



**The Republic of the Marshall Islands Procurement Regulations
Pursuant to the Procurement Code Act 1988**

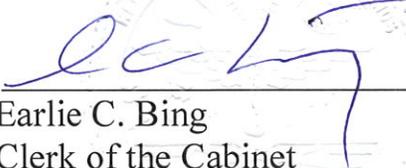


Clerk of the Cabinet

P.O. BOX 2
MAJURO, MARSHALL ISLANDS 96960

I, **EARLIE C. BING**, Clerk of the Cabinet in the Republic of the Marshall Islands, do hereby certify, that on December 22, 2020, Cabinet approved the attached regulations as the *Republic of the Marshall Islands Procurement Regulations 2020* ("Regulations"); that Cabinet instrument C.M. 269 (2020), accompanied by a certified copy of these Regulations, is hereby filed pursuant to Section 106 of the *Administrative Procedures Act 1979* ("APA"); and that said Regulations shall come into effect on the date of approval from Cabinet pursuant to Section 106 of the APA and Section 3, Part I of these Regulations.

IN WITNESS WHEREOF, I have
hereunto set my hand and affixed
the seal of the Office of the Clerk
of the Cabinet, at Majuro, this 22
day of December 2020.



Earlie C. Bing
Clerk of the Cabinet

TABLE OF CONTENTS

<u>PART I – PURPOSES, CONSTRUCTION AND APPLICATION</u>		9
§1.	BACKGROUND, PURPOSES, RULES OF CONSTRUCTION.	9
	A. Authority and Purpose.	9
	B. Interpretation.	9
	C. Definitions.	9
	D. Singular-Plural and Gender Rules.	12
§2.	APPLICATION.	12
	A. General Application.	12
	B. Application to Government Procurement.	12
§3.	CITATION.	12
<u>PART II – PROCUREMENT ORGANIZATION</u>		13
§1.	GOVERNMENT PROCUREMENT POLICY OFFICE.	13
	A. Chief Secretary Shall Manage the Policy Office.	13
	B. Administrative Support.	13
§2.	CHIEF PROCUREMENT OFFICER.	13
	A. Central Procurement Officer.	13
	B. Delegation of Authority by the Chief Procurement Officer.	13
	C. Authority to Delegate.	13
	D. Statutory Exceptions to Delegation.	13
	E. Decision to Delegate.	14
	F. Delegation of Authority to Officials.	14
<u>PART III – PROCUREMENT OF PROFESSIONAL SERVICES</u>		14
§1.	AUTHORITY TO CONTRACT FOR CERTAIN SERVICES.	14
§2.	NOTICE.	14
§3.	EXEMPTIONS.	15
§4.	SPECIFICATIONS OF EXEMPTED ITEMS	15
<u>PART IV – SPECIFICATIONS</u>		16
§1.	SPECIFICATIONS.	16
	A. Definitions.	16
§2.	GENERAL PURPOSE AND POLICIES.	16
	A. Use of Functional or Performance Descriptions.	16
	B. Preference for Commercially Available Products.	17
§3.	DUTIES OF THE CHIEF PROCUREMENT OFFICER.	17

A.	Authority to Prepare Specifications.....	17	
B.	Relationship With Purchasing Agencies.....	17	
§4.	MAXIMUM PRACTICABLE COMPETITION.....		18
	PART V – COMPETITIVE PROCUREMENT METHOD		18
§1.	USE OF THE BID COMMITTEE.....		18
§2.	BIDDERS LISTS.....		18
A.	Purpose.....	18	
B.	Public Availability.....	18	
§3.	METHODOLOGY.....		18
A.	Contracts.....	18	
B.	Invitation for Bids Notice.....	18	
C.	Bidding Time.....	19	
D.	Bidder Submissions.....	19	
E.	Bid Samples and Descriptive Literature.....	19	
F.	Public Announcement.....	20	
G.	Pre-Bid Conferences.....	20	
H.	Amendments to Invitations for Bids.....	20	
I.	Pre-Opening Modification or Withdrawal of Bids.....	21	
J.	Late Bids, Late Withdrawals, and Late Modifications.....	21	
K.	Receipt, Opening, and Recording of Bids.....	22	
L.	Mistakes in Bids.....	22	
M.	Bid Evaluation and Award.....	24	
N.	Low Tie Bids.....	25	
O.	Documentation of Award.....	25	
P.	Publicizing Awards.....	25	
Q.	Multi-Step Sealed Bidding.....	25	
R.	Pre-Bid Conferences in Multi-Step Sealed Bidding.....	26	
S.	Procedure for Phase One of Multi-Step Sealed Bidding.....	26	
T.	Mistakes During Multi-Step Sealed Bidding.....	28	
U.	Procedure for Phase Two.....	28	
	PART VI – COMPETITIVE SEALED PROPOSALS		29
§1.	USE OF COMPETITIVE SEALED PROPOSALS.....		29
A.	Justifications.....	29	
B.	Determinations.....	29	
§2.	METHODOLOGY.....		29
A.	Notice.....	29	

B.	Content	30
C.	Proposal Preparation Time.....	30
D.	Form of Proposal.....	30
E.	Amendments to Requests for Proposals.....	30
F.	Modification or Withdrawal of Proposals.....	30
G.	Late Proposals, Late Withdrawals, and Late Modifications.	30
H.	Receipt and Registration of Proposals.	31
§3.	EVALUATION OF PROPOSALS.	31
A.	Evaluation Factors in the Request for Proposals.....	31
B.	Proposal Discussions with Individual Offerors.	31
C.	Mistakes in Proposals.....	32
	<u>PART VII – SMALL PURCHASES</u>	33
§1.	SMALL PURCHASES.	33
§2.	APPLICATION.	33
§3.	AUTHORITY TO MAKE SMALL PURCHASES.	33
A.	Amount.....	34
B.	Existing Government Contract for Item.....	34
C.	Available from One Business Only.	34
D.	Competition for Small Purchases Between \$500 and \$25,000.....	34
E.	Competition for Small Purchases of Construction.....	34
F.	Small Purchases of \$500 or Less.	34
	<u>PART VIII – SOLE SOURCE PROCUREMENT</u>	34
§1.	CONDITIONS FOR USE OF SOLE SOURCE PROCUREMENT.	34
§2.	NEGOTIATION IN SOLE SOURCE PROCUREMENT.	35
§3.	RECORD OF SOLE SOURCE PROCUREMENT.	35
	<u>PART IX – EMERGENCY PROCUREMENTS</u>	35
§1.	EMERGENCY PROCUREMENTS.	35
A.	Definition of Emergency Conditions.	36
§2.	SCOPE OF EMERGENCY PROCUREMENTS.	36
§3.	AUTHORITY TO MAKE EMERGENCY PROCUREMENTS.	36
§4.	QUARTERLY ANTICIPATED PROCUREMENT NEEDS FILED WITH THE SECRETARY OF FINANCE.	36
	<u>PART X – SPECIAL PROCUREMENTS</u>	36
	PART XI – PROCUREMENT OF INFRASTRUCTURE FACILITIES AND SERVICES	37
§1.	DEFINITIONS.	37

A.	Infrastructure-Related Definitions.....	37
B.	Application.....	38
§2.	CONTRACTING FOR INFRASTRUCTURE FACILITIES AND SERVICES	38
A.	Project Delivery Methods Authorized.....	38
B.	Flexibility.....	39
C.	Participation in Prior Reports or Studies.....	39
D.	Source Selection Methods Assigned to Project Delivery Methods.....	39
E.	Construction Management (At-Risk).....	40
F.	Proposal Development Documents Not Required.....	40
G.	Choice of Project Delivery Methods.....	41
H.	Application of Regulation and General Policy.....	41
I.	Lease, Buy, or Build.....	42
J.	Additional Procedures.....	43
K.	Additional Procedures for Design-Build.....	43
§3.	ARCHITECTURAL AND ENGINEERING SERVICES.	45
A.	Policy.....	45
B.	\$25,000 or Less A&E Selection Committee.....	45
C.	\$25,000 or More A&E Selection Committee.....	45
D.	Negotiation and Award of Contract.....	46
E.	Determinations Required Prior to Procurement of Services.....	47
F.	Annual Statement of Qualifications and Performance Data.....	47
G.	Public Announcement of Required Architectural and Engineering Services.....	48
H.	Evaluation of Statements of Qualifications and Performance Data.....	48
I.	Selection of Firms for Discussions.....	49
J.	Selection of the Most Qualified Firms.....	49
	PART XII – CANCELLATION BIDS OR PROPOSALS	49
§1.	CANCELLATION OF INVITATIONS FOR BIDS OR REQUESTS FOR PROPOSALS.	49
§2.	CANCELLATION OF SOLICITATION-NOTICE.	49
§3.	CANCELLATION OF SOLICITATION; REJECTION OF ALL BIDS OR PROPOSALS.	50
A.	Prior to Opening.....	50
B.	After Opening.....	50
C.	Documentation.....	50
§4.	REJECTION OF INDIVIDUAL BIDS OR PROPOSALS.	50
A.	General.....	50
B.	Notice in Solicitation.....	50
C.	Reasons for Rejection.....	50

D.	Notice of Rejection.	51
E.	"All or None" Bids or Proposals.	51
F.	Disposition of Bids or Proposals.	51
§5.	QUALIFICATIONS AND DUTIES	51
A.	Responsibility of Bidders and Offerors.	51
B.	Application.	52
C.	Standards of Responsibility.	52
D.	Ability to Meet Standards.	52
E.	Duty Concerning Responsibility.	52
F.	Written Determination of Non-responsibility Required.	53
§6.	PREQUALIFICATION PROCEDURES.	53
A.	Procedures for Suppliers and Contractors.	53
§7.	SUBSTANTIATION OF OFFERED PRICES.	53
A.	Meaning of Terms Not Defined in the Code.	53
B.	Submission of Substantiating Data.	54
	<u>PART XIII – TYPES OF CONTRACTS</u>	54
§1.	TYPES OF CONTRACTS.	54
A.	Contract Provisions.	55
B.	Contract Selection Policy.	55
C.	Requirement of Accounting System.	56
§2.	MULTI-YEAR CONTRACTS.	56
A.	Use.	56
B.	Multi-Term Contract Procedure.	56
C.	Incremental Award.	57
D.	Multiple Award.	58
	PART XIV - PRE-LITIGATION RESOLUTION OF CONTROVERSIES	58
§1.	AUTHORITY TO RESOLVE PROTESTED SOLICITATIONS AND AWARDS.	58
A.	APPLICATION.	59
B.	PROTEST.	59
§2.	DEFINITIONS.	59
§3.	COMPLAINT TO CHIEF PROCUREMENT OFFICER.	59
A.	Filing of Protest.	59
B.	Requested Information; Time for Filing.	60
C.	Stay of Procurements During Protest.	60
D.	Making Information on Protests Available.	60
E.	Decision by the Chief Procurement Officer.	60

F.	Request for Reconsideration.....	61	
G.	Effect of Judicial or Administrative Proceedings.....	61	
§4.	SOLICITATIONS OR AWARDS IN VIOLATION OF LAW		61
A.	Application.....	61	
B.	Determination that Solicitation or Award Violates Law.....	61	
C.	Remedies Prior to an Award.....	62	
D.	Canceling or Revising Solicitation or Proposed Award to Comply with Law...	62	
E.	Remedies After an Award.....	62	
§5.	SUSPENSION.		62
A.	Initiation.....	62	
B.	Effect of Decision.....	63	
§6.	DEBARMENT		63
A.	Initiation of Debarment Action.....	63	
B.	Request for Hearing.....	63	
C.	Notice of Hearing.....	63	
D.	Authority of Hearing Officer.....	64	
E.	Hearings Procedures.....	64	
F.	Determination of Hearing Officer; Final Decision.....	64	
G.	Effect of Debarment Decision.....	65	
§7.	MAINTENANCE OF LIST OF DEBARRED AND SUSPENDED PERSONS.		65
	PART XV – PROCUREMENT APPEALS BOARD	65	
§1.	CREATION OF THE PROCUREMENT APPEALS BOARD.		65
A.	Terms and Qualifications of Members of the Board.....	65	
§2.	RULES OF PROCEDURE.		66
§3.	DECISIONS OF THE PROCUREMENT APPEALS BOARD.		66
§4.	JURISDICTION OF THE PROCUREMENT APPEALS BOARD.		66
§5.	PROTEST OF SOLICITATIONS OR AWARDS.		66
A.	Scope.....	66	
B.	Time Limitations on Filing a Protest or an Appeal.....	67	
C.	Decision.....	67	
D.	Standard of Review for Factual Issues.....	67	

PART I – PURPOSES, CONSTRUCTION AND APPLICATION

§1. Background, Purposes, Rules of Construction.

A. Authority and Purpose.

The Republic of the Marshall Islands *Procurement Code Act 1988* (“Code”) governs procurement for the Government of the Republic of the Marshall Islands (“Government”). According to §111 of the Code, the Policy Office (“Policy Office”) shall be created in the Office of the Chief Secretary. Under §145 of the Code, the Policy Office has authority and responsibility to promulgate regulations, consistent with the Code, governing the procurement, management, control and disposal of any and all supplies, services and construction procured by the Government. Accordingly, the Policy Office established the following regulations (“Regulations”) that shall apply to all Government procurement.

