adopts the federal statutory definition of such services codified at 40 U.S.C. 541. See also 48 C.F.R. Chapter 1, Section 36.102. This change is intended to promote a unified national definition of architectural and engineering services, to accurately describe the services design professionals typically provide, and to minimize transaction costs imposed on vendors of design services that arise from arcane differences in the definition of such services among state and local jurisdictions. This definition has been routinely applied for many years on federally supported state/local infrastructure projects for water, wastewater, transit, and highway projects.

(2) The 1979 edition of the Code included the following definition of “Architect-Engineer Services and Land Surveying Services”:

“Architect-Engineer Services and Land Surveying Services are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of this State.”

(3) The new definition promotes closer integration of project feasibility and evaluation services with the evaluation of design and project alternatives. Current nationwide efforts to improve overall Infrastructure Asset Management techniques and strategies reflects a growing need for public owners to assess the effects of alternative designs, technologies, projects, schedules, and finance methods on initial and life-cycle quality, cost, and time of delivery of entire collections of infrastructure facilities. Public owners need to structure long-term strategies for the design, construction, operation, and maintenance of collections of infrastructure facilities. The American Consulting

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Engineers' Council's present focus on value based delivery systems, for instance, is one example of how an integrated approach to the procurement of design and related services encourages the design professional's role as a trusted advisor in the simultaneous use of a variety of project delivery and finance methods.

- (2) *Design-bid-build* means a project delivery method in which the Purchasing Agency sequentially awards separate contracts, the first for architectural and engineering services to design the project and the second for construction of the project according to the design.

### COMMENTARY:

This definition is new to the Code, although design-bid-build is a proven, commonly used public procurement method throughout the United States that was previously authorized under the 1979 Code. Included within the concept of design-bid-build is a widely used variation known as construction management at risk. The Code permits the [State] to elect to employ construction management at risk or design-bid-build, based upon the authority contained in Section 5-202(2)(b).

- (3) *Design-build* means a project delivery method in which the Purchasing Agency enters into a single contract for design and construction of an infrastructure facility.

### COMMENTARY:

This definition is new to the Code. Design-build is a productive, competitive alternative to design-bid-build and construction management at risk when the government has established the functional requirements (or design criteria) of a project. The Code defines these "functional requirements" or "design criteria" as "design requirements" in Section 5-101 (6).

- (4) *Design-build-finance-operate-maintain* means a project delivery method in which the Purchasing Agency enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. No [State] funds are appropriated to pay for any part of the services provided by the contractor during the contract period.

### COMMENTARY:

(1) This definition is new to the Code. Design-build-finance-operate-maintain is a proven delivery method in common use throughout the world and in American antiquity. Design-build-finance-operate-maintain integrates long-term operation and maintenance, as well as project finance, into a single competition. Design-build-finance-operate-maintain depends on the prior establishment of functional requirements of a project.

(2) Design-build-finance-operate-maintain has characteristics distinct from design-build-operate-maintain as defined in Section 5-101(5). In design-build-finance-operate-maintain, no agency funds are appropriated to pay for any part of the services provided by the contractor during the contract period. This distinction is important in the statutory scheme, since the government's competitive sealed proposal process is structured on the premise that offerors will be required to finance the project, with no expectation of state appropriations. This project delivery method should be carefully and wisely used, since design-build-finance-operate-maintain makes practical sense only where government has made a preliminary determination that project revenues are sufficient, over the length of the proposed contract, to cover design, construction, finance, and operations.

- (5) *Design-build-operate-maintain* means a project delivery method in which the Purchasing Agency 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 funds

required to pay for the services provided by the contractor during the contract period are either appropriated by the [State] prior to award of the contract or secured by the [State] through fare, toll, or user charges.

**COMMENTARY:**

This definition is new to the Code. Design-build-operate-maintain integrates long-term operation and maintenance into a single competition. Design-build-operate-maintain depends on the prior establishment by the government of the functional requirements of a project. Note the differences in the definition of design-build-operate-maintain from that of design-build-finance-operate-maintain. Projects which are partially or completely funded by direct public appropriations or by publicly imposed user charges, fares, or tolls are defined in the Code as design-build-operate-maintain projects.

- (6) *Design requirements* means the written description of the infrastructure facility or service to be procured under this Article, including:
- (a) required features, functions, characteristics, qualities, and properties that are required by the [State];
  - (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.

**COMMENTARY:**

(1) This definition is new to the Code. The revised code requires that design requirements be set forth in Requests for Proposals that solicit proposals using the design-build, design-build-operate-maintain, and design-build-finance-operate-maintain project delivery methods. See Section 5-201 (1) and 5-202.

(2) The Code flexibly defines design requirements because the specifics of each project vary. Government prepares a functional description that sets forth only the essential features of each project, including anticipated schedule, and estimated budget for design, construction, operation, and maintenance. The integrated procurement methods – design-build, design-build-operate-maintain, and design-build-finance-operate-maintain – permit the government to use the competitive process to test for higher quality, lower price, and quicker delivery. If the design requirements go beyond functional description into particular design, construction, finance, or operational requirements, the scope and the intensity of this competition is compromised, to the detriment of both government and offerors. For example, “design-build” competitions in which major design decisions are already set forth in the design requirements – known in the industry as “detail-build” – are not likely to produce innovation in the integration of design and construction. “Detail-build” procurements split the professional design function between government and the contractor, an allocation that leads to confusion and disputes over liability for design, for construction results, and for performance problems. The Code encourages government: (1) to prepare design requirements for each project before a procurement method is selected; and (2) to procure the design function from a single entity.

- (7) *Independent Peer Reviewer Services* are additional architectural and engineering services provided to the [State] in 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.

**COMMENTARY:**

(1) This definition is new to the Code and is applicable to design-build-operate-maintain and design-build-finance-operate-maintain projects, that is, those procurements in which the design function is integrated with both construction and operations.

(2) The independent peer reviewer function is applied to these types of procurements because these project delivery methods typically include contract periods for operations and maintenance of between 15 and 25 years. In design-build-operate-maintain and design-build-finance-operate-maintain procurements, a high portion of the contract price is devoted to operation, maintenance, and (in the case of design-build-finance-operate-maintain) to financing concerns. The government has heightened, but practical, interests: (a) to ensure that initial design is consistent with the applicable standard of care; (b) to preserve the government's investment in the project during the contract period; and (c) to provide increased flexibility in the event a termination for convenience or for default is in the government's interest. An independent, contemporaneous, peer review by a highly-qualified professional designer will help to ensure that the contractor's design comports with good engineering and architectural practice at the time the services are rendered.

(3) The Code requires that the independent peer reviewer be identified by each offeror during the competitive process, and the experience and qualifications of each particular proposed reviewer is made an evaluation factor by Section 5-204(3)(b). Each offeror has strong incentive to select a highly-qualified reviewer, in whom both the government and the offeror have confidence.

(8) *Infrastructure Facility* means a building; structure; or networks of buildings, structures, pipes, controls, and equipment 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.

**COMMENTARY:**

This definition is new to the Code. The addition of the term "infrastructure facility" facilitates the Code's treatment of design, construction, finance, and operations as separate or integrated functions.

(9) *Operations and Maintenance* means a project delivery method whereby the Purchasing Agency enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

**COMMENTARY:**

This definition is new to the Code. Contracts for operations and maintenance services offer governments flexible alternatives to utilize competitive procurement processes to combine initial strategies for delivering an infrastructure facility with long-term strategies to operate and maintain either new or existing facilities. Design-bid-build or design-build can be followed by an operations and maintenance procurement to provide for the overall delivery of an infrastructure facility and service. Many governments will continue to produce new facilities using either the design-bid-build or design-build project delivery method, followed by long-term operations and maintenance directly by public employees. The Code gives procurement officials the flexibility to use competitive sealed bidding to acquire all or a portion of the supplies and services required to maintain and operate infrastructure facilities.

- (10) *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.