B. Interpretation.

These Regulations shall be construed and applied to promote the underlying purposes and policies in accordance with §103 of the Code.

C. Definitions.

Word and expressions used in these Regulations that are also used in the Code shall have the meanings respectively assigned to them in the Code. The words defined in this Section shall have the meanings set forth below whenever they appear in these Regulations unless:

- i. the context in which they are used clearly requires a different meaning; or
- ii. a different definition is prescribed for a particular Article or provision.
 1. *Adequate Price Competition*. Price competition exists if competitive sealed proposals are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be “adequate” unless the Chief Procurement Officer or the head of the Purchasing Agency (or Bid Committee if applicable) determines in writing that such competition is not adequate.
 2. *Bid Committee* means a committee used for different procurement processes as determined by these Regulations or the Chief Procurement Officer. The Bid Committee shall consist of members as appointed by the Policy Office. The Bid Committee composition shall be determined by the Policy Office. No one from the Policy Office may be a member of the Bid Committee.
 3. *Code* means the Republic of the Marshall Islands *Procurement Code Act* of 1988.
 4. *Compact of Free Association* means the 1986 Agreement between the United States and the Government governing the relationship between them including financial assistance to the Government in exchange for international defense authority.
 5. *Construction* means the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation,

routine repair, or routine maintenance of any existing public infrastructure facility, including structures, buildings, or real property.

6. *Days* mean calendar days. In computing any period of time prescribed by these Regulations, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a Government holiday, in which event the period shall run to the end of the next business day.
7. *Electronic* means electrical, digital, magnetic, optical, electromagnetic, or any other similar technology.
8. *Employee* means an individual drawing a salary from a governmental body, whether elected or not, and any non-compensated individual performing personal services for any governmental body. Employee is sometimes referred to as the Government employee.
9. *Established Market Price* means a current price, established by usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of the price.
10. *Government* means the executive, legislative and judicial branch of the Government of the Republic of the Marshall Islands and all its political subdivisions including Local Government Councils and State-Owned Enterprises.
11. *Government Cabinet* means heads of executive ministries in the Government nominated from members of the Nitijela by the President and appointed by the Speaker of the Nitijela.
12. *High Court* means a court of competent jurisdiction to handle claims under these Regulations.
13. *Invitation for Bids* means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
14. *May* denotes the permissive. However, the words "no person may" mean that no person is required, authorized, or permitted to do the act prescribed.
15. *Nitijela* is the legislative branch of the Government and the national parliament.
16. *Offer* means proposal and *Offeror* means a person submitting a proposal when a procurement is made by a source selection method other than competitive sealed bidding.
17. *Policy Office* means the office within the Office of the Chief Secretary created under §111 of the Code.
18. *Practicable* denotes what may be accomplished or put into practical application. For purposes of these Regulations, the terms "practical" and "practicable" shall be considered to have the same meaning.
19. *Prices Set by Law or Regulation*. The price of a supply or service set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the Government and other than customers.

20. *Protest* means a written statement concerning any unresolved disagreement or controversy arising out of the solicitation or award of a Government contract filed in accordance with §3(A) of Part XII (Filing of Protest).
21. *Protestor* means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.
22. *Public Notice* means the distribution or dissemination of information to interested parties using methods that are reasonably available. Such methods will often include publication in newspapers of general circulation, electronic or paper mailing lists, and web site(s) designated by the Government and maintained for that purpose.
23. *Purchasing Agency* means any governmental body other than the Chief Procurement Officer which is authorized by the Code or these Regulations, or by way of delegation from the Chief Procurement Officer, to enter into procurement contracts.
24. *Purchase Request or Purchase Requisition* means that document whereby a Using Agency requests that a contract be entered into for a specific need, and may include, but is not limited to, the description of the requested item, delivery schedule, transportation data, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by these regulations.
25. *Purchase Description* means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or made a part of the solicitation.
26. *Regulation(s)* means a governmental body's statement, having general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy, or describing organization, procedure, or practice requirements, which has been prepared by the Policy Office and promulgated in accordance with the Administrative Procedure Act.
27. *Responsible Bidder or Offeror* means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
28. *Responsive Bidder* means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.
29. *Request for Proposals* means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.
30. *RMI* means, as sometimes used in these Regulations, the Republic of the Marshall Islands.
31. *Services* means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.
32. *Shall* denotes the imperative.

33. *Signature* means a manual or electronic identifier, or the electronic result of an authentication technique attached to or logically associated with a record that is intended by the person using it to have the same force and effect as a manual signature.
34. *State-Owned Enterprise (SOE)* means units owned by the Government with the exception of the National Telecommunications Authority, with its own Board of Directors and includes utility companies, a national airline, Ports Authority and the Marshall Islands Development Bank.
35. *Supplies* means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.
36. *Technical Proposal* means solicited or unsolicited submission of information from a prospective contractor which states how that party intends to perform certain work; its technical and business qualifications; and its proposed delivery, warranty, and other terms and conditions as those might differ from or supplement the Government's solicitation requirements. It shall include such pricing information as may be required.
37. *Using Agency* means any governmental body of the Government which utilizes any supplies, services, or construction procured under the Code and these Regulations.
38. *Written or In Writing* means the product of any method of forming characters on paper, other materials, or viewable screens, which can be read, retrieved, and reproduced, including information that is electronically transmitted and stored.

D. Singular-Plural and Gender Rules.

In these Regulations, unless the context requires otherwise:

- i. words in the singular number include the plural, and those in the plural include the singular; and
- ii. words of a particular gender include any gender and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

§2. Application.

A. General Application.

These Regulations apply only to contracts solicited or entered into after the effective date of these Regulations unless the parties agree to its application to a contract solicited or entered into prior to the effective date.

B. Application to Government Procurement.

These Regulations shall apply to every expenditure of public funds irrespective of their source, including all political subdivisions, local government councils, State-Owned Enterprises or any other Governmental entity as defined herein.

§3. Citation.

These Regulations shall be cited as the *RMI Procurement Regulations 2020* and shall come into effect on the date the Cabinet approves the Regulations pursuant to the *Administrative Procedures Act*.

PART II – PROCUREMENT ORGANIZATION

§1. Government Procurement Policy Office.

A. Chief Secretary Shall Manage the Policy Office.

The Policy Office shall be an independent office within the Division of Administration in the Office of the Chief Secretary. The Chief Secretary shall manage and direct the Policy Office.

B. Administrative Support.

The Office of the Attorney General, the Office of the Auditor General and Secretary of Finance are authorized to provide such services as the Chief Secretary may request, on such basis, reimbursable or otherwise, as may be agreed upon between the Office of the Attorney General, the Office of the Auditor General, the Secretary of Finance and the Chief Secretary.

§2. Chief Procurement Officer.

A. Central Procurement Officer

The Chief Procurement Officer shall be:

- i. the head of the Office of the Chief of Procurement & Supply created under §113 of the Code; and
- ii. the central procurement officer of the Government pursuant to §115 of the Code; and
- iii. the Chairperson for the Government's Bid Committee.

B. Delegation of Authority by the Chief Procurement Officer.

Pursuant to §116 of the Code and subject to these Regulations, the Chief Procurement Officer may delegate authority to designees or to any department, agency, or official. Delegation shall be in writing. No Purchasing Agency shall transfer, sell, trade-in, or otherwise dispose of supplies owned by the Government without written authorization of the Chief Procurement Officer.

C. Authority to Delegate.

Authority may not be delegated by the Chief Procurement Officer or by the head of a Purchasing Agency unless so provided in accordance with the Code or these Regulations. Except as provided under these Regulations, any authority conferred on the Chief Procurement Officer may be delegated by the Chief Procurement Officer to any employee in any department or Purchasing Agency; and any authority conferred on the head of a Purchasing Agency by the Code and these Regulations may be delegated by that officer to any employee in that Purchasing Agency. Such delegations shall remain in effect unless modified or until revoked in writing.

D. Statutory Exceptions to Delegation.

The authority conferred on the Chief Procurement Officer or the head of a Purchasing Agency in the following Sections shall not be delegated:

- i. Contract Performance and Payment Bonds, Reduction of Bond Amounts;
- ii. Contract Clauses and Their Administration, Modification of Required Clauses;
- iii. Contract Clauses and Their Administration, Modification of Clauses;

- iv. Authority to Resolve Protested Solicitations and Awards, Stay of Procurements During Protests; and
- v. Authority to Debar or Suspend, Authority.

E. Decision to Delegate.

The Chief Procurement Officer or the head of a Purchasing Agency may delegate authority or may revoke authority they have delegated. Factors to consider in making the decision to delegate include:

- i. the expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;
- ii. the past experience of the potential delegate in exercising similar authority;
- iii. the degree of economy and efficiency to be achieved in meeting the Government's requirements if authority is delegated;
- iv. the available resources of the Office of the Chief Procurement Officer to exercise the authority if it is not delegated; and
- v. the consistency of delegation under similar circumstances.

F. Delegation of Authority to Officials

The Chief Procurement Officer may delegate in writing such authority as may be deemed appropriate to the head of any department or independent agency of the Government. Such delegation shall be in writing and shall specify:

- i. the activity or function authorized;
- ii. any limits or restrictions on the exercise of the delegated authority;
- iii. whether the authority may be further delegated; and
- iv. the duration of the delegation.

PART III – PROCUREMENT OF PROFESSIONAL SERVICES

§1. Authority to Contract for Certain Services.

No contract for the services of legal counsel may be awarded without the approval of the Attorney General. Unless otherwise required by other laws, the procurement of services of accountants, clergy, physicians, and dentists shall be in accordance with the Public Service Commission or as provided herein.

§2. Notice.

The Purchasing Agency shall give adequate notice to the public for the procurement of any of the above services in consultation with the Chief Procurement Officer in the following manner:

- i. the advertisement shall contain the Terms of Reference and Scope of Work required to fulfill duties and responsibilities through a Request for Proposal;

- ii. applicants shall submit statements of qualification, resume, or curriculum vitae attached to an expression of interest within the timeframe specified and no later;
- iii. selection of candidate and award shall be made to the offeror determined in writing by the Purchasing Agency to be the best qualified applicant based on the evaluating factors set forth in the Request for Proposal, contract negotiations and compensation determined to be fair and reasonable;
- iv. upon selection of a legal counsel through the above process, the Purchasing Agency shall send recommendation to the Attorney General for approval of award in accordance with §118(2) of the Code.

§3. Exemptions.

Unless otherwise ordered by these Regulations, the following supplies, services, and construction need not be procured through the Office of the Chief Procurement Officer, but shall nevertheless be procured by the appropriate Purchasing Agency subject to the requirements of the Code and these Regulations:

- i. the design, construction, maintenance, operation, and private finance of bridge, highway, water, waste water, or other heavy or specialized infrastructure facility or service, as defined in §119 of the Code;
- ii. works of art for museum and public display;
- iii. published books, maps, periodicals, and technical pamphlets;
- iv. architect-engineer and land surveying services as defined in these Regulations;
- v. Supplies, services and construction procured by the local government councils, the Kwajalein Atoll Development Authority or State-Owned Enterprises (SOE), provided however, they shall be subject to these Regulations.

§4. Specifications of Exempted Items

The Purchasing Agency shall utilize the forms and methodology provided and available through the Policy Office for the preparation, maintenance and contents of specifications for supplies, services, and construction required under the Code, including procurement of services under §118 and §119 of the Code:

- i. Specifications for the supplies, services and construction shall be furnished to offerors and expressions of interest within expressed deadline, unless provided in the Request for Proposal;
- ii. Specifications shall be prepared in consultation with and assistance from an expert or relevant personnel from the Using Agency, including specifications for but not limited to those prepared by:
 - 1. Architects;
 - 2. Engineers;
 - 3. Designers;
 - 4. Draftsmen;
 - 5. Computer and/or Network technicians;
 - 6. Health technicians; and

7. Any other expert specializing in a particular field or a person who has the experience or ability to provide specifications or expert advice.
- iii. Specifications shall seek to promote the overall economy for the purpose intended and encourage fair competition in satisfying the Government's needs and shall not be too restrictive.

PART IV – SPECIFICATIONS

§1. Specifications.

Specification means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery, and as appropriate, the Certificate of Origin for any supply, item or material to be procured.

A. Definitions.

- i. *Brand Name Specification* means a specification limited to one or more items by manufacturers' names or catalogue numbers.
- ii. *Brand Name or Equal Specification* means a specification which uses one or more manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet Government requirements, and which provides for the submission of equivalent products.
- iii. *Qualified Products List* means an approved list of supplies, services, or construction items described by model or catalogue numbers, which, prior to competitive solicitation, the Government has determined will meet the applicable specification requirements.
- iv. *Specification* means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service, or construction item for delivery. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably throughout these Regulations.
- v. *Specification for a Common or General Use Item* means a specification which has been developed and approved for repeated use in procurements.

§2. General Purpose and Policies.

A. Use of Functional or Performance Descriptions.

Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the Government. To facilitate the use of such criteria, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met.

B. Preference for Commercially Available Products.

It is the general policy of the Government to procure standard commercial products whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable.

§3. Duties of the Chief Procurement Officer.

The Chief Procurement Officer and the Bid Committee shall monitor the use of specifications for supplies, services, and construction required by the Government.