**COMMENTARY:**

This definition is new to the Code. The Code requires that proposal development documents be solicited in Requests for Proposals that use design-build, design-build-operate-maintain, and design-build-finance-operate-maintain project delivery methods. See Section 5-204(2)(b).

**DEFINITIONAL CROSS-REFERENCES:**

|                               |         |           |
|-------------------------------|---------|-----------|
| “Change Order”                | Section | 1-301(2)  |
| “Chief Procurement Officer”   | Section | 1-301(3)  |
| “Construction”                | Section | 1-301(4)  |
| “Contract”                    | Section | 1-301(5)  |
| “Contract Modification”       | Section | 1-301(6)  |
| “Contractor”                  | Section | 1-301(7)  |
| “Cost-Reimbursement Contract” | Section | 3-101(1)  |
| “Data”                        | Section | 1-301(8)  |
| “Designee”                    | Section | 1-301(9)  |
| “Invitation for Bids”         | Section | 3-101(3)  |
| “May”                         | Section | 1-301(14) |
| “Person”                      | Section | 1-301(15) |
| “Procurement”                 | Section | 1-301(16) |
| “Procurement Officer”         | Section | 1-301(17) |
| “Public Notice”               | Section | 1-301(18) |
| “Purchase Description”        | Section | 3-101(4)  |
| “Purchasing Agency”           | Section | 1-301(19) |
| “Regulation”                  | Section | 1-301(20) |
| “Request for Proposals”       | Section | 3-101(5)  |
| “Responsible Bidder”          | Section | 3-101(6)  |
| “Responsive Bidder”           | Section | 3-101(7)  |
| “Services”                    | Section | 1-301(21) |
| “Shall”                       | Section | 1-301(22) |
| “Specification”               | Section | 4-101     |
| “Supplies”                    | Section | 1-301(24) |
| “Written” or “In Writing”     | Section | 1-301(26) |

**Part B – Contracting for Infrastructure Facilities and Services**

**§5-201 Project Delivery Methods Authorized.**

- (1) The following project delivery methods are authorized for procurements relating to infrastructure facilities and services in this [State]:
- (a) Design-bid-build (including construction management at-risk);
  - (b) Operations and maintenance;
  - (c) Design-build;
  - (d) Design-build-operate-maintain;
  - (e) Design-build-finance-operate-maintain.

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- (2) Participation in a report or study that is subsequently used in the preparation of design requirements for a project shall not disqualify a firm from participating as a member of a proposing team in a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless such participation would provide the firm with a substantial competitive advantage.

### COMMENTARY:

(1) The purpose of this Part is to provide procurement officials with adequate authority to conduct procurement transactions by fair and open competition under varying market conditions in order to satisfy public needs for infrastructure-related supplies, services, and construction at the most economical prices. This Article does not compel government procurement officials to use only one of these methods, or to contract for maintenance and operations services which could be done internally. Rather, the Article permits any one or more of the common components of an infrastructure facility procurement – design, construction, operations and maintenance, and finance – to be procured competitively by contract, either separately or in combination with one or more other elements.

(2) The Code permits integrated project delivery methods to be used as well, including design-build, design-build-operate-maintain, and design-build-finance-operate-maintain. The integration of design with construction (design-build), or design with construction and operations (design-build-operate-maintain), or design with finance, construction, and operations (design-build-finance-operate-maintain) offers significant quality, cost, and time benefits to government, to taxpayers, and to ratepayers, in appropriate circumstances.

## §5-202 Source Selection Methods Assigned to Project Delivery Methods.

- (1) *Scope.*

This Section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section 5-201 (Project Delivery Methods Authorized), except as provided in Section 3-204 (Small Purchases), 3-205 (Sole Source Procurement), 3-206 (Emergency Procurements), and 3-207 (Special Procurements).

- (2) *Design-bid-build.*

- (a) Design: Architectural and Engineering Services.

The qualifications based selection process set forth in Section 5-205 (Design: Architectural and Engineering Services) shall be used to procure architectural and engineering services in design-bid-build procurements.

- (b) Construction.

Competitive sealed bidding, as set forth in Section 3-202 (1)(b) (Competitive Sealed Bidding), shall be used to procure construction in design-bid-build procurements [, except where regulations authorize the use of competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals), for contracts for construction management at-risk].

### COMMENTARY:

The bracketed language should be adopted by those jurisdictions wishing to include “construction management at-risk” as one of the available purchasing options for the construction component of design-bid-build procurement.

The intent of the Code is to permit the procurement of a construction manager, prior to the completion of design, to perform the construction function.

(3) *Operations and Maintenance.*

Contracts for operations and maintenance shall be procured as set forth in Section 3-201 (Methods of Source Selection).

**COMMENTARY:**

Contracts for operations and maintenance services offer governments flexible, competitive procurement processes to combine initial strategies for delivering an infrastructure facility with long-term strategies to operate and maintain either new or existing facilities. Design-bid-build or design-build can be followed by an operations and maintenance procurement to provide for the overall delivery of an infrastructure facility and service.

(4) *Design-build.*

Contracts for design-build shall be procured by competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals) [, except that the regulations may describe the circumstances under which particular design-build procurements will not require the submission of proposal development documents as required in Section 5-204(2)(b).]

**COMMENTARY:**

(1) The provisions of Section 5-204 (Additional Procedures Applicable to Certain Project Delivery Methods) provide additional procedures applicable to design-build procurements under Section 3-203 (Competitive Sealed Proposals.)

(2) The bracketed language provides procurement officials with the authority to exempt, by regulation, one or more design-build procurements from the requirement in Section 5-204(2)(b) that Request For Proposals for design-build services solicit proposal development documents from each offeror. The effect of this language, if used, is to permit the selection of a design-builder based primarily on qualifications. This option has the effect of applying a Qualifications Based Selection system (“QBS”) to the design-build process. Without proposal development documents, design is insufficiently developed to include a fixed price as one of the evaluation criteria at the time the design-builder is selected. This approach has been applied successfully on numerous design-build projects and is ideal where a firm limit on available funds has already been established by the public owner.

(5) *Design-build-operate-maintain.*

Contracts for design-build-operate-maintain shall be procured by competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals).

**COMMENTARY:**

The provisions of Section 5-204 (Additional Procedures Applicable to Certain Project Delivery Methods) provide additional procedures applicable to design-build-operate-maintain procurements under Section 3-203 (Competitive Sealed Proposals.)

(6) *Design-build-finance-operate-maintain.*

Contracts for design-build-finance-operate-maintain shall be procured by competitive sealed proposals, as set forth in Section 3-203 (Competitive Sealed Proposals).

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### COMMENTARY:

The provisions of Section 5-204 (Additional Procedures Applicable to Certain Project Delivery Methods) provide additional procedures applicable to design-build-finance-operate-maintain procurements under Section 3-203 (Competitive Sealed Proposals.)

## §5-203 Choice of Project Delivery Methods.

Regulations shall be promulgated describing the project delivery methods listed in Section 5-201 (Project Delivery Methods Authorized). These regulations shall:

- (a) set forth criteria to be used in determining which project delivery method is to be used for a particular project;
- (b) grant to the Chief Procurement Officer, or the head of the Purchasing Agency responsible for carrying out the project, the discretion to select an appropriate project delivery method for a particular project;
- (c) describe the bond, insurance, and other security provisions contained in Part C of this Article that apply to each project;
- (d) describe the appropriate contract clauses and fiscal responsibility requirements contained in Part D of this Article that apply to each project; and
- (e) require the procurement officer to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular project delivery method for each project.

### COMMENTARY:

(1) The 2000 revisions permit procurement officials, in a single decision-making process, to assign different project delivery methods to a number of infrastructure facilities. Numerous state and local governments are looking for ways to better allocate scarce resources across all of their infrastructure holdings. The 2000 revisions encourage procurement officials to make the project delivery decision in the context of an overall capital development program for infrastructure asset management.

(2) In addition to the project delivery methods listed in Section 5-201 and 5-202, other variations on the design-bid-build method might be used for design, construction, operations, maintenance, and, in appropriate circumstances, finance. This Section authorizes the [State] to issue appropriate regulatory guidance for the use of these project delivery methods for infrastructure facilities and services. A contract clause which simply requires separate prime contractors to cooperate and coordinate with each other without a central planning and management coordinator is not considered an acceptable method of project delivery.

(3) The specific terms in a Request for Proposal for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services will necessarily vary based upon the specific financial, engineering, architectural, and technological issues confronting a particular project. This Section of the Code authorizes the [State] to issue appropriate regulatory guidance for the application of these methods to infrastructure facilities and services.

## §5-204 Additional Procedures Applicable to Procurement of Certain Project Delivery Methods.

- (1) *Applicability.* In addition to the requirements of Section 3-203 (Competitive Sealed Proposals), the procedures in this Section shall

apply to procurements for design-build (Section 5-202(4)), design-build-operate-maintain (Section 5-202-(5)), and design-build-finance-operate-maintain (Section 5-202(6)).

- (2) *Content of Request for Proposals.* Each Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:
- (a) shall include design requirements;
  - (b) shall solicit proposal development documents; and
  - (c) may, when the [Purchasing Agency] determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:
    - (i) prequalify offerors by issuing a Request for Qualifications in advance of the Request for Proposals; and
    - (ii) select a short list of responsible offerors prior to discussions and evaluations under Subsection 3-203(6), provided that the number of proposals that will 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, provided that the amount of such stipends and the terms under which stipends will be paid are stated in the Request for Proposals.

**COMMENTARY:**

Subsection (2) establishes two requirements when the competitive sealed proposal process is applied to infrastructure projects: (1) that government clearly set forth the functional requirements of each project through design requirements, and (2) that government require qualified offerors to submit proposal development documents for evaluation. The terms “design requirements” and “proposal development documents” are defined in Section 5-101 (6) and 5-101 (10), respectively. Subsection (2)(c) adds pre-qualification, short-listing, and stipends as options. Procurement mechanisms must be sensitive to the relatively high cost of preparing “priced” offers for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain. The Code allows procurement officials to flexibly approach and resolve this issue, since it is in both parties’ interests to keep proposal costs within reasonable limits.

- (3) *Evaluation Factors.* Each Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:
- (a) 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; and

- (b) shall require each offeror, [when the contract price is estimated to exceed \$10,000,000 or when the contract period of operations and maintenance is ten years or longer] [in circumstances established by regulation], to identify an Independent Peer Reviewer whose competence and qualifications to provide such services shall be an additional evaluation factor in the award of the contract.

**COMMENTARY:**

Subsection (3) applies to design-build, design-build-operate-maintain, and design-build-finance-operate-maintain procurements only. Complex numerical analysis of numerous factors is likely to diffuse, rather than focus, competition among potential offerors. Competitive proposals can be sought through the simple statement of five or six evaluation factors: e.g. (1) demonstrated compliance with the design requirements, (2) offeror qualifications, (3) financial capacity, (4) project schedule, (5) price (or life-cycle price in appropriate circumstances), and (6) other factors. See the Commentary to §3-203(5) for a discussion of the underlying requirements for disclosure of factors and subfactors. The qualifications of the Independent Peer Reviewer may be an additional evaluation factor in design-build-operate-maintain and design-build-finance-operate-maintain procurements. The design requirements establish the key performance requirements of the project. The Code requires proposals to be submitted at the end of design development, which provides the [State] with ready comparisons of each proposal as to functional compliance, quality, price, and schedule. Proposals provide independent confirmation of the State's pre-solicitation assessment of price, time, and quality. Subsection (b) requires the use of an Independent Peer Reviewer on design-build-operate-maintain, and design-build-finance-operate-maintain contracts above a threshold dollar value. The Independent Peer Reviewer provides an independent professional peer review of key elements of the design of major public facilities. The Independent Peer Reviewer's function is not to conduct a second design alongside the designers of record. The Independent Peer Reviewer's purpose is to provide the government with independent professional advice and assurance that key design elements of the project are consistent with the functional description in the Request for Proposals and with the common law standard of professional care. The Independent Peer Reviewer's contractual relationship and professional obligation is to the [State]. By requiring that the offeror recommend an appropriate Independent Peer Reviewer (upon which the offeror is evaluated), the professional quality of the Independent Peer Reviewer is assured to be high.

**§5-205 Architectural and Engineering Services.**

- (1) *Policy.*

It is the policy of this [State] to publicly announce all requirements for Architectural and Engineering Services and to negotiate contracts for Architectural and Engineering Services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

**COMMENTARY:**

This section must be read in conjunction with Section 5-202 (Source Selection Methods Assigned to Project Delivery Methods).

- (2) *Architectural and Engineering Selection Committee.*

In the procurement of Architectural and Engineering Services, the Chief Procurement Officer or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. [The Chief Procurement Officer or the head of a Purchasing Agency, the Procurement Officer, and [the State Architect]] shall comprise the Architect-Engineer Selection Committee for each Architectural and

Engineering Services contract over [\$ ]. The Selection Committee for Architectural and Engineering Services contracts under this amount shall be established in accordance with regulations promulgated by the [Policy Office] [Chief Procurement Officer] [State]. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the [State], together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(3) *Negotiation.*

The Procurement Officer shall negotiate a contract with the highest qualified firm for Architectural and Engineering Services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the [State], negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this Section until an agreement is reached.

**COMMENTARY:**

- (1) This Section applies to procurement of all services within the scope of architecture and engineering services. The language in this section is unchanged from that contained in the 1979 Code. See Section 5-501 (1979 Code).
- (2) The principal reasons supporting this selection procedure for Architectural and Engineering Services are the lack of a definitive scope of work for such services at the time the selection is made and the importance of selecting the best-qualified firm. In general, the architect-engineer or land surveyor is engaged to represent the [State's] interests and is, therefore, in a different relationship with the [State] from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence, and availability of the three most qualified architect-engineers or land surveying firms are considered initially, and price negotiated later.
- (3) It is considered more desirable to make the qualification selection first and then to discuss the price because both parties need to review in detail what is involved in the work (for example, estimates of man-hours, personnel costs, and alternatives that the architect-engineer or land surveyor should consider in depth). Once parameters have been fully discussed and understood and the architect-engineer or land surveyor proposes a fee for the work, the

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recommended procedure requires the [State] to make its own evaluation and judgment as to the reasonableness of the fee.

(4) If the fee is fair and reasonable, award is made without consideration of proposals and fees of other competing firms. If the fee cannot be negotiated to the satisfaction of the [State], negotiations with other qualified firms are initiated. Thus price clearly is an important factor in the award of the Architectural and Engineering Services contract under this procedure. The principal difference between the recommended procedure for architect-engineer and land surveyor selection and the procedures used in most other competitive source selections is the point at which price is considered.

(5) If an enacting jurisdiction desires to use a different selection process, then it may consider the following language:

**“The Procurement Officer shall negotiate with the highest qualified firms for a contract for Architectural and Engineering Services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making such determination, the Procurement Officer shall take into account, in the following order of importance, the professional competence of offerors, the technical merits of offers, and the price for which the services are to be rendered.”**

## Part C – Bonds, Insurance, Guarantees

### §5-301 Bid Security.

- (1) *Requirement for Bid Security.* Bid security shall be required for all competitive sealed bidding for construction contracts in a design-bid-build procurement when the price is estimated by the Procurement Officer to exceed [\$100,000] [an amount established by regulation]. Bid security shall be a bond provided by a surety company authorized to do business in this State, or the equivalent in cash, or otherwise supplied in a form satisfactory to the [State]. Nothing herein prevents the requirement of such bonds on such contracts under [\$100,000] [the amount set by regulation] when the circumstances warrant.
- (2) *Amount of Security.* Bid security shall be in an amount equal to at least [5%] of the amount of the bid.
- (3) *Rejection of Bids for Noncompliance with Bid Security Requirements.* When the Invitation for Bids requires security, noncompliance requires that the bid be rejected unless, pursuant to regulations, it is determined that the bid fails to comply in a non-substantial manner with the security requirements.
- (4) *Withdrawal of Bids.* After bids are opened, they shall be irrevocable for the period specified in the Invitation for Bids (except as provided for bids in Section 3-202(6)). If a bidder is permitted to withdraw its bid (or proposal) before award, or is excluded from the competition before award, no action shall be had against the bidder or the bid security.