A. Authority to Prepare Specifications.

i. Statutory Authority of the Purchasing Agency to Prepare Specifications.

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) is authorized to prepare specifications for any type of supplies, services, or construction, the use of which shall be monitored by the Chief Procurement Officer and the Bid Committee.

ii. Authority to Contract for Preparation of Specifications (Including Design Requirements).

1. When a written determination is made by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) authorized to prepare such specifications that there will be no substantial conflict of interest involved and it is otherwise in the best interest of the Government, a contract to prepare specifications for Government use in procurement of supplies or services may be entered into provided such officer retains the authority to finally approve the specifications.
2. Whenever it is determined that the selected method of delivery for a project requires specifications, including, as appropriate, design requirements (as defined in §2(D) of Part XII, to be prepared by other than Government personnel, a contract may be entered into for such preparation provided the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) retains the authority to finally approve such specifications (and design requirements).

iii. Small Purchase and Emergency Authority.

If a specification for general or common use or a qualified products list exists for an item to be procured under Part VII (Small Purchases), it shall be used except as otherwise provided by the Chief Procurement Officer or the head of a Purchasing Agency. If no such specification exists, the Chief Procurement Officer or head of a Purchasing Agency shall prepare specifications for use in such purchases. In an emergency under Part IX (Emergency Procurements), any necessary specifications may be utilized by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) without regard to the provisions of this Chapter as pre-approved by the Government Cabinet.

B. Relationship With Purchasing Agencies.

The Chief Procurement Officer or head of a Purchasing Agency (or the Bid Committee if applicable) shall obtain expert advice and assistance from personnel of Using Agencies in the development of specifications and may delegate in writing to a Using Agency the authority to prepare and utilize its own specifications.

§4. Maximum Practicable Competition.

All specifications shall seek to promote the overall economy for the purposes intended and encourage competition in satisfying the Government's needs, and shall not be unduly restrictive.

PART V – COMPETITIVE PROCUREMENT METHOD

§1. Use of the Bid Committee.

The Bid Committee shall provide oversight of all procedures of source selection. The Bid Committee shall be directly involved in source selection of competitive sealed bidding over \$25,000, Emergency Procurement and selection of Architectural and Engineering Services along with the selection committee.

§2. Bidders Lists.

A. Purpose.

Bidders lists may be compiled to provide the Government with the names of businesses that may be interested in competing for various types of Government contracts. Unless otherwise provided, inclusion or exclusion of the name of a business does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a Government contract.

B. Public Availability.

Names and addresses on bidders lists shall be available for public inspection provided these lists shall not be used for private promotional, commercial or marketing purposes.

§3. Methodology.

A. Contracts.

Unless otherwise authorized by law, all Government contracts shall be awarded by one of the following methods:

- i. **Competitive Sealed Bidding;**
- ii. **Competitive Sealed Proposals;**
- iii. **Small Purchases;**
- iv. **Sole Source Procurement;**
- v. **Emergency Procurements;**
- vi. **Special Procurements;**
- vii. **Architectural and Engineering Services.**

B. Invitation for Bids Notice.

The Invitation for Bids is used to initiate a competitive sealed bid procurement.

- i. *Content.* The Invitation for Bids shall include the following:

1. instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the address of the office to which bids are

to be delivered, the maximum time for bid acceptance by the Government, and any other special information;

2. the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description; and
3. the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

ii. *Incorporation by Reference.*

The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.

iii. *Acknowledgement of Amendments.*

The Invitation for Bids shall require the acknowledgement of the receipt of all amendments issued.

C. Bidding Time.

Bidding time is the period of time between the date of distribution of the Invitation for Bids and the time and date set for receipt of bids. In each case bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of 14 days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable).

D. Bidder Submissions.

i. *Bid Form.*

The Invitation for Bids shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions.

ii. *Telegraphic Bids.*

The Invitation for Bids may state that electronic, telegraphic, and mailgram bids will be considered whenever they are received in hand at the designated office by the time and date set for receipt of bids. Such electronic, telegraphic, or mailgram bids shall contain specific reference to the Invitation for Bids; the items, quantities, and prices for which the bid is submitted; the time and place of delivery; and a statement that the bidder agrees to all the terms; conditions, and provisions of the Invitation for Bids.

1. any telegraphic submission, bid, or proposal must be password protected prior to the bid submission date and no later.
2. any telegraphic submission, bid, or proposal without password protection shall be deemed as non-conforming and shall be rejected and returned unopened.

E. Bid Samples and Descriptive Literature.

- i. *"Descriptive literature"* means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the Government to consider whether the terms meet its needs.
- ii. *"Bid sample"* means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

- iii. *Bid samples or descriptive literature* may be required when it is necessary to evaluate required characteristics of the bid items.
- iv. *The Invitation for Bids* shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the Invitation for Bids.

F. Public Announcement.

i. *Distribution.*

Invitations for Bids or Notices of the Availability of Invitations for Bids shall be mailed or otherwise furnished to a sufficient number of potential bidders for the purpose of securing competition. Notices of Availability shall indicate where, when, and for how long Invitations for Bids may be obtained; generally describe the supply, service, or construction desired; and may contain other appropriate information. (See also §2 of Part V (Bidders Lists). Where appropriate the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) may require payment of a fee or a deposit for the supplying of the Invitation for Bids.

ii. *Publication.*

Every procurement in excess of \$25,000 shall be publicized in one or more of the following ways:

1. in a newspaper of general circulation;
2. in a newspaper of local circulation in the area pertinent to the procurement;
3. in industry media;
4. through electronic mailing lists,
5. through the internet, agency web site, or other publicly accessible electronic media, or
6. in a government publication designed for giving public notice.

iii. *Public Availability.*

A copy of the Invitation for Bids shall be made available for public inspection at the Chief Procurement Officer's office, or the office of the Purchasing Agency.

G. Pre-Bid Conferences.

Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received an Invitation for Bids. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment as provided under §3(H) (Amendments to Invitations for Bids) and the §3(E)(iv) (Invitation for Bids) above, if a pre-bid conference was required therein, or the notice of pre-bid conference shall so provide. A summary of the conference shall be supplied to all these prospective bidders known to have received an invitation for Bids. If a transcript is made it shall be a public record.

H. Amendments to Invitations for Bids.

i. *Form.*

Amendments to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The amendment shall reference the portions of the Invitation for Bids it amends.

ii. *Distribution.*

Amendments shall be sent to all prospective bidders known to have received an Invitation for Bids.

iii. *Timeliness.*

Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such preparation, such time shall be increased to the extent possible in the amendment or, if necessary, by telegram or telephone and confirmed in the amendment.

I. Pre-Opening Modification or Withdrawal of Bids.

i. *Procedure.*

Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time and date set for bid opening. An electronic or telegraphic modification or withdrawal received from the bidder or, as applicable, the receiving telegraph company office prior to the time and date set for bid opening will be effective provided that there is objective evidence, in electronic form or from the receiving telegraph company, confirming that the message was received at prior to the time and date set for bid opening.

ii. *Disposition of Bid Security.*

If a bid is withdrawn in accordance with this Section, the bid security, if any, shall be returned to the bidder.

iii. *Records.*

All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file. The Head of Purchasing Agency shall keep and maintain an electronic record of each procurement.

J. Late Bids, Late Withdrawals, and Late Modifications.

i. *Definition.*

Any bid received after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received after the time and date set for opening of bids at the place designated for opening is late.

ii. *Treatment.*

No late bid, late modification, or late withdrawal will be considered unless received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of Government personnel directly serving the procurement activity.

iii. *Notice.*

Bidders submitting late bids that will not be considered for award shall be so notified as soon as practicable.

iv. *Records.*

Records equivalent to those required in §3(I)(iii) (Pre-Opening Modification or Withdrawal of Bids, Records) shall be made and kept for each late bid, late modification, or late withdrawal.

K. Receipt, Opening, and Recording of Bids.

i. *Receipt.*

Upon its receipt, each bid and modification shall be time-stamped but not opened and shall be stored in a secure place until the time and date set for bid opening. Bids submitted through electronic means shall be received in such a manner that the time and date of submittal, along with the contents of such bids shall be securely stored by the Chief Procurement Officer or head of Purchasing Agency, until the time and date set for bid opening.

ii. *Opening and Recording.*

Bids and modifications shall be opened publicly, in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable), shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The names and addresses of required witnesses shall also be recorded at the opening. The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in these Regulations. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the non-confidential portion of the bid. Price, makes and model, or catalogue of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary. Bid submitted through electronic means shall be received in such a manner that the requirements of this Section can be readily met.

iii. *Confidential Data.*

The Chief Procurement Officer or head of a Purchasing Agency (or the Bid Committee if applicable) shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall inform the bidders in writing what portions of the bids will be disclosed and that, unless the bidder protests under Part XIV of these Regulations, the bids will be so disclosed. The bids shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data.

L. Mistakes in Bids.

i. *General.*

Correction or withdrawal of a bid because of an inadvertent, non-judgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a non-judgmental mistake is permissible but only to the extent it is not contrary to the interest of the Government or the fair treatment of other bidders. Where the mistake is attributable to a mathematical error, the lump sum bid expressed in words shall prevail over the numerical figure and no modification shall be required.

ii. *Mistakes Discovered Before Opening.*

A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided under sub-sections on Pre-Opening Modification or Withdrawal of Bids.

iii. *Confirmation of Bid.*

When the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) knows or has reason to conclude that a mistake has been made, such officer should request the bidder to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in these Regulations are met.

iv. *Mistakes Discovered After Opening but Before Award.*

This Subsection sets forth procedures to be applied in three situations described in §3(L)(iv)(1) through §3(L)(iv)(3) below in which mistakes in bids are discovered after the time and date set for bid opening but before award.

1. *Minor Informalities.* Minor informalities are matters of form rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the Government. Examples include the failure of a bidder to:
 - a. return the number of signed bids required by the Invitation for Bids;
 - b. sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound; or
 - c. acknowledge receipt of an amendment to the Invitation for Bids, but only if:
 - it is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or
 - the amendment involved had a negligible effect on price, quantity, quality, or delivery.
2. *Mistakes Where Intended Correct Bid is Evident.* If the mistake and the intended correct bid are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.
3. *Mistakes Where Intended Correct Bid is Not Evident.* A bidder may be permitted to withdraw a low bid if:
 - a. a mistake is clearly evident on the face of the bid document but the intended correct is not similarly evident or
 - b. the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

v. *Mistakes Discovered After Award.*

Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

vi. *Determinations Required.*

When a bid is corrected or withdrawn, or correction or withdrawal is denied, under §3(L)(iv) or §3(L)(v) above, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall prepare the determination required under above section §3(L)(iv)(1).

M. Bid Evaluation and Award

i. *General.*

The contract is to be awarded "to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids." See §126(7) of the Code on Competitive Sealed Bidding, Award. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.

ii. *Responsibility and Responsiveness.*

Responsibility of prospective contractors is covered by §5 of Part XII on Responsibility. Responsiveness of bids is covered by §1(C)(ii)(28) of Part I which defines "responsive bidder" as "a person who has submitted a bid which conforms in all material respects to the Invitation for Bids."

iii. *Product Acceptability.*

The Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require the submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

1. inspection or testing of a product prior to award for such characteristics as quality or workmanship;
2. examination of such elements as appearance, finish, taste, or feel; or
3. other examinations to determine whether it conforms with any other purchase description requirements.

iv. *Nonresponsive.*

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another but only to determine that a bidder's offer is acceptable as set forth in the Invitation for Bids. Any bidder's offer which does not meet the acceptability requirements shall be rejected as nonresponsive.

v. *Determination of Lowest Bidder.*

Following determination of product acceptability as set forth above, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the Government in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but

are not limited to, transportation cost, and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

1. be reasonable estimates based upon information the Government has available concerning future use; and
2. treat all bids equitably.

vi. *Restrictions.*

Nothing in this Section shall be deemed to permit a contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined under §3(M)(v) above. Further, this Section does not permit negotiations with any bidder.

N. Low Tie Bids.

i. *Definition.*

Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation for Bids.

ii. *Award.*

Award shall not be made by drawing lots, except as set forth below, or by dividing business among identical bidders. In the discretion of the Chief Procurement Officer or the head of a Purchase Agency (or the Bid Committee if applicable), tie award shall be made in a manner that will discourage tie bids and a written determination is made so stating, award may be made by drawing lots.

iii. *Record.*

Records shall be made of all Invitations for Bids on which tie bids are received showing at least the following information:

1. the identification number of the Invitation for Bids;
2. the supply, service, or construction item; and
3. a listing of all the bidders and the prices submitted.

A copy of each such record shall be sent to the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable).

O. Documentation of Award.

Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file. Copy of record shall be kept and maintained by the head of the Purchasing Agency.

P. Publicizing Awards.

Written notice of award shall be sent to the successful bidder. In procurements over \$25,000, each unsuccessful bidder shall be notified of the award in writing or through electronic means. Notice of award shall be made available to the public through electronic means.