### §5-302 Contract Performance and Payment Bonds.

- (1) *When Required – Amounts.* When a construction, design-build, design-build-operate-maintain, or design-build-finance-operate-maintain

contract is awarded in excess of [\$100,000], the following bonds or security shall be delivered to the [State] and shall become binding on the parties upon the execution of the contract:

- (a) a performance bond satisfactory to the [State], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [State], in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance; and
- (b) a payment bond satisfactory to the [State], executed by a surety company authorized to do business in this State or otherwise secured in a manner satisfactory to the [State], 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 shall be in an amount equal to 100% of the portion of the contract price that does not include the cost of operation, maintenance, and finance.

**COMMENTARY:**

The intent is to continue the requirement expressed in the 1979 version of the Code that surety bonds be provided to secure the faithful performance of construction associated with infrastructure facilities, as well as the faithful payment of suppliers and subcontractors, irrespective of project delivery method. Paragraph (b) confirms that the surety bonds are to be provided from reputable sureties authorized to do business in the [State]. Regulations requiring sureties to be listed on the U.S. Treasury list may be one appropriate vehicle for accomplishing this goal.

- (2) *Reduction of Bond Amounts.* Regulations may authorize the Chief Procurement Officer or head of a Purchasing Agency to reduce the amount of performance and payment bonds to [50%] of the amounts established in Subsection (1) of this Section.
- (3) *Authority to Require Additional Bonds.* Nothing in this Section shall be construed to limit the authority of the [State] to require a performance bond or other security in addition to such bonds, or in circumstances other than specified in Subsection (1) of this Section.
- (4) *Suits on Payment Bonds – Right to Institute.* Every person who has furnished labor or material to the contractor or its subcontractors for the work provided in the contract, in respect of which a payment bond is furnished under this Section, and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by such person or material was furnished or supplied by such person for which such claim is made, shall have the right to sue on the payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action for the sum or sums justly due such person; provided, however,

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that any person having a direct contractual relationship with a subcontractor of the contractor, but no contractual relationship express or implied with the contractor furnishing said payment bond, shall have a right of action upon the payment bond upon giving written notice to the contractor within 90 days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material upon which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be personally served or served by other form of receipted transmittal that confirms actual delivery to the contractor at any place the contractor maintains an office or conducts its business.

- (5) *Suits on Payment Bonds – Where and When Brought.* Every suit instituted upon a payment bond shall be brought in a court of competent jurisdiction for the county or district in which the construction contract was to be performed, but no such suit shall 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 any such suit.

### COMMENTARY:

The provision of this Section with respect to suits on payment bonds essentially follows the Miller Act, 40 U.S.C. §270 (1970), and many similar State statutes. The language is unchanged in all material respects from Section 5-302 of the 1979 Code, except that subparagraph (4) is amended to authorize notice to be given by any method that produces a receipted transmittal, including registered mail, certified mail, overnight mail, or overnight delivery service.

## §5-303 Bond Forms and Copies.

- (1) *Bond Forms.* The [Policy Office] [State] shall promulgate by regulation the form of the bonds required by this Part.
- (2) *Certified Copies of Bonds.* Any person may request and obtain from the [State] 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 shall be *prima facie* evidence of the contents, execution, and delivery of the original.

## §5-304 Errors and Omissions Insurance.

Regulations shall be promulgated that specify when the Chief Procurement Officer or head of a Purchasing Agency 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 5-201 (1) (a), (c), (d), and (e).

**COMMENTARY:**

Section 5-304 is new to the revised Code. The intent of this provision is to provide flexibility to procurement officials in requiring offerors to provide appropriate errors and omissions insurance with respect to the design component of any of the four delivery methods authorized in Section 5-201 which include professional design services. Errors and omissions insurance may be of increased importance in the project delivery methods which integrate design and construction (design-build, design-build-operate-maintain, design-build-finance-operate-maintain), particularly when the successful offeror is a joint venture or special purpose corporation formed particularly for the instant project. The inclusion of the public owner as a named insured on the errors and omissions policy furnished to the contractor by the designer may be a prudent procurement strategy.

**§5-305 Other Forms of Security.**

Regulations shall be promulgated authorizing the Chief Procurement Officer or head of a Purchasing Agency to require a Request for Proposals to include 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 design-build-operate-maintain or design-build-finance-operate-maintain services:

- (a) Operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations under the project delivery methods set forth in Section 5-201 (1) (b), (d) and (e);
- (b) Letters of credit in an amount appropriate to cover the cost to the [Agency] of preventing infrastructure service interruptions for a period up to twelve months under the project delivery methods set forth in Section 5-201 (1) (b), (d) and (e); and
- (c) Appropriate written guarantees from the contractor (or depending upon the circumstances, from parent corporations) to secure the recovery of reprourement costs to the [State] in the event of a default in performance by the contractor.

**COMMENTARY:**

Section 5-305 is new to the revised Code. Design-build-operate-maintain, design-build-finance-operate-maintain, and pure operations and maintenance contracts will likely require separate forms of security to assure contract performance of infrastructure services that complies with contract requirements and is uninterrupted, even in the event of contractor default. A letter of credit setting aside immediately available funds in the event of a contractor default provides ready assurance to the government that emergency cash funds will be available to continue service if contractor termination and reprourement is necessary. A corporate guarantee may be advisable in situations where the apparent successful bidder is a joint venture, or a special purpose entity formed only to provide the procured service. Corporate or parent corporation guarantee(s) may be required to secure the payment of reprourement costs over and above the limits already secured by operations period bonds and letters of credit.

**Part D – Contract Clauses and Fiscal Responsibility****§5-401 Contract Clauses and Their Administration.**

- (1) *Contract Clauses.*

Regulations shall be promulgated requiring the inclusion in [State] contracts issued under this Article 5 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 the [State] to order in writing:
  - (i) changes in the work within the scope of the contract; and
  - (ii) changes in the time of performance of the contract that do not alter the scope of the contract work;
- (b) variations occurring between estimated quantities of work in a contract and actual quantities;
- (c) suspension of work ordered by the [State]; and
- (d) site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses promulgated by the [Policy Office] [Chief Procurement Officer] need not be included in a contract:
  - (i) when the contract is negotiated;
  - (ii) when the contractor provides the site or design; or
  - (iii) when the parties have otherwise agreed with respect to the risk of differing site conditions.

**COMMENTARY:**

(1) This language is unchanged from Section 5-401(1) of the 1979 Code. The addition of four new delivery methods – operations and maintenance, design-build, design-build-operate-maintain, and design-build-finance-operate-maintain – does not eliminate the need for regulations that incorporate standard contract clauses. The Changes, Suspension of Work, and Variations clauses are standard mechanisms for government to maintain flexibility, and should be applicable to all procurement methods in Article 5. The principles underlying the Differing Site Conditions clause still apply to the design-bid-build process, and may apply to the negotiated processes (design-build, design-build-operate-maintain, design-build-finance-operate-maintain), depending upon the government’s structuring of the competition. Procurement officials may properly decide to collect and furnish subsurface information to prospective offerors, with the intent of asking those offerors to rely on the information furnished in submitting offers. In such circumstances, a standard Differing Site Conditions clause is appropriate.

(2) The phrase “or other contract provisions” of this Section is not intended to alter the price adjustment provisions set forth in Subsection (2) of this Section. This Subsection is intended to enable the parties to deal with the effects of changes, variations in estimated quantities, suspensions of work, and differing site conditions on matters other than price or time for performance. For example, where a change order revises the specification, not only price or time for performance may be affected, but other terms or conditions such as insurance or inspection may also be affected.

(2) *Price Adjustments.*

- (a) Adjustments in price pursuant to clauses promulgated under Subsection (1) of this Section shall be computed in one or more of the following ways:

- (i) by agreement on a fixed-price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (ii) by unit prices specified in the contract or subsequently agreed upon;
  - (iii) by the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
  - (iv) in such other manner as the contracting parties may mutually agree; or
  - (v) in the absence of agreement by the parties, by a unilateral determination by the [State] of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the [State] in accordance with applicable sections of the regulations promulgated under Article 7 (Cost Principles) and subject to the provisions of Article 9 (Legal and Contractual Remedies).
- (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 3-403 (Substantiation of Offered Prices).

(3) *Additional Contract Clauses.*

Regulations shall be promulgated requiring the inclusion in [State] construction contracts of clauses providing for appropriate remedies and covering the following subjects:

- (a) liquidated damages as appropriate;
- (b) specified excuses for delay or nonperformance;
- (c) termination of the contract for default; and
- (d) termination of the contract in whole or in part for the convenience of the [State].

(4) *Modification of Required Clauses.*

The Chief Procurement Officer or the head of a Purchasing Agency may vary the clauses promulgated by the [Policy Office] [Chief Procurement Officer] under Subsection (1) and Subsection (3) of this Section for inclusion in any particular [State] construction contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided

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that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.

### COMMENTARY:

(1) The language is unchanged in all material respects from Sections 5-401 (2) through (4) of the 1979 Code. This Section directs the [Policy Office] [Chief Procurement Officer] to promulgate contract clauses that call for adjustment of price, time for performance, or other contract provisions as appropriate with respect to situations that continually develop on construction projects. It does not require these situations to be treated in any particular way, but it does require that they be anticipated and addressed.

(2) Subsection (2) permits price adjustments pursuant to any clauses promulgated under Subsection (1) to be determined in accordance with the contract terms or by agreement. Absent an agreement, the Procurement Officer will make a unilateral determination of the price adjustment which is subject to appeal under Article 9 (Legal and Contractual Remedies).

(3) In using unit prices it must be remembered that great variations in the number of units required may necessitate adjustments in the unit price.

(4) Other clauses not normally subject to the pricing formulas of Subsection (2) are also required to be included in the contract as appropriate by Subsection (3).

## §5-402 Fiscal Responsibility.

Every contract modification, change order, or contract price adjustment under a construction contract with the [State] in excess of [\$ \_\_\_\_] shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Procurement Officer shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section.

**Guidance & Best Practices**  
for  
Permissible Communications in a Competitive Sealed Proposal  
After Opening but Prior to Award

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State Procurement Office / Information Technology Management Office / State Engineer's Office  
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Version Date: November 26, 2007

**Restrictions: As expressly provided by law in R.19-445.2095(I)(4), the discussions allowed in paragraph (b) may be conducted only by procurement officers authorized in writing by the appropriate chief procurement officer.**

*Notes: (1) Regulation 19-445.2095(G) provides that "[t]he appropriate Chief Procurement Officer may develop and issue procedures which shall be followed by all agencies using the competitive sealed proposal method of acquisition." This guidance, not including the commentary, is issued pursuant to this Regulation. (2) Paragraph (B) is taken verbatim from R. 19-445.2095(I), except for the commentary. Paragraph (E)(5) is adapted from R. 19-445.2010(C). (3) For any given procurement, the term "procurement officer" is defined, for purposes of this document, as the person, or his successor, identified as such in the solicitation.*

(A) Communications After Opening, Prior to Award - Not Including Discussions [11-35-1530(6)] or Negotiations [11-35-1530(8)]. The Code and Regulations authorize the following communications after opening, prior to award. Unless the law reflects otherwise, such communications may take place at any time between opening and posting of the award notice, consistent with the underlying enabling authority.

(1) Opening. Very limited communications, if any, can take place during opening. [11-35-1530(3); R.19-445.2010(D); R.19-445.2095(C)(1)]

(2) Acceptance Period Extensions. The procurement officer may exchange information in writing with an offeror regarding a request that an offeror extend its offer acceptance period. [R.19-445.2097(C)]

(3) Minor Informalities. The procurement officer may exchange information in writing with an offeror to allow the offeror to cure, or the state to waive, any deficiency resulting from a minor informality or irregularity. [11-35-1520(8),(13); R.19-445.2095(E)]

(4) Corrections & Withdrawals. The procurement officer may exchange information in writing with an offeror regarding an offeror's request to correct or withdraw its offer. [R.19-445.2085(A)&(B); R.19-445.2095(H)(4)]

[Commentary: See commentary to item (B)(2)(d).]

(5) Questions & Answers. Most solicitations provide an opportunity for offerors to submit written questions and for the state to respond in a written amendment to the solicitation.

[Commentary: In a solicitation amendment that responds to vendor questions, the amendment should not (i) reveal the identity of any offerors,<sup>1</sup> or (ii) provide information not necessary for bidders to submit offerors. The solicitation amendment forms part of the contract documents. Draft amendments accordingly.]

(6) Clarifications. Clarifications are an exchange of information conducted to facilitate the State's understanding of a proposal - as originally submitted - by resolving substantial ambiguities in the proposal. [11-35-1520(8);<sup>2</sup> R.19-445.2080, -445.2095(E)]

(a) Clarifications may be conducted *only* to clarify an ambiguity in a proposal.

[Commentary: (1) Exchange sufficient information with the vendor to resolve the ambiguity. (2) The procurement officer is charged with limiting such exchanges to only the information necessary to determine how to read language *already existing* in the proposal. (3) A proposal is ambiguous if open to more than one reasonable interpretation or obscure in meaning, through indefiniteness of expression.<sup>3</sup> Silence is not an ambiguity. (4) Clarifications *cannot* involve an opportunity for proposal revisions. Accordingly, clarifications must be limited to determining which reasonable interpretation was intended and should *not* include new information or revisions to existing information. Identifying the correct interpretation of language requires only a limited amount of information.]

(b) Clarifications may be conducted only with offerors who have submitted proposals that are obviously responsive to the solicitation's material requirements. [R.19-445.2080] A proposal is not obviously responsive if the determination of responsiveness is dependent on the vendor's resolution of an ambiguity in its proposal.<sup>4</sup>

[Commentary: (1) Allowing the clarification of an ambiguity under Section 11-35-1520 to determine whether an offer is responsive is fundamentally inconsistent with the competitive bidding process, around which Section 11-35-1520 is written.<sup>5</sup> (2) In determining responsiveness, only the face of the proposal may be considered.<sup>6</sup>]

(c) Clarifications must be conducted with *all* obviously responsive offerors, but only substantial ambiguities need be clarified.

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<sup>1</sup> R.19-445.2010(D).

<sup>2</sup> Because Section 11-35-1520 governs competitive sealed bidding, the guidance has been drafted to apply equally to IFBs. As a practical matter, the authority to seek clarifications pursuant to Section 11-35-1520 has a very narrow application in the context of competitive sealed bidding.

<sup>3</sup> Penton v. J.F. Cleckley & Co., 486 S.E.2d 742 (S.C. 1997) ("An ambiguous contract is one capable of being understood in more ways than just one or one unclear in meaning because it expresses its purpose in an indefinite manner."), Southern Atlantic Financial Services, Inc. v. Middleton, 562 S.E.2d 482, 484 (S.C. Ct. App. 2002) ("Mere lack of clarity on casual reading is not the standard for determining whether a contract is afflicted with ambiguity. A contract is ambiguous when its terms are reasonably susceptible of more than one interpretation.") (citations omitted).