Q. Multi-Step Sealed Bidding.

i. *Definition.*

Multi-step sealed bidding is a two phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the Government, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their price bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtain the benefits of the competitive sealed proposals procedure through the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

ii. *Conditions for Use.*

The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on price. Multi-step sealed bidding may thus be used when it is considered desirable:

1. to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;
2. to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;
3. to accomplish subsections §3(Q)(ii)(1) and §3(Q)(ii)(2) of this Section prior to soliciting priced bids; and
4. to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

R. Pre-Bid Conferences in Multi-Step Sealed Bidding.

Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by sub-section on Pre-Bid Conferences may be conducted by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable). The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) may also hold a conference of all potential bidders in accordance with above relevant sub-section at any time during the evaluation of the unpriced technical offers.

S. Procedure for Phase One of Multi-Step Sealed Bidding.

i. *Form.*

Multi-step sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by the Invitation for Bids, except as hereinafter provided. In addition to the requirements set forth in §3(B) of Part V, the multi-step Invitation for Bids shall state:

1. that unpriced technical offers are requested;
2. whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, such priced bids shall be submitted in a separate sealed envelope;
3. that it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from those bidders whose unpriced technical offers are found acceptable in the first phase;
4. the criteria to be used in the evaluation of the unpriced technical offers;

5. that the Government, to the extent the Chief Procurement Officer or the head of a Purchasing Agency (or Bid Committee if applicable) finds necessary, may conduct oral or written discussions of the unpriced technical offers;
6. that bidders may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data to remain confidential; and
7. that the item being procured shall be furnished generally in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids.

ii. *Amendments to the Invitation for Bids.*

After receipt of unpriced technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted unpriced technical offers, and they shall be permitted to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable), a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids shall be cancelled in accordance with §3 of Part XII (Cancellation of Solicitations; Rejection of Bids or Proposals) of these Regulations and a new Invitation for Bids issued.

iii. *Receipt and Handling of Unpriced Technical Offers.*

Unpriced technical offers shall not be opened publicly but shall be opened in front of two or more procurement officials. Such offers shall not be disclosed to unauthorized persons. Bidders may request nondisclosure of trade secrets and other proprietary data identified in writing.

iv. *Evaluation of Unpriced Technical Offers.*

The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:

1. acceptable;
2. potentially acceptable, that is, reasonably susceptible of being made acceptable; or
3. unacceptable. The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall record in writing the basis of finding an offer unacceptable and include it as part of the procurement file.

v. *Discussion of Unpriced Technical Offers.*

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During the course of such discussions the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall not disclose any information derived from one unpriced technical offer to any other bidder. Once discussions start, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable). Such submission may be made at the request of the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) or upon the bidder's own initiative.

vi. *Notice of Unacceptable Unpriced Technical Offer.*

When the Chief Procurement Officer or the head of Purchasing Agency (or the Bid Committee) determines a bidder's unpriced technical offer to be unacceptable, such offeror shall not be afforded an additional opportunity to supplement its technical offer.

T. Mistakes During Multi-Step Sealed Bidding.

Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with sub-section on Mistakes in Bids.

U. Procedure for Phase Two.

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) may initiate Phase Two of the procedure if, in the opinion of Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable), there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) finds that such is not the case, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth above.

i. Initiation.

Upon the completion of Phase One, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee) shall either:

1. open priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; or
2. if priced bids have not been submitted, technical discussions have been held, or amendments to the Invitation for Bids have been issued, invite each acceptable bidder to submit a priced bid.

ii. Conduct.

Phase Two shall be conducted as any other competitive sealed bid procurement except:

1. as specifically set forth in §3(Q) of Part V (Multi-Step Sealed Bidding) through this Section;
2. no public notice need be given of this invitation to submit priced bids because such notice was previously given;
3. after award the unpriced technical offer of the successful bidder shall be disclosed as follows. The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall examine written requests of confidentiality for trade secrets and proprietary data in the technical offer of such bidder to determine the validity of any such requests. If the parties do not agree as to the disclosure of data, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that, unless the bidder protests under Part XIV of these Regulations, the offer will be so disclosed. Such technical offer shall be open to public inspection subject to any continuing prohibition on the disclosure of confidential data; and
4. unpriced technical offers of bidders who are not awarded the contract shall not be open to public inspection unless the Chief Procurement Officer or the head of a Purchasing Agency

(or the Bid Committee if applicable) determines in writing that public inspection of such offers is essential to assure confidence in the integrity of the procurement process; provided, however, that the provisions of §3(U)(ii)(3) shall apply with respect to the possible disclosure of trade secrets and proprietary data.

PART VI – COMPETITIVE SEALED PROPOSALS

§1. Use of Competitive Sealed Proposals.

Competitive sealed bidding is not practicable unless the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery or performance schedule, and all other terms and conditions of the Invitation for Bids.

A. Justifications

Factors to be considered in determining whether competitive sealed bidding is not practicable include:

- i. whether the contract needs to be other than a fixed-price type;
- ii. whether oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;
- iii. whether offerors may need to be afforded the opportunity to revise their proposals, including price;
- iv. whether award may need to be based upon a comparative evaluation as stated in the Request for Proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the Government. Quality factors include technical and performance capability and the content of the technical proposal; and
- v. whether the primary consideration in determining award may not be price.

B. Determinations.

A determination may be made to use competitive sealed proposals if it is determined that it is not advantageous to the Government, even though practicable, to use competitive sealed bidding. Factors to be considered in determining whether competitive sealed bidding is not advantageous include:

- i. if prior procurements indicate that competitive sealed proposals may result in more beneficial contracts for the Government; and
- ii. whether the factors listed in §1(A)(ii) through §1(A)(v) above are desirable in conducting a procurement rather than necessary; if they are, then such factors may be used to support a determination that competitive sealed bidding is not advantageous.

The officer who made such determination may modify or revoke it at any time, and such determination should be reviewed for current applicability from time to time.

§2. Methodology

Contracts shall be made to the responsible offeror whose proposal is determined in writing as provided in the following sections.

A. Notice

A Request for Proposals is used to initiate a competitive sealed bid procurement by publication in a newspaper of public circulation or other similar means of publication, or if determined in writing to be advantageous to the Government by the Purchasing Agency or the Chief Procurement, through a solicitation letter to pre-qualified bidders and offerors, on the basis that such solicitation is for a specific type of supply, service, infrastructure facility or construction item.

B. Content.

The RFP shall be prepared in accordance with Section 3(B) of Part V of these Regulations provided that it shall also include:

- i. a statement that discussions may be conducted with offerors who submit proposals determined to be reasonably susceptible of being selected for award, but that proposals may be accepted without such discussions; and
- ii. a statement of when and how price should be submitted.

C. Proposal Preparation Time.

Proposal preparation time shall be set to provide offerors a reasonable time to prepare their proposals. A minimum of 14 days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable).

D. Form of Proposal.

The manner in which proposals are to be submitted, including any forms for that purpose, may be designated as a part of the Request for Proposals.

- ii. *Use of Bidders Lists.*

Bidders lists compiled and maintained in accordance with §2 of Part V (Bidders Lists) may serve as a basis for soliciting competitive sealed proposals.

- iii. *Pre-Proposal Conferences.*

Pre-proposal conferences may be conducted in accordance with §3(G) of Part V (Pre-Bid Conferences). Any such conference should be held prior to submission of initial proposals.

E. Amendments to Requests for Proposals.

Amendments to Requests for Proposals may be made in accordance with §3(H) of Part V (Amendments to Invitations for Bids) prior to submission of proposals. After submission of proposals, amendments may be made in accordance with §3(S)(ii) of Part V (Procedure for Phase One of Multi-Step Sealed Bidding, Amendments to the Invitation for Bids).

F. Modification or Withdrawal of Proposals.

Proposals may be modified or withdrawn prior to the established due date in accordance with §3(I) of Part V (Pre-Opening Modification or Withdrawal of Bids). For the purposes of this Section and §2(G) of Part VI (Late Proposals, Late Withdrawals, and Late Modifications), the established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any; or if discussions have begun, it is the time and date by which best and final offers must be submitted, provided that only offerors who submitted proposals by the time announced for receipt of proposals may submit best and final offers.

G. Late Proposals, Late Withdrawals, and Late Modifications.

Any proposal, withdrawal, or modification received after the established due date at the place designated for receipt of proposals is late. See §2(F) of Part V (Modification or Withdrawal of Proposals) for the definition of "established due date." They may only be considered in accordance with §3(J) of Part V (Late Bids, Late Withdrawals, and Late Modifications).

H. Receipt and Registration of Proposals.

Proposals shall not be opened publicly but shall be opened in the presence of two or more procurement officials. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the supply, service, or construction item offered. The Register of Proposals shall be open to public inspection only after award of the contract. Proposals and modifications shall be shown only to Government personnel having a legitimate interest in them.

§3. Evaluation of Proposals.

Evaluation of proposals shall take into account to be the most advantageous to the Government taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

A. Evaluation Factors in the Request for Proposals.

The Request for Proposals shall state all of the evaluation factors (and sub-factors), including price, and their relative importance.

i. Evaluation.

The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems may be used but are not required. Factors not specified in the Request for Proposals shall not be considered.

ii. Classifying Proposals.

For the purpose of conducting discussions under §3(B) below (Proposal Discussions with Individual Offerors), proposals shall be initially classified as:

1. acceptable;
2. potentially acceptable, that is, reasonably susceptible of being made acceptable; or
3. unacceptable.

Offerors whose proposals are unacceptable shall be so notified promptly.

B. Proposal Discussions with Individual Offerors.

i. "Offerors" Defined.

For the purposes of §126(6) of the Code and this Section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.

ii. Purposes of Discussions.

Discussions are held to:

1. promote understanding of the Government's requirements and the offerors' proposals; and
2. facilitate arriving at a contract that will be most advantageous to the Government taking into consideration price and the other evaluation factors set forth in the Request for Proposals.

iii. *Conduct of Discussions.*

Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions and revisions of proposals. The Chief Procurement Officer should establish procedures and schedules for conducting discussions. If during discussions there is a need for any substantial clarification of or change in the Request for Proposals, the Request shall be amended to incorporate such clarification or change. Auction techniques (revealing one offeror's price to another) and disclosure of any information derived from competing proposals are prohibited. Any substantial oral clarification of a proposal shall be reduced to writing by the offeror.

iv. *Best and Final Offers.*

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall establish a common date and time for the submission of best and final offers. Best and final offers shall be submitted only once; provided, however, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) may make a written determination that it is in the Government's best interest to conduct additional discussions or change the Government's requirements and require another submission of best and final offers. Otherwise, no discussion of or changes in the best and final offers shall be allowed prior to award. Offerors shall also be informed that if they do not submit a notice of withdrawal or another best and final offer, their immediate previous offer will be construed as their best and final offer.

C. Mistakes in Proposals.

i. *Modification or Withdrawal of Proposals.*

Proposals may be modified or withdrawn as provided in §2(F) of Part VI (Modification or Withdrawal of Proposals).

ii. *Confirmation of Proposal.*

When the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) knows or has reason to conclude before award that a mistake has been made, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) should request the offeror to confirm the proposal. If the offeror alleges mistake, the proposal may be corrected or withdrawn during any discussions that are held or if the conditions set forth in §3(C)(iii) through §3(C)(iv) of this Section are met.

iii. *Mistakes Discovered After Receipt of Proposals but Before Award.*

This Subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.

1. *During Discussions; Prior to Best and Final Offers.* Once discussions are commenced with any offeror or after best and final offers are requested, any offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

2. *Minor Informalities.* Minor informalities, unless otherwise corrected by an offeror as provided in this Section, shall be treated as they are under competitive sealed bidding. See §3(L)(iv) of Part V (Mistakes in Bids, Mistakes Discovered After Opening but Before Award).
3. *Correction of Mistakes.* If discussions are not held or if the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if:
 - a. the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn; or
 - b. the mistake is not clearly evident on the face of the proposal, but the offeror submits proof of evidentiary value which clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not be contrary to the fair and equal treatment of other offerors.
4. *Withdrawal of Proposals.* If discussions are not held, or if the best and final offers upon which award will be made have been received, the offeror may be permitted to withdraw the proposal if:
 - a. the mistake is clearly evident on the face of the proposal and the intended correct offer is not;
 - b. the offeror submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made but does not demonstrate the intended correct offer; or
 - c. the offeror submits proof of evidentiary value which clearly and convincingly demonstrates the intended correct offer, but to allow correction would be contrary to the fair and equal treatment of the other offerors.

iv. *Mistakes Discovered After Award.*

Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) finds it would be unconscionable not to allow the mistake to be corrected.

PART VII – SMALL PURCHASES

§1. Small Purchases.

Any procurement not exceeding the amount of \$25,000 is not subject to the bidding process and may be made in accordance with small purchase procedures, provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this Section.

§2. Application.

In accordance with the Code, this Regulation establishes \$25,000 as the amount for supplies or services and \$25,000 as the amount for construction below which small purchase procedures may be used for procurements.

§3. Authority to Make Small Purchases.

A. Amount.

The Chief Procurement Officer or the head of a Purchasing Agency may use this Regulation if the procurement is to be less than \$25,000 for supplies or services and less than \$25,000 for construction. If these methods are not used, the other methods of source selection provided in §3(A) of Part III consistent with the Code shall apply.

B. Existing Government Contract for Item.

Supplies, services, or construction items which may be obtained under current Government contracts shall be procured under such agreements in accordance with the terms of such contracts. Further, supplies, services, or construction items available from Government stocks shall not be procured under this Regulation. Operational procedures and contract terms may provide for waivers or exceptions to this Subsection.