<sup>4</sup> See, generally, Protest of Cannon Associates, Inc., Case No. 2000-13 ("The Panel has decided in several cases that contacting a bidder to seek clarification of substantive portions of his bid injects the potential for abuse into the procurement process. The Panel has stated that once bids are opened and it becomes clear that a certain bidder is the winner but for an ambiguous provision in his bid, clarification would allow that bidder to manipulate his bid to insure that he receives award of the contract.").

<sup>5</sup> Protest of Abbott Laboratories, Case No. 1997-4 ("Because Ross wrote its request [for mutual termination-for-convenience rights] expressly in the bid, the MMO was compelled to interpret its meaning. The Panel has ruled repeatedly that State procurement officials cannot contact a bidder for clarification."), Protest of Two State Construction Co., Case No. 1996-2 ("The procuring agency cannot seek bid clarification on which it intends to base its decision of responsiveness. . . . The procuring agency may not seek clarification before making a determination of responsiveness, but must find a bid nonresponsive if it feels clarification of the bid is needed."), Protest of United Testing Systems, Inc., Case No. 1991-20 ("Once bids are opened and it becomes clear that a certain bidder is the winner but for an ambiguous provision in his bid, clarification would allow that bidder to manipulate his bid to insure that he receives the award of the contract."), Protest of Value Options, Case No. 2001-7 (concerning an RFP) ("[T]his clarification was clearly in violation of the Code because Magellan was not yet deemed an apparent responsive offeror as is required for Discussion with Offerors under 11-35-1530 of the Code."). See, generally, John Cibinic, Jr. and Ralph C. Nash, Jr., Formation of Government Contracts 569 (George Washington University 3d ed. 1998) ("Bids that are indefinite, uncertain, or ambiguous are normally rejected as nonresponsive.").

<sup>6</sup> Protest of Two State Construction Co., Case No. 1996-2 ("The Panel agrees with Two State that a bid must be found responsive on its face . . ."). See also Blount, Inc. v. United States, 22 Cl.Ct. 221, 226 (Cl. Ct. 1979) ("Matters of bid responsiveness must be discerned solely by reference to the materials submitted with the bid and facts available to the government at the time of bid opening.") and Southern Foods Group, L.P. v. State, Dept. of Educ., 974 P.2d 1033, 1047 (Haw. 1999) ("Responsiveness is determined by reference to when they are opened and not by reference to subsequent changes in a bid.") (quoting R. Nash & J. Cibinic, Federal Procurement law, 260 (3d ed.1977)).

[Commentary: Section 11-35-1520(8) mandates that *all* offers *needing* clarification must be accorded that opportunity; however, no clarification is needed if an offer contains no substantial ambiguities. The statute affords the procurement officer considerable judgment regarding whether or not an ambiguity needs clarification.]

(d) Clarifications must be conducted only by the procurement officer. Most communications should be in writing.

(e) Clarifications must be documented in writing by the procurement officer and must be included with the proposal. *Clarifications may not result in proposal revisions, only a proper interpretation of the proposal as submitted.*

[Commentary: The statute does not require the procurement officer to include with the proposal all communications exchanged for the purpose of clarifying an ambiguity. Rather, the statute requires that the clarification "must be documented in writing by the procurement officer and included with the [proposal]." This distinction recognizes that clarifications under Section 11-35-1520 do *not* involve proposal revisions. Obviously, the procurement officer cannot legitimately include text in a proposal not agreed to by the offeror. Likewise, the procurement officer cannot - as part of clarifications under 11-35-1520 - include text in a proposal that is unnecessary to resolve the ambiguity. Because the communications exchanged during clarifications can result in receiving information unnecessary to resolving the ambiguity, the procurement officer should document and include in the proposal only that text agreed to by the offeror that is necessary to resolve the ambiguity. Because clarifications do not involve an opportunity for proposal revisions, clarifications *must* be limited to determining which reasonable interpretation of existing proposal text was intended and *cannot* include new information or revisions to existing information.]

(7) Responsibility. The procurement officer may exchange information in writing with an offeror regarding its responsibility.

(a) Such information may be requested at any time prior to award. [11-35-1580; R. 19-445.2125(B)]

[Commentary: While responsibility can be determined earlier in the process, responsibility is often determined only for the apparent successful offeror, after evaluation and shortly before award. If special standards of responsibility have been established, the procurement officer may find it more efficient to identify which offerors meet the special standards early in the process. Exchanges to acquire this information are allowed after opening and prior to award. Most RFPs include one or more evaluation criteria that contemplate an offeror's capabilities. Adding such additional information to the proposal would provide that offeror an unfair opportunity to enhance its proposal.]

(b) Information gathered after opening to determine responsibility - either generally or regarding special standards of responsibility - cannot be added to the documents to be evaluated and ranked, i.e., the proposal.

[Commentary: Most RFPs include one or more evaluation criteria that contemplate an offeror's capabilities. Adding such additional information to the proposal would provide that offeror an unfair opportunity to enhance its proposal.]

(8) Oral Presentations / Demonstrations. Oral presentations and demonstrations may not be conducted except as part of the evaluation process.

(a) Oral presentations are used only for understanding an offeror's proposal in order to facilitate evaluation. Demonstrations involve an evaluation of an offeror's product.

Presentations and demonstrations must be consistent with and limited to the equipment, supplies, services, information technology, pricing, terms, and conditions provided in the offeror's proposal.

(b) Under the control of the procurement officer, people directly involved in evaluating proposals may attend, participate, and ask questions of offerors during an oral presentation or demonstration. Such communications may not (i) communicate demands or weaknesses or deficiencies to an offeror, (ii) include or take place during negotiations, or (iii) result in proposal revisions.

(c) People participating or attending an oral presentation or demonstration must agree to the same limitations applicable to those with access to proposals - R. 19-334.2010(d) & (e).

(9) Cost / Pricing Data. If allowed by law, the procurement officer may exchange information with an offeror regarding its cost or pricing data. [11-35-1830; R.19-445.2120] Generally, the procurement officer will request cost or pricing data only in conjunction with negotiations or prior to making an award without negotiations to the highest ranked offeror.

#### (B) Discussions with Offerors<sup>7</sup>

**Special Restrictions: Do not conduct discussions under this paragraph (B):**  
**(1) unless you have been authorized under R.19-445.2095(I)(4),**  
**(2) for procurements with an expected value below \$500,000,**  
**(3) for solicitations issued prior to September 3, 2007.**

[Commentary: Paragraph (B) is taken verbatim from R. 19-445.2095(I), except for the commentary.]

(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.

[Commentary: Please see related training materials for illustrations.]

(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

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<sup>7</sup> The communications addressed in R.19-445.2095(I) are authorized by the following statute:

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.* All offerors whose proposals, in the procurement officer's sole judgment, need clarification must be accorded that opportunity.

S.C. Code Ann. § 11-35-1530(6) (emphasis added).

procurement officer's judgment, based on the particular facts of each acquisition. In conducting discussions, the procurement officer shall:

(a) Control all exchanges;

[Please see attached Form Letter for Discussions with Offerors.]

(b) Advise in writing every offeror of all deficiencies in its proposal, if any, that will result in rejection as non-responsive;

[Commentary: R.19-445.2095(J) identifies the basic reasons for rejecting an individual proposal.<sup>8</sup>]

(c) Attempt in writing to resolve uncertainties concerning the cost or price, technical proposal, and other terms and conditions of the proposal, if any;

[Commentary: (1) Unlike clarifications conducted under Section 11-35-1520, discussions conducted under Section 11-35-1530 expressly include proposal revisions. While discussions are not designed to generate unrestrained enhancements to or further development of proposals, they are conducted for the purpose of clarification and should provide all offerors an opportunity to clarify significant ambiguities in their proposals. (2) Language can be ambiguous either because it can be fairly understood in more than one way or because it expresses its purpose in an indefinite manner.<sup>9</sup> (3) Because discussions do involve an opportunity for proposal revisions, discussions may include new information or revisions to existing information. However, discussions are not designed to allow unrestrained enhancements to or further development of proposals. Accordingly, the extent that new information or revisions to existing information is allowed should be limited to addressing the ambiguity. The procurement officer can exercise some control by carefully phrasing any questions sent to an offeror.]