C. Available from One Business Only.

If the supply, service, or construction item is available from only one business, the sole source procurement method set forth in Part VIII (Sole Source Procurement) of these regulations shall be used even if the procurement is a small purchase.

D. Competition for Small Purchases Between \$500 and \$25,000.

i. Procedure.

Insofar as it is practical for small purchases of supplies or services between \$500 and \$25,000, no less than three businesses shall be solicited to submit written, electronic, or oral quotations that are recorded and placed in the procurement file. Award shall be made to the business offering the lowest acceptable quotation.

ii. Records.

The names of the businesses submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

E. Competition for Small Purchases of Construction.

For procurement of construction, as defined in these Regulations, between \$500 and \$25,000, the procedures and records required in §3(D)(ii) (Small Purchases of Supplies or Services Between \$500 and \$25,000) shall apply. For procurement of construction equal to or less than \$500, §3(F) (Small Purchases of \$500 or Less) shall apply.

F. Small Purchases of \$500 or Less.

The Chief Procurement Officer or the head of a Purchasing Agency and the Secretary of Finance shall adopt and publish operational procedures for making small purchases of an amount equal to or less than \$500. Such operational procedures shall provide for obtaining adequate and reasonable competition and for making records to properly account for funds and to facilitate auditing of a Purchasing Agency.

PART VIII – SOLE SOURCE PROCUREMENT

§1. Conditions for Use of Sole Source Procurement.

Sole source procurement is not permissible unless a requirement is available from only a single supplier. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances which could necessitate sole source procurement:

- where the availability and compatibility of equipment, accessories, or replacement parts is the paramount consideration;
- where a sole supplier's item is needed for trial use or testing;
- where a sole supplier's item is to be procured for resale;
- where public utility services, or services provided for public use such as road, electricity, natural gas, water, sewage, telephone, cable, or other public utility services, are to be procured; or
- where direct procurement from a manufacturer or licensed distributor is necessary for specialized parts, tools and accessories for use by medical equipment, heavy machinery, vehicles, or other specialized equipment or tool.

The determination as to whether a procurement shall be made as a sole source shall be made by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable). Such determination and the basis therefor shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a Purchasing Agency that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

§2. Negotiation in Sole Source Procurement.

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall conduct negotiations, as appropriate, as to price, delivery, and terms.

§3. Record of Sole Source Procurement.

For the purpose of complying with §143 of the Code, a record of sole source and emergency procurements shall be maintained that lists:

- each contractor's name;
- the amount and type of each contract;
- a listing of the supplies, services, or construction procured under each contract; and
- the identification number of each contract file.

The record for each fiscal year shall be submitted to the Policy Office which shall be maintained for a minimum of five (5) years.

PART IX – EMERGENCY PROCUREMENTS

§1. Emergency Procurements.

Notwithstanding any other provisions in these Regulations, the Government Cabinet may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in these Regulations, provided that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

A. Definition of Emergency Conditions.

An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, or such other reason as may be proclaimed by the Government Cabinet. The existence of such condition creates an immediate and serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:

- the functioning of the Government;
- the preservation or protection of property; or
- the health or safety of any person.

Failure to plan, causing a need for an immediate procurement, does not constitute an emergency procurement.

§2. Scope of Emergency Procurements.

Emergency procurement shall be limited to those supplies, services, or construction items necessary to meet the emergency.

§3. Authority to Make Emergency Procurements.

All such emergency procurements require the Government Cabinet prior approval. Cabinet, in considering emergency procurements, shall approve materials, items and services necessary to meet the emergency.

§4. Quarterly Anticipated Procurement Needs Filed with the Secretary of Finance.

In order to monitor procurement needs and determine if there is an emergency, Purchasing and Using Agencies shall provide quarterly, a report of anticipated procurement needs for the following quarter. If a Purchasing or Using Agency requests a procurement that is not on the list, the Secretary of Finance may deny the request unless the procurement meets the definition of an emergency and is approved by the Government Cabinet.

PART X – SPECIAL PROCUREMENTS

Notwithstanding any other provision of these Regulations, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) with prior approval of the Government Cabinet, may with prior public notice initiate a procurement above the small purchase amount specified in Part II of these Regulations where the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest.

Any special procurement under this Section shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the selection of the particular contractor shall be included by the Chief Procurement Officer or the head of the Purchasing Agency (or the Bid Committee if applicable) in the contract file, and a report shall be made publicly available at least annually describing all such determinations made subsequent to the prior report.

PART XI – PROCUREMENT OF INFRASTRUCTURE FACILITIES AND SERVICES

§1. Definitions.

The words and expressions used in this Part shall have the same meaning as assigned in the Code, unless otherwise specified.

A. Infrastructure-Related Definitions.

i. Architectural and Engineering Services means:

1. professional services of an architectural or engineering nature, as defined by the Code and these Regulations, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this Subsection;
2. professional services of an architectural or engineering nature including land surveying services performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
3. 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.

ii. *Design-bid-build* means a project delivery method in which the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) 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.

iii. *Design-build* means a project delivery method in which the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) enters into a single contract for design and construction of an infrastructure facility.

iv. *Design-build-finance-operate-maintain* means a project delivery method in which the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period. No Government funds are appropriated to pay for any part of the services provided by the contractor during the contract period.

v. *Design-build-operate-maintain* means a project delivery method in which the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) 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 Government prior to award of the contract or secured by the Government through fare, toll, or user charges.

vi. *Design requirements* means the written description of the infrastructure facility or service to be procured under this Article, including:

1. required features, functions, characteristics, qualities, and properties that are required by the Government;
2. the anticipated schedule, including start, duration, and completion; and
3. 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.

- vii. *Turn-Key Project* means a construction project where the company contracted to undertake the construction work manages the entirety of the project, from conception to completion.
- viii. *Independent Peer Reviewer Services* are additional architectural and engineering services provided to the Government in design-build, design-build-operate-maintain or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care.
- ix. *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.
- x. *Operations and Maintenance* means a project delivery method whereby the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.
- xi. *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.

B. Application.

The provisions of this Part shall apply to all procurements of infrastructure facilities and services which are expected to be \$25,000 or greater and to the procurement of architectural and engineering services which are expected to be \$25,000 or greater. Procurement of construction expected to be less than \$25,000 and procurement of architectural and engineering services expected to be less than \$25,000 shall be made in accordance with Part V (Small Purchases).

§2. Contracting for Infrastructure Facilities and Services

A. Project Delivery Methods Authorized.

- i. The following project delivery methods are authorized for procurements relating to infrastructure facilities and services:
 1. Design-bid-build (including construction management at-risk);

2. Operations and maintenance;
 3. Design-build;
 4. Design-build-operate-maintain;
 5. Design-build-finance-operate-maintain;
 6. Turn-Key Project
- ii. 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.

B. Flexibility.

i. *Flexibility.*

It is intended that the Government has significant new flexibility in configuring and applying the project delivery methods authorized by this Section to fit not only the particular needs and requirements of each project, but to apply these delivery methods to the overall goal of configuring all of the Government's Infrastructure Facility contracts to meet long-term needs, requirements, and constraints. The Government's acquisition planners may now focus upon excluding project delivery methods that cannot be effectively applied to a particular Infrastructure Facility, and to then make reasoned choices of project delivery method to single projects with the configuration of the entire collection of projects in mind.

ii. *Use of Regulation.*

This Regulation is intended to guide Government personnel in selecting an appropriate project delivery method.

C. Participation in Prior Reports or Studies.

- i. Before awarding a contract for a report or study that could subsequently be used in the creation of design requirements for an infrastructure facility or service, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) should address, to the extent practical, the contractor's ability to compete for follow-on work.
- ii. Before issuing a request for proposals for an infrastructure facility or service, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) should take reasonable steps to determine if prior participation in a report or study could provide a firm with a substantial competitive advantage, and, if so, the Chief Procurement Officer or the head of the Purchasing Agency (or the Bid Committee if applicable) should take appropriate steps to eliminate or mitigate that advantage.

D. Source Selection Methods Assigned to Project Delivery Methods.

i. *Scope.*

This Section specifies the source selection methods applicable to procurements for the project delivery methods identified under Project Delivery Methods Authorized, except as provided in Small Purchases, Sole Source Procurement, Emergency Procurements, and Special Procurements.

ii. Design-bid-build

1. *Design: Architectural and Engineering Services.*

The qualifications based selection process set forth under section on Design: Architectural and Engineering Services shall be used to procure architectural and engineering services in design-bid-build procurements.

2. *Construction.*

Competitive sealed bidding, as set forth under section on 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 under section on Competitive Sealed Proposals, for contracts for construction management at-risk.

iii. Operations and Maintenance.

Contracts for operations and maintenance shall be procured as set forth under section on Methods of Source Selection.

iv. Design-build.

Contracts for design-build shall be procured by competitive sealed proposals, as set forth under section on 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 §2(J)(ii)(2) of this Part.

v. Design-build-operate-maintain.

Contracts for design-build-operate-maintain shall be procured by competitive sealed proposals, as set forth under the section on Competitive Sealed Proposals.

vi. Design-build-finance-operate-maintain.

Contracts for design-build-finance-operate-maintain shall be procured by competitive sealed proposals, as set forth under the section on Competitive Sealed Proposals.

vii. Turn-Key Projects.

Contracts for design-build-operate-maintain shall be procured by competitive sealed proposals, as set forth under the section on Competitive Sealed Proposals.

E. Construction Management (At-Risk).

Procurement of Construction Management (At-Risk). The Government is authorized to use competitive sealed proposals, as set forth under section on Competitive Sealed Proposals, for contracts for construction management at-risk. This regulation is intended to permit the procurement of a construction manager (at-risk) to perform the functions that a construction manager may provide to a public owner, including constructability review, schedule and cost review, and the construction function prior to the completion of the design of the project by the Designer.

F. Proposal Development Documents Not Required.

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) may exempt a Design-build procurement from the requirement in §2(J)(ii)(2) of this Part to submit proposal development documents under the following circumstances:

- i. the expected value of the design-build contract is less than \$25,000;
- ii. a fixed contract price has been established by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) that is also the limit of publicly available funds; and
- iii. the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) has approved the exemption in writing.

G. Choice of Project Delivery Methods.

These Regulations shall:

- i. set forth criteria to be used in determining which project delivery method is to be used for a particular project;
- ii. grant to the Chief Procurement Officer, or the head of a Purchasing Agency (or the Bid Committee if applicable) responsible for carrying out the project, the discretion to select an appropriate project delivery method for a particular project;
- iii. describe the bond, insurance, and other security provisions contained in Part XII of these Regulations that apply to each project;
- iv. describe the appropriate contract clauses and fiscal responsibility requirements contained in §5 of Part XII of these Regulations that apply to each project; and
- v. require the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) 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.

H. Application of Regulation and General Policy.

- i. *Application.*

This Regulation contains provisions applicable to the selection of an appropriate competitive method for acquiring infrastructure facilities and services.

- ii. *Selecting An Appropriate Project Delivery Method.*

In selecting an appropriate project delivery method for each of the Government’s Infrastructure Facilities and services, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) should consider all authorized project delivery methods, the comparative advantages and disadvantages of each, and how these methods may be appropriately configured and applied to fulfill Government requirements. Factors to consider include:

- 1. the extent to which the Government’s design requirements for the Infrastructure Facility are known, stable, and established in writing;
- 2. the extent to which qualified and experienced Government personnel are available to provide the decision-making and administrative contributions required by the Project Delivery Method selected by the Government;
- 3. the extent to which decision-making and administrative contributions may be appropriately assigned to Designers, Builders, Construction-Managers (At-Risk), Design-

Builders, DBO Producers, DBFO Producers, Peer Reviewers, or Operators, as appropriate to the Project Delivery Methods elected by the Government;

4. the extent to which outside consultants, including Construction Managers (Agent), may be able to assist the Government with decision-making and administrative contributions required by the Project Delivery Method selected by the Government;
5. the Government's projected cash flow for the Infrastructure Facility to be acquired (both sources and uses of the funds necessary to support design, construction, operations, maintenance, repairs, and demolition over the facility life cycle);
6. the type of Infrastructure Facility or service to be acquired – for example, public buildings, schools, water distribution, wastewater collection, highway, bridge, or specialty structure, together with possible sources of funding for the Infrastructure Facility;
7. the required delivery date of the Infrastructure Facility to be acquired;
8. the location of the Infrastructure Facility to be acquired;
9. the size, scope, complexity, and technological difficulty of the Infrastructure Facility to be acquired;
10. the Government's current and projected sources and uses of public funds that are currently generally available (and will be available in the future) to support operation, maintenance, repair, rehabilitation, replacement, and demolition of existing and planned Infrastructure Facilities;
11. the current condition of existing Infrastructure Facilities; and
12. the current financial condition of the Government, including, for example, debt structure and bond rating.

I. Lease, Buy, or Build.

Before initiating a procurement in which a new Infrastructure Facility will be constructed or service provided, consideration should be given to other acquisition options, including leasing or buying comparable facilities. Factors to consider when considering such alternatives include, but are not limited to:

- i. whether the Government's requirements for infrastructure services are permanent, continuing, fluctuating, or temporary;
- ii. whether the Government must be in custodial control of the Infrastructure Facility in order to meet the Government's particular needs;
- iii. the condition, current operating cost, projected life cycle cost, and functional adequacy of the Government's existing infrastructure facilities;
- iv. the adequacy of available space to fit Government needs;
- v. the life-cycle costs associated with leasing, buying, contracting for infrastructure services, or building; and
- vi. environmental effects.

J. Additional Procedures.

i. Applicability.

In addition to the requirements of Part VI (Competitive Sealed Proposals), the procedures in this Section shall apply to procurements for design-build, design-build-operate-maintain, and design-build-finance-operate-maintain.

ii. Content of Request for Proposals.

Each Request for Proposals for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain:

1. shall include design requirements;
2. shall solicit proposal development documents; and
3. may, when the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) determines that the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement:
 - a. prequalify offerors by issuing a Request for Qualifications in advance of the Request for Proposals; and
 - b. select a short list of responsible offerors prior to discussions and evaluations under §3 of Part VI of these Regulations 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
 - c. 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.

iii. Evaluation Factors.

Each Request for Proposals for design-build, design-build-operate-maintain, design-build-finance-operate-maintain or Turn-key project:

1. 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
2. shall require each offeror when the contract period of operations and maintenance is ten years or longer 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.

K. Additional Procedures for Design-Build.

i. Content of Request for Proposals.

Each Request for Proposal (RFP) issued by the Government for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain services shall contain a cover sheet that:

- confirms that design requirements are included in the RFP;

- confirms that proposal development documents are solicited in each offeror's response to the RFP; and
- states the Government's determination for that procurement:
 1. whether offerors will be pre-qualified through a Request for Qualifications;
 2. whether the Government will select a short list of responsible offerors prior to discussions and evaluations (along with the number of proposals that will be short-listed); and
 3. whether the Government will pay stipends to unsuccessful offerors (along with the amount of such stipends and the terms under which stipends will be paid).

ii. *Purpose of Design Requirements.*

The purpose and intent of including Design Requirements in the RFP is to provide prospective and actual offerors a common, and transparent, written description of the starting point for the competition and to provide the Government with the benefit of having responses from competitors that meet the same RFP requirements. In order to be effective, the Government must first come to understand and then to communicate its basic requirements for the Infrastructure Facility to those who are considering whether they will participate in the procurement competition. To encourage competition for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain over long periods of time, and over numerous projects, the Government's written description of its Design Requirements in such procurements must be perceived within the procurement community as stable, fair, and reliable.

iii. *Purpose of Requirement for Proposal Development Documents in the Response to .*

The purpose and intent of including the requirement for submittal of Proposal Development Documents in each RFP for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain is to provide actual offerors with a common, and transparent, written description of the finish point for the competition. To be responsive, each offeror must submit drawings and other design related documents that are sufficient to fix and describe the size and character of the infrastructure facility to be acquired, including price (or life-cycle price for design-build-operate-maintain and design-build-finance-operate-maintain procurements). To encourage competition for design-build, design-build-operate-maintain, or design-build-finance-operate-maintain over long periods of time, and over numerous projects, the Government's requirements for Proposal Development Documents must be perceived within the procurement community to be stable, fair, and reliable.

iv. *Content of Request for Proposals: Evaluation Factors.*

Each Request for Proposals for design-build, design-build-operate-maintain, design-build-finance-operate-maintain or turn-key project shall state the relative importance of:

- demonstrated compliance with the design requirements;
- offeror qualifications;
- financial capacity;
- project schedule;
- price (or life-cycle price for design-build-operate-maintain, design-build-finance-operate-maintain and turn-key project procurements), and
- other factors, if any.

The Government may comply with this requirement by listing the required factors in descending order of importance (without numerical weighting), or by listing each factor along with a numerical weight to be

associated with that factor in the Government's evaluation. Subfactors, if any, must be disclosed in the RFP, as required by §3 of Part VI of these Regulations and listed, pursuant to the requirements of this Regulation, either in descending order, or with numerical weighting assigned to each subfactor. The purpose and intent of disclosing the relative importance of factors (and subfactors) is to provide transparency to prospective and actual competitors from the date the RFP is first published.

v. Identification of Independent Peer Reviewer.

In each RFP for design-build-operate-maintain, or design-build-finance-operate-maintain where the contract price is estimated to exceed \$25,000, and for any design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement in which the scope of work includes: the design and construction of a public school, the design, construction, and operation of a public water supply system, a public wastewater collection and treatment system, each offeror shall identify an Independent Peer Reviewer whose competence and qualifications to provide such services under contract to the Government shall be an additional evaluation factor in the award of the contract.

If, for any reason, the Government shall determine that it is not in its best interest to contract with the Independent Peer Reviewer so identified, the Government shall contract with another Independent Peer Reviewer to provide the services required.

§3. Architectural and Engineering Services.

A. Policy.

It is the policy of the Government 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.

B. \$25,000 or Less A&E Selection Committee.

In the procurement of Architectural and Engineering ("A&E") Services, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) 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, the head of a Purchasing Agency that will use the services, and the Chief Planner-Secretary of Works, Infrastructure and Utilities shall comprise the Architect-Engineer Selection Committee for each A&E Services contract under \$25,000.

The Selection Committee for A&E Services contracts under this amount is hereby established in accordance with these Regulations. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the Government, 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.

C. \$25,000 or More A&E Selection Committee.

When a contract for architectural and engineering services is expected to exceed \$25,000 the Architectural and Engineering Selection Committee shall be:

- i. The Chief Procurement Officer; and

- ii. The Secretary of Works, Infrastructure and Utilities (referenced in the Code as the Chief Planner);
- iii. The head of a Purchasing Agency who will be using the services;
- iv. The Chief Procurement Officer may appoint a person to the selection committee with expertise in architecture and engineering who will not be interested in providing such services to the Government.
- v. The Bid Committee shall be involved in the selection if the cost of the services is expected to exceed \$25,000.

Chief Procurement Officer shall chair the Committee. The Chief Procurement Officer shall negotiate a contract with the most qualified firm in accordance with §3(D) of this Part (Architectural and Engineering Services, Negotiation).

D. Negotiation and Award of Contract.

i. Elements of Negotiation.

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall negotiate a contract with the most qualified firm for the required services at compensation determined in writing to be fair and reasonable to the Government. Contract negotiations shall be directed toward:

- making certain that the firm has a clear understanding of the scope of the work, specifically, the essential requirements involved in providing the required services;
- determining that the firm will make available the necessary personnel and facilities to perform the services within the required time; and
- agreeing upon compensation which is fair and reasonable, taking into account the estimated value, scope, complexity, and nature of the required services.

ii. Submission of Cost and Pricing Data.

The firm selected for award shall submit and certify cost and pricing data in accordance with §7 of Part XII (Substantiation of Offered Prices).

iii. Successful Negotiation of Contract with the Most Qualified Firm.

If fair and reasonable compensation, contract requirements, and contract documents can be agreed upon with the most qualified firm, the contract shall be awarded to that firm.

iv. Failure to Negotiate Contract with the Most Qualified Firm.

If fair and reasonable compensation, contract requirements, and contract documents cannot be agreed upon with the most qualified firm, the Chief Procurement Officer shall advise the firm in writing of the termination of negotiations.

Upon failure to negotiate a contract with the most qualified firm, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall enter into negotiations with the next most qualified firm. If fair and reasonable compensation, contract requirements, and contract documents can be agreed upon, then the contract shall be awarded to that firm. If

negotiations again fail, negotiations shall be terminated as provided in §3(K)(i) and commenced with the next most qualified firm.

v. *Notice of Award.*

Written notice of the award shall be sent to the firm with whom the contract is successfully negotiated. Each firm with whom discussions were held shall be notified of the award. Notice of award shall be made available to the public.

vi. *Failure to Negotiate Contract with Firms initially Selected as Most Qualified.*

Should the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) be unable to negotiate a contract with any of the firms initially selected as the most highly qualified firms, additional firms shall be selected in preferential order based on their respective qualifications, and negotiations shall continue in accordance with §5-502.10.4 until an agreement is reached and the contract awarded.

vii. *Record of Negotiations.* After award of the proposed contract, a memorandum setting forth the principal elements of the negotiation with each firm shall be prepared by the Chief Procurement Officer or the Purchasing Agency (or the Bid Committee if applicable). Such memorandum shall contain sufficient detail to reflect the significant considerations controlling price and the other terms of the contract. Such memorandum shall be included in the procurement file and be available to the public upon request.

E. Determinations Required Prior to Procurement of Services.

Prior to announcing the need for any A&E services, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall determine in writing:

- that the services to be acquired are services defined under §1(A)(i) of Part XII;
- that a reasonable inquiry has been conducted and it has been determined that Government personnel are unable, unavailable, or otherwise not suitable to perform the services required under the proposed contract;
- the nature of the relationship to be established between the Government and the contractor by the proposed contract; and
- that the Chief Procurement Officer or head of a Purchasing Agency (or the Bid Committee if applicable) has developed, and fully intends to implement, a written plan for utilizing such services, which shall be included in the contractual statement of work.

F. Annual Statement of Qualifications and Performance Data.

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall encourage firms engaged in providing A&E services to submit annually a statement of qualifications and performance data which shall include, but not be limited to, the following:

- the name of the firm and the location of all of its offices nationwide and internationally, specifically indicating the principal place of business;
- the age of the firm and its average number of employees over the past five years;

- the education, training, and qualifications of members of the firm and key employees;
- the experience of the firm reflecting technical capabilities and project experience;
- the names of five clients who may be contacted, including at least two]for whom services were rendered in the last year;
- any other pertinent information requested by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable).

A standard form or format may be developed for these statements of qualifications and performance data by the Chief Procurement Officer. Firms may amend statements of qualifications and performance data at any time by filing a new statement.

G. Public Announcement of Required Architectural and Engineering Services.

i. Notice of Need.

Notice of need for architectural and engineering services shall be given by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) as provided in §3-202.06 (Public Notice). Such notice shall be published sufficiently in advance of when responses must be received in order that firms have an adequate opportunity to submit a statement of qualifications and performance data. The notice shall contain a brief statement of the services required which adequately describes the project and specifies how a solicitation containing specific information on the project may be obtained.

ii. Solicitations.

A solicitation shall be prepared which describes the Government's requirements and sets forth the evaluation criteria. It shall be distributed upon request and payment of a fee, if any.

The solicitation shall include notice of any conference to be held and the criteria to be used in evaluating the statements of qualifications and performance data and selecting firms, including but not limited to:

1. competence to perform the services as reflected by technical training and education; general experience; experience in providing the required services; and the qualifications and competence of persons who would be assigned to perform the services;
2. ability to perform the services as reflected by workload and the availability of adequate personnel, equipment, and facilities to perform the services expeditiously; and
3. past performance as reflected by the evaluations of private persons and officials of other governmental entities that have retained the services of the firm with respect to such factors as control of costs, quality of work, and an ability to meet deadlines.

H. Evaluation of Statements of Qualifications and Performance Data

The Selection Committee shall evaluate:

- annual statement of qualifications and performance data submitted under (Annual Statement of Qualifications and Performance Data);
- statements that may be submitted in response to the solicitation for architectural and engineering services, including proposals for joint ventures; and

- supplemental statements of qualifications and performance data, if their submission was required.

All statements and supplemental statements of qualifications and performance data shall be evaluated in light of the criteria set forth in the solicitation for architectural and engineering services.

i. *Fewer Than Three Responses to Public Announcement.*

If fewer than three responses are received in response to the public announcement provided for in §3(G) of this Part (Public Announcement of Required Architectural and Engineering Services), a second public announcement shall be made. If, after this announcement, there remain fewer than three responses, the Selection Committee shall evaluate the responding firm or firms in accordance with this Regulation. If the firm or firms responding are qualified, the procedures set forth in §5-205.10 (Negotiation and Award of Contract) shall be followed.

ii. *Selection of Firms for Discussion.*

The Selection Committee shall select for discussions no fewer than three firms evaluated as being professionally and technically qualified. The Chief Procurement Officer shall notify each firm in writing of the date, time, and place of discussions, and, if necessary, shall provide each firm with additional information on the project and the services required. Such notice shall provide that a representative of each firm must attend discussions in order for the firm to be considered further.

I. Selection of Firms for Discussions.

Following evaluation of the statements of qualifications and performance data, the Selection Committee shall hold discussions with the firms selected pursuant to §5-205.07.3 (Evaluation of Statements of Qualifications and Performance Data; Selection of Firms for Discussions, Evaluation) regarding the proposed contract. The purposes of such discussions shall be to:

- i. determine each firm's general capabilities and qualifications for performing the contract; and
- ii. explore the scope and nature of the required services and the relative utility of alternative method of approach.

J. Selection of the Most Qualified Firms.

After discussions the Selection Committee shall reevaluate and select, in order of preference, no fewer than three firms which it deems to be the most highly qualified to provide the required services. The Selection Committee shall prepare a memorandum of the selection process which indicates how the evaluation criteria were applied to determine the ranking of the three most highly qualified firms.

PART XII – CANCELLATION BIDS OR PROPOSALS

§1. Cancellation of Invitations for Bids or Requests for Proposals.

Pursuant to §131 of the Code, An Invitation for Bids, a Request for Proposals, or other solicitation may be canceled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the Government in accordance with these Regulations. The reasons therefore shall be made part of the contract file.