(d) Resolve in writing suspected mistakes, if any, by calling them to the offeror's attention.

[Commentary: (1) Discussions are conducted for the purpose of clarification, not to allow enhancements to or further development of a proposal. Accordingly, mistakes only include unintended errors, defects, or omissions that the procurement officer has reason to suspect based solely on examining the proposal document.<sup>10</sup> Examples include apparent clerical errors, suspected errors in pricing, inadvertent omissions (e.g., perhaps a missing numbered page). The opportunity to identify mistakes must not be used to identify areas an agency may want an offeror to improve or further develop. (2) Discussions to correct mistakes

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<sup>8</sup> Formerly, rejection of individual proposals was governed by R. 19-445.2070. Under the revised (2007) regulations, rejection is governed by R. 19-445.2095(J), which reads as follows:

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 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 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.

S.C. Code Ann. Regs. § 19-445.2095(J).

<sup>9</sup> *Penton v. J.F. Cleckley & Co.*, 486 S.E.2d 742 (S.C. 1997) ("An ambiguous contract is one capable of being understood in more ways than just one or one unclear in meaning because it expresses its purpose in an indefinite manner.").

<sup>10</sup> Mistakes evident on the face of an offer can be corrected under R.19-445.2085; however, the scope of corrections allowed under that regulation is much narrower than what is correctable under R. 19-445.2095. E.g., *Protest of Millers of Columbia, Inc.*, Case No. 1989-3 ("Although it was evident on the face of the bid that a mistake had been made, that mistake could not be corrected from the information available.") and *Protest by Ohmeda Company*, Case No. 1987-5.

should not be used to alter elements of a proposal that were intended by the offeror but later found to be disadvantageous because, in that situation, there was no mistake. (3) Communications regarding mistakes should identify the suspected mistake and the reason for the suspicion,<sup>11</sup> but should not suggest correct answers, solutions, or improvements.]

(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.

[Commentary: (1) No "discussions" are conducted with any offeror whose proposal is classified as unacceptable. (2) Under Section 11-35-1530(6), discussions are conducted only "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements." Discussions are not conducted to coach offerors regarding how to enhance or further develop their proposals. Likewise, discussions do not involve either negotiations or revisions to the solicitation. (3) Except as required in Paragraph (2)(b) - (e), discussions need not be in writing. Discussions may include communications to assure an offeror's full understanding of the solicitation requirements,<sup>12</sup> but all offerors must be accorded fair and equal treatment. (4) When communicating to an offeror the information required by items (2)(b) through (2)(d) above, do not share one offeror's communications with another offeror. (5) After opening, you must not allow proposal revisions except in conjunction with, and in accordance with, discussions conducted pursuant to this paragraph. Paragraph (2)(e) strictly limits the type of proposal revisions allowed. Revisions beyond those allowed may result in rejection of a proposal. If an offeror submits revisions beyond those allowed, the procurement officer has two choices. First, as noted in the form letter, the procurement officer may reject the revisions and consider only the initial proposal (which may be non-responsive). The regulation requires only "a reasonable opportunity to submit any . . . revisions." Second, the procurement officer may conduct further discussions, i.e., advise the offeror in writing of the deficiency and provide an opportunity to cure with proposal revisions. ]

(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.

[Commentary: (1) With one exception, discussions are conducted prior to final ranking because (i) discussions are used to facilitate responsiveness, and section 11-35-1530(7) allows only responsive offers to be ranked, and (ii) discussions lead to proposal revisions, and evaluations must consider the entire proposal. Discussions can occur after best and final offers have been solicited and received. (2) Multiple rounds of discussions may be conducted, subject to all other applicable rules, especially the regarding fair and equal treatment of all offerors.]

(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.

[Commentary: Selected procurement officers will be authorized individually, in writing, by the appropriate CPO.]

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<sup>11</sup> The suspected error could relate to an offeror's pricing. You may suspect a defective price based on how the offeror's price compares with other prices. When communicating to the offeror the reason for the suspicion, do not indicate how the offeror's price compares with any other offeror's pricing.

<sup>12</sup> S.C. Code Ann. § 11-35-1530(6) (Authorizing discussions "for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements."); R. 19-445.2095(J)(1) ("[T]o the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted."). Discussions conducted to clarify the state's requirements may not involve amending the solicitation. As with pre-opening conferences, the state's requirements may not be changed by such discussions. See R. 19-445.2042 ("Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment.").

(C) Negotiations. Negotiation is an exchange between the State and an offeror undertaken with the intent of allowing the offeror to revise its proposal. 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. Negotiated proposal revisions may affect the scope of the proposed contract, so long as the changes are within the general scope of the request for proposals.

(1) Negotiations are optional.<sup>13</sup>

(2) Negotiations must be controlled by the procurement officer.

[Commentary: Manage vendor expectations by conveying the following rules to the vendor in writing: (i) the potential for submitting cost and pricing data, (ii) the potential for a BAFO process, (iii) the absence of any obligation to provide formal notice that negotiations have been terminated with an individual offeror, (iv) the restrictions imposed by the solicitation on communications by the offeror.]

(3) The primary objective of negotiations is to maximize the State's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation. [11-35-310(28); 11-35-1530(9)]

(4) Negotiations are tailored to each offeror's proposal.

(5) Negotiations must be meaningful. The procurement officer is encouraged to discuss those aspects of an offeror's proposal that could, in the opinion of the procurement officer, be altered or explained to enhance materially the proposal's potential for award. However, the procurement officer is not required to discuss every area where the proposal could be improved. The scope and extent of negotiations are a matter of procurement officer judgment. Negotiations must be conducted in good faith.

[Commentary: (1) Negotiations present an opportunity for offerors to expand, strengthen, enlarge, enhance, or further develop their proposals, so long as the changes are (i) within the general scope of the request for proposals and (ii) do not involve a significant revision to the solicitation's mandatory requirements. The Procurement Officer can facilitate such improvements by identifying concerns with an offeror's proposal, including significant deficiencies, weaknesses, excesses, ambiguities, uncertainties, omissions, errors or mistakes. Concerns may involve any aspect of an offeror's proposal, including price, past performance, references, technical approach, and any matter evaluated. As an example, the procurement officer could identify excesses or "gold plating" that could be eliminated along with a price concession. (2) Issues raised during the evaluation process may provide valuable information for negotiations. (3) As noted in the limits on exchanges - item (e) below, a procurement officer should avoid engaging in unfair negotiation practices, such as providing one firm's innovative technical solution to another offeror or aggressively identifying concerns in negotiations with one offeror while failing to undertake any such effort in negotiations with another offeror.]

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<sup>13</sup> Award may be made to the highest ranking offeror without conducting negotiations. Section 11-35-1530(9) provides that "the procurement officer, in his sole discretion and not subject to review under Article 17, may proceed in any of the manners" allowed in subparagraphs (a) through (c). As used in that sentence, the term "sole discretion" applies to the decision whether or not to negotiate at all, i.e., whether to make an award to the highest ranked offeror without negotiations or to conduct negotiations. Section 11-35-1530(9)(a) provides that "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." As used in this sentence, the term "sole discretion" applies to the decision whether - in the face of an unsuccessful negotiation - to move down to the next highest ranked vendor, to re-negotiate with a higher ranked vendor, or to request best and final offers. The conclusion that negotiations were unsuccessful is *not* a matter of the procurement officer's sole discretion, but it is final unless arbitrary or capricious.

(6) Negotiations should not involve a significant change to the solicitation. If the procurement officer makes changes to the solicitation's mandatory requirements or general scope, the procurement officer must request best and final offers pursuant to paragraph (d) below.

(7) Once negotiations with a vendor begin, the procurement officer must attempt, in good faith, to successfully negotiate a "satisfactory contract" - without regard to any other proposals received. (Negotiations are not an opportunity to re-evaluate one offeror against another. That step took place during the evaluation and ranking.) If the procurement officer concludes that a satisfactory contract cannot be negotiated, the procurement officer may then proceed as allowed by section 11-35-1530(8). In evaluating whether or not a contract is satisfactory, the stated evaluation factors must form the ultimate basis of your decision.

(8) Under 11-35-1530(9), the contract file must contain the basis on which the award is made. Under 11-35-310(28), the award of the contract must be made on the basis of the evaluation factors stated in the solicitation. If award is made to the highest ranked offeror without negotiations, the basis for award should appear in the written determination explaining the evaluation and ranking. If award is made after negotiations, the basis for award must also explain (i) the results of any negotiations, and (ii) the reasons any negotiations were unsuccessful, i.e., why a satisfactory contract could not be negotiated with an offeror.

(9) If an offeror's initial price is considered unacceptable, make a determination of price unreasonableness under R. 19-445.2095(J)(1)(c) prior to ranking. Negotiations are not a mechanism to price shop. If a price reduction cannot be negotiated, the BAFO process may be appropriate.

#### (D) Best and final offers (BAFO)

(1) Best and final offers may be requested only after evaluation and final ranking pursuant to Section 11-35-1530(7). Best and final offers may be sought before, after, or without negotiations. If negotiations are started, those negotiations must be concluded before the procurement officer may seek best and final offers.

(2) In conducting a BAFO, the procurement officer should (i) make changes to the solicitation's required scope of work, as long as the changes are within the general scope of the request for proposals, and (ii) provide all responsive offerors an opportunity to submit their best and final offers.

[Commentary: BAFOs are most commonly used to achieve price reductions that could not be achieved through negotiations, typically because the price reduction requires a reduction in the scope of work required by the solicitation that cannot be achieved properly in negotiations.]

(3) A request for best and final offers must be issued as an amendment to the request for proposals. The request shall include:

- (a) Any changes to the request for proposals allowed by Section 11-35-1530(8)(c);
- (b) Notice that negotiations are concluded, if applicable;

- (c) Notice that this is the opportunity to submit a best and final offer;
- (d) A common cutoff date and time that allows a reasonable opportunity for submission of written best and final offers; and
- (e) Notice that if any best and final offer is submitted, it must be received by the date and time specified and is subject to the rules governing submission of proposals.

[Commentary: (1) Amendments for purposes of a BAFO are not posted to the internet. Rather, they are sent only to actual offerors. (2) Best and final offers should be submitted as proposal revisions. Include appropriate instructions in your request for BAFOs.]

(4) Following receipt of best and final offers, all responsive offerors must be evaluated and ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the request for proposals. Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State. [11-35-310(28); 11-35-1530(9)] After conducting a BAFO, the procurement officer may not conduct successive rounds of best and final offers.

(5) Do not disclose confidential information derived from proposals submitted by or negotiations conducted with competing offerors. [11-35-1530(8)]

(6) If, in the judgment of the procurement officer, based on market research or otherwise, a solicitation amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, such that additional sources likely would have submitted offers had the substance of the amendment been known to them, the procurement officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition.

(E) Limits on exchanges. Prior to the issuance of an award or notification of intent to award, whichever is earlier, state personnel involved in an acquisition shall not engage in conduct that—

[[Commentary: (1) Limitations outlined in Paragraph (E) apply to all types of communications addressed in this guidance. (2) Prior to posting an award, or intent to award, regulation 19-445.2010(D) prohibits anyone from disclosing either the number of offerors or their identity unless required to do so by law. (3) Regulation 19-445.2010(c) allows the responsible procurement officer to authorize certain disclosures in writing.]]

(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 an offeror's price without that offeror's permission. However, the procurement officer may inform an offeror that its price is considered by the State to be too high, or too low;

(4) Reveals the names of individuals providing reference information about an offeror's past performance; or

(5) Knowingly furnishes source selection information to anyone other than 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: (a) proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices, (b) source selection plans, (c) technical evaluation plans, (d) technical evaluations of proposals, (e) cost or price evaluations of proposals, (f) information regarding which proposals are determined to be reasonably susceptible of being selected for award, (g) rankings of responses, proposals, or competitors, (h) reports, evaluations of source selection panels or evaluation panels, (i) 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.

-end-

#### FOR IFBs & RFPs

CLARIFICATION (NOV 2007): Pursuant to Section 11-35-1520(8), the Procurement Officer may elect to communicate with you after opening for the purpose of clarifying either your offer or the requirements of the solicitation. Such communications may be conducted only with offerors who have submitted an offer which obviously conforms in all material aspects to the solicitation. Clarification of an offer must be documented in writing and included with the offer. Clarifications may not be used to revise an offer or the solicitation. [Section 11-35-1520(8); R.19-445.2080]

#### FOR RFPs Only

DISCUSSIONS & NEGOTIATIONS (NOV 2007): Submit your best terms from a cost or price and from a technical standpoint. Your proposal may be evaluated and your offer accepted without any discussions, negotiations, or prior notice. Ordinarily, nonresponsive proposals will be rejected outright. Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. If improper revisions are submitted, the State may elect to consider only your unrevised initial proposal. [11-35-1530(6); R.19-445.2095(I)] The State may also elect to conduct negotiations, beginning with the highest ranked offeror, or seek best and final offers, as provided in Section 11-35-1530(8). If negotiations are conducted, the State may elect to disregard the negotiations and accept your original proposal.

**SUBMITTING CONFIDENTIAL INFORMATION (AUG 2002):** (An overview is available at [www.procurement.sc.gov](http://www.procurement.sc.gov)) For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "CONFIDENTIAL" every page, or portion thereof, that Offeror contends contains information that is exempt from public disclosure because it is either (a) a trade secret as defined in Section 30-4-40(a)(1), or (b) privileged and confidential, as that phrase is used in Section 11-35-410. For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the words "TRADE SECRET" every page, or portion thereof, that Offeror contends contains a trade secret as that term is defined by Section 39-8-20 of the Trade Secrets Act. For every document Offeror submits in response to or with regard to this solicitation or request, Offeror must separately mark with the word "PROTECTED" every page, or portion thereof, that Offeror contends is protected by Section 11-35-1810. All markings must be conspicuous; use color, bold, underlining, or some other method in order to conspicuously distinguish the mark from the other text. Do not mark your entire response (bid, proposal, quote, etc.) as confidential, trade secret, or protected! If your response, or any part thereof, is improperly marked as confidential or trade secret or protected, the State may, in its sole discretion, determine it nonresponsive. If only portions of a page are subject to some protection, do not mark the entire page. By submitting a response to this solicitation or request, Offeror (1) agrees to the public disclosure of every page of every document regarding this solicitation or request that was submitted at any time prior to entering into a contract (including, but not limited to, documents contained in a response, documents submitted to clarify a response, and documents submitted during negotiations), unless the page is conspicuously marked "TRADE SECRET" or "CONFIDENTIAL" or "PROTECTED", (2) agrees that any information not marked, as required by these bidding instructions, as a "Trade Secret" is not a trade secret as defined by the Trade Secrets Act, and (3) agrees that, notwithstanding any claims or markings otherwise, any prices, commissions, discounts, or other financial figures used to determine the award, as well as the final contract amount, are subject to public disclosure. In determining whether to release documents, the State will detrimentally rely on Offeror's marking of documents, as required by these bidding instructions, as being either "Confidential" or "Trade Secret" or "PROTECTED". By submitting a response, Offeror agrees to defend, indemnify and hold harmless the State of South Carolina, its officers and employees, from every claim, demand, loss, expense, cost, damage or injury, including attorney's fees, arising out of or resulting from the State withholding information that Offeror marked as "confidential" or "trade secret" or "PROTECTED". (All references to S.C. Code of Laws.)