§2. Cancellation of Solicitation-Notice.

Each solicitation issued by the Government shall state that the solicitation may be cancelled as provided in these Regulations.

§3. Cancellation of Solicitation; Rejection of All Bids or Proposals.

A. Prior to Opening.

- i. As used in this Section, "opening" means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding, or receipt of proposals in competitive sealed proposals.
- ii. Prior to opening, a solicitation may be cancelled in whole or in part when the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) determines in writing that such action is in the Government's best interest.
- iii. When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses solicited.
- iv. The notice of cancellation shall:
 1. identify the solicitation;
 2. briefly explain the reason for cancellation; and
 3. where appropriate, explain that an opportunity will be given to compete on any re-solicitation or any future procurements of similar supplies, services, or construction.

B. After Opening.

- i. After opening but prior to award, all bids or proposals may be rejected in whole or in part when the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) determines in writing that such action is in the Government's best interest.
- ii. A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to §4(D) below.

C. Documentation.

The reasons for cancellation or rejection shall be made a part of the procurement file and shall be available for public inspection.

§4. Rejection of Individual Bids or Proposals.

A. General.

This Section applies to rejections of individual bids or proposals in whole or in part.

B. Notice in Solicitation.

Each solicitation issued by the Government shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the Government as provided in these Regulations.

C. Reasons for Rejection.

- i. *Bids.*

As used in this Subsection, "bid" means any bid submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding and includes submissions under §1 of Part VII (Small Purchases) if no changes in offers are allowed after submission. Reasons for rejecting a bid include but are not limited to:

1. the business that submitted the bid is non-responsible as determined under §5(F) (Written Determination of Non-responsibility Required);
2. the bid is not responsive, that is, it does not conform in all material respects to the Invitation for Bids; see §3(M)(ii) of Part V on Bid Evaluation and Award, Responsibility and Responsiveness of these Regulations; or
3. the supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids. (See §3(M)(iii) of Part V on Bid Evaluation and Award, Product Acceptability).

ii. *Proposals.*

As used in this Subsection, "proposal" means any offer submitted in response to any solicitation, including an offer under §1 of Small Purchases, except a bid as defined in §4(C)(i) above. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and the Government's stated requirements may be revised or 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:

1. the business that submitted the proposal is non-responsible as determined under §5(A) below regarding the Responsibility of Bidders and Offerors;
2. the proposal ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced -requirements of the Government in some material respect; or
3. the proposed price is clearly unreasonable.

D. Notice of Rejection.

Upon request, unsuccessful bidders or offerors shall be advised of the reasons therefor.

E. "All or None" Bids or Proposals.

Only when provided by the solicitation may a bid or proposal limit acceptance to the entire bid or proposal offering. Otherwise, such bids or proposals shall be deemed to be nonresponsive. If the bid or proposal is properly so limited, the Government shall not reject part of such bid or proposal and award on the remainder.

F. Disposition of Bids or Proposals.

When bids or proposals are rejected, or a solicitation cancelled after bids or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders or offerors upon request, or otherwise disposed of.

§5. Qualifications and Duties

A. Responsibility of Bidders and Offerors.

- i. *Determination of Non-responsibility.*

A written determination of non-responsibility of a bidder or offeror shall be made in accordance with these regulations. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder or offeror.

ii. *Right of Nondisclosure.*

Confidential information furnished by a bidder or offeror pursuant to this Section shall not be disclosed outside of the Office of the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) without prior written consent by the bidder or offeror.

B. Application.

A determination of responsibility or non-responsibility shall be in accordance with the standards in the following sections of these Regulations.

C. Standards of Responsibility.

i. *Standards.*

Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

- available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- a satisfactory record of performance;
- a satisfactory record of integrity;
- qualified legally to contract with the Government; and
- supplied all necessary information in connection with the inquiry concerning responsibility.

ii. *Information Pertaining to Responsibility.*

The prospective contractor shall supply information requested by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) concerning the responsibility of such contractor. If such a contractor fails to supply the requested information, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable.

D. Ability to Meet Standards.

The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

- evidence that such contractor possesses such necessary items;
- acceptable plans to subcontract for such necessary items; or
- a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

E. Duty Concerning Responsibility.

Before awarding a contract, the Chief Procurement Officer or the head of the Purchasing Agency (or the Bid Committee if applicable) must be satisfied that the prospective contractor is responsible.

F. Written Determination of Non-responsibility Required.

If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility setting forth the basis of the finding shall be prepared by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable). A copy of the determination shall be sent promptly to the non-responsible bidder or offeror. The final determination shall be made part of the procurement file.

§6. Prequalification Procedures.

Prospective suppliers may be prequalified for particular types of supplies, services, and construction. The method of submitting prequalification information and the information required in order to be prequalified shall be determined by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable).

A. Procedures for Suppliers and Contractors.

i. *General.*

Prospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified. The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.

ii. *Qualified Products Lists.*

This Section is not applicable to qualified products lists which are treated in Part IV (Specifications) of these Regulations.

§7. Substantiation of Offered Prices.

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) may request factual information reasonably available to the bidder or offeror to substantiate that the price or cost offered, or some portion of it, is reasonable, if:

- i. the price is not:
 - 1. based on adequate price competition;
 - 2. based on established catalogue or market prices; or
 - 3. set by law or regulation; and
- ii. the price or cost exceeds an amount established in these Regulations.

A. Meaning of Terms Not Defined in the Code

i. *Adequate Price Competition.*

Price competition exists if competitive sealed proposals are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be "adequate" unless the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) determines in writing that such competition is not adequate.

- ii. *Established Market Price* means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.
- iii. *Prices Set by Law or Regulation*.

The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the Government and other customers.

B. Submission of Substantiating Data.

- i. *Time and Manner*.

When factual information is requested by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) to substantiate that the price or cost offered, or some portion of such price or cost, is reasonable, the offeror shall submit such data to the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable). Such information shall either be actually submitted or specifically identified in writing.

- ii. *Refusal to Submit Data*.

A refusal by the offeror to supply the requested information may be grounds to disqualify the offeror or to defer award pending further review and analysis. In the event the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) decides to enter into the contract without first receiving the requested information, the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall make a written determination setting forth the reasons for the award, which shall be made a part of the procurement file.

PART XIII – TYPES OF CONTRACTS

§1. Types of Contracts.

Except for a cost-plus-a percentage-of-cost contract, any type of contract which will promote the best interests of the Government may be used. Permitted contract types may include, but are not limited to the following:

- Fixed price contracts (with contract specified adjustments);
- Firm fixed-priced contracts;
- Fixed-price contracts with price adjustments;
- Cost-reimbursement contracts;
- Allowable Cost Contracts;
- Cost-Plus-Fixed Fee Contracts;

- Cost Incentive Contracts;
- Fixed-Price Cost Incentive Contracts;
- Cost Reimbursement Contracts with Cost Incentive Fee;
- Performance Incentive Contracts;
- Time and Materials Contracts;
- Labor Hour Contracts;
- Definite Quantity Contracts;
- Indefinite Quantity Contracts;
- Requirements Contracts;
- Leases;
- Lease with Purchase Option.

A. Contract Provisions.

i. *Notice Required.*

When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. Exercise of the option is always at the Government’s discretion only, and subject to agreement or acceptance by the contractor.

ii. *Option Provision.*

Before exercising any option for renewal, extension, or purchase, the Chief Procurement Officer and / or the head of the Purchasing Agency (or the Bid Committee if applicable) should attempt to ascertain whether a competitive procurements is practical, in terms of pertinent competitive and cost factors, and would be more advantageous to the Government than renewal or extension of the existing contract.

iii. *Lease with Purchase Option.*

A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals, or the leased supply or facility is the only supply or facility that can meet the Government’s requirements, as determined in writing by the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable). Before exercising such an option the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall:

1. investigate alternative means of procuring comparable supplies or facilities; and
2. compare estimated costs and benefits associated with the alternative means and the exercise of such option, for example, the benefit of buying new state-of-the-art equipment compared to the estimated, initial savings associated with exercise of a purchase option.

B. Contract Selection Policy.

The selection of an appropriate contract type depends on factors such as the nature of the supplies or services to be procured, the uncertainties which may be involved in contract performance, and the extent to which the Government or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor.

Among the factors that may be considered in selecting any type of contract are:

- i. the type and complexity of the supply or service being procured;

- ii. the difficulty of estimating performance costs such as the inability of the Government to develop definitive specifications, to identify the risks to contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;
- iii. the administrative costs to both parties;
- iv. the degree to which the Government must provide technical coordination during the performance of the contract;
- v. the effect of the choice of the type of contract on the amount of competition to be expected;
- vi. the stability of material or commodity market prices or wage levels;
- vii. the urgency of the requirement; and
- viii. the length of contract performance.

C. Requirement of Accounting System.

These Regulations shall require that all contractors submit appropriate documentation prior to the award of contracts in which the Government agrees to reimburse costs, confirming that:

- i. The proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and
- ii. The proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

§2. Multi-Year Contracts.

A. Use.

A multi-year contract is authorized where:

- i. estimated requirements cover the period of the contract and are reasonably firm and continuing; and
- ii. such a contract will serve the best interests of the Government by encouraging effective competition or otherwise promoting economies in Government procurement.

B. Multi-Term Contract Procedure.

- i. *Solicitation.* The solicitation shall state:
 1. the amount of supplies or services required for the proposed contract period;
 2. that a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);
 3. that the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the Government's rights or the contractor's rights under any termination clause in the contract;
 4. that the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;

5. whether bidders or offerors may submit prices for:
 - a. the first fiscal period only;
 - b. the entire time of performance only; or
 - c. both the first fiscal period and the entire time of performance;
6. that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and
7. that, in the event of cancellation as provided in §2(B)(iii) of Part XIII below, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.

ii. *Award.*

Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to "buy in", that is, give such bidder or offeror an undue competitive advantage in subsequent procurements.

iii. *Cancellation.*

"Cancellation," as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available. The contract for the first fiscal period shall not be cancelled. Cancellation results when the Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable):

1. notifies the contractor of non-availability of funds for contract performance for any fiscal period subsequent to the first; or
2. fails to notify the contractor by the date set forth in the contract, unless the parties agree to extend such date, that funds are available for performance of the succeeding fiscal period and funds which may be used for the contract have not been appropriated or otherwise made available.
3. These provisions on cancellation of multi-term contracts do not limit the rights of the Government or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this Subsection.

C. Incremental Award.

i. *General.*

An incremental award is an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity and the sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.

ii. *Intent to Use.*

If an incremental award is anticipated prior to issuing a solicitation, the Government shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

iii. *Determination Required.*

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the procurement file.

D. Multiple Award.

i. General.

A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror when the Government is obligated to order all of its actual requirements for the specified supplies or services from those contractors.

ii. Limitations on Use.

A multiple award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple award shall be made in accordance with the provisions for Competitive Sealed Bidding, Competitive Sealed Proposals, Small Purchases, and Emergency Procurements, as applicable. Multiple awards shall not be made when a single award will meet the Government's needs without sacrifice of economy or service.

iii. Contract and Solicitation Provisions.

All eligible users of the contract shall be named in the solicitation, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract, provided, that:

1. the Government shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its norm or an amount specified in the contract;
2. the Government shall reserve the right to take bids separately if the Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the Government; and
3. the contract shall allow the Government to procure supplies produced, or services performed, incidental to the Government's own programs, such as industries of correctional institutions, when such supplies or services satisfy the need.

iv. Intent to Use.

If a multiple award is anticipated prior to issuing a solicitation, the Government shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

v. Determination Required.

The Chief Procurement Officer or the head of a Purchasing Agency (or the Bid Committee if applicable) shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the procurement file.

PART XIV - PRE-LITIGATION RESOLUTION OF CONTROVERSIES

§1. Authority to Resolve Protested Solicitations and Awards.

A. Application.

This Regulation applies to all debarments or suspensions of persons from consideration for award of contracts imposed by the Chief Procurement Officer.

B. Protest.

i. Right to Protest.

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the Chief Procurement Officer. The protest shall be submitted in writing within 14 days after such aggrieved person knows or should have known of the facts giving rise thereto. Protests filed after the 14 days shall not be considered. Officer shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract

ii. Decision.

If the protest is not resolved by mutual agreement, the Chief Procurement Officer shall promptly issue a decision in writing. The decision shall:

1. state the reasons for the action taken; and
2. inform the protestant of its right to judicial or administrative review as provided in this Article.

iii. Notice of Decision.

A copy of the decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

iv. Finality of Decision.

A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or:

1. any person adversely affected by the decision commences an action in court; or
2. any person adversely affected by the decision appeals administratively to the Procurement Appeals Board in accordance with Part XIV of these Regulations.

§2. Definitions.

- i. Interested party* means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest.
- ii. Protestor* means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or the award of a contract and who files a protest.

§3. Complaint to Chief Procurement Officer.

Complainants should seek resolution of their complaints initially with the Chief Procurement Office. Such complaints may be made verbally or in writing.

A. Filing of Protest.

i. When Filed.

Protests shall be made in writing to the Chief Procurement Officer and shall be filed in duplicate within 14 days after the protestor knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Chief Procurement Officer. Protests filed after the 14 day period shall not be considered.

ii. *Subject of Protest.*

Protestors may file a protest on any phase of solicitation or award including but not limited to specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

iii. *Form.*

To expedite handling of protests, the envelope should be labeled "Protest." The written protest shall include as a minimum the following:

1. the name and address of the protestor;
2. appropriate identification of the procurement, and, if a contract has been awarded, its number;
3. a statement of reasons for the protest; and
4. supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

iv. *Notification of the Attorney General.*

The Chief Procurement Officer shall submit a copy of the protest to the Attorney General within three days of receipt of the written protest.

B. Requested Information; Time for Filing.

Any additional information requested by any of the parties should be submitted within the time periods established by the requesting source in order to expedite consideration of the protest. Failure of any party to comply expeditiously with a request for information by the Chief Procurement Officer may result in resolution of the protest without consideration of any information which is untimely filed pursuant to such request.

C. Stay of Procurements During Protest.

When a protest has been filed within 14 days and before an award has been made, the Chief Procurement Officer shall make no award of the contract until the protest has been settled unless the Chief Procurement Officer makes a written determination, after consulting with the head of the Purchasing Agency (or the Bid Committee if applicable), that the award of the contract without delay is necessary to protect substantial interests of the Government.

D. Making Information on Protests Available.

The Chief Procurement Officer shall upon written request make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential should so request by specifically identifying such information within documents submitted, and indicating on the front page of each document that it contains such information.

E. Decision by the Chief Procurement Officer.

i. *Time for Decisions.*

A decision on a protest shall be made by the Chief Procurement Officer as expeditiously as possible after receiving all relevant, requested information. If a protest is sustained, the available remedies include, but are not limited to, those set forth in §3(E)(ii) of this Section, §4 of Part XIV below, or as determined by the the Chief Procurement Office or Appeals Board as appropriate.

ii. *Bid Preparation Costs.*

In addition to any other relief, the Chief Procurement Officer shall award the protesting bidder or offeror the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees, when a protest is sustained and the protesting bidder or offeror should have been but was not awarded the contract under the solicitation.

F. Request for Reconsideration.

i. *Request.*

Reconsideration of a decision of the Chief Procurement Officer may be requested by the protestor, appellant, any interested party who submitted comments during consideration of the protest, or any Purchasing Agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

ii. *Time for Filing.*

Requests for reconsideration of a decision of the Chief Procurement Officer shall be filed not later than ten days after receipt of such decision.

iii. *Time for Acting.*

A request for reconsideration shall be acted upon as expeditiously as possible. The Chief Procurement Officer may uphold the previous decision or reopen the case as the Chief Procurement Officer deems appropriate.

G. Effect of Judicial or Administrative Proceedings.

The Chief Procurement Officer may refuse to decide any protest when a matter involved is the subject of a proceeding before the Procurement Appeals Board or has been decided on the merits by the Board. If an action concerning the protest has commenced in court, the Chief Procurement Officer shall not act on the protest but refer the protest to the Attorney General. This Section shall not apply where the Board or a court requests, expects, or otherwise expresses interest in the decision of the Chief Procurement Officer.

§4. Solicitations or Awards in Violation of Law

A. Application

The provisions of this Part apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law.

B. Determination that Solicitation or Award Violates Law.

i. *Determination.*

A solicitation or award may be in violation of the law due to actions of Government employees, bidders, offerors, contractors, or other persons. After consultation with the Attorney General, the Chief Procurement

Officer may determine that a solicitation or contract award is in violation of the provisions of the Code or these Regulations. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal. The Procurement Appeals Board may determine that a solicitation or contract award is in violation of the provisions of the Code or these Regulations.

ii. *Finding of Bad Faith or Fraud.*

Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations.

C. Remedies Prior to an Award.

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:

- i. cancelled; or
- ii. revised to comply with the law.

D. Canceling or Revising Solicitation or Proposed Award to Comply with Law.

A finding by the Chief Procurement Officer, after consultation with the Attorney General, that the solicitation or proposed award is in violation of law will constitute a cogent and compelling reason to cancel or revise a solicitation or proposed award. Such cancellation shall be made in accordance with §3 of Part XII (Cancellation of Solicitations).

E. Remedies After an Award.

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

- i. if the person awarded the contract has not acted fraudulently or in bad faith:
 1. the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the Government; or
 2. the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination.
- ii. if the person awarded the contract has acted fraudulently or in bad faith:
 1. the contract may be declared null and void; or
 2. the contract may be ratified and affirmed if such action is in the best interests of the Government, without prejudice to the Government's rights to such damages as may be appropriate.

§5. Suspension.

A. Initiation.

After consultation with the affected Purchasing Agency, the Attorney General, and, where practicable, the contractor or prospective contractor who is to be suspended, and upon written determination by the Chief Procurement Officer that probable cause exists for debarment, a contractor or prospective contractor shall be

suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor. Such notice shall state that:

- i. the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of a debarment decision but not for a period in excess of three months;
- ii. bids or proposals will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and
- iii. if a hearing has not been held, the suspended person may request a hearing.

B. Effect of Decision.

A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be ended by the Chief Procurement Officer who issued the notice of suspension, by a High court or by the Procurement Appeals Board but otherwise shall only be ended when the suspension has been in effect for three months or a debarment decision taken effect.

§6. Debarment

A. Initiation of Debarment Action.

Written notice of the proposed debarment action shall be sent by certified mail, return receipt requested, to the contractor or prospective contractor. This notice shall:

- state that debarment is being considered;
- set forth the reasons for the action;
- state that if the contractor or prospective contractor so requests a hearing will be held, provided such request is received by the Chief Procurement Officer within ten days after the contractor or prospective contractor receives notice of the proposed action; and
- state that the contractor or prospective contractor may be represented by counsel.

Such notice shall also be sent to the Attorney General and the affected Purchasing Agency. If more than one affected Purchasing Agency is involved the Chief Procurement Officer may designate one or more representatives to be consulted in respect to this action.

B. Request for Hearing.

A contractor or prospective contractor that has been notified of a proposed debarment action may request in writing that a hearing be held. Such request must be received by the Chief Procurement Officer within ten days of receipt of notice of the proposed action under §6(A) of Part XIV above (Initiation of Debarment Action). If no request is received within the ten day period, a final determination may be made as set forth in §6(F) of Part XIV below (Determination of Hearing Officer; Final Decision) after consulting with the Attorney General and the affected Purchasing Agency

C. Notice of Hearing.

If a hearing is requested, the Chief Procurement Officer may appoint a hearing officer to conduct the hearing and recommend a final decision. Otherwise, the Chief Procurement Officer shall act as the hearing officer. The hearing officer shall send a written notice of the time and place of the hearing. Such notice shall be sent by certified mail, return receipt requested, and shall state the nature and purpose of the proceedings. Copies shall be sent to the Attorney General and the affected Purchasing Agency.

D. Authority of Hearing Officer.

The hearing officer, in the conduct of the hearing, has the power, among others, to:

- i. hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;
- ii. require parties to state their positions with respect to the various issues in the proceeding;
- iii. require parties to produce for examination those relevant witnesses and documents under their control;
- iv. rule on motions, and other procedural items on matters pending before such officer;
- v. regulate the course of the hearing and conduct of participants therein;
- vi. receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
- vii. fix time limits for submission of written documents in matters before such officer;
- viii. impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
 1. refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
 2. excluding all testimony of an unresponsive or evasive witness; and
 3. expelling any party or person from further participation in the hearing;
 4. take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice; and
 5. administer oaths or affirmations.

E. Hearings Procedures.

- i. Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.
- ii. A hearing may be recorded but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

F. Determination of Hearing Officer; Final Decision.

The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the Chief Procurement Officer. Copies shall also be sent to the contractor or prospective contractor, the Attorney General, and the affected Purchasing Agency. The contractor or

prospective contractor shall have ten days to file comments upon the hearing officer's determination. The Chief Procurement Officer may request oral argument. After consultation with the affected Purchasing Agency and the Attorney General, the Chief Procurement Officer shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment (not to exceed three years), the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of its rights to judicial or administrative review under Article 9 (Legal and Contractual Remedies).

G. Effect of Debarment Decision.

A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until a court, the Procurement Appeals Board, or the Chief Procurement Officer, orders otherwise or until the debarment period specified in the decision expires.

§7. Maintenance of List of Debarred and Suspended Persons.

The Chief Procurement Officer shall maintain and update a list of debarred and suspended persons. All Purchasing Agencies and political subdivisions of the Government shall be supplied with this list. The Chief Procurement Officer shall send updates of this list to all Purchasing Agencies and political subdivisions of the Government as necessary. Such list shall be available to the public upon request.

These Regulations establish procedures and remedies to resolve contract and breach of contract controversies between the Government and a contractor. It is the Government's policy, consistent with these Regulations, to try to resolve all controversies by mutual agreement without litigation. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreement and are encouraged. If such informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible. Independent committees and panels which review controversies expeditiously and informally with a view to fair settlement possibilities, are also encouraged at this stage.

PART XV – PROCUREMENT APPEALS BOARD

§1. Creation of the Procurement Appeals Board.

There is hereby established in the executive branch of the Government a Procurement Appeals Board to be composed of a chairperson and at least two other members, but not more than five members. The chairperson and members of the Board shall be appointed by the Policy Office.

A. Terms and Qualifications of Members of the Board.

i. Term.

The term of office of the chairperson and each member of the Procurement Appeals Board shall be six years, except that in making the initial appointments, the Policy Office shall appoint one member for a term of two years, one member for a term of four years, and the chairperson for a term of six years, so that a term of office shall expire every two years. Thereafter, their successors shall be appointed for terms of six years, or for the balance of any unexpired term, but members may continue to serve beyond their terms until their successors take office. Members may be reappointed for succeeding terms. If there is no chairperson, or if

such officer is absent or unable to serve, the senior member in length of service shall be temporary chairperson.

ii. *Authority of the Chairperson.*

The chairperson may adopt operational procedures and issue such orders, not inconsistent with this Code and these Regulations, as may be necessary in the execution of the Board's functions. The chairperson's authority may be delegated to the Board's members and employees, but only members of the Board may issue decisions on appeals.

iii. *Administrative Support.*

Policy Office is authorized to provide for the Board such services as the chairperson requests, on such basis, reimbursable or otherwise, as may be agreed upon between the Policy Office and the chairperson.

iv. *Qualifications for Board Membership.*

The chairperson and members of the Board shall be experienced in contract or commercial matters.

§2. Rules of Procedure.

The Procurement Appeals Board shall adopt rules of procedure, which to the fullest extent possible, will provide for the expeditious resolution of controversies. The Board may adopt Small Claims Procedures for the resolution of controversies involving claims of less than \$25,000.

§3. Decisions of the Procurement Appeals Board.

Acting by one or more of its members, the Procurement Appeals Board shall issue a decision in writing or take other appropriate action on each appeal submitted. A copy of any decision shall be provided to all parties and the Chief Procurement Officer.

§4. Jurisdiction of the Procurement Appeals Board.

Unless an action has been initiated previously in a court of competent jurisdiction for essentially the same cause of action, or unless within 15 days after the action is brought before the Procurement Appeals Board, written objection is made by either the aggrieved bidder, offeror, or contractor, prospective or actual, or the Chief Procurement Officer with the concurrence of the Attorney General, the Procurement Appeals Board shall have jurisdiction to review and determine de novo:

- any protest of a solicitation or award of a contract addressed to the Procurement Appeals Board by an aggrieved actual or prospective bidder or offeror, or a contractor; and
- any appeal by an aggrieved party from a determination by the Chief Procurement Officer which is authorized by:
 - i. Section on (Authority to Resolve Protested Solicitations and Awards);
 - ii. Section on (Authority to Debar or Suspend); and
 - iii. Section on (Authority to Resolve Contract and Breach of Contract Controversies).

§5. Protest of Solicitations or Awards.

A. Scope.

This Section applies to:

- i. a protest of a solicitation or award of a contract addressed to the Procurement Appeals Board by an aggrieved actual or prospective bidder or offeror, or a contractor; and
- ii. an appeal addressed to the Procurement Appeals Board of a decision under section on Authority to Resolve Protested Solicitations and Awards, Decision.

B. Time Limitations on Filing a Protest or an Appeal.

- i. For a protest under Subsection (A)(i) of this Section, the aggrieved person shall file a protest with the Procurement Appeals Board within 14 days after the aggrieved person knew or should have known of the facts and circumstances upon which the protest is based.
- ii. For an appeal under Subsection (A)(ii) of this Section, the aggrieved person shall file an appeal within seven days of receipt of a decision under section on Authority to Resolve Protested Solicitations and Awards, Decision.

C. Decision.

On any direct protest under Subsection (A)(i) of this Section or appeal under Subsection (A)(ii) of this Section, the Procurement Appeals Board shall promptly decide whether the solicitation or award was in accordance with the statutes, regulations, and the terms and conditions of the solicitation. The proceeding shall be *de novo*. Any prior determinations by administrative officials shall not be final or conclusive.

D. Standard of Review for Factual Issues.

A determination of an issue of fact by the Procurement Appeals Board under Subsection (3) of this Section shall be final and conclusive unless arbitrary, capricious, fraudulent, or clearly erroneous.